

TEXTO PARA EL HILO

Judgment of the General Court (Tenth Chamber, Extended Composition) of 9th June 2021 in Case T-665/20, Ryan Air DAC v European Commission ECLI:EU:T:2021:344 (JIRP).

When the formal investigation procedure about a State Aid is not initiated by the Commission, interested parties, who could have submitted comments during that stage, are deprived of that possibility. In order to remedy this, they are entitled to challenge the Commission's decision not to initiate the formal investigation procedure before the EU judicature.

The decision not to initiate the formal investigation procedure laid down by Article 108(2) TFEU must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 296 TFEU if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties.

Since this is an exception to the general principle, stated in Article 107(1) TFEU, that State aid is incompatible with the common market, Article 107(2)(b) TFEU must be interpreted narrowly. Aid likely to exceed the damage suffered as a direct result of the occurrence at issue is not covered by Article 107(2)(b) TFEU

TEXTO DE LA ENTRADA

Judgment of the General Court (Tenth Chamber, Extended Composition) of 9th June 2021 in Case T-665/20, Ryan Air DAC v European Commission ECLI:EU:T:2021:344 (JIRP)

Tags: State aid, COVID 19, decision not to initiate the formal investigation procedure, narrow interpretation, suspension of annulment.

Context: Application by competitor – Ryan Air - under Article 263 TFEU for annulment of Commission Decision C(2020) 2795 final of 26 April 2020 on State aid SA.56867 (2020/N, ex 2020/PN) – Germany, in compensation for the damage caused by the COVID-19 outbreak to Condor Flugdienst.

Condor Flugdienst GmbH ('Condor') is an airline which operates charter flights and has its registered office in Kelsterbach (Germany). It provides air transport services to individual passengers and tour operators from Frankfurt, Düsseldorf, Munich and Hamburg (Germany), with a focus on the leisure travel market.

Condor was owned previously by Thomas Cook Group plc ('the Thomas Cook group'). On 23 September 2019, the Thomas Cook group ceased its operations and was placed in compulsory liquidation. The close operational and financial links between the Thomas Cook group and Condor resulted in the latter facing financial difficulties and filing for insolvency on 25 September 2019.

On the same day, the Federal Republic of Germany notified the European Commission that it intended to grant individual aid to Condor in the form of a rescue loan of EUR 380 million backed by a State guarantee. The purpose of that measure was to allow Condor to continue its operations while it built its own liquidity reserves allowing it to operate independently of the Thomas Cook group. The rescue loan aimed to maintain orderly air transport and to limit the negative consequences for Condor caused by the liquidation of its parent company. By decision of 14 October 2019, C(2019)7429 final on State aid SA.55394 (2019/N) – Germany – Rescue aid to Condor, the Commission approved the aid.

On 24 April 2020, the Federal Republic of Germany notified the Commission, in accordance with Article 108(3) TFEU, of another award of individual aid in favour of Condor in the form of two loans which it guaranteed with subsidised interest rates. The purpose of the notified measure was to compensate Condor for the damage suffered directly because of the cancellation or rescheduling of its flights following the imposition of travel restrictions, and in particular lockdown measures, as a result of the COVID-19 pandemic.

On 26 April 2020, the Commission adopted Decision C(2020) 2795 final on State aid SA.56867 (2020/N, ex 2020/PN) – Germany – Compensation for the damage caused by the COVID-19 outbreak to Condor ('the contested decision'), by which it concluded that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU and was compatible with the internal market on the basis of Article 107(2)(b) TFEU.

By application lodged at the Court Registry on 6 November 2020, the applicant, Ryanair DAC, as a 'party concerned' within the meaning of Article 108(2) TFEU and as an 'interested party' within the meaning of Article 1(h) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), as a competitor of Condor not subsidised, brought the action. The applicant claims that the Court should annul the contested decision and order the Commission to pay the costs.

The applicant submitted, without being contradicted, that it has been part of the German air services market for more than 20 years, that in 2019 it had carried 19 million passengers to and from Germany and that it had a market share of approximately 9% in Germany, making it the second largest airline in Germany. The applicant also submitted that its summer 2020 flight schedule, which was drawn up before the outbreak of the COVID-19 pandemic, included 265 routes departing from 14 German airports. In addition, in paragraph 15 of the contested decision, the Commission found that certain destinations served by Condor were also served by the applicant and that those airlines were in competition with regard to the sale of 'dry seats', that is to say seats sold directly to individual passengers. The applicant is therefore a party concerned with an interest in safeguarding its procedural rights under Article 108(2) TFEU.

The General Court held that there is no doubt as to the admissibility of the action in so far as, by that action, the applicant seeks to maintain that the Commission should have initiated the formal investigation procedure referred to in Article 108(2) TFEU.

In support of the action, the applicant relies on four pleas in law alleging, respectively: (i) an infringement of the principles of non-discrimination, freedom to provide services and freedom of establishment; (ii) a misapplication of Article 107(2)(b) TFEU and a manifest error of assessment relating to the proportionality of the aid; (iii) that the Commission should have initiated the formal investigation

procedure; and (iv) an infringement of the obligation to state reasons within the meaning of Article 296 TFEU.

The Court of Justice only examine the fourth plea in law. This was upheld, making unnecessary to examine the other arguments put forward by the applicant.

By its fourth plea, the applicant submits, in essence, that the contested decision is vitiated by a failure to state reasons or by insufficient reasoning in several respects. In particular, the applicant submits that the Commission did not give sufficient reasons, in the contested decision, regarding its assessment of the damage that the aid measure at issue seeks to compensate, which, in essence, prevents the applicant, and the Court, from verifying the proportionality of that aid measure.

The General Court held that exemptions to the general prohibition of State aid from 107.1 (as) as these founded in Article 108 (2) b) TFEU shall be interpreted narrowly, and that in the case the contested decision does not explain how the additional costs incurred in connection with the extension of Condor's insolvency proceedings were directly caused by the cancellation or rescheduling of its flights as a result of the travel restrictions imposed in the context of the COVID-19 pandemic.

Doctrine:

Admissibility

27. When the formal investigation procedure is not initiated, interested parties, who could have submitted comments during that second stage, are deprived of that possibility. In order to remedy this, they are entitled to challenge the Commission's decision not to initiate the formal investigation procedure before the EU judicature. Accordingly, an action for annulment of a decision based on Article 108(3) TFEU brought by a party concerned within the meaning of Article 108(2) TFEU, is admissible where that party seeks thereby to safeguard the procedural rights available to it under the latter provision (see judgment of 18 November 2010, NDSHT v Commission, C-322/09 P, EU:C:2010:701, paragraph 56 and the case-law cited).

Procedural rights

41. ... the decision not to initiate the formal investigation procedure laid down by Article 108(2) TFEU must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 296 TFEU if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties, the question of whether the reasoning is well founded being a separate matter (judgments of 27 October 2011, Austria v Scheucher-Fleisch and Others, C-47/10 P, EU:C:2011:698, paragraph 111, and of 12 May 2016, Hamr Sport v Commission, T-693/14, not published,

EU:T:2016:292, paragraph 54; see also, to that effect, judgment of 22 December 2008, Régie Networks, C-333/07, EU:C:2008:764, paragraphs 65, 70 and 71).

Narrow interpretation of Article 107(2) (b) TFEU

42. Under Article 107(2)(b) TFEU, which constitutes the legal basis of the contested decision, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market. Since this is an exception to the general principle, stated in Article 107(1) TFEU, that State aid is incompatible with the common market, Article 107(2)(b) TFEU must be interpreted narrowly. Therefore, only economic damage caused by natural disasters or exceptional occurrences may be compensated for under that provision. There must be a direct link between the damage caused by the exceptional occurrence and the State aid and as precise an assessment as possible must be made of the damage suffered (judgment of 23 February 2006, Atzeni and Others, C-346/03 and C-529/03, EU:C:2006:130, paragraph 79).

43. The Commission must, subsequently, examine whether or not the aid measures at issue are of a kind as to be useful in the making good of damage caused by exceptional occurrences and ban general measures unconnected with the damage allegedly caused by such occurrences (judgment of 17 February 2021, Ryanair v Commission, T-259/20, EU:T:2018:92, paragraph 25). The Member State concerned must also limit the amount of the compensation to what is necessary to make good the damage suffered by the beneficiaries of the measure at issue.

44. It follows that aid likely to exceed the damage suffered as a direct result of the occurrence at issue is not covered by Article 107(2)(b) TFEU (see, to that effect, judgment of 11 November 2004, Spain v Commission, C-73/03, not published, EU:C:2004:711, paragraphs 40 and 41).

45. Thus, the occurrence giving rise to the damage, as defined in the contested decision, must be the determining cause of the damage which the aid at issue is intended to remedy and must be directly responsible for causing it. A direct link will only exist where the damage is the direct consequence of the occurrence in question without being dependent on the interposition of other causes.

51. It should also be pointed out that it is for the Commission, which is responsible for reviewing the compatibility of State aid measures with the internal market, to ascertain whether such a causal link exists.

Suspension of the effects of the annulment of the contested decision

68. It is settled case-law that where it is justified by overriding considerations of legal certainty, the EU judiciary has discretion under the second paragraph of Article 264 TFEU to indicate, in each particular case, which of the effects of the act concerned must be regarded as definitive (see, by analogy, judgment of 22 December 2008, Régie Networks, C-333/07, EU:C:2008:764, paragraph 121 and the case-law cited).

69 *It therefore follows from the second paragraph of Article 264 TFEU that, if it considers it necessary, the EU judiciary may, even of its own motion, limit the annulling effect of its judgment (see, to that effect, judgment of 1 April 2008, Parliament and Denmark v Commission, C-14/06 and C-295/06, EU:C:2008:176, paragraph 85).*

70 *In accordance with that case-law, the EU judiciary has limited the temporal effect of a declaration that an EU measure is invalid where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the cases concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment (judgment of 22 December 2008, Régie Networks, C-333/07, EU:C:2008:764, paragraph 122).*

71 *In the present case, the Court considers that there are overriding considerations of legal certainty justifying the limitation of the temporal effects of the annulment of the contested decision. First, the immediate calling into question of the receipt of the sums of money provided for by the aid measure at issue would have harmful consequences for the German economy in an economic and social context already marked by the adverse effects of the COVID-19 pandemic. Second, account must be taken of the fact that the cause of the annulment of the contested decision is the inadequacy of its reasoning.*

72 *Under Article 266 TFEU, the Commission, whose act has been declared void, is required to take the necessary measures to comply with the present judgment of the General Court.*

73 *For those reasons, the effects of the annulment of the contested decision are to be suspended pending the adoption of a new decision by the Commission. Having regard to the speed with which the Commission acted following the pre-notification and notification of the measure at issue, those effects are to be suspended for a period of no more than two months from the date of delivery of the present judgment if the Commission decides to adopt such a new decision under Article 108(3) TFEU, and for a reasonable further period if the Commission decides to initiate the procedure under Article 108(2) TFEU (see, to that effect, judgment of 22 December 2008, Régie Networks, C-333/07, EU:C:2008:764, paragraph 126).*

The Court of Justice:

1. Annuls Commission Decision C(2020) 2795 final of 26 April 2020 on State aid SA.56867 (2020/N, ex 2020/PN) – Germany – Compensation for the damage caused by the COVID-19 outbreak to Condor Flugdienst GmbH;

- 2. Suspends the effects of the annulment of that decision pending the adoption of a new decision by the Commission under Article 108 TFEU. Those effects are to be preserved for a period not exceeding two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 108(3) TFEU, and for a reasonable further period if the Commission decides to initiate the procedure under Article 108(2) TFEU;**
- 3. Orders the Commission to bear its own costs, and to pay those incurred by Ryanair DAC;**
- 4. Orders the Federal Republic of Germany, the French Republic and Condor Flugdienst to bear their own costs.**