

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 July 2021 Ryanair DAC and Laudamotion GmbH v European Commission in the Case T-677/20 - Ryanair and Laudamotion v Commission (Austrian Airlines; Covid-19) (JIRP)

CONTEXT:

Austrian Airlines AG ('AUA') is a company which is part of the Lufthansa group. On 23 June 2020, the Republic of Austria notified the European Commission, in accordance with Article 108(3) TFEU, of an individual aid measure, granted in the form of a subordinated loan convertible into a grant of EUR 150 million in favour of AUA. That measure is intended to compensate AUA for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions and other containment measures amid the COVID-19 pandemic.

On 6 July 2020, the Commission adopted Decision C(2020) 4684 final on State aid SA.57539 (2020/N) – Austria – COVID-19 – Aid to Austrian Airlines ('the contested decision'), by which it concluded that the measure at issue, first, constituted State aid within the meaning of Article 107(1) TFEU and, second, was compatible with the internal market by virtue of Article 107(2)(b) TFEU.

By application lodged at the Court Registry on 13 November 2020, the applicants, Ryanair DAC and Laudamotion GmbH, brought an action claiming that the Court should annul the contested decision and order the Commission to pay the costs, adjudicated under an expedited procedure to the General Court (Tenth Chamber).

In support of the action, the applicants put forward five pleas in law, alleging, first, that the Commission failed to examine possible aid to or from 'Lufthansa', second, infringement of the principles of non-discrimination, free provision of services and freedom of establishment, third, that the Commission misapplied Article 107(2)(b) TFEU and made a manifest error of assessment, fourth, that the Commission should have initiated the formal investigation procedure, and, fifth, infringement of the duty to state reasons within the meaning of Article 296 TFEU.

KEYWORDS: State aid, non discrimination

DOCTRINE:

Infringement of the principle of non-discrimination

48 The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 15 April 2008, Nuova Agricast, C-390/06, EU:C:2008:224, paragraph 66; see also, to that effect, judgment of 5 June 2018, Montero Mateos, C-677/16, EU:C:2018:393, paragraph 49).

49 *The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 16 December 2008, Arcelor Atlantique et Lorraine and Others, C-127/07, EU:C:2008:728, paragraph 26).*

50 *Furthermore, it should be borne in mind that the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question (judgment of 17 May 1984, Denkavit Nederland, 15/83, EU:C:1984:183, paragraph 25); where there is a choice between several appropriate measures, recourse must be had to the least onerous measure and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 30 April 2019, Italy v Council (Fishing quota for Mediterranean swordfish), C-611/17, EU:C:2019:332, paragraph 55).*

51 *The applicants argue that the contested decision allows discriminatory treatment which is not necessary for achieving the objective of the measure at issue, namely to make good the damage caused by the cancellation and rescheduling of flights as a result of the travel restrictions and containment measures imposed in the context of the COVID-19 pandemic. They state that the Ryanair group holds 8% of the Austrian market and therefore suffered 8% of the damage caused by the COVID-19 pandemic. The aim of the measure would be achieved without discrimination, if it were granted to all the airlines operating in Austria. In that regard, the contested decision does not explain why the measure at issue was granted only to AUA, even though other airlines operating in Austria also suffered damage as a result of the travel restrictions and containment measures imposed during the COVID-19 pandemic. According to the applicants, the measure at issue is a measure of ‘naked economic nationalism’.*

52 *In that regard, in the first place, it should be borne in mind that the sole purpose of the measure at issue is to compensate AUA partially for the damage resulting from the cancellation or rescheduling of its flights following the introduction of travel restrictions or other containment measures amid the COVID-19 pandemic.*

53 *It is true, as the applicants correctly submit, that all airlines operating in Austria were affected by those restrictions and that as a consequence they, like AUA, have all suffered damage resulting from the cancellation or rescheduling of their flights following the introduction of the aforementioned restrictions.*

54 *However, the fact remains, as the Commission correctly submits in its defence, that there is no requirement for Member States to grant aid to make good the damage caused by an ‘exceptional occurrence’ within the meaning of Article 107(2)(b) TFEU.*

55 Specifically, first, while Article 108(3) TFEU requires Member States to notify their plans as regards State aid to the Commission before they are put into effect, it does not, however, require them to grant any aid (order of 30 May 2018, Yanchev, C-481/17, not published, EU:C:2018:352, paragraph 22).

56 Second, an aid measure may be directed at making good the damage caused by an exceptional occurrence, in accordance with Article 107(2)(b) TFEU, irrespective of the fact that it does not make good the entirety of that damage.

57 Consequently, it does not follow from either Article 108(3) TFEU or from Article 107(2)(b) TFEU that Member States are obliged to make good the entirety of the damage caused by an exceptional occurrence, such that they similarly cannot be required to grant aid to all of the victims of that damage.

58 In the second place, it should be noted that individual aid, such as that at issue, by definition benefits only one company, to the exclusion of all other companies, including those in a situation comparable to that of the recipient of that aid. Consequently, such individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is nevertheless inherent in the individual character of that measure. To argue, as the applicants do, that the individual aid at issue is contrary to the principle of non-discrimination amounts, in essence, to calling into question systematically the compatibility of any individual aid with the internal market solely on account of its inherently exclusive and thus discriminatory nature, even though EU law allows Member States to grant individual aid, provided that all the conditions laid down in Article 107 TFEU are met.

59 In the third place and in any event, even if, as the applicants claim, the difference in treatment established by the measure at issue, in so far as it benefits only AUA, may amount to discrimination, it is necessary to ascertain whether it is justified by a legitimate objective and whether it is necessary, appropriate and proportionate in order to attain that objective. Similarly, since the applicants refer to the first paragraph of Article 18 TFEU, it should be made clear that, under that provision, any discrimination on grounds of nationality is prohibited within the scope of the application of the Treaties 'without prejudice to any special provisions contained therein'. Therefore, it is important to ascertain whether that difference in treatment is permitted under Article 107(2)(b) TFEU, which is the legal basis for the contested decision. That examination requires, first, that the objective of the measure at issue satisfies the requirements laid down in that provision and, second, that the conditions for granting the measure at issue, namely, in the present case, that it benefits only AUA, are such as to enable that objective to be achieved and do not go beyond what is necessary to achieve it.

60 As regards the objective of the measure at issue, the applicants do not dispute the fact that compensation for damage resulting from the cancellation or rescheduling of an airline's flights following

the imposition of travel restrictions amid the COVID-19 pandemic makes it possible to make good the damage caused by that crisis. Nor do the applicants dispute that the COVID-19 pandemic constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

61 *As regards the arrangements for granting the measure at issue, the Commission stated in paragraph 40 of the contested decision that, according to the Austrian authorities, AUA played an essential role in Austria's airline services and that it made a significant contribution to the Austrian economy, given that it was the only network carrier operating out of Austria offering long-haul connectivity from and to the Vienna airport hub. Furthermore, in view of Vienna's relatively small catchment area, no other airline would be able to offer a large number of long-haul flights from and to Vienna, given that feeder flights could also be routed to other airports, from which long-haul flights could be offered. In addition, AUA employs approximately 7 000 people, and approximately 17 500 jobs are directly or indirectly dependent on AUA. According to the Austrian authorities, the economic importance of a network carrier such as AUA comprises approximately EUR 2.7 billion per annum in economic added value for the Austrian economy and approximately EUR 1 billion per annum in taxes.*

62 *Furthermore, it should be noted that, according to the information provided by the applicants in Annex A.2.2 to the application, AUA is the largest airline in Austria, where it held 43% of the market share in 2019, that market share being significantly higher than that of the second airline and of the applicants whose respective market shares were only 14% and 8% in 2019.*

63 *The applicants nevertheless argue that those factors do not justify the difference in treatment resulting from the measure at issue. They submit that that difference in treatment is not proportionate, since the measure grants AUA all the aid intended to remedy the damage at issue, whereas it bore only 43% of that damage.*

64 *In that regard, it is apparent from the contested decision that AUA, because of its essential role in providing Austria's airline services, was more affected by the cancellation and rescheduling of flights in Austria following the imposition of travel restrictions in the context of the COVID-19 pandemic than the other airlines operating in that country. That is confirmed by all of the data summarised in paragraphs 61 and 62 above.*

65 *In addition, it is apparent from the aforementioned data that AUA is proportionately and, because of the scale of its activities in Austria, significantly more affected by those restrictions than Ryanair, which, as is apparent from Annex A.2.2 to the application, carried out only a minimal part of its activities to or from that country, unlike AUA, which carried out a much larger part of its activities there. As regards Laudamotion, the applicants do not provide sufficiently clear information allowing the Court to grasp the proportion of that airline's activities which are carried out to or from Austria in relation to the*

entirety of its activities. In any event, there is nothing in the documents before the Court to suggest that that airline plays an essential role in providing airline services in Austria.

66 Finally, as regards the question of whether the measure at issue goes beyond what is necessary to attain the objective pursued, it must be stated that the amount of that measure is lower than the amount of damage caused to AUA by the cancellation and rescheduling of its flights as a result of the imposition of travel restrictions during the COVID-19 pandemic, as is apparent in particular from paragraph 79 of the contested decision. Therefore, the measure at issue does not go beyond what is necessary to achieve the legitimate objective it pursues.

67 Consequently, it must be held that the difference in treatment in favour of AUA is appropriate for the purpose of making good the damage resulting from those restrictions and does not go beyond what is necessary to achieve that objective.

68 Moreover, the applicants have not established that the fact of dividing the amount of the aid at issue among all the airlines operating in Austria would not deprive that measure of its effectiveness.

69 In any event and in so far as the difference in treatment brought about by the measure at issue may amount to discrimination, it follows that granting the benefit of the measure at issue only to AUA was justified and that the measure at issue does not infringe the principle of non-discrimination.

The General Court (Tenth Chamber, Extended Composition):

- 1. Dismisses the action;**
- 2. Orders Ryanair DAC and Laudamotion GmbH to bear their own costs and to pay those incurred by the European Commission;**
- 3. Orders the Federal Republic of Germany, the Republic of Austria and Austrian Airlines AG to bear their own respective costs.**