



## **Aid measures introduced by Sweden and Denmark for SAS for damage resulting from the cancellation or rescheduling of flights in the wake of travel restrictions caused by the Covid-19 pandemic comply with EU law**

*Given that SAS's market share is much higher than that of its closest competitor in those two Member States, the aid does not amount to unlawful discrimination*

In April 2020 Denmark and Sweden notified the Commission of two separate aid measures for SAS AB, each involving a guarantee on a revolving credit facility of up to 1.5 billion Swedish kronor (SEK).<sup>1</sup> Those measures were intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions amid the Covid-19 pandemic.

By decisions of 15 April 2020<sup>2</sup> and of 24 April 2020,<sup>3</sup> the Commission classified the notified measures as State aid<sup>4</sup> that was compatible with the internal market pursuant to Article 107(2)(b) TFEU. In accordance with that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is to be compatible with the internal market.

**The airline Ryanair brought actions for annulment of those decisions, which are, however, dismissed by the Tenth Chamber (Extended Composition) of the General Court of the European Union. In that respect, the General Court confirms for the first time the legality of individual aid measures adopted in order to address the consequences of the Covid-19 pandemic in the light of Article 107(2)(b) TFEU.**<sup>5</sup>

The General Court's assessment

In the first place, the General Court rejects the plea that the aid that has been granted is incompatible with the internal market because it is intended to make good the damage suffered by only one company. In that regard, the General Court notes that in accordance with Article 107(2)(b) TFEU aid may be intended to make good the damage caused by an exceptional occurrence even if it benefits only an individual company, without making good the entirety of the damage caused by that occurrence. Consequently, **the Commission had not erred in law solely because the aid measures for SAS did not benefit all of the victims of the damage caused by the Covid-19 pandemic.**

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<sup>1</sup> The aid measure adopted by Sweden is individual aid which Sweden decided to grant to SAS as a company eligible for the loan guarantees scheme intended to support all the Swedish airlines amid the Covid-19 pandemic, which had been notified to the Commission by Sweden before the notification of the individual aid measure and which the Commission had approved on 11 April 2020, pursuant to Article 107(3)(b) TFEU.

<sup>2</sup> Commission Decision C(2020) 2416 final on State Aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines.

<sup>3</sup> Commission Decision C(2020) 2784 final on State Aid SA.57061 (2020/N) – Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines.

<sup>4</sup> Within the meaning of Article 107(1) TFEU.

<sup>5</sup> In its judgment of 17 February 2021, *Ryanair v Commission*, [T-259/20](#) (also see press release [No 17/21](#)), the General Court carried out a similar examination of the legality of a State aid scheme adopted by France to address the consequences of the Covid-19 pandemic on the French air transport market. In its judgment of 14 April 2021, *Ryanair v Commission*, [T-388/20](#) (see also press release [No 53/21](#)), the General Court carried out an examination of another individual aid measure on the basis of Article 107(3)(b) TFEU.

In the second place, the General Court rejects Ryanair's plea disputing the proportionality of the aid measures in relation to the damage caused to SAS by the Covid-19 pandemic. The General Court notes, first of all, that Article 107(2)(b) TFEU allows compensation only for economic damage caused by natural disasters or exceptional occurrences. However, **given the evolving nature of the pandemic and the fact that the quantification of the damage caused by it to SAS is necessarily prospective in nature, the Commission had set out in sufficiently precise terms a calculation method for assessing that damage, which was capable of avoiding the risk of possible overcompensation.**<sup>6</sup> In that respect, the General Court takes note, in addition, of the commitment by Denmark and Sweden to carry out an *ex post* assessment of the damage actually suffered by SAS, by no later than 30 June 2021, and to request from SAS, if necessary, the repayment of aid exceeding that damage, taking into account all the aid liable to be granted to SAS owing to the Covid-19 pandemic, including by foreign authorities.

In the third place, the General Court rejects the plea claiming a breach of the principle of non-discrimination. Individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is inherent in the individual character of that measure. To argue that such aid is contrary to the principle of non-discrimination would therefore amount to calling into question systematically the compatibility of any individual aid with the internal market, whereas EU law allows Member States to grant such aid, provided that all the conditions laid down in Article 107 TFEU are met.

In addition, even if the difference in treatment brought about by the measures at issue may amount to discrimination pursuant to that principle, this may be justified where it is a necessary, appropriate and proportionate means of achieving a legitimate objective. Similarly, since Ryanair also refers to Article 18 TFEU, the General Court observes, in addition, that that provision prohibits any discrimination on grounds of nationality within the scope of application of the Treaties without prejudice to any special provisions contained therein. As Article 107(2)(b) TFEU is, according to the General Court, among the special provisions laid down by the Treaties, it continues its examination of the measures at issue on that basis.

In that regard, the General Court confirms, first, that the objective of the measures at issue satisfies the conditions laid down by Article 107(2)(b) TFEU in so far as it actually aims to make good in part the damage caused to SAS by an exceptional occurrence, that is to say the Covid-19 pandemic. The General Court finds, secondly, that the **difference in treatment in favour of SAS is appropriate for the purpose of achieving the objective of those measures and does not go beyond what is necessary to achieve that objective, given that SAS has the largest market share in Denmark and Sweden, and that that market share is much higher than that of its closest competitor in those two countries.**

In the fourth place, the General Court examines the Commission's decisions in the light of the free provision of services and the freedom of establishment. In that context, the General Court notes that **Ryanair does not demonstrate how the exclusivity of the measure is capable of discouraging it from establishing itself in Denmark or Sweden** or providing services from either of those countries or to them.

As regards Case T-379/20, the General Court finds, in addition, that the aid measure notified by Sweden is subsidiary to the Swedish aid scheme adopted under Article 107(3)(b) TFEU in order to deal with the disturbance in the Swedish economy caused by the Covid-19 pandemic.<sup>7</sup> However, it

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<sup>6</sup> The Commission estimated the extent of the damage suffered by SAS as corresponding to the 'loss of added value', which consists of the difference between revenue for the period from March 2019 to February 2020 and that of the period from March 2020 to February 2021, from which were subtracted, first, avoided variable costs, calculated on the basis of the costs incurred between March 2019 and February 2020 and, secondly, the profit margin relating to the loss in revenue. The amount of damage was provisionally assessed by reference to a fall in air traffic of between 50 and 60% for the period from March 2020 to February 2021 in comparison with the period from March 2019 to February 2020 and amounted to between SEK 5 and 15 billion.

<sup>7</sup> In its judgment of 17 February 2021, *Ryanair v Commission*, [T-238/20](#) (also see press release [No 16/21](#)), the General Court dismissed an action by Ryanair against the Commission's decision declaring that Swedish aid scheme to be compatible with the internal market.

rejects the argument that that measure could not, for that reason, have as its purpose the making good of an exceptional occurrence, within the meaning of Article 107(2)(b) TFEU. In that regard, the General Court states that the FEU Treaty does not preclude a concurrent application of Article 107(2)(b) and Article 107(3)(b) TFEU, provided that the conditions of each of those two provisions are met. That applies in particular where the facts and circumstances giving rise to a serious disturbance in the economy are the result of an exceptional occurrence.

Lastly, the General Court rejects as unfounded the pleas claiming an infringement of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

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**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.

**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.

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*The full text of the judgments ([T-378/20](#) and [T-379/20](#)) are published on the CURIA website on the day of delivery*

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

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