JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)
17 February 2021 (*)

(State aid – French air transport market – Deferral of payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020 in the context of the Covid-19 pandemic – Decision not to raise any objections – Aid intended to make good the damage caused by an exceptional occurrence – Free provision of services – Equal treatment – Criterion of holding a licence issued by the French authorities – Proportionality – Article 107(2)(b) TFEU – Duty to state reasons)

In Case T-259/20,

Ryanair DAC, established in Swords (Ireland), represented by E. Vahida, F.-C. Laprévote, S. Rating and I.-G. Metaxas-Maranghidis, lawyers,

applicant,

v

European Commission, represented by L. Flynn, S. Noë and C. Georgieva-Kecsmar, acting as Agents,

defendant,

supported by

French Republic, represented by E. de Moustier, C. Mosser, A. Daniel and P. Dodeller, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 2097 final of 31 March 2020 on State Aid SA.56765 (2020/N) – France – Covid-19 – Deferral of the payment of airline taxes in favour of public air transport undertakings,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov, E. Buttigieg (Rapporteur), K. Kowalik-Bańczyk and G. Hesse, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 September 2020,

gives the following

Judgment

Background to the dispute

On 24 March 2020, the French Republic notified the European Commission, in accordance with Article 108(3) TFEU, of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020 ('the aid scheme at issue').

The aid scheme at issue, which is designed to ensure that airlines holding an operating licence issued in France pursuant to Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) ('the French licence') are able to maintain sufficient liquidity until the restrictions or prohibitions on movement are lifted and normal commercial activity resumed, thus defers payment of those taxes until 1 January 2021 and then spreads payments over a period of 24 months, until 31 December 2022. The precise amount of the taxes is determined by reference to the number of passengers carried and the number of flights operated from a French airport. In addition, the aid scheme at issue will benefit public air transport undertakings holding a French licence, which means that they have their 'principal place of business' in France (see paragraph 29 below).

On 31 March 2020, the Commission adopted Decision C(2020) 2097 final concerning State aid SA.56765 (2020/N) – France – Covid-19 – Deferral of the payment of airline taxes in favour of public air transport undertakings ('the contested decision'), by which, after concluding that the aid scheme at issue constituted State aid within the meaning of Article 107(1) TFEU, it assessed the compatibility of the aid with the internal market and more particularly in the light of Article 107(2)(b) TFEU.

In that regard, in the first place, the Commission considered in particular that the Covid-19 epidemic constituted an exceptional occurrence within the meaning of Article 107(2)(b) TFEU and that there was a causal link between the damage caused by that occurrence and the harm compensated by the aid scheme at issue, since that aid scheme was aimed at reducing the liquidity crisis of airlines attributable to the Covid-19 pandemic, by providing a response to the cash-flow needs of public air transport undertakings holding a French licence.

In the second place, after observing that it followed from the case-law of the Court of Justice that only economic disadvantages caused directly by an exceptional occurrence might be compensated for and that the compensation could not exceed the amount of those disadvantages, the Commission considered, first, that the aid scheme at issue

was proportionate in the light of the amount of the damage expected since the amount of the projected aid seemed to be lower than the commercial damage expected from the crisis resulting from the Covid-19 pandemic.

Secondly, the Commission considered that the aid scheme at issue was clearly established in a non-discriminatory fashion, since the beneficiaries of the scheme included all airlines holding French licences. In that regard, it emphasised that the fact that, in the case at hand, the aid was granted by a deferral of certain taxes also imposed on the budgets of airlines holding operating licences issued by other Member States did not affect its non-discriminatory nature, since the aid scheme at issue was clearly intended to compensate for the damage sustained by airlines holding French licences. The coverage of the aid scheme at issue therefore remains proportionate in the light of its objective of compensating for the damage caused by the Covid-19 pandemic. In particular, the aid scheme at issue contributes to preserving the structure of the aviation sector for airlines holding French licences. Consequently, the Commission considered that the French authorities had demonstrated at that stage that the aid scheme at issue does not exceed the damage caused directly by the crisis attributable to the Covid-19 pandemic.

The Commission therefore decided, having regard to the commitments given by the French Republic and, in particular, the undertaking to communicate to the Commission and to have validated by it a detailed methodology of the way in which that Member State intended to quantify, *ex post facto* and for each beneficiary, the amount of the damage associated with the crisis caused by the Covid-19 pandemic, not to raise objections to the aid scheme at issue.

Procedure and forms of order sought by the parties

By document lodged at the Court Registry on 8 May 2020, the applicant brought the present action.

By document lodged at the Court Registry on the same date, the applicant applied for the present action to be decided under an expedited procedure in accordance with Articles 151 and 152 of the Rules of Procedure of the General Court. By decision of 29 May 2020, the General Court (Tenth Chamber) granted the request for an expedited procedure.

The Commission lodged the defence at the Court Registry on 18 June 2020.

Pursuant to Article 106(2) of the Rules of Procedure, the applicant submitted a reasoned request for a hearing on 30 June 2020.

By document lodged at the Court Registry on 20 July 2020, the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By document lodged at the Court Registry on 28 July 2020, the applicant requested, in accordance with Article 144(7) of the Rules of Procedure, that certain information concerning the number of bookings and the expected number of passengers contained in the application, in the abbreviated version of the application and in the annexes to those documents, should not be disclosed to the French Republic. Accordingly, it attached a non-confidential version of the application, the abbreviated version of the application and their annexes.

On a proposal from the Tenth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

By order of 5 August 2020, the President of the Tenth Chamber (Extended Composition) of the Court granted the French Republic leave to intervene and provisionally limited disclosure of the application, the abbreviated version of the application and their annexes to the non-confidential versions produced by the applicant, pending the submission of any observations by the French Republic on the request for confidential treatment.

By a measure of organisation of procedure of 6 August 2020, the French Republic was permitted, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention.

On the 21 August, the French Republic submitted to the Court Registry its statement in intervention, without raising any objection in relation to the applicant’s request for confidential treatment.

The applicant claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

The Commission contends that the Court should:

dismiss the action;

order the applicant to pay the costs.

The French Republic submits that the action is inadmissible in so far as it seeks to challenge the overall merits of the assessment of the aid, and that it should be dismissed on substantive grounds as to the remainder. In the alternative, it submits that the entire action should be dismissed on its merits.

Law

It should be recalled that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on its merits, without first ruling on its admissibility (see, to that effect, judgments of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52, and of 14 September 2016, *Trajektna luka Split* v *Commission*, T-57/15, not published, EU:T:2016:470, paragraph 84). Therefore, having particular regard to the considerations which led to the present proceedings being expedited and the importance of a swift substantive response, both for the applicant and the Commission and the French Republic, it is appropriate to begin by examining the merits of the action without first ruling on its admissibility.

The applicant puts forward four pleas in law in support of its action. The first plea alleges, in essence, infringement of the principles of non-discrimination on grounds of nationality and the free provision of services, the second plea alleges a manifest error of assessment in the appraisal of the proportionality of the aid scheme at issue in the light of the damage caused by the Covid-19 crisis, the third plea alleges infringement of the procedural rights under Article 108(2) TFEU, and the fourth plea alleges infringement of the duty to state reasons.

The first plea in law: infringement of the principles of non-discrimination on grounds of nationality and the free provision of services

The first plea is formed, in essence, of four limbs, namely a breach of Article 18 TFEU, an infringement of the principle of proportionality, a manifest error of assessment, and an infringement of the principle of the free provision of services, which has been subjected to an unjustifiable restriction. Before examining those pleas, the Court must determine whether the conditions laid down in Article 107(2)(b) TFEU have been satisfied.

As provided in Article 107(2)(b) TFEU, 'the following shall be compatible with the internal market … (b) aid to make good the damage caused by natural disasters or exceptional occurrences'. It is clear in that regard from the case-law that that provision covers aid which is, in law, compatible with the internal market, provided that it satisfies certain objective criteria. It follows that the Commission is bound, where those criteria are satisfied, to declare such aid compatible with the internal market, and that it has no discretion in that regard (judgment of 25 June 2008, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-268/06, EU:T:2008:222, paragraph 51; see also, to that effect, judgment of 17 September 1980, *Philip Morris* v *Commission*, 730/79, EU:C:1980:209, paragraph 17).

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 (see judgment of 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, EU:C:2006:130, paragraph 79 and the case-law cited).

The Commission must, consequently, 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 (see, to that effect, judgment of 1 February 2018, *Larko* v *Commission*, T-423/14, EU:T:2018:57, paragraph 38). 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.

In the present case, it is indisputable that the Covid-19 pandemic constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU. The contested decision sets out the criteria used by the Commission in its decision-making practice in that regard in paragraph 29 and then states how the Covid-19 pandemic corresponds to them. The applicant, without disagreeing with that, argued however at the hearing that, in their pleadings, the Commission and the French Republic viewed the travel restrictions and lockdown measures taken by that Member State as constituting the exceptional occurrence in question, not the pandemic itself. In fact, as the Commission shows in paragraph 35 of its statement in defence, clarified by footnote 18, the pandemic and the measures taken by the French authorities to deal with it are regarded as a whole as being the exceptional occurrence in question, as is clear from the explicit wording of paragraphs 15 and 50 of the contested decision. Indeed, those extremely restrictive measures, in particular as concerns the freedom to come and go, in France as well as within the European Union, have no rationale other than the desire to limit the spread of the pandemic. It dictated the need for the measures in question, which themselves had an impact on the airlines operating on the French market. There is therefore an unbroken causal link between the exceptional occurrence and the damage. A similar approach can be seen moreover in the case-law. Accordingly, the Court pointed out, in the judgment of 25 June 2008, *Olympiaki Aeroporia Ypiresies* v *Commission* (T-268/06, EU:T:2008:222, paragraph 49), that the Commission had rightly noted that the closure of the airspace of the United States from 11 to 14 September 2001 was in the nature of an exceptional occurrence, and had concluded that it was not only the terrorists attacks, but also the closure of the airspace that were classified as exceptional occurrences.

The causal link required by Article 107(2)(b) TFEU has therefore been established as existing between the Covid-19 pandemic, the restrictions and the lockdown measures taken by the French authorities, and the economic damage suffered by the airlines operating in France, with air transport, notably passenger transport (see paragraphs 35 to 37 of the contested decision), falling almost to zero on French territory.

The first three limbs of the first plea in law: infringement of Article 18 TFEU, infringement of the principle of proportionality and a manifest error of assessment

In the present case, first, the aid scheme at issue consists in the grant of a deferral of the payment of aviation taxes in favour of airlines holding a French licence, which requires their 'principal place of business' to be in France (see paragraph 29 below). That scheme is limited in time as it relates to the amount of taxes usually payable on a monthly basis for the period from March to December 2020. As is apparent from paragraph 2 above, the term 'French licence' refers to a licence issued under Article 3 of Regulation No 1008/2008 by the French authorities.

Secondly, under Article 2(26) of Regulation No 1008/2008, the 'principal place of business' is defined as the head office or registered office of an EU air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of that air carrier are exercised. The notion of a principal place of business, in practice, corresponds to the registered seat of that carrier (see, to that effect, judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 66). It is therefore true, as the applicant maintains, that for a given legal entity that regulation permits the establishment of only one principal place of business and, consequently, the issuing of only one licence by the authorities of the Member State on whose territory that principal place of business is located. It is nevertheless open to an airline to acquire a number of licences by creating a number of separate legal entities, for example by setting up subsidiaries.

Bearing that in mind, it should be recalled that, according to the case-law, it is clear from the general scheme of the Treaty that the procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Therefore, the Commission cannot declare State aid, certain conditions of which contravene other provisions of the Treaty, to be compatible with the internal market. Similarly, State aid, certain conditions of which contravene the general principles of EU law, such as the principle of equal treatment, cannot be declared by the

Commission to be compatible with the internal market (judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51).

In the present case, it has to be said that the eligibility criterion of holding a French licence results in a difference in treatment for airlines whose principal place of business is in France, so as to be able to benefit from the deferral granted by the State, and for those whose principal place of business is in another Member State and which operate in France, to France and from France, under the freedom to provide services and the freedom of establishment, which are not so entitled.

Even if, as the applicant submits, that difference in treatment may amount to discrimination within the meaning of 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 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 aid scheme at issue satisfies the requirements of that provision and, secondly, that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

In the first place, with regard to the objective of the aid scheme at issue, it should be stated that, in accordance with the wording of Article 107(2)(b) TFEU, it is, in general, to make good the damage in the air transport sector resulting from the exceptional occurrence in question. Consequently, the specific purpose of the aid scheme at issue is not the overall preservation of the structure of the aviation sector, as the applicant argues (paragraph 66 of the application, preliminary point), but rather, as the Commission rightly observes, to alleviate, by the grant of a deferral, the financial burden of airlines hit hard by the travel restrictions and lockdown measures taken by the French Republic in order to deal with the Covid-19 pandemic (see, in that regard, paragraphs 2 and 3 of the contested decision, under the heading 'Objective of the measure') and, more specifically, using the fiscal lever, to defer the payment of the two airline taxes in question, due for the period running from March to December 2020, in favour of airlines holding a French licence, that is to say, not a national licence, as the applicant would suggest, but rather an EU operating licence issued by the French authorities pursuant to Regulation No 1008/2008. To the extent that, when the contested decision was adopted, those travel restrictions and lockdown measures had already led to many aircraft being grounded and where that situation subsequently only worsened, causing the closure of airports on French territory and leading to the cancellation of almost all planned flights at the height of the lockdown period, it appears that a measure such as the aid scheme at issue does in fact aim at relieving the damage sustained by airlines operating on the territory concerned because of the travel restrictions and lockdown put in place by the French Republic.

The Court considers that, since the existence of an exceptional occurrence relating to the damage which the aid scheme at issue seeks to remedy has been established and that, more specifically, that scheme aims at easing the financial burden of airlines seriously affected by the travel restrictions and lockdown measures adopted by the French Republic to deal with the Covid-19 pandemic, the objective of the aid scheme at issue satisfies the conditions laid down in Article 107(2)(b) TFEU.

In the second place, with regard to ensuring that the conditions for granting the aid do not go beyond what is necessary to achieve the objective of the aid scheme at issue and to satisfy the conditions laid down in Article 107(2)(b) TFEU, the following observations should be made.

First, as regards the appropriateness of the aid scheme at issue, it has to be pointed out that the arrangements for that aid scheme consist in the temporary non-collection of taxes by granting a deferral to the eligible undertakings, that is to say, those which have a French licence.

Consequently, first, the compensation for the damage is not made by taking the nationality of the victims of the damage as the chief factor for allocation as such, but in fact requires an institutional link with the place where the damage caused by the travel restrictions and lockdown arose, namely the principal place of business, since the criterion to be eligible for the aid scheme in question is the issuing of a French licence, which presupposes that the airline's principal place of business is in France. Secondly, that link, in fact, also has a time element, because, as the applicant states in paragraph 59 of the application, it is not easy to obtain a licence from another Member State, as an airline must then not only transfer the principal place of business but also make a new application for an operating licence, while a provision of services may end from one day to the next. It is therefore normal for the Member State concerned to seek to ensure that the airlines eligible for the aid scheme at issue have a stable presence, in order for them to be present on French territory to honour the deferral of the payment of taxes granted, so that the shortfall in tax revenue is as low as possible in the medium term. The criterion of holding a French licence, in so far as it requires the principal place of business of the airlines to be on French territory, ensures at least the administrative and financial stability of the presence of those airlines, so that the authorities of the Member State granting the aid may control the manner in which that aid is used by the recipients, which would not have been the case if the French Republic had adopted another criterion allowing the eligibility of other airlines operating on French territory under a licence delivered by another Member State, like the applicant, as provision of services, by definition, is of a more uncertain nature in terms of its duration, since it may cease at very short notice, if not immediately.

Secondly, the conditions for granting the aid, which are in the nature of a tax measure, reflect the possibility and the obligation for the French authorities to carry out financial checks of the recipients. Such a possibility and such an obligation exist only for those airlines which hold a French licence because the French authorities alone are competent to monitor the financial situation of those airlines in accordance with the obligations arising, in particular, under Article 5 and Article 8(2) of Regulation No 1008/2008, as was stated in paragraph 46 of the contested decision. Indeed, that paragraph states that the aid scheme at issue, 'provides also that the commercial losses by beneficiary undertaking will be assessed and itemised *ex post facto* by the Directorate-General of Civil Aviation on the basis of

certified and audited 2020 accounts provided by each of the airlines which received the aid' and that 'the award of the aid will be conditional upon the public air transport undertakings providing the necessary supporting documents to calculate the damage'. However, the French authorities have no power under that regulation to monitor the financial situation of airlines which do not have a French licence.

Thirdly, while it is true that the Court considered that, in practice, the concept of principal place of business corresponded to that of a registered office (see paragraph 29 above) and that a change of registered office could be made relatively quickly, it should not be forgotten that Article 2(26) of Regulation No 1008/2008 contains other details, in particular in relation to the fact that continued airworthiness management must be carried out from the location of the principal place of business, that is to say, in the present case, in France. That consideration is supported by Article 5 (on the financial conditions for granting an operating licence), Article 7 (on proof of good repute) and Article 8 (on the validity of an operating licence) of Regulation No 1008/2008. Those provisions create reciprocal regulatory obligations between airlines holding a French licence and the French authorities and thus a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(2)(b) TFEU, which require that the aid address the damage caused by exceptional occurrences. Moreover, the loss of that link with the Member State concerned caused by the transfer of the principal place of business to another Member State cannot be narrowed down to a mere change of registered office, given that, as the applicant itself observes in paragraph 59 of the application, the airline must also take all the administrative steps with that State in order to obtain a new operating licence and satisfy all the conditions for that purpose, and the fact that the location of its new principal place of business is recognised is only one factor.

It is therefore certain that, by adopting that criterion, the French Republic sought, in essence, to ensure a permanent link between it and the airlines benefiting from the deferral, resulting in the presence of an important legal entity, namely the principal place of business of those airlines, on its soil, which would not have existed in that regard with airlines operating under a licence issued by a Member State other than itself, in that the latter are not subject to financial and reputational monitoring by the French authorities within the meaning of Regulation No 1008/2008 and, in their situation, that reciprocal stable link between it and the airlines holding an operating licence which it issued is absent.

Thus, by limiting eligibility for the aid only to those airlines which hold a French licence, as a result of the stable reciprocal links which tie them to the French economy, the aid scheme at issue is appropriate for achieving the objective of making good the damage caused by an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

It follows from the foregoing considerations that the applicant is wrong to maintain that, since its principal place of business is in Ireland, and since it has a significant share of around 7% of the market for the transport of passengers from France and to France, is the third largest airline there, and has participated in the structure of the French air transport market since 1997 (paragraph 66 of the application), the Commission committed an error of assessment by excluding airlines such as itself in so far as the Member State concerned does not have the means, in respect of companies operating under a licence delivered by another Member State, allowing it to carry out the checks described in paragraph 46 of the contested decision. Besides, that market share relates only to passenger air transport, excluding freight, and relates, by definition, to a period before the exceptional occurrence, whereas, according to the case-law referred to in paragraph 24 above, the point is to assess the damage sustained as precisely as possible.

Fourthly, concerning the proportionality of the aid scheme at issue, it must be found that, in applying the criterion of a French licence, the Member State concerned, taking into account, as the Commission rightly states, the fact that the Member States do not have unlimited resources, reserved the benefit of the aid scheme at issue to the airlines which were most severely affected by the travel restrictions and lockdown measures adopted by that Member State, which took effect, by definition, on its territory. As the Commission observes in its statement in defence, in 2019 Air France operated 98.83% of its flights in France, from France and to France, Transavia.com 97.05%, while it was 100% for Hop !, Aigle Azur, Air Corsica, Corsair, XL Airways France, and so forth. Conversely, flights in France, going to France and coming from France, accounted for a much smaller share of the business of the other companies, namely, for example, 22.99% for easyJet, 8.3% for the applicant, 18.93% for Vueling airlines, and so forth.

Those figures establish that the eligible airlines are proportionately much more severely affected than the applicant, which, according to the latest figures provided, generated only 8.3% of its business in France, going to France and coming from France, against 100% for some of the eligible companies.

Fifthly, the applicant suggests the possibility of an alternative aid scheme, based on the airlines' respective market shares. At the hearing, it suggested other possible criteria, like the number of passengers carried or the routes.

However, according to the case-law, it is not for the Commission to make a decision in the abstract on every alternative measure conceivable since, although the Member State concerned must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used, it is not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective. Although that Member State is not under any such obligation, the applicant is not entitled to ask the Court to require the Commission to take the place of the national authorities in that task of normative prospecting in order to examine every alternative measure possible (see, to that effect, judgment of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 94 and the case-law cited).

In any event, it should be pointed out that, for the reasons indicated in paragraphs 37 to 41 above, the extension of the aid scheme at issue to airlines not established in France would not have made it possible to achieve the objective of that scheme in so precise a manner and without a risk of overcompensation to the extent that, as was made clear in paragraph 42 above, the requirement to take into account air transport in France in its entirety, in its diversity and in

its permanence would not have been as well satisfied by adopting the criteria proposed by the applicant, so that the Commission was right not to approve them.

Accordingly, by concentrating the aid scheme at issue on one of the economic sectors most affected by the consequences of the travel restrictions and lockdown measures, namely the air transport sector, and by targeting, within that sector, the airlines which hold a French licence, the Member State met the case-law requirement noted in paragraph 32 above and the Commission was not required to penalise that delimitation, provided that the choice of that eligibility criterion made it possible to ensure the proportionality of the aid scheme at issue.

In its contested decision, the Commission therefore approved an aid scheme which actually aims to make good the damage caused by the exceptional occurrence constituted by the onset of the Covid-19 pandemic and the travel restriction and lockdown measures adopted by the French Republic in reaction to the pandemic, and which, under its conditions for granting the aid, does not go beyond what was necessary to achieve the objective of that scheme. It must therefore be held that, having regard to the principles set out in paragraph 32 above, the consequences of that scheme, in that the French authorities limited its scope to airlines which hold a French licence, do not infringe the first paragraph of Article 18 TFEU solely because the scheme favours airlines which have their principal place of business on French territory.

It is apparent from the foregoing that the objective of the aid scheme at issue satisfies the requirements of the derogation laid down in Article 107(2)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

The first three limbs of the first plea in law should, consequently, be rejected, without there being need to rule on the admissibility – disputed by the Commission – of Annexes A.3.1 and A.3.2 to the application, containing reports drawn up by the applicant's experts.

The fourth limb of the first plea in law: infringement of the principle of the freedom to provide services, which has been unjustifiably restricted

The applicant observes, first, that a restriction of the free provision of services is lawful if it is justified by an overriding reason relating to the general interest, it is non-discriminatory, and it is necessary and proportionate to the objective of general interest pursued and, secondly, that those conditions are cumulative and that a restriction becomes unjustified even if only one of them is found to not be fulfilled. That is the case here. The aid scheme at issue is, first of all, discriminatory, because it treats airline companies differently, depending on which EU Member State issued their EU operating licence, when all EU airlines operating in France have suffered the same damage from the Covid-19 pandemic, which the aid scheme at issue is intended to make good, and are part of the structure of the aviation sector, which that scheme aims to preserve. Next, the aid scheme at issue is not proportionate because it goes beyond what is necessary to achieve its objective, given that that objective, which is to make good the damage caused by the Covid-19 pandemic and preserve the structure of the aviation sector, could be achieved without impeding the free provision of services if it benefited all airlines operating in France, irrespective of which Member State issued their EU operating licence, simply by taking into account their overall contribution to the taxes covered by the aid scheme at issue.

Finally, the objective of general interest of compensating the airline sector for losses due to the Covid-19 pandemic in order to preserve the structure of the sector does not make it necessary to help only airlines which hold a French licence, given that the airlines operating in France under a licence issued by another Member State are just as important for the structure of the aviation sector in France and the entire European Union. On the contrary, assisting national airlines leads to the fragmentation of the internal market and the elimination of competitors from other Member States, weakens competition, aggravates the damage caused by the Covid-19 crisis, ultimately harms the structure of the airline sector which the aid scheme at issue is supposed to preserve and restricts the rights of EU carriers to provide air transport services freely within the internal market, regardless of which Member State issued their licence.

As a preliminary point, in so far as the applicant bases its arguments on the existence of discrimination arising from the aid scheme at issue and the lack of proportionality of that scheme, it is appropriate to refer to the examination of the first three limbs of the first plea in law.

With regard to Article 56 TFEU, it should be pointed out that, pursuant to Article 58(1) TFEU, the free provision of services in the field of transport is governed by the provisions of the title relating to transport, namely Title VI of the TFEU. The free provision of services in the field of transport is therefore governed, in primary law, by a special legal regime (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 36). Consequently, Article 56 TFEU does not apply as such to the air transport sector (judgment of 25 January 2011, *Neukirchinger*, C-382/08, EU:C:2011:27, paragraph 22).

Therefore, measures liberalising air transport services may only be adopted under Article 100(2) TFEU (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 38). However, the EU legislature adopted Regulation No 1008/2008 on the basis of that provision, and its very purpose is to define the conditions for applying in the air transport sector the principle of free provision of services (see, by analogy, judgment of 6 February 2003, *Stylianakis*, C-92/01, EU:C:2003:72, paragraphs 23 and 24). However, it should be pointed out that the applicant does not claim that there has been any infringement of that regulation.

In any event, although it is true that, owing to the definition of the scope of the aid scheme at issue, the applicant is deprived of access to the deferral granted by the French Republic of the levying of the taxes at issue, it does not demonstrate how that exclusion discourages it from providing services from France and to France. In particular, the applicant fails to identify the elements of fact or law which cause the aid scheme at issue to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which, as was found in the context of the

first three limbs of the first plea, are nevertheless necessary and proportionate to make good the damage caused by the exceptional occurrence of the pandemic, in accordance with the requirements of Article 107(2)(b) TFEU.

It follows from all of the foregoing that none of the limbs of the first plea can be upheld and that therefore that plea must be rejected.

Second plea in law: manifest error of assessment by the Commission in its appraisal of the proportionality of the aid to the damage caused by the Covid-19 crisis

By its second plea in law, the applicant argues that the Commission did not carry out a sufficient assessment of the value of the advantage accorded to the beneficiaries of the aid and that it therefore committed a manifest error of assessment.

In that regard, the applicant notes in particular that the Commission, in the contested decision, assessed the proportionality of the quantum of aid to the damage caused by the Covid-19 crisis and concluded that the quantum of aid was EUR 29.9 million. That amount was calculated to reflect the amount of interest that the beneficiaries of the aid would have had to pay in order to obtain cash equal to the amount of the taxes payment of which is deferred by the aid. Such reasoning is manifestly erroneous in two respects.

First, it is apparent from paragraph 47 of the contested decision that the Commission's calculation of the quantum of aid is based on the application of a Euribor (Euro interbank offered rate) reference rate plus 1 000 basis points which, according to the Commission's Communication on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p.6), corresponds to the assumption of a market rate for a loan to a borrower in the rating category of 'Bad/Financial difficulties (CCC and below)' with low collateralisation. The applicant submits, first, that that calculation is based on the undemonstrated assumption that there would still be market lenders prepared, in the current circumstances, to provide liquidity at such rates to the airlines eligible for the aid and, secondly, that the Commission does not explain why that assumption is reasonable. Furthermore, according to the applicant, another credible possibility is that no market lender would have provided any liquidity to the beneficiaries of the aid scheme at issue, which would require, according to the Commission's established decision-making practice, that the amount of aid to take into account for the purpose of the compensation be as high as the nominal amount of the liquidity provided. On that basis, the real amount of compensation to take into account is much higher, reaching EUR 200.1 million.

Secondly, the Commission's calculation of the compensation takes into account the cash-flow advantage, but ignores another advantage granted to the beneficiaries of the aid scheme at issue, namely the competitive advantage deriving from its discriminatory character, owing to the fact that the benefit of the aid scheme at issue is reserved to airlines holding an EU operating licence issued by the French Republic. That aid offers a cash-flow boost to the latter airlines precisely when traffic restarts, that is to say, at what is expected to be the end of the crisis caused by the Covid-19 pandemic, at the expense of their competitors who will still have to pay the same taxes. Accordingly, that competitive advantage also has a value and will translate, for the beneficiaries of the aid, into the acquisition of larger market shares than they could otherwise achieve.

Consequently, according to the applicant, the Commission's review of the adequacy of the compensation for the damage is flawed because one of the elements of the comparison between the damage and its compensation is undervalued. In addition, the clawback conditions imposed in the conclusion of the contested decision are not likely to correct that flaw because they do not refer to the value of the competitive advantage granted to the beneficiaries of the aid.

The Commission, supported by the French Republic, disputes those arguments.

First of all, it is necessary to refer to the observations made earlier in response to the first plea in law on the proportionality of the aid scheme at issue (see paragraphs 35 to 49 above).

Next, the following factors must be mentioned as regards the first limb of the second plea in law on the existence of a manifest error of assessment and an infringement of the principle of proportionality in so far as the Commission only took into account, in order to establish the amount of the aid scheme at issue, the nominal amount arising from the postponement of taxes resulting from the deferral, which means that the amount of the aid scheme in question overcompensates the damage caused by the exceptional occurrence.

In the first place, the applicant fails to mention that the postponement of the fiscal charges resulting from the deferral concerns only aviation taxes and not all the taxes for which the eligible airlines are liable. Since some taxes, such as corporate tax, are paid in 2020 on the basis of the results of the 2019 financial year, the airlines eligible for the aid scheme at issue, taxable in France because they have their principal place of business there, should continue to pay certain fiscal charges not imposed on the applicant, as the latter acts as a provider of services from another Member State or by means of the freedom of establishment.

In the second place, as the Commission states in the contested decision, the amount of damage sustained by the beneficiaries of the aid scheme at issue owing to the exceptional occurrence is, in all probability, higher, in nominal terms, than the total amount, in nominal terms, of the aid scheme at issue (approximately EUR 680 million versus EUR 200.1 million), so that the spectre of possible overcompensation must evidently be ruled out.

In the third place, even if the applicant rightly refers to the possible nervousness of the banking institutions or, in any case, their great caution in the context of the pandemic, it is not justified in adopting the premiss that no loans are available at all from that quarter. Apart from the fact that, as the Commission rightly observes, the burden of proof is on the applicant, which must thus prove the implausible nature of the Commission's assessment, it must be stated that the assertion that the airlines would not be able to obtain any loans is purely hypothetical in nature. Perhaps that assertion is correct with regard to one or other of the airlines benefiting from the aid scheme at issue, but it cannot be applied in general terms and, in any event, it cannot be accepted without the slightest prima facie evidence in support. It is more likely that the banking institutions will tend to support the airlines, while setting interest rates on the loans

granted that would be attractive for themselves. In those circumstances, the Commission's assumption of loans with premiums in line with the highest margin set out in the Communication on the revision of the method for setting the reference and discount rates (1 000 basis points), corresponding to a situation in which the borrower has a poor rating and possesses low collateral, appears to be prudent and appropriate. The Commission did not therefore commit any error of assessment.

In any event, there can be no prospect of success in the argument that the amount of damage caused to airlines with their principal place of business in France by the exceptional occurrence constituted by the Covid-19 pandemic could be overestimated by the grant of a deferral of aviation taxes, whether the amount of the aid scheme at issue is based on the calculation of increased interest payments on the amount of those taxes in relation to the length of the delay in payment, namely EUR 29.9 million, or whether its total nominal value is applied, that is to say, EUR 200.1 million, even if only for the reasons set out in paragraph 68 above. In addition, the oversight measures adopted and referred to in paragraph 46 of the contested decision aim precisely at preventing any risk of overcompensation and would not have been possible in respect of providers of services established in another Member State, like the applicant.

Moreover, it must be added that the Commission took into account, in order to find the aid scheme compatible with the internal market, the commitments given by the French Republic to communicate a methodology to it, which is an additional safeguard for avoiding any risk of overcompensation.

The first limb of the second plea must therefore be rejected.

With regard to the second limb of the second plea in law, it is sufficient to state, as does the Commission, that it cannot be allowed since it comes into conflict with the case-law of the Courts of the European Union concerning the calculation of the amount of the aid, both with reference to assessing the advantage and to recovering unlawful aid incompatible with the internal market. 'Second level' advantages, which are in fact too hypothetical and too complex to identify in certain terms, are not to be taken into consideration, which the applicant must have been aware of, given the terms of the judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraphs 90 to 92).

For all those reasons, the second plea in law must be rejected.

Fourth plea in law: infringement of the duty to state reasons

In support of the fourth plea, the applicant observes that the Commission is bound by a duty to state reasons by virtue of the second paragraph of Article 296 TFEU and that an infringement of that obligation justifies the annulment of the contested decision. In addition, under that provision, the Commission must disclose in 'a clear and unequivocal fashion' the reasoning it followed to adopt the measure in question in such a way that both the interested parties and the competent court of the European Union understand the reasons for adopting the contested measure. This requirement to state adequate reasons is all the more important in the present case since the contested decision was adopted without the initiation of a formal investigation procedure granting the interested parties the opportunity to put forward their arguments.

In the first place, the Commission failed in its duty to state reasons, first, by not assessing whether the aid was non-discriminatory and complied with the principle of free provision of services; secondly, by failing to assess, even in a succinct manner, the value of the competitive advantage provided to the airlines eligible for the aid; and, thirdly, by failing to provide reasons for its calculation of the aid amount.

In the second place, the Commission also failed in its duty to state adequate reasons. The contested decision recognises that the taxes for which the aid grants a deferral are also payable by airlines whose EU operating licence is issued by another Member State, but states that that circumstance has no impact on its non-discriminatory nature, given that the measure clearly aims to compensate damage suffered by airlines holding operating licenses issued by the French Republic. That is contradictory as it amounts to asserting that the aid is not discriminatory because its primary objective is to discriminate. Furthermore, the reference in footnote 23 of the contested decision to the precedent resulting from the Commission's decision of 12 March 2002 in Case N 854/2001 – United Kingdom – Aid to airlines for closure of airspace, is merely an unsuccessful attempt to find an appearance of a legal basis to what was from the outset fundamentally flawed reasoning. The Commission's reasoning is therefore either absent, tautological, or contradictory. The contradiction between the stated aims, namely making good the damage caused by the Covid-19 pandemic and preserving the structure of the aviation sector for airlines whose EU operating licence was issued in France, and the disproportionate and counterproductive means used to achieve those aims, namely the grant of discriminatory aid, does not allow the interested parties nor the Court to understand what the aim of the State aid measure at issue was, other than excluding airlines which hold an EU operating licence issued by Member States other than France from the benefit of the aid.

The Commission disputes those arguments. The French Republic refers to the statement in defence in that regard.

First, although the statement of reasons for an EU measure, required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the duty to state reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see judgment of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 75 and the case-law cited). The context in the present case is that of a pandemic and the extreme urgency in which the Commission examined the measures of which it had been notified by the Member States and adopted the decisions relating to those measures, including the contested decision. In that regard, it is apparent from paragraphs 1 and 3 above that only seven days elapsed between notification of the aid scheme at issue and the adoption of the contested decision.

Despite those exceptional circumstances, it should be pointed out that, in the present case, the contested decision contains 53 paragraphs and makes it possible, in a clear and intelligible way, to understand the factual and legal reasons why the Commission decided not to raise any objections concerning the aid scheme at issue.

Secondly, the figures which serve as the basis for determining the objective of the aid scheme at issue and for the way to achieve that objective (deferral of airline taxes for airlines holding a French licence) are clearly laid out. In particular, it must be said, in the light of the wording of paragraph 3 of the contested decision, that the applicant could not be mistaken about the objective of the aid scheme at issue. As for the allegation that it is impossible to determine the amount of that scheme, it lacks factual basis, for the reasons set out by the Commission, namely that paragraph 47 and footnote 22 of the contested decision, read with reference to paragraphs 7 and 8 of that decision, give clear reasons which make it possible to arrive at the sum of EUR 29.9 million.

Thirdly, as regards the reasoning relating to 'second level' advantages, the Commission had absolutely no obligation in that regard, those advantages not having to be examined for the purpose of identifying the amount of the aid.

Fourthly, since the contested decision was adopted on the basis of Article 107(2)(b) TFEU, it is by reference to compliance with the conditions laid down in that provision that the reasoning of the decision in question must be examined. The reasoning of the contested decision shows scrupulous compliance with the conditions of case-law, regarding both the characterisation of the occurrence as 'exceptional' and the examination of the causal link between that occurrence and the damage suffered by the beneficiaries of the aid scheme in question.

Thus, since the Commission, in the contested decision, set out the reasons why the aid scheme at issue satisfied the conditions laid down in Article 107(2)(b) TFEU and, in particular, why the eligibility criterion of holding a French licence was necessary, appropriate and proportionate, it satisfied the duty to state reasons.

The fourth plea in law should therefore be rejected.

Third plea in law: infringement of the procedural rights under Article 108(2) TFEU

The third plea, relating to safeguarding the applicant's procedural rights owing to the Commission's failure to initiate a formal investigation procedure despite the alleged existence of serious doubts, is in fact subsidiary in nature, in case the Court did not examine the overall merits of the assessment of the aid. According to settled case-law, the aim of such a plea is to enable interested parties to be held to have standing, in that capacity, to bring an action under Article 263 TFEU, which otherwise would be unavailable to them (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 48, and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 44). The Court examined the first two pleas in this action, relating to the overall merits of the assessment of the aid, so that the third plea is deprived of its stated purpose.

Furthermore, it must be pointed out that that plea lacks any independent content. Under that plea, the applicant may, in order to preserve the procedural rights which it enjoys under the formal investigation procedure, rely only on pleas which show that the assessment of the information and evidence which the Commission had or could have had at its disposal during the preliminary examination phase of the measure notified ought to have raised doubts as to the compatibility of that measure with the internal market (see, to that effect, judgments of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 81; of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 35; and of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59), such as the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination phase or the existence of complaints submitted by third parties. It should be noted that the third plea repeats in condensed form the arguments raised under the first and second pleas, without identifying specific evidence relating to potential serious difficulties.

For those reasons, having examined the merits of those pleas, the Court does not consider it necessary to examine the substance of this plea.

Accordingly, the Court dismisses the action as a whole on its merits, whilst also granting the applicant the benefit of the confidential treatment requested, as the French Republic raised no objection in that respect.

Costs

Under Article 134(1) 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, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission, including the costs relating to the request for confidential treatment.

The French Republic is to bear its own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

hereby:

Dismisses the action;

Orders Ryanair DAC to bear its own costs and to pay those of the European Commission, including the costs relating to the request for confidential treatment;

Orders the French Republic to bear its own costs.

Van der Woude Kornezov Buttigieg

Kowalik-Bańczyk Hesse

Delivered in open court in Luxembourg on 17 February 2021.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.