JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

19 May 2021 (*)

(State aid – Netherlands – State guarantee for loans and subordinated loan by the State to KLM amid the COVID-19 pandemic – Temporary Framework for State aid measures – Decision not to raise any objections – Decision declaring the aid compatible with the internal market – Aid granted previously to another company in the same group of companies – Duty to state reasons – Maintenance of the effects of the decision)

In Case T‑643/20,

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

applicant,

v

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

defendant,

supported by

French Republic, represented by E. de Moustier and P. Dodeller, acting as Agents,

by

Kingdom of the Netherlands, represented by J. Langer, acting as Agent, and by I. Rooms, lawyer,

and by

Koninklijke Luchtvaart Maatschappij NV, established in Amstelveen (Netherlands), represented by K. Schillemans, H. Vanderveen and P. Huizing, lawyers,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 4871 final of 13 July 2020 on State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik‑Bańczyk, G. Hesse and M. Stancu, Judges,

Registrar: I. Pollalis, Administrator,

having regard to the written part of the procedure and further to the hearing on 25 February 2021,

gives the following

Judgment

Background to the dispute

1 On 26 June 2020, the Kingdom of the Netherlands notified the European Commission, in accordance with Article 108(3) TFEU, of State aid for Koninklijke Luchtvaart Maatschappij NV ('KLM'), consisting, first, of a State guarantee for a loan that would be granted to it by a consortium of banks and, secondly, a State loan ('the aid measure at issue'). The total budget of the aid was EUR 3.4 billion. The objective of the aid measure at issue was to provide temporary liquidity to KLM which it needed to deal with the adverse effects of the COVID‑19 pandemic. The Kingdom of the Netherlands considered that, in view of the importance of KLM for its economy and air transport connectivity, the failure of that company would have exacerbated the serious disturbance in its economy caused by that pandemic.

2 KLM is part of the Air France-KLM group. The group is headed by the Air France-KLM holding company ('the Air France-KLM holding company'), in which the French and Netherlands States are the largest shareholders, owning 14.3% and 14% respectively of the share capital. The companies Air France and KLM are two subsidiaries of the Air France-KLM holding company.

3 On 4 May 2020, by Decision C(2020) 2983 final on State aid SA.57082 (2020/N) – France – COVID-19: Temporary Framework [Article 107(3)(b) TFEU] – Guarantee and shareholder loan for Air France ('the Air France decision'), the Commission declared individual aid granted by the French Republic to Air France, in the form of a State guarantee and a shareholder loan, totalling EUR 7 billion, as compatible with the internal market. The aid measure was intended to finance Air France's immediate liquidity needs.

4 On 13 July 2020 the Commission adopted Decision C(2020) 4871 final on State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM (OJ 2020 C 355, p. 1; 'the contested decision'), by which it found that the aid measure at issue, first, constituted State aid within the meaning of Article 107(1) TFEU and, secondly, was compatible with the internal market on the basis of Article 107(3)(b) TFEU. The Commission assessed the aid measure at issue in the light of its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (OJ 2020 C 91 I, p. 1), amended on 3 April 2020 (OJ 2020 C 112 I, p. 1), on 13 May 2020 (OJ 2020 C 164, p. 3) and on 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework').

Procedure and forms of order sought

5 By application lodged at the Court Registry on 23 October 2020, the applicant, Ryanair DAC, brought the present action.

6 By document lodged at the Court Registry on the same date, the applicant requested that the Court adjudicate on the present action by way of the expedited procedure laid down by Articles 151 and 152 of the Rules of Procedure of the General Court. By decision of 16 November 2020, the General Court (Tenth Chamber) granted the request for an expedited procedure.

7 The Commission lodged its defence at the Court Registry on 7 December 2020.

8 Pursuant to Article 106(2) of the Rules of Procedure, on 18 December 2020, the applicant submitted a reasoned request for a hearing.

9 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.

10 By documents lodged at the Court Registry on 14 December 2020, 6 January 2021 and 15 January 2021 respectively, the Kingdom of the Netherlands, the French Republic and KLM sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

11 By decisions of 12 and 19 January 2021 respectively, the President of the Tenth Chamber of the Court granted the Kingdom of the Netherlands and the French Republic leave to intervene.

12 By order of 27 January 2021, the President of the Tenth Chamber of the Court granted KLM leave to intervene.

13 By way of measures of organisation of procedure, on 14, 19 and 28 January 2021 respectively, the Kingdom of the Netherlands, the French Republic and KLM were authorised, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention. On 22 January 2021 and 3 February 2021 respectively, the Kingdom of the Netherlands and the French Republic lodged their statements in intervention at the Court Registry. KLM did not lodge a statement in intervention.

14 The parties presented oral argument and replied to the questions put by the Court at the hearing on 25 February 2021. At that hearing, the applicant requested the Court to adopt a measure of organisation of procedure, asking the Commission to produce the contracts referred to respectively in the Air France decision and in the contested decision, on the basis of which the aid measures at issue in those two decisions were granted. The oral part of the procedure was closed by decision of 26 February 2021.

15 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

16 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

17 The French Republic contends that the Court should dismiss the action as inadmissible in so far as it seeks to challenge the merits of the contested decision and dismiss it on substantive grounds as to the remainder. In the alternative, it contends that the Court should dismiss the entire action on substantive grounds.

18 Like the Commission, the Kingdom of the Netherlands and KLM contend that the Court should dismiss the action as unfounded.

Law

19 The applicant raises five pleas in law in support of the action, alleging, respectively, first, that the Commission wrongly excluded the aid granted by the French Republic to Air France from the scope of the contested decision, second, an infringement of the principles of non-discrimination, the free provision of services and the freedom of establishment, third, a misapplication of Article 107(3)(b) TFEU, fourth, that the Commission should have initiated the formal investigation procedure, and, fifth, a breach of the duty to state reasons within the meaning of Article 296 TFEU.

Admissibility

20 In paragraphs 39 to 45 of the application, the applicant submits that it has standing to bring proceedings as a 'party concerned' for the purposes 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), which enables it to bring an action for annulment to safeguard its procedural rights in relation to the contested decision, which was adopted without initiating the formal investigation procedure.

21 As a competitor of KLM, the applicant's interests are affected by the grant of the aid measure at issue in that it allows KLM to obtain loans on favourable terms and to remain on the market as a subsidised competitor to the applicant, despite the adverse effects of the COVID-19 pandemic. By contrast, the applicant, the third largest airline in the Netherlands, does not benefit from such support.

22 The Commission does not dispute the admissibility of the action.

23 The French Republic submits that the applicant does not have standing to challenge the merits of the contested decision and that, therefore, the first, second and third pleas are inadmissible. By contrast, the French Republic does not dispute the admissibility of the fourth plea in the action, since the applicant is, in its view, a party concerned for the purposes of Article 108(2) TFEU.

24 It must be held that the admissibility of the action is not in doubt in so far as, by that action, the applicant intends to maintain that the Commission should have initiated the formal investigation procedure under Article 108(2) TFEU.

25 In the context of the review procedure under Article 108 TFEU, two stages must be distinguished. First, the preliminary examination stage established by Article 108(3) TFEU, which enables the Commission to form a prima facie opinion on the conformity of the aid at issue. Second, the formal investigation procedure provided for in Article 108(2) TFEU, which allows the Commission to be fully informed of the facts of the case. It is only in the context of that procedure that the FEU Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (judgments of 19 May 1993, *Cook* v *Commission*, C‑198/91, EU:C:1993:197, paragraph 22; of 15 June 1993, *Matra* v *Commission*, C‑225/91, EU:C:1993:239, paragraph 16; and of 15 October 2018, *Vereniging Gelijkberechtiging Grondbezitters and Others* v *Commission*, T‑79/16, not published, EU:T:2018:680, paragraph 46).

26 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 for the purposes of Article 108(2) TFEU is admissible where that party seeks to safeguard the procedural rights available to it under that 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).

27 In the current case, the formal investigation procedure was not initiated by the Commission and the applicant, in the fourth plea, alleges infringement of its procedural rights. In the light of Article 1(h) of Regulation 2015/1589, an undertaking in competition with the beneficiary of an aid measure is without doubt an 'interested party' for the purposes of Article 108(2) TFEU (judgments of 18 November 2010, *NDSHT* v *Commission*, C‑322/09 P, EU:C:2010:701, paragraph 59, and of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C‑817/18 P, EU:C:2020:637, paragraph 50).

28 In the present case, it is indisputable that the applicant and the beneficiary of the aid are in competition with each other. The applicant submitted, without being contradicted, that it has been part of the Netherlands airline services market for more than 20 years, that in 2019 it had carried three million passengers from or to the Netherlands, and that it had a share of approximately 5% of the Netherlands market, which made it the third largest airline in the Netherlands. The applicant also stated that its summer 2020 flight schedule, planned before the COVID‑19 pandemic had broken out, comprised 43 destinations from three Netherlands airports. The applicant is therefore a party concerned with a legal interest in safeguarding the procedural rights available to it under Article 108(2) TFEU.

29 The action must therefore be declared to be admissible in so far as the applicant claims infringement of its procedural rights.

30 Against that background, it must be held that the fourth plea, which seeks expressly to secure respect for the applicant's procedural rights, is admissible, in view of the applicant's status as an interested party, as established in paragraph 29 above. The applicant may, in order to preserve the procedural rights which it enjoys under the formal investigation procedure, rely 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 notified measure 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; of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C‑83/09 P, EU:C:2011:341, paragraph 59; and of 6 May 2019, *Scor* v *Commission*, T‑135/17, not published, EU:T:2019:287, paragraph 73).

31 It should be borne in mind, in addition, that the applicant is entitled, in order to demonstrate the infringement of its procedural rights on account of the doubts that the measure at issue should have raised as to its compatibility with the internal market, to put forward arguments aimed at demonstrating that the Commission's finding as to the compatibility of that measure with the internal market was incorrect, which, a fortiori, is such as to establish that the Commission should have harboured doubts in its assessment of the compatibility of that measure with the internal market. Accordingly, the Court is entitled to examine the substantive arguments made by the applicant in order to determine whether they are such as to support the plea expressly raised by it concerning the existence of doubts justifying the initiation of the procedure under Article 108(2) TFEU (see, to that effect, judgments of 13 June 2013, *Ryanair* v *Commission*, C‑287/12 P, not published, EU:C:2013:395, paragraphs 57 to 60, and of 6 May 2019, *Scor* v *Commission*, T‑135/17, not published, EU:T:2019:287, paragraph 77).

32 As regards the fifth plea in law, alleging infringement of the duty to state reasons, it should be noted that a breach of the duty to state reasons goes to an issue of infringement of essential procedural requirements and involves a matter of public policy, which must be raised by the EU judicature of its own motion and does not relate to the substantive legality of the contested decision (see, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C‑367/95 P, EU:C:1998:154, paragraphs 67 to 72).

Substance

33 It is appropriate to examine the fifth plea in law first.

Fifth plea in law, alleging a breach of the duty to state reasons

34 By its fifth 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.

35 In particular, by the first part of the fifth plea, the applicant submits, in essence, that the Commission failed to set out the reasons why it did not take account of the impact of the aid previously granted to Air France, even though, like KLM, it is part of the Air France-KLM group.

36 According to the applicant, the aid previously granted to Air France is likely to benefit the entire Air France-KLM group. In those circumstances, the Commission could not a priori exclude such a possibility, but was required, according to the case-law, to take into account in that respect all the relevant factors and the context of the aid measure at issue. In paragraph 19 of the contested decision, the Commission merely stated, without proof or further explanation, that 'the Air France subsidiary of the Air France-KLM group is not the beneficiary of the aid measure [at issue]'. However, it failed to examine or provide any reasoning as to whether the aid previously granted to the rest of the group, in particular to Air France, might also benefit KLM, whose accounts are consolidated with those of Air France. In that regard, the applicant complains that the Commission merely stated that the Netherlands authorities 'confirmed' that the Air France subsidiary of the Air France-KLM holding company was not the beneficiary of the aid measure at issue, but without specifying how that assurance would be implemented. However, it was vital to examine those aspects of the aid measure at issue in order to determine the proportionality of the aid and, for example, whether the conditions for cumulation and the ceilings laid down in paragraph 25(d) and paragraph 27(d) of the Temporary Framework were complied with. According to the applicant, the Air France-KLM holding company and its two subsidiaries are part of a single economic unit which, under the contested decision and the Air France decision, received aid totalling EUR 10.4 billion.

37 The Commission, supported by the Kingdom of the Netherlands, the French Republic and KLM, disputes that line of argument. It argues that since KLM was not one of the beneficiaries of the aid granted to Air France, it was not required to provide any explanation on that point. It states in that regard that the beneficiary of the aid measure at issue is KLM and not the Air France-KLM group or Air France itself. Similarly, Air France was the recipient of the support authorised by the Air France decision and not the Air France-KLM group or KLM itself. Furthermore, the Netherlands and French authorities had confirmed that KLM and Air France were the respective beneficiaries of the aid measures in question. In addition, the characteristics of that aid prevented the risk that the aid granted to Air France would spill over to KLM and vice versa.

38 It should be observed, at the outset, that according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining an explanation. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 8 September 2011, *Commission* v *Netherlands*, C‑279/08 P, EU:C:2011:551, paragraph 125 and the case-law cited).

39 While it is true that the institutions are not obliged, in the statement of reasons for decisions which they adopt, to take a position on all the arguments relied on by the parties concerned before them during an administrative procedure, it nonetheless remains the case that they are required to set out the facts and the legal considerations having decisive importance in the context of their decisions (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala,* C‑413/06 P, EU:C:2008:392, paragraph 169 and the case-law cited, and of 18 September 2018, *Duferco Long Products* v *Commission*, T‑93/17, not published, EU:T:2018:558, paragraph 67).

40 In that context, 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 (see, to that effect, judgments of 22 December 2008, *Régie Networks*, C‑333/07, EU:C:2008:764, paragraphs 65, 70 and 71; 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).

41 In the present case, it must be noted that the Commission stated, in paragraphs 18 and 19 of the contested decision, first, that KLM was the beneficiary of the aid measure at issue and, secondly, that the Netherlands authorities had confirmed that Air France, a subsidiary of the Air France-KLM holding company, was not the beneficiary of the aid measure at issue.

42 It should also be observed that in the Air France decision, which concerns State aid granted approximately two months earlier to Air France, a company which, along with KLM, belongs to the same group of undertakings, a decision which constitutes a contextual factor to be taken into consideration for the purpose of examining whether the statement of reasons for the contested decision satisfied the requirements of Article 296 TFEU in accordance with the case-law referred to in paragraph 40 above, the Commission stated, in paragraph 21, inter alia, that the beneficiary of the aid measure which was the subject of that decision was 'Air France through the Air France-KLM company, the group's holding company' and that the French authorities had confirmed that the KLM subsidiary of the Air France-KLM holding company would not benefit from the financing in question.

43 The contested decision does not contain any other analysis as to whether the aid previously granted to 'Air France through the Air France-KLM company, the group's holding company' could also be used, if only in part, for KLM's liquidity needs, if necessary through the Air France-KLM holding company, of which both Air France and KLM are subsidiaries.

44 It is appropriate, therefore, to examine whether the statement of reasons for the contested decision discloses in a clear and unequivocal fashion, in such a way as to enable the persons concerned to ascertain the reasons for it and the Court to exercise its power of review, as to why the Commission found that KLM was not able to benefit from the aid previously granted to Air France through the Air France-KLM holding company, even though those companies are part of the same group.

45 In that regard, it must be borne in mind that, in accordance with paragraph 11 of the Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1), several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. To that end, it is necessary to take into consideration the existence of a controlling share and the existence of other functional, economic and organic links.

46 The case-law has also recognised that, where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking for the purposes of EU competition law. In the area of State aid, the question as to whether an economic unit exists arises primarily where the beneficiary of the aid needs to be identified (see, to that effect, judgments of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraphs 11 and 12, and of 8 September 2009, *AceaElectrabel* v *Commission*, T‑303/05, not published, EU:T:2009:312, paragraph 101).

47 Among the factors taken into account by the case-law in order to determine the presence or absence of an economic unit in the field of State aid are, inter alia, the company concerned being part of a group of companies which is directly or indirectly controlled by one of those companies, the pursuit of identical or parallel economic activities, and the companies concerned having no economic autonomy (see, to that effect, judgment of 14 October 2004, *Pollmeier Malchow* v *Commission*, T‑137/02, EU:T:2004:304, paragraphs 68 to 70); the formation of a single group controlled by one entity, despite the constitution of new companies each having a separate legal personality (see, to that effect, judgment of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraph 11); the possibility, for an entity owning a controlling shareholding in another company, to exercise functions relating to control, direction and financial support in relation to that company, going beyond the simple placing of capital by an investor, and the existence of organic and functional links between them (judgments of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C‑480/09 P, EU:C:2010:787, paragraph 51; see also, to that effect, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C‑222/04, EU:C:2006:8, paragraphs 116 and 117); and also the existence of relevant contractual clauses (see, to that effect, judgment of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C‑480/09 P, EU:C:2010:787, paragraph 57).

48 In addition, the onus is on the Commission to exercise particular vigilance in examining the links between companies belonging to the same group where there are grounds to fear the effects on competition of an accumulation of State aid within the same group (see, to that effect, judgment of 8 September 2009, *AceaElectrabel* v *Commission*, T‑303/05, not published, EU:T:2009:312, paragraph 116).

49 The Commission is required, furthermore, in the interests of sound administration of the fundamental rules of the FEU Treaty relating to State aid, to conduct a diligent and impartial examination of the aid measures at issue, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (see judgment of 2 September 2010, *Commission* v *Scott*, C‑290/07 P, EU:C:2010:480, paragraph 90; see also, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C‑367/95 P, EU:C:1998:154, paragraph 62).

50 In the present case, in the first place, it should be noted that Air France and KLM are two companies which are part of the same group, which is headed by the Air France-KLM holding company.

51 Whilst the contested decision describes the shareholder structure of the Air France-KLM holding company (paragraph 18 of the contested decision, see paragraph 2 above), it does not, by contrast, contain any information concerning the shareholder structure of its two subsidiaries, Air France and KLM.

52 When asked about this point at the hearing, the Kingdom of the Netherlands and KLM stated, as regards the shareholder structure of KLM, that 49% of the share capital of that company was held by the Air France-KLM holding company, 5.9% by the Kingdom of the Netherlands, 44.8% by 'two Netherlands foundations' and the rest by other shareholders. The Kingdom of the Netherlands and KLM stated in that regard that the Air France-KLM holding company held the so-called 'economic ownership' of KLM.

53 As regards the shareholder structure of Air France, the French Republic stated at the hearing, in response to a question put to it by the Court, that the Air France-KLM holding company was the sole shareholder of Air France.

54 Even though the accuracy and completeness of the information, obtained only at the hearing, cannot be verified in a manner which provides the Court with a full picture of the capital structure of the Air France-KLM group, it appears that, first, 100% of Air France's share capital is held by the Air France-KLM holding company and, secondly, the 'economic ownership' of KLM belongs to the Air France-KLM holding company, which is, moreover, its largest shareholder.

55 In the second place, it must be noted that the contested decision does not contain any information as to the functional, economic and organic links between the Air France-KLM holding company and its subsidiaries Air France and KLM.

56 When questioned on this point at the hearing, KLM explained that the Air France-KLM holding company dealt with, inter alia, obtaining financing on the global markets, via borrowing or issuing bonds, managing the joint sales and revenue generated, for example, by the sale of airline tickets, ensuring the provision of certain commonly used services, and with investor relations. It is thus apparent that the holding company carries out activities which are of some importance to the Air France-KLM group.

57 However, in the absence of any information in that regard in the contested decision, the Court has no verifiable and complete basis enabling it to understand the respective functions of the abovementioned companies in the group, the statutory links connecting them and, in particular, whether the Air France-KLM holding company exercises functions relating to control, direction and financial support with regard to its subsidiaries Air France and KLM.

58 In the third place, the Court notes that the contested decision shows that the Air France-KLM holding company was involved in the grant and administration of the aid forming the subject matter of the contested decision.

59 It is apparent from paragraph 12 of the contested decision that the Netherlands Government and 'the different parties involved' were to conclude several contracts for the purpose of granting the aid at issue. In particular, the Netherlands State, KLM and the Air France-KLM holding company were to conclude a framework agreement, setting out the general conditions for the grant of the aid to KLM. The contested decision does not contain any other information regarding the content of that agreement. It may nevertheless be inferred from it that, as a signatory to that agreement, the Air France-KLM holding company assumed certain contractual rights and obligations in relation to the aid measure at issue.

60 Similarly, several aspects of the Air France decision make it apparent that the Air France-KLM holding company assumed contractual obligations and rights in relation to the aid measure which was the subject of that decision. Accordingly, by way of example, paragraph 15 of that decision states that the French Republic, 'the Air France-KLM group' and the pool of banks concerned were to enter into an agreement relating to the State guarantee, before its initial grant, which would set out the specific conditions for applying that guarantee. According to paragraph 16 of that decision, the shareholder loan was also to be the subject of a loan agreement concluded between 'the Air France-KLM group' and the Agence des participations de l'État (the French Government shareholding agency), which manages the State's financial shareholdings. Accordingly, the financing at issue 'will be contracted with Air France-KLM', whereas, according to paragraph 21 of the Air France decision, the proceeds of that financing will be 'made available to Air France through mirror current accounts set up between the Air France-KLM holding company and its subsidiary Air France'. It thus appears that the contracts relating to the financing at issue will be concluded with the Air France-KLM holding company, and not with Air France. It seems, in addition, that that financing will be paid first into the accounts of the Air France-KLM holding company before being transferred, 'through mirror current accounts' the nature and function of which are not, however, made clear, to the Air France subsidiary. Furthermore, it is apparent from paragraphs 26 and 31 of the Air France decision that the duration of the loan guaranteed by the State and that of the State guarantee may be extended 'at the option of the Air France-KLM group'. As regards the shareholder loan, it will be granted, according to paragraph 44 of that same decision, subject to commitments 'which will be entered into by the Air France-KLM group'.

61 It follows from the factors described in paragraphs 59 and 60 above that the Air France-KLM holding company was involved in the grant of both the aid measure at issue and the one which was the subject of the Air France decision.

62 However, in the absence of other tangible evidence in that regard in the contested decision, it is impossible for the Court to understand the respective roles, rights and obligations of the Air France-KLM holding company and its subsidiaries, that is to say, KLM on the one hand and Air France on the other, as regards the grant of the aid measures at issue.

63 At the hearing, the Commission stated that the aid previously granted to Air France could not benefit KLM because of the 'contractual structure of the transaction'. It stated, in addition, that some of the contracts referred to in paragraph 60 above included specific clauses stipulating that the financing in question would benefit only Air France and would prevent that funding being used for KLM's liquidity needs.

64 However, when questioned on this point at the hearing, the French Republic stated that the contracts referred to in the Air France decision did not include any specific clauses aimed at preventing the financing in question from also contributing to the needs of the group.

65 Those exchanges thus attest to the inadequate and fragmentary nature of the information available to the Court. Indeed, the contested decision does not, in any way whatsoever, detail the nature of the contractual obligations and rights falling on respectively the Air France-KLM holding company, KLM, and Air France, let alone the possible existence of any kind of mechanism, whether contractual or not, which would prevent the aid granted to Air France via the Air France-KLM holding company from benefiting KLM, through that very holding company, and vice versa.

66 In any event, it must be borne in mind that the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought. By contrast, it is settled case‑law that the reasons for a decision cannot be explained for the first time *ex post facto* before the Court, save in exceptional circumstances (see judgments of 20 March 2014, *Rousse Industry* v *Commission*, C‑271/13 P, not published, EU:C:2014:175, paragraph 67 and the case-law cited; see also judgment of 20 September 2011, *Evropaïki Dynamiki* v *EIB*, T‑461/08, EU:T:2011:494, paragraph 109). Consequently, the explanation put forward by the Commission at the hearing cannot supplement the reasoning for the contested decision in the course of the proceedings and is, therefore, inadmissible.

67 It is apparent from all the foregoing considerations that the Commission could not conclude that the aid previously granted to Air France through the Air France-KLM holding company could not under any circumstances be used for KLM's liquidity needs, as the case may be through the Air France-KLM holding company, without setting out in a clear and unequivocal fashion its assessment in relation to all the factors referred to in paragraphs 52 to 60 above.

68 The Commission cannot, in that regard, raise an argument based on the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T‑371/94 and T‑394/94, EU:T:1998:140). In the case which gave rise to that judgment, the Commission had imposed conditions for authorising the aid in question in order to prevent part of the aid granted to Air France from being transferred, directly or indirectly, to another company in the same group. The Court held, in paragraphs 313 and 314 of that judgment, that those authorisation conditions were an adequate and appropriate means of guaranteeing that Air France was the sole beneficiary of the aid. However, in the present case, there seems to be no such authorisation conditions and the contested decision does not provide any information in that regard.

69 It is true that it has been held that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit or rather as being legally and financially independent for the purpose of applying the rules governing State aid. That discretion on the part of the Commission entails the consideration and appraisal of complex economic facts and conditions. Since the EU judicature cannot substitute its own assessment of the facts, especially in the economic field, for that of the originator of the decision, the Court must confine itself to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially correct and that there has been no manifest error of assessment or misuse of powers (see judgment of 8 September 2009, *AceaElectrabel* v *Commission*, T‑303/05, not published, EU:T:2009:312, paragraphs 101 and 102 and the case-law cited).

70 To that end, the EU Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence includes all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 20 September 2018, *Spain* v *Commission*, C‑114/17 P, EU:C:2018:753, paragraph 104).

71 However, it is apparent from paragraphs 43 to 65 above that the contested decision does not set out in a sufficiently clear and precise fashion all the relevant matters of fact and law in that regard. That obligation applies all the more in a situation, such as the present case, which features the parallel grant of two State aid measures to two subsidiaries of the same holding company, which is, moreover, involved in the grant and administration of that aid and has taken on contractual rights and obligations in relation to it.

72 Consequently, by merely finding, first, that KLM was the beneficiary of the aid measure which is the subject of the contested decision and, secondly, that the Netherlands authorities had 'confirmed' that the financing granted to KLM would not be used by Air France, even though those two companies were part of the same group and that certain features of the contested decision and the Air France decision showed that the Air France-KLM holding company played a role of some kind in the grant and administration of those aid measures (paragraphs 58 to 65 above), the Commission failed to provide reasons for the contested decision to the requisite legal standard.

73 In the light of all the foregoing, the first part of the fifth plea must be upheld, without it being necessary to examine the other parts of that plea.

74 It should also be borne in mind that Article 107(3)(b) TFEU requires not only that the Member State concerned is indeed faced with a serious disturbance in its economy, but also that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, second, appropriate and proportionate for achieving that objective. That same requirement is also apparent from paragraph 19 of the Temporary Framework.

75 In addition, and more specifically, as the applicant submits, in accordance with paragraph 25(d)(i) of the Temporary Framework, State aid in the form of new public guarantees on loans is considered to be compatible with the internal market on the basis of Article 107(3)(b) TFEU provided that, for loans with a maturity beyond 31 December 2020, the total amount of loans per beneficiary is not more than double the annual wage bill of the beneficiary for 2019, or for the last year available. The same threshold applies to State aid in the form of subsidies to public loans, in accordance with paragraph 27(d)(i) of that framework.

76 Accordingly, the assessment of the necessity and proportionality of the aid, in general, and of compliance with those thresholds, in particular, presupposes that the amount of the aid, the beneficiary and the absence of a risk of cross-financing, drawing on the aid in question, between the Air France-KLM holding company, KLM and Air France, have been determined beforehand. However, the inadequacy of the statement of reasons which vitiates the contested decision in that regard prevents the Court from reviewing whether the Commission rightly took the view that it was not faced with serious difficulties in assessing the compatibility of the aid in question with the internal market.

77 The inadequacy of the statement of reasons which vitiates the contested decision therefore requires the annulment of that decision.

78 The contested decision must therefore be annulled, without it being necessary to examine the other pleas in law raised by the applicant and without there being any need to rule on the request for a measure of organisation of procedure referred to in paragraph 14 above.

Maintenance of the effects of the annulled decision

79 It is settled case-law that where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU confers on the EU judicature discretion to decide, in each particular case, the specific effects of the measure concerned which 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).

80 It is therefore clear from that provision that, if the EU judicature considers it necessary, it 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).

81 In accordance with that case-law, the EU judicature 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).

82 In the present case, the Court considers that there are overriding considerations of legal certainty justifying the limitation of the temporal effect of the annulment of the contested decision. First, the immediate calling into question of the receipt of the sums of money envisaged by the aid measure at issue would have particularly damaging consequences for the economy and air transport connectivity of the Netherlands in an economic and social context which is already affected by the serious disturbance to the economy of that Member State owing to the harmful effects of the COVID‑19 pandemic. Secondly, account should be taken of the fact that the cause of the annulment of the contested decision is the inadequacy of its reasoning.

83 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 Court.

84 For those reasons, the effects of the annulment of the contested decision must 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 will be suspended for a period of no more than 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 (see, to that effect, judgment of 22 December 2008, *Régie Networks*, C‑333/07, EU:C:2008:764, paragraph 126).

Costs

85 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 Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by the applicant.

86 Furthermore, in accordance with Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraph 1, to bear its own costs.

87 It should therefore be ordered that the Kingdom of the Netherlands, the French Republic and KLM are to bear their own costs.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2020) 4871 final of 13 July 2020 on State aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM;**

2. **Orders the effects of the annulment of that decision to be suspended pending the adoption of a new decision by the European Commission under Article 108 TFEU; those effects are to be suspended 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 Kingdom of the Netherlands, the French Republic and Koninklijke Luchtvaart Maatschappij NV to bear their own respective costs.**

Kornezov	Buttigieg	Kowalik-Bańczyk
Hesse		Stancu

Delivered in open court in Luxembourg on 19 May 2021.

E. Coulon	S. Papasavvas
Registrar	President

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* Language of the case: English.