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Judgment of the General Court in Case T-260/21 | E. Breuninger v Commission and T-306/21 | Falke v Commission

The General Court dismisses the actions brought by Breuninger and Falke against the Commission's decision approving German aid to undertakings which suffered, in the context of the COVID-19 outbreak, a loss of turnover of at least 30%

The Commission's decision does not infringe the principle of proportionality or the principle of equal treatment

On 17 November 2020, Germany notified to the European Commission an aid scheme to provide support to undertakings for their uncovered fixed costs in the context of the COVID-19 outbreak on its territory. Under the scheme, aid of up to € 3 million could be granted to undertakings that had suffered a loss of turnover of at least 30% during the reference period.

Referring to its Communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak,¹ the Commission declared the notified scheme compatible with the internal market pursuant to Article 107(3)(b) TFEU.² Under that provision, aid intended to remedy a serious disturbance in the economy of a Member State may, under certain circumstances, be considered to be compatible with the internal market.

On 2 February 2021, Germany notified the Commission of an amendment to its aid scheme, increasing the aid ceiling to € 10 million per company and extending it until 31 December 2021. That amendment, which reflected various amendments made by the Commission to the Temporary Framework, was approved by the Commission on 12 February 2021.³

E. Breuninger GmbH & Co. and Falke KGaA brought actions for annulment of the Commission's decision, as amended, declaring the German aid scheme compatible with the internal market ('the contested decision'). In dismissing those actions, the Court clarifies, inter alia, the scope of the review of proportionality of decisions adopted by the Commission under Article 107(3)(b) TFEU.

Findings of the Court

¹ Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1; 'the Temporary Framework'), which was amended, for the first time on 3 April 2020 (OJ 2020 C 112 I, p. 1), for the second time on 8 May 2020 (OJ 2020 C 164, p. 3), for the third time on 29 June 2020 (OJ 2020 C 218, p. 3), for the fourth time on 13 October 2020 (OJ 2020 C 340 I, p. 1), and for the fifth time on 28 January 2021 (OJ 2021 C 34, p. 6).

² Commission Decision C (2020) 8318 final of 20 November 2020 on State aid SA.59289 (2020/N) – Germany COVID-19 – Support for uncovered fixed costs (OJ 2022 C 124, p. 1).

³ Commission Decision C (2021) 1066 final of 12 February 2021 on State aid SA.61744 (2021/N) – Collective notification of modification of the adaptation of aid schemes approved under the Temporary Framework, in particular following the fifth amendment to the Temporary Framework (OJ 2021 C 77, p. 18).

In the first place, the Court analyses the legality of the contested decision in the light of Article 107(3)(b) TFEU.

The applicants claimed, in that regard, that the Commission had infringed the principles of proportionality and equal treatment by approving the eligibility requirement laid down by the German aid scheme. In accordance with that requirement, access to the State aid scheme was restricted to undertakings which suffered a reduction in turnover of at least 30% during the reference period compared to the same period in 2019.

As a preliminary point, the Court rejects the plea of inadmissibility put forward by the Commission, alleging that the contested decision correctly applied the eligibility requirement set out in paragraph 87 of the Temporary Framework, the validity of which was not disputed by the applicants. On that point, it admittedly follows from the case-law that observance of the presumption of legality of measures taken by the European Union may preclude the merits of a decision, which constitutes the mere application of a final measure of general application producing binding legal effects vis-à-vis third parties, from being examined where the validity of that measure of general application has not been challenged. However, that is not the case where, as in the present case, the Commission applies rules of conduct that it has adopted in order to limit the exercise of its own discretion in the context of the application of Article 107(3) TFEU and which do not in themselves produce binding legal effects.

As regards the compliance with the principle of proportionality of the eligibility requirement laid down by the German aid scheme and approved by the contested decision, the Court recalls that compliance with that principle by a measure entails three components. The first component concerns its appropriateness, namely its suitability to achieve the legitimate objective pursued. The second component concerns its necessity and entails that that legitimate objective cannot be attained by less restrictive but equally appropriate means. Finally, the third component concerns its proportionality, namely the absence of disadvantages disproportionate to the aims pursued.

As regards the complaint alleging infringement of the principle of equal treatment, the Court notes, moreover, that the fact that the eligibility requirement for the German aid scheme, which is based on the loss of turnover assessed at the level of the undertakings concerned, leads to the undertakings being treated differently according to whether all or only part of their activities were affected by the COVID-19 pandemic does not, in itself, mean that it is unlawful. On the other hand, it is necessary to ascertain whether that difference in treatment is justified in the light of Article 107(3)(b) TFEU, which presupposes that that requirement is appropriate, necessary and proportionate to remedy a serious disturbance in the economy of the Member State concerned. Thus, the complaint alleging infringement of the principle of equal treatment is, in essence, equivalent to the complaints alleging infringement of the principle of proportionality in their various components.

Those clarifications having been made, **the Court rejects the various complaints challenging the appropriateness, necessity and proportionality of the eligibility requirement for the aid scheme approved by the contested decision.**

In that context, the Court notes in particular that, while it is open to the applicants to challenge the necessity of that eligibility requirement, which has its origin in the Temporary Framework, by proposing an alternative requirement which has been applied by the Commission in other decisions, it is only if that alternative requirement manifestly demonstrates that the eligibility requirement at issue is not necessary that such a complaint may be upheld. Moreover, the applicants' proposal to refer, as an alternative eligibility requirement, to losses incurred in respect of activities affected by the COVID-19 pandemic, without taking into account the situation of the undertaking concerned as a whole, would have greater budgetary implications for Germany than those resulting from the eligibility requirement adopted by the Commission. It must therefore be held that the alternative requirement proposed by the applicants does not constitute an 'equally appropriate' measure capable of demonstrating that the eligibility requirement adopted by the Commission was not necessary.

As regards the restrictive effects on competition that **the eligibility requirement for the approved aid scheme** entails, according to the applicants, for undertakings for which only certain activities were affected by the COVID-19

outbreak and which, consequently, were required to devote some of the resources taken from activities not affected by the pandemic to the financing of the activities affected, the Court finds that that requirement **does not, in any event, give rise to restrictive effects on competition which are manifestly disproportionate to the objective, pursued by the German aid scheme, of ensuring the viability of the undertakings affected by the COVID-19 pandemic.**

Moreover, contrary to what the applicants maintained, it cannot be held that the Commission failed to fulfil its obligation to carry out an individual examination of the notified aid scheme. In that regard, the applicants have failed to demonstrate the existence of exceptional circumstances specific to the approved aid scheme which would have justified the Commission not applying, in the contested decision, the eligibility requirement set out in the Temporary Framework.

In the second place, the General Court also rejects the applicants' plea alleging infringement of Article 108(2) TFEU. They claimed, in essence, that, by having validated the notified aid scheme without initiating the formal investigation procedure, the Commission had infringed the applicants' procedural rights under that provision.

On that point, the Court notes that this ground of appeal is, in reality, subsidiary in the event that it did not examine the complaints relating to the merits of the assessment of the notified aid scheme. In so far as those complaints were examined, that plea is deprived of its stated purpose. Moreover, in so far as this plea repeats in condensed form the arguments raised in the complaints relating to the merits of the assessment of the aid, it lacks any independent content.

In the light of those considerations, **the Court dismisses the** applicants' actions.

REMEMBER: The action for annulment seeks the annulment of acts of the EU institutions which are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

REMEMBER: An appeal, limited to points of law, may be brought before the Court of Justice against the decision of the General Court within two months and 10 days of notification of the decision.

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The full text of the judgments ([T-260/21](#) and [T-306/21](#)) is published on the CURIA website on the day of delivery.

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