

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

19 May 2011 \*

In Case T-423/07,

**Ryanair Ltd**, established in Dublin (Ireland), represented by E. Vahida, lawyer,

applicant,

v

**European Commission**, represented by L. Flynn, S. Noë and E. Righini, acting as Agents,

defendant,

APPLICATION for a declaration that the Commission has failed to act in unlawfully failing to adopt a position on the applicant's complaint concerning, first, aid allegedly granted by the Federal Republic of Germany to Lufthansa and its Star Alliance partners in the form of the exclusive use of Terminal 2 at Munich Airport (Germany) and, second, alleged abuse of a dominant position by Munich Airport,

\* Language of the case: English.

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas, President, V. Vadapalas (Rapporteur) and K. O'Higgins, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2010,

gives the following

## **Judgment**

### **Legal context**

- <sup>1</sup> Article 10(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) reads as follows:

‘Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.’

2 Article 20(2) of Regulation No 659/1999 provides:

‘Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject-matter of the information supplied, it shall send a copy of that decision to the interested party.’

3 Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (O) 2003 L 1, p. 1) provides:

‘1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 [EC] or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.’

- 4 Recital 6 in the preamble to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18) reads:

‘In order to be admissible for the purposes of Article 7 of Regulation ... No 1/2003, a complaint must contain certain specified information.’

- 5 Recital 7 in the preamble to Regulation No 773/2004 reads:

‘In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation ... No 1/2003.’

- 6 Article 5(1) of Regulation No 773/2004 provides:

‘Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation ... No 1/2003. Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.’

- 7 Paragraph 3 of Form C, annexed to Regulation No 773/2004, reads:

‘Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81[EC] or 82 [EC]... Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations

of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.’

- 8 Paragraph 6 of Form C, annexed to Regulation No 773/2004, reads:

‘Explain what finding or action you are seeking as a result of proceedings brought by the Commission.’

- 9 Paragraph 8 of Form C, annexed to Regulation No 773/2004, reads:

‘Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.’

### **Background to the dispute**

- 10 On 3 November 2005 the applicant, Ryanair Ltd, sent a letter to the Commission of the European Communities on the subject of a ‘complaint against Munich Airport for State aid to Lufthansa’.

- 11 In that complaint, the applicant objected to the fact that Lufthansa and its Star Alliance partners (the ‘Star Alliance partners’) had exclusive use of Terminal 2 at Munich



- 14 On 31 July 2007, because the applicant had received no response to its complaint, it sent a letter of formal notice to the Commission, by which it formally called on the Commission to act under Article 232 EC ('the letter of formal notice').
- 15 In the letter of formal notice, the applicant also called on the Commission to follow the procedures laid down by Regulation No 659/1999, Regulation No 1/2003 and Regulation No 773/2004.
- 16 In particular, the applicant called on the Commission:
- first, to require the Federal Republic of Germany to suspend the State aid in question, at least until the Commission had adopted a decision under Article 11(1) of Regulation No 659/1999; second, to adopt a formal decision in the context of the preliminary examination of the award of State aid contested in the applicant's complaint, under Article 4(2), (3) or (4) of Regulation No 659/1999 and under Article 13(1) thereof; and, third, to keep the applicant informed of the decisions taken, in accordance with Article 20(2) of Regulation No 659/1999, and also
  - to order the suspension of the anti-competitive conduct contested in the applicant's complaint as an interim measure pursuant to Article 8 of Regulation No 1/2003 and initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation No 1/2003 regarding such anti-competitive conduct, or inform the applicant of its reasons for considering that on the basis of the information in its possession there are insufficient grounds for acting on the complaint pursuant to Article 7 of Regulation No 773/2004.
- 17 By letter of 2 August 2007, the Commission acknowledged receipt of the letter of formal notice and stated that that letter had been allocated to DG Energy and Transport.

## **Procedure and forms of order sought**

18 By application lodged at the Registry of the Court on 15 November 2007, the applicant brought the present action.

19 The applicant claims that the Court should:

- declare, in accordance with Article 232 EC, that the Commission unlawfully failed to adopt a position with respect to the complaint lodged on 3 November 2005, despite having been formally called on to do so;
  
- order the Commission to pay all the costs, including those incurred by the applicant in the proceedings, even if, after the action is brought, the Commission adopts measures which, in the opinion of the Court, render the action devoid of purpose or if the Court dismisses the application as inadmissible;
  
- take any other measures that the Court considers appropriate.

20 The Commission contends that the Court should:

- dismiss the action;
  
- order the applicant to pay the costs.



- 21 By letter of 14 April 2008 ('the letter of 14 April 2008'), the applicant requested the adoption by the Court of a measure of organisation of procedure seeking the production of certain documents referred to by the Commission in its defence.
- 22 In its observations, lodged at the Court Registry on 30 April 2008, on the letter of 14 April 2008, the Commission contended that the Court should reject the applicant's request for measures of organisation of procedure.
- 23 By letter of 16 January 2009 ('the letter of 16 January 2009'), the Commission sent the Court a copy of the decision of 23 July 2008 to open, under Article 88(2) EC, formal investigation procedure C 38/08 (ex NN 53/07) Germany — Measures in favour of Munich Airport Terminal 2 ('the decision of 23 July 2008'). In that letter, the Commission contended that, following the decision of 23 July 2008, the present action for failure to act had become devoid of purpose. The Commission also hoped that the applicant would inform the Court that it was discontinuing its action and, should the applicant not discontinue its action, the Commission requested the Court to declare, in accordance with Article 113 of the Court's Rules of Procedure, that there was no need to adjudicate on the action.
- 24 In its observations on the letter of 16 January 2009, lodged at the Court Registry on 17 February 2009, the applicant declared its intention not to ask for the proceedings to be discontinued, since the Commission had failed to act on certain issues raised in the complaint, in particular regarding the Star Alliance partners, and since the decision to initiate a formal investigation procedure obviously did not constitute the definition of the Commission's position on the applicant's complaint against abuse of a dominant position. The applicant therefore claims that the Court should:

— reject all of the Commission's requests contained in the letter of 16 January 2009;

- declare that the Commission has failed to act on its complaint against abuse of a dominant position in the event that the Court is not in a position to declare that the Commission has failed to act on its complaint against the grant of unlawful State aid;
  
- order the Commission to pay the costs.

## Law

*The claim that the Commission failed to act in relation to the alleged State aid to Lufthansa and its Star Alliance partners*

- <sup>25</sup> As a preliminary point, it should be noted that in order to rule on the substance of a claim for a declaration that the Commission has failed to act, it is necessary to determine whether, at the time when the Commission was formally called upon to define its position within the meaning of Article 232 EC, it was under a duty to act (orders in Case T-126/95 *Dumez v Commission* [1995] ECR II-2863, paragraph 44, and in Case T-286/97 *Goldstein v Commission* [1998] ECR II-2629, paragraph 24, and judgment in Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, paragraph 71).
- <sup>26</sup> It should also be noted that, according to settled case-law, the remedy provided for in Article 232 EC, which serves different purposes from the remedy provided for in Article 226 EC (see, to that effect, Case C-154/00 *Commission v Greece* [2002] ECR I-3879, paragraph 28), is founded on the premiss that the unlawful inaction on

the part of the institution concerned enables the matter to be brought before the Court of Justice in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned. The effect of that declaration, under Article 233 EC, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court of Justice without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise. In circumstances where the act whose absence constitutes the subject-matter of the proceedings was adopted after the action was brought but before judgment, a declaration by the Court to the effect that the initial failure to act is unlawful can no longer bring about the consequences prescribed by Article 233 EC. It follows that in such a case, as in cases where the defendant institution has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist, so that there is no longer any need to adjudicate (see order in Case C-44/00 P *Sodima v Commission* [2000] ECR I-11231, paragraph 83 and the case-law cited, and Joined Cases T-297/01 and T-298/01 *SIC v Commission* [2004] ECR II-743, paragraph 31). The fact that the position adopted by the institution has not satisfied the applicant is of no relevance in this respect because Article 232 EC refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (see order in *Sodima v Commission*, paragraph 83 and the case-law cited).

27 It is in the light of those considerations that the Court must rule on the claim that the Commission failed to act in relation to the alleged State aid to Lufthansa and its Star Alliance partners.

28 The applicant claims that the Commission's failure to act lies in the fact that, following the exchanges with the German authorities, the Commission did not apparently take any steps and, in particular, did not adopt a decision declaring either that the State measure in question did not amount to aid within the meaning of Article 87(1) EC, or that such a measure was to be classified as aid within the meaning of Article 87(1) EC but was compatible with the common market under Article 87(2) and (3) EC, or that the procedure under Article 88(2) EC should be initiated. The Commission therefore

unlawfully failed to act in relation to the applicant's complaint concerning alleged State aid to Lufthansa and its Star Alliance partners.

- 29 The Commission, for its part, contends that the claim of failure to act in relation to the alleged State aid is unfounded and that, in any event, in the light of the adoption of the decision of 23 July 2008, the present action has become devoid of purpose.
- 30 Without there being any need to determine whether, at the time it was called upon to act for the purposes of Article 232 EC, the Commission was under an obligation to act, it is common ground that by the decision of 23 July 2008 the Commission initiated the formal investigation procedure laid down in Article 88(2) EC with regard to the alleged State aid to Lufthansa.
- 31 It follows that, by adopting one of the decisions referred to in the letter of formal notice, the Commission properly defined its position, within the meaning of the second paragraph of Article 232 EC, on the applicant's request to act in that regard.
- 32 Consequently, although the applicant had a legitimate interest in bringing the present action, the latter has become devoid of purpose, since it seeks a declaration that the Commission unlawfully failed to adopt a position with regard to the part of the applicant's complaint concerning the alleged State aid to Lufthansa.
- 33 There is therefore no need to adjudicate on the claim that the Commission failed to act in relation to the alleged State aid to Lufthansa.

34 As regards the claim that the Commission failed to act in relation to the alleged State aid to the Star Alliance partners, the applicant submits that, despite the adoption of the decision of 23 July 2008, it is still necessary to adjudicate on that part of the action.

35 In that regard, it should be observed that the decision of 23 July 2008 cannot be regarded as a definition of the Commission's position on the alleged State aid to the Star Alliance partners, since that decision relates only to the alleged State aid to Lufthansa. In such circumstances, it must be held that the applicant is right to maintain that it is necessary to adjudicate on that part of the action and for a decision to be taken as to whether the Commission unlawfully failed to act in that regard.

36 As was noted in paragraph 25 above, in order to rule on the substance of a claim for a declaration that the Commission has failed to act, it is necessary to determine whether, at the time when the Commission was formally called upon to define its position within the meaning of Article 232 EC, it was under a duty to act.

37 In the matter of State aid, the situations in which the Commission is required to act in respect of unlawful aid are governed by Regulation No 659/1999. Article 10(1) of that regulation provides: '[w]here the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay'. Article 20(2) of the same regulation provides: '[a]ny interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid'. That provision also states that '[w]here the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof'.

- 38 It is therefore appropriate to determine whether the complaint was against allegedly unlawful aid to the Star Alliance partners.
- 39 In the present case, it must be concluded that in its complaint the applicant merely alleged that State aid had been granted to Lufthansa and not to the Star Alliance partners. As is apparent from the complaint, which is a 'complaint against Munich Airport for State aid to Lufthansa', the applicant claimed that exclusive use of Terminal 2 at Munich Airport by Lufthansa and its Star Alliance partners meant that the German authorities were granting substantial State aid to Lufthansa. The applicant also called on the Commission to investigate 'the serious distortion of competition' resulting from the advantages granted to Lufthansa by Munich Airport and by the Federal Republic of Germany. Lastly, the applicant requested that DG Energy and Transport should force Lufthansa to pay back the substantial amounts of State aid it had received. It is by no means clear from the wording of the complaint that the applicant identified the Star Alliance partners as having been recipients of State aid. Moreover, it should be pointed out that in the reminder letter of 23 January 2007 annexed to the reply, too, the only alleged recipient of the alleged State aid was Lufthansa.
- 40 It must therefore be held that, at the time when the Commission was formally called upon to define its position within the meaning of Article 232 EC, it was under no duty to act in relation to the alleged State aid to the Star Alliance partners, so that it cannot be criticised for failure to act, according to the case-law cited in paragraph 25 above.
- 41 The claim that the Commission failed to act in relation to the alleged State aid to the Star Alliance partners must therefore be rejected as unfounded, without the need to adopt the measures of organisation of procedure sought by the applicant.

*The claim that the Commission failed to act in relation to the alleged abuse of a dominant position*

Arguments of the parties

- 42 The applicant submits that when the Commission is seised of a complaint it is obliged, according to the provisions of Regulations Nos 1/2003 and 773/2004, to examine carefully the evidence of fact and of law brought to its notice by the complainant in order to decide, within a reasonable time, whether it must initiate the procedure for establishing the infringement, reject the complaint without initiating the procedure or decide not to pursue the matter. The applicant adds that if the Commission decides that the investigation of a complaint under Article 82 EC is unwarranted or unnecessary, it must inform the applicant of its decision, stating its reasons, in order to allow judicial review of the legality of the decision.
- 43 In the applicant's view, since the applicant's complaint was also a complaint alleging infringement of competition law, the Commission was under an obligation to act within a reasonable time.
- 44 First, the Commission did not inform the applicant within four months, in accordance with paragraph 61 of the draft Commission notice on the handling of complaints by the Commission under Article 81 [EC] and Article 82 [EC] (OJ 2004 C 101, p. 65), whether or not it intended to investigate its case further. Secondly, it did not take any of the decisions that it was required to take following receipt of the complaint, that is to say, a decision to initiate the procedure for establishing an infringement of Article 82 EC, or a decision dismissing the complaint, after informing the applicant pursuant to Article 7 of Regulation No 773/2004, or a duly reasoned decision not to pursue the complaint on the ground of lack of Community interest. The applicant therefore claims that the Court should declare that the Commission has failed to act.

- 45 In its reply, the applicant also stated that it was not able to use Form C annexed to Regulation No 773/2004 because its complaint was a combined complaint against State aid and abuse of a dominant position, and the Commission had not provided a form for combined complaints. The applicant added, moreover, that since Article 5(1) of Regulation No 773/2004 merely stated that 'complaints shall contain the information required by Form C, as set out in the Annex', that provision requires merely the provision of that information, leaving the complainant free to choose the form and order in which it is to be provided. According to the applicant, its complaint was valid since the information required by Form C was provided in its complaint, was already known to the Commission, or else was unavailable.
- 46 The Commission contends that the complaint was primarily concerned with the grant of unlawful State aid, that the letter was addressed to the Commission's services dealing with State aid in the transport sector and that its subject-matter was a 'complaint against Munich Airport for State Aid to Lufthansa'. The Commission does not deny that the applicant also stated in its letter that Munich Airport had abused its dominant position or that the letter was to be copied to DG Competition, the Commission's service responsible for examining infringements of Articles 81 EC and 82 EC. However, it contends that the arguments concerning abuse of a dominant position were clearly of secondary importance and in any event not properly substantiated. The applicant merely asserted that Lufthansa and its Star Alliance partners had exclusive use of Terminal 2 at Munich Airport, and that that constituted abuse of a dominant position.
- 47 The Commission contends that such an assertion cannot be regarded as a complaint within the meaning of Article 7 of Regulation No 1/2003. It notes *inter alia* that, pursuant to Article 5(1) of Regulation No 773/2004, complaints for the purposes of Article 7 of Regulation No 1/2003 'shall contain the information required by Form C, as set out in the Annex'.



- 48 The Commission also observes, in its rejoinder, that even if it were accepted that a single document can contain both a complaint alleging unlawful State aid and a complaint alleging abuse of a dominant position, the complainant is certainly under a duty to make this very clear. Moreover, it states that while the complaint indeed contained some of the information required by Form C, important elements were missing. According to the Commission, the information required by paragraphs 6 to 8 of Form C was not provided at all and the complaint contained only part of the information required by the other paragraphs of the form.
- 49 In any event, the Commission contends, in its letter of 16 January 2009, that following the decision of 23 July 2008 by which it opened a formal investigation procedure in the case of Munich Airport Terminal 2, the applicant's action for failure to act became devoid of purpose.

## Findings of the Court

- 50 As a preliminary point, the Commission's argument that following the decision of 23 July 2008 the action for failure to act became devoid of purpose as regards the alleged abuse of a dominant position must be rejected.
- 51 Since that decision relates only to the alleged State aid to Lufthansa complained of by the applicant and not to the alleged abuse of a dominant position, it cannot be regarded as constituting a definition of the Commission's position on the latter allegation.

- 52 Therefore, it must be determined in this case whether, as the applicant claims, the Commission unlawfully failed to act in relation to the alleged abuse of a dominant position. To that end, it is appropriate to examine whether, at the time when the Commission was formally called upon to define its position within the meaning of Article 232 EC, it was under a duty to act (see paragraph 25 above).
- 53 The relevant criteria for assessing the existence of an obligation to act in relation to an alleged infringement of the competition rules contained in Articles 81 EC and 82 EC were recalled by the applicant itself. It stated that when the Commission is seised of a complaint, it is obliged, according to the provisions of Regulations Nos 1/2003 and 773/2004, to examine carefully the factual and legal considerations brought to its notice by the complainant in order to decide, within a reasonable time, whether it must initiate the procedure for establishing the infringement, reject the complaint without initiating the procedure or decide not to pursue the matter. If the Commission decides that the investigation of a complaint under Article 82 EC is unwarranted or unnecessary, it must inform the applicant of its decision, stating its reasons, in order to allow judicial review of the legality of the decision.
- 54 The Court considers that the requirements contained in those regulations have not been complied with by the applicant in this case.
- 55 In that regard, the Court notes that according to recitals 6 and 7 in the preamble to Regulation No 773/2004, in order to be treated as a complaint alleging an infringement of the competition rules laid down in Articles 81 EC and 82 EC, a complaint must comply with Article 5 of Regulation No 773/2004 concerning the admissibility of complaints, which expressly provides, firstly, that natural and legal persons must show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation No 1/2003 and, secondly, that complaints must contain the information required by Form C annexed to Regulation No 773/2004.

- 56 Form C, to which Article 5 of Regulation No 773/2004 refers, requires a certain amount of information to be supplied by complainants in support of their complaint. In particular, paragraphs 3 to 8 of the form require complainants (i) to set out in detail the facts from which it appears that there exists an infringement of Article 81 EC or Article 82 EC; (ii) to set out their view about the geographical scope of the alleged infringement and to explain, where it is not obvious, to what extent trade between Member States or between the Union and one or more European Free Trade Area (EFTA) States that belong to the European Economic Area (EEA) may be affected by the conduct complained of; (iii) to explain what finding or action they are seeking as a result of proceedings brought by the Commission; (iv) to set out the grounds on which they claim a legitimate interest as complainant pursuant to Article 7 of Regulation No 1/2003 — in particular how the conduct complained of affects them and explain how, in their view, intervention by the Commission would be liable to remedy the alleged grievance and, (v) to provide information about whether they have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court.
- 57 In the present case, the applicant merely stated in the complaint, as regards the alleged abuse of a dominant position, that the exclusive use by Lufthansa and its Star Alliance partners of Terminal 2 at Munich Airport constituted abuse of a dominant position, and that it was copying its complaint to the Commission's DG Competition, with a request that they investigate Munich Airport's abuse of a dominant position by its refusal to allow the applicant to operate from Terminal 2 at that airport.
- 58 Such information cannot, however, be considered to meet the requirements of Article 5 of Regulation No 773/2004. Therefore, in the light of the content of the complaint, the Commission could not reasonably consider it was seised of a complaint alleging abuse of a dominant position within the meaning of Regulations Nos 1/2003 and 773/2004.

59 The applicant's assertion that its complaint contained sufficient information to be classified as a complaint within the meaning of Regulations Nos 1/2003 and 773/2004 must be rejected since, in particular, the applicant failed to show a legitimate interest in accordance with Article 5(1) of Regulation No 773/2004, and certain information required by Form C annexed to Regulation No 773/2004 was lacking. The missing information included in particular the information required by paragraph 3 of that form, which states that the applicant must set out in detail the facts from which it appears that there exists an infringement of Article 82 EC.

60 In that regard, the Court notes that, although the applicant has set out a certain number of facts in order to show that State aid was granted to Lufthansa, the complaint did not contain any statement of facts capable of explaining in what way Munich Airport occupied a dominant position, or why the fact of reserving Terminal 2 for Lufthansa and its Star Alliance partners constituted abuse of a dominant position by Munich Airport. As the Commission contends in the rejoinder, Terminal 1 at Munich Airport is used by a large number of airlines (Aer Lingus, AirBerlin, Air France, Alitalia, British Airways, easyJet, Germanwings, Iberia and KLM). In any event, the applicant fails to explain why it is 'precluded from entering the Munich market' by being offered the use of the same terminal as that used by those other airlines. Nor does it make clear why Munich Airport would be abusing a dominant position by treating the applicant in the very same way as, for example, easyJet. Moreover, the fact remains that the complaint is unclear in that it could be construed as meaning that it is Lufthansa which is in a dominant position. Indeed, the complaint states in particular that '[t]he fact that Lufthansa and its [Star Alliance] partners have exclusive use of [Terminal 2 at Munich Airport] ... is not only an abuse of dominance through the refusal of access to this facility [for the applicant], but also means that Lufthansa has received and continues to receive substantial State aid'.

- 61 Furthermore, it should be noted that, first, the applicant has not explained what finding or action it is seeking as a result of proceedings brought by the Commission, as required by paragraph 6 of Form C. Contrary to the applicant's submission, the fact that, in its complaint, it requested the Commission to investigate the abuse of the Airport's dominant position cannot be regarded as meeting the requirements contained in paragraph 6. Secondly, the applicant did not provide information, as required by paragraph 8 of Form C, about whether it had approached a competition authority and whether a lawsuit had been brought before a national court.
- 62 In those circumstances, the complaint lodged on 3 November 2005 cannot be classified as a complaint brought in accordance with Regulations Nos 1/2003 and 773/2004. Hence, at the time when the Commission was formally called upon to define its position within the meaning of Article 232 EC, it was not under a duty to act, so it cannot be criticised for failure to act according to the case-law cited in paragraph 25 above.
- 63 It follows that the action, seeking a declaration that the Commission has failed to act in unlawfully failing to adopt a position on the alleged abuse of a dominant position must be rejected as unfounded, without the need to adopt the measures of organisation of procedure requested by the applicant.

## **Costs**

- 64 Under Article 87(2) 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. Furthermore, under Article 87(6) of those rules, where a case does not proceed to judgment the costs are in the discretion of the Court.

- 65 In the present case, as regards, first, the main part of the action concerning the alleged State aid to Lufthansa, on which, following the adoption of the decision of 23 July 2008, there is no longer any need for the Court to give a decision, the applicant cannot be criticised for having brought that action in order to protect its rights without waiting for the Commission to adopt its decision, which was in fact adopted after the expiry of the time-limit for bringing an action for failure to act.
- 66 As regards, secondly, the part of the action concerning the alleged State aid to the Star Alliance partners and the alleged abuse of a dominant position, since the applicant has been unsuccessful in its pleadings it must be ordered to pay the costs. The Court therefore considers it to be fair in the circumstances of the case, on the one hand, to order the Commission to bear its own costs and half of the costs of the applicant and, on the other hand, to order the applicant to bear half of its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Declares that there is no need to give a ruling on the claim submitted by Ryanair Ltd that the Commission failed to act in relation to the alleged State aid to Lufthansa;**
- 2. Rejects the claim submitted by Ryanair that the Commission failed to act in relation to the alleged State aid to Lufthansa's Star Alliance partners;**

- 3. Rejects the claim submitted by Ryanair that the Commission failed to act in relation to the alleged abuse of a dominant position;**
  
- 4. Orders the European Commission to pay its own costs and half of those incurred by Ryanair;**
  
- 5. Orders Ryanair to pay half its own costs.**

Papasavvas

Vadapalas

O'Higgins

Delivered in open court in Luxembourg on 19 May 2011.

[Signatures]