Reports of Cases

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

18 May 2022*

(State aid – German air transport market – Loan granted by Germany to Condor Flugdienst – Decision declaring the aid compatible with the internal market – Article 107(3)(c) TFEU – Guidelines on State aid for rescuing and restructuring undertakings in difficulty – Intrinsic difficulties that are not the result of an arbitrary allocation of costs within the group – Difficulties that are too serious to be dealt with by the group itself – Risk of disruption to an important service)

In Case T-577/20,

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

applicant,

v

European Commission, represented by L. Flynn and V. Bottka, acting as Agents,

defendant,

supported by

Condor Flugdienst GmbH, established in Neu-Isenburg (Germany), represented by A. Birnstiel and S. Blazek, lawyers,

intervener,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and D. Petrlík, Judges,

Registrar: I. Pollalis, Administrator,

having regard to the written part of the procedure,

further to the hearing on 7 December 2021,

* Language of the case: English.

gives the following

Judgment

1 By its action on the basis of Article 263 TFEU, the applicant, Ryanair DAC, seeks annulment of Commission Decision C(2019) 7429 final of 14 October 2019 on State aid SA.55394 (2019/N) – Germany – Rescue aid to Condor (OJ 2020 C 294, p. 3; 'the contested decision').

I. Background to the dispute

2 The intervener, Condor Flugdienst GmbH, is an airline providing charter flights which has its registered office in Neu-Isenburg (Germany). It mainly provides air transport services to tour operators from airports in Düsseldorf, Frankfurt, Hamburg and Munich (Germany), with a focus on the leisure travel market. At the material time, the intervener was wholly owned by Thomas Cook Group plc ('the Thomas Cook group').

3 On 23 September 2019, the Thomas Cook group was placed in compulsory liquidation and ceased trading.

4 Consequently, on 25 September 2019, the intervener had in turn to file for insolvency.

5 On the same day, the Federal Republic of Germany notified the European Commission of a rescue aid measure in favour of the intervener in the form of a loan of EUR 380 million granted by Kreditanstalt für Wiederaufbau (Public Development Bank), accompanied by a guarantee of 50% provided by the *Land* of Hessen (Germany) and of 100% by the German Federal State ('the measure at issue').

6 The measure at issue is restricted to a period of six months; it is intended to maintain an orderly air transport operation and to limit the negative consequences for the intervener, its passengers and staff caused by the liquidation of its parent company, enabling the intervener to continue operating until it reaches a settlement with its creditors and the sale of the company is carried out.

7 On 14 October 2019, the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, adopted the contested decision, by which it found that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU and that the measure was compatible with the internal market on the basis of Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines').

II. Forms of order sought

8 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

9 The Commission and the intervener contend that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

III. Law

10 In support of the action, the applicant relies on five pleas in law, alleging: (i) infringement of point 22 of the Guidelines; (ii) infringement of point 44(b) of the Guidelines; (iii) infringement of point 74 of the Guidelines; (iv) infringement of its procedural rights; and (v) breach of the obligation to state reasons.

A. Admissibility

11 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 allows it to bring an action for annulment, seeking to safeguard its procedural rights, against the contested decision, which was adopted without initiating the formal investigation procedure.

12 The Commission and the intervener do not dispute the admissibility of the action.

13 In that regard, it should be recalled that, where the Commission adopts a decision not to raise objections on the basis of Article 4(3) of Regulation 2015/1589, as in the present case, it declares not only that the measures at issue are compatible with the internal market, but also, by implication, that it refuses to initiate the formal investigation procedure laid down in Article 108(2) TFEU and Article 6(1) of that regulation (see, by analogy, judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 42 and the case-law cited). If, following the preliminary examination, it finds that the measure notified raises doubts as to its compatibility with the internal market, the Commission is required to adopt, on the basis of Article 4(4) of Regulation 2015/1589, a decision initiating the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of that regulation. Under the latter provision, such a decision is to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which must not as a rule exceed one month (see, by analogy, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 46).

14 When the formal investigation procedure is not initiated, as in the present case, the 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).

15 In addition, in the light of Article 1(h) of Regulation 2015/1589, an undertaking competing with the beneficiary of an aid measure is without doubt an 'interested party' for the purposes of Article 108(2) TFEU (see judgment 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 and the case-law cited).

16 In the present case, it is indisputable that there is a competitive relationship, albeit limited, between the applicant and the intervener. The applicant has submitted, without being contradicted, that it has provided aviation services on the German market for more than 20 years, that in 2019 it had carried more than 19 million passengers to and from Germany, and that it had a share of approximately 9% of the air transport market in Germany, making it the second largest airline in Germany. The applicant also stated that its 2020 summer flight schedule, drawn up before the spread of the COVID-19 pandemic, included 265 routes departing from 14 German airports. In addition, in paragraph 7 of the contested decision, the Commission found that certain destinations operated by the intervener were also operated by the applicant and that those airlines were in competition with regard to the sale of seats directly to end-customers. Accordingly, although the sale of those seats represents only a minority of the intervener's sales, the competitive relationship between it and the applicant as regards those sales is not disputed.

17 The applicant is therefore a party concerned with an interest in safeguarding the procedural rights available to it under Article 108(2) TFEU.

18 It must therefore be held that the action is admissible in so far as the applicant alleges an infringement of its procedural rights.

19 Therefore, the fourth plea, which expressly seeks to secure respect for the applicant's procedural rights, is admissible.

20 Furthermore, the applicant can, in order to demonstrate 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, rely on 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 had doubts regarding its assessment of the compatibility of that measure with the internal market. The Court is therefore entitled to examine the substantive arguments put forward by the applicant in its first, second and third pleas in law, to which the applicant refers in its fourth plea, in order to ascertain whether they are such as to support the plea expressly made by it regarding 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).

21 As regards the fifth plea, alleging breach of the obligation to state reasons, it should be noted that disregard for the obligation to state reasons goes to an issue of infringement of essential procedural requirements and is 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, paragraph 67).

B. Substance

22 It is appropriate to examine the fourth plea first.

1. The fourth plea, alleging infringement of the applicant's procedural rights

23 In its fourth plea in law, the applicant argues that three indicia related to the content of the contested decision, corresponding to its first three pleas in law, demonstrate, in its view, the doubts which the Commission should have had during the preliminary investigation of the measure at issue.

24 It is appropriate to recall at the outset the principles governing the review of legality, on the basis of Article 263 TFEU, of a decision not to raise objections, before examining the indicia identified by the applicant.

(a) Applicable principles

25 According to the case-law, where the Commission is unable to reach a firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either is not 'aid' within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the FEU Treaty, or where that procedure has not enabled it to overcome the serious difficulties involved in assessing the compatibility of the measure under consideration, the Commission is under a duty to initiate the procedure provided for in Article 108(2) TFEU, without having any discretion in that regard (see, to that effect, judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 47). That duty is, moreover, expressly confirmed by the provisions of Article 4(4) in conjunction with Article 15(1) of Regulation 2015/1589 (see, by analogy, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 113).

26 Article 4 of Regulation 2015/1589 shows in that regard that, in so far as the measure notified by the Member State concerned does in fact constitute aid, it is the presence or absence of 'doubts' as to the compatibility of that measure with the internal market that enables the Commission to decide whether or not to initiate the formal investigation procedure at the end of its preliminary examination.

27 The concept of doubts set out in Article 4(3) and (4) of Regulation 2015/1589 is an objective one. Whether or not such doubts exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it decided on the compatibility of the disputed aid with the internal market. It follows that judicial review by the General Court of the existence of doubts will, by its nature, go beyond consideration of whether or not there has been a manifest error of assessment (see, to that effect, judgments of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraph 63, and of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 80 and the case-law cited). The information 'available' to the Commission is that which seemed relevant to the assessment to be carried out and which could have been obtained, upon request by the Commission, during the preliminary examination phase (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71). Although it may thus be necessary for the

Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice, it is not, on the other hand, for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain (see, to that effect, judgments of 29 April 2021, *Achemos Grupė and Achema* v *Commission*, C-847/19 P, EU:C:2021:343, paragraphs 49 and 50, and of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 45).

28 The onus is on the applicant to prove the existence of doubts, proof that can take the form of a consistent body of evidence (see, to that effect, judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 63 and the case-law cited).

29 It is in the light of that case-law that the Court must examine the applicant's arguments that seek to establish the existence of doubts which should have led the Commission to initiate the formal investigation procedure.

(b) Indicia relating to an infringement of point 22 of the Guidelines

30 The applicant submits, in essence, that the Commission infringed point 22 of the Guidelines, which is indicative of the existence of doubts as to the compatibility of the measure at issue with the internal market.

31 Point 22 of the Guidelines states as follows:

'A company belonging to or being taken over by a larger business group is not normally eligible for aid under these guidelines, except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. …'

32 According to the applicant, point 22 of the Guidelines lays down three distinct, cumulative conditions for the grant of rescue aid to an undertaking belonging to a group, namely, first, that its difficulties are intrinsic, second, that they are not the result of an arbitrary allocation of costs within the group and, third, that those difficulties are too serious to be dealt with by the group itself. The applicant submits that the Commission erred in its legal interpretation of that point in so far as it found that the first two aforementioned conditions constituted only one condition that had to be understood as meaning that a beneficiary's difficulties are intrinsic when they are not the result of an arbitrary allocation of costs within the group.

33 In addition, according to the applicant, none of the conditions referred to in point 22 of the Guidelines is satisfied in the present case.

34 The Commission and the intervener dispute the applicant's arguments.

35 As a preliminary point, it should be noted that it is not disputed that the intervener, the beneficiary of the measure at issue, belonged to a group, within the meaning of point 22 of the Guidelines, at the time of the contested decision. It is therefore necessary to examine whether the Commission should have had doubts as to whether the other conditions referred in point 22 were satisfied.

(1) Whether the intervener's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group

36 As is apparent from paragraphs 32 to 34 above, the parties disagree as regards both the interpretation of point 22 of the Guidelines and as regards its application to the present case.

37 Those two issues must therefore be examined in turn.

(i) Interpretation of point 22 of the Guidelines

38 According to the applicant, point 22 of the Guidelines sets out, in particular, two distinct conditions that are independent of each other, namely, first, that the beneficiary's difficulties are intrinsic and, second, that its difficulties are not the result of an arbitrary allocation of costs within the group. By contrast, according to the Commission and the intervener, this is one and the same condition, to be understood as meaning that the beneficiary's difficulties must be regarded as being intrinsic if they are not the result of an arbitrary allocation of costs within the group.

39 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

40 In the first place, as regards the wording of point 22 of the Guidelines, it should be borne in mind that EU legislation is drafted in various languages and that the different language versions are all equally authentic, so that an interpretation of a provision of EU law involves a comparison of the different language versions (judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 18, and of 6 October 2005, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 42).

41 In that regard, first of all, it must be noted that in many language versions, the syntax of the subordinate phrase, 'except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself', has a two-part structure, sometimes separated by a comma, as follows: 'except where it can be demonstrated that [first condition], and that [second condition].' The repetition of the subordinate conjunction 'that' shows that two conditions are thus involved, the first one, positioned after the first 'that', relating to the fact that the beneficiary's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and the second one, placed after the second 'that', relating to the fact that those difficulties are too serious to be dealt with by the group itself. That first condition thus appears to be one and the same condition. That syntactical structure can be seen, inter alia, in the Czech, English, French, Croatian, Italian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovak and Slovenian versions.

42 Next, it should be noted that the German version expressly states that difficulties that are not the result of an arbitrary allocation within the group are considered to be 'intrinsic' ('*wenn es sich bei den Schwierigkeiten des betreffenden Unternehmens nachweislich um Schwierigkeiten des Unternehmens selbst handelt, die nicht auf eine willkürliche Kostenverteilung innerhalb der Gruppe zurückzuführen sind*'). The Greek and Bulgarian versions also point in that direction.

43 Those examples show that, according to the wording in many language versions of point 22 of the Guidelines, a beneficiary's difficulties must be regarded as being intrinsic if they are not the result of an arbitrary allocation of costs within the group.

44 Lastly, since some other language versions are less explicit, it should be borne in mind that where there is divergence between the various language versions of a text of EU law, the provision in question must be interpreted by reference to the context and objectives of the rules of which it forms part (see, to that effect, judgments of 24 October 1996, *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 28; of 24 February 2000, *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 22; and of 7 December 2000, *Italy* v *Commission*, C-482/98, EU:C:2000:672, paragraph 49).

45 In the second place, as regards the context and objectives of the rules of which point 22 of the Guidelines forms part, it should be recalled that the objective of the rule set out in that point is, inter alia, to prevent a group of undertakings from having the State bear the cost of an operation for the rescue or restructuring of one of the undertakings belonging to the group, when that undertaking is in difficulty and the group itself has created those difficulties owing to an arbitrary allocation of costs within it (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-511/09, EU:T:2015:284, paragraph 159).

46 The purpose of point 22 is therefore to prevent a group of undertakings from offloading its costs, debts or liabilities onto a group entity, thus making it eligible for rescue aid, whereas it would not be otherwise. In other words, point 22 seeks to prevent the circumvention of State aid rules by means of mechanisms that are created artificially within a group. By contrast, the objective of that point is not to exclude an undertaking belonging to a group from the scope of rescue aid solely on the ground that its difficulties originate in the difficulties faced by the rest of the group or by another company in the group, in so far as those difficulties have not been created artificially or allocated arbitrarily within that group.

47 The arguments put forward by the applicant would have the effect of disregarding mutual financial assistance within groups of undertakings, by discouraging a better performing company within a group from assisting another company in the same group that faces financial difficulties, lest it itself becomes ineligible for rescue aid if those difficulties spread to it, precisely because of the assistance it has provided.

48 In the light of the foregoing, it must be concluded that the part of the sentence 'except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group' in point 22 of the Guidelines merely sets out one and the same condition which is to be interpreted as meaning that the difficulties of an undertaking belonging to a group must be regarded as being intrinsic if they are not the result of an arbitrary allocation of costs within that group.

(ii) Application to the present case

49 The applicant submits, first, referring to paragraphs 19 and 57 of the contested decision, that the intervener's difficulties are extrinsic rather than intrinsic, in that they are entirely attributable to causes that lie in the internal organisation of the Thomas Cook group. Thus, despite the latter's difficulties, the intervener generated a positive result before interest and tax on its business activities during the period from 2017 to 2019. Accordingly, the intervener is a profitable, competitive airline which has been ruined by its parent company. Second, the applicant argues

that the intervener's difficulties are the result of an arbitrary allocation of costs within the group. According to paragraphs 15 and 57 of the contested decision, a large share of the liquidity earned by the intervener in recent years has been channelled to its parent company by means of the pooling of the group's cash (the cash-pool), a system which the applicant describes as artificial and coercive.

50 It is apparent from paragraphs 15 to 17, 80 and 109 of the contested decision that the intervener's difficulties were the result mainly of the liquidation of the Thomas Cook group, which led, inter alia, to the write-off of significant amounts of receivables held by the intervener as against that group in the context of the cash-pool, the cessation of intra-group financing, and the loss of its main customer, namely the Thomas Cook group tour operators.

51 First, it should be noted in that regard, as the Commission and the intervener stated at the hearing, without being contradicted by the applicant, that the pooling of cash within a group is a common and widespread practice within groups of companies. The pooling functions like an intra-group bank in that the various companies within a group obtain intra-group loans from the fund, in the event of liquidity needs, and deposit funds with the cash-pool, in the event of surplus liquidity, in return for a receivable in respect of that cash, that is subject to interest. That system, which is managed by a group entity created for that purpose, is intended to facilitate financing of the group while enabling companies in the group to make savings in respect of financing costs. Accordingly, as a general rule, each company in the group may, at a given time, benefit from the pooling system by obtaining direct access to the group's liquid funds, while being required to contribute to that cash-pool if it has surplus liquidity.

52 Second, as regards in particular the Thomas Cook group cash-pool system, it should be noted, as the intervener submits without being contradicted by the applicant on this point, that that system has been in place for several years and that it was therefore in operation long before the group's difficulties arose, so that its establishment was unrelated to those difficulties. Accordingly, by way of example, the intervener benefited from that system in 2016 as a result of a lack of liquidity caused by a reduction in demand for flights to Turkey.

53 Third, it is apparent from paragraph 12 of the contested decision, which lists the causes that lay at the origin of the Thomas Cook group's difficulties, that that cash-pool system was not the source of those difficulties. Those difficulties were the result, inter alia, of a very high level of indebtedness stemming from acquisitions and operating losses, weak business in the British market reinforced by the discussions on Brexit, negative media coverage of the group's restructuring, and structural deficits in the organisation of the group.

54 Although the applicant asserts that the Thomas Cook group's cash-pool system was 'artificial, harmful or coercive', it must be stated that it has not adduced any concrete evidence capable of substantiating that argument.

55 Fourth, the applicant complains that the Commission failed to examine whether the cash-pool agreement between the intervener and the Thomas Cook group had been concluded on fair terms and whether the risks were shared equally between the various companies in the group.

56 However, it must be stated, in the light of paragraphs 117 to 120 of the contested decision, which summarise the arguments put forward by the applicant in the complaint that it had submitted to the Commission concerning the measure at issue, that it had not criticised, in that complaint, any unfair application of the group's pooling of cash. It follows from the case-law referred to in

paragraph 27 above that it is not for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain. Accordingly, in circumstances such as those of the present case, summarised in paragraphs 52 to 55 above, and in the absence of any concrete evidence to the contrary, it must be held that the Commission was not under an obligation to investigate further, on its own initiative, the 'fairness' of the cash-pool system.

57 Fifth, the applicant argues that, according to paragraph 57 of the contested decision, the intervener's liquidity position was 'artificially depleted' since it was forced to transfer significant sums of money to its loss-making parent company. However, it should be noted that that part of paragraph 57 of the contested decision merely summarises the Federal Republic of Germany's observations on the complaint lodged with the Commission and does not therefore contain the Commission's legal assessment. That assessment appears, inter alia, in paragraph 80 of the contested decision. It follows from that paragraph, read in conjunction with paragraphs 15 to 17 of the contested decision, that, according to the Commission, the intervener was a fundamentally sound and viable company and that its financial difficulties stemmed from those of its parent company and not from the fact that the group had put in place an artificial arrangement designed to weaken the intervener.

58 Accordingly, it must be held that the applicant has not demonstrated the existence of doubts as to the compatibility of the measure at issue with the condition set out in point 22 of the Guidelines, according to which the intervener's difficulties must be intrinsic and not be the result of an arbitrary allocation of costs within the group.

(2) Whether the intervener's difficulties were too serious to be dealt with by the group itself

59 The applicant submits, in essence, that the Commission failed in the contested decision to examine whether the Thomas Cook group was incapable of dealing with the intervener's difficulties, as required by point 22 of the Guidelines. According to the applicant, placing the Thomas Cook group into liquidation does not necessarily mean that it was incapable of dealing with the difficulties of its subsidiary, given that it could have implemented several measures, such as the sale of the intervener or termination of the cash-pool system.

60 First, it must be noted that it is apparent from paragraphs 10 to 13 of the contested decision that the Thomas Cook group, the intervener's sole shareholder, was in a very poor financial state when the contested decision was adopted. The group ceased trading with immediate effect on 23 September 2019 and was subsequently placed in compulsory liquidation with debt equivalent to approximately 1.7 thousand million pounds sterling (GBP) (approximately EUR 1.91 thousand million).

61 It must therefore be found, as did the Commission, that the Thomas Cook group did not have the capacity to deal with its subsidiary's difficulties since it was itself in liquidation and had ceased trading.

62 Second, it is clear from paragraph 26 of the contested decision that the Commission took into consideration the possibility of an eventual sale of the intervener, which had been the subject of discussions with several interested investors since February 2019, which might have been carried out in the following three to six months. The applicant cannot therefore criticise the Commission for having failed to examine the capacity of the Thomas Cook group to deal with the intervener's difficulties, in particular by selling it. However, since those discussions, when the contested

decision was adopted, had not yet borne fruit, the Commission could not base its assessment on a future solution that was as yet uncertain. Having regard to the urgency surrounding any rescue aid, there is also nothing to indicate that the Commission was obliged to await the outcome of those discussions before authorising the aid, given the uncertainty that is inherent in any ongoing business negotiations.

63 Third, as regards the applicant's assertion that the Thomas Cook group or the liquidator could have adopted several other measures, such as the termination of the cash-pool system, in order to resolve the intervener's difficulties, it is sufficient to mention, as the intervener observed at the hearing without being contradicted on this point by the applicant, that the intervener, having become aware of the financial difficulties of its parent company, had on its own initiative stopped contributing to that system on 5 February 2019.

64 It follows from the foregoing that the applicant has not demonstrated the existence of doubts in respect of the Commission's examination of the condition laid down in point 22 of the Guidelines, according to which the difficulties of an undertaking belonging to a group must be too serious to be dealt with by the group itself.

65 Accordingly, it must be concluded that the applicant has not succeeded in demonstrating the existence of doubts in respect of the examination of the requirements laid down in point 22 of the Guidelines which should have led the Commission to initiate the formal investigation procedure.

(c) Indicia relating to an infringement of point 44(b) of the Guidelines

66 The applicant submits, in essence, that the Commission should have had doubts as to whether the measure at issue satisfied the requirements set out in point 44(b) of the Guidelines. According to the applicant, the Commission, first, did not establish that the intervener provided an important service within the meaning of that point and, second, that that service could not easily be provided by a competitor.

67 The Commission and the intervener dispute those arguments.

68 As a preliminary point, the Court, having regard to the judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742), considers it necessary to point out that it is apparent from point 43 of the Guidelines that, in order to be declared compatible with the internal market on the basis of the Guidelines, a State aid measure must pursue an objective of common interest. According to that same point, that requirement takes the form of the condition that such a measure must be one that 'aims to prevent social hardship or address market failure'. That is confirmed by point 44 of those guidelines, according to which Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure. The wording of that requirement is thus related to the condition laid down in Article 107(3)(c) TFEU, according to which the aid measure must be intended to facilitate the development of certain economic activities or of certain economic areas, as the parties indeed submitted at the hearing.

69 It follows that the actual substance of the requirements laid down in points 43 and 44 of the Guidelines is not contrary to Article 107(3)(c) TFEU, which, moreover, none of the parties claims, and that, in imposing that requirement, the Guidelines have not improperly reduced the scope of that provision as regards the examination of the compatibility of a State aid measure in

terms of the judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742). In addition, it is apparent from paragraphs 66 and 67 of that judgment that the fact that the planned aid enables a market failure to be remedied may be a relevant factor for assessing the compatibility of that aid under Article 107(3)(c) TFEU.

70 Point 44(b) of those guidelines provides that Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure, in that 'there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in (for example, a national infrastructure provider)'.

71 In the present case, it is necessary to examine whether it was possible for the Commission, without having any doubts, to arrive at the conclusion that the service in question was 'important' and that it was hard to replicate it, for the purposes of point 44(b) of the Guidelines.

72 In paragraphs 81 to 97 of the contested decision, the Commission reached that conclusion on the basis, in essence, of two factors, namely, first, the difficulty in organising the repatriation by other airlines of the intervener's passengers that were still abroad and, second, it being impossible for those airlines to replicate in the short term the service provided by the intervener to independent tour operators and travel agencies in Germany.

73 It is necessary to examine at the outset the first factor taken into account by the Commission, namely the risk of disruption to the passenger transport services provided by the intervener, which would have led to the need to repatriate the passengers that were still abroad.

74 In the first place, it must be noted that the Guidelines do not provide any definition of the concept of 'important service'.

75 Nevertheless, point 44 of the Guidelines contains a non-exhaustive list of circumstances in which the Commission would consider that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure. Some of those examples relate to the risk of 'serious social hardship', including sub-point (a), which takes into account the unemployment rate, or (g), which refers to 'similar situations of severe hardship duly substantiated'. The other examples relate rather to the risk of severe market failure. Such is the case of sub-point (b), at issue in the present case, and also (c), which refers to the exit of an 'undertaking with an important systemic role in a particular region or sector', and (d), which refers to the risk of interruption to the continuity of provision of a service of general economic interest (SGEI). It follows that, in order for the service to be regarded as 'important', there is no requirement for the undertaking that provides that service to play an important systemic role for the economy of a region of the Member State concerned, or that it be entrusted with an SGEI, those two latter situations being covered respectively by point 44(c) and (d) of the Guidelines.

76 Furthermore, contrary to what the applicant argues, the mere fact that point 44(b) refers 'for example' to 'a national infrastructure provider' does not in any way mean that the scope of that point is limited to services that are of importance at the national level.

77 Accordingly, the applicant's argument that a service is 'important' only if it is of importance for the entire economy of a Member State must be rejected.

78 In addition, the applicant's argument that airline travel to holiday destinations is not an 'important service' within the meaning of point 44(b) of the Guidelines must also be rejected as irrelevant. The Commission did not find that the service in question was 'important' on the ground that it served holiday destinations.

79 In the second place, as regards the question of whether the services provided by the intervener were hard to replicate, within the meaning of point 44(b) of the Guidelines, it is apparent from paragraphs 82 and 85 of the contested decision that other, competitor, airlines could not have carried out at short notice the immediate repatriation of the intervener's passengers who were still abroad. That is because of several factors that occurred simultaneously, including the grounding of a total of 669 Boeing 737 MAX aircraft, which led to a reduction in the availability on the market of wet-lease aircraft, and the ongoing repatriation at the same time of 140 000 Thomas Cook passengers to the United Kingdom, involving no less than 50 airlines and a total of 746 flights to 55 different destinations over 2 weeks. By comparison, the possible repatriation of the intervener's passengers would have been of a considerably greater extent and complexity, since it would have concerned approximately 200 000 to 300 000 passengers distributed across 50 to 150 different destinations, including some 20 000 to 30 000 passengers in around 30 long-haul destinations, which would have required approximately 1 000 to 1 500 flights. In addition, according to paragraph 88 of the contested decision, the capacity of the four German airports served by the intervener would also have constrained any repatriation operation, considering that, by way of comparison, the repatriation of Thomas Cook's passengers to the United Kingdom had on its own necessitated the use of 10 of Thomas Cook's airport bases.

80 In respect of that point, the Court finds that the Commission was entitled to conclude, without having any doubts, that there was a risk of disruption to an important service which was hard to replicate on the basis of the fact that the intervener's exit from the market would have left a large number of passengers stranded abroad, including some in long-haul destinations, and that their repatriation by other airlines would have been hard to carry out owing to all the factors that are substantiated in a concrete and specific fashion in the contested decision. Owing to that risk, the intervener's exit from the market was likely to involve a severe failure of that market.

81 None of the arguments put forward by the applicant is capable of calling that conclusion into question.

82 First, the applicant's argument according to which airline overcapacity exists during the 'winter season' cannot succeed. It is common ground that the winter season in the aviation sector runs from the end of October to the end of March, while any possible repatriation operations, which had to begin on 23 September, did not fall within that season. In addition, and in any event, the fact remains that, during that period, the availability of aircraft was significantly affected by, in particular, two extraordinary events which occurred at the same time, namely the grounding of and problems with the delivery of several hundred Boeing 737 MAX, and the large-scale repatriation of Thomas Cook passengers. In that regard, it must be noted, as did the Commission, that the repatriation that would have had to be arranged in order to bring home the intervener's passengers would have been even larger than that of Thomas Cook's passengers, described as 'the largest peacetime repatriation'. The figures given in paragraph 79 above, which have not been contested, attest to that fact.

83 Accordingly, the impact of those two extraordinary and simultaneous events on the availability of aircraft would have greatly complicated any repatriation operations, which would have had to be carried out by other airlines in parallel and as a matter of urgency.

84 In that regard, it is important to note that point 44(b) of the Guidelines does not require that it is impossible to replicate an important service; it is sufficient that it is 'hard' to do so.

85 Second, as regards the applicant's argument that the Commission wrongly relied solely on the capacity of the four German airports served by the intervener, it should be stated that the Commission did not reject the possibility of the use of the capacity of other possibly less congested airports for the purpose of a possible repatriation. The capacity limits of the 4 German airports served by the intervener were simply referred to by the Commission, in paragraph 88 of the contested decision, by way of comparison with the 10 Thomas Cook air bases which had been used for the repatriation of its passengers, thereby demonstrating that the repatriation of the intervener's passengers would have been more complicated than that of Thomas Cook's passengers.

86 Third, concerning the applicant's assertion that the Commission did not justify the need for a period of six months to carry out the repatriation of the intervener's passengers, it must be pointed out that the Commission did not at any time take the view that such a period would have been necessary for that repatriation. The period of six months corresponds, in reality, to the duration of the measure at issue. As the Commission rightly states, the duration of the measure at issue is in no way linked to the time that would have been necessary for a possible repatriation. Moreover, the six-month period is intended, as indicated in point 60 of the Guidelines, to enable the beneficiary to restore its liquidity.

87 In those circumstances, it must be concluded that the extent, complexity and urgency of the repatriation operations that would have had to be carried out in circumstances impacted by the simultaneous occurrence of extraordinary events justify by themselves the finding that the intervener's exit from the market would have led to a risk of disruption to an important service which it would have been hard to replicate in the particular circumstances of the present case.

88 Therefore, the applicant's arguments disputing the second factor relied on by the Commission, namely the risk of disruption to the services provided by the intervener to independent tour operators and travel agencies in Germany, are ineffective.

89 In the light of the foregoing, it must be held that the second set of indicia also do not indicate any doubts.

(d) Indicia relating to an infringement of point 74 of the Guidelines

90 The applicant submits, in essence, that the Commission carried out an incomplete and insufficient examination of the one time, last time condition for aid laid down in point 74 of the Guidelines in that it merely mentioned that the intervener and the entities under its control had not received rescue aid, restructuring aid or temporary restructuring support over the previous 10 years, whereas it should also have verified that the Thomas Cook group itself had not received such aid.

91 The Commission and the intervener dispute those arguments.

92 Point 74 of the Guidelines states that 'where a business group has received rescue aid, restructuring aid or temporary restructuring support, the Commission will normally not allow further rescue or restructuring aid to the group itself or any of the entities belonging to the group unless 10 years have elapsed since the aid was granted or the restructuring period came to an end or implementation of the restructuring plan was halted, whichever occurred the latest'.

93 In the present case, it is sufficient to state that the applicant does not adduce any evidence, as it expressly acknowledged at the hearing, capable of demonstrating that the Thomas Cook group has received any rescue aid, restructuring aid or temporary restructuring support in the course of the last 10 years.

94 Therefore, in the circumstances of the present case, in the absence of evidence to that effect and in the light of the case-law cited in paragraph 27 above, the Commission cannot be accused of having carried out an incomplete and insufficient examination of the one time, last time condition for aid laid down in point 74 of the Guidelines.

95 Consequently, the applicant has not succeeded in demonstrating that the indicia relating to an infringement of point 74 of the Guidelines should have led the Commission to entertain doubts as to the compatibility of the measure at issue with the internal market.

96 In the light of all the foregoing considerations, it must be held that the applicant has not demonstrated the existence of doubts such as to justify the initiation of the formal investigation procedure.

97 Accordingly, the fourth plea in law must be rejected.

2. The fifth plea, alleging breach of the obligation to state reasons

98 By its fifth plea, the applicant submits, in essence, that the contested decision is vitiated by a failure to state reasons or by contradictory reasoning.

99 The Commission and the intervener dispute that line of argument.

100 It is apparent from settled case-law that 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 explanations. 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).

101 First, the applicant submits that the reasoning in paragraph 80 of the contested decision is contradictory in that the Commission stated, on the one hand, that the intervener's acute liquidity needs were a result inter alia of the financial arrangements previously applicable within the Thomas Cook group and, on the other, found that the intervener's difficulties were not the result of an arbitrary allocation of costs within the group.

102 However, a reading of paragraphs 12, 15 to 17, 80 and 109 of the contested decision makes it possible to understand why the Commission found, in particular, that the group's cash-pooling did not constitute such an arbitrary allocation. As is clear from paragraphs 52 to 57 above, the statement of reasons for the contested decision is not vitiated by any contradiction on that point.

103 Second, according to the applicant, the contested decision is vitiated by a failure to state reasons as to whether the intervener's difficulties were too serious to be dealt with by the group itself, as required by point 22 of the Guidelines.

104 In that regard, as pointed out in paragraphs 60 to 63 above, it is apparent from paragraphs 12 and 13 of the contested decision that the Thomas Cook group had ceased trading with immediate effect and had been placed in compulsory liquidation on 23 September 2019. In addition, in paragraph 17 of that decision, the Commission stated that the parent company was manifestly unable to support the intervener and rather represented a burden on it. Those paragraphs in the contested decision thus state, in a clear and unequivocal fashion, the reasons why the Commission considered that the abovementioned condition of point 22 of the Guidelines was satisfied.

105 Third, the applicant submits that the contested decision does not set out the reasons why the intervener's services had to be regarded as important and why they could not be replicated by other airlines, for the purposes of point 44(b) of the Guidelines.

106 However, it must be stated that paragraphs 81 to 95 of the contested decision contain a detailed statement of the reasons which led the Commission to find that the conditions laid down in point 44(b) of the Guidelines were satisfied. It based that conclusion in particular on the extent and complexity of possible repatriation operations in circumstances that were impacted by extraordinary events which occurred simultaneously, which would have complicated the organisation of such operations by other airlines. Therefore, it must be held that the statement of reasons for the contested decision is sufficient in that regard.

107 Fourth, according to the applicant, the Commission failed to state the reason why it considered that the one time, last time condition for aid set out in point 74 of the Guidelines was satisfied in the present case.

108 In that regard, it should be noted that the Commission stated in paragraph 112 of the contested decision that neither the intervener nor any entity controlled by it had received rescue aid, restructuring aid or temporary restructuring support in the last 10 years. In addition, in the absence of any evidence showing that the Thomas Cook group had received any kind of aid in the 10 years preceding the grant of the measure at issue, the Commission was not obliged to provide a more detailed statement of reasons on that point. In those circumstances, the Commission set out in sufficient detail the reasons why it found that the one time, last time condition for aid was satisfied in the present case.

109 Consequently, the fifth plea must be rejected as unfounded.

110 In the light of the foregoing considerations, the action must be dismissed in its entirety.

IV. Costs

111 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs, and to pay those incurred by the Commission, in accordance with the form of order sought by the latter.

112 The intervener is to bear its own costs, in accordance with Article 138(3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Ryanair DAC to bear its own costs, and to pay those incurred by the European Commission;**

3. **Orders Condor Flugdienst GmbH to bear its own costs.**

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Petrlík

Delivered in open court in Luxembourg on 18 May 2022.

E. Coulon M. van der Woude
Registrar President