Reports of Cases

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

20 December 2023 *

(State aid – Aid granted by France to Air France and Air France-KLM in the context of the COVID-19 pandemic – Recapitalisation – Decision declaring the aid compatible with the internal market – Action for annulment – *Locus standi* – Substantial adverse effect on the applicant's position on the market – Admissibility – Determination of the beneficiary of the aid in the context of a group of companies)

In Case T-494/21,

Ryanair DAC, established in Swords (Ireland),

Malta Air ltd., established in Pietà (Malta),

represented by F.-C. Laprévote, E. Vahida, V. Blanc, S. Rating, I.-G. Metaxas-Maranghidis and D. Pérez de Lamo, lawyers,

applicants,

v

European Commission, represented by L. Flynn, J. Carpi Badía and C. Georgieva, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by P.-L. Krüger and J. Möller, acting as Agents,

and by

French Republic, represented by A.-L. Desjonquères, P. Dodeller, T. Stéhelin, B. Fodda and T. Lechevallier, acting as Agents,

and by

Kingdom of the Netherlands, represented by M. Bulterman, C. Schillemans and J. Langer, acting as Agents, and by S. Corrijn, lawyer,

* Language of the case: English.

and by

Air France-KLM, established in Paris (France), represented by J. Derenne and D. Vallindas, lawyers,

and by

Société Air France, established in Tremblay-en-France (France), represented by J. Derenne and D. Vallindas,

interveners,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov (Rapporteur), G. De Baere, D. Petrlík and S. Kingston, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure,

further to the hearing on 22 May 2023,

gives the following

Judgment

1 By their action under Article 263 TFEU, the applicants, Ryanair DAC and Malta Air ltd., seek the annulment of Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID-19 – Recapitalisation of Air France and the Air France–KLM Holding ('the contested decision').

Background to the dispute

2 Société Air France ('Air France') and Air France-KLM ('the Air France-KLM holding') are part of the Air France-KLM group. The group is headed by the Air France-KLM holding. According to the contested decision, that group also includes Koninklijke Luchtvaart Maatschappij NV ('KLM'), 'Air France-KLM International Mobility (Switzerland)', 'Blueteam V (France)', 'BigBlank (France)', 'Air France-KLM Finance (France)' and 'Transavia Company (France)'.

3 According to the contested decision, the French Republic and the Kingdom of the Netherlands hold 14.3% and 14% of the capital of the Air France-KLM holding respectively, and the French Republic also holds 21% of the voting rights in that company. In turn, the Air France-KLM holding holds 100% of the shares in Air France and, directly and indirectly, 93.48% of KLM's share capital. That holding company also holds 99.7% of the economic rights, that is to say, dividend rights, and 49% of the voting rights in KLM. The same holding company holds 100% of the shares in the other subsidiaries listed in paragraph 2 above.

4 The contested decision forms part of a series of other State aid measures aimed at supporting the aviation sector and, more specifically, the companies forming part of the Air France-KLM group.

5 In particular, on 4 May 2020, the European Commission authorised individual aid granted by the French Republic to Air France in the form of (i) a State loan guarantee covering 90% of a loan of EUR 4 billion granted by a consortium of banks and (ii) a shareholder loan of up to EUR 3 billion ('the shareholder loan') by adopting Decision C(2020) 2983 final of 4 May 2020 on State Aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Commission Decision C(2020) 9384 final of 17 December 2020 and Commission Decision C(2021) 5701 final of 26 July 2021 ('the Air France decision'), which forms part of the file submitted to the Court.

6 In the Air France decision, the Commission considered that the beneficiaries of the aid concerned were Air France and the subsidiaries controlled by that company. On the other hand, neither the Air France-KLM holding nor its other subsidiaries, including KLM and the companies controlled by that company, were considered to be beneficiaries of that aid.

7 On 13 July 2020, the Commission approved individual aid granted by the Kingdom of the Netherlands to KLM, consisting of (i) a State loan guarantee for a loan granted to KLM by a consortium of banks and (ii) a State-guaranteed loan, and totalling EUR 3.4 billion, by Decision C(2020) 4871 final of 13 July 2020 on State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM ('the KLM decision').

8 On 31 March 2021, the French Republic notified the Commission, in accordance with Article 107(3)(b) TFEU and the Communication from the Commission of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (OJ 2020 C 91 I, p. 1), as amended on 1 February 2021 (OJ 2021 C 34, p. 6) ('the Temporary Framework'), of individual aid in the form of a recapitalisation of Air France and the Air France-KLM holding totalling EUR 4 billion ('the measure at issue'). The measure at issue consists of (i) the participation by the French Republic in a planned share capital increase of up to EUR 1 billion ('the equity participation') and (ii) the conversion of the shareholder loan covered by the Air France decision into a hybrid instrument ('the hybrid instrument').

9 On 5 April 2021, the Commission adopted the contested decision, by which it found that the measure at issue constituted State aid that was compatible with the internal market under Article 107(3)(b) TFEU and the Temporary Framework.

10 In the contested decision, the Commission found that the beneficiaries of the measure at issue were Air France and its subsidiaries, on the one hand, and the Air France-KLM holding and the subsidiaries controlled by that holding company, on the other ('the beneficiaries'), to the exclusion of KLM and its subsidiaries.

11 By judgment of 19 May 2021, *Ryanair* v *Commission (KLM; Covid-19)* (T-643/20, EU:T:2021:286), the Court annulled the KLM decision on the ground that it was vitiated by a failure to state reasons as regards the determination of the beneficiary of the aid measure at issue.

Forms of order sought

12 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

13 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

14 The Federal Republic of Germany, the Kingdom of the Netherlands, Air France and the Air France-KLM holding contend that the action should be dismissed as unfounded and that the applicants should be ordered to pay the costs.

15 The French Republic contends that the Court should dismiss the action as inadmissible, in so far as the applicants dispute the merits of the contested decision, and as unfounded, as to the remainder.

Law

Admissibility

16 The applicants submit, first, that they are interested parties for the purposes of Article 108(2) TFEU and 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), and that they therefore have standing to bring proceedings to defend their procedural rights. Secondly, they maintain that their competitive position on the market has been substantially affected by the measure at issue and that, consequently, they also have standing to challenge the contested decision on the merits.

17 The Commission, the Federal Republic of Germany, the Kingdom of the Netherlands, Air France and the Air France-KLM holding do not dispute the admissibility of the action.

18 By contrast, the French Republic maintains that the applicants do not have standing to challenge the contested decision on the merits.

19 In the present case, it is common ground that the applicants are competitors of Air France and it is not disputed that they must therefore be regarded as 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589 and as having standing to bring proceedings in order to safeguard the procedural rights which they derive from Article 108(2) TFEU.

20 As to the standing of the applicants to challenge the contested decision on the merits, it must be borne in mind that the admissibility of actions brought by natural or legal persons against acts which are not addressed to them, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that they be accorded standing to bring proceedings, which arises in

two situations. First, such proceedings may be instituted if the act is of direct and individual concern to those persons. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 59 and 91, and of 13 March 2018, *Industrias Químicas del Vallés* v *Commission*, C-244/16 P, EU:C:2018:177, paragraph 39).

21 Since the contested decision, which was addressed to the French Republic, does not constitute a regulatory act for the purposes of the fourth paragraph of Article 263 TFEU, since it is not an act of general application (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 56), it is for the Court to ascertain whether that decision is of direct and individual concern to the applicants, within the meaning of that provision.

22 In that regard, it is clear from settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of those factors distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107; of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 22; and of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 53).

23 Accordingly, where an applicant calls into question the merits of a decision appraising aid, taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as 'concerned' within the meaning of Article 108(2) TFEU cannot suffice to render the action admissible. It must then demonstrate that it has a particular status for the purposes of the case-law cited in paragraph 22 above. That is the case, in particular, where the applicant's position on the market concerned is substantially affected by the aid to which the decision at issue relates (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37 and the case-law cited).

24 In that regard, the demonstration by the applicant of a substantial adverse effect on its market position does not entail a definitive ruling on the competitive relationships between the applicant and the recipient undertakings, but requires only that the applicant adduce pertinent reasons to show that the Commission's decision may harm its legitimate interests by substantially affecting its position on the market in question (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 57 and the case-law cited).

25 It is thus apparent from the case-law of the Court of Justice that the substantial adverse effect on the applicant's competitive position on the market in question results not from a detailed analysis of the various competitive relationships on that market, allowing the extent of the adverse effect on its competitive position to be established specifically, but, in principle, from a prima facie finding that the grant of the measure covered by the Commission's decision leads to a substantial adverse effect on that position (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 58).

26 It follows that that condition may be satisfied if the applicant adduces evidence to show that the measure concerned is liable to have a substantial adverse effect on its position on the market at issue (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 59 and the case-law cited).

27 As regards the factors accepted by the case-law for the purpose of establishing a substantial adverse effect of that kind, it should be borne in mind that the mere fact that an act may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned is in a competitive relationship with the beneficiary of that act cannot suffice for that undertaking to be regarded as being individually concerned by that act. Therefore, an undertaking cannot rely solely on its status as a competitor of the recipient undertaking (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 60 and the case-law cited).

28 Demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in the applicant's commercial or financial performance, such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can also have an adverse effect on the competitive situation of an operator in other ways, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 61).

29 Moreover, the case-law does not require the applicant to adduce evidence of the size or geographic extent of the markets at issue; nor does it require it to adduce evidence of its market shares or those of the beneficiary of the measure in question or of other competitors on those markets (see, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 65).

30 It is in the light of those principles that it is necessary to examine whether the applicants have adduced evidence to show that the measure at issue is liable to have a substantial adverse effect on their position on the market concerned.

31 In that regard, in the first place, the applicants claim that, before the COVID-19 pandemic, they operated 211 air routes to or from France. In particular, they explain that Ryanair was in direct competition with Air France and its subsidiaries on 45 air routes in 2019 and on 47 air routes in 2021 to or from France, which are of economic importance inasmuch as they link large cities in Europe and beyond and were generally served by very few other airlines. In addition, Ryanair carried more than a million passengers on those routes in 2019 and a total of 127 305 passengers on them from January to August 2021.

32 The French Republic contends, in essence, that Ryanair is not the closest and most direct competitor of Air France. In addition, it denies that the applicants are 'in direct competition' with Air France, on the basis that the air routes operated by Air France to and from Roissy-Charles-de-Gaulle Airport ('CDG Airport') and Paris-Orly Airport ('ORY Airport') and those operated by Ryanair to and from Beauvais-Tillé Airport ('BVA Airport') are not substitutable and are therefore irrelevant for the purpose of assessing the competitive relationship between the applicants and Air France. As regards the other air routes relied on by the applicants, it argues that, on those routes, Ryanair is not the only competitor of Air France.

33 In that regard, it should be borne in mind that it is not necessary, at the stage of examining the admissibility of an action, to give a definitive ruling on the definition of the market for the products or services at issue or on the competitive relationships between the applicants and the beneficiary. It is sufficient, in principle, for the applicants to show that, prima facie, the grant of the measure concerned leads to a substantial adverse effect on their competitive position on the market (see the case-law cited in paragraphs 24 and 25 above).

34 As regards the question of whether the air routes to and from CDG Airport and ORY Airport, on the one hand, and BVA Airport, on the other, are substitutable, it is apparent from the case-law that, to that end, the Court may take account of a number of factors, such as distances and travelling times using the indicative benchmark of 100 km or one hour driving time, the views of competitors, the views of the airports concerned and of Member States' civil aviation authorities, the estimated proportion of leisure passengers on a route, the 'airport system' pursuant to Annex II to Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), marketing practices and whether transport services exist between the airports and certain cities (judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 103 et seq.).

35 It is true that, in footnote 100 to the contested decision, the Commission stated, 'for the sake of completeness', that CDG Airport and ORY Airport were not substitutable with BVA Airport. However, it did not state reasons for that finding and did not examine, or even mention, any of the relevant criteria listed in the case-law cited in paragraph 34 above.

36 At the hearing, the Commission stated that, in the light of those criteria, the air routes operated by Ryanair to or from BVA Airport could, for the purposes of the admissibility of the present action, be regarded, prima facie, as substitutable for those operated by Air France to or from CDG Airport and ORY Airport.

37 That position is reflected in the Commission's decision-making practice, which, while not binding the EU judicature, could nevertheless be a useful factor in the prima facie assessment of whether the grant of the measure at issue is likely adversely to affect the applicants' competitive position on the market. Thus, in recitals 266 to 279 of Decision C(2013) 1106 final of 27 February 2013 declaring a concentration incompatible with the internal market and the EEA Agreement (Case COMP/M.6663 – Ryanair/Aer Lingus III), the Commission found that the 100 km or one hour driving time criterion was satisfied, as the respective distances and the journey times by car to the centre of Paris from CDG Airport, ORY Airport and BVA Airport were 23 km (31 min), 20 km (30 min) and 80 km (60 min). On that basis, it concluded that ORY Airport was substitutable with CDG Airport and BVA Airport for flights to and from Dublin (Ireland).

38 In those circumstances, and in the absence of concrete evidence to the contrary in the documents before the Court, it must be held that the air routes operated by Ryanair to and from BVA Airport, to which the applicants refer in order to demonstrate their standing to bring proceedings, may be regarded as prima facie substitutable for those operated by Air France to and from CDG Airport and ORY Airport. Therefore, for the purposes of examining Ryanair's standing to bring proceedings, account must be taken of all the air routes referred to by the applicants. The French Republic does not dispute the substitutability of the other air routes operated by Ryanair and Air France respectively to and from other airports in France.

39 Accordingly, it must be held that Ryanair was in competition with Air France and its subsidiaries on a significant number of air routes to and from France, namely between 45 and 47 air routes in the period from 2019 to 2021. In addition, it is apparent from the documents before the Court, and in particular from Annex A.3.6 to the application, the probative value of which is not disputed by the Commission or by the interveners, that the number of seats offered by Ryanair on those routes was often comparable to, and in some cases even exceeded, the number offered by Air France and its subsidiaries. Competition between them was therefore also significant in terms of the number of seats offered.

40 In the second place, the applicants submit that they were planning to expand their business on the French market, as evidenced by the fact that they had launched 67 new air routes to and from France in 2019. The Commission and the interveners do not dispute that fact. Furthermore, the applicants add that they had ordered 210 Boeing 737 Max aircraft which joined their fleet in June 2021 and which enabled them to continue their expansion plans.

41 In the third place, it is apparent in particular from points 14 to 18 of the contested decision that the measure at issue was intended to avoid the risk of insolvency faced by the Air France-KLM holding and Air France. In addition, according to a report by the Foundation for Political Innovation, produced by the applicants, entitled 'Before COVID-19 Air Transportation in Europe: An Already Fragile Sector', dated May 2020, the content of which is not disputed by the parties, 'it [was] likely that Ryanair … [would] emerge from the COVID-19 crisis without too much damage and [would] even have enough financial resources, especially through indebtedness and the purchase of bankrupt companies, to take part in the probable restructuring of air transport in Europe.' It follows that Ryanair was in a relatively strong position in relation to traditional airlines, such as Air France, which faced a risk of insolvency or even exit from the market.

42 In the fourth place, it is apparent from the documents before the Court that, in 2019, the managing director of the Air France-KLM holding announced an action plan to intensify competition with 'low-cost' airlines, such as Ryanair, through the low-cost subsidiary 'Transavia France'.

43 The factors set out in paragraphs 38 to 42 above, taken together, permit the inference that the applicants have demonstrated that the grant of the measure at issue was likely to strengthen Air France's competitive position to the detriment of Ryanair and to lead prima facie to a substantial adverse effect on Ryanair's competitive position on the market, by causing, in particular, the loss of an opportunity to make a profit or a less favourable development than would have been the case without such a measure (see the case-law cited in paragraph 28 above).

44 That finding is not called into question by the French Republic's objection that Ryanair is not Air France's main competitor on the French market.

45 The case-law does not require the applicant to be the main competitor of the beneficiary of an aid measure in order for its competitive position to be regarded as substantially affected by that measure.

46 Nor can the French Republic's objection that the applicants have not shown that the contested decision affects them by reason of factual circumstances which distinguish them from all of Air France's other competitors succeed.

47 The condition that there be a substantial effect on the applicant's competitive position is a factor that is particular to that applicant, which must be assessed solely in relation to its market position prior to the grant of the measure in question or in the absence of that measure. It is therefore not a matter of comparing the situation of all the competitors operating on the market concerned (see, to that effect, Opinion of Advocate General Szpunar in *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2020:862, point 58). Moreover, as has been observed in paragraph 29 above, the Court of Justice has explained that it is not necessary for the applicant to provide information concerning its market shares or those of the beneficiary or of other competitors on that market. It thus follows that, in order to show that there has been a substantial effect on its competitive position, the applicant cannot be required to establish, with supporting evidence, what the competitive situation of all its competitors is and to differentiate itself from that situation.

48 Moreover, it is important to observe that the case-law cited in paragraph 22 above foresees two different criteria for showing that persons other than those to whom a decision is addressed are individually concerned by that decision, namely that the decision being contested affects them by reason of 'certain attributes which are peculiar to them' or 'circumstances in which they are differentiated from all other persons.' That case-law does not therefore require an applicant to show that, in every case, its factual circumstances are different from those of any other person. It is sufficient that the decision being contested affects the applicant by reason of certain attributes which are peculiar to it.

49 That is the case here. All the factors referred to in paragraphs 38 to 42 above indicate, in a sufficiently plausible manner, that Ryanair's position on the relevant markets was characterised by certain attributes which are peculiar to it, namely the fact that Ryanair is in direct competition with Air France on a large number of air routes, on which, moreover, it operates a large number of seats, that it had begun a commercial expansion on the French market by launching a large number of new air routes before the outbreak of the COVID-19 pandemic, that Air France was planning to intensify competition in the low-cost market segment, on which Ryanair operates, through its 'Transavia France' airline and that, in the absence of the measure at issue, there was a risk that Air France would become insolvent or at least significantly weakened, whereas Ryanair's financial situation appeared to be relatively strong in comparison with that of the beneficiary, thus placing it in a position which would enable it, in the absence of aid, to gain market share to the detriment of Air France.

50 In the light of all of the foregoing, it must be held that the applicants have shown to the requisite legal standard that the measure at issue was liable to have a substantial effect on Ryanair's competitive position on the market concerned.

51 Ryanair is also directly concerned by the contested decision, since there is no doubt that the French Republic intended to pay aid to the Air France-KLM holding and to Air France and that such a payment is liable to place Ryanair in an unfavourable competitive position and thus affect its right not to be subject to competition distorted by that aid (see, to that effect, judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43 and the case-law cited).

52 Ryanair is therefore entitled to challenge the contested decision on the merits.

53 As regards Malta Air's standing, it has been held that, where one of the applicants is entitled to bring proceedings and the action is a single action, there is no need to examine the standing of the other applicants (see judgment of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-643/11, EU:T:2014:1076, paragraph 33 (not published) and the case-law cited).

Substance

54 In support of their action, the applicants put forward seven pleas in law, concerning, in essence, (i) the exclusion of KLM from the scope of the beneficiaries of the measure at issue; (ii) an incorrect application of the Temporary Framework; (iii) an incorrect application of Article 107(3)(b) TFEU; (iv) breach of the principles of non-discrimination, freedom to provide services and freedom of establishment; (v) infringement of the applicants' procedural rights; (vi) a breach of the duty to state reasons, and (vii) infringement of Article 342 TFEU and of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition, Series I, 1952-1958, p. 59).

The first plea, relating to the exclusion of KLM from the scope of the beneficiaries of the measure at issue

55 The applicants maintain that the definition of the beneficiary of the measure at issue in the contested decision is unclear, incoherent and insufficiently reasoned, inasmuch as that definition does not correspond to any legal, economic or accounting reality. They put forward several factors to show that KLM could also be regarded as a beneficiary of the measure at issue. They put forward, in essence, the capital, organic, functional and economic links between the Air France-KLM holding, Air France and KLM, the context in which the measure at issue was granted, the contractual framework on the basis of which that measure was granted and the commitments made by the French Republic.

56 The Commission disputes the applicants' arguments. It asserts that it took account of all the relevant factors established in the case-law for determining whether legally distinct entities constitute an economic unit and correctly concluded that KLM and its subsidiaries would not benefit from the measure at issue. In reaching that conclusion, it states that it took account of (i) the contractual framework put in place with the aim of channelling the financial and economic effects of the measure at issue to Air France and (ii) the commitments made by the French Republic, which guaranteed that that measure would not be transferred to KLM.

57 The French Republic, the Kingdom of the Netherlands, Air France and the Air France-KLM holding endorse the Commission's observations.

58 In the contested decision, the Commission considered that the beneficiaries of the measure at issue were Air France and its subsidiaries, on the one hand, and the Air France-KLM holding and the subsidiaries controlled by that holding company, on the other, to the exclusion of KLM and its subsidiaries. Thus, it regarded as beneficiaries of that measure the Air France-KLM holding and all its subsidiaries, referred to in paragraph 2 above, namely Air France, 'Air France-KLM International Mobility (Switzerland)', 'Blueteam V (France)', 'BigBlank (France)', 'Air France-KLM Finance (France)' and 'Transavia Company (France)', to the exclusion of KLM and its subsidiaries.

59 The present plea thus raises, in essence, the question of the determination of the beneficiary of an aid measure in the context of a group of companies.

60 In that regard, it is apparent from the case-law that several separate legal entities may be considered to form one economic unit for the purposes of the application of the rules on State aid. In that field, the question whether several legally separate entities form an economic unit arises, in particular, where the beneficiary of the aid needs to be identified (see, to that effect, judgments of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraphs 11 and 12, and of 19 May 2021, *Ryanair* v *Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286, paragraph 46 and the case-law cited).

61 Among the factors taken into account by the case-law in order to determine the presence or absence of an economic unit in the field of State aid are, inter alia, the undertaking concerned being part of a group of companies which is directly or indirectly controlled by one of those companies, the pursuit of identical or parallel economic activities, and the companies concerned having no economic autonomy (see, to that effect, judgment of 14 October 2004, *Pollmeier Malchow* v *Commission*, T-137/02, EU:T:2004:304, paragraphs 68 to 70); the formation of a single group controlled by one entity, despite the constitution of new companies each having a separate legal personality (see, to that effect, judgment of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraph 11); the possibility, for an entity having a controlling shareholding in another company, to exercise functions relating to control, direction and financial support in relation to that company which go beyond the simple placing of capital by an investor, and the existence of organic, functional and economic links between that entity and that company (see, to that effect, judgments of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 51, and of 19 May 2021, *Ryanair* v *Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286, paragraph 47); and the existence of relevant contractual clauses (see, to that effect, judgment of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 57).

62 Furthermore, the type of aid measure granted, any commitments made by the Member State concerned and the context in which that measure was granted may, depending on the case, also constitute relevant factors for determining the presence or absence of an economic unit in the field of State aid.

63 Furthermore, the Commission clarified its interpretation of the concept of 'undertaking' in its Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1) ('the Notice on the notion of State aid'). That notice, while not binding on the Court, may nevertheless serve as a useful source of inspiration (see judgment of 6 April 2022, *Mead Johnson Nutrition (Asia Pacific) and Others* v *Commission*, T-508/19, EU:T:2022:217, paragraph 93 and the case-law cited).

64 The Commission recognised in paragraph 11 of the Notice on the notion of State aid that several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. To that end, according to that paragraph, it is necessary to take into consideration the existence of a controlling share and the existence of other functional, economic and organic links.

65 In that context, it has been held that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit or rather as being legally and financially independent units for the purpose of applying the rules governing

State aid. That discretion on the part of the Commission entails the consideration and appraisal of complex economic facts and conditions. Since the EU judicature cannot substitute its own assessment of the facts, especially in the economic field, for that of the originator of the decision, the Court must confine itself to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially correct and that there has been no manifest error of assessment or misuse of powers (see judgment of 8 September 2009, *AceaElectrabel* v *Commission*, T-303/05, not published, EU:T:2009:312, paragraphs 101 and 102 and the case-law cited).

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

67 In addition, the onus is on the Commission to exercise particular vigilance in examining the links between companies belonging to the same group where there are grounds to fear the effects on competition of an accumulation of State aid within the same group (see judgment of 19 May 2021, *Ryanair* v *Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:28, paragraph 48 and the case-law cited).

68 Furthermore, there is a chronological and structural link between the measure forming the subject matter of the Air France decision and the measure at issue. The prospect of converting the shareholder loan, which is the subject of the Air France decision, into equity was already envisaged when that decision was adopted, as is expressly stated in point 11 thereof. Thus, a few months later, the loan authorised by that decision was converted, for the same amount, into a hybrid instrument, which, for its part, is the subject of the contested decision. In point 3 of that decision, the Commission acknowledged that the measure at issue 'followed' the aid measure authorised in the Air France decision.

69 In those particular circumstances, the Air France decision constituted a contextual factor which had to be taken into consideration when examining the measure at issue (see, to that effect and by analogy, judgment of 19 May 2021, *Ryanair v Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286, paragraph 42).

70 In the light of the criteria identified in the above case-law and the arguments of the parties, it is appropriate to examine consecutively the capital, organic, functional and economic links between the Air France-KLM holding, Air France and KLM and their respective subsidiaries, the agreements on the basis of which the measure at issue was granted, as well as the type of aid measure granted and the context of that measure.

– *The capital and organic links between the Air France-KLM holding, Air France and KLM*

71 In the first place, as regards the capital links within the Air France-KLM group, it should be noted, as has been observed in paragraphs 2 and 3 above, that Air France is 100% owned by the Air France-KLM holding and that the latter holds 93.48% of the share capital, 99.7% of the economic rights and 49% of the voting rights in KLM. The other subsidiaries of the Air France-KLM holding referred to in paragraph 2 above are also 100% owned by that holding company.

72 It follows that the Air France-KLM holding holds 'controlling rights' over both Air France and KLM. That fact is, moreover, explicitly stated in point 29 of the Air France decision, in which the Commission stated, on the basis of the same capital links as those referred to in paragraph 71 above, that although Air France and KLM were separate legal entities, each with their own shareholding structure, the Air France-KLM holding held 'controlling rights' over both Air France and KLM.

73 Although that fact is an initial relevant factor in the examination of whether those entities form an economic unit, the case-law on State aid also requires the Court to verify whether the parent company actually exercises control by involving itself directly or indirectly in the management of its subsidiaries and thus takes part in the economic activity carried on by the controlled undertaking (see, to that effect, judgment of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 49 and the case-law cited).

74 In the absence of such an analysis, the simple separation of an undertaking into two different entities, the first of which pursues directly the economic activity at issue and the second of which controls the first, being fully involved in its management, would be sufficient to deprive the rules of EU law relating to State aid of their practical effect. It would enable the second entity to benefit from subsidies or other advantages granted by the State or by means of State resources and to use them in whole or in part for the benefit of the first, in the interest, also, of the economic unit formed by the two entities (see judgment of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 50 and the case-law cited).

75 In the present case, it is apparent from points 27 and 91 of the Air France decision that the Air France-KLM holding has a power of control over Air France and KLM by virtue of the veto rights which it enjoys over their business plans and budgets, on the one hand, and over the remuneration, appointment and dismissal of their managers, including the appointment and dismissal of the members of their boards of directors, on the other. Thus, that holding company must approve decisions concerning, inter alia, the strategic options, budget and investment plan of the 'Air France-KLM group, including KLM' before they are adopted or implemented.

76 It is also apparent from point 91 of the Air France decision that the Air France-KLM holding has the right to approve any financing transactions in excess of EUR 150 million carried out by its subsidiaries.

77 In the second place, as regards the organic links between the Air France-KLM holding, Air France and KLM, the applicants refer in particular to the 2019 Universal Registration Document for that holding company filed with the Autorité des marchés financiers (Financial Markets Authority, France) pursuant to Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ 2017 L 168, p. 12) ('the 2019 Universal Registration Document'), which was the subject of discussion at the hearing. In accordance with Articles 9 and 21 of Regulation 2017/1129, the universal registration document is a document made available to the public describing the organisation, business, financial position, earnings and prospects, governance and shareholding structure of the issuer in question.

78 It is apparent from the 2019 Universal Registration Document that there are, at the Air France-KLM group level, a number of mixed bodies, composed of high-level representatives of the Air France-KLM holding, Air France and KLM, responsible for monitoring and coordinating certain important decisions to be taken within that group.

79 For example, within the Air France-KLM group, all investments of more than EUR 5 million, together with operations relating to the fleet, as well as shareholding and divestment operations, are subject to approval by a 'Group Executive Committee', composed, inter alia, of the managing directors of the Air France-KLM holding, Air France and KLM, as that holding company confirmed at the hearing.

80 In addition, according to the 2019 Universal Registration Document, while investments are managed at the level of each company in the Air France-KLM group, the decision-making process is coordinated by a 'Group Investment Committee (GIC)', composed of the executive vice president of the Air France-KLM holding with responsibility for economic and financial affairs, the executive vice president of Air France with responsibility for economic and financial affairs, and the Chief Financial Officer of KLM.

81 Similarly, it is apparent from the 2019 Universal Registration Document that the management of market risk within the Air France-KLM group is overseen by a Risk Management Committee, which is also made up of senior managers from the Air France-KLM holding, Air France and KLM, and decides on and monitors the group's financial risks and determines which safeguards need to be put in place.

82 It is also apparent that the decisions taken by those mixed bodies at the level of the Air France-KLM group are then implemented by each entity in the group.

83 It follows that the capital and organic links within the Air France-KLM group indicate that the Air France-KLM holding actually exercises control by involving itself directly or indirectly in the management of Air France and KLM and thus takes part in the economic activity carried on by them. It also follows that there is, at the level of that group, a centralised decision-making procedure and a certain degree of coordination, carried out through joint bodies bringing together high-level representatives of the Air France-KLM holding, Air France and KLM, at least as regards the way in which certain important decisions are taken.

84 The capital and organic links within the Air France-KLM group are thus, as the applicants claim, an initial factor indicating that the separate legal entities within that group form a single economic unit for the purposes of the application of the rules on State aid.

– *The functional links between the Air France-KLM holding, Air France and KLM*

85 In the first place, the Commission noted in point 37 of the contested decision that the Air France-KLM holding was not active in the air transport market, but that it coordinated the activities of its subsidiaries and provided them with financial services. In addition, it stated that that holding company employed its own employees and 'relied' on employees seconded to it by Air France and KLM. In addition, as has been recalled in paragraph 75 above, the Air France-KLM holding had veto rights over the remuneration, appointment and dismissal of KLM's and Air France's managers. It follows that there is some degree of integration between the employees of that holding company and its subsidiaries and that the same holding company is involved in the most important decisions concerning the managers of its subsidiaries.

86 In the second place, the Commission found that Air France and the Air France-KLM holding had 'commercial and financial relationships with the other strategic subsidiary of the Holding, KLM', and that there was 'some degree of integration' between that holding company, Air France and KLM, relating in particular to 'mutualisation of costs, strategic alignments and access to finance' (see, in particular, point 113(c) of the contested decision).

87 In point 38 of the Air France decision, the Commission found that Air France and KLM, under the aegis of the Air France-KLM holding, coordinated their activities in the 'area of sales and price and revenue management on the basis of the strategy determined at the level of [the Air France-KLM holding]', with the assistance of Air France and KLM employees seconded to that holding company for that purpose.

88 It follows that, while it is true that the Air France-KLM holding does not itself provide air transport services, the fact remains that it plays a strategic role in the provision of those services, in particular in the area of sales and price and revenue management, and that it is also involved in decisions taken regarding operations relating to the fleet (see paragraph 79 above), which confirms that there is a degree of integration between the Air France-KLM holding, Air France and KLM.

89 The existence of a degree of functional coordination within the Air France-KLM group is, moreover, illustrated by the example of 'Transavia', raised by the applicants. As is apparent from the Commission's responses to the questions put in the context of a measure of organisation of procedure, within that group there are several companies containing the name 'Transavia', some of which are active on the market for passenger air transport services. This includes Transavia France SAS and Transavia Airlines CV, referred to in the contested decision as 'Transavia France' and 'Transavia Netherlands' respectively. 'Transavia France' and 'Transavia Netherlands' are subsidiaries of Air France and KLM respectively. The Commission has stated in that regard that, although those two companies have their own licences, certificates, traffic rights, slots, assets, staff and management, they appear on the market under the same Transavia brand and share the same website, which the Air France-KLM holding confirmed at the hearing.

90 Furthermore, the Commission does not dispute the fact noted in an article of 12 July 2021, submitted by the applicants, that the 'Air France-KLM group' had entered into negotiations with Boeing Co. and Airbus SE with a view to ordering aircraft for 'Transavia France, Transavia Netherlands and KLM'. Furthermore, as has been noted in paragraph 58 above, 'Transavia Company (France)' was, according to the contested decision, among the beneficiaries of the measure at issue. According to the Commission's responses to the questions put in the context of a measure of organisation of procedure, the economic activity of that company consisted of the leasing of two aircraft, which were then sub-leased to Transavia Netherlands, although Transavia Netherlands was not regarded as a beneficiary of that measure. Those examples thus demonstrate a degree of integration and functional and commercial cooperation between two subsidiaries of Air France and KLM.

91 In the third place, the Air France-KLM holding also performs financial functions as required by its subsidiaries. It is apparent from point 20(c) of the contested decision that one of the sources of financing for the beneficiaries before the COVID-19 pandemic included non-guaranteed medium- and long-term financing obtained on the financial markets 'mostly at [the Air France-KLM holding] level', for example in the form of public or private fixed-income securities or equity capital.

92 Similarly, as has been noted in paragraph 86 above, in point 113(c) of the contested decision, the Commission stated that there was some degree of integration between the Air France-KLM holding, Air France and KLM as regards 'access to finance'. It should be added, as the applicants have done and as is apparent from paragraphs 79 to 81 above, that the Air France-KLM holding is involved in the coordination and approval of significant investments by its subsidiaries, in shareholding and divestment operations, and in the management of financial risks and the safeguards that need to be put in place, which are subject to continuous and ongoing monitoring at the level of the Air France-KLM group.

93 The financial role assumed by the Air France-KLM holding is illustrated, in the present case, by the fact, recalled in paragraph 76 above, that it has a right of approval in respect of financing transactions of its subsidiaries which exceed EUR 150 million and that, consequently, it had to approve the measure at issue.

94 This is further supported by the findings in points 32 to 34 and 91 of the Air France decision, which show that the Air France-KLM holding performs financial functions as required by Air France and KLM. First, it provides, inter alia, budgetary instructions to its subsidiaries. Secondly, it may, 'occasionally' in the words of that decision, raise capital on the financial (debt or equity) markets for the benefit of its subsidiaries depending on their individual requirements. As regards the issue of shares or instruments giving access to capital, those operations are also carried out at the level of that holding company, whereas debts within the Air France-KLM group are 'mainly' incurred directly by Air France and KLM.

95 In addition, it is apparent from the information in the 2019 Universal Registration Document that the Air France-KLM holding carried out a series of bond issues for significant amounts, that 'financial strategy is decided by [the Air France-KLM group] in coordination with [Air France] and [KLM]', that that holding company was the 'main' issuer of the bonds, and that that group envisaged 'systematic use of financing on the markets [through] Air France-KLM'.

96 Lastly, it is apparent from point 113(b) of the contested decision that the financial situation of the Air France-KLM holding, which has no independent commercial activity, largely depends on the financial situation of its subsidiaries Air France and KLM. According to the same point of the contested decision, the aid measure which is the subject of the Air France decision had the effect of making the financial situation of the Air France-KLM holding more dependent on that of Air France. In practice, the measure resulted in a debt of EUR 7 billion owed by the Air France-KLM holding to the French Republic and, at the same time, in a claim for a similar amount held by that holding company against its subsidiary Air France. Thus, according to the Commission's findings, in the event of Air France's insolvency, the Air France-KLM holding's equity would not be sufficient to cover losses of that magnitude. By ensuring the viability of Air France, that measure ultimately ensured the viability of the Air France-KLM holding.

97 Accordingly, the functional links between the Air France-KLM holding, Air France and KLM constitute a further factor indicating that those entities form a single economic unit for the purposes of the application of the rules on State aid.

– *The economic links between the Air France-KLM holding, Air France and KLM*

98 In point 43 of the contested decision, the Commission refers to the existence of commercial relationships between Air France (and its subsidiaries) and KLM (and its subsidiaries) involving financial flows consisting, in particular, in the provision of services or the sale of products by Air

France to KLM, or vice versa. It is also apparent from that point that those companies have entered into cost-sharing agreements and that they carry out activities collectively. The contested decision does not specify the nature of those activities or of the services provided by Air France to KLM or vice versa, or indeed the purpose of those cost-sharing agreements. Nevertheless, the existence of such cost-sharing agreements between Air France and KLM and of activities carried out collectively confirms the existence of a degree of integration and economic cooperation between them.

99 That finding is supported, as the applicants claim, by the fact that the Air France-KLM holding generates its revenues entirely internally from its subsidiaries, by means of management fees (which cover the holding company's management costs), trade mark royalties and certain redistribution mechanisms (point 37 of the contested decision). This shows that there is some economic interdependence between the holding company and its subsidiaries. This is confirmed in particular by the fact that Air France and KLM are trying to achieve synergies by coordinating their respective activities under the aegis of the Air France-KLM holding, in particular in the area of sales and price and revenue management (see paragraph 88 above), and that the Air France-KLM holding is involved in the financing of its subsidiaries in a coordinated manner (see paragraphs 91 to 95 above).

100 Similarly, as is apparent from paragraphs 91 to 95 above, the Air France-KLM holding acts on the financial markets in the interest of its subsidiaries by raising funds on those markets to meet the needs of those subsidiaries. That fact shows that the holding company negotiates the terms of financing on the financial markets on the basis of the financial position of the Air France-KLM group as a whole. It is therefore by virtue of the Air France-KLM holding that synergies are achieved within the Air France-KLM group.

101 However, the Commission considered that the financial and commercial relations between the Air France-KLM holding and its subsidiaries Air France and KLM, as well as between those subsidiaries themselves, were conducted under 'normal market conditions', which would prevent the risk of the advantage derived from the measure at issue being transferred to KLM (points 42, 43 and 44 of the contested decision, as well as the second indent of point 113(c) thereof).

102 In that regard, in particular, the Commission explained, in essence, that Air France and KLM remained taxable in France and the Netherlands respectively, that French and Netherlands tax legislation provided that all intra-group transactions had to be conducted in accordance with the arm's length principle and that any deviation from that principle could give rise to 'tax optimisation' contrary to the national legislation referred to above (point 42(a) of the contested decision). While those factors certainly appear to be relevant for the purpose of taxing those companies at Member State level, they are not, however, sufficient to demonstrate that the Air France-KLM holding, Air France and KLM have economic autonomy within the Air France-KLM group, having regard to the factors set out in paragraphs 98 to 100 above.

103 Moreover, it should be recalled that the grant of the measure at issue was justified in particular by the fact that it was impossible for the Air France-KLM holding and Air France to obtain financing on the debt and capital markets under acceptable financial conditions and within the time necessary to avoid insolvency proceedings (points 16 and 19 of the contested decision). In those circumstances, the advantage of that measure is precisely the provision of significant amounts of liquidity which would not have been available under market conditions. Thus, such a measure would have the effect of strengthening the financial position of the Air France-KLM group as a

whole, inasmuch as it avoids the risk of default by the holding company and by one of its main subsidiaries, namely Air France, and thus reassures investors and the creditors of the companies in that group, it being specified, moreover, that the hybrid instrument took the form of a deeply subordinated instrument of a perpetual nature, which was senior, in the event of insolvency, only to subscribed capital and capital reserves (point 59 of that decision). Secondly, in view of the financial role of the Air France-KLM holding within that group, that holding company could – where appropriate and in the interest of and to meet the needs of its subsidiaries – obtain financing on the market which, in the absence of the aid, would have been inaccessible to it or would have been accessible only on less favourable terms.

104 Moreover, in the absence of the measure at issue, Air France would not have been able to continue its activities and, therefore, would also have jeopardised the continuation of the activities carried out collectively with KLM (see paragraphs 86, 89 and 98 above). Therefore, by allowing Air France's activities to continue, that measure also implicitly but necessarily allows the activities carried out collectively by Air France and KLM to continue.

105 The Commission also noted in point 42(b) of the contested decision that the 'governance structures within the Air France-KLM group' have the effect of incentivising the management of Air France and KLM to negotiate the terms of the contracts concluded between them in the best interests of each of them. It stated that those two subsidiaries are managed 'autonomously' by separate management teams.

106 However, that statement needs to be qualified by the evidence set out in paragraphs 75 to 83 and 85 above, from which it is apparent that the Air France-KLM holding has a right of veto over the remuneration, appointment and dismissal of the managers of its subsidiaries, that mixed bodies within the Air France-KLM group are responsible for the control and coordination of certain important decisions concerning its subsidiaries, and that the Air France-KLM holding relies on employees of Air France and KLM seconded to it.

107 Accordingly, the economic links between the Air France-KLM holding, Air France and KLM constitute a third factor indicating that those entities form a single economic unit for the purposes of the application of the rules on State aid.

– The contractual instruments on the basis of which the measure at issue was granted and the commitments made by the French Republic

108 In points 39, 40, 44 to 46 and 113(c) of the contested decision, the Commission considered, in essence, that the contractual framework on the basis of which the measure at issue was granted, together with the commitments entered into by the French Republic, ensured that KLM and its subsidiaries were not beneficiaries of that measure.

109 The applicants claim that those factors are not capable of demonstrating that KLM and its subsidiaries could not benefit from the measure at issue. First, they submit that, although the Commission relies on the contractual framework on the basis of which that measure was granted, the objective of which was to channel that measure from the Air France-KLM holding to Air France, it does not explain which clauses would ensure that that holding company does not derive part of the benefit and that such a measure does not benefit KLM and its subsidiaries, unlike other subsidiaries of that holding company. Secondly, they maintain, as regards the market conditions for relations between Air France and KLM, that the Commission failed to examine the relations between those two companies, on the one hand, and that holding company, on the other,

which was essential in order to ascertain whether the same measure confers an indirect advantage on KLM. Thirdly, they claim that the commitments given by the French Republic are inadequate and ineffective.

110 The Commission contends that the contractual framework on the basis of which the measure at issue was granted ensured that KLM's equity position remained unchanged. In its view, KLM's financial situation did not depend either on the financial situation of Air France or on that of the Air France-KLM holding. In addition, it argues that the commitments in question, which it monitors on an ongoing basis, prevent KLM from benefiting from any subsequent improvement in the financial situation of that holding company, in so far as those commitments provide that all relations between KLM and Air France and between KLM and the holding company must be carried out under market conditions. Moreover, even if the advantages alleged by the applicants were proved, they would constitute only secondary economic effects of the aid and not an indirect advantage for KLM and its subsidiaries.

111 In the first place, as regards the contractual framework on the basis of which the measure at issue was granted, it is apparent from points 26 and 39 to 41 of the contested decision that that measure had to be granted 'formally' to the Air France-KLM holding on the basis of a contract between the holding company and the French Republic, then 'channelled' to Air France through 'mirror' instruments ('the mirror instruments'), the objective of which was to ensure that the financial and economic advantage of that measure was entirely channelled to Air France and that KLM (and its subsidiaries) would not benefit from it. Thus, the shareholder loan authorised by the Air France decision would be converted into a hybrid instrument equivalent to an equity position of the Air France-KLM holding, then the 'intra-group' loan which, according to the Air France decision, was intended to channel the shareholder loan processes and which had been the subject of a mirror agreement between that holding company and Air France would in turn be converted into a hybrid instrument equivalent to an equity position of Air France.

112 As regards the equity participation, the Commission found, in point 41 of the contested decision, that the equity in question would first be injected by the French Republic into the Air France-KLM holding on the basis of Article 102 of Finance Law No 2020-1721 of 29 December 2020 for 2021 (JORF of 30 December 2020, text No 1) and a decision of the Ministry of the Economy and Finance under Article 24 of Order No 2014-948 of 20 August 2014 on governance and the capital transactions of publicly owned companies (JORF of 23 August 2014, text No 22). That equity injection would then be 'reflected' by a corresponding equity injection from the Air France-KLM holding to Air France.

113 It follows that the agreement relating to the hybrid instrument was concluded between the French Republic, on the one hand, and the Air France-KLM holding, on the other. Thus, only that holding company assumed contractual rights and obligations vis-à-vis the French Republic. Therefore, contractual liability towards the French Republic lies with the Air France-KLM holding.

114 Similarly, the equity participation was first to be injected into the Air France-KLM holding.

115 As has been pointed out in paragraph 96 above, the Commission acknowledges that, as a result of the measure at issue, the equity of the Air France-KLM holding is increased, that its financial situation depends principally on that of its subsidiaries and that, by ensuring Air France's viability, that measure also ensures the viability of that holding company.

116 As is argued by the applicants, that reasoning also applies to KLM *mutatis mutandis*. The improvement of the financial position of the Air France-KLM holding following the recapitalisation of that holding company and the increase of its equity has the effect of reducing, or even excluding, the risk of its default and, by extension, the default of its subsidiaries Air France and KLM and of the Air France-KLM group as a whole. In the absence of the measure at issue, the risk of default of the Air France-KLM holding, identified in the contested decision, could have spread to the Air France-KLM group as a whole, including KLM and its subsidiaries.

117 The Commission attempts to put that risk into perspective by explaining, in footnote 63 to the contested decision, in essence, that the bankruptcy of Air France and the Air France-KLM holding would not 'necessarily' lead to KLM's bankruptcy, as KLM has 'limited exposure' to Air France and that holding company. However, the very wording of that statement does not rule out the possibility that the risk could have spread as such. In addition, in the light of the capital, organic, functional and economic links between KLM and the rest of the Air France-KLM group, referred to in paragraphs 71 to 107 above, the repercussions on KLM of any bankruptcy of that holding company, which the measure at issue seeks to avoid, cannot be underestimated.

118 That conclusion is not called into question by the existence of the mirror instruments referred to in paragraphs 111 and 112 above. First of all, it must be pointed out that the Commission does not refer, in the contested decision, to any specific contractual clause intended to ensure that the measure at issue does not benefit KLM or its subsidiaries, at least indirectly.

119 Next, given the coordinated and centralised management of significant investments, fleet operations and financial risk management at the level of the Air France-KLM group (see paragraphs 78 to 81 above), the measure at issue is also capable of strengthening, at least indirectly, KLM's financial position.

120 Lastly, given that the Air France-KLM holding would ensure its viability through the measure at issue, that measure would therefore enable it to strengthen its ability to raise funds on the financial markets to meet the needs of its subsidiaries, including KLM, as the applicants rightly claim.

121 The effects of the measure at issue described in paragraphs 115 to 120 above are not affected by the mirror instruments.

122 In the second place, as regards the commitments entered into by the French Republic, it should be noted that they consist in (i) the commitment that, in essence, the commercial and financial relations between Air France (and its subsidiaries), KLM (and its subsidiaries) and the Air France-KLM holding (and its other subsidiaries) would be conducted under normal market conditions and (ii) the commitment that the French Republic would recover any part of the measure at issue should it be transferred directly or indirectly to KLM or its subsidiaries, including interest. Compliance with those commitments was to be monitored by a monitoring trustee approved by the Commission and remunerated by Air France and that holding company (points 44 to 46, 48 and 113 of the contested decision).

123 As regards the first commitment, reference should be made to paragraphs 102 to 104 above. Moreover, the mere fact that intra-group transactions are conducted under normal market conditions in accordance with the arm's length principle, assuming that it is established, in no way detracts from the finding that, as a result of the measure at issue, the Air France-KLM holding would be in a stronger financial position enabling it, in particular, to obtain on the

financial markets the financing required by its subsidiaries or to carry out operations relating to the fleet as required by, and in the interests of, its subsidiaries, on better terms than those which would have prevailed in the absence of that measure, which would also be likely to strengthen, at least indirectly, the position of KLM.

124 As regards the second commitment, it should be noted that, by that commitment, the French Republic and the Commission accept, in reality, that it cannot be ruled out that the advantage of the measure at issue may be transferred, directly or indirectly, to KLM and its subsidiaries. If, as the Commission argues, KLM and its subsidiaries could in no way be regarded as having benefited, even indirectly, from that measure, there would have been no need to consider a possible recovery of part of the aid from them.

125 In the light of the foregoing, it must be concluded that the abovementioned commitments are not sufficient to ensure that the beneficiaries of the measure at issue would be Air France and its subsidiaries, as well as the Air France-KLM holding and its subsidiaries, with the sole exception of KLM and its subsidiaries.

126 That conclusion is not called into question by the Commission's argument that the case-law has accepted that the beneficiary of State aid may be only one of the companies forming part of a group, where there are, inter alia, allocation clauses which give one of the companies in that group the benefit of that aid, to the exclusion of the other companies in that group.

127 In that regard, as has been noted in paragraphs 61 and 62 above, a number of factors must, depending on the case, be examined in order to determine whether separate legal entities may be regarded as forming a single economic unit for the purposes of the application of the rules on State aid, such as the capital, organic, functional and economic links between those entities, and the contracts on the basis of which the aid measure was granted, as well as the type of aid measure granted and the context in which it was granted. It is therefore a global assessment of several factors specific to each individual case. As regards, in particular, the agreements on the basis of which the aid measure was granted, the assessment of those agreements clearly depends on their actual content. Thus, the fact that the Courts of the European Union have – or have not – concluded in a given case, on the basis of concrete evidence specific to that case, that the beneficiary of a given aid measure was a single entity belonging to a group of companies, to the exclusion of the other entities in that same group, cannot support a general conclusion one way or the other.

128 In any event, the particular circumstances of the cases which gave rise to the judgments cited by the Commission are not comparable to those giving rise to the present case.

129 First, in the judgment of 3 July 2003, *Belgium* v *Commission* (C-457/00, EU:C:2003:387), the Court of Justice stated, in paragraphs 56 and 57, that, in order to determine the beneficiary of an aid measure, it was necessary to take into account, inter alia, the existence and wording of allocation clauses and that it was possible that such an analysis would lead to the conclusion that the beneficiary of the aid was someone other than the borrower of the loan at issue. Thus, in accordance with that judgment, the outcome of that analysis depends on the existence and precise content of the relevant contractual clauses. In the present case, as is apparent from paragraphs 111 to 125 above, it is precisely on the basis of the examination of the contractual framework and of the ring-fencing commitments entered into by the French Republic, among other factors, that the General Court considers that it was not possible to exclude KLM and the

subsidiaries controlled by that company from benefiting, at least indirectly, from the measure at issue. In addition, unlike the circumstances that gave rise to that judgment, the Air France-KLM holding was regarded in the present case as one of the beneficiaries of the measure at issue.

130 Secondly, there are several important factual differences between the present case and the cases which gave rise to the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140). The organic, functional and economic links between the entities of the Air France-KLM group identified in the present case are not comparable to those between the companies concerned in the abovementioned judgment. For example, in the present case, the Air France-KLM holding has maintained all its strategic prerogatives with regard to financing, investment and fleet operations, which was not true for the holding company in the abovementioned cases.

131 Thirdly, the cases that gave rise to the judgment of 11 May 2005, *Saxonia Edelmetalle and ZEMAG* v *Commission* (T-111/01 and T-133/01, EU:T:2005:166), concerned a very different situation from that at issue in the present case. They concerned the obligation to recover aid from certain subsidiaries of a group which had been designated as the initial beneficiaries of that aid. In that regard, it was held, in paragraphs 125 and 126 of that judgment, that, having regard to the circumstances of those cases, the Commission was not entitled to impose automatically the obligation to repay the disputed aid on those subsidiaries, in the absence of proof that they had actually received it, on the sole ground that they were designated as the initial beneficiaries of the aid at issue. That situation is not relevant to the present case. Thus, no useful conclusion can be drawn from it for the resolution of the present dispute.

132 Accordingly, the contractual framework on the basis of which the measure at issue was granted and the commitments made by the French Republic do not allow the conclusion that the Air France-KLM holding, Air France and KLM do not form a single economic unit for the purposes of the application of the rules on State aid.

– *The type of aid measure granted and the context in which it was granted*

133 As regards the type of aid measure granted and the context in which it was granted, it should be noted that the applicants are criticising the fact that the Commission did not examine the cumulative effects of the aid covered by the Air France decision, the KLM decision and the contested decision.

134 It should be noted in that regard, as the applicants have done, that the Commission did not explain why it defined the beneficiaries of the measure at issue differently from how it did in the Air France decision, which was a contextual factor that needed to be taken into account when examining the measure at issue (see paragraphs 68 and 69 above), even though the two aid measures are chronologically, structurally and economically linked and the financing in question came in part, in both cases, from the shareholder loan, albeit in different forms.

135 In that regard, the Commission has explained before the Court that the form of the intervention by the State, namely (i) aid in the form of a loan (a State-guaranteed loan and a shareholder loan) in the Air France decision and (ii) a recapitalisation measure in the contested decision, was different. However, that difference in form cannot in itself justify the diverging conclusions reached by the Commission, as regards the determination of the beneficiary of the aid, in the Air France decision and in the contested decision. A shareholder loan converted, a few months later, into a recapitalisation instrument of the same amount, produces overall a similar economic effect

on the competitive position of the beneficiary. Accordingly, with regard to capital instruments in particular, it is clear from the Temporary Framework that such instruments must be designed in such a way as to ensure the exit of the State from the undertaking in question as soon as possible. Thus, for example, equity instruments must include a step-up mechanism aimed at increasing the remuneration of the State over time and thus incentivising the beneficiary to buy back the State's shareholding as soon as possible (paragraphs 61 and 62 of the Temporary Framework). Similarly, hybrid instruments must provide for an increase in the remuneration of the State over time (paragraph 66 of the Temporary Framework) and, after their conversion into equity, a step-up mechanism (paragraph 68 of the Temporary Framework). It follows that, like a loan, a recapitalisation measure must also, in principle, be repaid. Although different in their form, the aid measures covered by the Air France decision and those covered by the contested decision thus remain closely linked in chronological, structural and economic terms. Moreover, in the contested decision, the Commission did not even mention the KLM decision.

136 Accordingly, in the particular circumstances of the present case, and in the light of the case-law cited in paragraph 67 above, it was for the Commission to take into account, for the purpose of determining the beneficiaries of the measure at issue, the type of aid measure granted and the context in which it was granted.

– The difference between a direct or indirect advantage, on the one hand, and mere secondary economic effects, on the other

137 The Commission argues that the measure at issue has, at most, only 'mere secondary economic effects' in respect of KLM and its subsidiaries, which are inherent in any State aid but which cannot be classified as a direct or indirect advantage for them.

138 The applicants counter that the Commission has not demonstrated to the requisite legal standard that KLM would obtain no advantage from the measure at issue, beyond mere secondary effects. In their view, the increase in the equity of the Air France-KLM holding provided for in the context of a shareholding acquisition by the French Republic could procure an advantage for KLM by means of the following mechanisms: (i) funds raised by the holding company Air France-KLM from private investors could be used for purposes other than financing Air France; (ii) by improving the financing conditions for the holding company Air France-KLM, which would, in particular, make it possible for intra-group loans to be granted, and (iii) by reducing the credit default risk of the holding company Air France-KLM, which would enable KLM to raise more debt at lower cost on the capital markets. Thus, the possibility of transferring the benefit resulting from the measure at issue goes far beyond the concept of 'secondary economic effects' which are inherent in almost all aid measures and is instead covered by the concept of an 'indirect advantage' of such a measure.

139 In that regard, it is necessary to distinguish the concept of an 'indirect advantage' from that of 'secondary effects inherent in any aid measure'.

140 According to the case-law, an undertaking receiving an indirect advantage must be regarded as a beneficiary of the aid. An advantage directly granted to certain natural or legal persons may constitute an indirect advantage and, therefore, State aid for other legal persons that are undertakings (see, to that effect, judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 26, and of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 60 to 66).

141 Moreover, according to paragraph 115 of the Notice on the notion of State aid, a 'measure can also constitute both a direct advantage to the recipient undertaking and an indirect advantage to other undertakings, for instance, undertakings operating at subsequent levels of activity'. Footnote 179 to that notice states that, in case an intermediary undertaking is a mere vehicle for transferring the advantage to the beneficiary and it does not retain any advantage, it should not normally be considered as a recipient of State aid.

142 Paragraph 116 of the Notice on the notion of State aid further states that indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures. For that purpose, according to that paragraph, the foreseeable effects of the measure should be examined from an *ex ante* point of view. Thus, an indirect advantage is present if the measure is designed in such a way as to channel its secondary effects 'towards identifiable undertakings or groups of undertakings'. Footnote 181 to that notice explains that, by contrast, a mere secondary economic effect in the form of increased output, which does not amount to indirect aid, can be found where the aid is simply channelled through an undertaking, for example a financial intermediary, which passes it on in full to the aid beneficiary.

143 In the present case, it is apparent from the analysis set out in paragraphs 108 to 132 above that the role of the Air France-KLM holding is not limited to that of a 'mere vehicle for transferring the advantage to the beneficiary' or to a 'financial intermediary' for the purposes of paragraphs 115 and 116 of the Notice on the notion of State aid. That holding company is itself, according to the contested decision, a beneficiary of the measure at issue. Accordingly, the foreseeable effects of that measure from an *ex ante* perspective suggest, in view of the type of aid measure granted, consisting, in essence, of a financing solution, that that financing solution was likely to benefit the Air France-KLM group as a whole, by improving its overall financial position, which indicates the existence, at the very least, of an indirect advantage in favour of '[an] identifiable [group] of undertakings' for the purposes of paragraph 116 of that notice.

144 That finding is not called into question by the order of 21 January 2016, *Alcoa Trasformazioni* v *Commission* (C-604/14 P, not published, EU:C:2016:54), cited by the Commission in support of its argument that, when calculating the amount of aid, it does not examine the secondary effects of the aid on consumers, suppliers, investors or employees of the beneficiary. First, as the applicants submit, the case which gave rise to that order did not concern an intra-group situation. Secondly, as has been pointed out in paragraph 143 above, the present case does not concern the secondary economic effects of an aid measure on consumers, suppliers, investors or employees.

145 The Commission and the French Republic also refer to the judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990), arguing, in essence, that, according to that judgment, the secondary effects of an aid measure should not be taken into consideration when assessing the compatibility of aid with the internal market. The cases that gave rise to that judgment concerned an aid scheme in the form of a reduced rate of a national tax on air transport which was declared incompatible with the internal market. The question that arose was, inter alia, how much of the advantage should be recovered from the beneficiaries of the aid, which were airlines. The airlines maintained, in essence, that the advantage in question had been passed on to passengers, in the form of reduced air ticket prices. It was in that context that the Court of Justice held that the recovery of the disputed aid entailed the restitution of the advantage conferred on the airlines, and not of any economic benefit which they might have enjoyed by exploiting that advantage (paragraphs 100 and 102). Unlike those cases, the present case does not concern the determination of the amount

of the advantage to be recovered in the context of aid declared incompatible with the internal market, but the *ex ante* identification of the beneficiaries of an aid measure in order to examine the compatibility of that measure with the internal market. Moreover, and in any event, the present case does not involve the economic repercussions of the measure at issue on the price of airline tickets.

146 Accordingly, the Commission's argument that the measure at issue has, at most, merely secondary economic effects vis-à-vis KLM and its subsidiaries must be rejected.

Conclusion

147 In the light of all of the foregoing, it must be held that the Commission committed a manifest error of assessment by considering that the beneficiaries of the measure at issue were Air France and its subsidiaries and the Air France-KLM holding and its other subsidiaries, with the sole exception of KLM and its subsidiaries, and, consequently, the first plea in law must be upheld.

148 Article 107(3)(b) TFEU requires not only that the Member State concerned is indeed faced with a serious disturbance in its economy, but also that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, secondly, appropriate and proportionate for achieving that objective. That same requirement is also apparent from paragraph 19 of the Temporary Framework (judgment of 19 May 2021, *Ryanair* v *Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286, paragraph 74).

149 In addition, and more specifically, the application of several conditions arising from the Temporary Framework depends on the definition of the beneficiary of the measure at issue, such as those laid down in paragraph 49 of the Temporary Framework, according to which a recapitalisation measure must satisfy certain conditions relating to the situation of the beneficiary, in paragraph 53 of the Temporary Framework, according to which the Member State must ensure that the recapitalisation instruments chosen and the conditions attached to them are the most appropriate to meet the beneficiary's recapitalisation needs, while distorting competition as little as possible, or in paragraph 54 of the Temporary Framework, according to which the amount of recapitalisations amid the COVID-19 pandemic must not exceed the minimum necessary to ensure the viability of the beneficiary concerned and should be limited to restoring the capital structure of that beneficiary prior to the COVID-19 outbreak.

150 Thus, the examination of the necessity and proportionality of the aid, in general, and of compliance with the conditions cited by way of example in paragraph 149 above, in particular, presupposes that the beneficiary of the aid has been identified beforehand. The incorrect or incomplete identification of the beneficiary of an aid measure is likely to have an impact on the entire analysis of the compatibility of that measure with the internal market.

151 The contested decision must therefore be annulled, without there being any need to examine the other pleas raised in the action.

152 Lastly, as regards the possibility for Member States to grant State aid to companies belonging to a group of companies active in a number of Member States, it should be noted, for all practical purposes, that the Member States and the EU institutions are bound by reciprocal duties of sincere cooperation, in accordance with Article 4(3) TEU. The Commission and the Member States must therefore work together in good faith with a view to ensuring full compliance with the provisions of the FEU Treaty, in particular the provisions on State aid (see, to that effect,

judgment of 22 December 2010, *Commission* v *Slovakia*, C-507/08, EU:C:2010:802, paragraph 44 and the case-law cited). That duty of sincere cooperation and of coordination is all the more necessary where different Member States intend to grant aid simultaneously to entities belonging to the same group of companies which operates in a coordinated manner in the internal market in order to derive full benefit therefrom.

Costs

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

154 Under Article 138(1) and (3) of the Rules of Procedure, the interveners must bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID-19 – Recapitalisation of Air France and the Air France-KLM Holding;**

2. **Orders the European Commission to bear its own costs and to pay those of Ryanair DAC and Malta Air ltd.;**

3. **Orders the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, Air France-KLM and Société Air France to bear their own costs.**

Van der Woude Kornezov De Baere

Petrlík Kingston

Delivered in open court in Luxembourg on 20 December 2023.

V. Di Bucci M. van der Woude
Registrar President