



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

8 May 2024*

(State aid – German air transport market – Restructuring aid granted by Germany to an airline – Changes to the terms of loans granted by Germany and the partial write-off of debts – Decision not to raise any objections – Action for annulment – *Locus standi* – Admissibility – Safeguarding of procedural rights – Serious difficulties – Article 107(3)(c) TFEU – Point 67 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Burden sharing)

In Case T-28/22,

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

applicant,

v

European Commission, represented by I. Barcew, V. Bottka and J. Ringborg, acting as Agents,

defendant,

supported by

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

and by

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

interveners,

THE GENERAL COURT (Eighth Chamber),

composed of A. Kornezov (Rapporteur), President, G. De Baere and K. Kecsmár, Judges,

Registrar: S. Spyropoulos, Administrator,

* Language of the case: English.

having regard to the written part of the procedure,

further to the hearing on 22 September 2023,

gives the following

Judgment¹

- 1 By its action under Article 263 TFEU, the applicant, Ryanair DAC, seeks annulment of Commission Decision C(2021) 5729 final of 26 July 2021 on State aid SA. 63203 (2021/N) – Germany – Restructuring aid for Condor (‘the contested decision’).

Background to the dispute

...

- 10 Lastly, by the contested decision, the Commission, on the basis of Article 107(3)(c) TFEU and the R&R Guidelines, approved an aid measure to support the restructuring and continuation of Condor’s operations (‘the measure at issue’), which comprises two parts. The first part consists in a modification to the terms of the COVID-19 loans of 2020 and a partial write-off of EUR 90 million of debt resulting from those loans. The second part involves the write-off of EUR 20.2 million of debt corresponding to the interest payable by Condor following the amended decision on the COVID-19 aid of 2020.

Forms of order sought

- 11 The applicant claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 12 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 13 The Federal Republic of Germany and Condor contend that the Court should dismiss the action and order the applicant to pay the costs.

Law

...

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Substance

...

The sixth item of evidence, to the effect that the Commission did not establish the proportionality of the measure at issue

...

- 202 In the second place, the applicant submits that the Commission infringed point 67 of the R&R Guidelines in that it did not examine in the contested decision whether the measure at issue provided for terms that afforded the State a reasonable share of future gains in the value of Condor. It states that the Commission should have carried out such an assessment because the measure at issue improved Condor's financial position in terms of its equity, for the purposes of that point.
- 203 The Commission submits, in essence, that it was not required to examine in the contested decision whether the Federal Republic of Germany benefited from a reasonable share of future gains in the value of Condor, for the purposes of point 67 of the R&R Guidelines, since, in its view, that requirement applies only where, first, the measure at issue constitutes a capital injection and, second, the Member State concerned has a shareholding in the beneficiary's capital, which is not the case here.
- 204 It is apparent from point 65 of the R&R Guidelines that where State support is given in a form that enhances the beneficiary's equity position, for example where the State provides grants, injects capital or writes off debt, that can have the effect of protecting shareholders and subordinated creditors from the consequences of their choice to invest in the beneficiary; that can create moral hazard and undermine market discipline. Consequently, aid to cover losses should only be granted on terms which involve adequate burden sharing by existing investors.
- 205 In accordance with point 66 of the R&R Guidelines, adequate burden sharing normally means that incumbent shareholders and, where necessary, subordinated creditors must absorb losses in full. Subordinated creditors should contribute to the absorption of losses either via conversion into equity or write-down of the principal of the relevant instruments. Therefore, State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders.
- 206 Under point 67 of the R&R Guidelines, adequate burden sharing also means that any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for.
- 207 In that regard, it should be observed in the first place that the Commission failed in the contested decision to assess whether the measure at issue complied with the requirements set out in point 67 of the R&R Guidelines. There is nothing in the contested decision to suggest that the Commission addressed the question of whether the measure at issue had been granted on terms that would afford the Federal Republic of Germany a reasonable share of future gains in value of Condor.

- 208 Consequently, it is necessary to assess whether, as the Commission maintains, it was able to take the view, without entertaining any doubts, that the measure at issue did not fall within the scope of point 67 of the R&R Guidelines, meaning that it was not required to carry out a review in the contested decision of whether that measure complied with the requirement set out in that point.
- 209 In that regard, it must be borne in mind that the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and the objectives and purpose pursued by the act of which it forms part (see judgment of 22 June 2023, *Pankki S*, C-579/21, EU:C:2023:501, paragraph 38 and the case-law cited).
- 210 In that respect, first, as regards the literal interpretation of point 67 of the R&R Guidelines, it should be pointed out that, according to the wording of that point, the requirement to provide for terms that afford the State a reasonable share of future gains in value of the beneficiary applies to ‘any State aid that enhances the beneficiary’s equity position’.
- 211 Point 65 of the R&R Guidelines provides three examples of State aid given ‘in a form that enhances the beneficiary’s equity position’, namely grants, injections of capital and write-offs of debt.
- 212 In the present case, the measure at issue is in the form, inter alia, of a partial write-off of debt, such that it must be classified as ‘State aid that enhances the beneficiary’s equity position’ within the meaning of point 67 of the R&R Guidelines.
- 213 Accordingly, the wording of the introductory part of point 67 of the R&R Guidelines, read in conjunction with the wording of point 65 thereof, suggests that the measure at issue falls within the scope of point 67 of the R&R Guidelines.
- 214 It follows that the interpretation advocated by the Commission, that point 67 of the R&R Guidelines applies only to injections of capital and only where the State concerned has a shareholding in the capital of the beneficiary, conflicts with the wording of the introductory part of that point, read in conjunction with point 65 of the R&R Guidelines, from which it is apparent that the requirement set out in point 67 is intended to apply both to injections of capital and to write-offs of debt and, therefore, both to situations where the State has a shareholding in the capital of the beneficiary and to situations where it is a creditor thereof.
- 215 That being said, it is also true, as the Commission observes, that the words ‘in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for’, at the end of point 67 of the R&R Guidelines, refer only to a situation where there has been an injection of capital.
- 216 The wording of point 67 of the R&R Guidelines thus appears to be somewhat inconsistent since, on the one hand, its introductory part states that it is to apply to ‘any State aid that enhances the beneficiary’s equity position’, namely grants, capital injections and debt write-offs, while its final part refers, on the other hand, to ‘State equity injected’.
- 217 In that regard, it should nevertheless be observed that the latter part of the sentence follows immediately on from the requirement that the State should be afforded a ‘reasonable share’ of future gains in value of the beneficiary. Accordingly, it may be understood as an indication of what constitutes, quantitatively speaking, a ‘reasonable share’, which is to be determined on the basis of the proportion that the amount paid by the State represents in comparison with the amount of the

remaining equity of the beneficiary after losses have been accounted for. That interpretation would thus make it possible to reconcile the introductory and final parts of point 67 of the R&R Guidelines.

- 218 In any event, the inconsistent wording of point 67 of the R&R Guidelines referred to in paragraph 215 above, which is, moreover, attributable to the Commission, as it drew up those guidelines, should have raised doubts on its part as to whether the measure at issue fell within the scope of point 67 of the R&R Guidelines and led it to examine that provision more thoroughly in the light of its context and objectives, which it failed to do.
- 219 Indeed, where the wording of a provision of EU law causes difficulties of interpretation, it is necessary to examine that provision in the light of the objectives of the act of which it forms part and, where it is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, to that effect, judgments of 24 February 2000, *Commission v France*, C-434/97, EU:C:2000:98, paragraph 21 and the case-law cited, and of 4 October 2001, *Italy v Commission*, C-403/99, EU:C:2001:507, paragraph 28).
- 220 Accordingly, second, as regards the contextual interpretation of point 67 of the R&R Guidelines, it should be noted that that point forms part of Section 3.5.2.2 of those guidelines, entitled ‘Burden sharing’. That section begins with point 65, which, as observed in paragraph 204 above, refers, without distinction, to grants, injections of capital and debt write-offs as forms of State aid that enhance the beneficiary’s equity position.
- 221 Similarly, there is nothing in the wording of point 66 of the R&R Guidelines, which forms part of the same section of those guidelines and which states, in essence, that State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders, to suggest that that rule is intended to apply only to certain forms of State aid and not others. On the contrary, the general reference to State intervention (‘State intervention should only take place’) and the absence of any other statement to the contrary indicate that point 66 is to apply regardless of the form of that intervention.
- 222 Accordingly, the introductory part of point 67 of the R&R Guidelines, in that it refers to ‘any State aid that enhances the beneficiary’s equity position’, accords with the scope of points 65 and 66 thereof.
- 223 In addition, it should be observed that the requirement set out in point 67 of the R&R Guidelines is additional to those set out in points 65 and 66 of the guidelines, as is shown by the statement that ‘adequate burden sharing will also mean’. It is also important to point out that the Member States and the Commission do not enjoy discretion as regards their obligation to satisfy the requirement of point 67 of the R&R Guidelines, since that point provides that ‘any’ State aid that enhances the beneficiary’s equity position ‘should’ be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary. That interpretation is confirmed by point 68 of the R&R Guidelines, which provides for exceptions to full implementation of the requirements set out in point 66 thereof, but not to that set out in point 67. Accordingly, the fact that the requirements of points 65 and 66 of the R&R Guidelines have been satisfied in a particular case does not exempt the Member States and the Commission from ensuring that the requirement set out in point 67 has also been met.

- 224 It follows that points 66 and 67 of the R&R Guidelines lay down two autonomous requirements, the content and application of which relate to different points in time. First, the requirement in point 66 concerns absorption of the beneficiary's losses by existing shareholders and subordinated debt creditors, which must be implemented prior to intervention by the State. Second, point 67 refers to a situation in the future, namely that of future gains in value of the beneficiary, and provides that, in such a case, the State must obtain a reasonable share of those gains in value.
- 225 However, there is nothing to indicate that points 65, 66 and 67 of the R&R Guidelines should have differing scopes, depending on the form taken by the State support, provided that it enhances the beneficiary's equity position. In particular, the broad logic of the requirements foreseen by points 66 and 67 of the R&R Guidelines and the fact that they are cumulative suggest that, as with point 65 of those guidelines, they are intended to apply to any State aid aimed at achieving such an enhancement. The obligation to absorb losses before the State intervenes and the necessity to ensure that it is afforded a reasonable share of future gains in value of the beneficiary are mutually reinforcing and complementary, since dealing with the beneficiary's losses and the support of the State are an essential condition for ensuring the beneficiary's subsequent return to viability and, therefore, its profitability. There thus appears to be no legitimate reason to justify excluding certain forms of aid from the scope of the obligation set out in point 67 of the R&R Guidelines.
- 226 Third, as regards the teleological interpretation of point 67 of the R&R Guidelines, it is apparent in particular from points 9, 11, 65, 87 and 90 thereof that the provisions on adequate burden sharing are intended *inter alia* to prevent moral hazard. Accordingly, as observed in paragraph 204 above, point 65 of those guidelines states that where State support is given in a form that enhances the beneficiary's equity position, for example where the State provides grants, injects capital or writes off debt, this can have the effect of protecting shareholders and subordinated creditors from the consequences of their choice to invest in the beneficiary. That can create moral hazard and undermine market discipline.
- 227 However, the Commission does not refer to any element that is capable of showing that the risk of moral hazard arises only where a Member State injects capital into the beneficiary, but not where it writes off its debt or provides it with a grant. In reality, no part of the R&R Guidelines makes it possible to draw such a conclusion. On the contrary, according to point 65 of the R&R Guidelines, such a risk arises for any State support given in a form that enhances the beneficiary's equity position, such as grants, injections of capital and debt write-offs.
- 228 Furthermore, it should be borne in mind that, as is apparent in particular from point 9 of the R&R Guidelines, the risk of moral hazard consists of the fact that undertakings anticipating that they are likely to be rescued or restructured when they run into difficulty may embark upon excessively risky and unsustainable business strategies. Both the requirement in point 66 of the R&R Guidelines, concerning the absorption of the beneficiary's losses by its current shareholders and subordinated creditors, and that of point 67 of those guidelines, on the obligation to afford the State a share of the beneficiary's future profits, contribute to reducing possible incentives for an undertaking to take excessive risks in order to generate more profits.
- 229 It follows that the underlying objective of point 67 of the R&R Guidelines cannot be fully achieved if certain types of aid measure, such as the write-off of debt, were to be excluded from its scope, even though they enhance the beneficiary's equity position and give rise to the same moral hazard as that resulting from a capital injection.

- 230 In addition, both the R&R Guidelines and the Communication from the Commission COM(2012) 209 final of 8 May 2012 on EU State aid modernisation, to which the guidelines refer, underline the importance of the principle of the efficiency or effectiveness of public spending. That communication also emphasises the importance of the sound use of public resources, better use of taxpayers' money, budgetary consolidation and the need to avoid wasting public resources. Ensuring the State a reasonable share of future gains in value of the beneficiary, where it grants restructuring aid, and whether that is through a grant, an injection of capital or a debt write-off, is consistent with those objectives.
- 231 Moreover, contrary to what the Commission argued at the hearing, it is incorrect to assert that a State may obtain 'a reasonable share of future gains in value of the beneficiary', as provided for by point 67 of the R&R Guidelines, only when it holds a shareholding in the beneficiary. As the applicant rightly states, even where the State does not have a shareholding in the capital of the beneficiary and is thus merely one of its creditors, it could in any event benefit from future gains in the value or the future profits of the beneficiary which are, at least in part, generated owing to the aid, by stipulating, for example, where there has been a partial write-off of debt such as that in the present case, that there be a variable rate of interest on the portion of its claim that has not been written off that increases in line with a rise in the value or profits of the beneficiary. Another mechanism that could allow a State which has written off a part of the debt owed to it by a beneficiary to share in future gains in the value or the future profits of the beneficiary is, for example, a commitment by the beneficiary to repay all or part of its written-off debt if its fortunes improve.
- 232 Lastly, Condor's argument, that the future repayment of the remaining portion of the debt left from the COVID-19 loans of 2020 could be considered as ensuring the State 'a reasonable share of future gains in value' of Condor, within the meaning of point 67 of the R&R Guidelines, must be rejected. First, it suffices to observe that there is nothing in the contested decision to suggest that the Commission considered that the possible repayment of the portion of debt not written off would by itself afford the State 'a reasonable share of future gains in value' of Condor, within the meaning of point 67 of the R&R Guidelines. However, according to settled case-law, the statement of reasons for the contested decision cannot be supplemented during the proceedings (see, to that effect, judgment of 15 December 2021, *Oltchim v Commission*, T-565/19, EU:T:2021:904, paragraph 275 and the case-law cited). Second, and in any event, Condor's argument cannot succeed, otherwise it risks rendering point 67 of the R&R Guidelines meaningless. By its very essence, a partial write-off of debt implies that the part of the debt not written off will be repaid. That argument thus amounts to excluding de facto the partial write-off of debt from the scope of point 67 of the R&R Guidelines, which would, however, conflict with the literal, contextual and teleological interpretation of that point.
- 233 It follows that, taking account of the literal, contextual and teleological interpretation of point 67 of the R&R Guidelines, the Commission was not entitled, without having any doubts, to find that the measure at issue did not fall within the scope of that point and fail to examine whether that measure complied with the requirements set out in that point.
- 234 Accordingly, it must be concluded that the applicant has demonstrated to the requisite legal standard that the Commission should have had doubts as to whether the measure at issue satisfied the requirement set out in point 67 of the R&R Guidelines.

...

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls Commission Decision C(2021) 5729 final of 26 July 2021 on State aid SA. 63203 (2021/N) – Germany – Restructuring aid for Condor;**
- 2. Orders the European Commission to bear its own costs and to pay those incurred by Ryanair DAC;**
- 3. Orders the Federal Republic of Germany and Condor Flugdienst GmbH to bear their own costs.**

Kornezov

De Baere

Kecsmár

Delivered in open court in Luxembourg on 8 May 2024.

[Signatures]