Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

7 February 2024*

(State aid – Aid granted by the Netherlands to KLM in the context of the COVID-19 pandemic – State guarantee for a bank loan and a subordinated loan by the State – 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-146/22,

Ryanair DAC, established in Swords (Ireland), represented by E. Vahida, F.-C. Laprévote, V. Blanc, D. Pérez de Lamo and S. Rating, lawyers,

applicant,

v

European Commission, represented by C. Georgieva, J. Carpi Badía and M. Farley, acting as Agents,

defendant,

supported by

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

by

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

by

Société Air France, established in Tremblay-en-France (France),

and

Air France-KLM, established in Paris (France),

* Language of the case: English.

represented by J. Derenne and D. Vallindas, lawyers,

and by

Koninklijke Luchtvaart Maatschappij NV, established in Amstelveen (Netherlands), represented by K. Schillemans, P. Huizing and E. de Krom, lawyers,

interveners,

THE GENERAL COURT (Eighth Chamber),

composed of A. Kornezov (Rapporteur), President, G. De Baere and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 7 July 2023,

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Ryanair DAC, seeks the annulment of Commission Decision C(2021) 5437 final of 16 July 2021 on State Aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM ('the contested decision').

Background to the dispute and context of the measure at issue

2 Koninklijke Luchtvaart Maatschappij ('KLM') is part of the Air France-KLM group. The holding company Air France-KLM ('the Air France-KLM holding') is at the head of that group. According to the contested decision, that group also includes Société Air France S.A. ('Air France'), '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. In turn, the Air France-KLM holding holds 100% of the shares in Air France and, directly and indirectly, 93.84% 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 voting rights in KLM. That 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') (Commission 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). That decision was corrected twice, first on 17 December 2020 (Commission Decision C(2020) 9384 final), and, secondly, on 26 July 2021 (Commission Decision C(2021) 5701 final) ('the Air France decision'). In the Air France decision, the Commission considered that the beneficiaries of the aid measure which was the subject of that decision were Air France and the subsidiaries which it controls. By contrast, 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 measure.

6 On 26 June 2020, the Kingdom of the Netherlands notified the Commission, in accordance with Article 108(3) TFEU, of State aid in favour of KLM consisting of (i) a State guarantee for a loan granted to it by a consortium of banks, and (ii) a State loan ('the measure at issue'). The total budget of the aid was EUR 3.4 billion. The objective of the measure at issue was to provide temporary liquidity to KLM which it needed to deal with the adverse effects of the COVID-19 pandemic. The Kingdom of the Netherlands considered that, in view of the importance of KLM for its economy and air transport connectivity, the failure of that company would have exacerbated the serious disturbance in its economy caused by that pandemic.

7 On 13 July 2020, by Decision C(2020) 4871 final on State aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM, the Commission found that the measure at issue, first, constituted State aid within the meaning of Article 107(1) TFEU and, secondly, was compatible with the internal market on the basis of Article 107(3)(b) TFEU. According to that decision, KLM was the sole beneficiary of the aid, to the exclusion of the other companies in the Air France-KLM group.

8 On 5 April 2021, the Commission adopted Decision C(2021) 2488 final on State aid SA.59913 – France – COVID-19 – Recapitalisation of Air France and the Air France-KLM holding ('the Air France-KLM and Air France decision'), in which it concluded that individual aid granted by the French Republic in the form of a recapitalisation of Air France and the Air France-KLM holding totalling EUR 4 billion was compatible with the internal market pursuant to Article 107(3)(b) TFEU and the Temporary Framework. That aid includes (i) the participation by the French Republic in a planned share capital increase of up to EUR 1 billion and (ii) the conversion of the EUR 3 billion shareholder loan, which formed part of the measure at issue in the Air France decision, into a hybrid instrument equivalent to an equity participation. According to the Air France-KLM and Air France decision, the beneficiaries of those measures were Air France and its subsidiaries as well as the Air France-KLM holding and the subsidiaries which it controls, to the exclusion of KLM and its subsidiaries.

9 By judgment of 19 May 2021, *Ryanair* v *Commission (KLM*; *Covid-19)* (T-643/20, EU:T:2021:286), the Court annulled Commission Decision C(2020) 4871 final of 13 July 2020 on the ground that it was vitiated by a failure to state reasons as regards the determination of the beneficiary of the measure at issue. In addition, it ordered that the effects of the annulment of that decision be suspended pending the adoption of a new decision by the Commission under Article 108 TFEU.

10 On 16 July 2021, the Commission adopted the contested decision, in which it found that the measure at issue involved State aid within the meaning of Article 107(1) TFEU but was compatible with the internal market on the basis of Article 107(3)(b) TFEU, and that KLM and its subsidiaries were the sole beneficiaries of the aid, to the exclusion of the other companies in the Air France-KLM group.

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 Kingdom of the Netherlands, KLM, Air France and the Air France-KLM holding contend that the action should be dismissed as unfounded, and that the applicant should be ordered to pay the costs.

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

Law

Admissibility

15 First, the applicant argues that it is an interested party 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 it therefore has standing to bring proceedings in order to protect its procedural rights. Secondly, it maintains that its competitive position on the market has been substantially affected by the measure at issue and that, consequently, it also has standing to challenge the contested decision on the merits.

16 The Commission, the Kingdom of the Netherlands, KLM, the Air France-KLM holding and Air France do not dispute the admissibility of the action.

17 By contrast, the French Republic maintains that the applicant does not have standing to challenge the contested decision on the merits.

18 In the present case, it is common ground that the applicant is a competitor of KLM and it is not disputed that it must therefore be regarded as an 'interested party' 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 it derives from Article 108(2) TFEU.

19 As to the standing of the applicant 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).

20 Given that the contested decision, which was addressed to the Kingdom of the Netherlands, 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 applicant, within the meaning of that provision.

21 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).

22 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 referred to in paragraph 21 of the present judgment. 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).

23 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).

24 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).

25 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).

26 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).

27 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).

28 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).

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

30 In that regard, in the first place, the applicant claims that, in 2021, it had carried approximately 1.3 million passengers and operated 37 air routes to and from three airports in the Netherlands. In particular, it states that it was in direct competition with KLM on 13 of those air routes, on which it had carried approximately 185 000 passengers in 2021, which the other parties do not dispute.

31 In addition, the data set out in Annex A.3.6 to the application, which are also not disputed, show that the number of seats offered by the applicant on those 13 air routes was often comparable, or even exceeded in some cases, that offered by KLM. Competition between them was therefore, in terms of the number of seats offered, also significant.

32 Furthermore, according to the applicant's unchallenged assertion, the 13 air routes on which it was in direct competition with KLM were served by few other airlines.

33 In the second place, the applicant claims, in substance, without being contradicted, that it envisaged commercial expansion on the Netherlands market, as evidenced by the fact that it ordered 210 Boeing 737 Max aircraft which began joining its fleet in June 2021 and which enabled it to continue its expansion plan.

34 In the third place, it is apparent from a report of the Fondation pour l'innovation politique (Foundation for political innovation), produced by the applicant, entitled 'Before COVID-19, Air transportation in Europe: an already fragile sector', dated May 2020, the content of which is not disputed by the other parties, that 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 the applicant was in a relatively strong position in relation to traditional airlines, such as KLM, which faced a risk of insolvency or even exit from the market.

35 The risk that KLM would be declared insolvent, in the absence of the measure at issue, is apparent from the contested decision, which states that the objective of that measure was to provide KLM with the liquidity it needed to deal with the liquidity shortage resulting from the negative impact of the COVID-19 health crisis and thus to prevent KLM's insolvency.

36 In the fourth place, the applicant claims that the competitive relationship it has with the Air France-KLM group, taken as a whole, is even more pronounced. Thus, it is the first airline at EU level in terms of number of passengers carried, whereas the Air France-KLM group is only the fourth, which is not disputed by the other parties.

37 Moreover, it is apparent from a report by Exane BNP Paribas entitled 'European Airlines, Blinded by the light' of 15 July 2020, produced by the applicant and the content of which is not disputed by the other parties, that the airlines of the Air France-KLM group had become, thanks to State support, the airlines, taken together, with the largest amount of liquidity in Europe and that, according to the applicant's undisputed claim, they supplanted it as the European airline that could withstand the largest period of full grounding as from July 2020 before fully exhausting its cash reserves.

38 The factors set out in paragraphs 30 to 37 above, taken together, permit the inference that the applicant has demonstrated that the grant of the measure at issue was likely to strengthen KLM's competitive position to the detriment of its own and to lead prima facie to a substantial adverse effect on its 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 27 above).

39 That finding is not called into question by the French Republic's objection that the applicant is not KLM's main competitor on the Netherlands market.

40 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.

41 Nor can the French Republic's objection that the applicant has not shown that the contested decision adversely affects it by reason of factual circumstances which distinguish it from all of KLM's other competitors succeed.

42 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 at issue 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 in question (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 observed in paragraph 28 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 therefrom.

43 Moreover, it is important to observe that the case-law cited in paragraph 21 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 by reason of '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.

44 That is the case here. All the factors referred to in paragraphs 30 to 37 above indicate, in a sufficiently plausible manner, that the applicant's position on the relevant markets was characterised by certain attributes which are peculiar to it, namely the fact that the applicant is in direct competition with the beneficiary on a considerable number of air routes, on which, moreover, it operates a large number of seats, that it planned a commercial expansion on the Netherlands market and that, in the absence of the measure at issue, there was a risk that KLM would become insolvent or at least significantly weakened, whereas the applicant'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 shares to the detriment of KLM.

45 In the light of all the foregoing, it must be held that the applicant has shown to the requisite legal standard that the measure at issue was liable to have a substantial effect on its competitive position on the market concerned.

46 It must be held that the applicant is also directly concerned by the contested decision, since there is no doubt that the Kingdom of the Netherlands intended to pay aid to KLM and that such a payment is liable to place the applicant in an unfavourable competitive position and thus affect its right not to be subject to competition distorted by that aid (see, to that effect, judgment 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).

47 The applicant is therefore entitled to challenge the contested decision on the merits.

Substance

48 In support of the action, the applicant relies on five pleas in law, alleging, in substance, (i) an error of law and a manifest error of assessment relating to the exclusion of the Air France-KLM holding and Air France from the scope of the beneficiaries of the measure at issue; (ii) infringement of the provisions of the FEU Treaty and of the general principles of law relating to non-discrimination, the freedom to provide services and the freedom of establishment; (iii) misapplication of Article 107(3)(b) TFEU; (iv) infringement of its procedural rights; and (v) infringement of the duty to state reasons.

The first plea, relating to the exclusion of the Air France-KLM holding and Air France from the scope of the beneficiaries of the measure at issue

49 The applicant disputes the determination of the beneficiary of the measure at issue. It submits that the Commission wrongly considered that only KLM and the companies which it controls were the beneficiaries of the measure at issue, to the exclusion of the Air France-KLM holding and Air France. In that regard, it puts forward several factors in order to demonstrate that the Air France-KLM holding and Air France were also potential or indirect beneficiaries of the measure at issue. Those factors concern, in substance, the capital, organic, functional and economic links between the Air France-KLM holding, Air France and KLM, the contractual framework on the basis of which the measure at issue was granted and the context of that measure.

50 The Commission disputes the applicant's arguments, pointing out, on the basis of the evidence highlighted in the contested decision, that Air France and KLM enjoy de facto considerable functional, economic and organic autonomy, both in relation to each other and in relation to the Air France-KLM holding. In addition, the corporate and governance structure of the Air France-KLM group also prevents there being any risk of indirect transfer of the aid between Air France and KLM. Furthermore, the measure at issue includes contractual mechanisms equivalent to an allocation clause, which channel the actual financial and economic benefit exclusively to KLM.

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

52 In the contested decision, the Commission considered that the beneficiaries of the measure at issue were KLM and the subsidiaries which it controls. By contrast, although KLM is part of the Air France-KLM group, neither its parent company, namely the Air France-KLM holding, nor its sister companies, including Air France and the subsidiaries which it controls, are beneficiaries of that measure.

53 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.

54 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).

55 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); 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).

56 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.

57 Furthermore, the Commission clarified its interpretation of the notion 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).

58 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.

59 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).

60 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).

61 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:2021:286, paragraph 48 and the case-law cited).

62 In the light of the criteria identified in the 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*

63 As a preliminary point, the Commission submits that, in the application, the applicant maintains that the fact that a parent company had the *de jure* possibility of exercising control over its subsidiary was sufficient 'in itself' to consider that the parent company had to be included as a beneficiary of an aid measure. In the reply, the applicant submits that the Commission did not take account of the power of control of the Air France-KLM holding over its subsidiaries in its assessment. Since that latter argument of the applicant does not amount to a development of the argument set out in the application, it is therefore inadmissible, given that it was raised for the first time in the reply.

64 The Commission's line of argument relating to the inadmissibility of the applicant's argument set out in the reply according to which it did not take account of the power of control of the Air France-KLM holding over its subsidiaries in its assessment must be rejected in that it is based on a partial reading of the application. In the application, first, the applicant submits that the Commission did not correctly assess the effects of the fact that the Air France-KLM holding could, by virtue of its status, exercise control, direction and financial support functions over its subsidiary KLM and, secondly, it criticises the Commission's assessment of a number of other factors concerning the organic, functional, economic and contractual links between the various entities of the Air France-KLM group. The arguments set out in the application were therefore not limited to invoking the mere *de jure* possibility for the Air France-KLM holding to exercise control over KLM. Consequently, since the argument set out in the reply referred to above constitutes an amplification, it is therefore not inadmissible.

65 That being said, in the first place, it should be noted that, as regards the capital links between the various entities belonging to the Air France-KLM group, as has been observed in paragraph 3 above, Air France is 100% owned by the Air France-KLM holding and the latter holds 93.84% of the share capital, 99.7% of the economic rights and 49% of the voting rights in KLM.

66 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).

67 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).

68 In the present case, it is apparent from recital 33 of the contested decision that the Air France-KLM holding has a power of control over KLM by virtue of the veto rights which it enjoys over KLM's business plans and budgets, on the one hand, and over the remuneration, appointment and dismissal of its managers, including the appointment and dismissal of the members of KLM's board 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.

69 It is also apparent from recitals 40 and 51 of the contested 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. That right was relevant in the present case, given that, as the Commission acknowledges in the contested decision, the financing granted by the Kingdom of the Netherlands exceeded the threshold of EUR 150 million. Thus, the Air France-KLM holding had to approve it before it could be granted.

70 In the second place, as regards the organic links between the Air France-KLM holding, Air France and KLM, the applicant refers 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'), an extract of which was submitted to the Court by the applicant and 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.

71 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.

72 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 transactions, 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.

73 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.

74 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.

75 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 of the group.

76 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.

77 The capital and organic links within the Air France-KLM group are thus, as the applicant claims, 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*

78 In the first place, the Commission noted in recital 36 of the contested decision that the Air France-KLM holding employed its own employees and '[relied] on' employees seconded to it by Air France and KLM. In addition, it stated in recitals 33 and 112 of that decision, as has been recalled in paragraph 68 above, that that 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 that holding company is involved in the most important decisions concerning the managers of its subsidiaries.

79 In the second place, in recital 37 of the contested decision, the Commission explained that the Air France-KLM holding was not 'directly' active in the air transport markets on which Air France and KLM were active, finding that the role of that holding company was to provide support to its subsidiaries 'in the fields of information technology, human resources, marketing, digital matters, communication and innovation'.

80 However, in recital 42 of the contested 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. Such a finding is also apparent from recital 112 of that decision.

81 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 72 above), which confirms that there is a degree of integration between the Air France-KLM holding, Air France and KLM.

82 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 applicant. 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. In addition, as the applicant claims, 'Transavia' is often mentioned as a single undertaking in the 2019 Universal Registration Document and the 2020 Universal Registration Document of the Air France-KLM holding filed with the French Financial Markets Authority pursuant to Regulation 2017/1129 ('the 2020 Universal Registration Document') where those documents refer to the 'low-cost' segment of that group's commercial activity. That example thus demonstrates a degree of functional and commercial cooperation between two subsidiaries of Air France and KLM.

83 In the third place, it is apparent from recitals 38 to 40 and 112 of the contested decision that the Air France-KLM holding also 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 the contested decision, raise capital on the financial (debt or equity) markets for the benefit of its subsidiaries depending on their individual requirements.

84 It should be added, as the applicant has done and as is apparent from paragraphs 70 to 75 above, that the Air France-KLM holding is involved in the coordination and approval of significant investments by its subsidiaries, in shareholding and divestment transactions, 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.

85 The financial role assumed by the Air France-KLM holding is illustrated, in the present case, by the fact, noted in recital 40 of the contested decision, 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.

86 In the contested decision and at the hearing, the Commission, while acknowledging the financial role played by the Air France-KLM holding for the benefit of its subsidiaries, put the importance of that role into perspective, describing it as 'limited' (recital 38 of the contested decision).

87 However, it is apparent from paragraphs 68 to 85 above that significant or strategic decisions on financing, investment and fleet are coordinated, or even approved, by the Air France-KLM holding.

88 That finding is supported by the information in the 2019 and 2020 Universal Registration Documents, from which it is apparent 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'.

89 Nevertheless, in the contested decision, the Commission considered that Air France and KLM were 'functionally autonomous', on the basis of the following factors (recital 41 of the contested decision).

90 First, Air France and KLM had 'separate management teams' (first indent of recital 41 of the contested decision). However, that statement needs to be considerably qualified by the evidence set out in paragraphs 68 to 75 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 that holding company relies on employees of Air France and KLM seconded to it.

91 Secondly, KLM is 'independent and fully responsible' for 'most' of the main aspects of its commercial activities, in particular human resources, fleet, network development, customer experience, passenger and freight management, maintenance activities, air operations, on-board services and marketing (first indent of recital 41 of the contested decision). However, those statements disregard the role played by the Air France-KLM holding both as regards operations relating to the fleet (see paragraphs 68 and 72 above), and as regards the provision of air transport services, in particular in the area of sales and price and revenue management, the strategy for which is determined at the level of that holding company (see paragraphs 80 to 82 above).

92 Thirdly, KLM has an 'independent finance organisation', in particular with regard to the financing and control of internal and external reporting, treasury, auditing and taxation (second indent of recital 41 of the contested decision). In recital 40 of the contested decision, the Commission also stated that 'day-to-day' financial activities would be carried out independently by Air France and KLM. However, those statements are at odds with the fact that any financing above the EUR 150 million threshold or any investment above EUR 5 million must be approved by the Air France-KLM holding. Furthermore, the fact that 'day-to-day' financial activities are managed by Air France and KLM does not contradict the foregoing.

93 Fourthly, KLM manages its liquidity needs 'independently without interference from Air France'. The Air France-KLM holding has no control over KLM's funds. For example, certain decisions are taken at the level of KLM's board of directors and not at the level of that holding company. Nor is there any 'profit- and loss-sharing mechanism or cash-pooling agreement between Air France and KLM' (second indent of recital 40 and third indent of recital 41 of the contested decision).

94 However, first, the fact that Air France and KLM manage their liquidity independently must also be qualified, since the Air France-KLM holding raises capital on the market for the benefit of its subsidiaries (see paragraph 83 above), approves financing transactions above EUR 150 million, and gives budgetary instructions to its subsidiaries. Similarly, the assertion that certain decisions are taken at the level of KLM's board of directors and not at the level of the Air France-KLM holding must be qualified in the light of the circumstances referred to in paragraph 72 above, from which it is apparent that the holding company is involved in significant or strategic decisions taken on financing, investment and fleet operations.

95 Secondly, although the Commission stated that there was no profit- and loss-sharing mechanism or cash-pooling agreement between Air France and KLM, it nevertheless noted, in recital 47 of the contested decision, that there were 'cost-sharing agreements' between Air France and KLM and their subsidiaries. It is apparent from the same recital of the contested decision that there are 'joint activities carried out collectively by Air France and KLM or their subsidiaries'. That evidence confirms that there is a certain degree of functional integration and cooperation between them within the Air France-KLM group.

96 Thus, the conclusion reached by the Commission, namely that Air France and KLM enjoy functional autonomy, is called into question by all the considerations set out in paragraphs 78 to 95 above.

97 Accordingly, the functional links between the Air France-KLM holding, Air France and KLM constitute a second 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 recitals 43 to 46 and 113 of the contested decision, the Commission found that the Air France-KLM holding, KLM and Air France enjoyed de facto economic autonomy, for the following reasons.

99 First of all, the Air France-KLM holding does not have any activity generating external revenue. Thus, it cannot support Air France and KLM autonomously. The holding company's revenue is generated entirely internally by its subsidiaries through a management fee, which covers the holding company's management costs, trade mark royalties and certain cost redistribution mechanisms (recitals 43 and 44 of the contested decision). Next, although the Air France-KLM holding can provide certain financial services to KLM, such services do not involve the provision of financial support to KLM and Air France (recital 45 of the contested decision). Lastly, commercial relations between Air France and KLM are conducted under normal market conditions and negotiated by autonomous management teams. The cost-sharing agreements between those two companies provide for an allocation key based on 'market standards' (recitals 46 and 47 of that decision).

100 In that regard, first, as the applicant submits, the fact that the Air France-KLM holding generates its revenue solely from its subsidiaries demonstrates that there is a degree of economic interdependence between that holding company and its subsidiaries. This is supported 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 80 above), and that that holding company is involved in the financing of its subsidiaries in a coordinated manner (see paragraphs 83 to 87 above).

101 Secondly, even assuming that the Air France-KLM holding acts on the financial markets solely as an 'intermediary' between its subsidiaries and investors, that confirms the fact that that holding company acts in the interests of its subsidiaries by raising funds to meet their needs on those financial markets. That fact shows that the Air France-KLM holding 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 that group.

102 This is evidenced by the fact, relied on by the applicant, that the Air France-KLM holding had publicly announced in July 2021 a joint order for a large number of aircraft for KLM, 'Transavia Netherlands' and 'Transavia France'. When questioned in that regard in the context of a measure of organisation of procedure and at the hearing, the Commission confirmed the existence of that joint order, explaining that that holding company had negotiated the terms of those orders in order to obtain a better agreement. Thus, even though the contracts were signed and paid

separately by KLM, 'Transavia Netherlands' and 'Transavia France', the fact remains that it is thanks to the Air France-KLM holding that KLM, 'Transavia Netherlands' and 'Transavia France' were able to benefit from a better agreement.

103 Thirdly, as has been pointed out in paragraph 95 above, the fact, acknowledged by the Commission, that there are cost-sharing agreements between Air France and KLM and activities carried out collectively by Air France and KLM and their subsidiaries confirms that there is a degree of economic integration and cooperation between them.

104 Fourthly, the Commission argues, in recitals 44 and 46 of the contested decision, that the financial and commercial relations between the Air France holding and its subsidiaries Air France and KLM, as well as between those subsidiaries themselves, were conducted under 'normal market conditions'. In particular, as regards the relationship between Air France and KLM, it refers, in that context, to the fact that they remain taxable in France and the Netherlands respectively, that French and Netherlands tax legislation provide that all intra-group transactions must be carried out as if they had been concluded between independent parties, and that, consequently, no advantage can pass from one to the other by that means (first indent of recital 46 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 100 to 103 above.

105 Moreover, it should be borne in mind that the grant of the measure at issue was justified in particular by the need to support KLM at a time of severe liquidity shortage and risk of failure (recitals 12 and 13 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 the 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 failure of one of its main subsidiaries, namely KLM, and thus reassures the creditors of the companies in that group, it being specified, moreover, that the State loan, which forms part of the measure at issue, was subordinated to unsecured and non-subordinated bank or bond debt (recital 81 of that decision). In addition, 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.

106 Furthermore, in the absence of the measure at issue, KLM would probably not have been able to continue its activities and, therefore, would also have jeopardised the continuation of the activities carried out collectively with Air France (see paragraphs 80-82, 95, 102 and 103 above). Therefore, by allowing KLM's activities to continue, that measure also implicitly but necessarily allows the activities carried out collectively by Air France and KLM to continue.

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 agreements on the basis of which the measure at issue was granted*

108 In recitals 53 and 114 of the contested decision, the Commission found, in essence, that the contractual mechanisms on the basis of which the measure at issue had been granted ensured that KLM and its subsidiaries were the sole beneficiaries of that measure.

109 The applicant submits, in essence, with reference to the wording of certain clauses in the agreements at issue, that those agreements are not capable of guaranteeing that KLM is the sole beneficiary of the measure at issue.

110 The Commission contends that the contractual mechanisms at issue are equivalent to an allocation clause, which gives KLM exclusively the actual financial and economic benefit of the measure at issue.

111 It must be noted that the measure at issue was to be granted on the basis, inter alia, of the following contracts, described in recital 18 of the contested decision: (i) a framework agreement concluded between the Netherlands State, KLM and the Air France-KLM holding ('the framework agreement'), (ii) a revolving credit facility agreement concluded between KLM and a consortium of banks ('the bank loan agreement'); and (iii) a State loan agreement between the Netherlands State and KLM ('the State loan agreement').

112 It should be noted, as the applicant submits, that the Air France-KLM holding is a contracting party to the framework agreement which lays down the general conditions governing the grant of the measure at issue. As such, that holding company assumed contractual rights and obligations vis-à-vis its contractual partners in the context of the implementation of the measure at issue.

113 First, as is apparent from recital 51 of the contested decision, the framework agreement is the legal means by which financing under the measure at issue is approved by the Air France-KLM holding, since all financing transactions exceeding EUR 150 million are subject to its approval.

114 Secondly, it is apparent from recitals 85 to 90 of the contested decision that the Netherlands authorities impose 'additional conditions' for the grant of the measure at issue. It is apparent from the Commission's replies to a measure of organisation of procedure and at the hearing that those 'additional conditions' were included in the framework agreement and that, therefore, the Air France-KLM holding specifically undertook to implement them as conditions for the grant of the measure at issue.

115 Thus, for example, it is apparent from the Commission's replies to the measure of organisation of procedure that the Air France-KLM holding had to give its agreement to a restructuring plan for KLM, which, according to recital 89 of the contested decision, had to be drawn up by 1 October 2020 at the latest and was to apply until 2025 in order to improve KLM's profit margin.

116 In addition, the Air France-KLM holding had agreed to amend, in the framework agreement, certain provisions of the agreements concluded between the Netherlands State, that holding company and KLM at the time of approval of the merger between Air France and KLM in 2004. The effect of those amendments is to extend to five years the notice period for the termination of the commitments made by the parties under those agreements relating, in particular, to the location of KLM's establishment, its home base in the Netherlands and the retention of its existing operational licences.

117 The Air France-KLM holding also agreed to the implementation of other conditions provided for in the framework agreement concerning, inter alia, employment conditions, network quality and sustainability.

118 It follows that several conditions for the grant of the measure at issue are explicitly subject to the approval of the Air France-KLM holding or are the subject of a commitment on its part. That shows that the contracts on the basis of which the measure at issue was granted impose on that holding company significant contractual rights and obligations in the context of the grant and implementation of that measure.

119 Despite the foregoing, the Commission considered, in recitals 53 and 114 of the contested decision, that several contractual mechanisms ensured that the measure at issue benefited only KLM and its subsidiaries.

120 First, the Commission noted, in the first indent of recital 53 of the contested decision, that one of the clauses of the State loan agreement provided that that loan could be used only for the general corporate needs of KLM and its subsidiaries and that no amount from that loan could be 'on-lent' to Air France or to the Air France-KLM holding.

121 It must be stated, as the applicant submits, that, according to its wording as reported in the contested decision, the clause referred to in paragraph 120 above merely prohibits the 'on-lending' of the loan at issue to the Air France-KLM holding or to Air France, without, however, excluding the possibility that they may benefit otherwise from the measure at issue, if only indirectly.

122 Secondly, according to another clause of the framework agreement, the Air France-KLM holding and KLM undertake not to use the proceeds of the measure at issue for the 'direct' benefit of the holding company or Air France. The Netherlands State also appoints one of its agents in order to supervise KLM's use of the funds deriving from the measure at issue and, in particular, to ensure that they are not used for the 'direct' benefit of that holding company or Air France (second and sixth indents of recital 53 of the contested decision).

123 However, as the applicant submits in substance, the clause referred to in paragraph 122 above relates only to use for the 'direct' benefit of the holding company or Air France, but does not rule out the possibility that those companies may benefit indirectly from the measure at issue.

124 According to the case-law, an undertaking receiving an indirect advantage must also be regarded as a beneficiary of the aid. Therefore, 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).

125 In that regard, it is sufficient to note that, in the 2020 Universal Registration Document, an extract of which was submitted to the Court by the applicant, the Air France-KLM group expressly acknowledged that the aid measures granted by the French Republic and by the Kingdom of the Netherlands and approved by the Commission, in a total amount of EUR 10.4 billion, 'enabled an improvement in the Group's liquidity position'. It follows that, in that group's opinion, those measures, including the measure at issue, benefited that group as a whole, and not only KLM.

126 By ensuring the viability of KLM, which is one of the two main subsidiaries of the Air France-KLM holding, the measure at issue also enhances the viability of that holding company. In the absence of that measure, the risk of failure by KLM could have spread to the Air France-KLM holding and, consequently, the Air France-KLM group as a whole.

127 Accordingly, in view of the level of integration within the Air France-KLM group, and more specifically the coordinated and centralised management of significant investments, fleet operations and financial risk management at the level of that group (see paragraphs 68 to 75 above), the measure at issue is capable of strengthening, at least indirectly, the financial position of that group as a whole. Similarly, by improving the liquidity position of the group as a whole, as expressly acknowledged in 2020 Universal Registration Document, that measure is likely to strengthen the capacity of the Air France-KLM holding to raise funds on the financial markets for the needs of its subsidiaries, including Air France, as the applicant rightly states.

128 Thirdly, according to the bank loan agreement, KLM could borrow sums from the revolving credit facility agreement only for a short term depending on its liquidity needs. Accordingly, if there were no longer such a need, KLM would not be able to refinance the existing loans and would have to repay them. The same applies indirectly to the State loan agreement. In addition, according to the framework agreement and the State loan agreement, that loan was to be paid in tranches and, for each request for payment, KLM had to confirm that the conditions set out in the State loan agreement were complied with and, in particular, the condition relating to the prohibition on 'on-lending' that loan to the Air France-KLM holding and Air France (third and fourth indents of recital 53 of the contested decision).

129 However, the fact that, according to the State loan agreement, that loan is paid in tranches or that, according to the bank loan agreement, that loan takes the form of a revolving credit facility according to KLM's liquidity needs does not in any way preclude, for the reasons set out in paragraphs 125 to 127 above, the possibility that those loans might, if only indirectly, benefit the group as a whole.

130 Fourthly, KLM is prohibited from paying dividends or other distributions of capital during the term of the measure at issue, which prevents KLM from transferring the aid thus obtained to the holding company or Air France in the form of dividends (fifth indent of recital 53 of the contested decision).

131 However, the prohibition at issue, which is intended, principally, to prevent public funds from being diverted to the beneficiary's shareholders in the form of dividends or other distributions of capital, does not call into question the considerations set out in paragraphs 125 to 127 above.

132 In the light of the foregoing, it must be concluded that the contractual mechanisms referred to in the contested decision do not support the conclusion that the sole beneficiaries of the measure at issue are KLM and its subsidiaries, to the exclusion of the Air France-KLM holding and Air France, and of the subsidiaries controlled by them.

133 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.

134 In that regard, as has been noted in paragraphs 55 and 56 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 group, cannot support a general conclusion one way or the other.

135 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.

136 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 this instance, as is apparent from paragraphs 111 to 132 above, it is precisely on the basis of the content of the various contractual clauses applicable in the present case that the General Court considers that those clauses do not support a finding that the sole beneficiaries of the measure at issue are KLM and its subsidiaries, to the exclusion of the Air France-KLM holding and Air France and the subsidiaries controlled by them. In addition, the Air France-KLM holding has, in the present case, significant contractual rights and obligations in the context of the measure at issue and is therefore directly involved in the management of that measure.

137 Secondly, there are several important factual differences between the present case and the case 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 in the Air France-KLM group identified in the present case are not comparable to those between the companies concerned in the abovementioned case. 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 case. Moreover, that holding company did not have any rights or prerogatives comparable to those which the Air France-KLM holding has concerning the grant of the measure at issue.

138 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. It concerned the obligation to recover aid from certain subsidiaries of a group of companies 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 that aid. 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.

139 Accordingly, the contractual framework on the basis of which the measure at issue is granted does not lead to the conclusion that the only beneficiaries of the measure at issue are KLM and its subsidiaries.

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

140 So far as concerns the type of aid measure granted and its context, the applicant criticises, in substance, the fact that the Commission did not examine the cumulative effects of the aid covered by the Air France decision, the Air France-KLM and Air France decision and the contested decision.

141 In that regard, it must be stated that the contested decision mentions only the aid measure which is the subject of the Air France decision. The Commission summarises the considerations on which it relied in that decision in order to conclude that neither the Air France-KLM holding nor KLM can be regarded as beneficiaries of that measure (recitals 118 to 123 of the contested decision).

142 By contrast, the contested decision does not mention the aid measure which is the subject of the Air France-KLM and Air France decision. In that decision, the Commission had considered that both the Air France-KLM holding and its subsidiaries, and Air France and its subsidiaries, to the exclusion of KLM and its subsidiaries, to be beneficiaries of the aid measure which was the subject of that decision.

143 The Air France-KLM and Air France decision was adopted on 5 April 2021, that is to say, more than three months before the decision being contested in the present case, dated 16 July 2021; accordingly, it was a relevant contextual element known to the Commission when it adopted the contested decision.

144 In the specific circumstances of the present case, it must be held that there was a chronological, structural and economic link between the measure at issue and the measures which formed the subject matter of the Air France decision and the Air France-KLM and Air France decision. First, all of those measures were granted in parallel within a short period of time. Secondly, by their nature, the type of aid measures covered by the contested decision and the Air France decision was similar. Furthermore, as is apparent from the Air France decision and the Air France-KLM and Air France decision, the shareholder loan covered by that first decision was converted a few months later into a hybrid instrument of the same amount, which formed the subject matter of that second decision.

145 Moreover, as has been pointed out in paragraph 125 above, the improvement in the liquidity position of the Air France-KLM group as a whole was attributed, in the 2020 Universal Registration Document, to the cumulative effect of those various aid measures.

146 Accordingly, in those specific circumstances of the present case, and in the light of the case-law referred to in paragraph 61 above, it was incumbent on the Commission to take account also of the context of the measure at issue, in particular the Air France-KLM and Air France decision, which it failed to do.

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

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

148 The applicant counters that the Commission has not demonstrated to the requisite legal standard that the measure at issue could not benefit the other companies in the Air France-KLM group, for example by strengthening the financial situation of the Air France-KLM holding and, indirectly, that of Air France. Such an effect would go beyond the mere secondary effect inherent in any aid measure.

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

150 As was pointed out in paragraph 124 above, 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.

151 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.

152 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 through a financial intermediary, which passes it on in full to the aid beneficiary.

153 In the present case, it is apparent from the analysis set out in paragraphs 111 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 actually exercises control over its subsidiaries by involving itself directly or indirectly in their management and thus takes part in the economic activity they pursue, for the purposes of the case-law cited in paragraphs 66 and 67 above, which enables it to control and direct the activities of its subsidiaries on the basis of its own interests and those of the group in general. The Commission's argument that the Air France-KLM holding and Air France benefit only from mere secondary economic effects that are inherent in any State aid must therefore be rejected.

154 Similarly, the foreseeable effects of the measure at issue from an *ex ante* perspective suggest, in view of the type of aid measure granted and the context in which it was 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 the Notice on the notion of State aid.

155 It is apparent in particular from recital 13 of the contested decision that, in view of the significant and immediate financial impact of the COVID-19 pandemic, the Kingdom of the Netherlands decided to assist KLM at a time of severe liquidity shortage and risk of failure. Thus, since the objective of the measure at issue is to find a financing solution in order to meet KLM's liquidity needs and since it is apparent from the documents before the Court that the Air France-KLM holding plays a certain role in financing the Air France-KLM group, that measure would have the foreseeable *ex ante* effects of (i) improving the financial situation of that holding company – which is a party to the framework agreement and has significant contractual rights and obligations in that capacity – and thus of the group as a whole, and (ii) ensuring the financial stability – including in the eyes of the financial markets – of that group as a whole, including Air France.

156 Furthermore, as has been pointed out in paragraph 126 above, in the absence of the measure at issue, the immediate threat to the continuity of KLM's activities, identified in the contested decision, could have spread to the Air France-KLM group as a whole, given that KLM is one of the main subsidiaries of that group, generating a significant portion of its revenue.

157 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 applicant submits, the case which gave rise to that order did not concern an intra-group situation. Secondly, as has been pointed out in paragraphs 153 to 156 above, the present case does not concern the secondary economic effects of an aid measure on consumers, suppliers, investors or employees.

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

Conclusion

159 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 KLM and its subsidiaries, to the exclusion of the Air France-KLM holding and its other subsidiaries, including Air France and its subsidiaries, and, consequently, the first plea in law must be upheld.

160 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).

161 In addition, and more specifically, in accordance with paragraph 25(d)(i) of the Temporary Framework, State aid in the form of new public guarantees on loans is considered to be compatible with the internal market on the basis of Article 107(3)(b) TFEU provided that, for loans with a maturity beyond 31 December 2020, their total amount per beneficiary is not more than double the annual wage bill of the beneficiary for 2019, or for the last year available. The same threshold applies to State aid in the form of subsidies to public loans, in accordance with paragraph 27(d) of that framework (judgment of 19 May 2021, *Ryanair* v *Commission (KLM*; *Covid-19)*, T-643/20, EU:T:2021:286, paragraph 75).

162 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 161 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.

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

164 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

165 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 of the applicant, in accordance with the form of order sought by the latter.

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

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Commission Decision C(2021) 5437 final of 16 July 2021 on State aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM;**

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

3. Orders the French Republic, the Kingdom of the Netherlands, Air France-KLM, Société Air France and Koninklijke Luchtvaart Maatschappij NV to bear their own respective costs.

Kornezov De Baere Petrlík

Delivered in open court in Luxembourg on 7 February 2024.

V. Di Bucci M. van der Woude
Registrar President