



## Reports of Cases

### JUDGMENT OF THE GENERAL COURT (Third Chamber)

9 September 2014\*

(State aid — Airport charges — Lübeck Airport — Decision to initiate the procedure laid down in Article 108(2) TFEU — Article 107(1) TFEU — Manifest error of assessment — Article 10 of Regulation (EC) No 659/1999)

In Case T-461/12,

**Hansestadt Lübeck** (Germany), successor in title to Flughafen Lübeck GmbH, represented by M. Núñez Müller, J. Dammann de Chaptot and T. Becker, lawyers,

applicant,

v

**European Commission**, represented by T. Maxian Rusche and R. Sauer, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision C(2012) 1012 final of 22 February 2012 on State aid No SA.27585 and No SA.31149 (2012/C) (ex NN/2012, ex CP 31/2009 and CP 162/2010) — Germany, in so far as that decision concerns the schedule of charges of Lübeck airport (Germany) adopted in 2006),

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas (Rapporteur), President, N.J. Forwood and E. Bieliūnas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2014,

gives the following

### Judgment<sup>1</sup> ...

#### Procedure and forms of order sought

- 11 By application lodged at the Registry of the General Court on 19 October 2012, FL brought the present action.

\* Language of the case: German.

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

- 12 In the reply lodged at the Court Registry on 20 February 2013, the city of Lübeck declared that it was taking the place of FL in order to pursue the action brought by FL.
- 13 By way of measures of organisation of procedure as provided for in Article 64 of its Rules of Procedure, the Court invited the applicant to answer certain questions in writing, and the applicant complied with that request within the prescribed time-limit. The Commission presented its observations on the applicant's replies within the prescribed time-limit.
- 14 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.
- 15 On hearing the report of the Judge-Rapporteur, the General Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, put questions in writing to the parties. The parties replied within the prescribed period.
- 16 The parties presented oral argument and replied to the Court's oral questions at the hearing on 12 March 2014.
- 17 The applicant claims that the Court should:
- annul the contested decision in so far as it initiates a formal investigation procedure in relation to the 2006 schedule;
  - annul the contested decision in so far as it requires the Federal Republic of Germany to reply to the information injunction in relation to the 2006 schedule;
  - order the Commission to pay the costs.
- 18 The Commission contends that the Court should:
- dismiss the application as inadmissible;
  - in the alternative, dismiss the application as unfounded;
  - order the applicant to pay the costs.

## Law

### *The first head of claim ...*

#### Merits

- 39 In support of its first head of claim, the applicant raises five pleas in law alleging: (i) infringement of the rights of defence of the Federal Republic of Germany; (ii) infringement of the obligation to carry out a diligent and impartial examination; (iii) infringement of Article 108(2) and (3) TFEU, and Articles 4, 6 and 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1); (iv) infringement of Article 107(1) TFEU; and (v) infringement of the duty to state reasons.
- 40 The Court considers that it is appropriate in the first place to examine the fourth plea in so far as it alleges an infringement of Article 107(1) TFEU in relation to the selectivity criterion.

- 41 In support of that part of the plea, the applicant claims that the Commission should not have concluded that the 2006 schedule constituted State aid for the purposes of Article 107(1) TFEU, as it is not selective.
- 42 In that regard, it must be stated first that it follows from settled case-law that, where, in an action against a decision to initiate a formal investigation procedure, the applicant challenges the Commission's assessment of a measure as constituting State aid, review by the Court is limited to ascertaining whether or not the Commission has made a manifest error of assessment in forming the view that it was unable to resolve all the difficulties on that point during its initial examination of the measure concerned (see, to that effect, Case C-194/09 P *Alcoa Trasformazioni v Commission* [2011] ECR I-6311, paragraph 61; order of the President of the General Court in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar v Commission* [2001] ECR II-3915, paragraph 79; and Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v Commission* [2002] ECR II-4217, paragraph 49).
- 43 Next, it should be recalled that, in accordance with settled case-law, classification as aid requires all the following conditions to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 31 and the case-law cited).
- 44 The selective application of a State measure constitutes one of the characteristics of State aid within the meaning of Article 107(1) TFEU (see, to that effect, Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 40; judgment of 24 November 2011 in Case C-458/09 P *Italy v Commission*, not published in the ECR, paragraph 56; and Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 39). That article prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid. Thus, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of that article (Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 99).
- 45 In order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation (see Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 82 and the case-law cited).
- 46 According to equally settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective, where that differentiation arises from the nature or the overall structure of the system of which they form part (see *British Aggregates v Commission*, paragraph 83 and the case-law cited).
- 47 In the present case, it should be noted that the Commission found, in paragraph 279 of the contested decision, that the advantages in question were granted only to airlines using Lübeck airport and that, therefore, they were selective for the purposes of Article 107(1) TFEU.
- 48 The applicant argues that the airlines located in other airports are not in a similar situation, in law or in fact, to that of the airlines located at Lübeck airport, and that the Commission has not claimed that the 2006 schedule granted certain Lübeck airport users, compared with other users of that airport, uncustomary advantages on the market.
- 49 The Commission contends that the 2006 schedule is selective in that it applies only to airlines using Lübeck airport.

- 50 First of all it must be observed that the reasoning in paragraph 279 of the contested decision, referred to in paragraph 47 above and illustrated in paragraphs 265 to 267 of the contested decision, is the only reasoning advanced in support of the selective nature of the 2006 schedule, and so the review of that decision must be carried out having regard to that reasoning alone.
- 51 Next, it must be noted that the fact that the 2006 schedule applies only to airlines using Lübeck airport is consubstantial with the German legal rules on airport charges and with the very nature of the rules setting those charges. In accordance with Paragraph 43a of the Luftverkehrs-Zulassungs-Ordnung, each airport manager must draw up the fees scale applicable to that airport. Under the legal framework at issue, the 2006 schedule could therefore concern only the charges applicable to Lübeck airport. The airlines using other German airports are subject to rules on charges which apply specifically to those airports. They, therefore, do not find themselves in a situation comparable to that of the companies using Lübeck airport.
- 52 Furthermore, although it is clear from the case-law, as the Commission indicates, that aid may be selective even where it concerns a whole economic sector (see Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 45 and the case-law cited), it must be stated, first, that that case-law, developed in particular in the context of national measures of general application, is not directly relevant to the present case. The measure in question does not concern ‘a whole economic sector’, which in the present case is the airport sector, but only the undertakings using Lübeck airport.
- 53 Secondly, it must be stated that in order to assess the potentially selective nature of a fee scale drawn up by a public entity for the use of a product or service in a given sector in relation to certain undertakings, it is necessary, in particular, to refer to all of the undertakings using or able to use that specific product or service and to examine whether only some of them obtain or are able to obtain a potential advantage. The situation of undertakings which do not want to or cannot use the product or service in question is therefore not directly relevant when assessing the existence of an advantage. In other words, the selective nature of a measure consisting of a fee scale drawn up by a public entity for the use of a product or service made available by that entity may be assessed only in relation to current or potential customers of that entity and of the specific product or service in question, and not, in particular, in relation to customers of other undertakings from that sector providing similar products and services. Furthermore, even if it were to be considered that every non-discriminatory fee scale implemented by a public entity in consideration of a given product or service has a selective character, that would, essentially, have the effect of excessively extending the notion of aid ‘favouring certain undertakings or the production of certain goods’ referred to in Article 107(1) TFEU. In addition, in order for a potential advantage, conferred by a public entity in the context of the provision of specific products or services, to favour certain undertakings, it is necessary that the undertakings using or wishing to use that product or that service do not or cannot obtain that advantage from that entity in that particular context.
- 54 It follows from the foregoing, first, that the mere fact that the 2006 schedule applies only to airlines using Lübeck airport is not a relevant criterion for finding that that schedule is selective.
- 55 Secondly, in view of the fact that the specific service in question is the use of Lübeck airport, in return for payment of the fees laid down in the 2006 schedule, and that it is not disputed that all the airlines may benefit from the pricing provisions of that schedule, the Commission was wrong, in the light of the statement of reasons contained in the contested decision, to have found that the 2006 schedule was selective.
- ...
- 59 In those circumstances, it is clear that the Commission’s conclusion that the advantages created by the 2006 schedule are selective is, in view of the statement of reasons put forward in the contested decision, vitiated by a manifest error of assessment.

60 It follows from the foregoing that the fourth plea in law raised in support of the first head of claim must be upheld, and that the contested decision must be annulled in so far as it initiates a formal investigation procedure in relation to the 2006 schedule, without it being necessary to examine the other pleas raised in support of that head of claim.

...

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Commission Decision C(2012) 1012 final of 22 February 2012 on State aid No SA.27585 and No SA.31149 (2012/C) (ex NN/2012, ex CP 31/2009 and CP 162/2010) — Germany, in so far as that decision concerns the schedule relating to airport charges for Lübeck airport adopted in 2006;**
2. **Dismisses the action as to the remainder;**
3. **Orders the European Commission to bear its own costs and to pay half of those incurred by Hansestadt Lübeck.**

Delivered in open court in Luxembourg on 9 September 2014.

[Signatures]