Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

24 May 2023 *

(State aid – Italian air transport market – Compensation scheme for airlines with an Italian operating licence – Decision not to raise any objections – Aid intended to make good the damage caused by an exceptional occurrence – Obligation to state reasons)

In Case T-268/21,

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

applicant,

v

European Commission, represented by L. Flynn, C. Georgieva and F. Tomat, acting as Agents,

defendant,

supported by

Neos SpA, established in Somma Lombardo (Italy),

Blue panorama airlines SpA, established in Somma Lombardo,

Air Dolomiti SpA – Linee aeree regionali Europee, established in Villafranca de Verona (Italy),

represented by M. Merola and A. Cogoni, lawyers,

interveners,

THE GENERAL COURT (Tenth Chamber),

composed, at the time of the deliberations, of A. Kornezov, President, E. Buttigieg and G. Hesse (Rapporteur), Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

further to the hearing on 24 November 2022,

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, Ryanair DAC, seeks the annulment of Commission Decision C(2020) 9625 final of 22 December 2020 on State aid SA.59029 (2020/N) – Italy – COVID-19: Compensation scheme for airlines with an Italian operating licence ('the contested decision').

Background to the dispute

2 By decreto-legge n. 34 – Misure urgenti in materia di salute, sostegno al lavoro e all'economia nonche' di politiche sociali connesse all'emergenza epidemiologica da COVID-19 (Decree-Law No 34 on urgent health, labour support, economy and social-policy measures related to the COVID-19 epidemiological emergency), of 19 May 2020 (Ordinary Supplement to GURI No 128 of 19 May 2020, p. 1), as amended and converted into law by Law No 77 of 17 July 2020 (Ordinary Supplement to GURI No 180 of 18 July 2020, p. 1) ('Decree-Law No 34'), the Italian authorities established, inter alia, a compensation fund of EUR 130 million for the damage suffered by the aviation sector in the context of the COVID-19 pandemic.

3 On 14 August 2020, the Italian authorities adopted decreto-legge n. 104 – Misure urgenti per il sostegno e il rilancio dell'economia (Decree-Law No 104 laying down urgent measures to support and relaunch the economy) (Ordinary Supplement to GURI No 203 of 14 August 2020, p. 1). That decree-law authorised, pending completion of the procedure provided for in Article 108(3) TFEU, the Minister for Infrastructure and Transport of the Italian Republic to grant, by way of advance, subsidies financed by the fund created by Decree-Law No 34 in a total amount not exceeding EUR 50 million to airlines satisfying the eligibility conditions set out in Article 198 of Decree-Law No 34.

4 On 15 October 2020, in accordance with Article 108(3) TFEU, the Italian Republic notified the European Commission of an aid measure consisting in subsidies paid out of the fund created by Decree-Law No 34 ('the measure at issue'). That measure, the legal basis of which is Article 198 of Decree-Law No 34, is intended to make good the damage suffered by eligible airlines as a result of travel restrictions and other containment measures taken to limit the spread of the COVID-19 pandemic.

5 The conditions of eligibility, as set out in Article 198 of Decree-Law No 34, are as follows. First, the airline must not be the beneficiary of a fund created by another decree-law which provided for compensation for damage caused by the COVID-19 pandemic for airlines holding a licence issued by the Italian authorities and entrusted with the performance of public service obligations on the date of entry into force of that decree-law. Second, the airline must hold a valid air operator certificate and an Italian licence. Third, the capacity of the airline's aircraft must be greater than 19 places. Fourth, the airline must apply to its employees whose home base is in Italy and to employees of third-party undertakings taking part in its activity remuneration which may not be lower than the minimum remuneration established by the national collective agreement

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

applicable to the air transport sector, concluded by the employers' organisations and trade unions considered to be the most representative at national level ('the minimum remuneration requirement').

6 On 22 December 2020, by the contested decision, the Commission decided not to raise objections to the measure at issue, on the ground that that measure, including the eligibility conditions, was compatible with the internal market.

Forms of order sought

7 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission and the interveners, Neos SpA, Blue panorama airlines SpA and Air Dolomiti SpA – Linee aeree regionali Europee, to pay the costs.

8 The Commission contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

9 The interveners contend that the Court should:

– dismiss the application as inadmissible and, in any event, unfounded;

– order the applicant to pay the costs.

Law

…

Fourth plea in law: infringement of the obligation to state reasons

18 By its fourth plea, the applicant submits, in essence, that the contested decision is vitiated by a failure to state reasons in several respects. In particular, the applicant submits that the contested decision does not enable it to understand the reasons why the Commission examined the compatibility with EU law of the fourth condition for eligibility of the aid, namely the requirement of a minimum remuneration, solely in the light of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation'), and not in the light of the principles of non-discrimination and freedom to provide services.

19 The Commission, supported by the interveners, disputes that line of argument.

20 It should be borne in mind that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 125 and the case-law cited).

21 In that context, the decision not to initiate the formal investigation procedure provided for by Article 108(2) TFEU must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 296 TFEU if it discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties, the question of whether the reasoning is well founded being a separate matter (judgments of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 111, and of 12 May 2016, *Hamr – Sport* v *Commission*, T-693/14, not published, EU:T:2016:292, paragraph 54; see also, to that effect, judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraphs 65, 70 and 71).

22 In the present case, with regard to the compatibility of the measure at issue with the internal market, it is apparent, first of all, from the contested decision that the Commission referred to the judgments of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51, paragraph 14), and of 15 June 1993, *Matra* v *Commission* (C-225/91, EU:C:1993:239, paragraph 41), according to which aspects of aid which contravene specific provisions of the FEU Treaty, other than Articles 107 and 108 TFEU, could be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, with the result that their effect on the compatibility or incompatibility of the aid as a whole would then of necessity have to be determined in the context of the procedure prescribed in Article 108 TFEU (recital 92 of the contested decision). In that regard, the contested decision states that the Italian Republic established four eligibility conditions for selecting the potential beneficiaries of the measure at issue and that the Commission considered that those four conditions were indissolubly linked to the measure at issue (recital 93 of the contested decision).

23 Next, in recital 95 of the contested decision, the Commission noted that there was a particular reason for examining the fourth eligibility condition requiring beneficiaries to pay a minimum remuneration to their employees whose home base was in Italy. The Commission took the view that that requirement was not inherent in the objective of the measure at issue, given that its aim was to ensure that the beneficiaries guarantee a minimum salary protection to their employees whose home base was in Italy, as required by Italian law. Consequently, in its view, the compatibility of that requirement had to be assessed in the light of 'other relevant provisions of Union law'.

24 At this stage, it must be stated that the contested decision does not disclose in a clear and unequivocal manner the reasoning which led the Commission to state both that the minimum remuneration requirement was indissolubly linked to the measure at issue, in recital 93 of that decision, and that that requirement was not inherent in the objective of that measure, in recital 95 of that decision.

25 In addition, in recitals 96 to 98 of the contested decision, the Commission stated that the minimum remuneration requirement applied only to employees whose home base was in Italy. It went on to examine that requirement in the light of Article 8 of the Rome I Regulation, which lays down special conflict-of-law rules relating to individual contracts of employment. It found that, in accordance with that provision, all carriers with employees based in Italy were required to respect the minimum protection afforded by Italian law, irrespective of the nationality of the carrier or the law applicable to the individual contract of employment. On that basis, it concluded, in recital 99 of the contested decision, that the minimum remuneration requirement prima facie complied with the protection granted to employees under the Rome I Regulation and did not constitute an infringement of 'other provisions of Union law'.

26 In so reasoning, the Commission did not set out the reasons substantiating its view that the only relevant provision, other than Articles 107 and 108 TFEU, in the light of which it had to examine the compatibility of the minimum remuneration requirement with EU law, was Article 8 of the Rome I Regulation.

27 It thus becomes clear that the Commission's finding in recital 99 of the contested decision, to the effect that the minimum remuneration requirement was not contrary to 'other provisions of Union law', does not state the reasons on which it is based. Apart from Article 8 of the Rome I Regulation, the Commission did not refer to any other provision of EU law in the light of which it examined that requirement. Accordingly, the Commission failed to set out in a clear and transparent manner the reasons why it had found that that requirement did not constitute an infringement of 'other provisions of Union law'.

28 That failure to state reasons is, moreover, illustrated by the fact, set out in recitals 94 and 95 of the contested decision, that, when examining the minimum remuneration requirement, the Commission took account of the 'context', namely the complaint filed by the Italian Low Fares Airline Association (AICALF), concerning Article 203 of Decree-Law No 34, the wording of which was similar to Article 198 of that decree-law, the legal basis of the measure at issue. The content of that complaint was included in an annex to the application.

29 According to that complaint, the Italian legislation at issue was unlawful in so far as it provided that air carriers had to pay their employees whose home base was in Italy remuneration which could not be lower than the minimum remuneration established by the relevant national collective agreement for the air transport sector, concluded by the most representative trade unions and employers at national level. AICALF maintained that the national collective agreement referred to in that legislation had been negotiated by a trade association which was not representative, since its members accounted for only 11.3% of total Italian air traffic. According to AICALF, that legislation constituted an indirectly discriminatory restriction on the freedom to provide services within the meaning of Article 56 TFEU.

30 The complaint was based, inter alia, on the case-law of the Court of Justice, in particular the judgments of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772); of 18 December 2007, *Laval un Partneri* (C-341/05,

EU:C:2007:809); of 3 April 2008, *Rüffert* (C-346/06, EU:C:2008:189); and of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235). In that regard, AICALF maintained that the Court had already examined national measures requiring foreign operators to comply with the wage conditions established by national collective agreements and had declared them incompatible with EU law.

31 Prior to the adoption of the contested decision, the Commission's attention had therefore been drawn to Article 203 of Decree-Law No 34, the wording of which was similar to the minimum remuneration requirement provided for by the measure at issue, and to the compatibility of the measure at issue with the internal market, in the light, in particular, of Article 56 TFEU. It also had relevant information in that regard.

32 In view of that context, the Commission was a fortiori in a situation in which it had to rule on the relevance of Article 56 TFEU as '[another provision] of Union law' in respect of which it potentially had to examine the compatibility of the measure at issue with the internal market.

33 Thus, the applicant is correct in arguing that the contested decision does not enable it to understand the reasons why the Commission examined the compatibility of the minimum remuneration requirement with EU law solely in the light of Article 8 of the Rome I Regulation, and not in the light, in particular, of the principle of freedom to provide services, enshrined in Article 56 TFEU.

34 It follows from all the foregoing that the Commission has failed to explain why, in its view, the only relevant provision, other than Articles 107 and 108 TFEU, in the light of which it had to examine the compatibility of the minimum remuneration requirement with EU law was Article 8 of the Rome I Regulation, to the exclusion of 'other provisions of Union law' and, in particular, Article 56 TFEU establishing the freedom to provide services. In those circumstances, the General Court is not in a position to review whether the minimum remuneration requirement was compatible with 'other provisions of Union law' and thus whether the measure at issue as a whole was compatible with the internal market.

35 That conclusion is not called into question by the fact, noted in recital 94 of the contested decision, that, on the date of adoption of the contested decision, no infringement proceedings under Article 258 TFEU had been initiated against the Italian Republic on account of the legislation referred to in the complaint. It follows from the overall scheme of Article 258 TFEU that the Commission is not required to initiate such proceedings. It has a discretion in that regard (judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 47). Accordingly, the fact that the Commission did not initiate infringement proceedings does not mean that the Italian legislation at issue is compatible with EU law. Hence that clarification has no bearing on the inadequacy of the statement of reasons for the contested decision.

36 As regards the statement in recital 99 of the contested decision that 'it will be for the Italian competent authorities, and, as the case may be, the Italian courts, to ensure that [the minimum remuneration requirement] is implemented and enforced in a way which is compatible with Union law', it must be borne in mind that the assessment of the compatibility of aid with the internal market falls within the exclusive competence of the Commission, subject to review by the EU judicature (see, to that effect, judgment of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraph 79). Accordingly, the fact that the Italian authorities or courts are able to ensure that that

requirement is implemented and enforced in accordance with EU law does not relieve the Commission of its obligation to assess the compatibility of aid with the internal market, including, where appropriate, in the light of provisions of EU law other than Articles 107 and 108 TFEU. Therefore, the statement in recital 99 of the contested decision also has no bearing on the inadequacy of the statement of reasons given in the contested decision.

37 Lastly, it is settled case-law that the statement of reasons cannot be explained for the first time *ex post facto* before the Court, save in exceptional circumstances (see judgment of 20 September 2011, *Evropaïki Dynamiki* v *EIB*, T-461/08, EU:T:2011:494, paragraph 109 and the case-law cited). Consequently, the explanations put forward by the Commission in the defence and at the hearing, to the effect that the measure at issue does not breach the principle of freedom to provide services and that the examination of 'other provisions of Union law' was not necessary, cannot supplement, in the midst of proceedings underway, the statement of reasons provided in the contested decision.

38 Accordingly, the contested decision must be annulled in so far as the Commission infringed the obligation to state reasons imposed on it by Article 296 TFEU.

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On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

1. **Annuls Commission Decision C(2020) 9625 final of 22 December 2020 on State aid SA.59029 (2020/N) – Italy – COVID-19: Compensation scheme for airlines with an Italian operating licence;**

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

3. **Orders Neos SpA, Blue panorama airlines SpA and Air Dolomiti SpA – Linee aeree regionali Europee to bear their own costs.**

Kornezov Buttigieg Hesse

Delivered in open court in Luxembourg on 24 May 2023.

[Signatures]