JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)
17 February 2021 (*)

(State aid – Air transport market in Sweden, from Sweden and to Sweden – Loan guarantees to support airlines amid the Covid-19 pandemic – Decision not to raise any objections – Temporary Framework for State aid measures – Measure intended to remedy a serious disturbance in the economy of a Member State – Free provision of services – Equal treatment – Proportionality – Criterion of holding a licence issued by the Swedish authorities – Failure to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Article 107(3)(b) TFEU – Ratio legis – Duty to state reasons)

In Case T-238/20,

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

applicant,

v

European Commission, represented by L. Flynn, S. Noë and F. Tomat, acting as Agents,

defendant,

supported by

French Republic, represented by E. de Moustier, C. Mosser, A. Daniel and P. Dodeller, acting as Agents,

and by

Kingdom of Sweden, represented by C. Meyer-Seitz, H. Eklinder, A. Runeskjöld, M. Salborn Hodgson, H. Shev, R. Shahsavan Eriksson and J. Lundberg, acting as Agents,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 2366 final of 11 April 2020 on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov, E. Buttigieg (Rapporteur), K. Kowalik-Bańczyk and G. Hesse, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 22 September 2020,

gives the following

Judgment

Background to the dispute

On 3 April 2020, the Kingdom of Sweden notified the European Commission of an aid measure in the form of a loan guarantee scheme for certain airlines ('the aid scheme at issue') in accordance with Article 108(3) TFEU. The aid scheme at issue aims to ensure that airlines which hold a licence issued by that Member State ('the Swedish licence') and which are important to secure connectivity in Sweden have sufficient liquidity to ensure that the disruptions caused by the Covid-19 pandemic do not undermine their viability and to preserve the continuity of economic activity during and after the current crisis. The aid scheme at issue will benefit all airlines which, on 1 January 2020, held a Swedish licence to conduct commercial activities in aviation under Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3), except for airlines which have non-scheduled passenger air services as their main activity. The maximum amount of the loan guarantees under that scheme will be 5 billion kronor (SEK), and the guarantee will concern investment and working capital loans, it will be granted until 31 December 2020 at the latest and the duration will be limited to a maximum of six years.

On 11 April 2020, the Commission adopted Decision C(2020) 2366 final on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines ('the contested decision'), by which, after concluding that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU, it assessed its compatibility with the internal market in the light of its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (OJ 2020 C 91 I, p. 1), and amended on 3 April 2020 (OJ 2020 C 112 I, p. 1) ('the Temporary Framework').

In that regard, first, the Commission notes that, pursuant to Regulation No 1008/2008, eligible airlines have their 'principal place of business' (see paragraph 26 below) in Sweden, and their financial situation was regularly monitored by the national licensing authority. Furthermore, the operation of scheduled passenger services by the beneficiaries of

the measure at issue is likely to play a major role in the connectivity of the country. Therefore, the eligibility criteria for the measure are relevant in order to identify airlines that have a link with Sweden and play a role in securing the connectivity of Sweden, in line with the objective of the aid scheme at issue. Secondly, it considered that that scheme was necessary, appropriate and proportionate to remedy a serious disturbance in the Swedish economy and met all the relevant conditions set out in section 3.2 of the Temporary Framework entitled 'Aid in the form of guarantees on loans'. Thus, the Commission concluded that the aid scheme at issue was compatible with the internal market pursuant to Article 107(3)(b) TFEU and therefore did not raise objections to it.

Procedure and forms of order sought by the parties

By document lodged at the Court Registry on 1 May 2020, the applicant brought the present action.

By document lodged at the Court Registry on the same date, the applicant applied for the present action to be decided under an expedited procedure in accordance with Articles 151 and 152 of the Rules of Procedure of the General Court. By decision of 27 May 2020, the General Court (Tenth Chamber) granted the request for an expedited procedure.

The Commission lodged the defence at the Court Registry on 15 June 2020.

Pursuant to Article 106(2) of the Rules of Procedure, the applicant submitted a reasoned request for a hearing on 22 June 2020.

On a proposal from the Tenth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

By way of a measure of organisation of procedure, within the meaning of Article 89 of the Rules of Procedure, on 20 July 2020, the Court invited the applicant to reply in writing to two questions. The applicant complied with that request within the period prescribed.

By document lodged at the Court Registry on 20 July 2020, the French Republic sought leave to intervene in these proceedings in support of the form of order sought by the Commission. By document lodged at the Court Registry on 28 July 2020, the applicant requested, in accordance with Article 144(7) of the Rules of Procedure, that certain information concerning the number of bookings and the expected number of passengers contained in the application, in the abbreviated version of the application and in the annexes to those documents should not be disclosed to the French Republic. Accordingly, it attached a non-confidential version of the application, the abbreviated version of the application and their annexes.

In reply to the measure of organisation of procedure referred to in paragraph 9 above, the applicant confirmed on 5 August 2020 that it was withdrawing paragraphs 66 to 76 of the application, in the third part of the second limb of the first plea in law, and paragraphs 110 to 114 of the application, in the second limb of the third plea in law.

By order of the same date, the President of the Tenth Chamber (Extended Composition) of the Court granted the French Republic leave to intervene and provisionally limited disclosure of the application, the abbreviated version of the application and their annexes to the non-confidential versions produced by the applicant, pending the submission of any observations by the French Republic on the request for confidential treatment.

By a measure of organisation of procedure of 6 August 2020, the French Republic was permitted, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention.

By document lodged at the Court Registry on 11 August 2020, the Kingdom of Sweden sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By document lodged at the Court Registry on 17 August 2020, the applicant requested, in accordance with Article 144(7) of the Rules of Procedure, that the information referred to in paragraph 10 above should not be disclosed to the Kingdom of Sweden.

By order of 21 August 2020, the President of the Tenth Chamber (Extended Composition) of the Court granted the Kingdom of Sweden leave to intervene and provisionally limited disclosure of the application, the abbreviated version of the application and their annexes to the non-confidential versions produced by the applicant, pending the submission of any observations by the Kingdom of Sweden on the request for confidential treatment. By a measure of organisation of procedure of the same date, the Kingdom of Sweden was permitted, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention.

On the same day, the French Republic submitted to the Court Registry its statement in intervention, without raising any objection in relation to the applicant's request for confidential treatment.

On 7 September 2020, the Kingdom of Sweden submitted to the Court Registry its statement in intervention, without raising any objection in relation to the applicant's request for confidential treatment.

The applicant claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

The Commission contends that the Court should:

dismiss the action as unfounded;

order the applicant to pay the costs.

The French Republic submits that the action is inadmissible in so far as it seeks to challenge the overall merits of the assessment of the aid, and that it should be dismissed on substantive grounds as to the remainder. In the alternative, it submits that the entire action should be dismissed on its merits.

Like the Commission, the Kingdom of Sweden submits that the action should be dismissed as unfounded.

Law

It should be recalled that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on its merits without first ruling on its admissibility (see, to that effect, judgments of 26 February 2002, *Council* v *Boehringer*, C-23/00 P,

EU:C:2002:118, paragraphs 51 and 52, and of 14 September 2016, *Trajektna luka Split* v *Commission*, T-57/15, not published, EU:T:2016:470, paragraph 84). Therefore, having particular regard to the considerations which led to the present proceedings being expedited and the importance of a swift substantive response, both for the applicant and for the Commission, the French Republic and the Kingdom of Sweden, it is appropriate to begin by examining the merits of the action without first ruling on its admissibility.

The applicant puts forward four pleas in law in support of its action. The first plea alleges, in essence, infringement of the principles of non-discrimination on grounds of nationality and the free provision of services, the second plea alleges infringement of the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, the third plea alleges, in essence, infringement of the procedural rights under Article 108(2) TFEU and the fourth plea alleges infringement of the duty to state reasons.

First plea in law: infringement of the principles of non-discrimination on grounds of nationality and the free provision of services

The first plea consists, in essence, of four limbs, the first alleging that the aid scheme at issue is discriminatory on grounds of nationality, the second, that it is neither necessary nor proportionate to achieve the objective assigned to it, the third, that it restricts the free provision of services and the fourth, that the resulting restriction is unjustified.

The first two limbs of the first plea in law, alleging that the aid scheme at issue is discriminatory on grounds of nationality and is neither necessary nor proportionate to achieve the objective assigned to it

In the present case, first, the aid scheme at issue consists in providing a State guarantee to airlines holding a Swedish licence as at 1 January 2020 – except for those whose main activity is the operation of charter flights – which requires that their 'principal place of business' is in Sweden (see paragraph 26 below) when they apply for loans from banking institutions. That scheme is limited in time (until 31 December 2020) and amount (SEK 5 billion). As is apparent from paragraph 1 above, the term 'Swedish licence' refers to a licence issued under Article 3 of Regulation No 1008/2008 by the Swedish authorities. Accordingly, the applicant's argument, in paragraph 57 of the application, that, by using the term 'Swedish licence', the Commission resorted to a concept which does not exist in EU law, must be rejected at the outset.

Secondly, under Article 2(26) of Regulation No 1008/2008, the 'principal place of business' is defined as the head office or registered office of an EU air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the air carrier are exercised. The notion of a principal place of business, in practice, corresponds to the registered office of that carrier (see, to that effect, judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 66). It is therefore true, as the applicant maintains, that for a given legal entity that regulation permits the establishment of only one principal place of business and, consequently, the issuing of only one licence by the authorities of the Member State on whose territory that principal place of business is located. It is nevertheless open to an airline, as the Kingdom of Sweden rightly states in its statement in intervention, to acquire a number of licences by creating a number of separate legal entities, for example by setting up subsidiaries.

Thirdly, it must be pointed out that one of the eligibility criteria for the aid scheme at issue is the holding of a Swedish licence as at 1 January 2020, that is to say, before the Covid-19 pandemic was recognised. In so far as acquiring a licence from the Swedish authorities presupposes that an airline has its principal place of business in Sweden, it necessarily follows that that airline had to have been established in that country at the latest some time before the end of 2019, bearing in mind the time frames for acquiring a licence. Accordingly, as the Commission contends, the fact that, by transferring the location of its principal place of business, an airline is able to acquire a licence from another Member State has no bearing on the legality of the aid scheme at issue. Similarly, the applicant cannot maintain in paragraphs 53 and 54 of the application that, by putting forward such an argument in a letter of 22 April 2020 sent by the Commission to the applicant, the Commission intended to promote a subsidies race.

Bearing that in mind, it should be pointed out that, under Article 107(3)(b) TFEU, aid intended inter alia to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market.

It should be recalled that, according to the case-law, it is clear from the general scheme of the Treaty that the procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Therefore, the Commission cannot declare State aid, certain conditions of which contravene other provisions of the Treaty, to be compatible with the internal market. Similarly, State aid, certain conditions of which contravene the general principles of EU law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the internal market (judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51).

In the present case, it has to be said that one of the eligibility criteria, that of holding a Swedish licence, results in a difference in treatment for airlines whose principal place of business is in Sweden, so as to be able to benefit from a loan guaranteed by the State, and for those whose principal place of business is in another Member State and which operate in Sweden, to Sweden and from Sweden under the freedom to provide services and the freedom of establishment, which are not so entitled.

Even if, as the applicant submits, that difference in treatment may amount to discrimination within the meaning of the first paragraph of Article 18 TFEU, it should be made clear that, under that provision, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaties 'without prejudice to any special provisions contained therein'. Therefore, it is important to ascertain whether that difference in treatment is permitted under Article 107(3)(b) TFEU, which is the legal basis for the contested decision. That examination requires, first, that the objective of the aid scheme at issue satisfies the requirements of that provision and, secondly, that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

In the first place, with regard to the objective of the aid scheme at issue, it should be recalled that the Kingdom of Sweden based that measure on Article 107(3)(b) TFEU (paragraph 9 of the contested decision). That scheme thus aims to remedy the serious disturbance in the Swedish economy caused by the Covid-19 pandemic, as is clear from paragraphs 41 and 42 of the contested decision, which corresponds to one of the situations covered by Article 107(3)(b) TFEU, by securing Sweden's connectivity. The aid scheme at issue, as is apparent from paragraphs 8 and 43 of the contested decision, ensures that airlines 'with a Swedish license that are important to secure connectivity in Sweden' have sufficient liquidity and those airlines 'that have a link with Sweden and play a role in securing the connectivity of Sweden' are indeed defined by the fact that they hold a Swedish licence, but also, as the Commission and the Kingdom of Sweden point out, by the fact that they operate regular flights in Sweden, to Sweden and from Sweden. Those airlines whose main activity is the operation of charter flights, that is to say, unscheduled flights, are not eligible for the aid scheme at issue, even if they hold a Swedish licence.

The Court considers that, since the existence both of a serious disturbance in the Swedish economy as a result of the Covid-19 pandemic and of the significant adverse effects it has had on aviation in Sweden, and therefore on air services in the territory of that Member State, has been established to the requisite legal standard in the contested decision, the objective of the aid scheme at issue satisfies the conditions laid down in Article 107(3)(b) TFEU.

In the second place, with regard to ensuring that the conditions for granting the aid do not go beyond what is necessary to achieve the objective of the aid scheme at issue and to satisfy the conditions laid down in Article 107(3)(b) TFEU, the following observations should be made.

The arrangements for the aid scheme at issue consist in granting a State guarantee so as to enable eligible airlines to overcome the liquidity crisis caused by the consequences for Swedish air traffic of the Covid-19 pandemic by borrowing from banking institutions. The bank loans backed up by the State guarantee may be taken out for a maximum term of six years (paragraph 24 of the contested decision). The aid scheme at issue was adopted pursuant to section 3.2 of the Temporary Framework entitled 'Aid in the form of guarantees on loans'.

It should be recalled, in that regard, that section 5 of the Temporary Framework is worded as follows:

'Banks and other financial intermediaries have a key role to play in dealing with the effects of the COVID-19 outbreak, by maintaining the flow of credit to the economy. If the flow of credit is severely constrained, economic activity will decelerate sharply, as undertakings struggle to pay their suppliers and employees. Against this background, it is appropriate that Member States can take measures to incentivise credit institutions and other financial intermediaries to continue to play their role in continuing supporting economic activity in the EU.'

Accordingly, the Kingdom of Sweden, by adopting the aid scheme at issue, intended to introduce an incentive measure aimed at the banking sector, in line with paragraph 5 of the Temporary Framework, by issuing a State guarantee for new loans, which may be taken out up to 31 December 2020 (paragraph 14 of the contested decision).

The applicant maintains, in paragraphs 58 and 82 of the application, that the contested decision does not establish the need to allocate the aid on the basis of holding an EU operating licence issued by the Swedish authorities.

That argument cannot succeed.

First, with regard to the appropriateness of the aid scheme at issue, bearing in mind the fact that that scheme takes the form of State guarantees which make it possible for banking institutions to grant loans for a maximum period of six years, it is normal for the Member State concerned to seek to ensure that the airlines eligible for the guarantee have a stable presence, in order for them to be present on Swedish territory to honour the loans granted, so that the State guarantee is used as little as possible. The criterion of holding a Swedish licence, in so far as it requires the principal place of business of the airlines to be on Swedish territory, ensures at least the administrative and financial stability of the presence of those airlines, so that the authorities of the Member State granting the aid may control the manner in which that aid is used by the recipients, which would not have been the case if the Kingdom of Sweden had adopted another criterion allowing the eligibility of other airlines operating on Swedish territory as mere service providers, like the applicant, which service provision, by definition, could cease at very short notice, if not immediately.

Secondly, those conditions for granting the aid reflect the possibility and the obligation for the Swedish authorities to carry out financial checks of the recipients. Such a possibility and such an obligation exist only for those airlines which hold a Swedish licence, because the Swedish authorities alone are competent to monitor the financial situation of those airlines in accordance with the obligations arising, in particular, under Article 5 and Article 8(2) of Regulation No 1008/2008, as was stated in paragraph 43 of the contested decision. However, the Swedish authorities have no power under that regulation to monitor the financial situation of airlines which do not have a Swedish licence.

Thirdly, while it is true that the Court considered that, in practice, the concept of principal place of business corresponded to that of a registered office (see paragraph 26 above) and that a change of registered office could be made relatively quickly, it should not be forgotten that Article 2(26) of Regulation No 1008/2008 contains other details, in particular in relation to the fact that continued airworthiness management must be carried out from the location of the principal place of business, that is to say, in the present case, in Sweden. That consideration is supported by Article 5 (on the financial conditions for granting an operating licence), Article 7 (on proof of good repute) and Article 8 (on the validity of an operating licence) of Regulation No 1008/2008. Those provisions create reciprocal regulatory obligations between airlines holding a Swedish licence and the Swedish authorities, and thus a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(3)(b) TFEU, which require that the aid addresses a serious disturbance in the economy of the Member State concerned. Moreover, the loss of that link with the Member State concerned caused by the transfer of the principal place of business to another Member State cannot be narrowed down to a mere change of registered office, given that, as the applicant itself observes in paragraph 54 of the application, the airline must also take all the administrative steps with that State in order to obtain a new

operating licence and satisfy all the conditions for that purpose, and the fact that the location of its new principal place of business is recognised is only one factor.

It is therefore certain that, by adopting that criterion together with the criterion of the non-eligibility of airlines operating charter flights, the Kingdom of Sweden sought, in essence, to ensure a permanent link between it and the airlines benefiting from its guarantee, resulting in the presence of an important legal entity, namely the principal place of business of those airlines, on its soil, which would not have existed in that regard with airlines operating under a licence issued by a Member State other than itself, in that the latter are not subject to financial and reputational monitoring by the Swedish authorities within the meaning of Regulation No 1008/2008 and, in their situation, that reciprocal stable link between it and the airlines holding an operating licence which it issued is absent.

Thus, by limiting eligibility for the aid to only those airlines which hold a Swedish licence, to the exclusion of those operating charter flights, as a result of the stable reciprocal links which tie them to the Swedish economy, the aid scheme at issue is appropriate for achieving the objective of remedying the serious disturbance in the economy of that Member State.

Fourthly, with regard to the proportionate nature of the aid scheme at issue, it must be noted that, in order to secure Sweden's connectivity, the double requirement of a Swedish licence and air services in Swedish territory through regular flights is the most appropriate for guaranteeing that the presence of an airline on that territory is permanent, by ensuring that, as a result of that licence, the principal place of business of that airline will be in that territory and that it will intend to stay there, bearing in mind the regular air routes mentioned above. Although it is true, in theory, as the applicant claims, that the presence of the principal place of business of an airline in the territory of a given Member State is not necessarily the same as a strong commercial presence in that territory, it appears, first, that it does equate to the place where administrative and financial decisions are taken, which is particularly important in the present case in order to ensure that Sweden's connectivity is not interrupted from one day to the next, and, secondly, that the eligible airlines overall contribute most to Sweden's regular air service, both as regards freight and passenger transport, which meets the objective of ensuring Sweden's connectivity, whether in relation to air routes in Sweden, from Sweden and to Sweden, despite the applicant's arguments in that regard.

Thus, it is apparent from the information provided by the Kingdom of Sweden when the aid scheme at issue was notified, which is set out in paragraph 33 of the defence, that the airlines which hold a Swedish licence were responsible for 98% of the domestic passenger traffic and 84% of the domestic freight transport in 2019, which is a key piece of information bearing in mind the size and geography of that Member State. With regard to the share of passenger air traffic within the European Union going to Sweden and coming from Sweden, in 2019, 49% of that was carried out by operators holding a Swedish licence. Those operators' share of passenger air traffic outside the European Union going to Sweden and coming from Sweden was, however, less, being 35% in 2019. Taking into consideration the variety of situations at issue (transport of passengers and goods, and domestic and international services in the territory) and the commitment to ensuring the presence of a durable link with the Swedish territory, it must be held that the Commission did not err in its assessment by considering that the aid scheme at issue did not go beyond what was necessary to achieve the stated objective of the Swedish authorities, which became crucial given that, at the end of March 2020, that State had recorded a drop of 93% of the passenger air traffic in the three main airports.

Furthermore, as was stated in paragraph 32 above, it is appropriate to point out again that the aid scheme at issue does not benefit undertakings which hold a Swedish licence and whose main activity is the operation of charter flights, since unscheduled flights are not able to guarantee the same connectivity over time in Swedish territory, as they are by definition irregular and accordingly less predictable for the Member State concerned.

In that regard, the argument which the applicant makes in paragraph 55 of the application that the airlines which hold an operating licence issued by another Member State are often owned and operated by nationals of Member States other than the Kingdom of Sweden, in the same way that they employ such nationals, as is the case with the applicant, even if it were established, is purely circumstantial and cannot have any effect on the need for the aid scheme at issue, in particular having regard to the criteria which it lays down, including the criterion relating to the Swedish licence. It should be added that that argument may easily be relied on against the applicant, since the capital of companies which hold a Swedish licence may belong to legal or natural persons established in different Member States, other than the Kingdom of Sweden, or who are nationals of those other Member States.

It follows from the foregoing considerations that the applicant is wrong to maintain that, since its principal place of business is in Ireland, and since it has a significant share of the Swedish market of around 5%, it is the fourth largest airline in Sweden and it has been delivering connectivity in Sweden since 1997, the Commission committed an error of assessment by asserting that the requirement for the beneficiary to have its principal place of business in Sweden was relevant to attaining that objective and to identifying airlines that 'play[ed] a role in securing the connectivity of Sweden'. In doing so, the applicant ignores the objective of remedying the serious disturbance in the Swedish economy and fails to mention the fact that Sweden's connectivity is not only assured by passenger air transport, on the one hand, and by non-domestic transport to Sweden, on the other, but is also assured by the air transport of goods and by domestic passenger air transport.

Furthermore, it is essential to take into account the temporal aspect inherent in the objective pursued by the aid scheme at issue. Although it is true that, before that scheme was adopted, the applicant made a tangible contribution to Sweden's connectivity, even if that contribution was overall fairly limited, since its market share in passenger air transport in relation to Sweden was around 5%, it should be recalled that the grant of public funds in the context of Article 107(3)(b) TFEU implies that the aid provided by the Member State concerned, albeit in serious difficulty, may remedy the disturbance in its economy, which involves taking into account the overall situation of the airlines capable

of enabling the restoration of that economy and, in particular, contribute to Sweden's connectivity, which gives relevance to the criterion of a stable link with the territory of that Member State. Bearing in mind that the resources which may be allocated by the Member State concerned are finite and must therefore address priorities, it cannot be forgotten that that Member State had to take into consideration airlines which, although smaller than the applicant, and therefore transport less passengers and have a smaller turnover, focused on domestic services in the Swedish territory, which was an even more vital issue given the specific features of the Swedish territory and the exceptional period characterised by the pandemic. Contrary to what the applicant maintains, it is therefore not contrary to the principle of proportionality, in light of the objective of the aid scheme at issue, to permit airlines which have a smaller share of the market than its own on the overall passenger air transport market relating to Sweden to be eligible for that scheme, in particular where such airlines are of particular importance to that country's connectivity, like airlines that are smaller than the applicant and which operate flights for a specific purpose, for example for medical or emergency purposes, as was made clear in paragraph 15 of the contested decision.

In addition, the Kingdom of Sweden had no guarantee that the contribution to that country's connectivity from an airline that focused on non-domestic passenger air transport, and whose principal place of business was not in its territory, would be maintained after the crisis, even if it was granted the benefit of the State guarantee. The applicant's situation at the time of the contested decision is one such example. It is apparent from the evidence on file that the applicant's market share fell constantly, from 11.8% to 5%, and that it intended to reduce its physical presence on Swedish territory to a single base in Göteborg, which, according to paragraph 14 of the application, contained only one aircraft. The Commission therefore did not commit any error of assessment.

As regards the alleged infringement of the principle of proportionality, the applicant bases part of its arguments on the assumption that there is an alternative aid scheme based on the airlines' respective market shares. At the hearing, it also set out other possible criteria, like the number of passengers carried or the routes.

However, according to the case-law, it is not for the Commission to make a decision in the abstract on every alternative measure conceivable since, although the Member State concerned must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used, it is not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective. Although that Member State is not under any such obligation, the applicant is not entitled to ask the Court to require the Commission to take the place of the national authorities in that task of normative prospecting in order to examine every alternative measure possible (see, to that effect, judgment of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 94 and the case-law cited).

In any event, it should be pointed out that, for the reasons indicated in paragraphs 40 to 44 above, the extension of the aid scheme at issue to airlines not established in Sweden would not have made it possible to achieve the objective of that scheme to the extent that, as was made clear in paragraph 49 above, the requirement to take into account air transport in Sweden in its entirety, in its diversity and in its permanence would not have been as well satisfied by adopting the criteria proposed by the applicant, so that the Commission was correct not to approve them.

Therefore, the applicant's arguments alleging that the aid scheme at issue was inappropriate and disproportionate should be rejected, without there being any need to rule on the admissibility – disputed by the Commission – of Annexes A.3.1 and A.3.2 to the application, containing reports drawn up by the applicant's experts.

In its contested decision, the Commission therefore approved an aid scheme which actually aims to remedy the serious disturbance in the economy of a Member State and which, under its conditions for granting the aid, does not go beyond what was necessary to achieve the objective of that scheme. It must therefore be held that, having regard to the principles set out in paragraph 31 above, the consequences of that scheme, in that the Swedish authorities limited its scope to airlines which (i) hold a Swedish licence and (ii) do not have as their main activity the operation of charter flights, do not infringe the first paragraph of Article 18 TFEU solely because the scheme favours airlines which have their principal place of business on Swedish territory and whose main activity is not the operation of charter flights.

It is apparent from the foregoing that the objective of the aid scheme at issue satisfies the requirements of the derogation laid down in Article 107(3)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

Consequently, the first two limbs of the first plea must be rejected.

The last two limbs of the first plea in law, alleging that the aid scheme at issue restricts the free provision of services and that that restriction is unjustified

The applicant observes, first, that a restriction of the free provision of services is lawful if it is justified by an overriding reason relating to the general interest, it is non-discriminatory, and it is necessary and proportionate to the objective of general interest pursued and, secondly, that those conditions are cumulative and that a restriction becomes unjustified even if only one of them is found to not be fulfilled. That is the case here. The aid scheme at issue is, first of all, discriminatory, because it treats airline companies differently, depending on which EU Member State issued their EU operating licence, when all EU airlines operating in Sweden and contributing to its connectivity should be able to be eligible for the aid scheme at issue. Next, the aid scheme at issue is not proportionate, because it goes beyond what is necessary to achieve its objective, given that that objective, which is to enable the Kingdom of Sweden to ensure its connectivity, could be achieved without impeding the free provision of services if it benefited all airlines operating in Sweden, irrespective of which Member State issued their EU operating licence, simply by taking into account their respective market share.

Finally, the objective of general interest of compensating the airline sector for losses due to the Covid-19 pandemic in order to preserve Sweden's connectivity does not make it necessary to help only airlines which hold a Swedish licence,

given that the airlines operating in Sweden under a licence issued by another Member State are just as important to that end. On the contrary, assisting national airlines leads to the fragmentation of the internal market and the elimination of competitors from other Member States, weakens competition, aggravates the damage caused by the Covid-19 pandemic, ultimately harms the structure of the airline sector which the aid scheme at issue is supposed to preserve and restricts the rights of EU carriers to provide air transport services freely within the internal market, regardless of which Member State issued their licence.

As a preliminary point, in so far as the applicant bases its arguments on the existence of discrimination arising from the aid scheme at issue and the lack of proportionality of that scheme, it is appropriate to refer to the examination of the first two limbs of the first plea in law.

With regard to Article 56 TFEU, it should be pointed out that, pursuant to Article 58(1) TFEU, the free provision of services in the field of transport is governed by the provisions of the title relating to transport, namely Title VI of the TFEU. The free provision of services in the field of transport is therefore governed, in primary law, by a special legal regime (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 36). Consequently, Article 56 TFEU does not apply as such to the air transport sector (judgment of 25 January 2011, *Neukirchinger*, C-382/08, EU:C:2011:27, paragraph 22).

Therefore, measures liberalising air transport services may only be adopted under Article 100(2) TFEU (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 38). However, the EU legislature adopted Regulation No 1008/2008 on the basis of that provision, and its very purpose is to define the conditions for applying in the air transport sector the principle of free provision of services (see, by analogy, judgment of 6 February 2003, *Stylianakis*, C-92/01, EU:C:2003:72, paragraphs 23 and 24). However, it should be pointed out that the applicant does not claim that there has been any infringement of that regulation.

In any event, although it is true that, owing to the definition of the scope of the aid scheme at issue, the applicant is deprived of access to loans which benefit from the State guarantee granted by the Kingdom of Sweden, it does not demonstrate how that exclusion discourages it from providing services from Sweden and to Sweden, especially when it is apparent from the documents in the file that, independently of the aid scheme at issue and for purely commercial reasons, the applicant progressively reduced its activity on the Swedish market, both in respect of the destinations served and the number of aircraft present (see paragraph 51 above). In particular, the applicant fails to identify the elements of fact or law which cause the aid scheme at issue to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which, as was found in the context of the first two limbs of the first plea, are nevertheless necessary and proportionate to remedy the serious disturbance in the Swedish economy caused by the Covid-19 pandemic, in accordance with the requirements of Article 107(3)(b) TFEU.

It follows from all of the foregoing that none of the limbs of the first plea can be upheld and that therefore that plea must be rejected.

Second plea in law: infringement of the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition

The applicant argues, in paragraphs 94 to 102 of the application, that the Commission did not satisfy its obligation, when examining the compatibility of aid, to weigh the expected beneficial effects of such aid, in terms of achieving the objectives set out in Article 107(3)(b) TFEU, against its adverse effects, in terms of distortion of competition and effect on trade between Member States, which constitutes a manifest error of assessment of the facts and therefore a sufficient ground for annulling the contested decision. The Commission disputes this line of argument, supported by the French Republic. In that regard, the Kingdom of Sweden refers to the Commission's arguments.

Under Article 107(3)(b) TFEU, 'the following may be considered to be compatible with the internal market: … aid to … remedy a serious disturbance in the economy of a Member State'. It follows from the wording of that provision that its authors considered that it was in the interests of the European Union as a whole that one or other of its Member States be able to overcome a major or possibly even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole. That textual interpretation of the wording of Article 107(3)(b) TFEU is confirmed by comparing it with Article 107(3)(c) TFEU concerning 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', in so far as the wording of the latter provision contains a condition relating to proof that there is no effect on trading conditions to an extent that is contrary to the common interest, which is not found in Article 107(3)(b) TFEU (see, to that effect, judgment of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraphs 20 and 39).

Thus, in so far as the conditions laid down in Article 107(3)(b) TFEU are fulfilled, that is to say, in the present case, that the Member State concerned is indeed confronted with a serious disturbance in its economy and that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, secondly, appropriate and proportionate, those measures are presumed to be adopted in the interests of the European Union, so that that provision does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU. In other words, such a balancing exercise would have no *raison d'être* in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive. Indeed, the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular.

It must therefore be held that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU, but only to ascertain whether the aid measure at issue is necessary, appropriate and proportionate in order to remedy the serious disturbance in the economy of the Member State

concerned. Accordingly, the Court rejects the applicant's argument that the obligation to conduct the balancing test results from the exceptional nature of compatible aid, including aid declared compatible under Article 107(3)(b) TFEU. For the same reasons, it is not justified in relying on the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563, paragraphs 210 to 214), in so far as, in that decision, the General Court did not take into account the consequences of the difference in the wording between Article 107(3)(b) and Article 107(3)(c) TFEU, highlighted by the Court of Justice in the judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742, paragraphs 20 and 39).

Nor may the applicant rely on the obligatory nature of a balancing test on the basis of the Temporary Framework, by arguing that that framework binds the Commission and provides a second basis separate from the Commission's obligation in that respect, because such an obligation does not appear in the Temporary Framework. In particular, section 1.2 of that framework, referred to by the Commission, relating to 'the need for close European coordination of national aid measures', contains a single paragraph, paragraph 10, which contains no requirements in that regard. Consequently, the applicant was not entitled to rely on that.

For the same reasons, the Commission's arguments, presented in the alternative, that the Temporary Framework itself contains such a balancing exercise, must be rejected.

The second plea must therefore be rejected.

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

In support of the fourth plea, the applicant observes that the Commission is bound by a duty to state reasons by virtue of the second paragraph of Article 296 TFEU and that an infringement of that obligation justifies the annulment of the contested decision. In addition, under that provision, the Commission must disclose in 'a clear and unequivocal fashion' the reasoning it followed to adopt the measure in question in such a way that both the interested parties and the competent court of the European Union understand the reasons for adopting the contested measure. This requirement to state adequate reasons is all the more important in the present case since the contested decision was adopted without the initiation of a formal investigation procedure granting the interested parties the opportunity to put forward their arguments.

In the first place, the Commission failed in its duty to state reasons, first, by not assessing whether the aid was non-discriminatory and complied with the principle of free provision of services, secondly, by not performing, even in a succinct manner, a balancing test between the positive and negative effects of the aid and, thirdly, by not assessing, even in a succinct manner, the impact of the aid on trade and competition.

In the second place, the Commission also failed in its duty to state adequate reasons. The Commission's reference to the stated objectives of the aid contains significant semantic discrepancies on the objectives of the aid, which are described in paragraph 8 of the contested decision as ensuring that airlines 'with a Swedish license that are important to secure connectivity in Sweden' have sufficient liquidity, and in paragraph 43 of that decision as identifying airlines 'that have a link with Sweden and play a role in securing the connectivity of Sweden, in line with the objective of the notified measure'. The wording used is completely equivocal and does not allow the interested parties, nor the Court, to understand what the aim of the aid measure in question was, other than excluding airlines holding an EU operating licence issued by Member States other than the Kingdom of Sweden from the benefit of the aid.

The Commission contends that those arguments should be rejected. The French Republic and the Kingdom of Sweden refer to the statement in defence in that regard.

First, although the statement of reasons for an EU measure, required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the duty to state reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see judgment of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 75 and the case-law cited). The context in the present case is that of a pandemic and the extreme urgency in which the Commission, first of all, adopted the Temporary Framework providing both Member States and undertakings affected by the consequences of that pandemic with some guidance, then examined the measures of which it had been notified by those States, in particular pursuant to that framework, and finally adopted the decisions relating to those measures, including the contested decision. In that regard, it is apparent from paragraphs 1 and 2 above that only eight days elapsed between notification of the aid scheme at issue and the adoption of the contested decision.

Despite those exceptional circumstances, it should be pointed out that, in the present case, the contested decision contains 44 paragraphs and, in general, makes it possible to understand the legal and factual reasons why the Commission decided not to raise any objections concerning the aid scheme at issue. In particular, contrary to what the applicant maintains, the minor wording variations found in paragraphs 8 and 43 of the contested decision do not result in confusion in identifying the objective of the aid scheme at issue, which in essence must be understood as maintaining Sweden's connectivity by air, whether in relation to flight routes in Sweden, from Sweden or to Sweden (see paragraphs 45 and 49 above).

Secondly, with regard to the lack of reasoning in relation to weighing the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, it is apparent from paragraph 69 above that there is no such requirement under Article 107(3)(b) TFEU. Consequently, the Commission did not have to provide reasons in that regard.

Thirdly, as the Commission submits, paragraphs 6 to 8, 15, 17, 27, 41 and 43 of the contested decision set out the reasons why the aid scheme at issue is compatible with the internal market. Thus, since the Commission, in the

contested decision, set out, albeit at times succinctly in relation to the urgency, the reasons why the aid scheme at issue satisfied the conditions laid down in Article 107(3)(b) TFEU and in particular why the eligibility criteria, including the criterion for holding a Swedish licence on 1 January 2020, were necessary, appropriate and proportionate, it satisfied the duty to state reasons.

The fourth plea in law should therefore be rejected.

Third plea in law: infringement of the procedural rights under Article 108(2) TFEU

The third plea, relating to safeguarding the applicant's procedural rights owing to the Commission's failure to initiate a formal investigation procedure despite the alleged existence of serious doubts, is in fact subsidiary in nature, in case the Court did not examine the overall assessment of the aid. According to settled case-law, the aim of such a plea is to enable interested parties to be held to have standing, in that capacity, to bring an action under Article 263 TFEU, which otherwise would be unavailable to them (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 48, and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 44). The Court examined the first two pleas in this action, relating to the overall assessment of the aid, so that the third plea is deprived of its stated purpose.

Furthermore, it must be pointed out that that plea lacks any independent content. Under that plea, the applicant may, in order to preserve the procedural rights which it enjoys under the formal investigation procedure, rely only on pleas which show that the assessment of the information and evidence which the Commission had or could have had at its disposal during the preliminary examination phase of the measure notified ought to have raised doubts as to the compatibility of that measure with the internal market (see, to that effect, judgments of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 81; of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 35; and of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59), such as the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination phase or the existence of complaints submitted by third parties. It should be noted that the third plea repeats in condensed form the arguments raised under the first and second pleas, without identifying specific evidence relating to potential serious difficulties.

For those reasons, having examined the merits of those pleas, the Court does not consider it necessary to examine the substance of this plea.

Accordingly, the Court dismisses the action as a whole on its merits, whilst also granting the applicant the benefit of the confidential treatment requested, as the French Republic and the Kingdom of Sweden raised no objection in that respect.

Costs

Under Article 134(1) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission, including the costs relating to the request for confidential treatment.

The French Republic and the Kingdom of Sweden are to bear their own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

hereby:

Dismisses the action;

Orders Ryanair DAC to bear its own costs and to pay those of the European Commission, including the costs relating to the request for confidential treatment;

Orders the French Republic and the Kingdom of Sweden to bear their own respective costs.

Van der Woude Kornezov Buttigieg

Kowalik-Bańczyk Hesse

Delivered in open court in Luxembourg on 17 February 2021.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.