JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

14 April 2021 (*)

(State aid – Danish air transport market – Aid granted by Denmark to an airline amid the Covid-19 pandemic – Guarantee – Decision not to raise any objections – Commitments as a condition to make the aid compatible with the internal market – Aid intended to make good the damage caused by an exceptional occurrence – Freedom of establishment – Free provision of services – Equal treatment – Duty to state reasons)

In Case T−378/20,

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

applicant,

v

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

defendant,

supported by

**Kingdom of Denmark,** represented by J. Nymann-Lindegren and M. Søndahl Wolff, acting as Agents, and by R. Holdgaard, lawyer,

by

**French Republic,** represented by E. de Moustier and P. Dodeller, acting as Agents,

and by

**SAS AB,** established in Stockholm (Sweden), represented by F. Sjövall, lawyer,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 2416 final of 15 April 2020 on State Aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

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

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 27 November 2020,

gives the following

## Judgment

### Background to the dispute

1 On 10 April 2020, the Kingdom of Denmark notified the European Commission, in accordance with Article 108(3) TFEU, of an aid measure ('the measure at issue') in the form of a guarantee on a revolving credit facility of up to 1.5 billion Swedish kronor (SEK) for SAS AB. That measure seeks to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions amid the Covid-19 pandemic.

2 On 15 April 2020, the Commission adopted Decision C(2020) 2416 final on State Aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines ('the contested decision'), by which it concluded 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(2)(b) TFEU.

### Procedure and forms of order sought

3 By application lodged at the Court Registry on 19 June 2020, the applicant, Ryanair DAC, brought the present action.

4 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 15 July 2020, the General Court (Tenth Chamber) granted the request for an expedited procedure.

5 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.

6 The Commission lodged the defence at the Court Registry on 29 July 2020.

7 Pursuant to Article 106(2) of the Rules of Procedure, the applicant submitted a reasoned request for a hearing on 12 August 2020.

8 By documents lodged at the Court Registry on 31 August, 4 and 21 September 2020 respectively, the Kingdom of Denmark, SAS and the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By documents lodged at the Court Registry on 8, 15 and 30 September 2020 respectively, the applicant requested, in accordance with Article 144(7) of the Rules of Procedure, that certain information in the application and in the abbreviated version of the application not be disclosed to the Kingdom of Denmark, SAS and the French Republic.

9 By orders of 17 September and 7 October 2020 respectively, the President of the Tenth Chamber (Extended Composition) of the Court granted the Kingdom of Denmark, the French Republic and SAS leave to intervene, and provisionally limited disclosure of the application and the abbreviated version of the application to the non-confidential versions produced by the applicant, pending the submission of any observations by the interveners on the request for confidential treatment.

10 By measures of organisation of procedure, on 7 October 2020, the Kingdom of Denmark, the French Republic and SAS were authorised, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention.

11 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

12 The Commission and SAS contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

13 The French Republic and the Kingdom of Denmark contend that the Court should dismiss the action.

**Law**

14 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 and the Kingdom of Denmark, it is appropriate to begin by examining the merits of the action without first ruling on its admissibility.

15 In support of its action, the applicant raises five pleas in law, alleging, first, that the Commission breached the requirement that the aid granted under Article 107(2)(b) TFEU is not to make good the damage suffered by a single victim; secondly, that the Commission erred in finding that the measure at issue was proportionate in relation to the damage caused to SAS by the Covid-19 pandemic; thirdly, that the Commission infringed various provisions on the liberalisation of air transport in the European Union; fourthly, that the Commission infringed the applicant's procedural rights by refusing to open the formal investigation procedure despite serious difficulties and, fifthly, that the Commission infringed the second paragraph of Article 296 TFEU.

***The first plea in law, alleging that the Commission breached the requirement that aid granted under Article 107(2)(b) TFEU is not to make good the damage suffered by a single victim***

16 The applicant submits that exceptional occurrences within the meaning of Article 107(2)(b) TFEU generally affect entire regions or industries, or even the entire economy. Accordingly, that provision is intended to make good the damage suffered by all the victims of those occurrences, not just some of them.

17 The Commission, the Kingdom of Denmark, the French Republic and SAS dispute the applicant's line of argument.

18 In that regard, it should be borne in mind that under Article 107(2)(b) TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences must be compatible with the internal market.

19 In the present case, the applicant does not dispute the Commission's assessment in the contested decision that the Covid-19 pandemic should be regarded as an 'exceptional occurrence' within the meaning of Article 107(2)(b) TFEU. Furthermore, it is clear from the contested decision that the Covid-19 pandemic has led to the suspension of most air transport passenger services, having regard, in particular, to the closure of the borders of several EU Member States, including Denmark.

20 Accordingly, the applicant is correct in observing that SAS is not the only company, nor the only airline, to be affected by the exceptional occurrence at issue.

21 However, as the Commission correctly submits in its defence, there is no requirement for Member States to grant any aid to make good the damage caused by an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

22 More specifically, first, while Article 108(3) TFEU requires Member States to notify their plans as regards State aid to the Commission before they are put into effect, it does not, however, require them to grant any aid (order of 30 May 2018, *Yanchev*, C−481/17, not published, EU:C:2018:352, paragraph 22).

23 Secondly, an aid measure may be directed at making good the damage caused by an exceptional occurrence, in accordance with Article 107(2)(b) TFEU, irrespective of the fact that it does not make good the entirety of that damage.

24 Consequently, it does not follow from either Article 108(3) TFEU or Article 107(2)(b) TFEU that Member States are obliged to make good the entirety of the damage caused by an exceptional occurrence, such that they likewise cannot be required to grant aid to all of the victims of that damage.

25 In those circumstances, the applicant is not justified in arguing that the Commission erred in law solely because the measure at issue did not benefit all of the victims of the damage caused by the Covid-19 pandemic.

26 The applicant's first plea in law must therefore be rejected.

***The second plea, alleging that the Commission erred in finding that the measure at issue was proportionate in relation to the damage caused to SAS by the Covid-19 pandemic***

27 The applicant submits that the Commission infringed Article 107(2)(b) TFEU in that it authorised possible overcompensation of the damage suffered by SAS.

28 The Commission, the Kingdom of Denmark, the French Republic and SAS dispute the applicant's line of argument.

29 In that regard, it should be noted that, since this is an exception to the general principle set out in Article 107(1) TFEU that State aid is incompatible with the internal market, Article 107(2)(b) TFEU must be interpreted narrowly. Therefore, only economic damage caused by natural disasters or exceptional occurrences may be compensated for under that provision (judgment of 23 February 2006, *Atzeni and Others*, C−346/03 and C−529/03, EU:C:2006:130, paragraph 79).

30 It follows that aid likely to exceed the losses incurred by its beneficiaries is not covered by Article 107(2)(b) TFEU (see, to that effect, judgment of 11 November 2004, *Spain* v *Commission*, C−73/03, not published, EU:C:2004:711, paragraphs 40 and 41).

31 In the contested decision, the Commission found that the measure at issue was intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights due to the imposition of travel restrictions amid the Covid-19 pandemic. Although it noted that the extent of the damage suffered by SAS was not yet known when that decision was adopted, it nevertheless stated that what was at issue was 'the loss of added value', consisting of the difference between revenue for the period from March 2019 to February 2020 and that from March 2020 to February 2021, excluding, first, avoided variable costs, calculated on the basis of the costs incurred between March 2019 and February 2020, and, secondly, the profit margin relating to the loss in revenue. The damage was provisionally assessed by reference to a fall in air traffic of between 50 and 60% for March 2020 to February 2021 in comparison with the period from March 2019 to February 2020 and amounted to between SEK 5 and 15 billion.

32 In those circumstances, the Commission found that, even if the quantum of aid stemming from the measure at issue was the same as the amount guaranteed, namely SEK 1.5 billion, that would still be lower than the damage suffered by SAS. The Commission stated in addition that the Kingdom of Denmark had

committed to carry out an *ex post* assessment of the damage actually suffered by SAS by no later than 30 June 2021 and to request the repayment of any aid received which exceeds that damage, taking into account all the aid liable to be granted to SAS owing to the Covid-19 pandemic, including by foreign authorities, the Norwegian authorities among them.

33 In the first place, the applicant submits, first, that the method of calculation used to measure the damage suffered by SAS, as set out in the contested decision, is not sufficiently precise and does not allow the damage suffered by that company to be quantified correctly. It argues that, in those circumstances, the Commission erred in law and committed an error of assessment.

34 Secondly, the applicant submits that the Commission should have taken account of the damage suffered by the other airlines in Denmark.

35 As regards, first, the calculation of the damage suffered by SAS, it is clear from paragraph 31 above that the Commission, in the contested decision, identified the factors that should be taken into consideration in order to quantify the damage, namely the loss in revenue, the avoided variable costs and the adjustment of the profit margin, as well as the period of time in which that damage could arise. It also stated that the loss in revenue had to be determined by taking into account SAS's total revenue, not just that from the carriage of passengers, and it gave a non-exhaustive list of the costs incurred by SAS. In addition, as is apparent from paragraphs 34 to 37 of the contested decision, the Commission noted the commitment by the Danish authorities (i) to carry out a detailed and specific *ex post* quantification of the damage which SAS suffered and of the amount of aid which it ultimately received and (ii) to ensure that SAS repaid any overcompensation for that damage.

36 Consequently, it must be held that, having regard to the circumstances of the case, characterised by the exceptional occurrence, within the meaning of Article 107(2)(b) TFEU, caused by the Covid-19 pandemic, its evolving nature and the fact that the quantification of the damage caused and the amount of aid finally granted is necessarily prospective in nature, the Commission set out in the contested decision, in sufficiently precise terms, a method of calculation for assessing the damage suffered by SAS.

37 Furthermore, it must be stated that the applicant does not adduce any evidence capable of establishing that the method of calculation, set out in the contested decision, would lead to the payment of State aid that was higher than the damage actually suffered by SAS. In that regard, the fact, relied on by the applicant, that the Commission, in the document entitled 'Aid to make good the damage caused by natural disasters (Article 107(2)(b) TFEU) – Checklist for Member States', asks that Member States provide 'a detailed programme setting out a method for the calculation of damage' where such a method already exists in the national law of the Member State concerned is not such as to establish that the method of calculation set out in the contested decision lacks precision for the purposes of applying Article 107(2)(b) TFEU.

38 In those circumstances, having regard to the foregoing, it must be held that the Commission did not err in law or commit an error of assessment as far as concerns the calculation of the damage suffered by SAS.

39 As regards, secondly, the damage suffered by the other airlines in Denmark, the applicant submits, on the basis of its line of argument developed in the context of the first plea, that the Commission was obliged to take into account all the victims of the exceptional occurrence at issue covered by Article 107(2)(b) TFEU. However, it must be borne in mind that, as stated in paragraph 24 above, the Member States are not required to grant aid to all the victims of damage caused by such an exceptional occurrence. Consequently, in contrast to what is claimed by the applicant, the award of aid to SAS alone did not depend on the Commission showing that the damage caused by that occurrence affected only that company.

40 In the second place, the applicant submits that it is not possible for the Commission to review the proportionality of the measure at issue before March 2021. It argues that SAS benefits from the total amount of the aid almost immediately after the adoption of the contested decision, whereas the damage suffered by SAS will arise only gradually up to March 2021 and that the amount of that damage will remain speculative, bearing in mind in particular the lack of a method for calculating that amount.

41 In that regard, first, it should be noted that the measure at issue is a guarantee for a revolving credit facility. Accordingly, the maximum amount of aid, that is to say, the guaranteed amount of SEK 1.5 billion, will be paid only if SAS is not able to repay all the sums which it borrowed. The applicant does not adduce any evidence capable of showing that, when the contested decision was adopted, the Commission ought to have known that SAS would necessarily be in such a position of being unable to pay.

42 Accordingly, as indeed follows from the Commission Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10), the amount of aid for SAS corresponded, in fact, to the difference in the interest rate given to SAS with or without the measure at issue on the date of the adoption of the contested decision.

43 The Commission calculated the maximum interest rate, in the absence of the measure at issue, as being 10.26%, which the applicant has not disputed. Consequently, the amount of aid paid to SAS cannot exceed SEK 153.9 million in the first year, from which the cost of that measure charged to SAS should also be deducted, which, according to the contested decision, amounts to at least SEK 15 million per annum, in addition to the interest rate negotiated by SAS, taking into account the adoption of that measure.

44 It follows that the applicant is not justified in claiming that SAS is likely to receive the full amount of the aid from the adoption of the contested decision.

45 Secondly, the Commission found, in any event, that the damage suffered by SAS, estimated to be at least SEK 5 billion, would be greater than the amount guaranteed by the measure at issue, that is to say, SEK 1.5 billion. Although the calculation of the damage depends on forecasts relating to the fall in air traffic, the applicant adduces no evidence capable of calling that assessment into question. More specifically, it does not dispute the Commission's assumption of a fall in air traffic of between 50 and 60% for the period from March 2020 to February 2021 compared with March 2019 to February 2020. Nor does it deny that the damage suffered by SAS as a result of the Covid-19 pandemic amounts to at least SEK 5 billion.

46 In those circumstances, the applicant is not justified in disputing the proportionality of the measure at issue.

47 In the third place, the applicant submits that the Commission did not take into consideration the aid granted by the Kingdom of Norway and the Kingdom of Sweden or other aid which could be granted before March 2021.

48 In that regard, suffice it to note, first, that in the contested decision, the Commission found that the damage suffered by SAS, estimated to be at least SEK 5 billion, would be greater than the combined amounts resulting from the measure at issue and an aid scheme previously adopted by the Kingdom of Sweden for which SAS was eligible, that is to say, SEK 3 billion. Secondly, the Commission referred directly to all the aid which could be granted to SAS owing to damage caused by the Covid-19 pandemic before the first quarter of 2021. In particular, apart from the Swedish scheme, it made specific reference to an aid scheme adopted by the Kingdom of Norway for which SAS would be eligible. The Kingdom of Denmark accordingly committed to request repayment of the aid resulting from the measure at issue, to the extent that that measure, combined with others, including those granted by foreign authorities, exceeds the damage actually suffered by SAS.

49 Consequently, the applicant is not justified in claiming that the Commission did not take into consideration the aid granted by the Kingdom of Norway and the Kingdom of Sweden or that which could be granted before March 2021.

50 In the fourth place, the applicant submits that the Commission has not taken account of the competitive advantage resulting from the discriminatory nature of the measure at issue.

51 In that regard, it should be noted that, for the purposes of assessing the compatibility of aid with the internal market, the advantage procured by that aid for the recipient does not include any economic benefit

the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid, and there may indeed be no such benefit, but that cannot justify a different assessment of the compatibility of the aid with the internal market (see, to that effect and by analogy, judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C−164/15 P and C−165/15 P, EU:C:2016:990, paragraph 92).

52 Consequently, it must be held that the Commission, correctly, took account of the advantage procured for SAS, resulting from the measure at issue, as is apparent from paragraphs 40 to 46 above. However, the Commission cannot be criticised for not having determined the existence of any possible economic benefit resulting from that advantage.

53 In those circumstances, the applicant is not justified in criticising the Commission for failing to take account of a possible competitive advantage resulting from the discrimination which it alleges.

54 Accordingly, the Court rejects the applicant's second plea.

***The third plea in law, alleging that the Commission infringed various provisions relating to the liberalisation of air transport within the European Union***

55 The applicant submits that the Commission infringed the principle of non-discrimination, and the freedom to provide services and the freedom of establishment, on the ground that the measure at issue offers more favourable conditions to companies established in Denmark.

56 The Commission, the Kingdom of Denmark, the French Republic and SAS dispute the applicant's line of argument.

57 It should be recalled that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (judgment of 22 September 2020, *Austria* v *Commission*, C−594/18 P, EU:C:2020:742, paragraph 44; see also, to that effect, judgment of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraphs 50 and 51).

*Infringement of the principle of non-discrimination*

58 The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraph 66; see also, to that effect, judgment of 5 June 2018, *Montero Mateos*, C−677/16, EU:C:2018:393, paragraph 49).

59 The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C−127/07, EU:C:2008:728, paragraph 26).

60 Furthermore, it should be borne in mind that the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question (judgment of 17 May 1984, *Denkavit Nederland*, 15/83, EU:C:1984:183, paragraph 25); where there is a choice between several appropriate measures, recourse must be had to the least onerous measure and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C−611/17, EU:C:2019:332, paragraph 55).

61 The applicant argues that the contested decision allows discriminatory treatment which is not necessary for achieving the objective of the measure at issue, namely to make good the damage caused by the Covid-19 pandemic. It submits that the objective of preserving Danish and intra-Scandinavian connectivity, also

referred to in that decision, infringes Article 107(2)(b) TFEU and requires that other airlines be taken into account as they represent 68% of Denmark's total domestic and international passenger air traffic. Furthermore, the objective of preserving intra-Scandinavian connectivity constitutes discrimination based on nationality. Similarly, the criterion relating to the Member State which issued SAS's operating licence, used in the contested decision, constitutes discrimination based on nationality.

62 In that regard, in the first place, it should be noted that, in contrast to what is submitted by the applicant, the objective of the measure at issue is not, aside from compensating SAS in part for the damage arising from the Covid-19 pandemic, to preserve the connectivity of Denmark and 'intra-Scandinavian accessibility'.

63 First, it should be noted that the applicant refers, in that regard, to paragraphs 21 to 26 of the contested decision. Those paragraphs are included in the section entitled 'Beneficiary', which simply describes the beneficiary of the measure at issue, namely SAS. Secondly, it is apparent from the section of that decision entitled 'Objective of the measure', and more specifically paragraph 5, that the measure at issue is intended solely to compensate SAS in part for the damage arising from the cancellation or rescheduling of its flights as a result of the imposition of travel restrictions amid the Covid-19 pandemic.

64 It follows that the applicant is likewise not justified in submitting that the measure at issue was granted to SAS on the ground that it held an operating licence, within the meaning of 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), issued by the Kingdom of Denmark. It is true that, in the section of the contested decision entitled 'Beneficiary', the Commission found that SAS was the only airline to hold a licence issued by the Kingdom of Denmark, which is 'critical to accessibility to, from and within [that Member State]'. However, it should be noted that, since the objective of the measure at issue is not to ensure Denmark's accessibility, the purpose of that finding by the Commission cannot be interpreted as being to justify the fact that the measure at issue was to benefit only SAS.

65 In the second place, it should be noted that individual aid, such as that at issue, by definition benefits only one company, to the exclusion of all the other companies, including those in a situation comparable to that of the recipient of that aid. Consequently, such individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is however inherent in the individual character of that measure. To argue, as the applicant does, that the individual aid at issue is contrary to the principle of non-discrimination amounts, in essence, to calling into question systematically the compatibility of any individual aid with the internal market solely on account of its inherently exclusive and thus discriminatory nature, even though EU law allows Member States to grant individual aid, provided that all the conditions laid down in Article 107 TFEU are met.

66 In that regard, it has, moreover, been pointed out in paragraph 24 above that with regard more specifically to Article 107(2)(b) TFEU, Member States are not obliged to make good all the damage caused by an exceptional occurrence and, consequently, to grant aid to all the victims of that damage.

67 In the third place, it should be noted that, having regard to the case-law referred to in paragraph 59 above, the applicant rightly submits that all the airlines operating in Denmark have been affected by the restrictions related to the Covid-19 pandemic and that, consequently, they have all suffered damage, like SAS, from the cancellation or rescheduling of their flights after the imposition of travel restrictions amid the Covid-19 pandemic.

68 However, even if, as the applicant submits, the difference in treatment brought about by the measure at issue, in that it benefits only SAS, may amount to discrimination, it is necessary to ascertain whether it is justified by a legitimate objective and whether it is necessary, appropriate and proportionate for achieving that objective (see paragraphs 58 and 60 above). Similarly, since the applicant refers to 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(2)(b) TFEU, which is the legal basis for the contested decision. That examination requires, first, that the objective of the measure at issue satisfies the requirements laid down in that provision and, secondly, that the conditions for granting the measure at issue, namely, in the present case, that it benefits only SAS, are such as to enable that objective to be achieved and do not go beyond what is necessary to achieve it.

69 As regards the objective of the measure at issue, the applicant does not dispute the fact that compensation for damage resulting from the cancellation or rescheduling of an airline's flights following the imposition of travel restrictions amid the Covid-19 pandemic makes it possible to make good the damage caused by that pandemic. Nor does the applicant, as noted in paragraph 19 above, dispute the fact that the Covid-19 pandemic constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

70 As regards the conditions for granting the measure at issue, the Commission stated in the contested decision that SAS, whose operations were concentrated in Denmark, Sweden and Norway, accounted for two thirds of intra-Scandinavian air traffic, 33% of the traffic at Copenhagen Airport (Denmark), 32% of total domestic and international traffic in Denmark, and 40% of Denmark's domestic connectivity. The applicant itself acknowledges that 'market share is an acceptable proxy for the damage that … airlines have suffered'.

71 The applicant nevertheless argues that such a factor does not justify the difference in treatment resulting from the measure at issue. It submits that that difference in treatment is not proportionate since that measure grants SAS all the aid intended to make good the damage caused by the Covid-19 pandemic, whereas SAS will suffer less than 35% of that damage.

72 In that regard, it is apparent from the contested decision that SAS, because of its larger market shares, has been more affected than the other airlines present in Denmark by the restrictions relating to the Covid-19 pandemic. That is confirmed, moreover, by the data in Annex A.3.2 to the application, from which it is apparent that SAS had the largest market share in Denmark, at 34%, and that that market share was much higher than that of its closest competitor and the applicant, which only had a market share of 18% and 9% respectively.

73 In addition, it is apparent more particularly from the data referred to in paragraph 70 above that SAS is proportionately much more affected by those restrictions than the applicant, which, as is clear from Annex A.3.2 to the application, has only a minimal share of its business with Denmark as the destination or the State of origin, unlike SAS, for which that proportion is much larger.

74 Consequently, it must be held that the difference in treatment in favour of SAS is appropriate for the purpose of making good the damage resulting from those restrictions and does not go beyond what is necessary to achieve that objective, in accordance with the reasons already set out in paragraphs 40 to 49 above.

75 Moreover, bearing in mind the small amount of the measure at issue, noted in paragraph 43 above, in the light of the calculation of the damage sustained by SAS, referred to in paragraph 31 above, the applicant has not established that dividing that amount among all the airlines present in Denmark would not have deprived that measure of its effectiveness.

76 It follows that granting the benefit of the measure at issue only to SAS was justified and that the measure at issue does not infringe the principle of non-discrimination.

*Infringement of the freedom of establishment and the free provision of services*

77 It should be noted that, first, the provisions of the FEU Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same

way as nationals of that State (see judgment of 6 October 2015, *Finanzamt Linz*, C−66/14, EU:C:2015:661, paragraph 26 and the case-law cited).

78 Secondly, the free provision of services precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, irrespective of whether there is discrimination on the grounds of nationality or residence (see, to that effect, judgment of 6 February 2003, *Stylianakis*, C−92/01, EU:C:2003:72, paragraph 25). However, 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, which enshrines the free provision of services, 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).

79 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). As the applicant rightly notes, 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).

80 In the present case, it should be noted that the applicant submits, in essence, that the measure at issue constitutes a restriction on the freedom of establishment and the free provision of services on account of its discriminatory nature.

81 While it is true that the measure at issue concerns individual aid which benefits only SAS, the applicant does not demonstrate how that exclusivity is capable of discouraging it from establishing itself in Denmark or providing services from and to that country. In particular, the applicant fails to identify the elements of fact or law which cause that measure to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which, as was found in paragraphs 58 to 76 above, are nevertheless necessary and proportionate to make good the damage caused to SAS by the exceptional occurrence of the Covid-19 pandemic, in accordance with the requirements laid down in Article 107(2)(b) TFEU.

82 Consequently, the measure at issue cannot constitute a restriction on the freedom of establishment or the free provision of services. It follows that the applicant is not justified in complaining that the Commission failed to examine the compatibility of that measure with the freedom of establishment and the free provision of services.

83 In those circumstances, the applicant's third plea must be rejected.

***The fourth plea, alleging that the Commission infringed the applicant's procedural rights by refusing to open the formal investigation procedure despite serious difficulties***

84 The applicant submits that the examination conducted by the Commission was insufficient, in particular as regards the proportionality of the measure at issue and its compatibility with the principle of non-discrimination and the principles of the free provision of services and the freedom of establishment. The insufficient nature of that examination is evidence of the existence of serious difficulties, which should have led the Commission to open the formal investigation procedure and give the applicant the opportunity to submit its observations and, thus, to influence that investigation.

85 The Commission, the Kingdom of Denmark, the French Republic and SAS dispute the applicant's line of argument.

86 It should be noted, as in essence the Commission argues, that the applicant's fourth plea is in fact subsidiary in nature, in case the Court did not examine the overall merits of the 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 has examined the first three pleas in this action, relating to the overall merits of the assessment of the aid, so that such a plea is deprived of its stated purpose.

87 Furthermore, it must be pointed out that this plea lacks any independent content. Under such a 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 fourth plea repeats in condensed form the arguments raised under the first to third pleas, without identifying specific evidence relating to potential serious difficulties.

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

***The fifth plea in law, alleging that the Commission infringed the second paragraph of Article 296 TFEU***

89 The applicant submits that the Commission infringed the second paragraph of Article 296 TFEU in so far as it failed to assess the competitive advantage granted to SAS, did not explain how it had calculated the value of the measure at issue, failed to calculate the damage caused by the Covid-19 pandemic, and did not verify that that measure complied with the principle of non-discrimination and the principles of the freedom to provide services and the freedom of establishment. The Commission's reasoning is therefore either absent, tautological, or contradictory.

90 At the hearing, the applicant added, in essence, that the exceptional occurrence, within the meaning of Article 107(2)(b) TFEU, at issue in the present case, was not clearly identified in the contested decision. It argued that the contested decision referred to travel restrictions, which were lifted between mid-June 2020 and the start of July 2020, whereas the preliminary estimate of the damage by the Kingdom of Denmark corresponded to the 'loss in added value' between 2019 and 2020, and 2020 and 2021.

91 The Commission, the Kingdom of Denmark, the French Republic and SAS dispute the applicant's line of argument.

92 In that regard, it should be borne in mind that the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. Accordingly, 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 laid down in 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 (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C−367/95 P, EU:C:1998:154, paragraph 63; of 22 June 2004, *Portugal* v *Commission*, C−42/01, EU:C:2004:379, paragraph 66; and of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraph 79).

93 In the present case, as regards the nature of the measure at issue, the contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question without opening the formal investigation procedure under paragraph 2 of that article, which is designed to enable the Commission to be fully informed of all the facts pertaining to that aid.

94 Such a decision, which is taken within a short period of time, 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 (judgment of 22 December 2008, *Régie Networks*, C−333/07, EU:C:2008:764, paragraph 65).

95 In that regard, first, as concerns the value of the competitive advantage and the amount of the aid, it should be noted that the Commission explained, in the contested decision, that the Kingdom of Denmark could not determine the amount of the measure at issue since SAS had not yet, on the date of the adoption of that decision, negotiated a revolving credit facility while taking advantage of that measure. However, the Commission estimated the rate that would have been applied to it without that measure, as observed in paragraph 43 above. In addition, it assessed the compatibility of that measure with the internal market, taking into account its nominal value.

96 Moreover, in so far as the applicant refers to the competitive advantage resulting from the discriminatory nature of the measure at issue, it is sufficient to note, as is clear from paragraph 52 above, that the Commission was not required to take such an advantage into consideration for the purpose of assessing the compatibility of that measure with the internal market, so that it was not required to refer to it in the contested decision.

97 Lastly, the Commission, first, calculated the damage suffered by SAS as being between SEK 5 and 15 billion and, second, set out the factors, referred to in paragraph 35 above, which had to be taken into consideration by the Kingdom of Denmark for the purpose of calculating that damage.

98 Secondly, as regards the principle of non-discrimination and the principles of the free provision of services and the freedom of establishment, it should, admittedly, be borne in mind that where the beneficiaries of the measure, on the one hand, and other excluded operators, on the other, are in a comparable situation, the EU institution which is the author of the act is under a duty to explain in what way the difference in treatment thus introduced is objectively justified and to give specific reasons in that regard (judgment of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraph 82). However, in the present case, it must be held that the contested decision includes the factors, referred to in paragraph 70 above, which make it possible to understand why the Commission found that it was justified for SAS alone to be able to benefit from the measure at issue.

99 Thirdly, as regards the exceptional occurrence at issue in the present case, it should be noted, as mentioned in paragraph 19 above and as is clear from paragraphs 51 to 56 of the contested decision, that the Commission considered that the Covid-19 pandemic was such an occurrence.

100 Furthermore, while paragraph 3 of the contested decision does, indeed, refer specifically to restrictions and recommendations on travel adopted by the Kingdom of Denmark, the Kingdom of Sweden and the Kingdom of Norway in April and May 2020, it should be noted, first, that the objective of the measure at issue, referred to in paragraph 5 of that decision, is to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights following the imposition of travel restrictions amid the Covid-19 pandemic, without those restrictions being specifically identified. Consequently, it is not apparent

from the contested decision that the damage suffered by SAS was limited to damage caused by the restrictions referred to in paragraph 3 of that decision and not to possible restrictions which might also have been adopted amid the Covid-19 pandemic subsequent to that decision. Secondly, it must be noted that the contested decision does not preclude the restrictions referred to in paragraph 3 of that decision from being liable to have an effect on air traffic even after they are lifted, in accordance with the Commission's forecasts referred to in paragraph 31 above. Consequently, it must be stated that there was no contradiction in considering both that the damage suffered by SAS was the result of travel restrictions amid the Covid-19 pandemic and that that damage could continue into 2021.

101 It follows that the contested decision contains a sufficient statement of reasons and that, consequently, the applicant's fifth plea must be rejected.

102 It follows from all of the foregoing that the action must be dismissed in its entirety, without there being any need to rule on its admissibility.

**Costs**

103 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.

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

105 SAS is to bear its own costs, in accordance with Article 138(3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

**1. Dismisses the action;**

**2. 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;**

**3. Orders the Kingdom of Denmark, the French Republic and SAS AB to bear their own costs.**

Van der Woude Kornezov Buttigieg

Kowalik-Bańczyk Hesse

Delivered in open court in Luxembourg on 14 April 2021.

E. Coulon M. van der Woude

Registrar President

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* Language of the case: English.