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JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

10 May 2023 (*)

(State aid – Danish and Swedish air transport markets – Aid granted by Denmark and Sweden to an airline in the context of the COVID-19 pandemic – Recapitalisation of SAS – Decision not to raise any objections – Actions for annulment – Individual concern – Substantial effect on the competitive position – Admissibility – Temporary Framework for State aid measures – Aid to remedy a serious disturbance in the economy of a Member State – Compliance with the requirements of the Temporary Framework)

In Case T-238/21,

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

applicant,

v

European Commission, represented by L. Flynn, J. Carpi Badía and A. Bouchagiar, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented by M. Søndahl Wolff, C. Maertens and C. Grønbech-Jensen, acting as Agents, and by R. Holdgaard, lawyer,

by

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

and by

SAS AB, established in Stockholm (Sweden), represented by F. Sjövall and A. Lundmark, lawyers,

interveners,

THE GENERAL COURT (Tenth Chamber),

composed, at the time of the deliberations, of A. Kornezov, President, E. Buttigieg and K. Kowalik-Bańczyk (Rapporteur), Judges,

Registrar: S. Spyropoulos,

having regard to the written part of the procedure,

further to the hearing on 17 November 2022,

gives the following

Judgment

By its action under Article 263 TFEU, the applicant, Ryanair DAC, seeks annulment of Commission Decision C(2020) 5750 final of 17 August 2020 on State Aid SA.57543 (2020/N) – Denmark and SA.58342 (2020/N) – Sweden – COVID-19 recapitalisation of SAS AB ('the contested decision').

Background to the dispute

On 11 August 2020, the Kingdom of Denmark and the Kingdom of Sweden notified the European Commission, pursuant to Article 107(3)(b) TFEU and the Commission 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), as last amended on 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework'), of an individual aid measure in the form of the participation of those two Member States in the plan for the recapitalisation of SAS ('the measure at issue').

The measure at issue comprises two recapitalisation instruments, namely, first, subscription by the Kingdom of Denmark and the Kingdom of Sweden to State hybrid notes ('the hybrid capital instrument') and, second, subscription by those two Member States to new common shares ('the equity instrument'). The total maximum amount of the aid is approximately 11 billion Swedish kronor (SEK) (approximately EUR 1.069 billion), of which approximately SEK 6 billion (approximately EUR 583 million) is provided by the Kingdom of Denmark and approximately SEK 5 billion (approximately EUR 486 million) by the Kingdom of Sweden.

Furthermore, the recapitalisation plan foreseen by SAS also provides for the participation of private actors. To that end, SAS, inter alia, entered into an agreement with the holders of certain existing hybrid notes and the holders of certain bonds to convert, first, those hybrid notes into new common shares and, second, the bonds into either new commercial hybrid notes or common shares.

On 17 August 2020, the Commission adopted the contested decision, by which it decided not to raise objections to the measure at issue on the ground that it was compatible with the internal market on the basis of Article 107(3)(b) TFEU.

Forms of order sought

The applicant claims that the Court should:

annul the contested decision;

order the Commission, the Kingdom of Denmark, the Kingdom of Sweden and SAS to pay the costs.

The Commission contends that the Court should:

dismiss the action;

order the applicant to pay the costs.

The Kingdom of Denmark and the Kingdom of Sweden, intervening in support of the form of order sought by the Commission, contend that the action should be dismissed.

SAS, intervening in support of the form of order sought by the Commission, contends that the Court should:

dismiss the action;

order the applicant to pay the costs.

Law

Admissibility of the action

The applicant submits, first, that it is an interested party for the purposes of Article 108(2) TFEU and Article 1(h) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), and that it therefore has standing to bring proceedings in the present case to protect its procedural rights. Second, it argues that its competitive position on the market has been substantially affected by the measure at issue and that it is therefore entitled to challenge the merits of the contested decision.

The Commission does not dispute the admissibility of the action and acknowledges that the applicant has standing to bring proceedings in order to protect its procedural rights.

The interveners do not submit any observations as regards the admissibility of the action.

In the circumstances of the present case, it is necessary to examine first whether the applicant is entitled to challenge the contested decision on the merits.

In that regard, it follows from the fourth paragraph of Article 263 TFEU that any natural or legal person may institute proceedings for annulment against, inter alia, an act which is of direct and individual concern to them.

In the first place, as regards the condition of individual concern, it should be borne in mind that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (see judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 223, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 33).

Accordingly, where an applicant calls into question the merits of a decision appraising aid, taken on the basis of Article 108(3) TFEU, or after the formal investigation procedure, it must demonstrate that it has a particular status, for the purposes of the case-law referred to in paragraph 15 above. That applies in particular where the applicant's position on the market concerned is substantially affected by the aid to which the decision at issue relates (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37 and the case-law cited).

In the present case, the applicant submits that it is the closest and most relevant competitor to SAS, with the result that it is in factual circumstances that distinguish it from other airlines.

The applicant submits that it is in direct competition with SAS on 33 routes between pairs of cities defined as the point of origin and the point of destination, of which 17 routes are operated in Denmark and 16 in Sweden. Those routes are generally operated by very few other airlines (namely between one and four other airlines on 29 of the aforementioned 33 routes). They are also particularly important from an economic point of view since they connect Denmark and Sweden, in particular Copenhagen (Denmark), Stockholm (Sweden) and Gothenburg (Sweden), with large European cities such as London (United Kingdom), Rome (Italy), Brussels (Belgium), Dublin (Ireland), Barcelona (Spain), Prague (Czech Republic) or Marseilles (France).

Furthermore, the applicant argues that it is the only main challenger to SAS's position on the Danish and Swedish markets. It experienced much greater growth than SAS on those markets between 2010 and 2019 and, moreover, had plans for expansion. Accordingly, it launched 27 new routes from those two countries in 2019, of which 10 were from Copenhagen Airport.

In that context of close competition between itself and SAS, the applicant argues that its competitive situation has been significantly affected by the measure at issue. Since it does not itself benefit from aid intended to cushion the impact of the crisis caused by the COVID-19 pandemic, it will not be able to compete on equal terms with SAS.

It is apparent from the information referred to in paragraphs 18 and 19 above, the accuracy of which is not disputed by the other parties and which is indeed corroborated by the evidence provided in support of the action, that the applicant and SAS were, prior to the adoption of the contested decision, in competition on a large number of routes to and from Denmark and Sweden and that the applicant was one of the main competitors to SAS on the Danish and Swedish markets, where it has experienced significant growth.

In those circumstances, and in the absence of any challenge on the part of the Commission and the interveners, the applicant must be regarded as demonstrating, prima facie, that the grant of the measure at issue substantially affects its competitive position on the market by causing it the loss of an opportunity to make a profit or a less favourable development than would have been the case without that measure.

In the second place, as regards the condition related to direct concern, it must be found that the applicant is directly concerned by the contested decision since there is no doubt as to the intention of the Kingdom of Denmark and the Kingdom of Sweden to provide aid to SAS and since such a payment is liable to place it in an unfavourable competitive position and thus affect its right not to be subject to competition distorted by that aid (see, to that effect, judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C‑622/16 P to C‑624/16 P, EU:C:2018:873, paragraph 43 and the case-law cited, and of 15 September 2016, *Ferracci* v *Commission*, T‑219/13, EU:T:2016:485, paragraph 44 and the case-law cited).

In those circumstances, the applicant is entitled to challenge the merits of the contested decision.

The merits of the action

The applicant relies on four pleas in law in support of its action, alleging, first, infringement of Article 107(3)(b) TFEU and the Temporary Framework; second, infringement of the principles of non-discrimination, the free provision of services and free establishment; third, infringement of Article 108(2) TFEU; and fourth, infringement of the obligation to state reasons.

In particular, by the first plea, the applicant submits that the Commission infringed Article 107(3)(b) TFEU and various provisions of the Temporary Framework. This plea consists of eight parts, alleging, respectively, (i) failure to demonstrate SAS's eligibility for the aid under Article 107(3)(b) TFEU and the Temporary Framework; (ii) failure to assess any other possible measures that were more appropriate and less distortive of competition; (iii) various errors in the examination of the amount of the recapitalisation; (iv) failure to apply proper conditions regarding the remuneration and exit of the State; (v) an absence of measures to prevent undue distortions of competition; (vi) a lack of safeguards against aggressive expansion by SAS; (vii) failure to weigh the beneficial and adverse effects of the measure at issue; and (viii) failure to require the notification of a restructuring plan in due time.

In the circumstances of the present case, it is appropriate to begin by examining the fourth part of the first plea, alleging failure to apply proper conditions regarding the remuneration and exit of the State.

In that regard, the applicant submits that the Commission disregarded the conditions laid down in section 3.11.5 of the Temporary Framework regarding the remuneration and exit of the State. The measure at issue does not provide for a step-up mechanism for increasing remuneration, as required by points 61 and 68 of the Temporary Framework, whether as regards the State hybrid notes or the new common shares. Nor does it include an alternative mechanism with an equivalent incentive effect on the exit of the State and a similar overall impact on the remuneration of the State, for the purposes of points 62 and 68 of the Temporary Framework.

The Commission, supported by the interveners, contests the arguments put forward by applicant.

This part of the plea concerns the absence of a step-up mechanism from the two recapitalisation instruments forming the measure at issue, namely, first, the hybrid capital instrument and, second, the equity instrument.

Before examining whether the Commission complied with the provisions of the Temporary Framework as regards each of the two recapitalisation instruments, it is necessary first of all to make a number of preliminary observations relating, first, to the intensity of the judicial review and, second, to the content of the provisions of the Temporary Framework relating to the step-up mechanism.

The intensity of judicial review

In accordance with settled case-law, the Commission, when applying Article 107(3) TFEU, enjoys wide discretion, the exercise of which involves complex economic and social assessments (see judgment of 19 July 2016, *Kotnik and Others*, C‑526/14, EU:C:2016:570, paragraphs 37 and 38 and the case-law cited). Judicial review of the manner in which that discretion is exercised is thus confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see judgment of 11 September 2008, *Germany and Others* v *Kronofrance*, C‑75/05 P and C‑80/05 P, EU:C:2008:482, paragraph 59 and the case-law cited).

However, in the exercise of that discretion, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States. In adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 19 July 2016, *Kotnik and Others*, C‑526/14, EU:C:2016:570, paragraphs 39 and 40).

Nevertheless, the adoption of guidelines by which the Commission limits its discretion does not relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU. Consequently, the Commission may authorise proposed State aid that departs from those guidelines in exceptional circumstances (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C‑526/14, EU:C:2016:570, paragraphs 41 and 43).

The content of the provisions of the Temporary Framework relating to the step-up mechanism

Section 3.11.5 of the Temporary Framework, entitled 'Remuneration and exit of the State', first sets out general principles (points 55 to 59 of that framework), which are then applied in relation to equity instruments (points 60 to 64 of the framework) and to hybrid capital instruments (points 65 to 70 of that framework).

As regards the general principles, it is apparent from points 56 to 58 of the Temporary Framework that the Member State must put a mechanism in place to gradually incentivise the beneficiary concerned and the other shareholders to redeem the State recapitalisation carried out in the context of the COVID-19 pandemic. To that end, point 57 of the framework provides that, 'The remuneration of the … recapitalisation measure should be increased in order to converge with market prices'. As an alternative to the remuneration methodologies set out in the Temporary Framework, point 59 allows Member States to use an adapted remuneration methodology, provided that that method leads overall to a similar outcome with regard to the incentive effects on the exit of the State and a similar impact overall on the State's remuneration.

As regards the remuneration of equity instruments, point 61 of the Temporary Framework provides that, 'Any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections'. That increase in remuneration may take the form of additional shares granted to the State or other mechanisms, and should correspond to a minimum 10% increase in the remuneration of the State four years after the capital injection, if the State has not sold at least 40% of its equity participation resulting from that injection. If, six years after the capital injection, the State has not sold in full its equity participation resulting from that injection, the step-up mechanism is to be activated again.

Point 62 of the Temporary Framework provides that the Commission may accept alternative mechanisms, provided they lead overall to a similar outcome with regard to the incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

As regards the remuneration of hybrid capital instruments, point 66 of the Temporary Framework establishes a minimum remuneration for hybrid capital instruments until they are converted into equity instruments. It is apparent from the table inserted in that point of the Temporary Framework that the interest rate providing that remuneration is to increase over time, rising in the second, fourth, sixth and eighth years following the recapitalisation.

In addition, point 68 of the Temporary Framework provides that a step-up mechanism must be provided, after the conversion into equity of the hybrid capital instrument concerned, in order to increase the remuneration of the State, to incentivise the beneficiary concerned to buy back the State capital injections. If the equity resulting from the State's COVID-19 intervention is still owned by the State two years after the conversion into equity, the State is to receive an additional share of ownership of the beneficiary concerned, in addition to its remaining participation resulting from the State's conversion of the hybrid capital instruments as defined in the context of the COVID-19 pandemic. That additional share of ownership is to be at a minimum of 10% of the remaining participation resulting from the State's conversion of those same hybrid capital instruments. The Commission may accept alternative step-up mechanisms provided they have the same incentive effect and a similar overall impact on the State's remuneration.

Compliance with the provisions of the Temporary Framework relating to the step-up mechanism

– *As regards the hybrid capital instrument*

The measure in question provides for the issue of State hybrid notes, one part of which, totalling SEK 5 billion (approximately EUR 486 million), is placed equally with the Kingdom of Denmark and the Kingdom of Sweden, and the other, amounting to SEK 1 billion (approximately EUR 97 million), only with the Kingdom of Denmark. Remuneration for all those hybrid notes is provided by an interest rate that increases in the second, fourth, sixth and eighth years following the recapitalisation and generates compound interest in the event of unpaid coupons (see paragraphs 49 and 142 of the contested decision). Those hybrid notes are not convertible into shares (see paragraphs 50 and 140 of the contested decision).

It should be observed that the applicant, in complaining that the Commission failed to provide for a step-up mechanism as regards the State hybrid notes, relies on points 61, 62 and 68 of the Temporary Framework.

However, first, points 61 and 62 of the Temporary Framework require a step-up mechanism only as regards equity instruments. Consequently, they are not applicable to hybrid capital instruments such as the State hybrid notes in the present case.

Second, point 68 of the Temporary Framework provides for a step-up mechanism 'after conversion into equity' of the hybrid capital instrument concerned. As a result, as the Commission rightly observes, that point does not apply to hybrid capital instruments that are not convertible into equity, such as the State hybrid notes in the present case, which, as the parties agree, are not convertible into shares (see paragraph 41 above).

It follows that the applicant's line of argument is ineffective in so far as it is based on points 61, 62 and 68 of the Temporary Framework.

In any event, assuming that the applicant may be considered to be also relying on other provisions of the Temporary Framework pursuing a similar objective, it must indeed be observed that point 57 of that framework prescribes, in general terms, an increase in the remuneration of recapitalisation instruments (see paragraph 36

above) and that point 66 of the framework, which applies that general principle with respect to hybrid capital instruments, lays down that remuneration for the latter is to be provided by means of an increasing interest rate until their conversion into equity (see paragraph 39 above).

However, it must be stated, as the Commission has observed, that the measure at issue in the present case provides for remuneration for the State hybrid notes by means of an interest rate which increases over time (see paragraph 41 above). Moreover, while it is true that there is no certainty as to the principle for and the timing of the payment of the coupons, it should be observed that that measure also includes a system of compound interest in the event of the non-payment of the coupons (see paragraph 41 above). It follows that the remuneration of the State hybrid notes increases over time, which constitutes an incentive for the exit of the State, in accordance with the provisions of points 57 and 66 of the Temporary Framework.

Accordingly, the Commission was entitled to conclude in paragraph 144 of the contested decision that the hybrid capital instrument satisfied the requirements of the Temporary Framework relating to the remuneration and exit of the State.

– *As regards the equity instrument*

The plan for the recapitalisation of SAS, of which the measure at issue forms part, provides for the issue of new common shares subscribed to, in particular, by the Kingdom of Denmark and the Kingdom of Sweden. Some of those shares are offered to all eligible shareholders, namely to all the existing shareholders, whether public or private, as part of a rights issue of a maximum of approximately SEK 4 billion (approximately EUR 389 million), of which a maximum amount of approximately SEK 3 billion (approximately EUR 291 million) is allocated to the two Member States concerned. The other shares are placed only with the Kingdom of Denmark and the Kingdom of Sweden in a directed issue of common shares amounting, in total, to SEK 2 billion (approximately EUR 194 million). The subscription price in both cases is SEK 1.16 per share.

Since the new common shares constitute equity, the remuneration for that recapitalisation instrument is governed by points 61 and 62 of the Temporary Framework, as correctly claimed by the applicant and as observed in paragraphs 37 and 38 above.

In that regard, it is important to point out that points 61 and 62 of the Temporary Framework do not provide for any derogation from the obligation to require either a step-up mechanism or an alternative mechanism leading to the same result.

In the present case, it is common ground that the equity instrument is not accompanied by any step-up mechanism, within the meaning of point 61 of the Temporary Framework.

In paragraph 133 of the contested decision, the Commission nevertheless found that the ‘overall structure’ of the measure at issue constituted an alternative mechanism to the one envisaged in point 61 of the Temporary Framework. In that regard, the Commission, in paragraph 131 of the decision, highlighted the interconnected nature of the two components of the measure at issue, which, in its view, justified taking into account their combined effects to incentivise the exit of the State. To that end, the Commission referred, in paragraphs 130 and 132 of the decision, to a number of factors, namely, first, the large discount from which the Kingdom of Denmark and the Kingdom of Sweden benefited when they acquired the shares in SAS, second, the fact that remuneration for the State’s hybrid notes would be provided by an increasing coupon and, third, the behavioural commitments, in particular the prohibition on paying dividends, which would remain in force until the aid was repaid in full. On the basis of those factors, the Commission concluded in paragraph 133 of the contested decision that the ‘overall structure’ of the measure at issue included sufficiently strong incentive effects on the exit of the State from SAS’s capital.

It is therefore necessary to examine whether the Commission was entitled to conclude, on the basis of the abovementioned factors, that the equity instrument included an alternative mechanism to that of the step-up mechanism, within the meaning of point 62 of the Temporary Framework. To that end, it is necessary to determine whether those factors overall lead to a similar outcome with regard to the incentive effects on the exit of the State and whether they have a similar impact overall on the remuneration of the State, as required by point 62 of the Temporary Framework.

In that regard, it should be observed, as Ryanair has done, that none of the factors put forward by the Commission demonstrates that the equity instrument was accompanied by an alternative mechanism to that of the step-up.

First, the Commission states, in paragraphs 128 and 130 of the contested decision, that, by acquiring new common shares at a price of SEK 1.16 per share, the Kingdom of Denmark and the Kingdom of Sweden benefit from a discount of 86.7% compared with the average price of SAS shares over the 15 days preceding the request for the capital injection, namely SEK 8.71 per share. That discount, according to the Commission, is very significant and enables those two Member States to acquire 72.7% of the capital injected into SAS, that is to say, more than the 68.13% of that capital that they would have obtained by purchasing their shares at that average price and then benefiting from a step-up mechanism in compliance with the Temporary Framework. Consequently, according to the Commission, that discount constitutes sufficient remuneration for those States ‘at entry’ into SAS’s capital.

However, it must be found that the price of the shares acquired by the State on its entry into the equity of the beneficiary concerned does not have a sufficiently close connection with the subject matter and purpose of the step-up mechanism or of an alternative mechanism, within the meaning of point 62 of the Temporary Framework.

First, that price is governed by point 60 of the Temporary Framework, according to which a capital injection by the State, or an equivalent intervention, is to be conducted at a price that does not exceed the average share price of the beneficiary concerned over the 15 days preceding the request for the capital injection. The purchase price referred to above therefore establishes that it complies with point 60 of the Temporary Framework. However, the fact that the equity instrument complies with point 60 does not mean that it may derogate from the obligation to provide for a step-up mechanism within the meaning of point 61 of the Temporary Framework, or for an alternative mechanism, within the meaning of point 62 thereof. In fact, these are two distinct requirements in that framework, which concern different issues. The necessity to establish such a mechanism is by no means conditional on the initial purchase price of the shares.

Second, the objective pursued by the step-up mechanism is different from that underlying the rule on the initial purchase price of the shares. The objective of that mechanism is to cause the State’s shareholding to become more onerous over time by increasing the latter’s share of the company’s equity, without there being a further injection of capital by the State. That mechanism is therefore intended to be an *ex post* incentive to the beneficiary concerned to buy back that shareholding as quickly as possible, since the mechanism is only activated, if necessary, in the fourth and then the sixth year respectively after the capital injection. By contrast, the requirements as to the purchase price of the shares are intended, in essence, to ensure that the price at which the State acquires its shares does not exceed their market price. That price therefore has an *ex ante* impact on the situation of the beneficiary concerned, that is to say, at the time the State enters the capital of that beneficiary, and it is not necessarily intended to increase over time the incentive, for the beneficiary concerned, to buy back that shareholding, since the price of the shares may rise as well as fall.

Consequently, the price of the shares at the time of the State’s entry into the capital of the beneficiary concerned does not lead overall to a similar outcome with regard to the incentive effects on the exit of the State, as required under point 62 of the Temporary Framework.

Second, the Commission also asserts that the coupon that provides remuneration for the State hybrid notes increases over time, significantly raising the cost of maintaining the State aid within SAS (see paragraph 132 of the contested decision). However, that too is a separate requirement laid down by the Temporary Framework for hybrid capital instruments until their conversion into equity-like instruments, namely that set out in point 66 of the framework, which does indeed provide for interest rates which increase over time (see paragraph 39 above). That requirement therefore has an entirely different field of application to that of the requirement, flowing from points 61 and 62 of the framework, to provide for a step-up or alternative mechanism with regard to equity instruments.

Third, the fact that SAS will be subject to the behavioural commitments set out in section 3.11.6 of the Temporary Framework, such as a prohibition on the payment of dividends (see paragraphs 57 and 132 of the contested decision) likewise does not replace the obligation to establish a step-up or an alternative mechanism within the meaning of point 62 of the Temporary Framework, since that too is a matter of separate requirements which are additional to, but are not a substitute for, the requirement set out in points 61 and 62 of that framework.

Fourth, the Commission argues in the rejoinder that the mere increased presence of the two States in SAS’s capital is ‘undesirable’. It must be observed, first, that the Commission did not refer to such a ground in the contested decision and, second, that that ground is in any event irrelevant because it is subjective and lacks any legal force.

In those circumstances, the applicant is correct in maintaining that all the justifications put forward by the Commission relate, in reality, to other, separate requirements foreseen by the Temporary Framework, which do not replace but are additional to the requirement to establish a step-up or alternative mechanism for any recapitalisation measure by means of equity instruments.

It follows that the Commission has not demonstrated to the requisite legal standard that the ‘overall structure’ of the measure at issue, and in particular the combined effects of its two interconnected components, led overall, with regard to the equity instrument, to incentive effects on the exit of the State from the beneficiary’s capital that are comparable to the incentive effects generated by a step-up mechanism within the meaning of point 61 of the Temporary Framework or an alternative mechanism within the meaning of point 62 of that framework.

It must therefore be found that the equity instrument is not accompanied by any step-up or alternative mechanism, contrary to the requirements of the Temporary Framework.

That finding is not called into question by the interveners’ arguments.

In the first place, the Kingdom of Denmark argues that the obligation, under point 85 of the Temporary Framework, to notify a restructuring plan if, six years after the COVID-19 recapitalisation, the intervention of the two States has not been reduced to below 15% of SAS’s equity (see paragraph 186 of the contested decision), is a strong incentive for those States to exit in order to avoid restructuring.

In that regard, it must be observed that the Commission did not rely on such a ground, either in the contested decision or before the Court, in order to find that the measure at issue included a sufficient incentive for the two States to exit SAS’s capital.

Be that as it may, it is indeed true that the obligation to notify a restructuring plan six years after the recapitalisation, where the conditions of point 85 of the Temporary Framework are satisfied, is covered by section 3.11.7 of the Temporary Framework, which requires the beneficiary concerned to demonstrate a credible exit strategy for the participation of the Member State.

However, it must be observed, first, that the obligation to notify a restructuring plan under point 85 of the Temporary Framework does not, in and of itself, have any bearing on the amount of and the methods for the remuneration of the State and cannot therefore lead to a similar effect on that remuneration as the step-up mechanism laid down by point 61 of that framework. Second, it should be stated that that obligation to notify a restructuring plan is applicable only where the State’s intervention has not been reduced to below 15% of the total equity of the beneficiary concerned and when six years have elapsed since the recapitalisation. It follows that that obligation cannot, in any case, have the same incentive effects on the exit of the State as the step-up mechanism laid down by point 61 of the framework, which is triggered four years after the equity injection and solely on the condition that the State has not sold at least 40% of its equity participation resulting from that injection.

In the second place, the Kingdom of Sweden and SAS submit that the Swedish Companies Act precluded the establishment of a mechanism whereby SAS would buy back shares from only some shareholders but not from others. SAS adds that that Companies Act also precludes the granting of additional shares to a shareholder at no cost, triggered by a future event. The Kingdom of Sweden and SAS also argue that the allocation of additional shares to the two States would merely complicate and delay their exit.

In that regard, first, it is common ground that, under the Swedish Companies Act, a company may not buy back ordinary shares from only one specific shareholder and that it may only buy back ordinary shares from all shareholders on the same terms (see paragraph 62 of the contested decision).

However, it must be observed that the Commission did not rely on such a ground in the contested decision in order to find that the measure at issue included a sufficient incentive for the two States to exit SAS's capital. While that institution referred to the Swedish Companies Act in paragraphs 61 to 63 and 134 of the contested decision, it was only for the purpose of assessing whether the equity instrument complied with the provisions of points 63 and 64 of the Temporary Framework, which do not relate to the requirement for a step-up mechanism, but to the fact that the State may exit the capital of the beneficiary concerned either by the beneficiary itself repurchasing its equity stake or by the sale of that equity stake to purchasers other than the beneficiary.

In addition, the Commission acknowledged at the hearing that the Swedish Companies Act did not necessarily preclude the establishment of an alternative mechanism, within the meaning of point 62 of the Temporary Framework.

Ryanair, in its observations on the intervention by SAS, submitted that a buy-back of shares by the beneficiary was not the only option capable of providing an incentive for the two States to exit. It stated, without being contradicted subsequently, that the Commission could have envisaged other options, such as requiring the suspension of coupon payments on the new commercial hybrid notes, currently exempt from the prohibition on non-mandatory coupon payments, if the two States have not divested a sufficient amount of their participation in four to six years.

Second, SAS provides no substantiation for its assertion that the Swedish Companies Act precludes the granting of additional shares to a shareholder at no cost. Moreover, the Commission made no mention in the contested decision of such a rule under Swedish law.

Third, as regards the argument raised by the Kingdom of Sweden and SAS that the granting of additional shares to the two States would merely complicate and delay their exit, it must be observed that point 61 of the Temporary Framework explicitly states that the step-up mechanism may take the form of the grant of additional shares to the State. Consequently, unless the lawfulness or relevance of point 61 of the Temporary Framework were to be called into question, a step-up mechanism in the form of the grant of additional shares cannot be rejected as being, as a matter of principle, inappropriate for the purpose of leading to an incentive effect on the exit of the State concerned.

In those circumstances, the interveners' arguments do not serve to justify the absence of a step-up mechanism or an alternative mechanism as regards the equity instrument.

Lastly, the Commission does not refer to any specific exceptional circumstance capable of justifying, in the particular case of the measure at issue and in accordance with the case-law referred to in paragraph 34 above, the direct application of Article 107(3)(b) TFEU and a derogation from the provisions of the Temporary Framework requiring the inclusion of a step-up or alternative mechanism as regards equity instruments.

Consequently, the Commission has infringed points 61 and 62 of the Temporary Framework in that it failed to require the inclusion of a step-up or an alternative mechanism with regard to the equity instrument.

Accordingly, this part of the plea is well founded as regards the equity instrument.

The consequences to be drawn from the infringement of the provisions of the Temporary Framework relating to the step-up mechanism

Since the fourth part of the first plea is well founded as regards the equity instrument, but not as regards the hybrid capital instrument, it is necessary to determine whether the unlawfulness found in connection with the equity instrument is capable of resulting in the annulment of the contested decision in its entirety or only in part.

In that connection, it should be observed that, according to settled case-law, partial annulment of an act of the European Union is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement of severability is not satisfied where the partial annulment of a measure would have the effect of altering its substance (see judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 57 and the case-law cited).

In the present case, it must be held that although the measure at issue is composed of two instruments, it nevertheless concerns a single measure aimed at the participation of two Member States in the recapitalisation of SAS. Consequently, the Commission found, in overall terms, that that measure constituted State aid (see paragraph 74 of the contested decision) and that it was compatible with the internal market on the basis of Article 107(3)(b) TFEU (see the conclusion of the contested decision). It only carried out a separate analysis of the two instruments comprising the measure at issue as regards compliance with the provisions of the Temporary Framework relating to the remuneration and exit of the State, since the Temporary Framework laid down in that regard separate rules which are applicable, respectively, to equity instruments and to hybrid capital instruments. Furthermore, the Commission itself stated, in paragraph 131 of the contested decision, that the two instruments at issue were tightly interconnected.

It follows that the equity instrument cannot be severed from the remainder of the contested decision and that, therefore, the partial annulment of that decision would have the effect of altering its substance.

Consequently, the unlawfulness found in connection with the equity instrument affects the compatibility of the whole of the measure at issue with the internal market and is capable, on its own, of justifying the annulment in full of the contested decision.

It follows from all the foregoing that the contested decision must be annulled in its entirety, without there being any need to examine the other pleas and complaints put forward by the applicant.

Costs

Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 134(2) of those rules, where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared.

In accordance with Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs.

In the present case, the Commission and the interveners have been unsuccessful and the applicant has applied for costs to be awarded against them. In those circumstances, the Commission, first, must be ordered to bear its own costs and to pay those incurred by the applicant, with the exception of those relating to the interventions, and, second, the interveners must be ordered to bear their own costs and to pay those incurred by the applicant as a result of their respective interventions.

On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

Annuls Commission Decision C(2020) 5750 final of 17 August 2020 on State Aid SA.57543 (2020/N) – Denmark and SA.58342 (2020/N) – Sweden – COVID-19 recapitalisation of SAS AB;

Orders the European Commission to bear its own costs and to pay those incurred by Ryanair DAC, with the exception of those related to the interventions;

Orders the Kingdom of Denmark, the Kingdom of Sweden and SAS to bear their own costs and to pay those incurred by Ryanair as a result of their respective interventions.

Kornezov Buttigieg Kowalik-Bańczyk

Delivered in open court in Luxembourg on 10 May 2023.

T. Henze S. Papasavvas

Acting Registrar President

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* Language of the case: English.