Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

14 June 2023 *

(State aid – Agreements concluded with the airline Ryanair and its subsidiary Airport Marketing Services – Marketing services – Decision declaring the aid incompatible with the internal market and ordering its recovery – Advantage – 'Real need' test – Articles 41 and 47 of the Charter of Fundamental Rights – Right of access to the file – Right to be heard)

In Case T-79/21,

Ryanair DAC, established in Swords (Ireland),

Airport Marketing Services Ltd, established in Dublin (Ireland),

represented by E. Vahida, F.-C. Laprévote, V. Blanc, S. Rating, I.-G. Metaxas-Maranghidis and D. Pérez de Lamo, lawyers,

applicants,

v

European Commission, represented by L. Flynn, J. Carpi Badía and C. Georgieva, acting as Agents,

defendant,

supported by

Council of the European Union, represented by A. Maceroni and A.-L. Meyer, acting as Agents,

intervener,

THE GENERAL COURT (Ninth Chamber),

composed, at the time of the deliberations, of M.J. Costeira (Rapporteur), M. Kancheva and P. Zilgalvis, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

further to the hearing on 20 October 2022,

gives the following

Judgment [1]

…

I. Background to the dispute

A. The agreements at issue

2 The first applicant, Ryanair DAC, formerly Ryanair Ltd ('Ryanair'), is an airline established in Ireland which operates more than 2 000 daily flights connecting 209 destinations in 33 countries across Europe and North Africa. The second applicant, Airport Marketing Services Ltd ('AMS'), is a subsidiary of Ryanair which provides marketing strategy solutions. Its activity consists primarily of selling advertising space on Ryanair's website.

3 Montpellier Méditerranée airport ('Montpellier airport') lies approximately 7 km from the centre of Montpellier, which is the capital of the Department of Hérault, in Occitania, France. The airport is open to domestic and international commercial traffic.

4 Between 1964 and 2009, Montpellier airport was managed by the Chamber of Commerce and Industry of Montpellier, which was later absorbed into the Chamber of Commerce and Industry of Hérault ('the CCIM'). On 23 June 2009, the management of the airport was transferred to the public limited company Aéroport Montpellier Méditerranée ('AMM'), which is 60% owned by the French State, 25% owned by the CCIM, 7% owned by the Departmental Council of Hérault, 6.5% owned by the Region of Occitania, 1% owned by the Communauté d'agglomération du Pays de l'Or, and 0.5% owned by Montpellier Méditerranée Métropole.

…

6 The Association de promotion des flux touristiques et économiques (Association for the Promotion of Tourist and Economic Flows) ('the APFTE') is an association set up in June 2010 on the initiative of the CCIM in collaboration with several local authorities, namely the Regional Council of Languedoc-Roussillon (now the Region of Occitania), the Department of Hérault, the Communauté d'agglomération de Montpellier (now Montpellier Méditerranée Métropole), the Communauté de communes du Pays de l'Or (now the Communauté d'agglomération du Pays de l'Or) and the City of Montpellier ('the public members of the APFTE'), and with the participation of several local businesses.

7 According to its constitution, the APFTE's object is to 'promote and develop tourism in the area, including business tourism, by entering into promotional agreements, purchasing internet advertising and marketing services or utilising any other advertising medium such as participation in fairs and exhibitions, in order to attract international customers'.

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

8 Between 2010 and 2018, the APFTE concluded three sets of marketing services agreements with the applicants ('the agreements at issue').

…

B. The administrative procedure

13 On 23 March 2017, the European Commission received a complaint from the airline Air France alleging that the APFTE had granted unlawful State aid to Ryanair between 2010 and 2015 in the form of marketing services agreements to support its air transport operations to and from Montpellier airport.

…

C. The contested decision

18 At the end of the formal investigation procedure, the Commission adopted, on 2 August 2019, Decision C(2019) 5729 final on State aid SA.47867 2018/C (ex 2017/FC) granted by France to Ryanair and AMS ('the initial decision'). On 13 October 2020, the Commission corrected the initial decision by Decision C(2020) 6938 final ('the corrigendum'). On 19 November 2020, the contested decision, which corresponds to the initial decision as corrected, was published in the *Official Journal of the European Union*.

…

21 Thirdly, the Commission noted, in assessing the economic advantage, that the links between the airport services agreements concluded by AMM, the purpose of which was to lay down the financial and operational conditions of the commercial flights operated by Ryanair to and from Montpellier airport, and the agreements at issue, concluded by the APFTE, were not sufficient to justify a joint assessment and decided to carry out an individual assessment of the agreements at issue. It took the view that, in concluding those agreements, the APFTE was pursuing a regional policy objective, was acting only as a public authority and could not have expected any financial gain as a market economy operator. It also considered that the purchase of marketing services did not meet a real need, but rather was intended to subsidise Ryanair flights to and from Montpellier airport, with the result that the 'market economy operator' test ('"MEO" test') was not applicable. It added that, even if that test were applicable, it would not be satisfied, since the prices paid under the agreements at issue were not in line with the market price. For those reasons, it concluded that the agreements at issue conferred an economic advantage on Ryanair.

…

24 The Commission concluded that the agreements at issue constituted State aid within the meaning of Article 107(1) TFEU.

…

II. Forms of order sought

28 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

29 The Commission, supported by the Council, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

A. Substance

…

2. The second plea in law, alleging that the Commission erred in law, made a manifest error of assessment and failed to state reasons inasmuch as it found that the 'MEO' test was not applicable

…

(d) The fourth part, alleging that the contested decision was contradictory as regards the application of the 'MEO' test

136 The applicants criticise the Commission, first, for having considered that the 'MEO' test was not applicable and, secondly, for having applied it by seeking to determine whether the APFTE had a 'real need' to purchase marketing services from the applicants and whether the price paid was in line with the market price. They submit that it is apparent from the case-law and the Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1) that the 'real need' test is a variation of the 'MEO' test which must be applied only in exceptional circumstances, and that the comparison of the price of a transaction with a market price is a typical element of the 'MEO' test. Therefore, according to the applicants, there is a discrepancy in the contested decision's statement of reasons.

137 The Commission disputes those arguments. It maintains that the 'real need' test is not a variation of the 'MEO' test and that, in its Notice on the notion of State aid, it is stated, in the section relating to the second of those tests, that 'there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions', an approach which has been confirmed by the Court.

138 In addition, the Commission contends that the contested decision is neither inconsistent nor unclear. In recital 180 of that decision, it is specified that the purchase of the marketing services was not able to meet a 'real need', but was intended to subsidise Ryanair flights from and to

Montpellier airport. Subsequently, it is mentioned that, even if the 'MEO' test were applicable, it would not be satisfied in so far as the price of the marketing services was not in line with the market price. According to the Commission, the second limb of the analysis does not contradict the first, but simply complements it by examining, alternatively, the arguments raised by the applicants and those raised by other concerned parties during the formal investigation procedure.

139 In that regard, first, it should be recalled that, as is apparent from paragraph 69 above, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which are to be regarded as an economic advantage which the undertaking who is the beneficiary thereof would not have obtained under normal market conditions are regarded as State aid.

140 Furthermore, as is apparent from paragraph 71 above, the assessment of the conditions under which such an advantage was conferred is carried out, as a rule, by applying the 'MEO' test.

141 The starting point for determining whether that test is to be applied must be the economic nature of the Member State's action, not how that Member State, subjectively speaking, thought it was acting or which alternative courses of action it considered before adopting the measure in question (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 27).

142 Article 107(1) TFEU does not distinguish between the causes or the objectives of State measures (judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 27, and of 13 February 2003, *Spain* v *Commission*, C-409/00, EU:C:2003:92, paragraph 46). The nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid (judgments of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 17, and of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 122).

143 Where the 'MEO' test is applicable, it is necessary to examine whether the same measure would have been adopted under normal market conditions by a private operator in a situation as close as possible to that of the State. The test to be employed in practice in a given case must be determined on the basis of, inter alia, the nature of the transaction envisaged by the Member State concerned (see, to that effect, judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraphs 52 and 55).

144 In that context, it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the undertaking who is the beneficiary would manifestly not have been able to obtain similar conditions from a private operator (see, to that effect, judgment of 11 December 2018, *BTB Holding Investments and Duferco Participations Holding* v *Commission*, T-100/17, not published, EU:T:2018:900, paragraph 264 and the case-law cited).

145 For the purposes of that assessment, only the benefits and obligations linked to the situation of the Member State as a private operator, to the exclusion of those linked to its status as a public authority, are to be taken into account (see judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 55 and the case-law cited).

146 Secondly, it should be pointed out that a State measure in favour of an undertaking cannot be excluded in principle from the concept of 'State aid', within the meaning of Article 107 TFEU, merely because the parties undertake reciprocal commitments (see, to that effect, judgment of 28 January 1999, *BAI* v *Commission*, T-14/96, EU:T:1999:12, paragraph 71).

147 The mere fact that a State purchases goods and services which were allegedly offered on market conditions is not sufficient for that transaction to constitute a normal commercial transaction concluded under conditions which a private operator would have accepted. In certain circumstances, it is necessary to establish objectively that the State had a real need to purchase those goods and services (see, to that effect, judgment of 28 January 1999, *BAI* v *Commission*, T-14/96, EU:T:1999:12, paragraphs 74 to 79).

148 The Commission clarified its interpretation of 'real need' in its Notice on the notion of State aid. It is stated, inter alia, in paragraph 82 of that notice, included in Section 4.2, entitled 'The market economy operator (MEO) test', that, in order to assess whether certain transactions are in line with market conditions, all the relevant circumstances of the case should be considered. For instance, there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions.

149 Although that notice is not capable of binding the Court, it may nevertheless serve as a useful source of guidance (see, to that effect and by analogy, judgment of 26 July 2017, *Czech Republic* v *Commission*, C-696/15 P, EU:C:2017:595, paragraph 53).

150 In the present case, in Section 7.1.3.3 of the contested decision, entitled 'Applicability of the market economy operator principle', first, the Commission noted, in essence, that, in concluding the agreements at issue, the APFTE was pursuing a regional policy objective, was acting only as a public authority and could not have expected any financial gain as a market economy operator aside from the development of tourism in the region. It added that the purchase of marketing services by the APFTE did not meet a real need, but was in fact intended to subsidise Ryanair flights from and to Montpellier airport. Accordingly, it considered that the 'MEO' test was not applicable. Secondly, the Commission explained that, even if that test were applicable, the prices paid for the purchase of the marketing services were not in line with the market price, with the result that that test would not be satisfied.

151 It must therefore be held that the Commission considered that the MEO test was inapplicable in the present case for two reasons relating, in essence, to the fact that the APFTE was acting as a public authority and to the fact that the purchase of marketing services from the applicants by the APFTE did not meet a real need.

152 As is claimed, in essence, by the applicants, none of the grounds relied on by the Commission was such as to rule out the applicability of the market economy operator principle.

153 First, as regards the first ground, namely that relating to the fact that the APFTE was acting as a public authority, it should be observed that, as is apparent, in essence, from paragraphs 142 and 145 above, although the application of the 'MEO' test must be examined without reference to public policy objectives, the pursuit of such objectives does not preclude the applicability of that test.

154 Secondly, as regards the second ground, namely that relating to the purchase of marketing services from the applicants by the APFTE which did not meet a real need, it should be noted that, as is apparent, in essence, from paragraphs 146 to 149 above, examining the real need of the State to purchase goods and services by definition involves assessing whether a private operator in a situation as close as possible to that of the State would have adopted the same conduct under normal market conditions. Such an assessment falls, as is apparent from paragraph 143 above, within the scope of the 'MEO' test. Consequently, that ground, relied on by the Commission, also does not permit a finding that the 'MEO' test cannot be applied.

155 Therefore, it must be held that the Commission, in concluding that the 'MEO' test was not applicable in the present case, erred in law.

156 However, in the first part of Section 7.1.3.4 of the contested decision, entitled 'Determination of the advantage conferred on Ryanair/AMS by the APFTE', the Commission specifically examined whether the purchase of marketing services from the applicants met a real need of the APFTE.

157 Contrary to the applicants' assertions, that analysis by the Commission is not such as to vitiate the contested decision with a contradiction liable to affect its validity. In that regard, it should be borne in mind that a contradiction in the statement of the reasons on which a decision is based constitutes a breach of the obligation to state reasons such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (judgments of 24 January 1995, *Tremblay and Others* v *Commission*, T-5/93, EU:T:1995:12, paragraph 42, and of 30 March 2000, *Kish Glass* v *Commission*, T-65/96, EU:T:2000:93, paragraph 85).

158 In the present case, it is clear from recitals 182 to 305 of the contested decision that the Commission established the existence of an economic advantage on the ground that there was no real need for the APFTE to conclude the agreements at issue. The applicants were in a position to ascertain the real reasons for the contested decision and to challenge the merits of the Commission's assessment in that regard, which, moreover, they did in paragraphs 141 to 239 of the application and in paragraphs 58 to 84 of the reply. Accordingly, the contested decision will have to be annulled only if it transpires that those grounds are incapable of providing a basis for its operative part, which will be examined in the context of the fourth plea.

159 In so far as the applicants rely on a contradiction in the contested decision as regards the question whether the price paid under the agreements at issue was in line with the market price, it suffices to state that the Commission noted, in recitals 184, 306 and 307 of the contested decision, that the fact that there was no real need for the APFTE to conclude the agreements at issue was sufficient to establish the existence of an economic advantage and that it examined whether the price paid by the APFTE was in line with the market price in the alternative, since Ryanair had raised that argument in the comments it had made during the formal investigation procedure.

160 Therefore, subject to the analysis which will be carried out in connection with the first three parts of the fourth plea, the fourth part of the second plea must be rejected as unfounded, as must the second plea in law in its entirety.

…

IV. Costs

351 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. As the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

352 The Council is to bear its own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Ryanair DAC and Airport Marketing Services Ltd to bear their own costs and to pay those incurred by the European Commission;**

3. **Orders the Council of the European Union to bear its own costs.**

Costeira Kancheva Zilgalvis

Delivered in open court in Luxembourg on 14 June 2023.

[Signatures]