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GCLC Lunch Talk Series:

The first judgments on Covid-19
State aid decisions:

Ryanair v Commission

Brussels, 30 March 2021
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Overview – Ryanair Appeals vs. COM Decisions on Covid-19 State Aid Measures

Member State, Beneficiary	Case no. State aid	Court Case no.	Appeal filed at GC	Publication grounds of appeal in OJ	Intervention	Hearing scheduled	Judgment	Expedited procedure applied	Appeal
SE – Swedish Airlines	SA.56812	T-238/20	01.05.2020	22.06.2020 (C 209/36)	FR, SE	22.09.2020	17.02.2021	✓, accepted by Court	announced
FR – French Airlines	SA.56765	T-259/20	08.05.2020	29.06.2020 (C 215/59)	FR	23.09.2020	17.02.2021	✓, accepted by Court	announced
Denmark – SAS	SA.56795	T-378/20	19.06.2020	03.08.2020 (C 255/35)	DK, SE, SAS	27.11.2020	[14.04.2021]	✓, accepted by Court	
Sweden – SAS	SA.57061	T-379/20	19.06.2020	03.08.2020 (C 255/36)	FR, SE, SAS	27.11.2020	[14.04.2021]	✓, accepted by Court	
Finland – Finnair	SA.56809	T-388/20	26.06.2020	10.08.2020 (C 262/36)	FR, FI, ES	04.12.2020	[14.04.2021]	✓, accepted by Court	
Portugal – TAP	SA.57369	T-465/20	22.07.2020	31.08.2020 (C 287/46)	FR, PL, PT	09.12.2020		✓, accepted by Court	
DE – Condor (R&R)	SA.55394	T-577/20	11.09.2020	23.11.2020 (C 399/39)				✓	
ES – Spanish Airlines	SA.57659	T-628/20	16.10.2020	30.11.2020 (C 414/47)	FR, ES	24.02.2021		✓, accepted by Court	
NL – KLM	SA.57116	T-643/20	23.10.2020	07.12.2020 (C 423/40)	FR, NL, KLM	25.02.2021		✓, accepted by Court	
FI – Finnair	SA.57410	T-657/20	30.10.2020	14.12.2020 (C 433/66)				✓	
DE – Condor (107 2b)	SA.56867	T-665/20	06.11.2020	21.12.2020 (C 443/30)		18.03.2021		✓	
AT – AUA	SA.57539	T-677/20	13.11.2020	11.01.2021 (C 9/31)		[23.04.2021]		✓	
LT – Air Baltic	SA.56943	T-737/20	16.12.2020	15.02.2021 (C 53/50)				×	
ET – Nordica	SA.57586	T-769/20	23.12.2020	22.02.2021 (C 62/42)				×	
BE – Brussels Airlines	SA.57544	T-14/21	15.01.2021	01.03.2021 (C 72/33)				×	
DE – Lufthansa	SA.57153	T-34/21	22.01.2021	08.03.2021 (C 79/37)				×	
CT – Croatia Airlines	SA.55373	T-111/21	19.02.2021						

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- Last appeals in December 2020 and January 2021 not expedited procedure.
- In normal future procedures, COM will probably dispute admissibility – did not do so in expedited procedures so far.
- Test to show individual concern differs:
 - Applicant seeks to protect procedural rights (no Phase II)
 - Challenge based on the merits (Article 107 (3) TFEU) (*Plaumann* formula – substantially affected))
 - Ryanair abandoned/reduced its base and flights in several Member States.

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In almost all of the cases, Ryanair relies *mutatis mutandis* on one or all of the pleas in law brought forward, although cases are very different:

- Different legal basis: Article 107 (3) (b) – Article 107 (2) (b) TFEU
- Individual State aid – aid schemes
- Hub airlines – leisure airlines
- Domestic airlines – non-domestic airlines

"no frills airline" – "no frills appeals"

Pleas Brought Forward in cases T-238/20 (SWE) and T-259/20 (France)

Appeals rejected by GC entirely:

- First plea: The underlying schemes constitute breach of principle of non-discrimination on grounds of nationality and violate the freedom to provide services in EU, in particular against the backdrop of the liberalisation of air transport in the EU since the late 1980s.
- Second plea (SWE, T-238/20): Infringement of the EC's obligation to weigh the pro- and anticompetitive effects of Swedish aid scheme.
- Second plea (FRA, T-259/20): Manifest error in assessing the damage that occurred to eligible airlines (proportionality of the aid).
- Third plea: Failure to initiate a formal investigation procedure.
- Fourth plea: Infringement of the duty to state reasons.

First Plea – Non-Discrimination

GC upheld important aspects of EC's assessment frameworks under the two main legal bases Article 107 (2) (b) TFEU and the Temporary Framework pursuant to Article 107 (3) (b) TFEU

- There is no discrimination under Article 18 TFEU for limitation of aid schemes to airlines registered in the respective Member State, as long as the conditions in TF/Article 107 (3) (b) and Article 107 (2) (b) are met.
 - No legal requirement for Member State to extend State aid to airlines with a principal place of business outside its territory.
 - Member State have no unlimited financial resources. Focus on location-relevant companies/sectors must be possible, e.g. national infrastructure or transport sector.
 - Decision by Member State to grant aid is exclusively a national competence. EU State aid control limited to competition aspects. COM no "super regulatory authority".
 - ECJ *Nuova Agricast* (C-390/06, para 64-66): principle of equal treatment – companies in comparable situation?

Second Plea T-238/20 (SWE) – Weighing Pro- and Anticompetitive Effects

GC rejects argument that EC did not satisfy its obligation to weigh the beneficial effects of the aid against its adverse effects (distortion of competition)

- **Article 107 (3) (b) TFEU in itself weighs these effects.**
 - If the conditions are met, the aid is granted to remedy a "serious disturbance" in the economy, which is rendered as a common interest in the internal market.
 - If 107 (3) (b) TFEU is met, the result of a balancing exercise is already positive and no separate balancing exercise is required.
 - It is only for the Commission to assess whether the aid (scheme) is **necessary, appropriate and proportionate** (see para. 69 of judgment T-238/20).
 - ECJ (C-594/18P, para 20,34 – *Hinkley Point*): difference in wording "unlike Article 107 (3) (b) TFEU ..."
 - Court (T-68/15, para 210-214 – *Scandlines*): different wording of Article 107 (b) and (c) TFEU not taken into account.
- **Accordingly,**
 - no obligation exists to undertake a separate "balancing exercise" and
 - Ryanair would have to successfully make the argument that decisions are not in line with the TF and thus Article 107 (3) (b) TFEU.

Second Plea T-259/20 (France) – Assessing the Damage

GC rejects argument that the EC committed a manifest error in assessing the damage that occurred to eligible airlines and thus, the aid is not proportionate

- The aid received is in "all probability" lower than the damage compensation received.
- In addition to the safeguards introduced to avoid overcompensation (ex-post damage calculation and retrieval mechanism), the aid is proportionate.
- Furthermore, Ryanair, bearing the burden of proof as applicant, did not particularise why the assessment of aid is based on undemonstrated assumptions (e.g. why the calculation of the quantum of aid based on the application of a Euribor reference rate is an error in law, since market lenders would not have provided liquidity under these circumstances).