



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

21 November 2013*

(State aid — Articles 107 TFEU and 108 TFEU — Benefits granted by a public airport operator to a low-cost airline — Decision to initiate a formal investigation procedure in respect of that measure — Obligation of Member States' courts to abide by the Commission's assessment in that decision concerning the existence of aid)

In Case C-284/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Koblenz (Germany), made by decision of 30 May 2012, received at the Court on 7 June 2012, in the proceedings

Deutsche Lufthansa AG

v

Flughafen Frankfurt-Hahn GmbH,

intervener

Ryanair Ltd

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 April 2013,

after considering the observations submitted on behalf of:

- Deutsche Lufthansa AG, by A. Martin-Ehlers, Rechtsanwalt,
- Flughafen Frankfurt-Hahn GmbH, by T. Müller-Heidelberg, Rechtsanwalt,
- Ryanair Ltd, by G. Berrisch, Rechtsanwalt,
- the German Government, by T. Henze and K. Petersen, acting as Agents,

* Language of the case: German.

- the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents, and by A. Lepière, avocate,
 - the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,
 - the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
 - the European Commission, by V. Di Bucci and T. Maxian Rusche, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 27 June 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 107 TFEU and 108 TFEU.
- 2 The reference has been made in proceedings between Deutsche Lufthansa AG ('Lufthansa') and Flughafen Frankfurt-Hahn GmbH ('FFH'), the operator of Frankfurt-Hahn Airport (Germany), concerning the cessation and recovery of State aid which FFH allegedly granted to Ryanair Ltd ('Ryanair').

Legal context

- 3 Article 3 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), which is entitled 'Standstill clause', reads as follows:

'Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.'

- 4 Article 4 of that regulation, which is entitled 'Preliminary examination of the notification and decisions of the Commission', provides in paragraphs 2 to 4:

'2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [107(1) TFEU], it shall decide that the measure is compatible with the common market ...

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108(2) TFEU] (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

5 Article 6 of that regulation, headed ‘Formal investigation procedure’, provides at paragraph 1:

‘The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. ...’

6 Article 7 of the same regulation, headed ‘Decisions of the Commission to close the formal investigation procedure’, provides:

‘1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed, it shall decide that the aid is compatible with the common market ...

4. The Commission may attach to a positive decision conditions ... and ... obligations ...

5. Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect ...

6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed. The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. ...

...’

7 Article 11 of Regulation No 659/1999, which is entitled ‘Injunction to suspend or provisionally recover aid’, states:

‘1. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market ...

2. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market ...

...’

8 Article 12 of that regulation, which is entitled ‘Non-compliance with an injunction decision’, states:

‘If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the [Court] direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.’

9 Under Article 13 of that regulation, entitled ‘Decisions of the Commission’:

‘1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7 ...

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the Commission shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7).

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 FFH, operator of Frankfurt Hahn Civil Airport, was owned, until January 2009, 65% by Fraport AG, 17.5% by the German federal state of Rhineland-Palatinate and 17.5% by the German federal state of Hessen. Fraport AG is a public company listed on a stock exchange and owned, as to the majority of its shares, by the Federal Republic of Germany, the federal state of Hessen and the city of Frankfurt am Main.

11 FFH has generated annual losses of several million euros since the beginning of its activities. On 31 December 2011, those losses amounted to around EUR 197 million. Those were covered, until 2009, by Fraport AG on the basis of an agreement for the transfer of profits. On 1 January 2009, however, Fraport AG sold its shares to the federal state of Rhineland-Palatinate for the token sum of EUR 1. The reason for the transfer was said to be the impossibility of introducing a tax on passengers for the purpose of reducing the losses generated by Frankfurt Hahn Airport, because of Ryanair’s intention to leave the airport if such a tax was introduced.

12 Ryanair is a low-cost airline which is responsible for over 95% of passenger traffic through Frankfurt Hahn Airport. According to the schedule of fees of that airport for 2001, airlines using it had to pay a fee of EUR 4.35 per departing passenger. However, Ryanair was not charged any fee for take-off, approach, landing or use of the infrastructure of the airport since it exclusively used planes which, in accordance with that schedule, gave it an exemption, namely planes whose weight at take-off is between 5.7 and 90 tons.

13 The schedule of fees of Frankfurt Hahn Airport for 2006 is based on a grid drawn up on the basis of the number of passengers transported per year by an airline from that airport, the range being from EUR 5.35 for less than 100 000 passengers per year to EUR 2.24 for 3 million or more passengers. That schedule also makes the exemption from landing and take-off fees, as well as those relating to the provision of air navigation services and ground handling services, dependent on the condition that the duration of ground handling assistance does not exceed 30 minutes. That schedule also provides for the grant of ‘marketing support’ for the opening of new air routes. The amount of that support is determined on the basis of the total volume of passengers transported by the airline concerned. Ryanair received that support.

14 Considering that the business practices of FFH constituted State aid which had not been notified to the Commission and therefore had been granted in breach of Article 108(3) TFEU, Lufthansa brought an action before the Landgericht Bad Kreuznach (Bad Kreuznach Regional Court) on 26 November 2006 seeking an order for the recovery of the payments made to Ryanair by way of ‘marketing support’ between 2002 and 2005 and those corresponding to the reduction in airport fees which had benefited Ryanair in 2003 as a result of the schedule of fees adopted for 2001, and an order that there be no future aid for the benefit of Ryanair.

- 15 Following the dismissal of its claims, Lufthansa appealed to the Oberlandesgericht Koblenz (Koblenz Higher Regional Court). Its action did not succeed and Lufthansa appealed on a point of law to the Bundesgerichtshof (Federal Court of Justice). By a judgment of 10 February 2011, the Bundesgerichtshof set aside the judgment of the Oberlandesgericht Koblenz and referred the case back to it to establish whether there had been an infringement of Article 108(3) TFEU.
- 16 On 17 June 2008 the Commission decided to initiate a formal investigation procedure under Article 108(2) TFEU regarding possible State aid granted by the Federal Republic of Germany to FFH and Ryanair (OJ 2009 C 12, p. 6). The measures covered by the decision included the reduction in airport fees and marketing support provisions for the benefit of Ryanair. In that decision the Commission reached a preliminary view that each of the measures in question was selective and constituted State aid within the meaning of Article 107(1) TFEU, unless it satisfied the private investor principle. As regards that principle, the Commission noted that, on the basis of the information available to it at the time of the adoption of the decision of 17 June 2008, the airport fees paid by Ryanair were not enough to cover the costs incurred by FFH.
- 17 The Oberlandesgericht Koblenz therefore sent the Commission a request for an opinion pursuant to point 3.2 of the Commission Notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1). In its opinion the Commission stated that the Oberlandesgericht Koblenz itself was not required to assess whether the measures in question could or could not be classified as State aid as it could take the decision of 17 June 2008 as a basis for drawing all the necessary inferences from the infringement of Article 108(3) TFEU. With regard to the substance, the Commission stated that the measures in question were both imputable to the State and selective.
- 18 Considering, however, that it had to assess whether the measures at issue constituted State aid and, in particular, having doubts as to the selective nature of those measures, the Oberlandesgericht Koblenz decided to stay proceedings and referred the following questions to the Court for a preliminary ruling:
1. Does an uncontested decision of the Commission to initiate a formal investigation procedure under the second sentence of Article 108(3) TFEU have the result that, in appeal proceedings concerning the recovery of payments made and an order to refrain from making future payments, a national court is bound by the Commission's legal opinion in that decision as to whether a measure constitutes State aid?
 2. If Question 1 is answered in the negative:

Are measures adopted by a public undertaking within the meaning of Article 2(b)(i) of Commission Directive 2006/111/EC of 16 November 2006 [on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings] (OJ 2006 L 318, p. 17 ...), which operates an airport, to be regarded, for the purposes of State aid law, as selective measures within the meaning of Article 107(1) TFEU, simply because they benefit only airlines which use the airport?
 3. If Question 2 is answered in the negative:
 - (a) Is the criterion of selectivity not satisfied if the public undertaking which operates the airport offers the same conditions, and in a transparent manner, to all airlines which opt to use the airport?
 - (b) Is this still the case if the airport operator adopts a specific business model (cooperation with 'low-cost carriers', in this instance), which tailors its conditions of use to such customers, with the result that those conditions are not equally attractive to all airlines?

- (c) Is there a selective measure, at any rate, if the vast majority of the airport's passengers has been attributable to a single airline for a number of years?'

Consideration of the questions referred

Admissibility

- 19 Lufthansa disputes the admissibility of the request for a preliminary ruling on the ground that the order for reference is insufficiently reasoned and does not set out in detail the factual background to the main proceedings.
- 20 In that connection, it should be noted that, according to settled case-law, the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 57 and case-law cited, and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 32). Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (see, to that effect, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 7, and *Attanasio Group*, paragraph 32 and case-law cited).
- 21 According to the case-law of the Court, it is also important for the referring court to set out the precise reasons why it was unsure as to the interpretation of European Union law and why it considered it necessary to refer questions to the Court for a preliminary ruling (see, to that effect, inter alia, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 46 and case-law cited, and the order in Case C-432/10 *Chihabi and Others* [2011], paragraph 22).
- 22 In this case, the order for reference clearly contains the matters of fact and of law allowing both the Court to provide answers of use to the referring court and the governments of Member States and other interested parties to submit their observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. In addition, the reasons which led the referring court to refer questions to the Court for a preliminary ruling were clearly indicated in the order for reference.
- 23 The request for a preliminary ruling is therefore admissible.

The first question

- 24 By its first question, the referring court is essentially asking whether, where, in accordance with Article 108(3) TFEU, the Commission has initiated a formal investigation procedure under Article 108(2) TFEU with regard to a State measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to draw the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.
- 25 Article 108(3) TFEU establishes a prior control of plans to grant new aid (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 2, and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* ('*CELF I*') [2008] ECR I-469, paragraph 37).
- 26 The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision (*CELF I*, paragraph 48).

- 27 The implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate (see, to that effect, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41; Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 74, and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraphs 36 and 37).
- 28 Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (see, to that effect, *van Calster and Others*, paragraph 75, and *Transalpine Ölleitung in Österreich*, paragraph 38).
- 29 The involvement of national courts is the result of the direct effect which the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has been held to have. In this respect, the Court has stated that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified (*Lorenz*, paragraph 8; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* ('FNCE') [1991] ECR I-5505, paragraph 11, and *SFEI and Others*, paragraph 39).
- 30 National courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the last sentence of Article 108(3) TFEU, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures (*FNCE*, paragraph 12, and *SFEI and Others*, paragraph 40).
- 31 The objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision (Case C-1/09 *CELF and Ministre de la Culture et de la Communication* [2010] ECR I-2099, paragraph 30).
- 32 The initiation by the Commission of the formal examination procedure under Article 108(2) TFEU cannot therefore release national courts from their duty to safeguard the rights of individuals faced with a possible breach of Article 108(3) TFEU (*SFEI and Others*, paragraph 44).
- 33 However, the scope of that obligation may vary, depending on whether or not the Commission has initiated the formal examination procedure with regard to the measure at issue in the proceedings before the national court.
- 34 In a situation where the Commission has not yet initiated the formal examination procedure and has therefore not yet given a decision as to whether the measures under consideration are capable of constituting State aid, the national courts, seised of a request that they should draw the appropriate conclusions from a possible infringement of the last sentence of Article 108(3) TFEU, may have cause to interpret and apply the concept of aid with a view to determining whether those measures should have been notified to the Commission (see, to that effect, *SFEI and Others*, paragraphs 49 and 53 and paragraph 1 of the operative part of the judgment). Thus it is for those courts to verify, inter alia, whether the measure at issue constitutes an advantage and whether it is selective, that is to say whether it favours certain undertakings or certain producers within the meaning of Article 107(1) TFEU (*Transalpine Ölleitung in Österreich*, paragraph 39).

- 35 The obligation to notify and the prohibition of implementation laid down in Article 108(3) TFEU apply to plans which may be classified as State aid within the meaning of Article 107(1) TFEU. Therefore, before drawing the appropriate conclusions from a possible infringement of the last sentence of Article 108(3) TFEU, national courts must first decide whether or not the measures in question constitute State aid.
- 36 In a situation where the Commission has already initiated the formal examination procedure under Article 108(2) TFEU, it is necessary to consider which measures have to be taken by the national courts.
- 37 While the assessments carried out in the decision to initiate the formal examination procedure are indeed preliminary in nature, that does not mean that the decision lacks legal effects.
- 38 It must be pointed out in that regard that, if national courts were able to hold that a measure does not constitute aid within the meaning of Article 107(1) TFEU and, therefore, not to suspend its implementation, even though the Commission had just stated in its decision to initiate the formal examination procedure that that measure was capable of presenting aid elements, the effectiveness of Article 108(3) TFEU would be frustrated.
- 39 On the one hand, if the preliminary assessment in the decision to initiate the formal examination procedure is that the measure at issue constitutes aid and that assessment is subsequently confirmed in the final decision of the Commission, the national courts would have failed to observe their obligation under Article 108(3) TFEU and Article 3 of Regulation No 659/1999 to suspend the implementation of any aid proposal until the adoption of the Commission's decision on the compatibility of that proposal with the internal market.
- 40 On the other hand, even if in its final decision the Commission were to conclude that there were no aid elements, the preventive aim of the State aid control system established by the TFEU and noted in paragraphs 25 and 26 of the present judgment requires that, following the doubt raised in the decision to initiate the formal examination procedure as to the aid character of that measure and its compatibility with the internal market, its implementation should be deferred until that doubt is resolved by the Commission's final decision.
- 41 It is also important to note that the application of the European Union rules on State aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.
- 42 Consequently, where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.
- 43 To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.

44 Where they entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, national courts may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling (see, to that effect, as regards requests for preliminary rulings on the validity of State aid, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 72 to 74).

45 In the light of the foregoing considerations, the answer to the first question is that:

- Where, in accordance with Article 108(3) TFEU, the Commission has initiated the formal examination procedure under Article 108(2) TFEU with regard to a measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.
- To that end, the national court may decide to suspend the implementation of the measure in question and order the recovery of payments already made. It may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.
- Where the national court entertains doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, it may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a question to the Court for a preliminary ruling.

The second and third questions

46 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Where, in accordance with Article 108(3) TFEU, the European Commission has initiated the formal examination procedure under Article 108(2) TFEU with regard to a measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.

To that end, the national court may decide to suspend the implementation of the measure in question and order the recovery of payments already made. It may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the European Commission's decision to initiate the formal examination procedure.

Where the national court entertains doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, it may seek clarification from the European Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a question to the Court of Justice of the European Union for a preliminary ruling.

[Signatures]