

# Kluwer Competition Law Blog

## Ryanair's Food Envy – Who Allocates Corona Aid?

Ulrich Soltész (Gleiss Lutz) · Friday, February 19th, 2021

It is the same old story which we have heard many times before: Ryanair boss O'Leary is currently using strong words to complain about Corona subsidies granted to his competitors. His cursing is neither original nor surprising, but a variation on his favourite theme: Ryanair sees itself at a competitive disadvantage with other players that allegedly receive subsidies which distort competition. For this reason, the low-cost carrier has fought against countless measures from various Member States for 20 years. The fact that the low-cost airline itself enjoys state support – especially at regional airports – is of course not mentioned.

As always, Ryanair has turned to the EU courts in Luxembourg, where it is now likely to be one of its best customers. It has filed around 16 actions for annulment against various Commission decisions by which the regulator had cleared support measures aimed at helping airlines in the COVID crisis.

On 17 February 2021, the GC has now dismissed the first two actions for annulment (Cases T-238/20 and T-259/20 – *Ryanair DAC v Commission*). In these cases, Ryanair had taken issue with the Commission approval of a French scheme allowing airlines to defer certain taxes and Sweden's loan guarantee scheme.

### General Attack On The Member States' Subsidy Practice

The most important allegation in all of Ryanair's Corona aid-related lawsuits can be broken down to one key argument, next to which the other legal grounds play only a minor role. According to Ryanair, the Commission violated general principles of Union law, in particular the prohibition of discrimination and the freedom to provide services, when approving the Corona aid measures for its competitors. Ryanair claims that the Commission disregarded the COVID-19 damages incurred by pan-European airlines and allowed the Member States "to reserve aid" only to EU airlines with a domestic operating license.

This uniform boilerplate legal ground is the general attack underlying all 16 lawsuits. This plea was worded identically in all proceedings, although the cases are very different: Some of the decisions are adopted under Art. 107(3)b) and others under Art. 107 (2)b) TFEU). Some of the cases concern ad hoc measures, while others relate to aid schemes. The measures are also directed at very different companies – from holiday airlines to national carriers. And they apply to both domestic and foreign players.

Unfortunately, there is no room for such differentiations in the Ryanair mindset. All the more aggressive was its choice of words in the press, where there was talk of “naked support for national champions … addicted to state aid.” Their first reaction in a crisis would be “to put its hand in the government’s pocket” and “[to] stumble around Europe sucking up as much State Aid as it can possibly gather.” This lust for aggression is nothing new either. It would have been really surprising if the CEO statements had come across in a more moderate tone for once.

## No Discrimination

This harsh language was probably intended to obscure that the legal basis for this general criticism is unclear. The company seems to be relying on some CJEU rulings, according to which aid that violates general principles of Union law cannot be approved. However, the GC dismissed the Ryanair criticism in no uncertain terms.

Regarding the alleged discrimination on grounds of nationality (Article 18 TFEU) the GC found that the requirement that the ‘principal place of business’ is in the Member State concerned, does not render the approval decision illegal. Although the GC seems to concede that such a “difference in treatment may amount to discrimination”, the state aid provisions should take precedence. The GC then explained why the measures were targeted to remedy the serious disturbance caused by Covid-19 in the respective Member States, in particular by supporting airlines which are important to secure connectivity.

The GC took the view that airlines with a domestic license “have a link with the Member State concerned and operate regular flights”. The “criterion of holding a domestic licence … ensures at least the administrative and financial stability of the presence of those airlines, so that the … Member State may control the manner in which that aid is used”. By “adopting that criterion together with the criterion of the non-eligibility of airlines operating charter flights”, the national authorities sought to ensure a “permanent link” with the airlines, hereby securing the Member State’s connectivity. In addition, Ryanair’s market share was “overall fairly limited” and the beneficiaries focused much more on domestic services in the Member States’ territory, which was of particular importance in the crisis.

Ryanair also claimed that the aid measures would violate the freedom to provide services. However, the GC rejected this argument based on Article 58(1) TFEU which provides that free provision of services in the field of transport is governed by a special legal regime, so that Article 56 TFEU does not apply. In addition, the GC expressed doubts whether the mere fact that Ryanair does not receive state aid would discourage it from providing services in the Member State concerned, especially given that, independently of the aid schemes at issue and for purely commercial reasons, Ryanair progressively had reduced its activity there.

## A Sanity Check

The judgments provide very helpful clarifications concerning the Commission’s discretion when approving aid under Article 107(2) and 107(3) TFEU. The GC made it clear that the granting of subsidies for a specific company cannot *per se* constitute illegal discrimination – even if the company is a domestic player. For most state aid lawyers, this is just common sense. It is the

practice of all Member States to award subsidies on a case-by-case basis. Usually, only activities within the national territory are supported.

This practice does by no means constitute illegal discrimination. The awarding of grants on a case-by-case basis does not mean that aid is “reserved” for only some companies, as Ryanair had argued. Rather, the decision to award a subsidy is the sole responsibility of the Member States. EU state aid control extends only to competition aspects.

As the GC clearly stated, it is not for the Commission to revisit this decision. The GC explicitly confirmed that it is the Member State which “must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used”. The approval procedure under Article 108 TFEU does not entail a discussion on the question of whether any other conceivable measure could better achieve the intended objective.

It was helpful that the GC recalled the division of competences under the TFEU again. The aid package itself is defined by the Member State. And the legality of the funding commitment as such is governed by national rules, provided that Articles 107 et seq. TFEU are complied with. The Commission does not have to interfere in this decision. It is certainly not in a position to make indirect stipulations about the allocation of subsidies. DG COMP is not a super-regulator which ensures an equal distribution of state money.

## **Competition Rules Should Limit State Support, Not Extend It**

If one takes the Ryanair argument further, the Commission would have to worry about the allocation of state aid. In some cases, it would have to prohibit an aid package because it does not extend to all competitors. In Ryanair’s world of fantasy, all players would be entitled to subsidies via the backdoor of EU state aid law. This would lead to a massive increase in state aid, obviously exceeding the limitations of public budgets. That would be just about the last thing the founders of the EEC had in mind when they designed the state aid rules in 1958. Entitlement to state aid, as Ryanair imagines, can certainly not be based on Art. 107f. TFEU.

Some observers have, of course, made another valid point. Certain Member States with ‘deep pockets’ are in a position to boost their economies with considerable sums of money, while financially weaker Member States cannot do so. However, this problem can be solved by providing the latter with financial support from Brussels, such as the newly created Recovery and Resilience Facility.

In any case, for the Commission, the victories are an important milestone. They are the first judgments dealing with aid measures cleared under the COVID-regime. Any setback could have undermined the economic recovery process in the EU. Hence, this is good news from Luxembourg.

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