

## THE HIGH COURT

[2012 No. 6736 P.]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL,

DEFENDANTS

**RULING of Mr. Justice Cooke delivered the 4th day of July 2013**

1. The plaintiff's motion for the admission of this case to the Competition List is brought on the basis of para. (k) of the definition of "Competition Proceedings" contained in rule 1 of Order 63B of the Rules of the Superior Courts. That paragraph includes within the definition "any other proceedings which concern the application of a provision of the Act, of the Regulation or of Articles 81, 82, 86, 87 or 88 of the Treaty".

2. The Act in question is the Competition Act 2002 and the Regulation is Council Regulation (EC) No. 1/2003 of the 16th December, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The relevant state aid provisions of the Treaty, Articles 87 and 88 in the paragraph are now Articles 107 and 108 TFEU.

3. As commenced and as pleaded in the statement of claim, this was not a proceeding which came within the scope of that paragraph of the definition. It was exclusively a claim against the State and the Revenue Commissioners with the objective of establishing the invalidity and unconstitutionality of s. 55(2)(b) of the Finance (No. 2) Act 2008, and the unlawfulness of the air travel tax which that provision introduced. The claim is to be additionally based upon certain provisions of European Union law, namely Article 49 of the EC Treaty (now Article 56 TFEU); on certain provisions of the Charter of Fundamental Rights and on the provisions of Regulation 1008/2008 of the European Parliament and the Council of 24 September 2008 on common rules for the operation of air services in the Community. The plaintiff also claims restitution or repayment of the sums it alleges it was compelled unlawfully to pay under the Act of 2008 together with damages for infringements of its Constitutional rights and "Francovich damages" for losses it claims to have incurred by virtue of the State's infringement of those provisions of the Treaty, of the Charter and of Regulation 1008/2008. No reliance is placed in that pleading on any application of the State aid provisions of the Treaty and Articles 107 and 108 are not mentioned.

4. The plaintiff does not contend otherwise. It relies for the admission application on matters raised in the defence and particularly the pleas at paras. 17(d) and 23(g) where reliance is placed upon the decision of the European Commission of the 25th July, 2012, (C (2012) 537) which determined that the lower of the rates of that air travel tax was illegal as a grant of incompatible State aid contrary to Article 107 TFEU. In accordance with Article 14.1 of Regulation (EC) No.659/1999 that decision requires this Member State to "take all necessary measures to recover the aid from the beneficiaries". (See paragraph 71 and Articles 4 and 5 of the decision.) The recovery of the aid is to be "immediate and effective". (See Article 5.1)

5. The defence pleas in question are raised by way of answer to the plaintiff's claim for reimbursement of the tax in respect of passenger journeys for which the plaintiff claims to have paid at the higher rate. In these circumstances the issue before the Court on the motion is whether the claims as thus pleaded and met in the action, "concern the application" of the provisions of the State aid Articles.

6. There is one preliminary observation which the Court considers ought to be made in relation to the jurisdiction of the Court on an application for admission to this list. In view of the Court there is a distinction to be made between an application for admission to the Competition list and one for admission to the Commercial list under Order 63A. While the term "commercial proceedings" is given an extensive definition under rule 1 of the latter order, it is clear from the wording of rule 4 that entry to the list of a qualifying proceeding is not automatic or of right and that the Court has a discretion in deciding whether to grant an application. As practice has shown, the exercise of that discretion will take into account a number of factors, including, *inter alia*, the subject matter of the case, its urgency and its suitability to the case management and pre-trial procedures of the order.

7. In contrast, rule 4 (1) of Order 63B does not use the facultative "may" but provides that "Competition proceedings ... shall be heard in the Competition List by the Judge". Clearly, the purpose of the rule is to ensure that all "competition proceedings" – and only "competition proceedings" – are admitted to and heard in this list.

8. In resisting the application counsel for the defendants has placed great emphasis on the delay which admission of this case would have on the recovery proceeding mentioned in paragraph 10 below in circumstances where, as indicated in paragraph 4 above, the State is under an urgent legal obligation and administrative pressure from the European Commission to enforce the recovery of the unlawful aid. That however, is not an immediate consideration at this point because the Court must first be satisfied that the proceeding comes within paragraph k) of the definition: if it is shown to be a "competition proceeding", it must be heard in the Competition List. Whether or not its subsequent prosecution should be prevented from delaying the recovery action is something that can be dealt with by appropriate case management directions.

9. In general terms and without attempting to give an exhaustive description, the Court would consider a "competition proceeding" within the scope of para. (k), to be one in which the Court is required to either grant or refuse a relief whether by way of declaration or enforcement, which involves interpreting or giving effect to some aspect of one of the competition rules contained in the sections or articles in question. As already indicated, that was not the case in this proceeding on the basis of the statement of claim when the action was commenced. The question is whether the reliance placed in the defence upon the Commission decision of 25 July 2012 now brings the proceeding within the definition.

10. The later action now brought by the Minister for Finance against Ryanair (2003 No. 3286 P.) on the other hand does come within the paragraph because, as a claim for recovery of the value of the State aid declared unlawful by the Commission decision, it is brought in fulfilment of the State's mandatory obligation to give effect to those provisions. The claim made is thus an integral part and a necessary consequence of the State's obligation to ensure the effective application of the State aid prohibition and to provide a remedy for the infringement by recouping the benefit which the aid has unlawfully conferred on recipients. Article 14.1 of Council Regulation (EC) No. 659/1999 of the 22nd March, 1999, laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU), provides that: "Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary". As pointed out above, a decision to that effect has been directed to the State in Article 4 of the decision of 25th July 2012.

11. While the pleas relying on the Commission decision do not purport to ask the Court to give any effect to the state aid articles as such, the plaintiff argues that the adjudication on the claims made under article 56 of the Treaty and Regulation 1008/2008 in the light of the defences in question will require the Court to concern itself with how effect is to be given to the enforcement of the state aid decision. The argument is as follows.

12. The air travel tax introduced by the Act of 2008 was applied at two rates. A "normal rate" of €10 was applied to all flights departing from an airport in the State with a reduced rate of €2 per passenger for flights to a destination located no more than 300km from Dublin airport. In its decision the Commission found that the lower rate of tax provided an advantage to airline operators serving the route which the lower rate applied. It found that the advantage corresponded to the difference between the lower rate of €2 and the normal rate of €10 during the period before a common rate of €3 was introduced. Accordingly, the unlawful aid which the State is required to recover corresponds to the difference between the lower rate and the normal rate during that period, that is to say, €8 per passenger departing.

13. In its defence as indicated above, the State claims that the plaintiff is not entitled to the benefit of that lower rate in respect of any journey for which in the past it had paid tax at the normal rate as this would amount to a further payment of State aid already found to be unlawful.

14. The plaintiff indicated to the Court that its response to this defence will be that annulment proceedings are pending before the Court of Justice against the Commission decision and that one of the grounds relied upon is that the Commission has erred in holding that it was the lower rate and not the higher rate that was illegal. It relies particularly on the judgment of the Court of the 6th February, 2003, in case C-92/01 *Stylianakis* [2003] ECR I-1303. It is asserted that the Court of Justice indicated in that judgment that it was the higher rate that constituted the illegal State aid. (In the case in question a preliminary ruling had been referred to the Court of Justice by a national court in Greece in a case brought by the applicant against the Greek State claiming a refund of an "airport modernisation and development tax" he had been compelled to pay on a flight from Greece to France). It was indicated to the Court that in defending the recovery claim brought by the Minister for Finance, this plaintiff will assert an entitlement to set off against any recoverable State aid the amounts it may be entitled to recover either by way of damages or by way of restitution in the present case. It is on that basis that the plaintiff asserts that the effect of the pleas raised in the defence will be to require the Court to concern itself with the application of Articles 107 and 108.

15. This Court has no jurisdiction in relation to the correctness or validity of the Commission decision of the 25th July, 2012. Those issues fall exclusively into the jurisdiction of the Court of Justice and will, no doubt, be adjudicated upon in the pending action for annulment. Whether or not that issue will require some postponement of the trial of the Minister's claims in the recovery suit is an issue which will have to be dealt with at the appropriate time. So far as the present action is concerned, the arguments raised on either side do not "concern the application" of Articles 107 and 108. At most, they may involve a consideration of the nature and extent of the effects of the Commission decision of the 25th July, 2012, in the context of the claims made in the present action. That, however, will involve the Court in applying the findings and outcome of the Commission decision in the context of any findings successfully obtained by the plaintiff of infringement of the distinct provisions of Union law raised in the statement of claim. It does not, in the judgment of the Court, come within the scope of the concept of a proceeding which "concern[s] the application" of Articles 107 and 108.

16. The adjudication of the claims made by the plaintiff in the present proceedings and the defences raised to them will not accordingly concern the Court in any application of either of the state aid articles even if the Commission decision and its effects form part of the context or background to the action and may have a bearing on the entitlement to or quantum of any amounts the plaintiff might be adjudged entitled to recover in the present action.

17. For these reasons the Court will refuse the plaintiff's application for admission of the proceedings to the Competition List. In the judgment of the Court, the issues in the proceeding as presented in the pleadings are outside the scope of the definition of "competition proceedings" in rule 1 of Order 63B. This does not however preclude steps being taken at the appropriate time to have this case heard at or after or by the same court as the Minister's recovery action should it be considered in the interests of the parties and of efficient case management to do so.