STATE AIDS (AIRLINES): THE ADL CASE

Subject: State aids
Admissibility (of action)
Trade associations

Industry: Airlines
(Implications for many other industries)

Parties: Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen, representing:
- Aero Lloyd Flugreisen GmbH & Co Luftverkehrs KG
- Air Berlin GmbH & Co Luftverkehrs KG
- Condor Flugdienst GmbH
- Germania Fluggesellschaft mbH
- Hapag-Lloyd Fluggesellschaft mbH
- LTU Lufttransport Unternehmen GmbH & Co KG

Hapag-Lloyd Fluggesellschaft mbH
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities in Case T-86/96 (*Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen et al v Commission of the European Communities*), dated 11 February 1999, as summarised in WP 5/99

(Note. On two counts, this case represents a warning to those making a claim in an action before the Court of Justice under Article 173 of the EC Treaty that they may find it difficult to prove the "direct and individual concern". First, the individual company - in this case, Hapag Lloyd, which sued in its own name as well as in the name of the trade association to which it belonged, - was unable to show that the Commission's decision to prohibit the continuance of a state aid designed to help purchasers of new aircraft was of direct and individual concern to it, since all prospective purchasers were affected. Second, a trade association, though it might represent all or most potential purchasers under the state aid scheme, was not itself a party to which the Decision was of direct and individual concern. So both the action by the individual corporation and the action by the trade association representing various corporations were held to be inadmissible. The position of trade associations is discussed at some length in the full version of the judgment, which is at present available only in French. The text of Article 173, paragraph 4, of the EC Treaty is set out at the end of this report.)

Origin of the proceedings

By application lodged at the Court Registry on 31 May 1996, the applicants brought an action for annulment of Commission Decision 96/369, of 13 March 1996, concerning a state aid in the German airline sector in the form of a depreciation facility. By a separate document lodged on 16 September 1996, the Commission raised an objection of inadmissibility against this action.

Admissibility

The Commission argues that the action is inadmissible because the applicants are not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 173 of the Treaty.

According to the applicants, the locus standi of the applicant association Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen (ADL) must be distinguished from that of the applicant undertaking Hapag-Lloyd Fluggesellschaft mbH (HLF).

Findings of the Court

It is necessary to examine, first, the locus standi of HLF and, second, that of ADL.

Whether the action brought by HLF is admissible depends on whether the contested decision, which is addressed to Germany, is of direct and individual concern to HLF. In the present case, in prohibiting the extension of Paragraph 82f of the EStDV from 1 January 1995 to 31 December 1999, the contested decision affects the position of any natural or legal person acquiring a new aircraft registered in Germany and used commercially for the international transport of goods or persons or for other service activities performed outside Germany. Because it prohibits the extension of tax provisions having general application, the contested decision, although addressed to a Member State, appears, vis-a-vis the potential beneficiaries of those provisions, to be a measure of general application covering situations which are determined objectively and entailing legal effects for a class of persons envisaged in a general and abstract manner. HLF cannot therefore claim that the advantage of which the contested decision deprives it is individual in nature. Moreover, the fact that HLF is an interested third party within the meaning of Article 93(2) of the Treaty cannot confer on it locus standi entitling it to bring an action against the contested decision.

A natural or legal person may be individually concerned by reason of its status as an interested third party only by a Commission decision refusing to open the examination stage provided for by Article 93(2) of the Treaty. In such a case, it can ensure that its procedural guarantees are complied with only if it is entitled to challenge that decision before the Community judicature. However, where, as in the present case, the Commission adopted its decision at the end of the examination stage, interested third parties did in fact avail of their procedural guarantees, so that they can no longer be regarded, by virtue of that status alone, as being individually concerned by that decision.

As for HLF's participation in the procedure under Article 93(2) of the Treaty, this circumstance of itself does not suffice to distinguish it individually as it would the person to whom the contested decision is addressed. It follows that HLF has failed to establish attributes peculiar to it or that it is in a special situation, which distinguishes it from any other potential beneficiary of the depreciation treatment introduced by Paragraph 82f of the EStDV.

It is established case-law that an association formed to further the collective interests of a category of persons cannot be considered to be individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty by a measure affecting the general interests of that category. (The Court referred to Cases C-321/95P, *Greenpeace Council et al v Commission*; C-409/96P, *Sveriges Betodlares et al v Commission*; T-447 to 9/93, *AITEC et al v Commission*; and C-313/90, *CIRFS et al v Commission*.)

According to that case-law, in the absence of special circumstances such as the role which it could have played in the procedure leading to the adoption of the measure in question, such an association is not entitled to bring an action for annulment where its members may not do so individually. In the present case, it has already been held that HLF, which is a member of ADL, was not individually concerned by the contested decision. Moreover, ADL has failed to furnish any evidence to support its contention that its other members are in a position to bring an admissible action.

It is thus necessary to examine whether it can justify its locus standi by virtue of special circumstances. Four of the points put forward in this connection simply show that ADL intervened with the Commission for the purpose of defending the collective interests of its members. They cannot therefore establish that ADL has specific locus standi in its own right to bring an action against the contested decision.

So far as its status as interlocutor of the German Government is concerned, it is clear from the documents submitted that ADL was requested by the Ministry of Transport to attend three meetings in order to exchange information and to define a common course of conduct vis-a-vis the Commission. Attendance at such meetings cannot confer on ADL the status of negotiator. ADL did not, in the present case, negotiate and sign any agreement establishing or extending the tax provisions challenged by the Commission, and is not required, in order to give effect to the contested decision, to initiate fresh negotiations or conclude a new agreement concerning those provisions. Similarly, ADL did not play any role in the restructuring of the air-transport sector by negotiating, with the Commission, the establishment, extension and adaptation of constraints on State aid in that sector. In those circumstances, the action must also be declared inadmissible in so far as ADL is concerned. To hold ADL's action admissible in the circumstance of this case, in which its members are not individually concerned and in which ADL has no locus standi of its own, would have the consequence of allowing natural and legal persons to circumvent the fourth paragraph of Article 173 of the Treaty by means of a collective action.

The Court therefore dismissed the action as inadmissible and ordered the applicants jointly and severally to pay the costs. □

Article 173, paragraph 4, of the EC Treaty reads as follows: Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.