

Observations of the Government of the Netherlands on complaint no. 3398, VCP et al.

1. Introduction

On 22 December 2020, the Trade Union Federation for Professionals (VCP), the Dutch Airline Pilots Association (VNV) and the Dutch Association of Aviation Technicians (NVLТ) submitted a complaint to the ILO against the Government of the Netherlands for violating the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) in connection with the aid that the state allocated to KLM in relation to the economic impact of the COVID-19 pandemic. The complaint is supported by the International Federation of Air Line Pilots' Associations (IFALPA) and the European Cockpit Association (ECA).

2. The complaint

The complaint lodged by VCP et al. concerns the following six alleged violations by the Dutch state ('the state') of its obligations under ILO Convention No. 87 on the freedom of association and protection of the right to organise and ILO Convention No. 98 on the right to organise and collective bargaining.

- 1) The state did not consult with the social partners, or at any rate with the employees' organisations VNV and NVLT, before setting conditions that would have consequences for the collective labour agreements (CAOs) in force.
- 2) The state required KLM and the employees' organisations (such as VNV and NVLT) to alter the content of the then-current collective labour agreements, which had been freely concluded by the parties. This is not in conformity with the principles of free collective bargaining.
- 3) The state set conditions for KLM and the employees' associations with respect to the content of future collective labour agreements. This is inconsistent with the principles of free collective bargaining. The state failed to respect the autonomy of the social partners.
- 4) The state pursued political goals in attaching conditions to the state aid allocated to KLM that affect the employment conditions laid down in collective agreements. The state should have informed KLM and the unions of these goals and left it to KLM and unions to decide whether and how these goals could be taken into account.
- 5) The state discriminated against the employees' associations by not providing them with the information it provided to the employer about the conditions which would be attached to the state aid and would affect future changes in the employment conditions. In doing so, the state undermined the right of the employer and employees' associations to negotiate freely. The complainants believe this is damaging to industrial relations between the employer and employees' associations such as VNV and NVLT.
- 6) The state allegedly blocked the outcome of the collective negotiations and set and imposed conditions which the workers' organisations would be compelled to accept for a long period, which is incompatible with the essence of free collective bargaining.

3. Factual background

The complaint lodged by the trade union VCP and employees' organisations VNV and NVLT must be viewed in the light of the following.

Since March 2020 the Dutch government has provided substantial financial aid in the public interest due to the COVID-19 crisis. In most cases, the aid was general in nature, but in some cases it was directed towards sectors that were barred from opening or provided to rescue a specific company, such as KLM.

As in every other country, this aid was necessary to shield companies from going bankrupt as a result of the lockdown measures imposed by the government in the interests of public health. One of the general assistance packages introduced by the Dutch government in that period is the Temporary Emergency Scheme for Job Retention (NOW), a contribution towards payroll costs aimed at preserving employment. The scheme was (and remains) open to all companies. Besides the general support packages, to prevent bankruptcy and mass job losses KLM needed an additional individual support package in the form of a loan to be repaid and a guarantee on a credit facility granted by a consortium of banks. To achieve a proper balance between preventing job losses at KLM and ensuring the company's long-term health and continuity, the state attached conditions to the aid package, in the same way that other member states have done in similar situations. It was necessary for KLM to reduce certain structural costs, including payroll costs, in order to achieve a future-proof and economically balanced situation within the company. This was the only way to avoid bankruptcy in the long run after the COVID-19 crisis.

Measure	Type of government support	Maximum amounts	Amounts drawn down or paid out
Liquidity support 2020			
- A direct loan from the state	Loan	1.0	0.277
- A private credit facility, with a 90% guarantee provided by the state		2.4	0.665
NOW scheme	Grant	1.7	1.508
Deferred taxation (*)	Deferred payment of tax	1.37	n/a
Total (x billion Euro)		6.47	2.45
(*) On 1 October 2021 KLM began paying regular salaries tax and social insurance contributions.			

KLM's operations have decreased sharply as a consequence of COVID-19. In comparison with the forecast in KLM's budget for 2020, the number of flights fell by around 50%, 90% and 80% in March, April and May respectively. A return to the pre-crisis level of flight movements cannot be expected in the short term. Owing to the sharp decrease in the number of flights, KLM's financial situation deteriorated rapidly, leading to a liquidity problem. Together with external, independent advisers and the company, the government assessed the extent of KLM's liquidity requirements and in what form this need could best be met.

KLM's comfortable cash position at the beginning of the crisis deteriorated due to a sharp reduction in the airline's income while expenditure remained largely unchanged. KLM tried to cut spending as much as possible by, for example, making use of the general financial schemes and reducing its variable expenditure. However, the ongoing fixed costs weighed heavily on the company. As it is hard to predict precisely how the recovery of the aviation sector will proceed, various scenarios are conceivable. That is why the government, together with the company and financial and legal advisers, examined different scenarios and computed the financial implications in order to gauge

KLM's possible liquidity requirements. On the basis of the resulting information and forecasts, calculations were carried out to determine the extra liquidity needed to enable KLM to maintain its minimum required cash position. This scenario formed the basis for working out the details of the selected support measures.

The government then examined with external lenders to what extent the necessary financing could be provided by the market, and to what extent government support might be required. The financing facilities were worked out in detail and the entire support package was approved by the board of managing directors and supervisory board of KLM and by the board of directors of Air France-KLM. Pre-notification contacts with the European Commission were completed in order to test whether the intended support is in line with EU state aid rules. The formal notification was submitted on 26 June 2020. The support package was approved by the European Commission (see section 4, State aid). This constructive solution enabled the state to stabilise KLM's acute financial problems caused by the COVID-19 pandemic and mass job losses at KLM were averted in the longer term. This also prevented economic harm to companies whose operations are related to KLM and aviation and preserved employment in the broader sector.

The state recognises as essential and does not question the importance of the freedom of association, the right to organise and the right of collective bargaining, as guaranteed by ILO Conventions No. 87 and No. 98. ILO Convention No. 87 is about the right of employers and employees to establish organisations without state interference. ILO Convention No. 98 is aimed at, *inter alia*, promoting voluntary negotiation between employers' organisations and workers' organisations with a view to concluding collective labour agreements.

4. State aid

Like other airlines, KLM has been hit hard by the COVID-19 crisis. The airline is responsible for a significant share of the network of intercontinental destinations served by Schiphol, the Netherlands' largest airport. This network is of immense importance to the Dutch economy and employment. In this respect, KLM has an important position in society. Due to the highly exceptional circumstances of the COVID-19 pandemic and KLM's importance to the Dutch economy, the government of the Netherlands decided to provide state aid to KLM in the form of a loan to prevent an inevitable bankruptcy and mass job losses at KLM and other companies. Conditions were attached to this state aid in order to ensure the general viability of KLM despite the consequences of the COVID-19 crisis.

In June 2020 the Netherlands notified the European Commission of the support package for KLM. The notified support package, totalling €3.4 billion, comprised a state guarantee for a €2.4 billion loan to be issued by a consortium of banks and a €1 billion state loan. The state acts as guarantor for 90% of the bank loan. KLM is obliged to repay the aid within 5.5 years.

With this support package the Netherlands aimed to provide temporary liquidity to KLM which it needed to deal with the acute and adverse effects of the COVID-19 pandemic so that the company could continue operating and jobs would be spared. The Netherlands took the view that, given KLM's key role in the Dutch economy in terms of employment and air connectivity, bankruptcy would lead to a serious disturbance in the Dutch economy.

The European Commission determined that the support package for KLM was aid within the meaning of Article 107, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU) and assessed it in the light of the Temporary Framework for State Aid Measures to support the economy in the current COVID-19 outbreak. In its decision of 13 July 2020 the Commission declared the aid compatible with the internal market on the grounds of Article 107, paragraph 3 (b) TFEU (Decision SA.57116). Pursuant to that provision, aid that is intended to remedy a serious disturbance in the economy of a member state can under certain conditions be deemed compatible with the internal market.

-See: European Commission decision [Competition Policy \(europa.eu\)](#)

On 19 May 2021, the General Court of the Court of Justice of the European Union annulled the Commission's decision approving the Netherlands' financial aid for the airline KLM amid the COVID-19 pandemic on the grounds of inadequate reasoning.

- See General Court, judgment of 19 May 2021 in case T-643/20, *Ryanair DAC v. European Commission*, ECLI:EU:T:2021:286.

However, in view of the particularly damaging consequences of the pandemic for the Dutch economy, the General Court suspended the effects of the annulment pending the adoption of a new decision by the European Commission. On 19 July 2021 the Commission issued a decision re-approving the €3.4 billion in state aid for KLM and provided further reasoning in the light of the General Court's judgment of 19 May 2021.

In this regard, the Dutch government points out that in several other EU Member States, state aid was granted to national airlines during the COVID-19 pandemic because of the threat of bankruptcy. In these cases, the European Commission- and in some cases the General Court- approved the support packages for these airlines. See for example:

- [Competition Policy \(europa.eu\)](#) Lufthansa¹
- [Competition Policy \(europa.eu\)](#) (Finnair)²
- [Competition Policy \(europa.eu\)](#) (Air France)
- [Competition Policy \(europa.eu\)](#) (Air France)³
- [Competition Policy \(europa.eu\)](#) (Scandinavian airlines)⁴

5. Support package conditions

The government can attach certain conditions to financial support, including requirements relating to conditions of employment. One example (unrelated to state aid) is the ban on the termination of employment contracts provided for by the NOW scheme. Without the conditions set by the state, the support provided to KLM might have proved ineffectual as there is a considerable chance that the company would have gone bankrupt anyway, possibly in the short term. Furthermore, KLM would not have been able to repay the loans, which would also have been damaging to the Dutch economy given that the state had issued a direct loan of €1 billion and provided a 90% guarantee for the €2.4 billion bank loan.

The Dutch government would refer in this regard to the letter to parliament of 26 June 2020 (reference 2020-0000108071) which states the following:

'As indicated in the letter to parliament of 24 April 2020, the support will be subject to conditions. These conditions are intended to ensure effective use is made of taxpayers' money, make the company more competitive and achieve sustainability and quality-of-life goals. The underlying principles were formulated in the government's letters of 1 May and 19 June about conditions for aid to individual companies. As outlined in those letters, the conditions will be tailored to the circumstances of the company concerned. The following conditions have been set for KLM.

¹ See General Court, 14 July 2021, judgment of 14 July 2021, in Case T-677/20, *Ryanair and Laudamotion v Commission*, ECLI:EU:T:2021:465.

² See General Court, judgment of 14 April 2021, in Case T-388/20, *Ryanair DAC / Commission*, ECLI:EU:T:2021:196.

³ See General Court, judgment of 17 February 2021, in Case T-259/20, *Ryanair DAC / Commission* ECLI:EU:T:2021:92

⁴ See General Court, judgment of 14 April 2021, in Cases T-378/20 *Ryanair DAC v Commission* and T-379/20 *Ryanair DAC v Commission*, ECLI:EU:T:2021:194: all judgments regarding the Scandinavian airlines.

KLM will not pay dividends to the shareholders during the term of the support. In addition to the agreed premiums and interest, it will pay an extra amount to the state upon repayment of the aid (i.e. repayment of the direct loan and termination of the bank credit facility guaranteed by the state) and when its financial position is sufficiently healthy. This amount will increase over the term of the aid in order to provide an incentive for repayment by KLM at the earliest possible opportunity (if this is a responsible course of action). Another condition is that KLM's profitability and competitiveness must improve. For example, KLM, together with external advisers, must, by 1 October 2020, draw up a restructuring plan that examines ways of improving its competitive position, for example by cutting costs. KLM must achieve a 15% reduction in influenceable costs. This plan also examines the role that KLM's partners in the aviation industry can play in this. Naturally, the measures described in the restructuring plan will not conflict with the other conditions set for the company. Improving KLM's competitiveness will also require a substantial contribution from the staff through changes to the employment conditions. This is based on the principle that the strongest shoulders should bear the heaviest burden. This means that employees who earn at least three times the modal income must relinquish at least 20% of the value of their employment conditions. Lower percentages apply to income from modal level upwards, rising linearly to 20%. How this condition is met is a matter for the company and the trade unions. One consequence is that bonuses for the board of managing directors and senior management are suspended during the term of the aid.'

One of the conditions set by the state required KLM to draft an appropriate restructuring plan to achieve a 15% reduction in influenceable costs in order to improve its competitiveness. This 15% cost reduction is the main requirement that was assessed before the support package was finally authorised. This condition was formulated in a way that would allow KLM to decide itself how to meet the cost reduction requirement. In this regard, the state conveyed its view that improving KLM's competitiveness would require, *inter alia*, a substantial contribution from the staff through changes to the employment conditions, based on the principle that the strongest shoulders should bear the heaviest burden. It was proposed that compliance with this principle could be achieved by means of a graduated reduction in salaries. A 20% salary reduction was proposed for KLM staff earning at least three times the modal income.

It was then up to KLM and the employees' associations to decide how this contribution to the required cost reduction would be fulfilled. That this graduated reduction was a proposal and not a hard requirement is demonstrated by the fact that KLM and the trade unions did not apply a graduated salary reduction for cockpit staff but instead, at the unions' request according to KLM, agreed to an equal contribution of more than 19% across the board. In this regard it should be noted that the state has no involvement with the conflict between the employer (KLM) and the employees (VCP et al.). After all, the state is not a party to negotiations between the employer (KLM) and the employees (VCP et al.) with respect to the content of the collective agreements.

Given the threat of bankruptcy and the desire for certainty that all parties contribute to efforts to avert it with the help of the state aid package, the Dutch government is of the opinion that the condition set with regard to changes in employment conditions was justified. In the government's view, a review of the collective agreements in force was unavoidable. If the collective agreements from before the COVID-19 outbreak, including the agreed salary increases, had been maintained in full, this would have made it more difficult for KLM to meet the Dutch government's conditions aimed at saving the company in the period ahead and preserving employment. As stated earlier these efforts were financed with public funds.

The state recognises as essential and does not question the importance of the right of parties involved in the collective bargaining process to negotiate freely, as guaranteed by ILO Conventions No. 87 and No. 98. As stated above, however, this is an exceptional situation in which state aid was needed to avert the bankruptcy of an essential company. KLM is important for the network of intercontinental destinations served by Schiphol Airport and, by extension, for employment in the Netherlands, which is a public interest.

The Dutch government would reiterate that the support package allocated to KLM is in line with the state aid rules laid down in EU and national law. The government believes that the conditions that the state aid is subject to do not conflict with the freedom of collective bargaining laid down in the ILO conventions. KLM and the employees' associations concerned were free to decide how a contribution could be made to achieving the required structural cost reduction through changes to the employment conditions.

-Cf. Compilation of decisions of the Committee on Freedom of Association, no. 1451 (371st Report, Case No. 2947, para. 453).

6. General and specific salary measures

Because this case involves a specific, individual support package for a company (KLM), the situation differs from that in many of the complaints assessed by the Committee on Freedom of Association (CFA), which often concern general salary measures and therefore apply to all collective labour agreements.

In regard to KLM, this is not a case of the government unilaterally imposing a general measure that directly interferes with collective agreements that are in force. The support package is a two-way agreement between the state and KLM, which was discussed by the parties extensively and which KLM accepted voluntarily. In a certain sense, it is comparable to the NOW scheme introduced by the state during the COVID-19 crisis. Under this scheme, companies can apply for a grant but must commit to a number of conditions, including a temporary ban on paying bonuses. Another condition is the KLM must manage to reduce influenceable costs by 15% to improve its competitiveness. To achieve this reduction and increase its competitiveness, it was necessary to, *inter alia*, ask the staff to make a substantial contribution through changes to the employment conditions, on the basis of the principle that the strongest shoulders should bear the heaviest burden. It was up to KLM to decide how to fulfil the conditions and to consult with the trade unions. The unions are free to refuse to accept a salary reduction, for example.

The Dutch government would point out that state aid was provided to KLM due to the highly unexpected COVID-19 crisis, which has had a very serious impact on public health. It was necessary to take immediate and far-reaching measures which had a major impact on the economies of the EU member states and other countries outside Europe. This is clear from the Temporary Framework for State Aid Measures to support the economy in the current COVID-19 outbreak, pursuant to which the state aid allocated to KLM was approved. Both the support measures and the conditions attached to them had to be drafted and approved as quickly as possible. The state believes that in view of the aim of ensuring the company's long-term continuity, and the obligation to repay the loans, it was entitled to set strict requirements for KLM. As stated above, the support provided was not a general grant, but a very specific one, subject to very specific conditions. In that sense, the state aid for KLM was similar in nature to the other measures taken by the state in that all grants and support measures aimed at economic stability or recovery were introduced to protect employment as much as possible.

On the basis of earlier assessments by the CFA, it can be concluded the CFA considers it acceptable, in certain circumstances, for a state to set restrictions regarding the right to bargain collectively. For example, measures of this kind can be taken at times of economic urgency, comparable to the situation that arose during the COVID-19 crisis in connection with the pressing financial situation that unfolded at KLM. The Dutch government would refer, for example, to 297th Report, Case 1758, paragraph 225 :

'225. In similar cases concerning limitations on the right to collective bargaining related to economic stabilization measures, the Committee has recognized that when, for urgent reasons relating to national economic interests and, in the framework of a stabilization policy, a government considers that wage rates

cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards, in particular those who are likely to be the most affected. [...] The Committee of Experts on the Application of Conventions and Recommendations adopted the same approach in this respect. (*General Survey on Freedom of Association and Collective Bargaining*, 1994, para. 260.)'

As stated above, the Dutch government is of the opinion that the ILO conventions were not contravened. If the Committee would come to the conclusion that the situation involves a unilateral government-imposed salary measure, the Dutch government is of the opinion that the condition for the aforementioned exception was met given KLM's acute financial problems caused by the COVID-19 pandemic.

Where the effects of the aid allocated by the state to KLM have ramifications for the operation of the collective labour agreement concluded by KLM employees and the employer prior to the COVID-19 crisis and/or the possibility of concluding new agreements in a subsequent collective agreement, the state believes that such effects are justified by the economic emergency at KLM caused by the pandemic. The time frame of these effects was/is limited and directly related to the economic situation resulting from the pandemic and the allocation of general public funds for the purpose of, for a limited period of time, mitigating the economic impact and protecting jobs, not just at KLM but also in related sectors. In addition, the effects are limited in scope, and do not extend to all the matters that are normally addressed in the collective bargaining process. Furthermore, not only were there adequate safeguards to protect workers' living standards the aid was allocated by the state precisely to provide this protection. It is also clear the effects of the support measures do not extend to those in the company whose income position is most vulnerable.

7. Defence against the complaints

In their submission, the unions have set out six complaints explaining how the Netherlands allegedly acted contrary to their freedom of association and the right to collective bargaining enshrined in ILO Conventions No. 87 and No. 98. For each complaint, an explanation of why the state disagrees is given below.

1) Firstly, the complainants assert that the state did not consult with the social partners prior to setting conditions that have consequences for the collective agreements on employment conditions.

As explained in section 4 (State aid), the state may attach conditions to state aid. If this has consequences for the employment conditions, it is up to the collective agreement partners to determine how the conditions will be met, with due consideration for the crisis at hand and the threat of bankruptcy. The state would point out that it was not under any obligation to consult with the social partners, partly in view of the COVID-19 pandemic and the crisis situation that KLM was in.

2) Secondly, the complainants assert that the state forced KLM and the employees' associations to modify the current negotiated collective agreement, in contravention of the principles of free collective bargaining.

3) In the third complaint, the complainants allege that the State imposed boundaries on KLM and the unions regarding future collective agreements, in contravention of the principles of free collective bargaining.

The second and third complaints are addressed jointly below.

As set out in section 4 (State aid), the cost-reduction condition was formulated in a way that allowed KLM and the employees' associations concerned to negotiate the contribution to be made to achieving this required structural cost reduction. In this case too, the state did not interfere with collective agreements. The condition requiring a structural cost reduction was linked to urgently needed support measures in a highly exceptional situation. If the conditions had not been met, this crucial support would not have been provided. Otherwise there would have been absolutely no guarantee that the support would be effective and the taxpayer funds involved would be repaid. The details of how this condition would be fulfilled should be viewed in that context: both the continuity of KLM and the employment of KLM staff and personnel of many more companies connected with it depended on that condition being fulfilled. This constituted an extremely serious responsibility of an urgent nature for both the employer and the employees' associations.

4) The fourth complaint alleges that the state pursued political goals in attaching conditions to the state aid allocated to KLM which interfere with the employment conditions laid down in collective agreements. The state should have informed KLM and the trade unions of these goals and left it to KLM and the unions to decide whether and how these goals could be taken into account.

As laid out in this letter, the government has the authority to attach certain conditions to state aid. In exceptional cases, requirements affecting employment conditions may be set. The state's motivation for setting these conditions was to prevent KLM from going bankrupt and to avert job losses. In the state's view, saving this company, and in doing so preventing repercussions that would have affected broader national economic interests, preserving employment, and ultimately protecting the income security of a large group of workers, was not a political goal but rather a very social goal. It is in that context too that an agreement needed to be reached by the state and the company, as well as by the employer and the employees' associations (under pressure of time).

5) In the fifth complaint, the complainants assert that the state undermined effective collective negotiations between the employer and the unions by providing information about the state aid conditions pertaining to employment conditions to the employer only and not to the unions. This, they assert, was contrary to the principle of non-discrimination.

As explained in section 4 (State aid), the state attached conditions to the financial support for KLM. The state discusses financial support and conditions with the recipient, in this case the company, which is also the employer. Then it is up to the employer and the employees' associations to discuss methods for and the feasibility of meeting the conditions attached to the support package. It is not the state's place to enter into negotiations on this matter with the employees' associations, nor to provide them with information about the support or the attached conditions.

6) In the sixth complaint, the complainants allege that the state effectively blocked the outcome of the collective negotiations and set and imposed conditions which the workers' organisations would be compelled to accept for a long period, which is incompatible with the essence of free collective bargaining.

The state disputes this characterisation and refers to its response to complaints 1 to 5.

As regards the assertion that the conditions have a long time line, the Dutch government would point out that the conditions for state aid are, of course, linked to the loan repayment obligations. In determining the repayment term, account was taken of KLM's viability, which is dependent on compliance with the conditions attached to the support package, certainly during the term of the loans. In addition, the Dutch government would note that the complainants' assertion with respect to the commitment clause is incorrect. KLM was required to draft a restructuring plan that included measures to achieve a 15% reduction in costs. Reducing staff costs is one element of the plan. The

Dutch government assessed the restructuring plan to verify whether the 15% cost reduction would be achieved within a certain period of time.

8. Conclusion

The Dutch government requests that the ILO declare the six complaints unfounded given that violation of Conventions No. 87 and No. 98 has not been demonstrated or must be deemed acceptable given the exceptional circumstances described above.