Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 October 2020[1]

Case C-453/19 P

Deutsche Lufthansa AG
v

European Commission

(Appeal – State aid – Individual aid – Decision regarding the measures in favour of Frankfurt Hahn airport as State aid compatible with the internal market and finding no State aid in favour of airlines using that airport – Inadmissibility of an action for annulment – Individual concern – Effective judicial protection)

I. Introduction

1. The admissibility of actions for annulment of a decision of the European Commission on State aid, lodged by a competitor of the beneficiary of the measure in question has been the subject of a considerable body of litigation. The present appeal is further evidence of this, if evidence is needed.

2. The appellant, Deutsche Lufthansa AG, requests the Court of Justice to set aside the judgment of the General Court of the European Union of 12 April 2019, *Deutsche Lufthansa* v *Commission* (T-492/15, EU:T:2019:252, 'the judgment under appeal'), in which the latter held that the appellant's action for annulment of Commission Decision (EU) 2016/789 of 1 October 2014 on the State aid SA.21121 (C29/08) (ex NN 54/07) implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair (OJ 2016 L 134, p. 46) ('the decision at issue') was inadmissible.

3. At the request of the Court, this Opinion will be limited to an analysis of the fourth to sixth parts of the first ground of the appeal, concerning assessment of the appellant's individual concern within the meaning of the fourth paragraph of Article 263 TFEU.

II. Background to the dispute and the contested decision

4. The background to the dispute was set out in detail in the judgment under appeal, to which reference is made in that regard.[2] The main points that are needed in order to understand this Opinion may be summarised as follows.

5. The appellant is an airline established in Germany, whose main activity is transporting passengers.

1 Original language: French.

2 Paragraphs 1 to 33 of the judgment under appeal.

6. Frankfurt Hahn airport (Germany) is located in Land Rheinland-Pfalz ('the *Land*'), approximately 115 km from Frankfurt Main airport (Germany), the appellant's main airport base. Since 1 April 1995, it has been owned by Holding Unternehmen Hahn GmbH & Co. KG, a public-private partnership in which the *Land* participated, and operated by Flughafen Hahn GmbH & Co. KG Lautzenhausen ('Flughafen Hahn'). Since 1 January 1998, the majority of the shares of Flughafen Hahn have been held by Flughafen Frankfurt/Main GmbH ('Fraport'), the company which operates and manages Frankfurt Main airport.

7. In 1999, Flughafen-Hahn concluded with Ryanair Ltd (now Ryanair DAC, 'Ryanair') an agreement for a term of five years relating to the amount of airport charges payable by Ryanair. That agreement entered into force on 1 April 1999 ('the 1999 Ryanair agreement').

8. That same year, the *Land* and Fraport concluded a profit and loss transfer agreement, under which Fraport undertook to cover the losses of Flughafen Hahn in exchange for exclusive entitlement to all the profits generated by the latter. The profit and loss transfer agreement entered into force on 1 January 2001.

9. Subsequently, Holding Unternehmen Hahn & Co. and Flughafen Hahn merged to form Flughafen Hahn GmbH, (now Flughafen Frankfurt Hahn GmbH, 'FFHG'), 26.93% of the capital of which was held by the *Land*, and 73.07% by Fraport.

10. On 11 June 2001, Fraport was floated on the stock exchange, and 29.71% of its shares were sold to private shareholders, whilst the rest of the shares remained in the ownership of the public shareholders.

11. Between December 2001 and January 2002, Fraport and the *Land* increased the capital of FFHG ('the 2001 capital increase') by EUR 27 million, which was subscribed by Fraport and the *Land*, in the amount of EUR 19.7 million and EUR 7.3 million, respectively. The capital increase was intended to finance the most urgent part of an airport infrastructure improvement programme.

12. On 14 February 2002, the 1999 Ryanair agreement was replaced by a new agreement ('the 2002 Ryanair agreement').

13. The same year, Fraport, the *Land*, FFHG, and Land Hesse (Germany) agreed that Land Hesse would become the third shareholder in FFHG, in the event that an increase in capital might become necessary.

14. A shareholders' agreement to that effect was signed during 2005 between Fraport, the *Land* and Land Hesse, under which a EUR 19.5 million increase in the capital of FFHG took place. Between 2004 and 2009, Fraport, the *Land*, and Land Hesse injected EUR 10.21 million, EUR 540 000 and EUR 8.75 million, respectively, into FFHG. In addition, the *Land* and Land Hesse each undertook to inject an additional EUR 11.25 million as a capital reserve.

15. Following that capital increase ('the 2004 capital increase'), Fraport held 65% of the shares of FFHG, whilst the *Land* and Land Hesse held 17.5% of those shares each.

16. The shareholders' agreement also provided that any further debt contracted by FFHG should be covered by Fraport, the *Land* and Land Hesse in proportion to their shareholdings in FFHG, and that a new profit and loss transfer agreement running until 2014 should be concluded ('the 2004 profit and loss transfer agreement'). That agreement was concluded on 5 April 2004 and entered into force on 2 June 2004.

17. Between 1997 and 2004, the *Land* paid Flughafen Hahn and then FFHG direct grants.

18. The *Land* also introduced a compensation scheme for FFHG in respect of security checks, for which the *Land* collects an airport security tax from all departing passengers at Frankfurt Hahn airport. The *Land* subcontracted carrying out the checks to the airport and transferred the entire revenue from the security tax to the latter.

19. On 4 November 2005, an amendment was made to the 2002 Ryanair agreement.

20. Between 2003 and 2006, the Commission received several complaints concerning alleged State aid granted by Fraport, the *Land* and Land Hesse to Ryanair and FFHG.

21. On 17 June 2008, following exchanges with the Federal Republic of Germany, the Commission initiated the formal investigation procedure provided for in Article 88(2) of the EC Treaty (now Article 108(2) TFEU), in connection with State aid concerning the financing of Frankfurt Hahn airport and its relations with Ryanair.

22. On 31 December 2008, Fraport sold its entire shareholding in FFHG to the *Land*, with the result that the *Land* now held a majority shareholding of 82.5% in FFHG, the remaining 17.5% still being held by Land Hesse, and the 2004 profit and loss transfer agreement was terminated.

23. On 13 July 2011, the Commission initiated a second formal investigation procedure concerning financing measures for FFHG taken between 2009 and 2011. There were therefore two coexisting procedures.

24. On 1 October 2014, the Commission adopted the contested decision. In that decision, the Commission considered that the State aid implemented by Germany by means of the capital increase subscribed by Fraport and the *Land* between December 2001 and January 2002, the 2004 capital increase and the direct grants paid by the *Land* to Flughafen Hahn and subsequently FFHG between 1997 and 2004 was compatible with the internal market. It also considered that the 2004 capital increase by Fraport and the 2004 profit and loss transfer agreement did not constitute aid within the meaning of Article 107(1) TFEU. Lastly, it considered that the 1999 Ryanair agreement, the 2002 Ryanair agreement and the amendment to the 2002 Ryanair agreement, concluded on 4 November 2005, did not constitute State aid within the meaning of Article 107(1) TFEU.

III. The proceedings before the General Court and the judgment under appeal

25. By application lodged at the Registry of the General Court on 26 August 2015, the appellant brought an action for annulment of the contested decision, in support of which it raised seven pleas, alleging, first, a procedural error; second and third, errors in the assessment of the facts; fourth, manifest contradictions in the decision at issue, and, fifth to seventh, infringements of Article 107 TFEU.

26. By the judgment under appeal, the General Court dismissed the action as inadmissible, in so far as it concerned the individual aid measures in favour of Frankfurt Hahn airport and Ryanair, the only ones relevant for the purposes of this Opinion.

IV. The forms of order sought by the parties and the proceedings before the Court of Justice

27. By application lodged at the Registry of the Court of Justice on 13 June 2019, the appellant claims that the Court should:

– set aside the judgment under appeal;

– declare that the action was admissible and well founded;

– uphold the form of order sought at first instance and annul the decision at issue;

– in the alternative, refer the case back to the General Court, and

– order the Commission to pay the costs.

28. The Commission and the *Land* contend that the Court should:

– dismiss the appeal and

– order the appellant to pay the costs.

29. Ryanair contends that the Court should:

– dismiss the appeal;

– in the alternative, refer the case back to the General Court, and

– order the appellant to pay the costs.

30. No hearing has taken place.

V. Analysis

31. By its first ground of appeal, the appellant claims that, in finding the action inadmissible in so far as it was directed against the part of the contested decision relating to individual aid measures in favour of FFHG and Ryanair, the General Court infringed the fourth paragraph of Article 263 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

32. More specifically, by the fourth to sixth parts of the first ground of the appeal, which are put forward in the alternative, the appellant contests the General Court's reasoning and the finding that the appellant had not proved to the requisite legal standard its individual concern within the meaning of the fourth paragraph of Article 263 TFEU.

33. First of all, I shall make some observations regarding the rules on the admissibility of actions brought by competitors against Commission State aid decisions adopted following the formal investigation procedure provided for in Article 108(2) TFEU. I shall then examine, in the light of those observations, the arguments put forward by the appellant in support of the fourth to sixth parts of the first ground of the appeal.

A. The rules on the admissibility of actions for annulment brought by competitors in State aid cases

34. Since the entry into force of the Treaty of Lisbon, the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute proceedings against a Union act not addressed to them: where the act is of direct and individual concern to them and where it is a regulatory act not entailing implementing measures if that act is of

direct concern to them.[3]

35. Although the Court recently held that a Commission decision relating to an aid scheme could be considered, in respect inter alia of a competitor of the beneficiary or beneficiaries of that scheme, to be a regulatory act not entailing implementing measures,[4] thus making it easier to bring annulment proceedings against that type of decision, that reasoning cannot be transposed to Commission decisions relating to individual measures.[5]

36. In those circumstances, broadly speaking, whilst third parties may, provided they can prove that they are directly concerned, bring proceedings against a Commission decision relating to a general aid scheme, they must also prove that they are individually concerned where the contested decision relates to an individual aid measure.

37. According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 263 TFEU only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed.[6]

38. In that regard, and in a State aid case, where an applicant challenges a Commission decision not to open the formal investigation procedure provided for in Article 108(2) TFEU, in order to safeguard the procedural rights available to him under that provision, the mere status of 'interested party' within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999,[7] is sufficient to distinguish that person individually just as in the case of the person to whom the decision is addressed.[8]

39. However, that is not so where the purpose of the action is to challenge the merits of a Commission State aid decision: the mere status of interested party – and, therefore, of competitor – is not sufficient to establish individual concern. The applicant must therefore demonstrate that he enjoys a particular status within the meaning of the case-law recalled in point 37 of this Opinion, whether the decision in question was adopted following the preliminary examination phase provided for in Article 108(3) TFEU or following the formal investigation procedure provided for in Article 108(2) TFEU.

40. The judgment in *Cofaz and Others* v *Commission*[9] explained for the first time what such a requirement meant with regard to State aid actions brought by competitors. In that judgment, the Court held that the applicant's involvement in the administrative procedure before the Commission was one element to be taken into account when examining the applicant's individual concern, ' *provided, however*, that [the applicant's] position on the market is significantly affected by the aid which is the subject of the contested decision'.[10]

3 See, in that regard, Biernat, S., 'Dostęp osób prywatnych do sądów unijnych po Traktacie z Lizbony (w świetle pierwszych orzeczeń)', *Europejski Przegląd Sądowy*, 2014, No 1, p. 12 et seq.

4 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

5 Since a decision relating to individual aid, unlike those relating to an aid scheme, cannot be considered to be an act of general application and therefore a regulatory act.

6 Judgments of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 223); of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 53); and of 9 July 2009, *3F* v *Commission* (C-319/07 P, EU:C:2009:435, paragraph 29).

7 Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

8 Judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341, paragraph 48).

9 Judgment of 28 January 1986 (169/84, EU:C:1986:42).

10 Judgment of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42, paragraph 25). My emphasis.

41. In other words, the individual concern of a competitor who brings an action to challenge the merits of a Commission State aid decision is conditional on evidence that his position on the market is significantly affected. The Court subsequently confirmed that that condition was the essential condition for the finding of individual concern, whereas the applicant's involvement in the administrative procedure does not constitute a necessary condition for demonstrating a competitor's individual concern [11] but a 'relevant factor' [12] in that regard.

42. Thus the General Court and the Court of Justice determine systematically, in their examination of the admissibility of the action, whether there is a substantial effect on the market position of a competitor who has brought an action to challenge the merits of a Commission State aid decision.

43. Although case-law is now settled on this point, it is nevertheless unclear in respect of interpreting the requirement of a *substantial* effect on the applicant's competitive position, in particular as regards the methods and standard of proof needed to establish it.

44. Whilst the Court of Justice and the General Court initially accepted a fairly flexible interpretation of that requirement, it must be said that that approach now exists alongside a new, more restrictive, approach in the case-law of the General Court, the effect of which is that most of the actions brought by competitors of a beneficiary of a measure are inadmissible, because there is no *substantial* effect on their competitive position.

1. An originally flexible interpretation of the requirement of a substantial effect on the applicant's position on the market

45. In the first place, the Court of Justice has held, since the judgment in *Cofaz and Others* v *Commission*, [13] that demonstration of a substantial effect on the applicant's position on the market did not require the Court to make a definitive finding on the competitive relationship between the applicant and the beneficiary undertakings, but merely required the applicant to adduce 'pertinent reasons to show that the Commission's decision may adversely affect [its] legitimate interests by seriously jeopardising [its] position on the market in question'. [14]

46. On that basis, jurisprudential practice following the judgment in *Cofaz and Others* v *Commission* [15] readily accepted that the requirement of a substantial effect on the applicant's position on the market could be satisfied. Thus, the Court of Justice and the General Court have frequently recognised the existence of that substantial effect, where the applicant was the direct competitor of the undertaking in receipt of the aid on a market where few operators were present, [16] given that if an effect of that kind is established, the fact that an undefined number of competitors may allege a similar effect cannot prevent the recognition of the applicant's individual concern. [17]

11 Judgment of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 57).

12 Judgment of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 56).

13 See judgment of 28 January 1986 (169/84, EU:C:1986:42, paragraph 28).

14 See, also, judgments of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 41), and of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 60).

15 Judgment of 28 January 1986 (169/84, EU:C:1986:42).

16 See, inter alia, judgments of 27 April 1995, *ASPEC and Others* v *Commission* (T-435/93, EU:T:1995:79, paragraph 65 et seq.); of 27 April 1995, *AAC and Others* v *Commission* (T-442/93, EU:T:1995:80, paragraph 50 et seq.); of 22 October 1996, *Skibsværftsforeningen and Others* v *Commission* (T-266/94, EU:T:1996:153, paragraph 46); and of 5 November 1997, *Ducros* v *Commission* (T-149/95, EU:T:1997:165, paragraph 42). That case-law was confirmed by the judgment of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 37).

17 Judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 56).

47. The substantial effect on the applicant's competitive position in that situation results not from a detailed analysis of the various competitive relationships on the market in question allowing the extent of the effect on his competitive position to be established specifically but, in principle, from a prima facie finding that the grant of the measure covered by the Commission decision leads to a substantial effect on that position.

48. The Court of Justice has therefore held that the requirement of a substantial effect on the applicant's competitive position on the market would be met where the applicant provides evidence to show that the measure in question is *liable* to have a substantial effect on his position on the market.[18]

49. In the second place, the evidence accepted by case-law in order to establish a substantial effect also shows the originally flexible interpretation of that requirement.

50. Thus, it is clear from case-law that the substantial effect need not necessarily be inferred from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the measure in question. A substantial effect on the applicant's market position may also be established by adducing evidence of, inter alia, the loss of an opportunity to make a profit caused by the measure in question or a less favourable development than would have been the case without such aid. Moreover, the seriousness of the adverse effect on the applicant's position on the market may vary according to a large number of factors such as, in particular, the structure of the market concerned or the nature of the measure in question. Demonstrating a substantial adverse effect on a competitor's market position cannot, therefore, simply be done by providing evidence of a limited number of factors indicating a decline in the applicant's commercial or financial performance.[19]

51. Despite those principles consistently reiterated in case-law, the great majority of actions brought before the General Court by competitors of beneficiaries of aid seeking to challenge the merits of a Commission decision are now ruled inadmissible because the applicants have not managed to demonstrate that their position on the market has been substantially affected.[20] More recently, a stricter interpretation of the requirement of a substantial effect on the applicant's position on the market has emerged in the case-law of the General Court in particular.

2. The development of a restrictive interpretation of the requirement of a substantial effect on the competitor's position on the market

52. According to this trend in case-law, a substantial effect on the market position of a competitor of the beneficiary of the measure in question can be established only if that competitor manages to show that his competitive situation is 'special', that is to say, he is more affected by that measure than the beneficiary's other competitors.[21] In other words, whether the applicant's competitive position is substantially affected is assessed not merely with regard to the impact that the measure being examined may have on the applicant alone on a given market but in comparison with the effect on the competitive position of the beneficiary's other competitors.

18 Judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 38).

19 Judgments of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraphs 34 and 35); of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 53); of 12 June 2014, *Sarc* v *Commission* (T-488/11, not published, EU:T:2014:497, paragraph 36); and of 5 November 2014, *Vtesse Networks* v *Commission* (T-362/10, EU:T:2014:928, paragraph 40).

20 See, inter alia, for the most significant cases, order of 27 May 2004, *Deutsche Post and DHL* v *Commission* (T-358/02, EU:T:2004:159); judgments of 10 February 2009, *Deutsche Post and DHL International* v *Commission* (T-388/03, EU:T:2009:30); of 22 June 2016, *Whirlpool Europe* v *Commission* (T-118/13, EU:T:2016:365); and of 11 July 2019, *Air France* v *Commission* (T-894/16, EU:T:2019:508). That case-law led certain authors to describe proof of a substantial effect on the applicant's competitive position as a '*probatio diabolica*' and to question its compatibility with Article 47 of the Charter. See de Moncuit, A., and Signes de Mesa, J.I., *Droit procédural des aides d'État*, 1st Ed., 2019, Bruylant, Brussels, p. 162, and Thomas, S., 'Le rôle des concurrents dans les procédures judiciaires concernant des régimes d'aides d'État ou des aides individuelles. Montessori: le début d'une révolution?', *Revue des affaires européennes*, 2019, No 2, p. 264.

21 Judgment of 10 February 2009, *Deutsche Post and DHL International* v *Commission* (T-388/03, EU:T:2009:30, paragraph 38).

53. In those circumstances, the fact that the competitive position of another competitor may, potentially, be as affected by the measure in question as the applicant's position is sufficient to exclude the applicant being individually concerned by the Commission decision concerning that measure.

54. It follows from this that the General Court now requires a particularly high standard of proof for evidence that may be adduced to establish the existence of a substantial effect on a competitive position on the market. Thus, the General Court has held that the requirement of a substantial effect on the applicant was not met where there was no way of establishing that the applicant would have been *more capable* than an average competitor of capturing the demand resulting from the disappearance from the market of the undertaking in receipt of the measure, so the applicant had not shown that it suffered a sufficiently considerable loss of earnings *in comparison with the other competitors*.[22]

55. Similarly, the General Court has held that even if the measure in question can lead to restriction of the applicant's activity on the market that does not mean that the effect on the applicant's position on the market can be described as 'substantial' where it is not established that his situation *differs from that of other competitors*.[23]

56. Moreover, it seems, naturally, less straightforward for an applicant to show a more significant effect on his own competitive position than on the position of other competitors, since, where that criterion is applied, he has little evidence to show the precise position of his competitors on the market concerned.

57. Such a line of case-law appears to me, therefore, to be excessively restrictive and out of step with the case-law of the Court of Justice.[24] This is particularly so, in my view, since the fact of requiring an applicant to show, by comparing his or her situation with that of other competitors on the market, that his position is the most affected by a measure would appear to alter the criterion. According to that reasoning, when taken to the extreme, the requirement of a substantial effect on their position on the market cannot be met where two operators are adversely affected by an aid measure, even where the measure in question may have substantially affected each operator individually.

58. In my view, the absence of any substantial effect on the market positions of other competitors cannot be the criterion for establishing that the applicant is substantially affected.[25] It is not a matter of comparing the situation of all the competitors operating on the market in question. A substantial effect on his or her competitive position is a factor that is particular to the applicant, which must be assessed solely in relation to his or her market position prior to, or in the absence of, the grant of the measure that is the subject of the contested decision.

3. Proof that a competitor's market position is substantially affected

59. On a practical level, I am of the view that, in order to meet this requirement, it is necessary first of all for the applicant to demonstrate that his market position has been substantially affected by a number of factors, varying according to the case in point, whether it be a decline in his performance or the loss of an opportunity to make a profit.[26]

22 Judgment of 22 June 2016, *Whirlpool Europe* v *Commission* (T-118/13, EU:T:2016:365, paragraph 52).

23 Judgment of 11 July 2019, *Air France* v *Commission* (T-894/16, EU:T:2019:508, paragraphs 61 and 68).

24 See point 46 of this Opinion and judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 56). On that point, see also, Creve, B.A., '*Locus Standi* Requirements for Annulment Actions by Competitors: The Resurfacing "Unique Position Test" Ought to Be Discarded', *European State Aid Law Quarterly*, 2014, vol. 13, No 2, p. 233.

25 Such absence of effect on other competitors can only be an indication of the fact that the applicant is in fact substantially affected by the measure in question.

26 See point 50 of this Opinion.

60. Demonstration of a substantial adverse effect assumes also that the applicant has specified the market on which, first, he is in competition with the beneficiary of the measure and, second, he considers his competitive position has been affected. In that regard, factors relating to the structure of the market are definitely relevant for establishing the extent of the adverse effect on the applicant's situation, since that extent may vary, in particular, according to the size of that market. [27]

61. I should like to emphasise that the lack of details regarding the structure of the market, the number of competitors on it and their respective market shares does not, however, automatically mean that the applicant has not demonstrated that the measure in question substantially affected his position on that market. Such an effect may also result from circumstances other than mere trends in the market shares of the various competitors. [28]

62. The applicant must, lastly, establish that the measure covered by the contested Commission decision is one of the causes of the adverse effect on his competitive position. In that regard, I should like to point out that the causal link which it is necessary to establish in order to demonstrate that the measure in question substantially affects the applicant's market position does not require the adverse effect on his competitive position to be exclusively the result of the measure. [29]

63. I am of the view that, as regards simply establishing the admissibility of the action and not, for example, determining whether the applicant can obtain compensation for any damage suffered following the payment of the aid in question, the requirement of a causal link between the aid measure and the adverse effect on the applicant's competitive position must be assessed in a flexible way. In other words, in my view, it is sufficient for that measure to be *one* cause of the adverse effect on the applicant's competitive position. The fact that other factors may have contributed to affecting substantially the applicant's competitive position on the relevant market cannot, on its own, exclude the individual concern requirement from being met.

64. It is in the light of those considerations that I shall examine the fourth to sixth parts of the first ground of the appeal.

B. Fourth part of the first ground

65. By the fourth part of the first ground, the appellant claims that the General Court erred in law in finding that since it had not specified how much it had contributed to the financing of Frankfurt Hahn airport and the subsidisation of Ryanair, in its capacity as a shareholder and a client of Fraport, the extent of the adverse effect which its competitive position may have suffered as a result could not be established.

66. According to the appellant, the mere fact of having co-financed some of the measures referred to by the Commission is sufficient to distinguish it individually in a similar way to the recipient of the aid, so the General Court should not have required it to show in addition that its market position had been substantially affected by its participation in the measures.

27 Judgment of 5 November 2014, *Vtesse Networks* v *Commission* (T-362/10, EU:T:2014:928, paragraph 41).

28 See, inter alia, judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* (T-146/03, not published, EU:T:2006:386, paragraph 50), in which the General Court held that a substantial effect on the market position of an applicant could be established by the transfer of some of its customers to the recipient of the aid, without that transfer being translated specifically into market shares.

29 As was noted in the judgment of 11 July 2019, *Air France* v *Commission* (T-894/16, EU:T:2019:508, paragraph 65).

67. Thus, the appellant relies not on its status as a competitor of the undertaking in receipt of the aid but on its status as an entity that has participated in the financing of certain measures referred to in the Commission decision. In those circumstances, the appellant is right to claim that the General Court should not examine that argument merely from the point of view of the substantial effect on its competitive position on the market.

68. Although that criterion is relevant as regards determining the individual concern of competitors of the beneficiary of a measure, there can be no requirement that that criterion should be met by entities which have participated in the financing of that measure in order to fulfil the requirement of individual concern within the meaning of the fourth paragraph of Article 263 TFEU.[30]

69. However, I note that, in order to reject the appellant's line of argument, the General Court relied mainly on the fact that the appellant had not given details of the extent to which it had contributed to that financing in its capacity as a shareholder of Fraport.

70. Those details were essential in order to establish the individual concern of the appellant.

71. In fact, the appellant participated in the financing of the measures only in a very indirect way, through the airport charges it pays to Fraport in connection with its activity. It also cites its status as a minority shareholder of Fraport, which is itself a shareholder of the company operating Frankfurt Hahn airport and which itself allowed the measures referred to by the Commission to be implemented.

72. In those circumstances, unless it is considered that a potentially infinite number of entities – all the companies operating at Frankfurt Main airport and paying charges to Fraport, and all Fraport's shareholders, and indeed the shareholders of those shareholders – could claim to have participated in the financing of the measure referred to in the Commission decision and thus automatically be individually concerned by that decision, it was necessary for the appellant to demonstrate the extent of its participation in order to establish that it was actually individually concerned by the measures in question.

73. Therefore, the General Court cannot be criticised for carrying out that examination and concluding from it that there was no individual concern, and so the fourth part of the first ground of the appeal must be rejected.

C. Fifth part of the first ground

74. By the fifth part of the first ground, the appellant claims that the General Court erred in law by not relaxing the burden of proof on it in respect of the substantial effect on its market position. It puts forward three arguments in support of that contention.

75. First, it claims that the requirement of a substantial effect on its market position applies only if the measures referred to in the Commission decision are actually classified as aid within the meaning of Article 107 TFEU.

30 See, by analogy, with regard to the case-law recognising the individual concern of public entities that have participated in the financing of aid, judgments of 30 April 1998, *Vlaamse Gewest* v *Commission* (T-214/95, EU:T:1998:77, paragraph 28); of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraph 50); of 23 October 2002, *Diputación Foral de Guipúzcoa and Others* v *Commission* (T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraph 41); and of 23 October 2002, *Diputación Foral de Álava and Others* v *Commission* (T-346/99 to T-348/99, EU:T:2002:259, paragraph 37).

76. As the Commission contends, such an argument lacks any foundation and must be rejected. First, there is no justification for making the rules of admissibility dependent on whether the Commission decision is positive or negative. Second, as the appellant itself explains, the case-law of the Court of Justice states that the requirement of a substantial effect on the applicant's competitive position applies, whether or not the measure referred to in the contested decision is classified as aid. [31]

77. Secondly, the appellant contends that the Commission conducted an incomplete examination of the measures in question, failed to put precise figures on them and misinterpreted national law. This resulted in asymmetry of information to the appellant's detriment, which justifies relaxing the burden of proof.

78. Once again, this argument cannot succeed. It is not clear how an incomplete examination and misinterpretation of national law led to asymmetry of information to the appellant's detriment.

79. In any event, it should be pointed out, in view of the principles stated in points 57 to 62 of this Opinion and as the Commission contends, that all the information needed to demonstrate a substantial effect on the appellant's competitive position on the market is to be found purely within the appellant's own sphere. The appellant is thus best placed to assess that effect. Since the appellant is only required to demonstrate the way in which its own market situation evolved after the payment of the aid, and to establish a link, even one that is merely probable and not exclusive, between the adverse effect on its competitive position and payment of the aid, no asymmetry of information would justify relaxing the burden of proof.

80. Thirdly, the appellant states that, since it would have benefited from relaxation of the burden of proof, it actually adduced evidence that it was substantially affected, by listing the advantages Ryanair received and which 'necessarily' resulted in a substantial effect.

81. However, since there is no reason why the appellant should enjoy relaxation of the burden of proof, that argument cannot succeed. The appellant cannot merely argue that a substantial effect on its competitive position results 'necessarily' from the measures in question, without providing support for its argument.

82. Accordingly, the fifth part of the first ground of the appeal must be rejected.

D. Sixth part of the first ground

83. By the sixth part of the first ground, the appellant claims that the General Court erred in law in its assessment of the substantial effect on its competitive position, in particular in considering that it fell to it to define the relevant market on which its position is affected and to demonstrate a causal link between the measure in question and the effect on the appellant. In support of that part of the first ground, the appellant puts forward various arguments.

84. I would like to say, in the first place, that several of its arguments must be rejected as ineffective.

31 See, with regard to the application of the requirement of a substantial effect on the applicant's competitive position in the presence of a measure classified as aid, judgments of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609), and, on the same in the presence of a measure not constituting aid, of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700).

85. First, the appellant criticises the General Court for stating that the appellant should have defined the relevant market in terms of its physical and geographical scope and in the light of the principles of merger control law, and for thus refusing to take into account the market which the appellant regarded as being relevant, namely the Union's aviation market. The General Court also, allegedly, wrongly refused to take into account certain information regarding Ryanair's growth on the European aviation market, mentioning inter alia the evolution of market shares on that market.

86. Secondly, the appellant criticises the General Court for finding that it had not demonstrated the existence of overlaps between the air routes which it operates and those operated by Ryanair.

87. The General Court held, in paragraphs 150, 154 and 156 of the judgment under appeal, that the appellant had not adduced evidence regarding the markets on which its competitive position had been affected or any information as to their structure and the competitors present on those markets. It also appears clear from those paragraphs that the details concerning the structure of the market are, so far as the General Court is concerned, the evidence required in order to demonstrate that the appellant's competitive position has been substantially affected. As I stated in point 60 of this Opinion, that requirement goes beyond what is asked of competitors in order to establish that their competitive position has been substantially affected. The mere absence of details concerning the structure of the market does not automatically mean that no evidence has been provided of a substantial effect.

88. Moreover, the General Court held, in paragraph 153 of the judgment under appeal, that the appellant had adduced no evidence whatsoever to establish the existence of the overlaps in question.

89. However, the General Court did not rely on that evidence alone when it held that the appellant had not demonstrated that there had been a substantial effect on its competitive position.

90. The General Court also examined the appellant's arguments designed to show a substantial effect on its competitive position on various markets corresponding to the air routes operated both by the appellant and by Ryanair, and on the wider passenger air transport market. The General Court therefore supplemented its reasoning by accepting the existence, first, of the markets on which the appellant claimed that its position had been substantially affected and, second, of the overlaps between the air routes which the appellant claimed, and found at the end of that examination that a substantial effect on the appellant's competitive position had not been demonstrated.

91. In those circumstances, it cannot be claimed that the General Court erred in law in considering that the appellant had brought no evidence with regard to the structure of the markets concerned and the competitors present on those markets, or established the existence of the overlaps the appellant claimed.

92. In the second place, the appellant claims that the General Court erred in law in its examination of the substantial effect on its competitive position on the market, in particular when examining the causal link between the measures in question and the evidence it had adduced to establish that its market position was affected.

93. It thus contends that the General Court erred in law in considering that it was necessary for the appellant to demonstrate that its Score restructuring programme was launched solely as a result of the aid measures that Ryanair had received. In fact, its restructuring is a 'countermeasure' which in itself illustrates that the appellant's market position had been affected, so it was not necessary to provide evidence of a causal link.

94. It is true, as the appellant contends, that case-law accepts that a competitor of the recipient of aid should adopt certain measures, such as a restructuring programme, to limit the effects on its competitive position of the implementation of aid in favour of its recipient. [32]

95. That case-law must however only be interpreted, in the absence of a decline in the financial and economic situation of a competitor, as permitting recognition of a substantial effect on its competitive position on the market where that absence of a decline may be explained by restructuring that has taken place.

96. Moreover, although the adoption of remedial measures by a competitor may be an indicator that its market situation has been affected, it is still necessary, first, for that to have been the case and, second, for it to result, inter alia, from the implementation of aid measures for one of its competitors.

97. The General Court did not, therefore, err in law when it held that it was necessary for the appellant to demonstrate the existence of a link between the adoption of the alleged restructuring programme and the measures in question.

98. However, the General Court stated in paragraphs 166, 167 and 168 of the judgment under appeal, that the appellant had not supplied any documentation relating to the Score restructuring programme, not even a summary of its content, and that it was not therefore possible for that Court to establish in the present case the existence of a link between the measures in question and that restructuring programme.

99. On those grounds, the General Court was right to find that the appellant had not demonstrated that the restructuring programme had been made necessary because of the aid paid to Ryanair and Frankfurt Hahn airport.

100. In the third place, the appellant complains that the General Court held that it had not demonstrated the causal link between the measures in question and the relocation of Ryanair's activities to Frankfurt Main airport. The General Court therefore erred in law, since that relocation revealed that its competitive position had been affected.

101. In that regard, the appellant recalls that it argued during the proceedings before the General Court that Ryanair's conduct was part of a more global strategy to become established in regional airports in order to obtain grants there and to relocate its activities subsequently to other airports. It states that, in the context of the appeal, it has adduced other evidence confirming that strategy and establishing a causal link between the measures in question and the relocation of Ryanair's activities.

102. In so doing, the appellant merely repeats, however, the arguments it had already put forward before the General Court, with a view to obtaining a fresh assessment of the facts, which the Court does not have jurisdiction to undertake. [33]

103. Moreover, even if a causal link could be established between the relocation of Ryanair's activities and the aid measures in question which it received, it would still be necessary for the appellant to demonstrate beforehand that such relocation had substantially affected its competitive position. However, the appellant merely states that the relocation of Ryanair's activities 'naturally' affected its competitive position, without adducing further evidence in support of its contention, as the General Court rightly pointed out in paragraph 154 of the judgment under appeal.

32 Judgment of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraphs 35 and 36).

33 Judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 51), and order of 29 January 2020, *Silgan Closures and Silgan Holdings* v *Commission* (C-418/19 P, not published, EU:C:2020:43, paragraph 71).

104. In the fourth place, the appellant claims that the General Court erred in law in finding that the geographical proximity of Frankfurt Hahn airport to Frankfurt Main airport was merely indicative of a competitive relationship between those airports. That geographical proximity also provides evidence of competition between the different routes operated from the two airports. That competition being combined with the extent of the aid, the necessary result is a substantial effect on its competitive position.

105. In paragraphs 159 and 161 of the judgment under appeal, the General Court found that, assuming that geographical proximity may be regarded as indicating that there is a competitive relationship between Ryanair and the appellant, the mere status as a competitor of the recipient undertaking, combined with the alleged extent of the aid in question, was not sufficient to establish that there was a substantial effect on its competitive position.

106. The appellant again therefore is merely repeating the arguments already put forward before the General Court, with a view to obtaining a fresh assessment of the facts, and is in reality seeking a re-examination of those arguments, which the Court does not have jurisdiction to undertake. That argument should therefore be rejected as inadmissible.

107. In the fifth place, the appellant also contends that the General Court's finding relating to the existence of a causal link between the measures in question and their effects as alleged by the appellant is incorrect. It states that that condition was met, since the substantial effect on its competitive position, which it argues it has demonstrated, followed on sufficiently directly from the measures in question.

108. However, the appellant once again merely lists briefly the effects of the measures on Ryanair's position and claims that they resulted in a substantial effect on its market position. Thus, it merely restates the arguments already put forward before the General Court in order to prompt the Court of Justice to re-examine them, which, again, the Court does not have jurisdiction to undertake.

109. In the sixth and last place, the appellant claims that the General Court infringed Article 47 of the Charter since, as it seeks to demonstrate over the course of its arguments, the requirements set out in its judgment exceed the limits laid down in the case-law of the Court of Justice.

110. However, I note that the appellant does not provide any support for its arguments in that regard and does not explain what those alleged requirements are.

111. In any event, since, in the light of the foregoing, the General Court did not err in law in its assessment of the substantial effect on the appellant's position on the various markets, the appellant's argument alleging infringement of Article 47 of the Charter as a result of requirements exceeding the limits laid down in the case-law cannot succeed either.

112. Accordingly, the sixth part of the first ground of the appeal should be rejected in its entirety.

VI. Conclusion

113. In the light of all the foregoing, I am of the opinion that the fourth to sixth parts of the first ground of the appeal should be rejected, without prejudice to the merits of the other grounds of the appeal.