Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 26 January 2023 [1]

Case C-320/21 P

Ryanair DAC
v

European Commission

(Appeal – State aid – Article 107(2)(b) TFEU – Sweden – COVID-19 – State guarantee on a revolving credit facility – Decision by the European Commission not to raise objections)

I. Introduction

1. On 13 March 2020, two days after the World Health Organization (WHO) classified the COVID-19 outbreak as a pandemic, the European Commission adopted a communication [2] proposing an immediate reaction, in the form of 'a European coordinated response', to the major economic shock to the European Union caused by the public health emergency. In that communication, the Commission stated that it would use all the instruments at its disposal to mitigate the consequences of the pandemic, in particular, to allow Member States to act decisively in a coordinated way, through using the full flexibility of the State Aid Framework. It also emphasised that the main fiscal response to the coronavirus had to come from Member States' national budgets and that the rules on State aid enabled the Member States to take swift and effective action to support companies. On 19 March 2020, the Commission adopted a communication setting out a 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [3] In those instruments, the Commission recommended, inter alia, that, for critical situations, the Member States have recourse to specific derogations from the prohibition on State aid laid down in the Treaty, such as Article 107(2)(b) TFEU [4] and Article 107(3)(b) TFEU. [5] In that context, several Member States adopted measures, in the form of individual aid or aid schemes, to support airlines operating in their territory. Those measures, based on Article 107(2)(b) TFEU or Article 107(3)(b) TFEU, depending on the case, were swiftly declared compatible with the internal market by the Commission, without the

1 Original language: Italian.

2 Communication COM/2020/112 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup: Coordinated economic response to the COVID-19 Outbreak.

3 OJ 2020 C 91 I, p. 1.

4 Under Article 107(2)(b) TFEU, 'the following shall be compatible with the internal market: … aid to make good the damage caused by natural disasters or exceptional occurrences'.

5 Under Article 107(3)(b) TFEU, 'the following may be considered to be compatible with the internal market: … aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'.

formal investigation procedure provided for in Article 108(2) TFEU being initiated. The Ryanair group contested the majority of those decisions before the General Court. The latter has, to date, dismissed all of those actions except for three, which it upheld, on the ground that the decisions contested in those cases were vitiated by an inadequate statement of reasons, while maintaining the effects of the annulled decisions.[6] Eight appeals brought by the Ryanair group are currently pending before the Court of Justice.

2. By the appeal which I address in this Opinion, Ryanair DAC ('Ryanair' or 'the appellant') asks the Court to set aside the judgment of 14 April 2021, *Ryanair* v *Commission (SAS, Sweden; COVID-19)*[7] ('the judgment under appeal'), by which the General Court dismissed the application lodged by Ryanair pursuant to Article 263 TFEU and seeking the annulment of Commission Decision C(2020) 2784 final of 24 April 2020[8] ('the contested decision') concerning the aid granted by the Kingdom of Sweden to the airline SAS AB ('SAS').

II. The facts, the procedure before the General Court, the judgment under appeal, the procedure before the Court of Justice and the forms of order sought

3. The facts on which the action before the General Court was based are described in paragraphs 1 to 3 of the judgment under appeal, as follows.

4. On 11 April 2020, the Commission authorised, under Article 107(3)(b) TFEU, an aid measure in the form of a scheme providing loan guarantees to certain airlines ('the Swedish aid scheme'), notified by the Kingdom of Sweden on 3 April 2020.[9] On 21 April 2020, in accordance with Article 108(3) TFEU, the Kingdom of Sweden notified the Commission of an aid measure ('the measure at issue') in the form of a guarantee on a revolving credit facility of up to 1.5 billion kronor (SEK) (approximately EUR 137 million) for SAS, on the ground that SAS was having difficulties in securing loans from credit institutions in the framework of the Swedish aid scheme. That measure, intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights following the imposition of travel restrictions amid the COVID-19 pandemic, was declared compatible with the internal market on the basis of Article 107(2)(b) TFEU.

5. By application lodged at the Registry of the General Court on 19 June 2020, Ryanair brought an action challenging the contested decision. The French Republic, the Kingdom of Sweden and SAS were granted leave to intervene in support of the form of order sought by the Commission. Ryanair put forward five pleas in law in support of its action, alleging, first, that the Commission had breached the requirement that aid granted under Article 107(2)(b) TFEU was not to make good the damage suffered by a single victim; secondly, that the measure at issue was not based on Article 107(2)(b) TFEU and that the Commission had erred in finding that the measure at issue was proportionate in relation to the damage caused to SAS by the COVID-19 pandemic; thirdly, that the Commission had infringed various provisions on the liberalisation of air transport in the European Union; fourthly, that the Commission had infringed Ryanair's procedural rights by refusing to open the formal investigation procedure despite serious difficulties; and fifthly, that

6 The three judgments concerned are as follows: judgments of 19 May 2021, *Ryanair* v *Commission (KLM; COVID-19)* (T-643/20, EU:T:2021:286), and *Ryanair* v *Commission (TAP; COVID-19)* (T-465/20, EU:T:2021:284), and of 9 June 2021, *Ryanair* v *Commission (Condor; COVID-19)* (T-665/20, EU:T:2021:344).

7 T-379/20, EU:T:2021:195.

8 Decision on State Aid SA.57061 (2020/N) – Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines.

9 Decision C(2020) 2366 final on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines.

the Commission had infringed the second paragraph of Article 296 TFEU. By the judgment under appeal, the General Court rejected all of the pleas raised by Ryanair and dismissed the action in its entirety, ordered Ryanair to bear its own costs and to pay those of the Commission, and ordered the French Republic, the Kingdom of Sweden and SAS to bear their own costs.

6. By document lodged at the Registry of the Court of Justice on 21 May 2021, Ryanair brought the appeal which is the subject of this Opinion. On 14 September 2022, a joint hearing was held in respect of the present case and Case C-321/21 P, *Ryanair* v *Commission*,[10] which concerns a measure similar to the measure at issue granted to SAS by Denmark. In the course of that hearing, Ryanair, the Commission, SAS, Sweden and France made oral submissions.

7. Ryanair asks the Court, principally, to set aside the judgment under appeal, annul the contested decision and order the Commission to pay the costs, and, in the alternative, to set aside the judgment under appeal, refer the case back to the General Court for reconsideration and reserve the costs of the proceedings at first instance and on appeal. The Commission asks the Court to dismiss the appeal and order the appellant to pay the costs. SAS asks the Court to dismiss the appeal and order Ryanair to pay the costs. Sweden and France ask the Court to dismiss the appeal.

III. The appeal

8. Ryanair raises six grounds in support of its appeal. The first alleges that the General Court erred in law in rejecting Ryanair's claim that aid granted on the basis of Article 107(2)(b) TFEU is not to make good damage suffered by a single victim. The second alleges an error of law and manifest distortion of the facts in the application of Article 107(2)(b) TFEU and of the principle of proportionality in relation to the damage caused to SAS by the COVID-19 pandemic. The third alleges that the General Court erred in law in rejecting Ryanair's claim regarding infringement of the principle of non-discrimination. The fourth alleges that the General Court erred in law and manifestly distorted the facts in rejecting Ryanair's claim regarding infringement of the freedom of establishment and of the freedom to provide services. The fifth alleges an error of law and manifest distortion of the facts in connection with the failure to initiate the formal investigation procedure. The sixth ground of appeal alleges an error of law and manifest distortion of the facts in connection with a failure to state reasons.

A. The first ground of appeal

9. By its first ground of appeal, which is directed against paragraphs 22 to 27 of the judgment under appeal, the appellant argues that the General Court interpreted Article 107(2)(b) TFEU incorrectly in taking the view that that provision authorises the Member States to adopt individual aid measures.

10. In the judgment under appeal, the General Court rejected that same argument, raised by Ryanair at first instance, for two reasons. First, the General Court emphasised, in paragraphs 22 and 23 of the judgment under appeal, that there is no requirement for Member States to grant any aid to make good the damage caused by an exceptional occurrence within the meaning of Article 107(2)(b) TFEU. Secondly, it stated in paragraph 24 of the judgment under appeal that an aid measure may be directed at making good the damage caused by an exceptional occurrence, in

[10] I would observe that, although this Opinion concerns only Case C-320/21 P, Ryanair's grounds of appeal in Case C-321/21 P are substantially the same.

accordance with Article 107(2)(b) TFEU, irrespective of the fact that it does not make good the entirety of that damage. It thus concluded, in paragraph 25 of that judgment, that, since the Member States are not obliged to make good the entirety of the damage caused by an exceptional occurrence, they are likewise not required to grant aid to all of the victims of that damage.

11. The appellant maintains that neither of the two reasons on which the judgment under appeal is based answers the allegation it made in its first plea in law. The issue underlying that allegation is not whether Sweden should have granted more aid or whether it was required to make good the entirety of the damage caused by the pandemic, but rather whether a Member State may adopt a measure, under Article 107(2)(b) TFEU, to support a single undertaking, arbitrarily chosen, to the exclusion of all other undertakings operating in the same market. Ryanair asserts that a reading of Article 107(2)(b) TFEU to the effect that it authorises only aid schemes, and not individual aid measures, can be arrived at from the wording and logic of that provision. Indeed, if the Member State concerned were to assist only one single undertaking, the compensatory logic of that provision would be skewed and the pursuit of general policy objectives unconnected with that logic – which require a different legal basis to justify the aid – would be permitted. If that were the situation, the direct link between the natural disaster or exceptional occurrence, the damage suffered and the aid granted, which is a requirement for the application of Article 107(2)(b) TFEU, would be weakened. Ryanair argues that the reading of Article 107(2)(b) TFEU which it proposes was adopted by the Commission in its decision-making practice prior to the COVID-19 pandemic and is adopted in its checklist for Member States concerning aid to make good the damage caused by natural disasters [11] and in the template for notification under Article 107(2)(b) TFEU, [12] both of which refer solely to aid schemes.

12. I would point out that Article 107(2)(b) TFEU clearly provides that 'aid to make good the damage caused by natural disasters or exceptional occurrences' is compatible with the internal market. It is settled case-law that, this being an exception to the general principle enshrined in Article 107(1) TFEU that State aid is incompatible with the internal market, Article 107(2)(b) TFEU must be interpreted narrowly. [13] Therefore, under that provision, the only economic disadvantages which may be compensated for are those directly caused by natural disasters or exceptional occurrences. [14]

13. May a Member State adopt an individual aid measure under Article 107(2)(b) TFEU [15] when the entire economic sector in which the beneficiary undertaking operates, in competition with other undertakings, has been affected by the occurrence which justified the State's intervention and, if so, under what conditions may it do so?

14. That is, in essence, the question of law at the centre of the complaint which Ryanair raised before the General Court and which the latter answered in the affirmative, adopting reasoning which, simplified, may be summarised as follows. Given that the Member States are free to decide, on the one hand, whether to grant compensatory measures within the meaning of the

[11] Available at: https://ec.europa.eu/competition/state_aid/studies_reports/disaster_aid_checklist_en.pdf.

[12] Available at: https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf.

[13] See, inter alia, with reference to Article 92(2)(b) of the Treaty, judgment of 23 February 2006, *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraph 79 and the case-law cited).

[14] Judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 175 and the case-law cited).

[15] I note that, in the present case, although the measure at issue was not adopted within the framework of an aid scheme, it is nevertheless apparent from both the contested decision (recital 6) and the judgment under appeal (paragraph 88) that it falls within a national regulatory framework which, subject to certain conditions, makes similar measures available to all airlines qualifying for the Swedish aid scheme. There is, therefore, at least an indirect link between that scheme and the measure at issue.

provision in question and, on the other hand, the limits within which to compensate undertakings that have suffered damage, they may also decide whether to take action by instituting an aid scheme or by assisting a single undertaking. The only constraint on the freedom afforded to the Member States in that regard would be, as far as may be inferred from paragraphs 22 to 27 of the judgment under appeal, observance of the conditions relating to the existence of an event that qualifies as a natural disaster or an exceptional occurrence for the purposes of Article 107(2)(b) TFEU, to the existence of a causal link between that event and the damage compensated, and to the absence of overcompensation. The necessary corollary of that reasoning is that the Member States have full discretion in their choice of beneficiary undertaking, should they decide to grant individual aid.

15. I would immediately say that, in my view, Ryanair is right in maintaining that neither of the two reasons for which its first plea in law was rejected, considered separately or together, defeats the argument put forward by it at first instance. The reasoning set out in paragraphs 22 to 24 of the judgment under appeal suffers, it seems to me, from a leap of logic. It does not logically follow (or necessarily follow, in any event) from the fact that there is no obligation upon the Member States to adopt support measures within the meaning of Article 107(2)(b) TFEU or, in the event that such measures are adopted, to ensure that they make good the entirety of the damage, that that provision may serve as the legal basis for the adoption of aid measures confined to a single undertaking when all the undertakings operating in the market in question have suffered damage.

16. This does not mean, however, that I consider that the General Court erred in concluding that Article 107(2)(b) TFEU authorises such aid. Indeed, there is nothing in the wording or logic of that provision to exclude such aid from the scope of that provision. While the adoption of intervention schemes to support all of the operators in the sector affected certainly appears to be more in line with the objective which the provision pursues, which is to enable the Member States to remedy failures in the market caused by the occurrence of certain harmful events, that finding alone does not mean that the Member State concerned may not also take action by adopting measures intended to compensate only one of those operators.

17. Nevertheless, in order for the distortion of competition caused by such measures to be acceptable and for the measures to be considered compatible with the internal market by virtue of the derogation under Article 107(2)(b) TFEU, it is not sufficient, in my view, that they fulfil the three conditions to which the application of that provision is subject, which concern the specific nature of the event, the causal nexus between that event and the damage, and the absence of overcompensation. It is also necessary that the selection of the beneficiary should be in line with the purpose of that derogation, as indicated in point 16 of this Opinion, and neither arbitrary nor dictated solely by a desire to favour one undertaking over its competitors, in particular where the undertaking in question was already in difficulty before the event in question occurred, or is inefficient. The scope of Article 107(2)(b) TFEU must, in fact, remain confined to cases which fit with the logic underlying that provision, not only because this follows from the need to interpret narrowly the exceptions to the principle of prohibiting aid laid down in the first paragraph of Article 107 TFEU, but also because the derogation which it contains operates *de jure* and so excludes the exercise of any discretion on the part of the Commission.[16] That said, contrary to what Ryanair appears to believe, the compensatory logic of Article 107(2)(b) TFEU does not preclude the choice of the beneficiary of a measure adopted in circumstances such as I have

[16] See judgment of 17 September 1980, *Philip Morris Holland* v *Commission* (730/79, EU:C:1980:209, paragraph 17). It is worth clarifying in this regard that a finding by the Commission that the choice of the beneficiary of an individual aid measure adopted pursuant to Article 107(2) TFEU was not arbitrary is not arrived at by the exercise of any discretion by that institution, but is merely a matter of legal characterisation.

described from being dictated by specific objectives pertaining to the economic activity carried on by the operator or to its specific characteristics, such as supporting an undertaking which, in normal times, provides a service of general public interest or an undertaking which is vital to employment and therefore to social stability, those objectives being in line with the function of the measure placed at the Member States' disposal to make good the consequences of the events contemplated by that provision and, in an emergency such as that created by the COVID-19 pandemic, taking on even greater importance.

18. For the reasons which I have set out, the General Court's reasoning in paragraphs 22 to 27 of the judgment under appeal, which focuses solely on the Member States' freedom of action, is not, in my view, convincing. Nonetheless, since the conclusion set out in paragraph 27 of that judgment is correct, and since the reasons justifying the choice of SAS as beneficiary of the measure at issue emerge from the General Court's examination of the proportionality of that measure, I suggest that the Court reject the first ground of appeal and supplement the grounds of the judgment under appeal to provide further support for that conclusion, in the sense I have described.

B. The second ground of appeal

19. In its second ground of appeal, Ryanair makes eight separate submissions, each taking issue with the General Court's rejection of its second plea in law. More specifically, the first of these submissions is directed against paragraphs 31 to 36 of the judgment under appeal, in which the General Court examined and rejected the first part of that plea, in which it was argued that the measure at issue was not based on Article 107(2)(b) TFEU. The remaining seven submissions are directed against paragraphs 39 to 66 of the judgment under appeal, in which the General Court examined and rejected the second part of the second plea in law, in which it was argued that the measure at issue was not proportionate in relation to the damage suffered by SAS.

1. The first submission

20. By the first submission in its second ground of appeal, Ryanair takes issue with the General Court for holding that Article 107(2)(b) TFEU was a valid legal basis for authorising the measure at issue, which was subsidiary to the Swedish aid scheme previously authorised on the basis of Article 107(3)(b) TFEU.[17] It considers that the finding, in paragraph 34 of the judgment under appeal, that the FEU Treaty does not preclude the concurrent application of Article 107(2)(b) TFEU and Article 107(3)(b) TFEU, provided that the conditions of each of those two provisions are met, in particular where the facts and circumstances giving rise to a serious disturbance in the economy within the meaning of the latter provision are the result of an exceptional occurrence, conflicts with both the requirement for narrow interpretation of the derogation under Article 107(2)(b) TFEU and with the condition to which the application of that derogation is subject, which concerns the existence of a direct link between the damage and the aid. The effect of the General Court's interpretation would be to merge the two provisions into a single 'crisis regime' under which recourse might be had to one or other legal basis interchangeably and observance of the conditions to which the application of each provision is subject would necessarily be relaxed.

[17] In line with the Swedish aid scheme, the measure at issue provided a bank guarantee in SAS's favour of up to SEK 1.5 million.

21. As a preliminary remark, I would observe that the present case does not involve any cumulative application, in favour of the same beneficiaries, of measures taken on the basis of Article 107(2)(b) TFEU and of Article 107(3)(b) TFEU. Indeed, it is clear from recitals 4 to 6 of the contested decision, first, that the Swedish authorities decided to have recourse to individual aid measures within the meaning of the first of those provisions after the continually worsening financial situation of the airlines revealed the difficulty some airlines were having in obtaining credit on the conditions contemplated in the decision authorising the Swedish aid scheme and, secondly, that only airlines that might benefit from that scheme and were experiencing such difficulties would have access to such measures. The General Court's reference, in paragraph 34 of the judgment under appeal, to the concurrent application of Article 107(2)(b) TFEU and Article 107(3)(b) TFEU was merely a reference to the possibility that, in order to remedy the repercussions in the market caused by one and the same exceptional occurrence, a Member State might simultaneously use both types of measures provided for by those provisions.

22. Having clarified this, I see no obstacle to recognising the possibility of such concurrent application, including in the particular circumstances of the present case, in which there is an unquestionable link between the two measures in question, in terms of both the beneficiaries and the type of intervention envisaged. The arguments to the contrary put forward by Ryanair do not seem to me to be decisive. Indeed, first, provided that the measure adopted under Article 107(2)(b) TFEU satisfies all the conditions, explained above, to which the application of the derogation under that provision is subject, the question of any extended application of that derogation does not arise, even if that measure helps to define, together with other measures, the scope of the State's intervention in response to a crisis caused by an exceptional occurrence. Secondly, even if it were to be accepted that the measure at issue pursues, in addition to the compensatory function inherent in the measures provided for by Article 107(2)(b) TFEU, the objective stated in the last phrase of Article 107(3)(b) TFEU – which, moreover, accords with the *ratio* of those measures – I do not see how this could weaken the link that must necessarily exist, for the purposes of the first of those provisions, between the damage and the aid.

23. I suggest that, for those reasons, the Court reject the first submission in the second ground of appeal as unfounded.

2. The second submission

24. By the second submission in its second ground of appeal, Ryanair argues that, in paragraph 40 of the judgment under appeal, the General Court misconstrued the judgment of 11 November 2004, *Spain* v *Commission*,[18] cited in that paragraph, by introducing a 'likelihood test' into the assessment of the risk of overcompensation which is not mentioned in the judgment cited. In Ryanair's view, if the measure is intended to cover future damage, as in the present case, any aid that is likely to exceed the losses incurred must be regarded as incompatible with the internal market, regardless of the degree of probability of overcompensation. The provision of a mechanism for the recovery of excess aid paid is not, in its submission, sufficient to prevent an undue, albeit temporary, advantage from being conferred on the beneficiary undertaking.

25. That submission should, in my view, be rejected. In the first place, the appellant's line of argument, which is essentially semantic, rests, in my view, on a misconception of the meaning to be ascribed to the terms used by the General Court. Admittedly, the English-language version of paragraph 40 of the judgment under appeal, which alone is authentic, uses the expression 'likely

[18] C-73/03, not published, EU:C:2004:711; 'the judgment in *Spain* v *Commission*'.

to', which conveys a notion of probability. Nevertheless, it is quite clear to me from both the wording of that paragraph and its context, as well as from all the grounds of the judgment under appeal concerning the analysis of the second limb of the second plea in law, that the General Court in no way meant to introduce a test of the likelihood of overcompensation, still less to adopt such a test as a criterion for defining the scope of Article 107(2)(b) TFEU. In the second place, I would point out that paragraphs 40 and 41 of the judgment in *Spain* v *Commission*, to which the General Court refers, concern the proof of the existence of a direct link between the losses allegedly sustained by the beneficiaries of the measure and the aid granted – proof which is to be furnished by the presentation of data comparing the scale of the losses with the amount of the aid – and not the assessment of the existence of a likelihood of overcompensation, such as might be made after that link is established. The General Court could not, therefore, have logically inferred from those paragraphs that a test should be applied to ascertain the degree of likelihood that the planned aid would exceed the damage suffered, for the purpose of excluding the application of Article 107(2)(b) TFEU. It seems to me that the General Court meant rather to emphasise the need to exclude from the scope of Article 107(2)(b) TFEU measures in respect of which it is not possible to establish a link between the scale of the damage suffered and the amount of aid, such as would exclude the possibility of overcompensation.

26. In any event, even if paragraph 40 of the judgment under appeal were to be interpreted as meaning what Ryanair proposes, it must be observed that, in its analysis of the measure at issue, set out in paragraphs 45 to 57 of that judgment, the General Court concluded, first, that, having regard to the evolving nature of the exceptional occurrence that was the COVID-19 pandemic, and the necessarily prospective nature of the quantification of the damage caused and the amount of aid granted, the Commission had presented in sufficiently precise terms in the contested decision a calculation method for assessing the damage suffered by SAS and preventing any payments in excess thereof. Secondly, the General Court concluded that Ryanair had not adduced evidence that that calculation method would lead to overcompensation of that damage. Moreover, in paragraph 57 of the judgment under appeal, the General Court held that, in any event, the Commission had found that the damage suffered by SAS would be greater than the amount guaranteed by the measure at issue and that Ryanair had not adduced evidence capable of calling that assessment into question. Contrary to Ryanair's apparent view, those conclusions in no way imply a finding of possible, albeit unlikely overcompensation, the General Court having instead rejected the evidence of a likelihood of payments in excess of the damage suffered by SAS.

3. The third, fourth and fifth submissions

27. By the third, fourth and fifth submissions, which I shall address together, Ryanair alleges various errors of law and a manifest distortion of the facts and evidence committed by the General Court in paragraphs 46 to 50 of the judgment under appeal. In those paragraphs, the General Court, in the first place, concluded that, 'having regard to the circumstances of the case, characterised by the exceptional occurrence, within the meaning of Article 107(2)(b) TFEU, caused by the COVID-19 pandemic, its evolving nature and the fact that the quantification of the damage caused and the amount of aid finally granted is necessarily prospective in nature, the Commission set out in the contested decision, in sufficiently precise terms, a method of calculation for assessing the damage suffered by SAS' (paragraph 46). In the second place, it held that Ryanair had not adduced any evidence capable of establishing that the method of calculation, as set out in the contested decision, would lead to the payment of State aid that was higher than the damage actually suffered by SAS (paragraphs 47 and 48). In the third place, it pointed out that, notwithstanding the fact that the method established by the Commission did not

completely prevent the assessment of that damage from also including the consequences of decisions taken by SAS which had no direct link with the COVID-19 pandemic, Ryanair had not adduced any evidence capable of showing that, had that pandemic not taken place, SAS's revenue would have been likely to decrease in the period from March 2020 to February 2021 by comparison with the period from March 2019 to February 2020 (paragraph 49).

28. By the third submission in its second ground of appeal, Ryanair argues that, if the Commission's decision to authorise aid pursuant to Article 107(2)(b) TFEU does not properly define a method for calculating the damage to be compensated, there is no guarantee that there will be no overcompensation and a mechanism of *ex-post* assessment will take the place of the *ex-ante* assessment which the Commission is required to carry out. In the present case, the risk of overcompensation is particularly high and the aid authorised by the Commission is a blank cheque given to SAS for more than a year pending the first report of the actual losses, which Sweden was to submit in June 2021.

29. By the fourth submission in its second ground of appeal, the appellant maintains that the General Court erred in law by systematically placing the burden of proof on Ryanair, whereas, in State aid matters, it is for the Commission to demonstrate the compatibility of the aid. In any event, Ryanair argues that it did adduce sufficient evidence before the General Court to prove the existence, in the present case, of a likelihood of overcompensation.

30. Lastly, by the fifth submission in its second ground of appeal, Ryanair complains that the General Court failed to draw the necessary conclusions from its acknowledgment, in paragraph 49 of the judgment under appeal, that the method established by the Commission did not completely prevent the assessment of the damage from also including the consequences of decisions taken by SAS which had no direct link with the COVID-19 pandemic, and placed the onus on Ryanair to prove a counterfactual scenario, which is impossible to do.

31. I would observe that it is settled case-law that the only economic disadvantages that may be compensated for under Article 107(2)(b) TFEU are those directly caused by natural disasters or other extraordinary occurrences.[19] It follows that there must be a direct link between the damage caused by such events and the State aid, and that as precise an assessment as possible must be made of the damage suffered by the beneficiaries of the aid.[20] If that damage is not yet entirely and precisely quantifiable, for example because the extraordinary occurrence in question is not a single incident, but one which continues over time and evolves, the Commission must necessarily carry out a prospective analysis, based on a calculation system which is both flexible, so that it can be adapted as the situation evolves, and sufficiently precise and reliable to rule out the risk of overcompensation. Moreover, it must be possible for the application of that calculation system over time to remain permanently and fully under the Commission's control.

32. It is apparent from the contested decision that the objective of the measure at issue was to provide SAS with partial compensation for the damage resulting from the cancellation or re-scheduling of its flights following the imposition of travel restrictions under the COVID-19 pandemic (see recitals 9 and 61 of the contested decision). In its assessment of the compatibility of the measure at issue with the internal market, the Commission pointed out that, since the crisis caused by that pandemic was still ongoing, the Swedish authorities were not yet in a position to quantify precisely the damage suffered by SAS or the amount of the aid (recitals 64

[19] Judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 175 and the case-law cited).

[20] See, to that effect, judgment of 23 February 2006, *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraph 79).

and 68 of the contested decision). The estimated damage consequently had to be assessed on the basis of a 'general methodology', the elements of which are described in recital 65 of the contested decision. That damage was identified as being 'the loss of added value', corresponding to the loss of revenue, corrected by SAS's profit margin, less avoided costs. The loss of revenue was the difference between the revenue that could have been expected had the pandemic not arisen, calculated on the basis of revenue in the period from March 2019 to February 2020, immediately preceding the outbreak of that pandemic, and the revenue generated during the period covered by the crisis, namely the period from March 2020 to February 2021. Avoided costs were the costs that SAS would have incurred had its activity not been affected by the pandemic (such as fuel costs and airport taxes). The general methodology just described was to be supplemented by a 'detailed methodology' which the Swedish authorities undertook to submit to the Commission no later than 31 December 2020 for prior approval. The exact quantification of the damage suffered by SAS would not be carried out until later, by an independent body. In this connection, the Swedish authorities undertook to send the Commission, by no later than 30 June 2021, an *ex-post* assessment of the damage and an indication of the amount of aid guaranteed. They also undertook to recover any overcompensation that might come to light from the *ex-post* assessment of the damage (see recital 38 of the contested decision). The Commission also made a provisional estimate of the damage suffered by SAS, in the calculation of which it took into account a decrease in air traffic of between 50% and 60% in the period from March 2020 to February 2021 by comparison with the period from March 2019 to February 2020 (see recital 66 of the contested decision). That damage, estimated at between SEK 5 billion and SEK 15 billion, was considered by the Commission to be greater in any event than the total amount of the aid (see recital 68 of the contested decision).

33. The circumstances mentioned in paragraph 46 of the judgment under appeal and relating in particular to the evolving nature of the exceptional occurrence that was the COVID-19 pandemic, which the appellant does not dispute, taken together with the sudden and wide-spread nature of the crisis and the need for swift action in the adoption of measures to support the sectors most affected, such as aviation, amply justify, in my view, the step-by-step approach taken by the Commission, which consisted in setting the basic elements of the method for calculating the damage suffered by SAS and provisionally estimating the scale of that damage in such a way as to rule out in advance any real risk of overcompensation, and leaving the precise quantification of that damage to a later date.

34. In that context, the mere fact that the Commission agreed to leave it to the Swedish authorities to determine the details of the calculation methods for precisely quantifying the damage does not, in my view, permit the conclusion to be drawn, in the light of all the circumstances of the present case and the difference between the scale of the damage to be compensated, as provisionally assessed, and the maximum amount of the aid, that the Commission, as Ryanair maintains, neglected its duty to assess the compatibility of the measure at issue with the internal market. As the Commission and the French Government have rightly pointed out, the detailed methodology which the Swedish authorities undertook to send to the Commission was subject to the prior approval of that institution, which therefore had an opportunity to verify the consistency of that methodology with the 'general methodology' set out in the contested decision and possibly alter some of its elements, as well as to monitor the actual application of the measure and re-assess the likelihood of overcompensation. Contrary to Ryanair's assertions, there is therefore no contradiction, in my view, between the finding, in paragraph 46 of the judgment under appeal, that the Commission had set out in the contested decision a sufficiently precise method for calculating the scale of the damage suffered by SAS and recital 35 of that decision, in which the Commission takes note of Sweden's undertaking to submit

to it, by no later than 31 December 2020, the methodology that would be used to quantify that damage. Moreover, taking that undertaking into account as well as the Commission's provisional quantification of the damage, which indicated that the scale of the damage would, in any event, be greater than the upper limit of the guarantee granted to SAS by the Swedish authorities, Ryanair's assertion that the contested decision essentially authorised a blank cheque in favour of SAS until 30 June 2021, the date of the first *ex-post* assessment of the damage, is unfounded.

35. On the basis of the foregoing, I consider that the third submission in the second ground of appeal should be rejected as unfounded.

36. The fourth submission in that ground of appeal, by which Ryanair complains that the General Court reversed the burden of proof, should, in my view, also be rejected, as being inadmissible. I would point out in this connection that, in the judgment under appeal, the General Court held that the calculation method defined by the Commission, together with the commitments entered into by Sweden and the provisional quantification of the losses sustained by SAS as a result of the pandemic, enabled as precise an assessment as possible to be made of the damage which the measure at issue was intended to compensate, given the circumstances in which that measure was notified and approved. Moreover, in paragraphs 47 to 49 of that judgment, the General Court rejected as either insufficiently substantiated or as ineffective the arguments raised by Ryanair in order to challenge the ability of that methodology to rule out actual overcompensation. In such circumstances, by its fourth submission the appellant is actually taking issue with the assessment in the judgment under appeal of the relevance and/or the adequacy of the arguments and evidence which it put forward in order to call into question the conclusion reached by the General Court concerning the ability of the facts and matters set out in the contested decision to rule out a risk of overcompensation and, more generally, concerning the validity of the opinion issued by the Commission regarding the compatibility of the measure at issue with the internal market. However, although Ryanair alleges distortion of the evidence, it does not indicate either the evidence supposedly distorted by the General Court or how the latter distorted that evidence, essentially confining itself to repeating the arguments which it set out in paragraphs 55 to 60 of its application before the General Court. Those paragraphs, with the exception of paragraph 58, which simply contains a list of the matters which the Commission allegedly failed to identify or explain with sufficient precision in the contested decision, do no more than refer to the case-law on Article 107(2)(b) TFEU and the practice developed by the Commission in the application of that provision. The fourth submission does not, therefore, satisfy the requirements for admissibility which flow from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, as interpreted in the case-law. [21]

37. Lastly, as regards the fifth submission, by which Ryanair alleges an error of law in paragraph 49 of the judgment under appeal, that paragraph too must be read in the light of the finding, in paragraphs 45 and 46 of the judgment under appeal, that the method for calculating the damage suffered by SAS set out by the Commission, account being taken of all the commitments given by the Swedish authorities and in the light of the particular circumstances associated with the COVID-19 pandemic, satisfied the requirements for precision established in the case-law and gave sufficient guarantees that there would be no overcompensation. This submission too must therefore be rejected, as being unfounded.

[21] See judgment of 28 April 2022, *Changmao Biochemical Engineering* v *Commission* (C-666/19 P, EU:C:2022:323, paragraphs 73 and 74 and the case-law cited).

4. The sixth submission

38. By the sixth submission in its second ground of appeal, which is directed against paragraph 51 of the judgment under appeal, the appellant complains that the General Court erred in law in rejecting, with a simple reference to paragraph 25 of that judgment, the argument, developed in its second plea in law, that, in the contested decision, the Commission should have taken account of the damage suffered by other airlines in Sweden. The appellant maintains that, in circumstances such as those of the present case, the principle that aid must be commensurate with the damage requires that the damage be assessed at the level not only of the beneficiary of the aid, but also of its competitors. In this case, an assessment of the effect of the measure at issue on other airlines should therefore have been carried out. In any event, according to Ryanair, it was wrong of the General Court to state, as it did in paragraphs 82 and 84 of the judgment under appeal, that the measure at issue was justified because SAS was worse affected, given its competitive position, and then decline to take that situation into account when assessing the proportionality of the aid with respect to the damage.

39. I must point out that, in paragraph 51 of the judgment under appeal, the General Court answered a highly specific argument raised by Ryanair in the second limb of its second plea in law. By that argument, developed concisely in a single paragraph of the application initiating proceedings before the General Court, Ryanair, having observed that the contested decision did not include any assessment of the damage suffered by other airlines operating in Sweden, then simply referred to the interpretation of Article 107(2)(b) TFEU which it had proposed in the context of its first plea in law, according to which an exceptional occurrence within the meaning of Article 107(2)(b) TFEU, by definition, affects all the operators in a given sector and not just one of them. It then inferred from that interpretation that the Commission was required to explain why it was that only SAS had suffered damage as a result of the restrictions associated with the COVID-19 pandemic. It is therefore without committing any error of law that the General Court found it sufficient to answer that argument by referring to the reasoning by which, in paragraph 25 of the judgment under appeal, it had rejected, in my view correctly, the interpretation of Article 107(2)(b) TFEU relied on by Ryanair in its first plea in law.

40. In those circumstances, the appellant also cannot complain that the General Court erred in law, in paragraph 51 of the judgment under appeal, by refusing to ascribe importance, in the assessment of the proportionality of the measure at issue, to the 'impact of the aid on other airlines' or the 'competitive situation' of SAS. Indeed, first, it is clear from point 39 of this Opinion that the need for those matters to be taken into consideration had not been alleged by Ryanair in the context of the argument which was rejected in paragraph 51 of the judgment under appeal. Secondly, as the Commission has rightly emphasised, that paragraph of that judgment forms part of the General Court's examination of the proportionality of the measure at issue in relation to the damage to be compensated – the aim of which was solely to assess the existence of a risk of overcompensation – and not part of the separate examination of the necessary, appropriate and proportionate nature of that measure in relation to the objective pursued. I note, however, that in the eighth submission in its second ground of appeal, which is directed against a different part of the grounds of the judgment under appeal, Ryanair has put forward a line of argument that is, to a certain extent, similar, and I shall analyse that line of argument when addressing that submission.

41. On the basis of the foregoing considerations, I consider that the sixth submission in the second ground of appeal should also be rejected as unfounded.

5. The seventh submission

42. By the seventh submission in its second ground of appeal, which is directed against paragraphs 60 and 61 of the judgment under appeal, the appellant complains, in essence, that the General Court considered it sufficient that the Swedish authorities had committed to recovering the aid *ex post* in the event that the measure at issue, possibly combined with other measures, including those granted by foreign authorities, should exceed the damage actually suffered by SAS. Ryanair considers that, when assessing the existence of a risk of overcompensation, the Commission must take account of all the information available to it at the time when it adopts a decision under Article 107(2)(b) TFEU. In the present case, the Commission should have taken into account, in particular, the aid scheme already introduced by the Kingdom of Norway,[22] for which SAS was eligible.

43. In so far as the appellant criticises the General Court for not finding that the Commission had failed to consider the possible combination of the measure at issue with that aid scheme, the present submission is manifestly unfounded. Contrary to the appellant's assertions, it is in fact clear from paragraphs 60 and 61 of the judgment under appeal that the General Court found that the Commission had taken that scheme into account, both when assessing a priori the existence of a real risk of overcompensation and when checking that appropriate mechanisms had been put in place to ensure that any overcompensation resulting from the combination of the measure at issue with other measures, including the Norwegian aid scheme, would be corrected a posteriori. As to the remainder, the submission should, in my view, be declared inadmissible. Indeed, the appellant confines itself to reiterating the allegations made at first instance, without explaining why the conclusion in paragraph 61 of the judgment under appeal is vitiated by an error of law or a manifest error of assessment and without clarifying how the Commission should have taken the Norwegian aid scheme into account. If it is held that Ryanair's claims are nevertheless admissible and that they are to be understood as alleging that the General Court should have concluded that the measure at issue had – wrongly – been declared compatible with the internal market even though there was a risk of overcompensation due to the possibility that SAS might benefit from the Norwegian aid scheme, then I agree with the Commission that that argument should be rejected and that the General Court was right to regard as appropriate and sufficient, in circumstances where it was uncertain whether SAS would have access to the Norwegian aid scheme at some point, the commitment given by the Swedish authorities to recover *ex post* any aid paid in excess as a result of the combination of the measure at issue with other measures.

44. It follows from the foregoing that, in my view, the seventh submission in the second ground of appeal should also be rejected, as being, in part, unfounded and, in part, inadmissible.

6. The eighth submission

45. The eighth submission in the second ground of appeal is directed against paragraphs 62 to 64 of the judgment under appeal. In those paragraphs, the General Court rejected the argument, raised by Ryanair in the second limb of its second plea in law, that, in assessing the compatibility of the measure at issue with the internal market, the Commission should have taken into account, as a factor in the comparison of the damage and the compensation to be carried out under Article 107(2)(b) TFEU, the competitive advantage accruing to SAS as a result of the discriminatory nature of that measure. In particular, in paragraph 63 of the judgment under

[22] Approved by the EFTA Surveillance Authority on 30 March 2020 on the basis of Article 61(3)(b) of the EEA Agreement, which corresponds to Article 107(3)(b) TFEU ('the Norwegian aid scheme').

appeal, the General Court referred, by analogy, to the judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*,[23] ('the judgment in *Aer Lingus*') and held that, 'for the purposes of assessing the compatibility of aid with the internal market, the advantage procured by that aid for the recipient does not include any economic benefit the recipient may have enjoyed as a result of exploiting the advantage'.

46. Before the Court of Justice, the appellant argues that it is 'essential' that the competitive advantage just described be taken into account in order to determine 'whether the aid scheme does not go beyond what is necessary to attain its stated objective'. It also disputes the relevance of the judgment in *Aer Lingus*, which concerned the calculation of the quantum of aid declared incompatible with the internal market for the purposes of its recovery, and not the comparison between the advantage procured by the aid and the damage directly caused by an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

47. I would point out, as a preliminary matter, that part of the line of argument developed by Ryanair in the present submission raises a question of law which is different, in my view, from that raised in the corresponding plea before the General Court. Whereas, in its action at first instance, Ryanair confined itself to arguing that the failure to take account of the competitive advantage resulting from the fact that SAS was the only airline to have benefited from aid under Article 107(2)(b) TFEU prevented a proper comparison between damage and compensation from being carried out,[24] in the appeal it has, for the first time, related that omission to the assessment of the proportionality of the measure at issue with respect to the objective pursued. However, even assuming that, by putting forward such an argument, Ryanair intended to point to the absence of any assessment in the contested decision of the effects of the measure at issue on competition, that submission would in any event be inadmissible, first, because it would constitute a new plea and therefore one that cannot be raised on appeal and, secondly, because it fails to satisfy, in any event, the requirements of clarity and precision imposed by Article 168(1)(d) of the Rules of Procedure of the Court of Justice.

48. I shall therefore confine myself to responding to the present submission to the extent that it alleges that the General Court found it unnecessary, for the purpose of determining the advantage conferred by the measure at issue and assessing the existence of a risk of overcompensation, that account be taken of the competitive advantage described above. In that regard, the appellant rightly asserts that, in that assessment, the Commission must take into consideration all of the factors that might have a bearing on the direct causal nexus between the exceptional occurrence, the losses sustained and the aid granted, including in particular any sums received by the beneficiary undertaking by way of compensation for the harm suffered as a result of that occurrence or as a result of other State action taken after the exceptional occurrence in order to support undertakings. Those factors do indeed affect the scale of the losses actually borne by that undertaking, by reducing it. This does not mean, however, that, when determining the value of the advantage conferred on the beneficiary undertaking, the Commission is required to take into consideration – assuming that it is readily and precisely quantifiable – the value, first, of the secondary advantages associated with the grant of the aid or, secondly, of any economic benefits that that undertaking is likely to achieve by exploiting the aid. Indeed, the value of the former is not amenable to independent quantification, while, as regards the latter, in paragraph 92 of the judgment in *Aer Lingus*, to which the General Court referred, by analogy, in

[23] C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 92.

[24] It was with reference to the necessary correspondence between the compensation and the losses sustained, as well as to the causal nexus between those losses and the exceptional occurrence within the meaning of Article 107(2)(b) TFEU, that Ryanair spoke, in the second part of the second plea in law, of the 'proportionality of the aid'.

paragraph 63 of the judgment under appeal, the Court of Justice clarified that the obligation upon the Member State concerned to abolish, through recovery, aid incompatible with the single market and in that way restore the situation as it was before the aid was granted 'entails the restitution of the advantage procured by the aid for the recipient, not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage'. Contrary to Ryanair's assertions, that reference was relevant, at least to the extent that, in its application, Ryanair had identified the specific competitive advantage which it alleged resulted from SAS's acquiring the ability to increase its market share once the restrictions associated with the pandemic were lifted. [25] That said, leaving aside the secondary and indirect advantages I have mentioned in the present point, the 'competitive advantage' to which the appellant refers is nothing other, it seems to me, than the economic, selective benefit which the measure at issue confers on SAS and which, by placing it in a more favourable position by comparison with competitor airlines, gives rise to a distortion of competition. As is clear from the Commission Notice on the application of [Articles 107 and 108 TFEU] to State aid in the form of guarantees, [26] to which reference is made in the contested decision (see recitals 17 and 18), as well as in the judgment under appeal (see paragraph 54), in the case of a guarantee, that benefit is, in principle, calculated as the difference between the market price of the guarantee and the price actually paid. [27] However, it was on a calculation of precisely that kind that the Commission relied, in recital 68 of the contested decision, in order to determine the amount of the aid conferred by the measure at issue, so as to rule out the risk of overcompensation, without however dismissing the possibility that, in view of the market situation and the difficulties SAS was experiencing in obtaining financing, the amount of the aid could be equivalent to the full amount of the loans obtained thanks to the State guarantees. In those circumstances, in concluding in paragraph 64 of the judgment under appeal that the Commission had correctly taken account of the advantage procured for SAS, resulting from the measure at issue, and that that institution could not be criticised for not having determined the existence of any possible economic benefit resulting from that advantage, the General Court did not commit the error of law which Ryanair ascribes to it in the eighth submission in its second ground of appeal. This submission too should therefore be rejected as unfounded.

7. Conclusion regarding the second ground of appeal

49. Since I consider that all the submissions raised by the appellant in connection with its second ground of appeal should be rejected, that ground of appeal must, in my view, be dismissed in its entirety.

C. The third ground of appeal

50. In its third ground of appeal, which is directed against paragraphs 70 to 89 of the judgment under appeal, Ryanair alleges that the General Court committed various errors of law and manifestly distorted the facts in rejecting the first limb of its third plea in law and concluding in paragraph 89 of the judgment under appeal that, although the benefit of the measure at issue was granted only to SAS, that measure was justified and did not infringe the principle of non-discrimination.

[25] See the Opinion of Advocate General Mengozzi in the case which gave rise to the judgment in *Aer Lingus* (C-164/15 P and C-165/15 P, EU:C:2016:515, point 62).

[26] OJ 2008 C 155, p. 10; 'the 2008 Notice'.

[27] See point 4.2 of the 2008 Notice.

51. In the judgment under appeal, the General Court, in the first place, rejected Ryanair's allegation that the objective of the measure at issue was, in addition to providing SAS with partial compensation for the damage arising from the COVID-19 pandemic, to preserve the connectivity of Sweden, 'intra-Scandinavian accessibility' or the Swedish economy (paragraphs 74 and 75) or to maintain the structure of the market (paragraph 76). In the second place, it rejected Ryanair's argument concerning the discriminatory nature of the aid granted by means of the measure at issue (paragraphs 77 and 78). In the third place, it found that the difference in treatment in favour of SAS was appropriate for the purpose of making good the damage resulting from the restrictions imposed because of the COVID-19 pandemic and did not go beyond what was necessary to achieve that objective (paragraphs 80 to 88).

52. In its third ground of appeal, the appellant makes three separate submissions, one for each point in the General Court's reasoning. Following the same logical order as in the grounds of the judgment under appeal, I shall begin my analysis with the second submission, concerning the determination of the objective of the measure at issue.

1. The second submission

53. Ryanair asserts, in the first place, that the General Court erred in law and manifestly distorted the facts in rejecting, in paragraphs 74 and 75 of the judgment under appeal, the allegation which it made at first instance that the objective of the measure at issue was to preserve the connectivity of Sweden, 'intra-Scandinavian accessibility' or the Swedish economy. It maintains that the General Court adopted an excessively formalistic reading of the contested decision, which, moreover, is contradicted by paragraph 82 of the judgment under appeal.

54. Those arguments are, in my view, unfounded. The objective of the measure at issue is expressly stated, in fact, in recital 9 of the contested decision, which appears in section 2.1 thereof, entitled 'Objective of the measure', and is, as rightly held in paragraph 75 of the judgment under appeal, 'to compensate SAS for damage suffered due to the cancellation or rescheduling of its flights as a result of the imposition of travel restrictions linked to the COVID-19 pandemic'. Recitals 25 and 26 of the contested decision, on which the appellant relies and which set out, in addition to information regarding the position of SAS in the market, information concerning its contribution to the connectivity of Sweden, to 'intra-Scandinavian accessibility', to the labour market and, more generally, to the Swedish economy, are intended solely (as is apparent from their inclusion in section 2.5 of that decision, entitled 'Beneficiary') to provide a profile of the undertaking receiving the aid. Contrary to Ryanair's assertions, those recitals do not define, either directly or indirectly, the objective of the aid, which, as has been seen, and in accordance with the legal basis on which its compatibility is justified, was to make good the damage caused by the exceptional occurrence that was the COVID-19 pandemic. The General Court did not, therefore, make the error of interpretation of which the appellant complains. Nor is there any contradiction, as the appellant alleges, between paragraphs 74 and 75 of the judgment under appeal and paragraph 82 thereof. Indeed, in addition to the fact that the figures relating to SAS's share of intra-Scandinavian traffic and Swedish domestic traffic are taken into consideration in paragraph 82 of the judgment under appeal merely as an indicator of the damage suffered by that undertaking, and not as an indication of the objective pursued by the Swedish authorities, that paragraph forms part of the General Court's separate assessment, in paragraphs 80 to 87 of the judgment under appeal, of the proportionality of the conditions for granting the measure at issue in relation to the objective pursued by that measure.

55. In the second place, the appellant asserts that, in paragraph 76 of the judgment under appeal, the General Court erred in its interpretation of the applicable law in rejecting Ryanair's argument that the objective of the measure at issue was necessarily to preserve the structure of the market. In that paragraph, the General Court stated that, 'while, from the point of view of competition, it may be preferable to assist all economic operators in order to prevent a reduction in their number … the Member States are not required to make good all the damage caused by an exceptional occurrence under Article 107(2)(b) TFEU and, consequently, to grant aid to all the victims of that damage'. In this connection, I would point out that the appellant merely asserts that, in light of its finding in paragraph 76 of the judgment under appeal, the General Court should have concluded that maintaining the structure of the market formed part (or should have formed part) of the objectives of the measure at issue, without considering the reasons for which the General Court rejected such a conclusion, which are substantially the same as those which led it to reject the first plea in law and concern the margin of discretion which it recognises the Member States as having when adopting measures under Article 107(2)(b) TFEU. On this issue, I shall therefore confine myself to referring to the discussion of the first ground of appeal, which corresponds to the first plea in law before the General Court.

56. The third argument raised by Ryanair principally concerns infringement of the principle prohibiting discrimination on grounds of nationality and I shall therefore deal with it when examining the first submission in the third ground of appeal.

57. On the basis of the preceding reasons, the second submission in the third ground of appeal should, in my view, be rejected as unfounded.

2. The first submission

58. By the first submission in its third ground of appeal, which is directed against paragraphs 77 to 80 of the judgment under appeal, the appellant complains, in essence, that the General Court failed to apply correctly the prohibition of discrimination on grounds of nationality enshrined in the first paragraph of Article 18 TFEU. Ryanair argues that, although all the airlines operating in Sweden have suffered the consequences of the COVID-19 pandemic, only SAS has benefited from individual aid under Article 107(2)(b) TFEU. Since the contested decision clearly indicates that such aid could be granted only to airlines which have an operating licence issued by Sweden, and since that criterion was held by the Court of Justice to be equivalent to discrimination on grounds of nationality in its judgment of 18 March 2014, *International Jet Management*,[28] the appellant argues that the General Court erred in law in concluding that the contested decision did not infringe Article 18 TFEU.

59. In the judgment under appeal, the General Court first of all pointed out, in paragraph 77, that 'individual aid … by definition benefits only one company, to the exclusion of all the other companies, including those in a situation comparable to that of the recipient of the aid' and 'by its nature, brings about a difference in treatment, or even discrimination, which is however inherent in the individual character of that measure'. Ryanair's argument thus amounted to calling into question systematically the compatibility of any individual aid with the internal market solely on account of its inherently exclusive and thus discriminatory nature, even though EU law allows Member States to grant such aid, provided that all the conditions laid down in Article 107 TFEU are met. Then, in paragraph 80 of the judgment under appeal, the General Court went on to clarify that, even if the difference in treatment brought about by the measure at issue, designed to benefit

[28] C-628/11, EU:C:2014:171, paragraph 68; 'the judgment in *International Jet Management*'.

SAS alone, could amount to discrimination, it was necessary to ascertain whether it was justified by a legitimate objective and whether it was necessary, appropriate and proportionate for achieving that objective. Since Ryanair had referred to the first paragraph of Article 18 TFEU, the General Court noted that that provision prohibits discrimination on grounds of nationality within the scope of application of the Treaties 'without prejudice to any special provisions contained therein', and held that it was therefore important to ascertain whether the difference in treatment arising from the measure at issue was permitted under Article 107(2)(b) TFEU, which was the legal basis for the contested decision. According to the General Court, that examination required, 'first, that the objective of the measure at issue satisfies the requirements laid down in that provision and, secondly, that the conditions for granting the measure at issue, namely, in the present case, that it benefits only SAS, are such as to enable that objective to be achieved and do not go beyond what is necessary to achieve it'.

60. Ryanair argues, in the first place, that, contrary to the General Court's statement in paragraph 80 of the judgment under appeal, Article 107 TFEU is not a 'special provision' within the meaning of the first paragraph of Article 18 TFEU, since it does not lay down any specific rules of non-discrimination.

61. I would point out in this connection that the general principle of non-discrimination precludes the different treatment of comparable situations and the same treatment of different situations, unless such treatment is objectively justified. [29]

62. The first paragraph of Article 18 TFEU establishes that, 'within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. According to settled case-law, that provision applies independently only to situations governed by EU law in respect of which the Treaties lay down no specific rules prohibiting discrimination. [30] According to the Court, such specific rules include, in particular, the provisions of the Treaty on the freedom to move and reside within the territory of the Member States, conferred by Article 20(2)(a) TFEU and Article 21 TFEU, [31] as well as the provisions on the free movement of goods (Articles 30, 34 and 110 TFEU), [32] on the free movement of workers (Article 45 TFEU), [33] on freedom of establishment (Article 49 TFEU), [34] on the freedom to provide services (Articles 56 to 62 TFEU) [35] and on the free movement of capital (Articles 63 and 65 TFEU). [36]

63. The application of the first paragraph of Article 18 TFEU is thus subject to the condition that there must be no specific rule laid down by the Treaties prohibiting discrimination on grounds of nationality that is applicable to the situation that has given rise to the discrimination claimed. [37] Is Article 107 TFEU one such rule?

29 See judgment of 27 October 2022, *ADPA and Gesamtverband Autoteile-Handel* (C-390/21, EU:C:2022:837, paragraph 41).

30 See judgment of 6 October 2022, *Contship Italia* (C-433/21 and C-434/21, EU:C:2022:760, paragraph 29 and the case-law cited).

31 See judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraph 65).

32 See judgment of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 40).

33 See judgment of 6 October 2020, *Jobcenter Kreufeld* (C-181/19, EU:C:2020:794, paragraph 78).

34 See judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 55).

35 See judgment of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 40 and the case-law cited).

36 See judgment of 18 March 2021, *Autoridade Tributária e Aduaneira* (*Tax on capital gains on real property*) (C-388/19, EU:C:2021:212, paragraph 21).

37 See judgment of 11 June 2020, *TÜV Rheinland LGA Products and Allianz IARD* (C-581/18, EU:C:2020:453, paragraphs 31 and 33 and the case-law cited).

64. Although the prohibition of aid in paragraph 1 of Article 107 TFEU is intended to ensure that competition in the internal market is not distorted by intervention on the part of the Member States, which tendentially favours national undertakings, I confess that I have some difficulty in seeing in that provision a rule for implementing the prohibition of discrimination on grounds of nationality of the same kind as the provisions of the FEU Treaty concerning the four freedoms. While there is, between the principle of non-discrimination in the first paragraph of Article 18 TFEU and the rules on State aid, a potential similarity of purpose, namely the protection of competition and European freedoms, those rules nevertheless constitute a means for keeping discrimination in check; they themselves do not contain any rule of non-discrimination. Nonetheless, as the Commission points out, paragraphs 2 and 3 of Article 107 TFEU, in so far as they provide for the compatibility of some aid with the internal market under certain conditions, allow certain differences in treatment where they are necessary and proportionate for the purpose of attaining the objectives contemplated by those provisions and are therefore significant for the purposes of the application of the principle of non-discrimination, as 'special provisions' within the meaning of the first paragraph of Article 18 TFEU.

65. On the other hand, as I have already noted on another occasion, the case-law of the Court has, for some time now, highlighted the close connection between the concept of selectivity, inherent in the concept of aid, and the concept of discrimination.[38] The condition relating to a selective advantage requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory.[39]

66. However, where the aid provided for by such a measure is subsequently declared compatible with the internal market under Article 107(2) TFEU or Article 107(3) TFEU, the difference in treatment, between undertakings in a comparable legal and factual situation, to which it gives rise is regarded as objectively justified and tolerated in so far as it is necessary for the purpose of attaining objectives worthy of protection under the EU legal order. This applies both to individual measures and to aid schemes and implies that the measure in question, in addition to meeting the specific conditions laid down by the provisions for derogating from the prohibition of aid laid down in Article 107(1) TFEU, must be appropriate to attaining objectives permitted by that treaty and must not go beyond what is necessary for attaining the objective of the aid or for its proper functioning.[40] That is the sense in which to understand the statement made in paragraph 77 of the judgment under appeal – with which Ryanair takes issue in the [first] submission in its third ground of appeal – which is perhaps not formulated in the most felicitous terms. That statement is not, however, a decisive point in the General Court's reasoning in the judgment under appeal, given that the General Court then goes on to carry out, in paragraph 80 et seq. of that judgment, an examination of the proportionality of the measure at issue.

67. On the basis of the foregoing, Ryanair's argument that the General Court erred in law in holding Article 107 TFEU to be a 'special provision' within the meaning of the first paragraph of Article 18 TFEU should, in my view, be rejected.

38 See my Opinion in *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:51, point 17).

39 See judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 67).

40 See paragraph 15 of the judgment of 22 March 1977, *Iannelli & Volpi* (74/76, EU:C:1977:51; 'the judgment in *Iannelli & Volpi*').

68. In the second place, Ryanair argues that direct discrimination on grounds of nationality, such as that introduced by the measure at issue, can be justified only on the basis of the grounds for derogation expressly provided for in the Treaty and, therefore, only where the measure is one which impinges upon the freedom to provide services on the grounds of public policy, public security, or public health, as listed exhaustively in Article 52 TFEU, to which Article 62 TFEU refers. The justifications put forward by the Commission in the contested decision, concerning the need to preserve the connectivity of Sweden, 'intra-Scandinavian accessibility' or the Swedish economy, are not covered by those derogations. Since this argument largely overlaps with the arguments put forward by the appellant in its fourth ground of appeal, I shall merely refer to my examination of that ground of appeal.

69. In the third place, Ryanair argues that, even if the freedom to provide services were not relevant in the present case, the General Court in any event failed to consider, as required by the case-law of the Court of Justice and in particular the judgment in *International Jet Management*, whether the difference in treatment introduced by the measure at issue, which applies to SAS alone, it being the only airline which holds an operating licence issued by Sweden and is established in Sweden, is justified on the basis of 'objective considerations independent of the nationality of the persons concerned'. I would point out that, in the judgment in *International Jet Management*, the Court held that Article 18 TFEU precluded legislation of a Member State which required an air carrier holding an operating licence issued by a different Member State to obtain an authorisation to enter the airspace of the first Member State to operate flights from a third country, while such an authorisation was not required for air carriers holding an operating licence issued by the first Member State.

70. In this connection, I should make clear that SAS is the beneficiary of the measure at issue not by virtue of the fact that it holds an operating licence issued by Sweden, but as an undertaking which suffered damage as a result of the restrictions imposed by that Member State in response to the crisis created by the COVID-19 pandemic and which operates in a market – that of air transport – which has been particularly affected by the exceptional occurrence of the outbreak of that pandemic and for which Sweden considered it necessary to intervene with support measures. As I have already pointed out, in designating SAS as the beneficiary of the measure at issue, Sweden was entitled to take account, inter alia, of considerations pertaining to SAS's contribution – greater in percentage terms than that of other, competing airlines – to the attainment of certain objectives of fundamental importance to that Member State, such as preserving domestic and Scandinavian connectivity, including on less commercial routes, and international connectivity, particularly in the context of a prolonged state of emergency and uncertainty such as was caused by the COVID-19 pandemic. Admittedly, it is clear from the contested decision that only airlines that meet certain conditions, such as holding an operating licence issued by Sweden and being eligible for the Swedish aid scheme, may have access to individual aid measures under Article 107(2)(b) TFEU, such as the measure at issue. That alone, however, does not, in my view, permit the assertion to be made, as is made by the appellant, that the fact that that measure applies solely to SAS in and of itself infringes the principle of non-discrimination on grounds of nationality enshrined in the first paragraph of Article 18 TFEU. In any event, even assuming that the judgment in *International Jet Management*, on which the appellant relies, is relevant for the purposes of the application of the general principle of non-discrimination in the field of State aid, this does not mean that the considerations referred to above, relating to the contribution of SAS to both the connectivity of Sweden and 'intra-Scandinavian accessibility', which are mentioned in recital 26 of the contested decision, may

not, in particular in an emergency such as that created by the COVID-19 pandemic, be likely to constitute 'objective considerations independent of the nationality of the persons concerned' and not considerations of a purely economic nature within the meaning of that judgment.

71. On the basis of the foregoing considerations, I consider that the third argument raised by Ryanair in connection with the first submission in its third ground of appeal is unfounded. Therefore, the part of that submission examined thus far should, in my view, be rejected as unfounded.

3. The third submission

72. In the third submission in its third ground of appeal, which concerns the Commission's examination of the proportionality of the measure at issue, Ryanair makes four distinct criticisms of the reasoning set out in paragraphs 81 to 88 of the judgment under appeal. The first three are directed against paragraph 84 of that judgment, in which the General Court states that 'it is apparent from the contested decision that SAS, because of its larger market shares, has been more affected than the other airlines present in Sweden by the restrictions relating to the COVID-19 pandemic'.

73. The appellant argues, in the first place, that that statement, on the basis of which the General Court found the difference in treatment in favour of SAS introduced by the measure at issue to be sufficiently justified, does not appear in the contested decision, and that the General Court therefore made an inadmissible substitution of grounds.

74. In this connection, I would point out that, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court cannot, under any circumstances, substitute their own reasoning for that of the author of the contested act.[41] Nonetheless, except where there is no material factor to justify that course of action, the General Court may be led, in proceedings for annulment, to interpret the reasoning of the contested act in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons.[42] In the present case, in paragraph 84 of the judgment under appeal, the General Court responded to Ryanair's argument that the mere fact that SAS, whose operations were concentrated in Denmark, Sweden and Norway, accounted for 67% of intra-Scandinavian air traffic and almost half of Sweden's domestic traffic did not justify the difference in treatment resulting from the measure at issue.[43] However, it was on the basis of those figures – which appear in recital 26 of the contested decision and which, therefore, the Commission necessarily took into consideration when assessing the compatibility of the measure at issue – that the General Court stated, first, in paragraph 84 of the judgment under appeal, that it was *apparent* from the contested decision that SAS, because of its larger market shares, had been proportionally more affected than the other airlines present in Sweden by the restrictions introduced because of the COVID-19 pandemic and, secondly, in paragraph 86 of that judgment, that the difference in treatment in favour of SAS had to be considered appropriate for the purpose of making good the damage resulting from those restrictions and did not go beyond what was necessary to achieve that objective, regard being had also to the nature and quantum of the aid in question and the conditions for granting it. It follows that, in paragraphs 82 to 86 of the judgment

[41] See judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 70).

[42] See judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 71).

[43] See paragraphs 82 and 83 of the judgment under appeal.

under appeal, the General Court, in responding to Ryanair's criticism, merely interpreted the contested decision in a manner consistent with the information given in that decision and did not, therefore, make any substitution of its grounds.

75. In the second place, Ryanair argues that the justification proffered by the General Court in paragraph 84 of the judgment under appeal implies that an undertaking which has a large share of the market, and is therefore in a position to wield significant market power, is entitled to capture the entirety of the compensation for damage available under Article 107(2)(b) TFEU. Observance of the principle of proportionality, however, requires that such compensation be shared among all market operators in proportion to the damage suffered. The logic underlying that justification is, moreover, contrary to Article 102 TFEU, in that it reserves special rights to a dominant undertaking, which instead has a special responsibility not to allow its conduct to impair genuine competition.

76. In my view, this argument should also be rejected. It proceeds on the premiss that individual aid designed to compensate only one of the victims of an exceptional occurrence present on the market necessarily infringes the principle of proportionality, which requires that the aid be distributed proportionally among all the victims of that occurrence, and cannot therefore be declared compatible with the internal market under Article 107(2)(b) TFEU. However, that premiss was considered and found not to be well founded in my examination of the first ground of appeal. In that context, I reached the conclusion that such aid is allowed under Article 107(2)(b) TFEU, provided that the choice of beneficiary is not arbitrary and is appropriate and proportionate to the objective pursued by that provision. In an emergency, such as that caused by an occurrence covered by Article 107(2)(b) TFEU, a Member State must be free, subject to supervision by the Commission, to decide in respect of which markets it will intervene with compensatory measures and how to allocate the available resources, so as to ensure, as the General Court suggests in paragraph 87 of the judgment under appeal, that the action it takes is effective. As regards Ryanair's reference to Article 102 TFEU and to the special responsibility of undertakings that hold a 'dominant position' within the meaning of that provision, I would point out, first, that the appellant has neither submitted nor demonstrated that SAS enjoys a dominant position within the meaning of that provision and, secondly, that even if that dominant position were proved, the grant of individual aid does not in itself mean, as the French Government has rightly emphasised, that the beneficiary will be placed in a position to abuse its position on the market merely because its competitors have not benefited from similar measures. Moreover, as is also clear from paragraph 82 of the judgment under appeal, SAS's market share was taken into account by the General Court as a proxy for the greater damage suffered by SAS and it is, therefore, a valid criterion for the adoption of a compensatory measure under Article 107(2)(b) TFEU.

77. In the third place, the appellant argues that it is not clear from paragraph 85 of the judgment under appeal which restrictions have had much more of an effect on SAS than on Ryanair. If these are restrictions associated with the COVID-19 pandemic generally, the General Court's finding is manifestly incorrect, because Ryanair, being a pan-European airline, has been affected by those restrictions at least to the same degree as SAS. If, on the other hand, these are the restrictions adopted by the Swedish authorities, the criterion applied by the General Court is arbitrary, because it necessarily favours Swedish airlines, and also constitutes indirect discrimination that encourages fragmentation of the single market.

78. In that regard, I would reiterate that the objective of the measure at issue was to compensate SAS for the damage resulting from the cancellation or rescheduling of its flights following the imposition of travel restrictions in connection with the COVID-19 pandemic. As the Swedish Government has rightly observed, that damage was identified by applying a criterion – the cancellation or rescheduling of flights – that is independent of the origin of the restrictions. In order to assess the proportionality of the measure at issue, it is therefore not necessary, assuming it is even possible, to establish whether that damage is to be attributed to the restrictions adopted by the Swedish authorities alone, or to all the restrictions implemented by the Member States or by the Member States together with third countries. Moreover, as stated in paragraph 84 of the judgment under appeal, it is apparent from the contested decision that, in line with the territorial nature of State aid, the need to adopt a compensatory measure in favour of SAS was assessed with reference to the Swedish market, the other airlines present on that market and their respective shares of that market. That being so, the criterion which the General Court adopted for assessing the proportionality of the measure at issue, which takes account of the greater damage suffered by SAS as a result of its having a larger share of the Swedish market than the other airlines present on that market, is in no way discriminatory and is the logical consequence of the fact that the measure at issue was intended to make good the repercussions in the Swedish market of the exceptional occurrence that was the COVID-19 pandemic.

79. Lastly, the appellant takes issue with the criterion of 'effectiveness' which appears in paragraph 87 of the judgment under appeal, in which the General Court stated that, bearing in mind the small amount of the measure at issue and in the light of the calculation of the damage sustained by SAS, Ryanair had not established that dividing that amount among all the airlines present in Sweden would not have deprived that measure of its effectiveness. That argument must, in my view, be rejected as ineffective, being directed against a ground included in the judgment under appeal purely for the sake of completeness and therefore incapable of providing any basis for setting that judgment aside. [44]

4. Conclusion regarding the third ground of appeal

80. Given that I have concluded that all the submissions made by the appellant in support of its third ground of appeal should be rejected, that ground must, in my view, be rejected in its entirety.

D. The fourth ground of appeal

81. By its fourth ground of appeal, the appellant argues that the General Court committed various errors of law and manifestly distorted the facts in rejecting the second limb of Ryanair's third plea in law, by which it had alleged that the freedom of establishment and the freedom to provide services had been infringed as a result of the discriminatory nature of the measure at issue. This ground of appeal is divided into three submissions and I shall examine the second and third submissions together.

[44] See, to that effect, judgment of 10 November 2022, *Laboratoire Pareva* v *Commission* (C-702/21 P, not published, EU:C:2022:870, paragraph 52).

1. The first submission

82. By the first submission in its fourth ground of appeal, the appellant argues that, by stating in paragraph 94 of the judgment under appeal that Ryanair had not demonstrated how the exclusive nature of the measure at issue, which benefits SAS alone, '[was] capable of discouraging [Ryanair] from establishing itself in Sweden or providing services from and to that country', the General Court chose an incorrect test for determining whether a national measure impedes or renders less attractive the exercise of the freedom to provide services or the freedom of establishment. The test which emerges from the case-law is rather the ability of the measure in question to discourage any interested operator, and thus, in the present case, airlines other than SAS which operate in Sweden, from establishing themselves or providing services in that Member State.

83. This submission is clearly unfounded. For one thing, it is based on a partial reading of paragraph 94 of the judgment under appeal. In the second sentence of that paragraph, the General Court went on to state that Ryanair had not identified 'the elements of fact or law which cause [the measure at issue] to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which … are nevertheless necessary and proportionate to make good the damage caused to SAS by the exceptional occurrence of the COVID-19 pandemic, in accordance with the requirements laid down in Article 107(2)(b) TFEU'. The General Court thereby clarified the scope of the burden of proof which Ryanair had failed to discharge and freed it from any reference to the situation of a specific airline and, in particular, Ryanair's situation. For another thing, as the French Government has rightly observed, Ryanair's submission fails to take account of the reference in paragraph 94 of the judgment under appeal to the analysis that the General Court had carried out earlier in that judgment regarding the proportionality of the measure at issue, in the context of which the situations of all the airlines present in Sweden were taken into consideration.

2. The second and third submissions

84. By the second submission in its fourth ground of appeal, Ryanair maintains that the statement made in paragraph 94 of the judgment under appeal which I have set out in point 82 of this Opinion is contradictory and incorrect in law, since no demonstration was needed in this case, the fact of being arbitrarily excluded from a benefit reserved to the main Swedish airline in itself discouraging other airlines from exercising the freedom to provide services and freedom of establishment. In this connection, Ryanair refers once again to the judgment in *International Jet Management*. It argues that, in any case, it furnished various items of evidence, including in particular a report prepared by the investment banking division of Goodbody Stockbrokers and an opinion of an expert in air and space law. However, the General Court omitted to consider that evidence. By its third submission, the appellant complains, in essence, that the General Court wrongly rejected the arguments raised by Ryanair at first instance to demonstrate that the restriction on the freedom to provide services and freedom of establishment caused by the measure at issue was not justified.

85. It must be borne in mind that, in order to be caught by the prohibition laid down in Article 107(1) TFEU, the measure in question must confer an advantage selectively on certain undertakings or categories of undertakings or on certain economic sectors, placing them in a more favourable position than others.[45] It follows that, by definition, aid is likely to strengthen

[45] See, to that effect, judgments of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 59), and of 30 June 2016, *Belgium* v *Commission* (C-270/15 P, EU:C:2016:489, paragraph 48).

the position of its beneficiary, to the detriment of its competitors, and to make it more difficult for those competitors to supply their goods or services on the market concerned by the aid. As the Court has recognised, the inevitable consequence of State aid is often protection and, accordingly, some partitioning of the market in question, as far as concerns the goods and services of undertakings which do not derive any benefit from the aid.[46] The appellant is therefore not mistaken to assert, in essence, that any aid that reserves an advantage to a national economic operator is likely to have adverse effects upon the freedom to provide services and/or the freedom of establishment, inasmuch as undertakings operating on the same market as the beneficiary and exercising those freedoms, like all of the beneficiary's competitors, do not enjoy the same advantage.

86. However, such effects do not, as the appellant seems to assert, necessarily cause a restriction of those freedoms within the meaning of the Treaty.[47] In particular, one might ask in what way the grant of individual aid to an undertaking that is active on a market where there is trade with other Member States, apart from affecting such trade, necessarily and systematically entails direct or indirect discrimination on grounds of nationality, simply because the beneficiary of the aid is a national undertaking, or discourages operators in other Member States from establishing themselves or providing services in the Member State in question, or has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.[48] The argument which the appellant raises in the present submission, which assumes such an automatic effect, does not, in itself, discredit the finding, in paragraph 94 of the judgment under appeal, that Ryanair had not furnished evidence demonstrating that the measure at issue, which benefits SAS alone, has a deterrent effect on the exercise of freedom of establishment or the freedom to provide services. As regards the evidence which it did adduce before the General Court in that regard, Ryanair essentially did no more than make a general reference to two experts' reports which it had commissioned, from which no particular relevance to the issue here under consideration can be inferred.

87. The second submission in the fourth ground of appeal must therefore, in my view, be rejected as unfounded. Consequently, the third submission should also be rejected, since it is essentially based on the premiss that the General Court erred in ruling out the existence of a restriction of the freedom of establishment or the freedom to provide services, and thus assumes that the appellant's second submission is accepted.

3. Conclusion regarding the fourth ground of appeal

88. Given that I have concluded that all the submissions made by the appellant in support of its fourth ground of appeal should be rejected, that ground of appeal should, in my view, be rejected in its entirety.

[46] See, to that effect, with reference to the free movement of goods, paragraph 15 of the judgment in *Iannelli & Volpi*.

[47] See, to that effect, the judgment in *Iannelli & Volpi*, paragraph 10.

[48] I would emphasise that, in the present case, the question of possible infringement of the provisions of the Treaty regarding freedom of establishment and the freedom to provide services is raised only with regard to the measure at issue taken in isolation and independently from the Swedish aid scheme.

E. The fifth ground of appeal

89. By its fifth ground of appeal, which is directed against paragraphs 99 and 100 of the judgment under appeal, the appellant argues that the General Court, by rejecting Ryanair's fourth plea in law – by which it had alleged that the failure to initiate a formal investigation procedure infringed its procedural rights – with a simple reference to its examination of the first three pleas in law, which concerned the merits of the assessment of the compatibility of the measure at issue with the internal market, committed various errors of law and distorted the facts.

90. In the judgment under appeal, the General Court, first, pointed out that the fourth plea in law raised by Ryanair was in fact subsidiary in nature, in case the General Court did not examine the merits of the assessment of the aid (paragraph 99). Secondly, the General Court found that that plea 'lack[ed] any independent content', as it merely repeated 'in condensed form the arguments raised under the first to third pleas, without identifying specific evidence relating to potential serious difficulties' (paragraph 100).

91. Ryanair observes, in the first place, that, by contrast with the first three pleas in law, the fourth plea in law did not presuppose proof that the Commission erred in its assessments. A different test therefore applied to the review that the General Court was required to carry out and the General Court was not entitled merely to refer to the outcome of its examination of the first three pleas in law in order to rule that the fourth plea was unfounded. In the second place, Ryanair argues that, contrary to the General Court's statement, it did put forward separate arguments in support of its fourth plea in law, to highlight the gaps in the information at the Commission's disposal at the time when it adopted the contested decision, gaps which could have been filled only by initiating the formal investigation procedure.

92. First of all, it must be remembered that, according to settled case-law, the lawfulness of a decision not to raise objections, based on Article 4(3) of Regulation (EU) 2015/1589,[49] depends on the question whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should objectively have raised doubts as to the compatibility of that measure with the internal market. Proof of the existence of doubts concerning that compatibility is therefore what must be adduced in order to show that the Commission was obliged to initiate the formal investigation procedure under Article 108(2) TFEU. That proof, which requires investigation of both the circumstances in which the decision not to raise objections was adopted and the content of that decision, must be adduced by the person seeking the annulment of that decision on the basis of a body of consistent evidence.[50] The Court of Justice has clarified in this regard that the large amount of the aid granted under the measure concerned and the complexity and novelty of that measure do not, in themselves, constitute indications of serious difficulties such as to require the initiation of the formal investigation procedure.[51]

93. In the present case, as is clear from the considerations set out above, in its first three pleas in law Ryanair had alleged a series of manifest errors of assessment which, in its opinion, vitiated the finding that the measure at issue was compatible with the internal market. By its fourth plea in law, it had alleged that the examination carried out by the Commission was incomplete and

[49] Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ 2015 L 248, p. 9).

[50] Judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663, paragraphs 38 and 40).

[51] Judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663, paragraph 64).

insufficient and had maintained that the outcome of the assessment of the measure's compatibility might have been different upon the conclusion of the formal investigation procedure. In that context, in the first place, referring to the arguments developed in its first and second pleas in law, Ryanair had argued that the contested decision contained various shortcomings; in particular, there was no precise evaluation of the amount of the aid or of the losses sustained by SAS, no consideration was given to the competitive advantage conferred on SAS or to the contribution of other airlines to the connectivity of Sweden, and the analysis of the compatibility of the measure at issue with the principles of non-discrimination, freedom to provide services and freedom of establishment was insufficient. In the second place, Ryanair had argued that the emergency caused by the pandemic did not relieve the Commission of its obligation to initiate the formal investigation procedure in the event of serious difficulties in the assessment of the aid. Lastly, again referring to its first three pleas in law, Ryanair had alleged that each of the complaints raised in connection with those pleas, in relation to which it could have provided decisive information in the context of the formal investigation procedure, would have been sufficient, had such a procedure been initiated, to enable the Commission to conclude that the measure at issue was incompatible with the internal market.

94. In light of the foregoing, it is clear that the General Court was right to find that the arguments raised by Ryanair in the context of its fourth plea in law were not independent. Indeed, as the French Government has pointed out, a parallel existed between those arguments and those raised in connection with the first three pleas in law. That being so, the General Court was not required to examine separately the complaints raised in the first three pleas in law and the same complaints raised in connection with the fourth plea, but was entitled to find that the examination of the latter was subsumed under the examination of the former. As the French Government has observed, the judgment of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*,[52] to which the appellant refers, does not preclude such an approach. On the contrary, in the case that gave rise to that decision, the General Court examined together the two pleas for annulment raised in the action, relating respectively to the existence of serious difficulties and to the merits of the Commission's assessments,[53] and ruled out the former after finding that there was nothing to call into question the merits of the latter,[54] without that approach incurring the censure of the Court of Justice.

95. In that context, the appellant's reference to the finding in paragraph 49 of the judgment under appeal that the method established by the Commission for calculating the damage did not completely prevent the assessment of the damage from also including the consequences of decisions taken by SAS having no direct link with the COVID-19 pandemic is irrelevant because, in light of the context in which that method was established and of all the assessments made by the General Court, such a finding does not support the conclusion that, in the General Court's view, the Commission was faced with serious difficulties such that it could not rule out the existence of a real risk of overcompensation and might question the compatibility of the measure at issue with the internal market.[55] The same applies to the General Court's findings regarding the lack of evidence that the measure at issue had any deterrent effect on the freedom to provide services or the freedom of establishment. Lastly, as regards the appellant's reference to the question, which it regards as novel, of the concurrent application of measures under Article 107(2)(b) TFEU and under Article 107(3)(b) TFEU, I would observe, first, that, as noted in point 21 of this Opinion, the contested decision in any event ruled out any cumulative grant to SAS of aid under those two

52 C-431/07 P, EU:C:2009:223, paragraph 66.

53 See judgment of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission* (C-431/07 P, EU:C:2009:223, paragraph [67]).

54 See judgment of 4 July 2007, *Bouygues and Bouygues Télécom* v *Commission* (T-475/04, EU:T:2007:196, paragraphs 126, 155 and 156).

55 See point 37 of this Opinion.

provisions and, secondly, that, as already mentioned, the novelty of the measure at issue does not, in itself, constitute an indication of serious difficulties such as to require the initiation of the formal investigation procedure.

96. On the basis of all of the foregoing, I am of the view that the fifth ground of appeal should be rejected as unfounded.

F. The sixth ground of appeal

97. By its sixth ground of appeal, which is directed against paragraphs 105 to 116 of the judgment under appeal, the appellant claims that the General Court erred in law and manifestly distorted the facts in rejecting Ryanair's fifth plea in law, which alleged infringement of the second paragraph of Article 296 TFEU. First, according to the appellant, the General Court incorrectly applied the case-law of the Court of Justice regarding the scope of the duty to state reasons, inasmuch as the General Court held that the factual context of the COVID-19 pandemic had to be taken into account in the assessment of the adequacy and sufficiency of the statement of reasons for the contested decision. Secondly, the appellant argues that the observance of guarantees such as the right to a sufficiently reasoned decision is all the more important when, as in the present case, the EU institutions have a broad discretion.

98. It must be borne in mind that, in accordance with consistent case-law, to which the General Court referred in paragraph 105 of the judgment under appeal, the statement of reasons required by Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[56] It is on the basis of those principles that the appellant's submissions must be considered.

99. As regards the first of those submissions, it seems obvious to me that the General Court's reference to the context in which the measure arose, even if that context were deemed to encompass matters of a purely factual nature, cannot be understood in the sense that a reference to such a context allows the EU institutions to meet a lower standard of reasoning than is required of them under Article 296 TFEU, as interpreted in the case-law mentioned above. It follows that Ryanair would be right to complain of an infringement of that provision if, in the judgment under appeal, the General Court had, as the appellant alleges, justified any failure to state reasons by referring to the emergency caused by the COVID-19 pandemic.

100. However, as both the French Government and the Commission have rightly observed, in no part of the grounds of that judgment addressing the fifth plea in law can any reference whatsoever be found to the crisis caused by the COVID-19 pandemic as an element of the context to be taken

[56] Judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube* (C-891/19 P, EU:C:2022:38, paragraphs 87 and 88).

into account for the purpose of assessing the adequacy and sufficiency of the statement of reasons for the contested decision, in accordance with the case-law mentioned in the preceding point. The first submission should, therefore, be rejected.

101. As regards the second submission, an examination of the grounds of the judgment under appeal does not disclose any misconstruction of Article 296 TFEU on the General Court's part in relation, in particular, to the nature of the act in question, which is to say the decision not to raise objections under Article 108(3) TFEU. I would point out, in this connection, as the General Court did in paragraphs 106 and 107 of the judgment under appeal, that the Court of Justice has already had occasion to clarify that such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and that even a succinct statement of reasons for that decision must be regarded as sufficient if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties.[57] In the present case, the General Court considered, in paragraphs 108 to 114 of the judgment under appeal, the various lacunae in the reasoning which Ryanair alleged in its application – namely, a failure to assess whether the aid complied with the principle of equal treatment, freedom of establishment and the freedom to provide services, a failure to assess the value of the competitive advantage conferred on SAS, a failure properly to assess the method for quantifying the damage and the amount of the aid, and a lack of information on the reasons for which SAS was treated differently from other Swedish airlines which had suffered damage because of the COVID-19 pandemic – and found there to be no such lacunae and concluded, in paragraph 115 of that judgment, that the contested decision contained a sufficient statement of reasons. Therefore, contrary to the appellant's assertions, the General Court's review is not vitiated by any error as to the required standard of reasoning in respect of the act in question or the conclusions which the General Court reached regarding the adequacy of the statement of reasons for the contested decision. I would also point out that many of the submissions made by Ryanair in connection with its fifth plea in law, and now repeated in the sixth ground of appeal, are in fact more in the way of a complaint that the Commission's examination was incomplete, rather than that it failed to state reasons. The answer to those submissions is thus to be found in the passages of the judgment under appeal relating to the General Court's examination of the first three pleas in law, rather than in paragraphs 108 to 114 of that judgment, relating to a breach of the duty to state reasons.

102. On the basis of the foregoing, the sixth ground of appeal should, in my view, be rejected as unfounded.

G. Conclusion regarding the appeal

103. In light of all the foregoing considerations, all the grounds of appeal must, in my view, be rejected and the appeal must therefore be dismissed in its entirety.

[57] See judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663, paragraph 199).

IV. Conclusion

104. In light of all of the foregoing, I suggest that the Court dismiss the appeal. I also suggest that, in accordance with Article 184(1) of the Rules of Procedure of the Court of Justice, the Court order Ryanair to pay the costs incurred by the Commission and SAS and order the French Republic and the Kingdom of Sweden to bear their own costs.