



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

23 November 2023*

(Appeal – State aid – Article 107(2)(b) TFEU – French air transport market – Aid scheme notified by the French Republic – Deferral of the payment of airline taxes and charges to support airlines amid the COVID-19 pandemic – Temporary Framework for State aid measures – Decision by the European Commission not to raise objections – Aid intended to make good the damage suffered as a result of an exceptional occurrence – Principles of proportionality and non-discrimination – Free provision of services)

In Case C-210/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 2 April 2021,

Ryanair DAC, established in Swords (Ireland), represented by V. Blanc, F.-C. Laprèvote and E. Vahida, avocats, I.G. Metaxas-Maranghidis, dikigoros, D. Pérez de Lamo and S. Rating, abogados,

appellant,

the other parties to the proceedings being:

European Commission, represented by L. Flynn, C. Georgieva, S. Noë and F. Tomat, acting as Agents,

defendant at first instance,

French Republic, represented initially by A.-L. Desjonquères, P. Dodeller, T. Stéhelin and N. Vincent, and subsequently by A.-L. Desjonquères, T. Stéhelin and N. Vincent, and finally by A.-L. Desjonquères and T. Stéhelin, acting as Agents,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin (Rapporteur) and L.S. Rossi, Judges,

Advocate General: G. Pitruzzella,

* Language of the case: English.

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2022,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 By its appeal, Ryanair DAC seeks to have set aside the judgment of the General Court of the European Union of 17 February 2021, *Ryanair v Commission* (T-259/20, ‘the judgment under appeal’, EU:T:2021:92), by which the General Court dismissed its action for annulment of Commission Decision C(2020) 2097 final of 31 March 2020 on State aid SA.56765 (2020/N) – France – COVID-19 – Deferral of the payment of airline taxes in favour of public air transport undertakings (OJ 2020 C 294, p. 8; ‘the decision at issue’).

The background to the dispute and the decision at issue

- 2 The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.
- 3 On 24 March 2020, the French Republic notified the European Commission, in accordance with Article 108(3) TFEU, of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets owed by the airlines (‘the aid scheme at issue’).
- 4 The objective of the aid scheme at issue was to ensure that airlines holding an operating licence issued in France pursuant to Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) (‘the French licence’) would be able to maintain sufficient liquidity until the restrictions or prohibitions on movement linked to the COVID-19 pandemic are lifted and normal commercial activity resumed. It provided that the payment of civil aviation tax and solidarity tax on airline tickets owed for the period from March to December 2020 would be deferred to 1 January 2021 and would be spread over a period of 24 months, until 31 December 2022. The precise amount of the taxes was to be determined by reference to the number of passengers carried and the number of flights operated from a French airport. In addition, the aid scheme at issue was intended to benefit public air transport undertakings holding a French licence, which meant that they had their ‘principal place of business’ in France.
- 5 On 31 March 2020, the Commission adopted the decision at issue, by which, after concluding that the aid scheme at issue constituted State aid within the meaning of Article 107(1) TFEU, it assessed the compatibility of that aid with the internal market and more particularly in the light of Article 107(2)(b) TFEU.
- 6 In that regard, in the first place, the Commission considered in particular that the COVID-19 pandemic constituted an exceptional occurrence within the meaning of Article 107(2)(b) TFEU and that there was a causal link between the damage caused by that occurrence and the harm

compensated by the aid scheme at issue, since that aid scheme was aimed at reducing the liquidity crisis of airlines attributable to that pandemic, by providing a response to the cash-flow needs of public air transport undertakings holding a French licence.

- 7 In the second place, after observing that it followed from the case-law of the Court of Justice that only economic disadvantages caused directly by an exceptional occurrence might be compensated for and that the compensation could not exceed the amount of those disadvantages, the Commission considered, first, that the aid scheme at issue was proportionate in the light of the amount of the damage expected since the amount of the projected aid seemed to be lower than the commercial damage expected from the crisis resulting from the COVID-19 pandemic.
- 8 Second, the Commission considered that the aid scheme at issue had been established in a non-discriminatory fashion, since the beneficiaries of the scheme included all airlines holding French licences. In that regard, it emphasised that the fact that the aid was granted by a deferral of certain taxes also imposed on the budgets of airlines holding operating licences issued by other Member States did not affect its non-discriminatory nature, in so far as the aid scheme at issue was intended to compensate for the damage sustained by airlines holding French licences. The aid scheme at issue therefore remained proportionate in the light of its objective of compensating for the damage caused by the COVID-19 pandemic. In particular, the aid scheme at issue contributed to preserving the structure of the aviation sector for airlines holding French licences. Consequently, the Commission took the view that the French authorities had demonstrated at that stage that the aid scheme at issue did not exceed the damage caused directly by the crisis attributable to the COVID-19 pandemic.
- 9 The Commission therefore decided, having regard to the commitments given by the French Republic and, in particular, the undertaking to communicate to the Commission and to submit for its agreement a detailed methodology of the way in which that Member State intended to quantify, *ex post facto* and for each beneficiary, the amount of the damage associated with the crisis caused by the COVID-19 pandemic, not to raise objections to the aid scheme at issue.

The procedure before the General Court and the judgment under appeal

- 10 By application lodged at the Registry of the General Court on 8 May 2020, Ryanair brought an action for annulment of the decision at issue.
- 11 In support of its action, Ryanair put forward four pleas in law, alleging, first, infringement of the principles of non-discrimination on grounds of nationality and the free provision of services; second, a manifest error of assessment in the examination of the proportionality of the aid scheme at issue in the light of the damage caused by the COVID-19 pandemic; third, that the Commission had infringed its procedural rights by refusing to initiate the formal investigation procedure despite the existence of serious doubts which should have led to the initiation of that procedure; and, fourth, that the Commission had infringed the second paragraph of Article 296 TFEU.
- 12 By the judgment under appeal, the General Court rejected as unfounded the first, second and fourth pleas in law raised by Ryanair. As regards the third plea, it held, in particular in view of the grounds which had led to the rejection of the first two pleas in the action, that it was not necessary to examine its merits. Consequently, the General Court dismissed the action in its entirety, without ruling on the admissibility of that action.

Forms of order sought by the parties before the Court of Justice

- 13 By its appeal, Ryanair claims that the Court should:
- set aside the judgment under appeal;
 - annul the decision at issue;
 - order the Commission and the French Republic to pay the costs or, in the alternative;
 - set aside the judgment under appeal, and
 - refer the case back to the General Court and reserve the costs.
- 14 The Commission contends that the Court should:
- dismiss the appeal and
 - order the appellant to pay the costs.
- 15 The French Republic contends that the Court should dismiss the appeal.

The appeal

- 16 Ryanair relies on five grounds in support of its appeal. The first ground of appeal alleges errors of law in that the General Court wrongly rejected the plea at first instance alleging infringement of the principle of non-discrimination. The second ground of appeal alleges an error of law and a manifest distortion of the facts in the examination of the plea alleging infringement of the free movement of services. The third ground of appeal alleges an error of law and a manifest distortion of the facts in the application of Article 107(2)(b) TFEU and of the principle of proportionality in relation to the amount of damage suffered by the beneficiaries of the aid scheme at issue. The fourth ground of appeal alleges an error of law and a manifest distortion of the facts in so far as the General Court held that the Commission had not infringed its obligation to state reasons under the second paragraph of Article 296 TFEU. The fifth ground of appeal alleges an error of law and a manifest distortion of the facts by the General Court in deciding not to examine the substance of the third plea in the action at first instance, alleging infringement of the appellant's procedural rights.

The first ground of appeal

Arguments of the parties

- 17 By its first ground of appeal, which comprises four parts and relates to paragraphs 28 to 51 of the judgment under appeal, Ryanair submits that the General Court erred in law in finding that the aid scheme at issue did not infringe the principle of non-discrimination on grounds of nationality.

- 18 By the first part of its first ground of appeal, Ryanair argues that the General Court failed properly to apply the principle of prohibition of discrimination on grounds of nationality, which is an essential principle of the EU legal order. Although the General Court acknowledged, in paragraphs 31 and 32 of the judgment under appeal, that the difference in treatment established by the aid scheme at issue could be equated with discrimination in the light of one of the eligibility criteria, namely the holding of a French licence, it wrongly held that such discrimination had to be assessed only in the light of Article 107(2)(b) TFEU, on the ground that that provision was a special provision within the meaning of Article 18 TFEU. Limiting the benefit of the aid scheme at issue to air transport undertakings holding a French licence amounts to direct discrimination on grounds of nationality since, in order to obtain such a licence, an airline must necessarily have its principal place of business in France.
- 19 Furthermore, the appellant submits that the General Court should have examined whether such discrimination was justified on grounds of public policy, public security or public health, within the meaning of Article 52 TFEU, or, in any event, whether it was based on objective considerations, irrespective of the nationality of the persons concerned.
- 20 By the second part of that ground of appeal, the appellant submits that, in paragraphs 33 and 34 of the judgment under appeal, the General Court erred in law and manifestly distorted the facts as regards the determination of the objective of the aid scheme at issue. In particular, the General Court was wrong in holding that the objective of that scheme was to make good the damage caused by the COVID-19 pandemic for ‘airlines [which had been] hit hard’ or to mitigate the damage suffered by the airlines operating in the territory concerned and that that objective was consistent with Article 107(2)(b) TFEU, whereas it is apparent from the decision at issue that that objective was to allow airlines ‘holding a French licence’ to maintain sufficient liquidity.
- 21 By the third part of its first ground of appeal, Ryanair submits that the judgment under appeal is vitiated by an error of law and a distortion of the facts in so far as the General Court held, in paragraphs 36 to 41 of the judgment under appeal, that the aid scheme at issue, from which only airlines holding a French licence benefit, was appropriate to achieve its objective.
- 22 Ryanair submits, primarily, that the decision at issue does not contain any reasoning capable of justifying the use of an eligibility criterion linked to the holding of a French licence and that the General Court, by relying in that regard on grounds not provided for in the decision at issue, in paragraphs 37 to 39 of the judgment under appeal, provided substitute grounds, even though it did not have the competence to do so.
- 23 In the alternative, Ryanair submits that the three grounds put forward by the General Court for that purpose are vitiated by errors of law or that they distort the facts.
- 24 In that regard, it argues, the General Court misinterpreted Regulation No 1008/2008 by holding, in paragraphs 37 to 39 of the judgment under appeal, first, that a Member State which has granted an operating licence to an airline may control the use of the aid which it has granted to that airline, second, that that Member State can ensure that that airline pays the taxes the payment of which has been deferred, so as to reduce its loss of tax revenue in the medium term, and, third, that airlines holding an operating licence have a closer link with the economy of the Member State which granted that licence. There is, it submits, no difference, in terms of financial controls, of the risk of default in the payment of taxes and links with the economy of the Member State which granted the aid, between airlines which hold an operating licence issued by that Member State and those which hold an operating licence issued by another Member State. The General

Court thus read into Regulation No 1008/2008 aid-granting and aid-monitoring powers that are not to be found in that regulation and drew the wrong legal conclusions from the provisions of that regulation on the financial conditions for the grant of an operating licence.

- 25 By the fourth part of that ground of appeal, Ryanair submits, in essence, that the General Court erred in law and manifestly distorted the facts in so far as it held, in paragraphs 43 to 48 of the judgment under appeal, that the aid scheme at issue was proportionate.
- 26 First, in order to assess the proportionality of the eligibility criterion linked to holding a French licence, the General Court relied, in paragraph 43 of the judgment under appeal, on a ground alleging that the airlines holding a French licence were the most severely affected by the travel restrictions and lockdown measures adopted by the French authorities, which did not appear in the decision at issue. That ground cannot constitute an appropriate benchmark for assessing the proportionality of the aid scheme at issue if, as the General Court claims, the exceptional occurrence presented as the cause of the damage suffered includes both the COVID-19 pandemic and the travel restrictions adopted by the French authorities.
- 27 Second, in paragraph 43 of the judgment under appeal, the General Court justified that eligibility criterion, which is both arbitrary and discriminatory, by relying on the questionable argument that the Member States do not have unlimited resources. According to Ryanair, aid schemes may be put in place for capped amounts and on the basis of non-discriminatory criteria, so as to preserve budgetary resources while respecting Articles 18 and 56 TFEU and fulfilling the stated objective of the aid.
- 28 Third, the General Court failed, in the judgment under appeal, to assess the competitive effect of the aid for the purposes of assessing the proportionality of that aid. Such an assessment is, however, essential in order to determine, in the General Court's own words, whether the aid scheme does not go 'beyond what is necessary' to attain its stated objective.
- 29 Fourth, the General Court wrongly refused, in paragraph 46 of the judgment under appeal, to examine a different aid scenario on the ground that the Commission could not be entrusted with '[examining] every alternative measure possible'. In that regard, the General Court wrongly relied on its judgment of 6 May 2019, *Scor v Commission* (T-135/17, EU:T:2019:287), from which it is apparent only that the Commission was not required to examine all alternative measures in its statement of reasons.
- 30 In addition, the ground set out by the General Court in paragraph 47 of the judgment under appeal, according to which the hypothetical alternative measure, consisting of extending the aid scheme at issue to airlines not established in France, would not have made it possible to achieve the objective the aid scheme at issue, is based, by way of a cross-reference to paragraphs 37 to 41 of that judgment, on the erroneous legal assumption that, under Regulation No 1008/2008, airlines holding an operating licence issued by another Member State can more easily interrupt their routes to and from France.
- 31 The Commission and the French Republic contend that the first ground of appeal must be rejected as unfounded.

Findings of the Court

- 32 It should be recalled, as a preliminary point, that, according to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, that intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 28 June 2018, *Germany v Commission*, C-208/16 P, EU:C:2018:506, paragraph 79 and the case-law cited).
- 33 It is therefore with regard to measures having such characteristics and such effects, in so far as they are liable to distort competition and affect trade between the Member States, that Article 107(1) TFEU lays down the principle that State aid is incompatible with the internal market.
- 34 In particular, the requirement of selectivity arising from Article 107(1) TFEU presupposes that the Commission will establish that the economic advantage, understood in the broad sense, arising directly or indirectly from a particular measure specifically benefits one or more undertakings. It falls to the Commission to show, in particular, that the measure in question creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others (judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 103 and the case-law cited).
- 35 However, Article 107(2) and (3) TFEU provides for certain derogations from the principle that State aid is incompatible with the internal market, referred to in paragraph 33 of the present judgment, such as that set out in Article 107(2)(b) TFEU, concerning aid 'to make good the damage caused by natural disasters or exceptional occurrences'. Accordingly, State aid granted for the purposes of, and in accordance with, the conditions laid down by those derogating provisions, notwithstanding the fact that it has the characteristics and produces the effects referred to in paragraph 32 of the present judgment, is compatible with, or is capable of being declared compatible with, the internal market.
- 36 It follows that, unless those derogating provisions are to be deprived of all practical effect, State aid which is granted in accordance with those requirements, that is to say, for the purposes of an objective recognised therein and within the limits of what is necessary and proportionate to the achievement of that objective, cannot be held to be incompatible with the internal market having regard solely to the characteristics or solely to the effects, referred to in paragraph 32 of the present judgment, or effects which are inherent in any State aid, that is to say, *inter alia*, for reasons relating to whether the aid is selective or distorts competition (judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 107 and the case-law cited).
- 37 Therefore, aid cannot be considered incompatible with the internal market for reasons that are solely linked to whether the aid is selective or distorts or threatens to distort competition (judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 108).

- 38 That said, as regards the first part of its first ground of appeal by which Ryanair claims that the General Court erred in law in not applying, in paragraph 32 of the judgment under appeal, the principle of non-discrimination on grounds of nationality laid down in Article 18 TFEU, but examined the measure at issue in the light of Article 107(2)(b) TFEU, it should be recalled that it is clear from the case-law of the Court of Justice that the procedure provided for in Article 108 TFEU must never produce a result that is contrary to the specific provisions of the FEU Treaty. Accordingly, State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (judgments of 31 January 2023, *Commission v Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraph 96, and of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 109).
- 39 However, as regards Article 18 TFEU specifically, it is settled case-law that that article is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty lays down no specific prohibition of discrimination (judgments of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 25, and of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 110).
- 40 Since, as has been recalled in paragraph 35 of the present judgment, Article 107(2) and (3) TFEU provides for derogations from the principle, referred to in paragraph 1 of that article, that State aid is incompatible with the internal market, and thus allows, in particular, differences in treatment between undertakings, subject to fulfilment of the requirements laid down by those derogations, those derogations must be regarded as ‘special provisions’ provided for in the Treaties, within the meaning of the first paragraph of Article 18 TFEU (judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 111).
- 41 It follows that the General Court did not err in law in finding, in paragraph 32 of the judgment under appeal, that Article 107(2)(b) TFEU constituted such a specific provision and that it was necessary only to examine whether the difference in treatment brought about by the measure at issue was permitted under that provision.
- 42 It follows that the differences in treatment entailed by the measure at issue likewise do not have to be justified on the grounds set out in Article 52 TFEU, contrary to what Ryanair maintains.
- 43 In the light of the foregoing, the first part of the first ground of appeal must be rejected as unfounded.
- 44 By the second part of that ground of appeal, Ryanair submits, in essence, that the General Court, in paragraphs 33 and 34 of the judgment under appeal, incorrectly identified the objective of the aid scheme at issue, as set out in the decision at issue, and that it wrongly considered, inter alia, that that objective consisted of mitigating the damage suffered by the airlines operating in the territory concerned.
- 45 In that regard, the General Court, in paragraph 33 of the judgment under appeal, noted, in essence, that the objective of the aid scheme at issue was, in accordance with Article 107(2)(b) TFEU, in general, to make good the damage in the air transport sector resulting from an exceptional occurrence, namely the COVID-19 pandemic, and, more specifically, to alleviate, by the grant of a deferral, the financial burden of airlines severely affected by the travel restrictions and lockdown measures taken by the French Republic in order to deal with that pandemic.

- 46 That description of the objective pursued by that scheme is consistent with that set out in the decision at issue, in particular in recitals 2 and 3 thereof, in Section 2.1 entitled ‘Objective of the measure’, cited in the judgment under appeal. By contrast, contrary to what Ryanair maintains, it is not apparent from that decision that holding a French licence constituted an objective in itself of the aid scheme at issue, but rather that the holding of such a licence constituted, as the General Court held, in essence, in paragraph 33 of the judgment under appeal, an eligibility criterion for that scheme.
- 47 To the extent that, by the second part of that ground of appeal, Ryanair also alleges that the General Court distorted the facts submitted to it, it should be pointed out that, in accordance with the settled case-law of the Court of Justice, it follows from the second subparagraph of Article 256(1) TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts (judgment of 25 June 2020, *SatCen v KF*, C-14/19 P, EU:C:2020:492, paragraph 103 and the case-law cited).
- 48 It follows that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (judgment of 25 June 2020, *SatCen v KF*, C-14/19 P, EU:C:2020:492, paragraph 104 and the case-law cited).
- 49 Where an appellant alleges distortion of the evidence by the General Court, that person must, under 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, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that person’s view, led to such distortion. In addition, according to the settled case-law of the Court of Justice, that distortion must be obvious from the documents in the Court’s file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 25 June 2020, *SatCen v KF*, C-14/19 P, EU:C:2020:492, paragraph 105 and the case-law cited).
- 50 In the present case, it should be noted that Ryanair does not specify, in support of the second part of the first ground of appeal, the evidence which the General Court allegedly distorted in determining the objective of the aid scheme at issue and, a fortiori, does not demonstrate how that evidence was distorted.
- 51 In those circumstances, the second part of the first ground of appeal must be rejected as unfounded.
- 52 By the third part of that ground of appeal, Ryanair submits that the General Court erred in law and manifestly distorted the facts by holding, in paragraphs 36 to 41 of the judgment under appeal, that the aid scheme at issue, in so far as it benefited only airlines holding a French licence, was appropriate for achieving its objective.
- 53 In that regard, Ryanair submits, primarily, in essence, that, by stating, inter alia, in paragraph 37 of the judgment under appeal, that the criterion of holding a licence issued by the Member State granting the aid made it possible to control the manner in which the aid was used by the

beneficiaries, the General Court put forward a justification which did not appear in the decision at issue, with the result that it substituted its own grounds for those relied on by the Commission in support of that decision.

- 54 It is, admittedly, true that, according to the case-law of the Court of Justice, 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 (see, to that effect, 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 and the case-law cited). However, it should be noted that, in recitals 45 and 46 of the decision at issue, the Commission refers to the fact that airlines which hold a French licence have their principal place of business in France and are subject there to regular monitoring of their financial situation. Accordingly, in paragraph 37 of the judgment under appeal, the General Court merely explained the reasoning of the decision at issue and, more specifically, drew some conclusions from the evidence set out therein, without, however, substituting the grounds of that decision.
- 55 In the alternative, Ryanair contests the assertions of the General Court, in paragraphs 37 to 39 of the judgment under appeal, according to which, first, a Member State which has granted a licence to an airline was able to control the use of the aid which it granted to that airline, second, that that Member State was able to ensure that that airline paid the taxes the payment of which had been deferred, so as to reduce its shortfall in tax revenue as low as possible in the medium term, and, third, that airlines holding a licence have a closer link with the economy of the Member State which granted that licence. It was on the basis of those assertions that the General Court held, in paragraph 40 of that judgment, that, by limiting the benefit of the aid scheme at issue solely to airlines holding a French licence and therefore having their principal place of business in France, the French Republic had legitimately sought, in essence, to ensure that there is a permanent link between it and the airlines benefiting from the deferral, and, in paragraph 41 of that judgment, that the eligibility criterion relating to the holding of such a licence was therefore appropriate for achieving the objective to make good the damage caused by an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.
- 56 In that regard, first, the General Court relied on Regulation No 1008/2008, in paragraphs 37 to 39 of the judgment under appeal, only in order to establish the specific nature and stability of the link between airlines holding an operating licence and the Member State which granted that licence, in the light of the provisions of that regulation governing their relations and, in particular, the financial checks exercised by the authorities of that Member State on those airlines. However, the fact that those checks do not relate specifically to the aid granted to airlines holding a French licence, or that checks on the use of that aid may also be carried out on airlines which do not hold a French licence, is irrelevant to the assessment of that link, for the purposes of determining whether the eligibility criteria are appropriate for achieving the objective pursued by the aid scheme at issue, as Ryanair maintains.
- 57 Although, second, Ryanair alleges distortion of the facts as regards the considerations referred to in paragraph 55 of the present judgment, it is sufficient to note that Ryanair has not put forward any argument capable of demonstrating that the General Court distorted the facts in that way, in accordance with the case-law referred to in paragraph 49 of the present judgment.
- 58 In the light of the foregoing, the third part of the first ground of appeal must be rejected as unfounded.

- 59 By the fourth part of that ground of appeal, Ryanair alleges, in essence, that the General Court erred in law and manifestly distorted the facts in so far as the General Court held, in paragraphs 43 to 48 of the judgment under appeal, that the aid scheme at issue was proportionate.
- 60 The first two complaints in this part are directed against paragraph 43 of the judgment under appeal, in which the General Court held that, ‘in applying the criterion of a French licence, the Member State concerned, taking into account ... the fact that the Member States do not have unlimited resources, reserved the benefit of the aid scheme at issue to the airlines which were most severely affected by the travel restrictions and lockdown measures adopted by that Member State, which took effect, by definition, on its territory’.
- 61 In that regard, it should be noted that, in paragraph 43 of the judgment under appeal, the General Court referred, for the purposes of assessing the proportionality of the aid scheme at issue, to data produced by the Commission relating to flights in France, from France or to France, respectively, by airlines holding a French licence and by those not holding such a licence. The General Court inferred from those data, in paragraph 44 of the judgment under appeal, that those first airlines, which alone were eligible for the aid scheme at issue, were proportionately much more severely affected than the appellant, which, in the light of those data, generated only 8.3% of its business in France, going to France and coming from France, against 100% for some of the eligible airlines.
- 62 It is not apparent from the arguments put forward by the appellant in the first two complaints that the abovementioned reasoning is wrong in law or based on a manifestly incorrect assessment which constitutes a distortion of the evidence.
- 63 In particular, first, the General Court cannot be criticised for having substituted its own reasoning for that of the decision at issue, within the meaning of the case-law referred to in paragraph 54 of the present judgment, since it is apparent, *inter alia*, from recitals 2 and 3 of that decision that the objective of the aid scheme at issue was to provide compensation to airlines severely affected by the measures restricting travel which were taken as a result of the COVID-19 pandemic. In order to assess whether the eligibility criterion relating to the holding of a French licence made it possible to ensure the proportionality of that scheme, the General Court merely found, referring to the evidence adduced before it, that the companies holding such a licence were in fact the most affected by those measures.
- 64 Second, the General Court cannot be criticised for having justified that eligibility criterion, in paragraph 43 of the judgment under appeal, by the fact that ‘the Member States do not have unlimited resources’, that statement being merely part of the explanation of the context in which that eligibility criterion was adopted.
- 65 It follows that the first two complaints of the fourth part of the first ground of appeal must be rejected as unfounded.
- 66 In so far as, by the third complaint in the fourth part of the first ground of appeal, Ryanair complains that the General Court failed to examine, in the context of the proportionality of the aid scheme at issue, the competitive effects of that aid, it should be noted that the appellant did not raise, at first instance, a complaint alleging that it was necessary to examine, for the purposes of proportionality, the competitive effects of the aid or, more specifically, to weigh up those effects.

- 67 Under Article 170(1) of the Rules of Procedure, the subject matter of the proceedings before the General Court may not be changed in the appeal. Thus, according to settled case-law, the jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas and arguments debated before the General Court. A party cannot, therefore, put forward for the first time before the Court of Justice a complaint which it has not raised before the General Court since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court (judgment of 6 October 2021, *Sigma Alimentos Exterior v Commission*, C-50/19 P, EU:C:2021:792, paragraphs 37 and 38).
- 68 Accordingly, the third complaint in the fourth part of the first ground of appeal, alleging the need to examine the competitive effects of the aid, must be rejected as inadmissible, since that complaint was raised for the first time in the present appeal.
- 69 As regards the fourth complaint in this part of the appellant's first ground of appeal, directed against paragraph 46 of the judgment under appeal, it should be noted that it was only for the sake of completeness that the General Court held, in paragraph 46, that the Commission was not required to rule on all the alternative measures to the aid scheme at issue. The General Court held in paragraph 47 of its judgment, in any event, that the alternative measures proposed by the applicant at first instance would not have enabled the objective pursued by the aid scheme at issue to be achieved in so precise a manner and without a risk of overcompensation. It relied, to that end, on paragraphs 37 to 41 of that judgment, which, as is apparent from paragraphs 55 to 57 of the present judgment, are not vitiated by errors of law.
- 70 That complaint must therefore be rejected as ineffective.
- 71 In the light of the foregoing, the fourth part of the first ground of appeal must be rejected and, consequently, that ground of appeal must be rejected in its entirety.

The second ground of appeal

Arguments of the parties

- 72 By its second ground of appeal, Ryanair submits that, in paragraphs 55 to 57 of the judgment under appeal, the General Court erred in law and manifestly distorted the facts by rejecting the fourth limb of the first plea in law in its action at first instance, by which it alleged infringement of the principle of the free provision of services.
- 73 By the first part of that ground of appeal, Ryanair claims that, contrary to what is stated in paragraph 56 of the judgment under appeal, it had relied, before the General Court, on an infringement of Regulation No 1008/2008, claiming that the principle of the free provision of services in the air transport sector had been infringed. By rejecting its arguments on the incorrect ground that 'the [appellant] does not claim that there has been any infringement of that regulation', the General Court manifestly distorted its written pleadings and failed to state the reasons for its judgment to the requisite legal standard.
- 74 By the second part of this ground of appeal, Ryanair submits that the General Court held, in paragraph 57 of the judgment under appeal, in a contradictory and incorrect manner, that Ryanair had not established how its exclusion from the aid scheme at issue was such as to deter it

from providing services to and from France. The fact that airlines are excluded from an advantage reserved for what it calls ‘French airlines’ is sufficient to demonstrate that the free provision of services is discouraged, without any further demonstration being required. In any event, Ryanair produced abundant evidence showing that a measure such as the aid scheme at issue, which makes the grant by a Member State of an advantage subject to the holding of a licence issued by that Member State, places at a disadvantage, in practice, only air carriers with their registered office in another Member State.

- 75 The General Court therefore distorted the evidence by failing to examine the significant elements provided by the appellant regarding the restrictive effect of the aid scheme at issue on the free provision of services.
- 76 By the third part of the second ground of appeal, Ryanair submits that, in its action at first instance, it demonstrated to the requisite legal standard, contrary to what the General Court held in paragraph 57 of the judgment under appeal, that the restrictive effects of the aid scheme at issue on the free provision of services were not justified.
- 77 First, it argues, the General Court did not properly examine that restriction in the light of the relevant criteria of appropriateness and proportionality, which are not those of Article 107 TFEU.
- 78 Second, according to Ryanair, the General Court erred in law in finding, in particular in paragraph 46 of the judgment under appeal, that it was not necessary to examine, in the context of the assessment of the appropriateness and proportionality of the restriction on the free provision of services, whether there were any potentially less restrictive alternative measures.
- 79 In that regard, Ryanair states that it provided ample evidence showing that the aid scheme at issue had restrictive effects on the free provision of services which were unnecessary, inappropriate and disproportionate in the light of the objective of that scheme, namely to make good the damage caused by the occurrence of the COVID-19 pandemic. Moreover, it mentioned, in that context, an alternative criterion for eligibility of the aid, based on market shares, which would have been less prejudicial to the free provision of services. Moreover, the appellant expressly referred to that criterion in correspondence sent, prior to the adoption of the decision at issue, to the French Secretary of State for Transport and to the European Commissioner for Competition, which it annexed to the application at first instance.
- 80 The Commission and the French Republic contend that the second ground of appeal must be rejected as unfounded.

Findings of the Court

- 81 By the second and third parts of the second ground of appeal, which it is appropriate to examine together and in the first place, Ryanair submits, in essence, that the General Court vitiated the judgment under appeal by errors of law, in paragraph 57 of the judgment under appeal, in so far as it examined the fact that the aid scheme at issue benefited only the ‘French airlines’, namely airlines holding a French licence, solely in the light of the criteria of Article 107 TFEU, instead of verifying whether that measure was justified in the light of the grounds set out in the provisions of the FEU Treaty on the free provision of services. Ryanair, however, submitted to the General Court matters of fact and of law demonstrating an infringement of those provisions.

- 82 In that regard, as has been pointed out in paragraph 38 of the present judgment, the procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of EU law cannot be declared compatible with the internal market.
- 83 However, first, the restrictive effects which an aid measure has on the freedom to provide services still do not constitute a restriction prohibited by the Treaty, since it may be inherent in the very nature of State aid, such as its selective nature (judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 132).
- 84 Second, it is apparent from the case-law of the Court that, where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole with the internal market must therefore of necessity be determined by means of the procedure prescribed in Article 108 TFEU (see, to that effect, judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14; of 31 January 2023, *Commission v Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraph 97; and of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 133).
- 85 In the present case, as is apparent from paragraphs 45 and 46 of the present judgment, although holding a French licence did not in itself constitute the objective of the aid scheme at issue, but rather an eligibility criterion for that scheme, that criterion was, as such, inextricably linked to the object of that scheme, which was, in general, to make good the damage in the air transport sector resulting from an exceptional occurrence, namely the COVID-19 pandemic, and, more specifically, to alleviate, by the grant of a deferral, the financial burden of airlines severely affected by the travel restrictions and lockdown measures taken by the French Republic in order to deal with that pandemic. It follows that the effect of that eligibility criterion of the aid scheme at issue on the internal market cannot be examined separately from the effect of the compatibility of that aid measure as a whole with the internal market by means of the procedure prescribed in Article 108 TFEU.
- 86 It follows from the reasons set out above and from the case-law recalled in paragraphs 36 and 37 of the present judgment that the General Court did not err in law by holding, in paragraph 57 of the judgment under appeal, in essence that, in order to establish that the measure at issue, because it benefited only airlines holding an operating licence issued by France, and not, inter alia, Ryanair, constituted an obstacle to the freedom to provide services, Ryanair should have demonstrated, in the present case, that that measure produced restrictive effects which went beyond those inherent in State aid granted in accordance with the requirements laid down in Article 107(2)(b) TFEU (see, to that effect, judgment of 28 September 2023, *Ryanair v Commission*, C-320/21 P, EU:C:2023:712, paragraph 135).
- 87 The line of argument put forward by Ryanair in support of the second and third parts of the second ground of appeal seeks, as a whole, to criticise the aid scheme at issue in so far as only airlines holding a French licence were eligible for that scheme and the restrictive effects of that eligibility criterion on the free provision of services, even though such effects are inherent in the selective nature of that scheme.

- 88 In addition, as regards the evidence which it submitted before the General Court, it must be held that Ryanair has not put forward any argument capable of demonstrating that the General Court distorted that evidence.
- 89 It follows that the second and third parts of the second ground of appeal must be rejected as unfounded.
- 90 Lastly, the first part of that ground of appeal must be rejected as ineffective, in so far as it seeks to challenge paragraph 56 of the judgment under appeal, the grounds of which are included purely for the sake of completeness in relation to those set out in paragraph 57 of that judgment. In the light of the foregoing, the second ground of appeal must be rejected in its entirety.

The third ground of appeal

Arguments of the parties

- 91 By its third ground of appeal, Ryanair submits that the General Court contradicted itself and erred in law in reviewing, in paragraphs 59 to 74 of the judgment under appeal, the proportionality of the amount of the aid scheme at issue in relation to the damage suffered as a result of the exceptional occurrence.
- 92 By the first part of that ground of appeal, Ryanair submits that, in order to find, in paragraph 68 of the judgment under appeal, that the amount of the damage sustained by the beneficiaries of the aid owing to the exceptional occurrence was higher than the nominal amount of the aid scheme at issue, the General Court accepted all the damage caused by the occurrence of the COVID-19 pandemic. The General Court thus contradicted itself in so far as, in order to assess the proportionality of the eligibility criterion linked to the holding of a French licence, it had relied only on the damage resulting from the travel restrictions adopted by the French authorities.
- 93 By the second part of the third ground of appeal, the appellant complains that the General Court, in paragraph 73 of the judgment under appeal, wrongly held, relying on the judgment of 21 December 2016, *Commission v Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990), that the competitive advantage conferred on the beneficiaries of the aid as a result of the exclusion of airlines without a French licence was not to be taken into account for the purposes of comparing the amount of aid granted and the amount of damage suffered, pursuant to Article 107(2)(b) TFEU. That judgment, it submits, is not relevant, since it concerns the calculation of the amount of aid for the purposes of its recovery. By conflating that calculation with the examination of the proportionality of aid granted on the basis of that provision and by failing to take account of the essentially economic nature of that examination of proportionality, the General Court therefore erred in law.
- 94 The Commission and the French Republic contend that the third ground of appeal must be rejected as unfounded. According to the French Republic, this ground of appeal is, moreover, in part inadmissible, in so far as it seeks to call into question an assessment of the facts made by the General Court.

Findings of the Court

- 95 In so far as, by the first part of the third ground of appeal, Ryanair challenges the General Court's finding in paragraph 68 of the judgment under appeal that the amount of the damage sustained by the beneficiaries of the aid owing to the exceptional occurrence was, in all probability, higher than the nominal amount of the aid scheme at issue, that part of the third ground of appeal must be rejected as inadmissible, in accordance with the case-law referred to in paragraph 49 of the present judgment, since, without alleging any distortion of the facts, the appellant thus seeks to call into question a definitive assessment of the facts made by the General Court in that paragraph.
- 96 In any event, having regard to the close link between the occurrence of the COVID-19 pandemic and the restrictive measures adopted by the French authorities in that context, as the General Court found in paragraph 26 of the judgment under appeal, there is no contradiction in paragraph 68 between the General Court's assessment of the proportionality of the amount of the aid and its assessment of the proportionality of the eligibility criterion linked to the holding of a French licence.
- 97 By the second part of that ground of appeal, Ryanair submits, in essence, that the General Court erred in law in finding, in paragraph 73 of the judgment under appeal, that the Commission was not required, for the purposes of assessing the compatibility of the aid scheme at issue with the internal market under Article 107(2)(b) TFEU, and in particular its proportionality, to take into account the competitive advantage resulting for the beneficiaries from the exclusion of airlines not holding a French licence.
- 98 In that regard, it must be noted that, contrary to what Ryanair maintains, the judgment of 21 December 2016, *Commission v Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990), to which the General Court referred in paragraph 73 of the judgment under appeal, although it concerns the determination of the amount of unlawful aid for the purposes of its recovery, is still relevant in the present case, in so far as it may be inferred from paragraph 92 of that judgment that the advantage which aid confers on its recipient does not include any economic benefit that the recipient might obtain through exploiting that advantage.
- 99 Thus, in the case of the aid scheme at issue, namely aid in the form of a deferral of the payment of certain taxes to eligible beneficiaries, with deferred payment without interest, the amount of aid granted, which the Commission must take into account for the purposes of determining whether there has been any overcompensation of the damage suffered by the beneficiaries owing to the exceptional occurrence at issue, corresponds, in principle, in the light of the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6) and as the Commission found in the decision at issue, to the amount of interest which the beneficiaries of the measure would have had to pay on the market in order to obtain equivalent liquidity. By contrast, for the purposes of that determination, the Commission must not take into account any advantages that the beneficiaries of that scheme may have indirectly derived from that aid, such as the competitive advantage alleged by Ryanair.
- 100 It follows that the General Court did not err in law in holding, in paragraph 73 of the judgment under appeal, that the Commission was not required to take into account the competitive advantage which Ryanair alleged existed.
- 101 In the light of the foregoing, the second part of the third ground of appeal must be rejected as unfounded and, consequently, that ground of appeal must be rejected in its entirety.

The fourth ground of appeal

Arguments of the parties

- 102 By its fourth ground of appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts in that it wrongly held, in paragraphs 79 to 85 of the judgment under appeal, that the Commission had not infringed its obligation to state reasons under the second paragraph of Article 296 TFEU.
- 103 According to the appellant, the General Court accepted that the context in which the decision at issue was adopted, marked by the occurrence of the COVID-19 pandemic and the difficulties to which that situation may have given rise in the drafting of the Commission's decisions, could justify a lack of crucial evidence in the statement of reasons for the decision at issue, even though that evidence was necessary for the appellant to understand the reasoning underlying the Commission's conclusions. The General Court's interpretation of the second paragraph of Article 296 TFEU is, it submits, contrary to the case-law of the Court of Justice and deprives the obligation to state reasons of any practical effect.
- 104 The Commission and the French Republic contend that the fourth ground of appeal must be rejected as unfounded.

Findings of the Court

- 105 It should be pointed out that, according to settled case-law, the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court having jurisdiction 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 the second paragraph 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 (judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 198 and the case-law cited).
- 106 Specifically, as regards a decision under Article 108(3) TFEU not to raise objections in respect of an aid measure, as in the present case, the Court has held previously that such a decision, which is taken within a short period of time, must simply set out the reasons why 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 for the purpose of satisfying the requirement to state adequate reasons laid down in the second paragraph of Article 296 TFEU, provided that it discloses in a clear and unequivocal fashion the reasons why the Commission considered that it was not faced with serious difficulties, the question whether the reasoning is well founded being a separate matter (see, to that effect, judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 199 and the case-law cited).

- 107 It is in the light of those requirements that it is necessary to examine whether the General Court erred in law in holding that the decision at issue was sufficiently reasoned.
- 108 In that regard, first, in so far as Ryanair complains that the General Court, in essence, relaxed the requirements relating to the obligation to state reasons in view of the context of the COVID-19 pandemic in which the decision at issue had been adopted, it must be stated that, by referring, in paragraphs 79 and 80 of the judgment under appeal, to the context in which the decision at issue had been adopted, namely that of a pandemic and the extreme urgency in which the Commission had examined the measures notified to it by the Member States and had adopted the decisions relating to those measures, including that decision, the General Court rightly, as required by the case-law referred to in paragraphs 105 and 106 of the present judgment, took into consideration relevant factors in order to determine whether, by adopting that decision, the Commission had complied with its obligation to state reasons.
- 109 Second, in so far as Ryanair relies on specific factors on which the Commission, in breach of its obligation to state reasons, did not take a decision or which it did not assess in the decision at issue, such as whether the aid scheme at issue complied with the principle of equal treatment and the free provision of services, its competitive effects for the purposes of applying the proportionality test and calculating the amount of the aid, it is apparent from paragraphs 81 to 83 of the judgment under appeal that the General Court considered that those factors were either not relevant for the purposes of that decision, or that reference was made to them to the requisite legal standard in that decision for the Commission's reasoning to be understood in that regard.
- 110 It does not appear that, by those assessments, the General Court failed to have regard to the requirement to state reasons for a Commission decision adopted under Article 108(3) TFEU not to raise objections, as follows from the case-law referred to in paragraphs 105 and 106 of the present judgment, since that statement of reasons, in the present case, enables Ryanair to ascertain the reasons for that decision and enables the EU judicature to exercise its power of review with regard to that decision, as is, moreover, apparent from the judgment under appeal.
- 111 Furthermore, in so far as the line of argument put forward in the fourth ground of appeal seeks in reality to demonstrate that the decision at issue was adopted on the basis of an insufficient or legally incorrect assessment by the Commission, that line of argument, relating to the merits of that decision rather than to the requirement to state reasons as an essential procedural requirement, must be rejected in the light of the case-law referred to in paragraph 106 of the present judgment.
- 112 It follows from the foregoing that the General Court did not err in law in holding, in paragraph 84 of the judgment under appeal, that the decision at issue was sufficiently reasoned.
- 113 Lastly, it must be pointed out that Ryanair has not put forward any argument capable of demonstrating that the General Court distorted the evidence, within the meaning of the case-law referred to in paragraph 49 of the present judgment, when examining the fourth plea in the action at first instance.
- 114 Accordingly, the fourth ground of appeal must be rejected as unfounded.

The fifth ground of appeal

Arguments of the parties

- 115 By its fifth ground of appeal, Ryanair submits that, by finding, in paragraphs 86 and 87 of the judgment under appeal, that the third plea in its action at first instance, relating to the Commission's refusal to initiate the formal investigation procedure provided for in Article 108(2) TFEU, was deprived of its stated purpose as a result of the rejection of the first two pleas in that action and lacked any content independent of those two pleas, the General Court erred in law and manifestly distorted the facts.
- 116 Ryanair claims that, contrary to what the General Court held, the third plea in law had independent content in relation to the first two pleas in the action at first instance. Judicial review of the existence of serious difficulties which should have led to the initiation of a formal investigation procedure differs from review of the error of law or manifest error of assessment made by the Commission in the substantive examination of the aid measure. The existence of serious difficulties could thus be established even though, contrary to what the appellant maintained by its first two pleas in the action at first instance, the Commission's examination of the aid scheme at issue is not vitiated by either a manifest error of assessment or an error of law.
- 117 Similarly, the third plea in the action at first instance was not deprived of its stated purpose, since demonstrating the existence of a manifest error of assessment on the part of the Commission is completely different from demonstrating the existence of serious difficulties which should have led to the initiation of a formal investigation procedure. In addition, Ryanair raised independent arguments to that effect, demonstrating, inter alia, that the Commission did not have market data relating to the structure of the aviation sector as regards, inter alia, airlines holding a licence issued by a Member State other than France, which were of crucial importance for examining the compatibility of the aid scheme at issue in the light of its alleged objective. Before the General Court, Ryanair identified specific shortcomings in the information provided to the Commission and highlighted serious difficulties rendering its third plea independent of the first two pleas in the action.
- 118 The Commission and the French Republic contend that the fifth ground of appeal must be rejected as unfounded.

Findings of the Court

- 119 When an applicant seeks the annulment of a decision of the Commission not to raise objections in relation to State aid, it essentially contests the fact that that decision was adopted without the Commission initiating the formal investigation procedure provided for in Article 108(2) TFEU, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the internal market. The use of such arguments cannot, however, have the consequence of changing the subject matter of the application or altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of Council Regulation

(EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) (see, to that effect, judgment of 24 May 2011, *Commission v Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59 and the case-law cited).

- 120 Thus, it is for the party applying for annulment of a decision not to raise any objections to show that there were doubts concerning the compatibility of the aid with the internal market, meaning that the Commission was required to initiate the formal investigation procedure. Such proof must be sought both in the circumstances in which the decision was taken and in its content, on the basis of a body of corroborating evidence (see, to that effect, judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 40 and the case-law cited).
- 121 In particular, the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination procedure is an indication that the Commission was faced with serious difficulties in assessing the compatibility of the notified measure with the internal market, which should have led it to initiate the formal investigation procedure (see, to that effect, judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 41 and the case-law cited).
- 122 In that respect, as regards, first of all, the complaint alleging that the General Court held, in paragraph 87 of the judgment under appeal, that the third plea in law in the action at first instance lacked any independent content, it should be noted that it is true, as Ryanair has stated in its appeal, that if the existence of serious difficulties, within the meaning of the case-law of the Court of Justice referred to in paragraph 121 of the present judgment, had been established, the decision at issue could have been annulled on that ground alone, even though it had not been established, moreover, that the Commission's assessments as to substance were wrong in law or in fact (see, by analogy, judgment of 2 April 2009, *Bouygues and Bouygues Télécom v Commission*, C-431/07 P, EU:C:2009:223, paragraph 66).
- 123 Furthermore, the existence of such difficulties may be sought, inter alia, in those assessments and may, in principle, be established by pleas or arguments put forward by an applicant in order to challenge the merits of the decision not to raise objections, even if the examination of those pleas or arguments does not lead to the conclusion that the Commission's assessments as to substance are wrong in fact or in law (see, to that effect, judgment of 2 April 2009, *Bouygues and Bouygues Télécom v Commission*, C-431/07 P, EU:C:2009:223, paragraphs 63 and 66 and the case-law cited).
- 124 In the present case, it must be stated that the third plea in law in Ryanair's action at first instance alleged, in essence, that the examination carried out by the Commission during the preliminary examination procedure and the different assessment of the compatibility of the aid scheme at issue which the Commission would have made if it had decided to initiate a formal investigation procedure were incomplete and insufficient. It is also apparent from that action that, in support of that plea, Ryanair essentially either repeated in a condensed manner the arguments put forward in the first and second pleas in law of that action, relating to the merits of the decision at issue, or referred directly to those arguments.
- 125 In those circumstances, the General Court was fully entitled to find, in paragraph 87 of the judgment under appeal, that the third plea in the action at first instance lacked 'any independent content' in relation to the first two pleas in that action, in that, having examined the substance of those three pleas, including the arguments alleging that the examination carried out by the Commission was incomplete and insufficient, it was not required to assess separately the merits

of the third plea in that action, all the more so since, as the General Court also rightly pointed out in paragraph 87 of the judgment under appeal, Ryanair had not, by that plea, put forward specific evidence capable of demonstrating the existence of possible ‘serious difficulties’ encountered by the Commission in assessing the compatibility of the measure at issue with the internal market.

- 126 It follows that the General Court did not err in law in finding, in paragraph 87 of the judgment under appeal, that there was no need to rule on the merits of the third plea in the action at first instance. It is not necessary, in that regard, to examine, moreover, whether the General Court was right to hold, in paragraph 86 of the judgment under appeal, that that plea was subsidiary in nature and that it was deprived of its stated purpose.
- 127 Finally, it must be held that Ryanair has not put forward any argument capable of demonstrating that the General Court distorted the evidence, within the meaning of the case-law referred to in paragraph 49 of the present judgment, in its examination of the third plea in the action at first instance.
- 128 It follows from the foregoing that the fifth ground of appeal must be rejected as unfounded.
- 129 Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed in its entirety.

Costs

- 130 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.
- 131 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the appellant has been unsuccessful and the Commission has applied for costs to be awarded against it, the appellant must be ordered to pay the costs of the present appeal.
- 132 In accordance with Article 184(4) of the Rules of Procedure, an intervener at first instance who participates in the written or oral part of the proceedings before the Court may be ordered to pay costs. The Court may decide that it is to bear its own costs. Accordingly, the French Republic, intervener in the action at first instance, having participated in the proceedings before the Court of Justice, is to bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Ryanair DAC to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders the French Republic to bear its own costs.**

Lycourgos

Spineanu-Matei

Bonichot

Rodin

Rossi

Delivered in open court in Luxembourg on 23 November 2023.

A. Calot Escobar
Registrar

C. Lycourgos
President of the Chamber