Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

28 September 2023 *

(Appeal – State aid – Article 107(2)(b) TFEU – Danish air transport market – Aid granted by the Kingdom of Denmark to an airline amid the COVID-19 pandemic – Temporary Framework for State aid measures – State guarantee for a revolving credit facility – Decision by the European Commission not to raise objections – Aid intended to make good the damage suffered by a single victim – Principles of proportionality and non-discrimination – Freedom of establishment and freedom to provide services)

In Case C-321/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 May 2021,

Ryanair DAC, established in Swords (Ireland), represented initially by V. Blanc, F.-C. Laprévote E. Vahida, avocats, I.-G. Metaxas-Maranghidis, dikigoros, and S. Rating, abogado, and subsequently by V. Blanc, F.-C. Laprévote, 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, S. Noë and F. Tomat, acting as Agents,

defendant at first instance,

Kingdom of Denmark, represented initially by V. Pasternak Jørgensen and M. Søndahl Wolff, acting as Agents, and by R. Holdgaard, advokat, and subsequently by C. Maertens and M. Søndahl Wolff, acting as Agents, and by R. Holdgaard, advokat,

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

SAS AB, established in Stockholm (Sweden), represented by F. Sjövall and A. Lundmark, advokater,

interveners at first instance,

* Language of the case: English.

THE COURT (Fourth Chamber),

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

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 14 September 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 14 April 2021, *Ryanair v Commission (SAS, Denmark; Covid-19)* (T-378/20, 'the judgment under appeal', EU:T:2021:194), by which the General Court dismissed its action for annulment of Commission Decision C(2020) 2416 final of 15 April 2020 on State aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines (OJ 2020 C 220, p. 7, 'the decision at issue').

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 10 April 2020, in accordance with Article 108(3) TFEU, the Kingdom of Denmark notified the European Commission of an aid measure 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 AB ('the measure at issue'). That measure was intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions amid the COVID-19 pandemic.

4 On 15 April 2020, the Commission adopted the decision at issue by which it declared that the measure at issue was compatible with the internal market on the basis of Article 107(2)(b) TFEU.

The procedure before the General Court and the judgment under appeal

5 By application lodged at the Registry of the General Court on 19 June 2020, Ryanair brought an action for annulment of the decision at issue.

6 In support of its action, Ryanair raised five pleas in law alleging, first, that the Commission had breached the requirement that aid granted under Article 107(2)(b) TFEU is not to make good the damage suffered by a single victim; second, that the Commission had erred in finding that that measure was proportionate in relation to the damage caused to SAS by the COVID-19 pandemic;

third, that the Commission had infringed various provisions on the liberalisation of air transport in the European Union; fourth, that the Commission had infringed Ryanair's procedural rights by refusing to initiate the formal investigation procedure despite the existence of serious difficulties that should have led to the opening of such a procedure; and, fifth, that the Commission had infringed the second paragraph of Article 296 TFEU.

7 Having particular regard to the considerations which led it to expediting the present proceedings and the importance of a swift substantive response, both for Ryanair and for the Commission and the Kingdom of Denmark, the General Court considered it appropriate to begin by examining the merits of the action without first ruling on its admissibility.

8 By the judgment under appeal, the General Court dismissed as unfounded the first to third and fifth pleas in law raised by Ryanair. As regards the fourth plea, it held, in particular in view of the grounds which led to the dismissal of the first to third pleas, that it was not necessary to examine its merits. Finally, as regards the fifth plea, the General Court held that the statement of reasons for the decision at issue was sufficient in the light of Article 296 TFEU. 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

9 By its appeal, Ryanair claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue; and

– order the Commission and the interveners at first instance to pay the costs;

– in the alternative, set aside the judgment under appeal;

– refer the case back to the General Court; and

– reserve the costs of the proceedings at first instance and on appeal.

10 The Commission and SAS contend that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs.

11 The French Republic and the Kingdom of Denmark contend that the Court should dismiss the appeal.

The appeal

12 Ryanair relies on six grounds in support of its appeal. The first ground of appeal alleges that the General Court erred in law when it decided to reject Ryanair's argument that aid granted under Article 107(2)(b) TFEU is not intended to make good the damage suffered by a single victim. The

second ground 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 damage caused to SAS by the COVID-19 pandemic. The third ground alleges that the General Court erred in law in rejecting Ryanair's argument regarding an infringement of the principle of non-discrimination. The fourth ground alleges an error of law and a manifest distortion of the facts when it decided to reject Ryanair's argument relating to the infringement of the freedom of establishment and the freedom to provide services. The fifth ground alleges an error of law and a manifest distortion of the facts when it decided not to examine the substance of the fourth plea in the action at first instance, alleging an infringement of Ryanair's procedural rights. The sixth ground alleges an error of law and a manifest distortion of the facts in that the General Court wrongly held that the Commission had not infringed its obligation to state reasons under the second paragraph of Article 296 TFEU.

The first ground of appeal

Arguments of the parties

13 By its first ground of appeal, concerning paragraphs 21 to 26 of the judgment under appeal, Ryanair alleges, in essence, that the General Court erred in law in that it wrongly held that aid granted under Article 107(2)(b) TFEU may be intended to make good the damage suffered by a single victim of an exceptional occurrence, even though competitors of that victim, such as the appellant, were also affected by that occurrence.

14 According to Ryanair, the grounds set out in paragraphs 22 and 23 of the judgment under appeal do not justify the rejection of the first plea in its action at first instance. The issue is not whether the Kingdom of Denmark should have granted more aid, but rather whether that Member State should have granted any aid at all to SAS. The fact that a Member State is never obliged to grant aid cannot justify granting such aid in breach of the relevant legal basis, namely Article 107(2)(b) TFEU. Similarly, the issue is not whether the aid covers the entirety of the damage caused by an exceptional occurrence, but whether it is granted to all competing companies operating in a given market that have suffered that damage or to a single, arbitrarily chosen entity, since the latter case is not a correct application of that provision.

15 Ryanair argues that the General Court should have found that the merits of that argument are borne out by the clear wording and scheme of Article 107(2)(b) TFEU, which must be interpreted strictly, and by the Commission's decision-making practice prior to the COVID-19 pandemic. In that regard, the very purpose of that provision is to allow Member States to act as 'insurers of last resort' in cases where the risk associated with natural disasters or other exceptional occurrences cannot be covered by undertakings in the market. This is a fundamental economic role falling within the remit of each Member State. By definition, that function of 'insurer of last resort' supposes that the State offers the same protection (all things being equal) to all undertakings exposed to the underlying risk. A State that offers its protection to only a select few (or, as is the case here, a single company) therefore does not act as an insurer of last resort either, but for other public policy purposes, such as industrial policy reasons.

16 According to Ryanair, the concurrent pursuit of various public policy objectives by a Member State by means of aid granted under Article 107(2)(b) TFEU weakens the direct link between the exceptional occurrence, the damage and the aid granted, such a link being an essential condition for the application of that provision, which is based on a purely compensatory logic.

17 The Commission, the Kingdom of Denmark and the French Republic submit that the first ground of appeal must be dismissed as unfounded.

Findings of the Court

18 As a preliminary point, it should be recalled that, by the decision at issue, the measure at issue was declared compatible with the internal market under Article 107(2)(b) TFEU, which makes provision for such compatibility with regard to aid 'to make good the damage caused by natural disasters or exceptional occurrences'.

19 In that regard, it is apparent from settled case-law that, since this is an exception to the general principle that State aid is incompatible with the internal market, laid down in Article 107(1) TFEU, the provisions of Article 107(2)(b) TFEU must be interpreted narrowly. The Court has held, in particular, that only damage caused directly by natural disasters or other exceptional occurrences may be compensated for under those provisions. It follows that there must be a direct link between the damage caused by the exceptional occurrence and the State aid, and that as precise an assessment as possible must be made of the damage suffered by the operators concerned (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 the case-law cited).

20 According to Ryanair, if a Member State decides to adopt support measures under Article 107(2)(b) TFEU, it would be obliged to do so in respect of all undertakings which have suffered damage.

21 In that regard, while it is true that the derogation provided for in that provision must be interpreted narrowly, that does not mean that the terms used to define the derogation must be construed in such a way as to deprive it of its intended effect, since a derogation must be construed in a manner consistent with the objectives that it pursues (see, to that effect, judgment of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 40).

22 It is in no way apparent from the wording of Article 107(2)(b) TFEU, read in the light of the objective of that provision, that only aid granted to all the undertakings affected by the damage caused, in particular, by an exceptional occurrence may be declared to be compatible with the internal market within the meaning of that provision. Even if it is granted only to one undertaking, aid may, as appropriate, be intended to make good that damage and, in full compliance with EU law, fulfil the objective expressly referred to in that provision.

23 Therefore, as Advocate General Pitruzzella stated, in essence, in point 17 of his Opinion in *Ryanair* v *Commission* (C-320/21 P, EU:C:2023:54), the objective pursued by Article 107(2)(b) TFEU, which is to compensate for the disadvantages caused directly by an exceptional occurrence, does not mean that a Member State cannot, without that being dictated by a desire to favour one undertaking over its competitors, choose, for objective reasons, to grant only a single undertaking the benefit of a measure adopted under that provision.

24 Moreover, a contrary interpretation of Article 107(2)(b) TFEU would deprive that provision of much of its effectiveness. If that provision only allowed a Member State the option of granting aid to all the victims of an exceptional occurrence without being able to reserve that aid to a limited number of undertakings, or even just one, Member States would often be deterred from making use of that option because of the costs involved in the grant, in such circumstances, of significant aid to all undertakings that suffered damage coming under its authority.

25 It follows from the foregoing considerations that Article 107(2)(b) TFEU cannot be interpreted in the manner advocated by Ryanair without undermining the objective and effectiveness of that provision.

26 That said, in so far as Ryanair submits, in essence, in support of its first ground of appeal, that a Member State which grants aid under that provision only to a small number of undertakings that have been adversely affected by the exceptional occurrence, or even just one of those undertakings, does not pursue the objective referred to in that provision, namely to make good the damage caused as a result of such an occurrence, but public policy objectives, which, moreover, weaken the direct link required between the damage caused by the exceptional occurrence and the aid granted, it must be borne in mind, as is apparent, in essence, from the case-law cited in paragraph 19 above, that an aid measure can be declared compatible with the internal market pursuant to a derogation under Article 107(2) TFEU only if all the conditions for the application of that derogation are satisfied, which means, inter alia, that it must contribute to the attainment of an objective set out therein and be proportionate to the aim pursued.

27 It follows, as is apparent, in essence, from point 17 of the Opinion of Advocate General Pitruzzella in *Ryanair* v *Commission* (C-320/21 P, EU:C:2023:54), that aid measures granted under Article 107(2)(b) TFEU which, although intended to make good damage suffered as a result of an exceptional occurrence, are, in fact, motivated by considerations that are arbitrary or unrelated to that objective, such as the wish to favour, for reasons not connected with that objective, a particular undertaking compared with its competitors, especially an undertaking which was already in difficulty before the occurrence of the event in question, cannot be held to be compatible with the internal market.

28 Therefore, if, when examining the compatibility of an aid measure under Article 107(2)(b) TFEU, the Commission were to find, inter alia, that the selection of the beneficiary is not consistent with the objective of compensating for the disadvantages caused directly, inter alia, by an exceptional occurrence, referred to in that provision and that it thus does not genuinely reflect the concern to attain that objective, but other considerations unrelated to it, that measure cannot be declared compatible with the internal market on the basis of the derogation established by that provision.

29 In that respect, aid granted on the basis of Article 107(2) TFEU must be necessary to achieve the aims set out in that provision, so that aid which improves the financial situation of the recipient undertaking without being necessary to achieve those aims cannot be considered compatible with the internal market (see, by analogy, judgments of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 104, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 49).

30 However, contrary to what Ryanair suggests, the mere fact that aid under Article 107(2)(b) TFEU is granted to only one undertaking, as in the present case to SAS, from among a number of undertakings potentially adversely affected by the exceptional occurrence at issue, does not mean that that aid necessarily pursues other objectives to the exclusion of the one pursued by that provision or that it is granted arbitrarily.

31 In that context, it is appropriate to reject Ryanair's argument that the purpose of Article 107(2)(b) TFEU assumes that the Member State concerned acts as an 'insurer of last resort', since such an interpretation of that provision is not apparent either from its wording or from its objective, referred to in paragraphs 18 and 19 above.

32 Finally, in so far as Ryanair relies on a decision-making practice of the Commission prior to the COVID-19 pandemic, it is sufficient to observe that, in the present case, the legality of the decision at issue, and subsequently the judgment under appeal, must be assessed solely in the context of Article 107(2)(b) TFEU and not in the light of an alleged earlier decision-making practice of that institution (see, by analogy, judgments of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, EU:C:2011:515, paragraph 50, and of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 114).

33 It follows from the foregoing that the General Court did not err in law in concluding, in paragraph 25 of the judgment under appeal, that Ryanair was not justified in claiming that the Commission had erred in law merely because the measure at issue did not benefit all the undertakings that suffered damage caused by the COVID-19 pandemic.

34 Thus, the first ground of appeal must be dismissed as unfounded.

The second ground of appeal

Arguments of the parties

35 By its second ground of appeal, which relates to paragraphs 29 to 54 of the judgment under appeal and consists of six limbs, Ryanair alleges that the General Court erred in law and manifestly distorted the facts by wrongly concluding that the measure at issue was based on Article 107(2)(b) TFEU and that it was proportionate in relation to the damage suffered by SAS as a result of the COVID-19 pandemic.

36 By the first limb of its second ground of appeal, Ryanair submits that, in paragraph 30 of the judgment under appeal, the General Court misinterpreted paragraphs 40 and 41 of the judgment of 11 November 2004, *Spain* v *Commission* (C-73/03, EU:C:2004:711), in that it inferred a probability test from that case-law. If the measure concerned is intended to cover future damage, as in the present case, any aid that is likely to exceed the losses incurred by the recipient undertakings 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.

37 By the second limb, Ryanair alleges that the General Court erred in law and manifestly distorted the facts in the application of Article 107(2)(b) TFEU and the underlying proportionality test, in that it wrongly held that the Commission had given adequate reasons for the decision at issue, even though the method used by that institution to calculate the damage suffered by SAS was not sufficiently precise.

38 In that regard, it is apparent from settled case-law that aid may be authorised under Article 107(2)(b) TFEU only on the basis of a precise method of assessing the damage suffered. In the present case, the reason in paragraph 36 of the judgment under appeal, according to which the Commission had set out in the decision at issue in sufficiently precise terms a method of calculation for assessing the damage is impossible to reconcile with the content of that decision, in particular paragraph 34, which mentions that the Danish authorities had committed to submit, no later than 31 December 2020 for prior approval by the Commission, the methodology

to be used to quantify the damage. The measure at issue is therefore nothing more than a blank cheque given to SAS for more than a year, that is to say, until the first report on the actual losses suffered by that airline.

39 By the third limb of its second ground of appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts in asserting, in paragraph 37 of the judgment under appeal, that it did not adduce any evidence capable of establishing that the method of calculation, set out in the decision at issue, would have led to the payment of State aid that was higher than the damage actually suffered by SAS. According to the appellant, in order to ascertain whether the calculation method presented such a risk in the present case, the General Court examined whether the application of that method was 'likely' to lead to overcompensation. Ryanair provided ample evidence that the aid to SAS was likely to exceed its losses. In particular, for the purposes of calculating the damage, the General Court recognised the importance of the variable costs, which must be excluded in order to quantify the damage. If fixed and variable costs are unknown, there is a risk of overcompensation. That should therefore be enough to establish that the aid was not proportionate to the damage suffered by SAS due to the crisis linked to the COVID-19 pandemic. In addition, the General Court erred in law in that it systematically imposed the burden of proof on Ryanair and not on the Commission.

40 By the fourth limb, Ryanair complains that the General Court erred in law when it rejected, in paragraph 39 of the judgment under appeal, merely by referring to paragraph 24 of that judgment, Ryanair's argument that the Commission should have taken account of the damage suffered by the other airlines operating in Denmark. The principle that aid must be proportionate to the damage requires that the damage be assessed not only in relation to the recipient of the aid but also in relation to its competitors. In the present case, it was therefore necessary to assess the impact of the measure at issue on the other airlines operating in Denmark. In any event, the General Court could not reasonably state, as it did in paragraphs 70 and 72 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 suffered by that company.

41 By the fifth limb of its second ground of appeal, the appellant criticises the General Court for having justified the fact that the Commission failed to take into consideration the aid granted by the Kingdom of Norway in view of Denmark's commitment to request repayment of the aid *ex post*, in the event that the measure at issue, combined with others, including those granted by foreign authorities, exceeds the damage actually suffered by SAS, whereas the Commission should at the outset have taken into account the aid granted by the Kingdom of Norway, since it was known at the time the decision at issue was adopted, as opposed to contenting itself with an *ex post* evaluation.

42 By the sixth limb of that ground of appeal, Ryanair alleges that the General Court erred in law by rejecting, in paragraphs 50 and 51 of the judgment under appeal, its argument that the competitive advantage resulting from the fact that SAS was the only airline to benefit from the measure at issue should have been taken into account for the purpose of assessing the compatibility of the aid under Article 107(2)(b) TFEU. Such an assessment is essential in order to determine whether the aid scheme does not go beyond what is necessary to achieve its stated objective and whether it is therefore proportionate.

43 The Commission, the Kingdom of Denmark, the French Republic and SAS submit that the second ground of appeal must be dismissed as unfounded. The French Republic also contends that that ground of appeal is in part inadmissible.

Findings of the Court

44 The second ground of appeal is directed against paragraphs 29 to 54 of the judgment under appeal, in which the General Court examined and rejected the second plea in law in the action at first instance, challenging the proportionality of the measure at issue in relation to the damage suffered by SAS, in particular in so far as the Commission authorised possible overcompensation of that damage.

45 For the purposes of examining the six limbs of that ground of appeal, it should be pointed out at the outset that, as is apparent from paragraph 29 above, aid granted on the basis of Article 107(2) TFEU must be necessary to achieve the aims set out in that provision, so that aid which improves the financial situation of the recipient undertaking without being necessary to achieve those aims cannot be considered compatible with the internal market (see, by analogy, judgments of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 104, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 49).

46 As regards Article 107(2)(b) TFEU, as is apparent from the case-law of the Court recalled in paragraph 19 above, only disadvantages caused by natural disasters or exceptional occurrences may be compensated for under that provision.

47 It follows that the aid granted cannot exceed the losses incurred by its beneficiaries as a result of the event concerned, as the Court of Justice has already held, in essence, in paragraphs 40 and 41 of the judgment of 11 November 2004, *Spain* v *Commission* (C-73/03, EU:C:2004:711), referred to in paragraph 30 of the judgment under appeal.

48 In that regard, in so far as, by the first limb of its second ground of appeal, Ryanair criticises the General Court for introducing, in that paragraph of the judgment under appeal, an incorrect probability test, which is incompatible with the guidance in the judgment of 11 November 2004, *Spain* v *Commission* (C-73/03, EU:C:2004:711), it should be noted that that limb is based on a misreading of the judgment under appeal, in that the General Court did not introduce such a test. In paragraph 30 of that judgment, the General Court merely stated that, in so far as the amount of the aid exceeds the damage incurred by the beneficiary, that part of the aid cannot be justified under that provision. In any event, it is not apparent from the judgment under appeal that, for the purposes of ascertaining whether, in the decision at issue, the Commission approved overcompensation of the damage actually suffered by SAS, the General Court applied such a test and that it thus had an impact on the outcome of that examination.

49 It follows that the first limb of the second ground of appeal must be dismissed as unfounded.

50 In so far as, by the second limb of that ground of appeal, Ryanair alleges, in the first place, that the General Court erred in law in that it concluded, in paragraph 36 of the judgment under appeal, that, in the decision at issue, the Commission had set out a sufficiently precise method for calculating the damage suffered by SAS, it must be held that, in paragraph 35 of that judgment, the General Court refers to paragraph 31, in which it set out in detail all the factors taken into consideration by the Commission for assessing that damage. It was on the basis of that detailed description that the General Court, in paragraph 35 of that judgment, concluded that, in the

decision at issue, the Commission had, first, identified the factors which were taken into consideration in order to quantify the damage, namely the loss in revenue, the avoided variable costs and the adjustment of the profit margin, as well as the period of time in which that damage could arise, and, second, had stated that the loss in revenue had to be determined by taking into account SAS's total revenue, not just that from the carriage of passengers. In addition, the General Court stated that the Commission had taken note of the commitment by the Danish authorities, first, to carry out a detailed and specific *ex post* quantification of the damage suffered by SAS and of the amount of aid which it ultimately received and, second, to ensure that SAS repaid any overcompensation of that damage.

51 In view of all of those factors relating to the determination of the damage suffered by SAS relied on by the Commission, the General Court could, without erring in law, hold, in paragraph 36 of the judgment under appeal, that, having regard to the circumstances of the case, in particular the necessarily prospective nature of the quantification of that damage and of the amount of aid finally granted, the decision at issue contained a sufficiently precise statement of the method for calculating that damage.

52 Contrary to what Ryanair claims, that conclusion cannot be called into question on the sole ground that the Danish authorities had undertaken to submit to the Commission the detailed calculation method which would be used to quantify the damage *ex post*.

53 In the second place, by the second limb, to the extent that Ryanair 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 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).

54 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).

55 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).

56 In the present case, it must be stated that, in support of that limb, Ryanair does not specify the evidence which the General Court allegedly distorted in reaching the conclusion that the Commission had presented a sufficiently precise method for calculating the damage and, a fortiori, does not demonstrate how that evidence was distorted.

57 It follows that the second limb of the second ground of appeal is unfounded.

58 By the third limb of that ground of appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts in paragraph 37 of the judgment under appeal, according to which Ryanair had not adduced any evidence capable of establishing that the Commission's method of calculation led to the payment of aid that was higher than the damage actually suffered by SAS.

59 In so far as, in support of that limb, Ryanair merely asserts that the facts which it submitted to the General Court were capable of demonstrating that that argument was well founded, that limb must be rejected as inadmissible, in accordance with the case-law referred to in paragraphs 53 and 54 above, since, in the absence of specific evidence from which it may be concluded that the facts were distorted, the appellant in fact seeks to call into question the General Court's sovereign assessment of the facts when it decided, in paragraph 38 of the judgment under appeal, that the Commission had not made an error of assessment as regards the assessment of the damage suffered by SAS.

60 In so far as Ryanair maintains, moreover, that the General Court thereby reversed the burden of proof which, in its view, should have rested with the Commission, it should be borne in mind that it is in principle for the person who alleges facts in support of a claim or argument to provide proof of their reality (see, to that effect, judgment of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraph 52, and order of the President of the Court of Justice of 25 January 2008, *Provincia di Ascoli Piceno and Comune di Monte Urano* v *Apache Footwear and Others*, C-464/07 P(I), EU:C:2008:49, paragraph 9).

61 The General Court therefore did not infringe the principles relating to the apportionment of the burden of proof in finding that Ryanair had not adduced evidence of the facts relied on in support of its argument that the Commission had erred in its assessment of the damage suffered by SAS.

62 Consequently, the third limb of the second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

63 The fourth limb of that ground of appeal alleges, in essence, that the General Court, in examining whether the Commission was entitled to find that the measure at issue was proportionate in relation to the damage suffered by SAS as a result of the COVID-19 pandemic and that it thus did not receive overcompensation for its damage, wrongly rejected, in paragraph 39 of the judgment under appeal, Ryanair's argument, set out in paragraph 34 of that judgment, that the Commission should have taken account of the damage suffered by the other airlines operating in Denmark.

64 In that connection, as regards the proportionality of an aid measure granted under Article 107(2)(b) TFEU in relation to the amount of the aid in question, it is apparent from paragraph 47 above that that amount cannot exceed the losses incurred by its beneficiary. Where, as in the present case, individual aid is involved, it follows that it is for the Commission to ascertain, when assessing the compatibility of the aid with the internal market, whether the beneficiary does not obtain an amount of aid exceeding the damage it actually suffered as a result of the exceptional occurrence in question.

65 For the purposes of such an assessment concerning a particular airline, it is clearly irrelevant whether, or to what extent, other airlines have also suffered damage as a result of the same event.

66 In addition, it is apparent from paragraphs 21 to 26 above that, in support of its first ground of appeal, Ryanair is wrong to claim that the General Court erred in law in deciding that the Member State concerned is not required to take into account all the damage caused by the exceptional occurrence in question or to grant all victims of that damage the benefit of the aid. The General Court was therefore right to hold, on the basis of those considerations, in paragraph 39 of the judgment under appeal, that authorisation to grant aid solely to SAS was not conditional on the Commission demonstrating that the damage caused by that event was prejudicial only to that undertaking.

67 Finally, Ryanair merely asserts that it is contradictory that the General Court justified the necessity of the measure at issue by referring to SAS's competitive situation, but failed to take that situation into account when assessing the proportionality of the aid, without, however, indicating precisely the legal arguments in support of that claim.

68 It follows that the fourth limb of the second ground of appeal must be rejected.

69 In so far as Ryanair claims, by the fifth limb of that ground of appeal, that, contrary to what the General Court held in paragraphs 48 and 49 of the judgment under appeal, the Commission should at the outset have taken into account, for the purposes of assessing the existence of overcompensation of the damage suffered by SAS, the aid granted by the Kingdom of Norway, instead of merely carrying out an *ex post* assessment, suffice it to state that, in paragraph 49 of the judgment under appeal, the General Court found that the Commission had taken into account, in the decision at issue, the aid granted by the Kingdom of Norway, and that Ryanair had not put forward any argument to rebut that finding.

70 The fifth limb of the second ground of appeal must therefore be rejected as unfounded.

71 By the sixth limb of that ground of appeal, Ryanair alleges, in essence, that the General Court erred in law in finding, in paragraphs 51 and 52 of the judgment under appeal, that the Commission was not required to take into consideration, for the purposes of assessing the compatibility of the measure at issue with the internal market under Article 107(2)(b) TFEU, and in particular its proportionality, the competitive advantage resulting for SAS from the fact that it was the sole beneficiary of that aid.

72 In that regard, it must be noted, as Advocate General Pitruzzella did in point 48 of his Opinion in *Ryanair* v *Commission* (C-320/21 P, EU:C:2023:54), 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, paragraph 92), to which the General Court referred in paragraph 51 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.

73 Thus, in the case of the measure at issue, that is to say, aid in the form of a guarantee, the amount of aid granted to SAS, which the Commission must take into account in order to determine whether there has been any overcompensation of the damage suffered by that airline as a result of the exceptional occurrence at issue, corresponds, in principle, as is apparent from the Commission Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10) and as the General Court correctly pointed out in

paragraph 42 of the judgment under appeal, to the difference in rates granted to SAS with or without the measure at issue on the date the decision at issue was adopted. By contrast, for the purposes of that determination, the Commission must not have regard to any advantage that SAS might have indirectly derived from it, such as the competitive advantage alleged by Ryanair.

74 It follows that the General Court did not err in law in holding, in paragraphs 51 to 53 of the judgment under appeal, that the Commission was not required to take into account the competitive advantage which Ryanair alleged existed.

75 In the light of the foregoing, the sixth limb of the second ground of appeal must be rejected as unfounded and, consequently, that ground is dismissed in its entirety.

The third ground of appeal

Arguments of the parties

76 By its third ground of appeal, concerning paragraphs 58 to 76 of the judgment under appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts by rejecting the first limb of the third plea in law in its action at first instance and by deciding, in paragraph 76 of the judgment under appeal, that it was justified in granting the benefit of the measure at issue only to SAS and that that did not infringe the principle of non-discrimination.

77 In that regard, Ryanair submits, by the first limb of its third ground of appeal, that the General Court did not properly 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 paragraph 68 of the judgment under appeal, that the difference in treatment established by the measure at issue, in so far as it benefited only SAS, could amount to discrimination, 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 provided for in the Treaties, within the meaning of Article 18 TFEU. Furthermore, 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.

78 By the second limb of that ground of appeal, the appellant submits that, in paragraphs 62 to 65 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 measure at issue. In particular, the General Court erred in finding, in paragraphs 62 and 63 of the judgment under appeal, that the objective of that measure was not to preserve 'Denmark's connectivity' or 'intra-Scandinavian accessibility', which amounts to an excessively formalistic reading of the decision at issue. Moreover, that statement contradicts paragraph 70 of the judgment under appeal. According to Ryanair, the General Court's statement in paragraph 65 of the judgment under appeal that discrimination was inherent in the individual nature of the aid is also incorrect.

79 By the third limb of its third ground of appeal, Ryanair submits that the General Court made several errors of law in that it wrongly held, in paragraph 72 of the judgment under appeal, that the difference in treatment established by the measure at issue was justified, since SAS, on account of its larger market share, had been harmed more by the restrictions relating to the COVID-19 pandemic than the other airlines present in Denmark.

80 First, that justification is not stated at any point in the decision at issue. Second, such an assertion, in essence, amounts to asserting that an undertaking with a large market share is entitled to receive all the aid granted under Article 107(2)(b) TFEU, which would be contrary to the principles of proportionality and undistorted competition. Third, in so far as the General Court, in paragraph 73 of the judgment under appeal, justified SAS's entitlement to all the aid on the ground that it was 'proportionately much more affected by those restrictions than the applicant', that assertion 'makes no sense and is obviously wrong'. Fourth, the General Court erred in law in finding, in paragraph 75 of the judgment under appeal, that, in view of the relative value of the measure at issue, Ryanair had not established that dividing that amount among all the airlines present in Denmark would not have deprived that measure of its effectiveness. A test tied to that 'effectiveness', which was not defined by the General Court, is a 'purely *sui generis* construction'. In any event, nowhere in the decision at issue did such an analysis appear.

81 The Commission, the Kingdom of Denmark and the French Republic submit that the third ground of appeal must be dismissed as unfounded. The French Republic also contends that that ground of appeal is in part inadmissible.

Findings of the Court

82 By the second limb of the third ground of appeal, which it is appropriate to examine first, Ryanair submits, first, in essence, that the General Court, in paragraphs 62 to 64 of the judgment under appeal, incorrectly identified the objective of the measure at issue, as set out in the decision at issue, and that it wrongly considered that that objective did not consist of preserving 'Denmark's connectivity' and 'intra-Scandinavian accessibility'.

83 In that regard, it should be noted, as the General Court stated in paragraph 63 of the judgment under appeal, that it is expressly clear from recital 5 of the decision at issue, which appears in the section entitled 'Objective of the measure', that that objective is to 'compensate SAS for damage suffered due to the cancellation or re-scheduling of its flights as a result of the imposition of travel restrictions linked to the COVID-19 outbreak'. On the other hand, as regards the preservation of 'Denmark's connectivity' and 'intra-Scandinavian accessibility', those aspects are referred to in a different part of the decision at issue, that is to say, in the section entitled 'Beneficiary', which seeks only to describe the profile of the undertaking to which the measure at issue was addressed and not the objective of that measure.

84 In those circumstances, the General Court did not err in law or distort the wording of the decision at issue in finding, in paragraph 62 of the judgment under appeal, that the objective of the measure at issue, in the light of that decision, aside from compensating SAS in part for the damage arising from the COVID-19 pandemic, was not to preserve 'Denmark's connectivity' and 'intra-Scandinavian accessibility'.

85 In so far as Ryanair submits, next, that there is a contradiction between the grounds set out, on the one hand, in paragraphs 63 and 64 of the judgment under appeal and, on the other, in paragraph 70 of that judgment, suffice it to state that, in the latter paragraph, the General Court was no longer examining the objective of the measure at issue, referred to in paragraphs 63 and 64 of that judgment, but instead it examined the proportionality of the conditions for granting that measure in the light of that objective, which are the subject of paragraphs 68 to 75 of that judgment.

86 Lastly, in so far as the second limb of the third ground of appeal relates to paragraph 64 of the judgment under appeal, at the end of which the General Court rejected Ryanair's argument that the measure at issue was granted to SAS because only SAS held a Danish licence, that finding is not, on the same ground as the one set out in paragraph 83 above, vitiated by any error of law.

87 It is therefore appropriate to reject the second limb of the third ground of appeal as being, to that extent, unfounded.

88 By a final argument put forward in the context of both the first and second limbs of that ground of appeal, Ryanair alleges that the General Court, in paragraphs 65 and 68 of the judgment under appeal, erred in law in the application of the principle of non-discrimination and, more specifically, the prohibition of discrimination on grounds of nationality laid down in the first paragraph of Article 18 TFEU.

89 In the first place, as regards Ryanair's claim that the General Court erred in law in paragraph 65 of the judgment under appeal, it must be borne in mind that, according to the settled case-law of the Court of Justice, 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 (see, inter alia, judgment of 28 June 2018, *Germany* v *Commission*, C-208/16 P, EU:C:2018:506, paragraph 79 and the case-law cited).

90 It is therefore with regard to measures with such characteristics, 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 such measures are incompatible with the internal market.

91 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 (see, to that effect, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 48 and the case-law cited).

92 Where, as in the present case, the measure in question is envisaged as individual aid, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective (judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49 and the case-law cited).

93 It follows that, by stating, in essence, in paragraph 65 of the judgment under appeal, that, by its nature, individual aid introduces a difference in treatment between the undertaking receiving that aid and all other undertakings which, in the light of the objective pursued, are in a comparable situation, the General Court did not err in law. Furthermore, contrary to what Ryanair appears to claim, paragraph 65 cannot be understood as meaning that the General Court considers that individual aid which, in its view, is contrary to the principle of non-discrimination is nevertheless

compatible with the internal market, since it expressly stated at the end of that paragraph that EU law allows Member States to grant such aid, 'provided that all the conditions laid down in Article 107 TFEU are met'.

94 In that regard, Article 107(2) and (3) TFEU provides for certain derogations from the principle, referred to in paragraph 90 above, that State aid is incompatible with the internal market. Accordingly, State aid granted for the purposes of and in accordance with the requirements laid down by those derogating provisions, notwithstanding the fact that it has the characteristics and produces the effects referred to in paragraph 89 above, is compatible or is capable of being declared compatible with the internal market.

95 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 effects, referred to in paragraph 89 above, 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 (see, to that effect, judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraphs 14 and 15, and of 26 September 2002, *Spain* v *Commission*, C-351/98, EU:C:2002:530, paragraph 57).

96 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.

97 That said, as regards, in the second place, Ryanair's claim that the General Court erred in law in not applying, in paragraph 68 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 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 (judgment of 31 January 2023, *Commission* v *Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraph 96 and the case-law cited).

98 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 TFEU lays down no specific prohibition of discrimination (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 25 and the case-law cited).

99 Since, as has been recalled in paragraph 94 above, 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 the undertakings, subject to fulfilment of the requirements laid down by those derogations, those derogations must be regarded, as Advocate General Pitruzzella observed in point 64 of his Opinion in *Ryanair* v *Commission* (C-320/21 P, EU:C:2023:54), as 'special provisions' provided for in the Treaties, within the meaning of the first paragraph of Article 18 TFEU.

100 It follows that the General Court did not err in law in finding, in paragraph 68 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.

101 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.

102 In the light of the foregoing, the last complaint of the second limb and the first limb of the third ground of appeal must be rejected as unfounded.

103 By the third limb of its third ground of appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts when it examined, in particular in paragraphs 72, 73 and 75 of the judgment under appeal, in the context of the question of the proportionality of the measure at issue, the merits of Ryanair's argument, reproduced in paragraph 71 of that judgment, that the difference in treatment resulting from that measure was not proportionate, in so far as the measure grants SAS all the aid intended to make good the damage caused by the COVID-19 pandemic, whereas SAS suffered less than 35% of that damage.

104 In that regard, Ryanair submits, by its first complaint, in essence, that, by stating, inter alia, in paragraph 72 of the judgment under appeal, that SAS, because of its larger market shares, had been more affected by the restrictions imposed amid the COVID-19 pandemic than the other airlines present in Denmark, 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.

105 Although it is 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), it must be pointed out that, in paragraph 72 of the judgment under appeal, the General Court, in response to Ryanair's arguments referred to in paragraph 103 above, merely recalled the content of the decision at issue and, more specifically, drew conclusions from the information contained therein, without, however, substituting the grounds of that decision.

106 In so far as, by the third complaint of the third limb, the appellant refers to the General Court's assertions, in paragraphs 72 and 73 of the judgment under appeal, that SAS's market shares were 'much higher than [those] of its closest competitor' and that SAS was 'proportionately much more affected by those restrictions', that is to say, those imposed amid the COVID-19 pandemic, it should be noted that those assessments are sovereign assessments of fact which the General Court also made for the sake of completeness.

107 That complaint must therefore be rejected as inadmissible, particularly since the appellant has not established any distortion of those facts by the General Court.

108 In addition, in so far as Ryanair submits in support of the second and third complaints of that third limb, in essence, that, according to the principle of proportionality, the aid should have been allocated among all the victims of the exceptional occurrence at issue in proportion to the damage which they suffered, that reasoning is based on an erroneous premiss, as is apparent from paragraphs 20 to 25 above.

109 As regards the fourth complaint of the third limb of the appellant's third ground of appeal, suffice it to state that it seeks to challenge paragraph 75 of the judgment under appeal, which is superfluous in the light of the decision in paragraph 74 of the judgment under appeal, according to which the difference in treatment in favour of SAS does not infringe the principle of proportionality. That argument must therefore be rejected as ineffective.

110 In the light of the foregoing, it is appropriate to dismiss the third limb of the third ground of appeal and, consequently, that ground is dismissed in its entirety.

The fourth ground of appeal

Arguments of the parties

111 By its fourth ground of appeal, concerning paragraphs 81 to 83 of the judgment under appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts and evidence by rejecting the second limb of the third plea in law of its action at first instance, by which it alleged an infringement of the freedom of establishment and the freedom to provide services.

112 By the first limb of that ground of appeal, Ryanair argues that, by stating in paragraph 81 of the judgment under appeal that it had not demonstrated how the exclusive nature of the measure at issue, which benefited SAS alone, was 'capable of discouraging [Ryanair] from establishing itself in Denmark or providing services from and to that country', the General Court chose an incorrect test for determining whether that measure impeded or rendered less attractive the exercise of the freedom to provide services or the freedom of establishment. In accordance with the case-law, the General Court should instead have examined whether the measure at issue was such as to discourage 'any interested operator', and thus, in the present case, airlines other than SAS which operate in Denmark, from establishing themselves or providing services in that Member State.

113 By the second limb of that ground of appeal, Ryanair submits that, in its action at first instance, it demonstrated to the requisite legal standard, in accordance with the relevant criterion, that the measure at issue placed at a disadvantage, in practice, only air carriers whose registered office was in a Member State other than the Kingdom of Denmark. It submits that it provided numerous items of evidence relating to the restrictive effect of that measure on the freedom to provide services and, by failing to examine them, the General Court erred in law and distorted the evidence.

114 By the third limb of that ground of appeal, Ryanair submits that, contrary to what the General Court held in paragraph 81 of the judgment under appeal, Ryanair demonstrated that the restriction on the freedom to provide services and the freedom of establishment was not justified. The General Court made an error of law when it made a wholesale reference to its reasoning under Article 107 TFEU in the context of Article 18 TFEU while it was addressing a restriction to

the free provision of services. In fact, the General Court and, before it, the Commission should have examined whether the restriction on the freedom to provide services inferred by the measure at issue was justified by an overriding reason in the public interest, which was non-discriminatory, necessary and proportionate in relation to the public interest objective pursued. Ryanair identified elements of fact and law showing that the measure at issue had restrictive effects on the free provision of services that were unnecessary, inappropriate and disproportionate in light of the stated objective of that measure. The General Court 'denied that reality' and therefore erred in law and manifestly distorted the facts.

115 The Commission, the Kingdom of Denmark and the French Republic submit that the fourth ground of appeal must be dismissed as unfounded.

Findings of the Court

116 In so far as, by the first limb of that ground of appeal, Ryanair claims that the General Court, in the first sentence of paragraph 81 of the judgment under appeal, used an incorrect test for assessing whether the measure at issue hindered or rendered less attractive the exercise of the freedom to provide services and the freedom of establishment, it must be held that that limb is based on a misreading of that paragraph. Without it being necessary to examine whether, as Ryanair claims, the General Court erred in law as regards the extent of the burden of proof which it claims to have borne, it is apparent, as the French Government rightly pointed out in its response, from the second sentence of that paragraph, which refers to paragraphs 58 to 76 of the judgment under appeal in which the General Court analysed the proportionality of the measure at issue in the light of the situation of all the airlines present in Denmark, that the General Court referred to the existence of restrictive effects that would arise not exclusively with regard to Ryanair but to all airlines operating or wishing to operate in Denmark.

117 Accordingly, that limb must be rejected as unfounded.

118 By the second and third limbs of the fourth ground of appeal, which it is appropriate to examine together, Ryanair alleges that the General Court, in essence, vitiated the judgment under appeal by errors of law, in that it only examined the fact that the measure at issue benefited only SAS, in the light of the criteria of Article 107 TFEU, instead of verifying whether that measure was justified in the light of the grounds referred to in the provisions relating to the freedom to provide services or the freedom of establishment. Ryanair submitted to the General Court matters of fact and of law demonstrating an infringement of those provisions.

119 In that regard, as was pointed out in paragraph 97 above, 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.

120 However, first, as Advocate General Pitruzzella observed, in essence, in point 85 of his Opinion in *Ryanair* v *Commission* (C-320/21 P, EU:C:2023:54), the restrictive effects which an aid measure has on the freedom to provide services or the freedom of establishment 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.

121 Furthermore, it is clear from the case-law of the Court of Justice 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, and of 31 January 2023, *Commission* v *Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraph 97).

122 In the present case, as is apparent from paragraph 83 above, the choice of SAS as beneficiary of the measure at issue is part of the objective of that measure and, in any event, even if that choice were to be regarded as a condition of that measure, Ryanair does not dispute that such a condition is inextricably linked to that objective, which is to compensate that undertaking in part for the damage resulting from the COVID-19 pandemic. It follows that the effect of the choice of SAS as a beneficiary of the measure 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.

123 It follows from the reasons set out above and from what has been stated, in particular, in paragraphs 95 and 96 above that the General Court did not err in law by holding in paragraph 81 of the judgment under appeal in essence that, in order to establish that the measure at issue, because it benefited only SAS, constituted an obstacle to the freedom of establishment and 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.

124 The arguments advanced by Ryanair in support of the second and third limbs of the fourth ground of appeal, taken together, seek to criticise the choice of SAS as the sole beneficiary of the measure at issue and the consequences of that choice, even though that choice is inherent in the selective nature of that measure.

125 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.

126 It follows from the foregoing that the fourth ground of appeal must be dismissed.

The fifth ground of appeal

Arguments of the parties

127 By its fifth ground of appeal, Ryanair submits that, by finding, in paragraphs 86 and 87 of the judgment under appeal, that its fourth plea in law in the action at first instance, relating to the Commission's refusal to initiate the formal investigation procedure, was deprived of its stated purpose and lacked independent content, the General Court erred in law and manifestly distorted the facts.

128 Contrary to what the General Court held, that plea had an independent content different from the first three pleas in the action at first instance, because the standard of review is different for demonstrating serious difficulties that should have led to the opening of a formal investigation procedure and can be satisfied even if it is not established that the Commission's review showed a manifest error of assessment or an error of law, which formed the basis for those first three pleas.

129 Similarly, the fourth 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 at its disposal market data on the structure of the aviation sector or information on the assessment of the amount of damage caused by the crisis linked to the COVID-19 pandemic and the quantum of the aid granted to SAS. It follows that, before the General Court, Ryanair had identified lacunae and shortcomings in the information provided to the Commission, which revealed serious difficulties and constituted an 'independent content' in relation to the other pleas.

130 The Commission, the Kingdom of Denmark and the French Republic submit that the fifth ground of appeal must be dismissed as unfounded.

Findings of the Court

131 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, 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).

132 It is for the person making such a claim to show that there were doubts concerning that compatibility, meaning that the Commission was required to initiate the formal investigation procedure under Article 108(2) TFEU. 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).

133 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).

134 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 fourth plea in law in the action at first instance lacked any independent content, it should be noted that it is true, as Ryanair 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 the preceding paragraph, 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).

135 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).

136 In the present case, it must be stated that the fourth 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 measure at issue which the Commission made following 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 three pleas in law of that action, relating to the merits of the decision at issue, or referred directly to those arguments.

137 In those circumstances, the General Court was fully entitled to find, in paragraph 87 of the judgment under appeal, that the fourth plea in the action at first instance lacked 'any independent content' in relation to the first three 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 fourth plea in that action, all the more so since, as the General Court also rightly pointed out in that paragraph 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.

138 It follows that the General Court did not err in law in finding, in paragraph 88 of that judgment, that it was not necessary to examine the merits of the fourth plea in the action at first instance, without it being necessary to examine, moreover, whether the General Court was entitled 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.

139 Moreover, 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 55 above, in its examination of the fourth plea in the action at first instance.

140 It follows from the foregoing that the fifth ground of appeal must be rejected as unfounded.

The sixth ground of appeal

Arguments of the parties

141 By its sixth ground of appeal, Ryanair alleges that the General Court erred in law and manifestly distorted the facts in that it wrongly held, in paragraphs 89 to 101 of the judgment under appeal, that the Commission had not infringed its obligation to state reasons under the second paragraph of Article 296 TFEU.

142 According to the appellant, the General Court's reasoning suggests that the factual context which led to the adoption of the decision at issue, namely the occurrence of the COVID-19 pandemic and the impact that that situation may have had on the drafting quality of the Commission's decisions, could excuse the fact that certain crucial elements in the statement of reasons for the decision at issue are lacking, even though they were necessary for the appellant to ascertain the specific reasoning underlying the Commission's conclusions. Such a lax interpretation of the second paragraph of Article 296 TFEU, contrary to the case-law of the Court, would render the obligation to state reasons meaningless.

143 The Commission and the French Republic submit that the sixth ground of appeal must be dismissed as unfounded. The Kingdom of Denmark submits that that ground of appeal is inadmissible.

Findings of the Court

144 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 (see 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).

145 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, as the General Court also correctly observed in paragraph 94 of the judgment under appeal, 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).

146 It is in the light of those requirements, correctly recalled in paragraphs 92 and 94 of the judgment under appeal, that it is necessary to examine whether the General Court erred in law in holding that the decision at issue was sufficiently reasoned.

147 In that regard, in so far as Ryanair complains, first, 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 there is nothing to indicate that, by referring in paragraphs 89 to 101 of the judgment under appeal to the crisis linked to that pandemic, the General Court intended to justify, by that circumstance, a failure to state reasons for that decision.

148 Second, in so far as Ryanair relies on a number of specific factors on which the Commission, in breach of its obligation to state reasons, did not take a decision or did not assess in the decision at issue, such as whether the measure at issue complied with the principle of equal treatment, the freedom of establishment and the freedom to provide services, the competitive advantage granted to SAS, the method of calculating the damage and the amount of the aid, the precise reasons why SAS was treated differently in Denmark from other airlines operating in that Member State that suffered damage, it should be pointed out that, in paragraphs 95 to 100 of the judgment under appeal, the General Court, by examining each of those elements, held that they were either not relevant for the purposes of the decision at issue 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.

149 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 under Article 108(3) TFEU not to raise objections, as follows from the case-law referred to in paragraphs 144 and 145 above, since that statement of reasons, in the present case, enables Ryanair to ascertain the reasons for that decision and the EU judicature to exercise its power of review with regard to that decision, as is, moreover, apparent from the judgment under appeal.

150 Furthermore, in so far as the line of argument put forward in the sixth 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 145 above.

151 It follows from the foregoing that the General Court did not err in law in holding, in paragraph 101 of the judgment under appeal, that the decision at issue was sufficiently reasoned.

152 Lastly, it must be pointed out that Ryanair has not put forward any argument capable of demonstrating that the General Court distorted the facts, within the meaning of the case-law referred to in paragraph 58 above, by examining the fifth plea in the action at first instance.

153 Accordingly, the sixth ground of appeal must be dismissed as unfounded.

154 Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed in its entirety.

Costs

155 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.

156 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 and SAS have applied for costs to be awarded against it, the appellant must be ordered to pay all their costs relating to the present appeal.

157 In accordance with Article 140(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Member States and institutions which have intervened in the proceedings should bear their own costs. Accordingly, the French Republic and the Kingdom of Denmark, interveners in the action at first instance, having participated in the proceedings before the Court of Justice, are to bear their 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 and SAS AB;**

3. **Orders the French Republic and the Kingdom of Denmark to bear their own costs.**

Lycourgos Rossi Bonichot

Rodin Spineanu-Matei

Delivered in open court in Luxembourg on 28 September 2023.

A. Calot Escobar
Registrar

C. Lycourgos
President of the Chamber