Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

11 January 2024*

(Appeal – State aid – Air transport – Romania – Rescue aid to TAROM – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Decision of the European Commission not to raise objections on the ground that the measures constitute aid compatible with the internal market)

In Case C-440/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 July 2022,

Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.), established in Budapest (Hungary), represented by I.-G. Metaxas-Maranghidis, dikigoros, S. Rating, abogado, and E. Vahida, avocat,

appellant,

the other party to the proceedings being:

European Commission, represented by I. Barcew, V. Bottka and L. Flynn, acting as Agents,

defendant at first instance,

THE COURT (Ninth Chamber),

composed of J.-C. Bonichot, acting as President of the Chamber, S. Rodin (Rapporteur) and L.S. Rossi, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.) ('Wizz Air') seeks to have set aside the judgment of the General Court of the European Union of 4 May 2022, *Wizz Air Hungary* v *Commission (TAROM; Rescue aid)* (T-718/20, 'the judgment under appeal', EU:T:2022:276), by which the General Court dismissed its action for annulment of Decision C(2020) 1160 final of the Commission of 24 February 2020 concerning State aid SA.56244 (2020/N) – Romania – Rescue aid to TAROM (OJ 2020 C 310, p. 3, 'the decision at issue').

Legal context

2 Point 38 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines on State aid for rescuing and restructuring') provides as follows:

'In assessing whether notified aid can be declared compatible with the internal market, the Commission will consider whether each of the following criteria is met:

(a) contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty (section 3.1).

…

(f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive (section 3.6).

…'

3 Section 3.1 of the Guidelines on State aid for rescuing and restructuring, entitled 'Contribution to an objective of common interest', contains a point 43 which reads as follows:

'Given the importance of market exit to the process of productivity growth, merely preventing an undertaking from exiting the market does not constitute a sufficient justification for aid. Clear evidence should be provided that aid pursues an objective of common interest, in that it aims to prevent social hardship or address market failure (section 3.1.1) by restoring the long-term viability of the undertaking (section 3.1.2).'

4 In Section 3.1.1, entitled 'Demonstration of social hardship or market failure', point 44 of those guidelines provides:

'Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure, in particular by showing that:

…

(b) there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in (for example, a national infrastructure provider);

…’

5 Section 3.1.2 of those guidelines, entitled ‘Restructuring plan and return to long-term viability’, provides:

‘45. Restructuring aid within the scope of these guidelines cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses. In the case of restructuring aid, therefore, the [European] Commission will require that the Member State concerned submit a feasible, coherent and far-reaching restructuring plan to restore the beneficiary’s long-term viability. Restructuring may involve one or more of the following elements: the reorganisation and rationalisation of the beneficiary's activities on to a more efficient basis, typically involving withdrawal from loss-making activities, restructuring of those existing activities that can be made competitive again and, possibly, diversification towards new and viable activities. It typically also involves financial restructuring in the form of capital injections by new or existing shareholders and debt reduction by existing creditors.

46. The granting of the aid must therefore be conditional on implementation of the restructuring plan, which must be endorsed by the Commission in all cases of ad hoc aid.

47. The restructuring plan must restore the long-term viability of the beneficiary within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions that should exclude any further State aid not covered by the restructuring plan. The restructuring period should be as short as possible. The restructuring plan must be submitted in all relevant detail to the Commission and must include, in particular, the information set out in this section 3.1.2.

…’

6 In Section 3.6, entitled ‘Negative effects’, Section 3.6.1 of those guidelines, relating to the ‘One time, last time’ principle, provides as follows:

‘70. In order to reduce moral hazard, excessive risk-taking incentives and potential competitive distortions, aid should be granted to undertakings in difficulty in respect of only one restructuring operation. This is referred to as the “one time, last time” principle. The need for an undertaking that has already received aid pursuant to these guidelines to obtain further such aid demonstrates that the undertaking's difficulties are either of a recurrent nature or were not dealt with adequately when the earlier aid was granted. Repeated State interventions are likely to lead to problems of moral hazard and distortions of competition that are contrary to the common interest.

71. When planned rescue or restructuring aid is notified to the Commission, the Member State must specify whether the undertaking concerned has already received rescue aid, restructuring aid or temporary restructuring support in the past, including any such aid granted before the entry into force of these guidelines and any non-notified aid. If so, and where less than 10 years have elapsed since the aid was granted or the restructuring period came to an end or implementation of the restructuring plan was halted (whichever occurred the latest), the Commission will not allow further aid pursuant to these guidelines.

…’

The background to the dispute and the decision at issue

7 The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.

8 The Compania Națională de Transporturi Aeriene TAROM SA ('Tarom') is a Romanian airline operating from a single airport hub, located at OTP Bucharest Henri Coandă International Airport (Romania). It is mainly active in the air transport of passengers, cargo and mail. At the beginning of 2020, Tarom employed 1 795 people and had a fleet of 25 aircraft. Tarom operated both domestic and international routes.

9 On 19 February 2020, Romania notified to the Commission a project to grant rescue aid to Tarom, consisting of a loan to finance Tarom's liquidity needs in the amount of 175 952 000 Romanian lei (RON) (approximately EUR 36 660 000), repayable at the end of a period of six months with an option to repay part of the loan early ('the measure at issue').

10 On 24 February 2020, the Commission adopted the decision at issue, by which it found, inter alia, that Tarom's financial situation had significantly deteriorated over the previous five years and highlighted the fact that the accumulated losses over the 2004-2019 period amounted to RON 3 362 130 000 (approximately EUR 715 350 000), thus exceeding half of Tarom's capital.

11 As regards the situation of the transport infrastructure in Romania, the Commission noted that the general condition and reliability of road and rail infrastructure in Romania were poor, and that air transport, in particular the domestic routes operated by Tarom, remained essential for regional development in that country.

12 The Commission also indicated that, according to Romania, Tarom's exit from the market would not make it possible to operate flights for which bookings had already been made and Tarom's competitors would not be able to take over the routes concerned in the short term, and that such an exit would affect a large number of undertakings, in particular domestic airports.

13 In its examination of the measure at issue, in the first place, the Commission found that that measure constituted State aid within the meaning of Article 107(1) TFEU.

14 In the second place, the Commission examined whether the aid measure was compatible with the internal market on the basis of Article 107(3)(c) TFEU.

15 First, in recitals 52 to 57 of the decision at issue, the Commission found that Tarom was an undertaking in difficulty within the meaning of the Guidelines on State aid for rescuing and restructuring.

16 Secondly, in recitals 58 to 65 of the decision at issue, the Commission noted that the information provided by Romania demonstrated that the measure at issue fulfilled the condition laid down in points 43 to 52 of those guidelines, according to which State aid must contribute to an objective of common interest.

17 Thirdly, in recitals 66 to 77 of the decision at issue, the Commission found that the measure at issue was appropriate to achieve the objective pursued, namely to avoid Tarom's liquidation.

18 Fourthly, in recitals 78 to 85 of that decision, the Commission found that the measure at issue was proportionate to Tarom's liquidity needs over a period of six months.

19 Fifthly, in recitals 86 to 89 of the decision at issue, the Commission concluded that the 'one time, last time' principle, laid down in points 70 to 74 of the Guidelines on State aid for rescuing and restructuring, was complied with.

20 Consequently, by the decision at issue, the Commission decided not to raise any objections to the measure at issue on the ground that it was compatible with the internal market, in accordance with Article 107(3)(c) TFEU.

The action before the General Court and the judgment under appeal

21 By application lodged at the Registry of the General Court on 5 December 2020, Wizz Air brought an action for annulment of the decision at issue.

22 In support of its action, Wizz Air relied on four pleas in law, alleging, first, a manifest error of assessment of the contribution of the measure at issue to a well-defined objective of common interest, secondly, an error of law and a manifest error of assessment relating to compliance with the 'one time, last time' principle, thirdly, the existence of serious difficulties which should have led the Commission to initiate the formal investigation procedure, and, fourthly, infringement of the obligation to state reasons within the meaning of the second paragraph of Article 296 TFEU.

23 In the judgment under appeal, ruling, as a preliminary point, on the admissibility of the action, the General Court held that the action was admissible, in so far as Wizz Air was an interested party with an interest in safeguarding the procedural rights available to it under Article 108(2) TFEU, and in so far as it sought, in particular by the third plea in law, respect for its procedural rights.

24 In that regard, the General Court held that it was entitled to examine the substantive arguments put forward by the appellant in the context of the first two pleas in law in order to ascertain whether they were such as to support the third plea, expressly put forward by the appellant for that purpose and relating to the existence of doubts justifying the initiation of the procedure referred to in Article 108(2) TFEU.

25 After examining and rejecting, in the first place, the third plea in law put forward by Wizz Air, which referred to the first two pleas, and, in the second place, the fourth plea, the General Court dismissed the action in its entirety.

Forms of order sought by the parties to the appeal

26 By its appeal, Wizz Air claims that the Court should:

– set aside the judgment under appeal;

– principally, annul the decision at issue and order the Commission to pay the costs, or

– in the alternative, refer the case back to the General Court and reserve the costs of the proceedings at first instance and on appeal.

27 The Commission contends that the Court should:

– dismiss the appeal and

– order Wizz Air to pay the costs.

The appeal

28 Wizz Air relies on seven grounds in support of its appeal. The first ground of appeal alleges that the General Court erred in law by finding that the condition of the existence of an important service which is hard to replicate is satisfied. The second ground of appeal alleges misapplication of the Guidelines on State aid for rescuing and restructuring as regards evidence of the existence of difficulties for a competitor to step in to provide a service in the place of the beneficiary. The third ground of appeal alleges a manifest distortion of the evidence when assessing the available capacity on the market and the ability of low-cost airlines to operate domestic routes. The fourth ground of appeal alleges that the General Court erred in law by finding that capital increases cannot relate to a restructuring plan. The fifth ground of appeal alleges a manifest distortion of the evidence as regards the duration of Tarom's restructuring period. The sixth ground of appeal alleges an error of law in so far as the General Court held that there was no need for the Commission to ascertain whether existing aid had become new aid. The seventh ground of appeal alleges an error of law as regards the Commission's failure to initiate a formal investigation procedure.

The first ground of appeal

Arguments of the parties

29 By its first ground of appeal, Wizz Air submits, in essence, that the General Court erred in law in holding, in paragraphs 50 and 51 of the judgment under appeal, that, for the purposes of assessing whether there is a risk of disruption to an important service which is hard to replicate, within the meaning of point 44(b) of the Guidelines on State aid for rescuing and restructuring, the Commission was not required to take into account the size of the relevant market.

30 The appellant argues that, contrary to the finding of the General Court, it is necessary to analyse the size of a market and the share of the undertaking in receipt of the aid on that market in order to determine whether the service likely to be disrupted may be classified as important, since those elements show the loss which would be caused by the exit of that undertaking from the market. It further submits that paragraph 51 of the judgment under appeal, in so far as it states, first, that there is no need to take account of the size of the relevant market and, secondly, that a service may be classified as important even where it is provided on a 'relatively limited' market, is contradictory.

31 According to the Commission, the first ground of appeal must be rejected as being in part inadmissible and, as to the remainder, unfounded.

Findings of the Court

32 As a preliminary point, it should be noted that it is apparent from point 1 of the Guidelines on State aid for rescuing and restructuring that those guidelines set out the conditions which must be fulfilled in order for the aid measures for rescuing and restructuring undertakings in difficulty referred to therein to be considered compatible with the internal market on the basis of Article 107(3)(c) TFEU.

33 The adoption of such guidelines forms part of the exercise by the Commission of its exclusive competence to assess the compatibility of aid measures with the internal market under Article 107(3) TFEU. The Commission enjoys a wide discretion in that regard (see to that effect, inter alia, judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 37 to 39, and of 15 December 2022, *Veejaam and Espo*, C-470/20, EU:C:2022:981, paragraph 29).

34 By establishing, by means of guidelines, the conditions under which aid measures may be considered to be compatible with the internal market, and by announcing, by publishing those guidelines, that it will apply the rules contained therein, the Commission imposes a limit on the exercise of that discretion, in that, if a Member State notifies proposed State aid which complies with those rules, the Commission must, in principle, authorise that proposed aid. It cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 40, and of 31 January 2023, *Commission* v *Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraph 90).

35 That being said, in so far as, by its first ground of appeal, Wizz Air submits, in essence, that the General Court erred in law in finding, in paragraphs 50 and 51 of the judgment under appeal, that, for the purposes of applying point 44(b) of the Guidelines on State aid for rescuing and restructuring, the Commission was not required to take into account the size of the relevant market or the aid beneficiary's share on that market, it should be noted, first, that, according to point 44(b), Member States must show, inter alia, that 'there is a risk of disruption to an important service which is hard to replicate'.

36 Secondly, as is apparent from the introductory sentence of point 44 of those guidelines, the existence of that risk is one of the elements, listed in a non-exhaustive manner in point 44(a) to (g), by which the Member States can demonstrate serious social hardship or severe market failure which would be likely to result from the failure of the beneficiary of the aid, that demonstration being necessary for the recognition of an objective of common interest pursued by the aid.

37 Accordingly, although the size of the market in which the beneficiary of the aid operates and its market share may be factors indicating the importance of the service provided by that beneficiary, it does not follow either from point 44(b) of those guidelines or from its context, that that importance necessarily depends on those factors and that, in particular, the failure of the beneficiary of the aid is likely to give rise to serious social hardship or severe market failure only on condition that the market in which it operates exceeds a certain size.

38 As the General Court observed, in essence, in paragraph 51 of the judgment under appeal, the fact that the relevant market is relatively limited does not prevent a service provided on that market from being classified as important within the meaning of those guidelines. That is so in the circumstances of the present case where, as the General Court found in paragraph 52 of the

judgment under appeal, that cessation of operations by Tarom, entailing a concrete risk of disruption to some passenger air transport services in Romania, would be detrimental to the 'connectivity' of the regions in Romania exclusively served by that airline and to the economic situation of those regions.

39 It follows that the General Court did not err in law in finding, in paragraphs 50 and 51 of the judgment under appeal, that, for the purposes of assessing whether there is a risk of disruption to an important service which is hard to replicate, within the meaning of point 44(b) of the Guidelines on State aid for rescuing and restructuring, the Commission was not required to take into account the size of the market in which Tarom operates or that airline's share of that market.

40 It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

41 By its second ground of appeal, concerning paragraphs 58, 63, 64 and 66 of the judgment under appeal, Wizz Air submits, in essence, that the General Court erred in law in its assessment of the criteria, laid down in point 44(b) of the Guidelines on State aid for rescuing and restructuring, relating to the risk of disruption to an important service and the difficulties for competitors of stepping in to provide that service in the place of the aid beneficiary.

42 In that respect, in relation to, first, the subject matter of the proof which the Commission must adduce in that regard, the appellant claims that the General Court, in the first place, incorrectly held, in paragraphs 63 and 64 of the judgment under appeal, that, in order for it to be justified, the rescue aid had to have the objective of avoiding any disturbance in the provision of an important service, whereas point 44(b) of those guidelines requires that the objective of the aid be to avoid the risk of 'disruption' to such a service, which requires, in addition to a mere disturbance, a break in or interruption of the service.

43 In the second place, the General Court wrongly required, in paragraph 64 of the judgment under appeal, that Tarom's competitors be able to 'easily' provide the service performed by that airline, whereas point 44(b) of those guidelines provides only that it should not be 'difficult' for competitors to provide the service performed by the undertaking in difficulty.

44 Secondly, as regards the evidence which the Commission must adduce, Wizz Air submits that the General Court, in holding in paragraph 58 of the judgment under appeal that the commercial interest of low-cost airlines in entering the market to fully cover all routes was 'presumably low', resorted to mere presumptions, in disregard of the obligation that 'clear evidence should be provided' that the aid pursues an objective of common interest, set out in point 43 of those guidelines.

45 The Commission contends that the second ground of appeal must be rejected as inadmissible or, in any event, as unfounded.

Findings of the Court

46 As regards, in the first place, the part of the second ground of appeal directed against paragraph 58 of the judgment under appeal, it should be noted that, in that paragraph, the General Court found that, contrary to what the appellant had stated in the first part of its third plea in the action at first instance, the Commission had assessed, in recital 61 of the decision at issue, the possibility that Tarom might be replaced by its competitors on the domestic routes operated exclusively by Tarom. The General Court noted, inter alia, that the Commission had taken the view, by that recital, that it was unlikely that the competitor airlines present on the Romanian market, which are mainly low-cost airlines, would fully cover all of those routes, the commercial interest of those airlines in doing so being 'presumably low'.

47 It does not follow from that description of an element of assessment on the part of the Commission in the decision at issue that the General Court resorted to mere presumptions or that it erred in law as regards the burden of proof borne by the Commission under point 43 of the Guidelines on State aid for rescuing and restructuring.

48 That part of the second ground of appeal must therefore be rejected as unfounded.

49 In so far as Wizz Air criticises the General Court, in the second place, in essence, for having, in paragraphs 63, 64 and 66 of the judgment under appeal, used incorrect criteria in the application of point 44(b) of those guidelines, it suffices to note that the grounds set out in those paragraphs, for the purposes of rejecting the appellant's argument relating to the likelihood of Tarom's service being replaced by its competitors, are purely for the sake of completeness.

50 That part of the second ground of appeal must therefore be rejected as ineffective.

51 It follows from the foregoing that the second ground of appeal must be rejected.

The third ground of appeal

Arguments of the parties

52 By its third ground of appeal, Wizz Air complains that the General Court, in paragraph 69 of the judgment under appeal, manifestly distorted the evidence in its assessment of the passenger capacity available on the Romanian market and of the ability of low-cost airlines to operate on domestic routes.

53 The General Court, first, distorted the evidence by endorsing the Commission's incorrect finding as to the lack of sufficient passenger transport capacity on the ground that, at the date of the decision at issue, 'more than half of the aircraft grounded … belonged to Tarom'.

54 Next, by holding that the appellant did not explain to what extent it would be profitable for low-cost airlines to operate domestic routes involving only a limited number of passengers, the General Court repeated the assertions made in paragraph 58 of the judgment under appeal, which are based on a mere presumption.

55 Lastly, according to Wizz Air, there was no evidence to enable the General Court to state, in paragraph 69 of the judgment under appeal, that the airlines competing with Tarom were all low-cost airlines.

56 According to the Commission, the third ground of appeal is in part inadmissible and, as to the remainder, manifestly unfounded.

Findings of the Court

57 It should be recalled that, in accordance with the Court of Justice's settled case-law, 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).

58 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).

59 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 Court of Justice's settled case-law, 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).

60 In the present case, it must be held that the arguments put forward in support of the third ground of appeal do not demonstrate that the findings made by the General Court in paragraph 69 of the judgment under appeal, in order to reject the argument alleging overcapacity in Romania at the date of the decision at issue, are based on a distortion of the evidence put forward at first instance, that line of argument thus seeking, in reality, to call into question the General Court's definitive assessment of the facts for that purpose.

61 The third ground of appeal must therefore be rejected as inadmissible.

The fourth ground of appeal

Arguments of the parties

62 By its fourth ground of appeal, Wizz Air submits that the General Court erred in law in holding, in paragraph 103 of the judgment under appeal, that the capital increases did not constitute an element of the restructuring plan of an undertaking in difficulty.

63 In particular, the interpretation adopted by the General Court, which precludes restructuring aid comprising financial components, such as capital increases, from being regarded as an element of a restructuring plan, is clearly at odds with point 45 of the Guidelines on State aid for rescuing and restructuring, according to which financial restructuring in the form of capital injections may form part of a restructuring plan, in the same way as operational changes, such as the reorganisation and rationalisation of the beneficiary's activities.

64 That interpretation, which is not accompanied by any reference to the case-law, also contradicts that set out in paragraph 96 of the judgment under appeal.

65 The Commission contends that the fourth ground of appeal is ineffective and, in any event, unfounded.

Findings of the Court

66 It should be noted, as a preliminary point, that the fourth ground of appeal, like the fifth and sixth grounds of appeal, is directed against some of the grounds on which the General Court, in paragraphs 79 to 110 of the judgment under appeal, rejected the second part of the third plea put forward by Wizz Air in support of its action at first instance. The second part of the third plea referred to the second plea in that action, alleging, in essence, that, by authorising the measure at issue, even though Tarom had benefited from a series of capital increases up to 2019 pursuant to restructuring aid granted before Romania's accession to the European Union ('the restructuring aid for Tarom'), the Commission had infringed the 'one time, last time' principle, laid down in point 70 of the Guidelines on State aid for rescuing and restructuring.

67 According to that principle, as the General Court pointed out in paragraphs 79 and 80 of the judgment under appeal, aid must, in principle, be granted to undertakings in difficulty for only one restructuring operation. Point 71 of those guidelines states, in that context, inter alia, that if the undertaking has already received rescue aid, restructuring aid or temporary restructuring support, which it is for the Member State to specify, the Commission will not authorise new aid in accordance with those guidelines, if less than 10 years have elapsed since the aid was granted or the restructuring period came to an end or implementation of the restructuring plan was halted.

68 In so far as, by its fourth ground of appeal, Wizz Air submits that the General Court erred in law in that it wrongly held, in paragraph 103 of the judgment under appeal, that the capital increases did not constitute an element of the restructuring plan of an undertaking in difficulty, it must be held that that argument is based on a misreading of the judgment under appeal.

69 In paragraph 103 of the judgment under appeal, the General Court merely describes and interprets points 45 to 47 of the Guidelines on State aid for rescuing and restructuring, in order to conclude, in paragraph 104 of that judgment, without erring in law, that they distinguish the concept of 'implementation of an aid measure' from that of 'implementation of a restructuring plan', and in order to reject, in particular in paragraph 105 of that judgment, the appellant's line of argument that Tarom's restructuring plan had lasted until the end of the implementation of the restructuring aid for Tarom in 2019.

70 Therefore, contrary to what Wizz Air claims by its fourth ground of appeal, the General Court did not hold, in paragraph 103 of its judgment, that the financial components of restructuring aid, such as capital increases, could never be regarded as forming part of a restructuring plan.

71 The fourth ground of appeal must therefore be rejected as unfounded.

The fifth ground of appeal

Arguments of the parties

72 By its fifth ground of appeal, Wizz Air submits that, in paragraphs 85 and 99 of the judgment under appeal, the General Court manifestly distorted the evidence when it assessed the duration of Tarom's restructuring period.

73 Wizz Air submits, in the first place, that the General Court's finding, in paragraph 85 of the judgment under appeal, that the loan guarantees granted by Romania to Tarom were all called immediately after they were granted is contradicted by the Commission's assertions in recitals 25 and 88 of the decision at issue.

74 In the second place, the General Court distorted the evidence in finding, in paragraph 99 of the judgment under appeal, that the appellant had not adduced any evidence or indication that the restructuring period, as defined in paragraph 98 of that judgment, ended after 2005. In so doing, the General Court ignored some of the evidence provided by Wizz Air and, consequently, confirmed the Commission's erroneous conclusion as regards the end of the restructuring period.

75 According to the Commission, the fifth ground of appeal is ineffective and, in any event, unfounded.

Findings of the Court

76 Although, by its fifth ground of appeal, Wizz Air claims that the General Court distorted the facts, in paragraphs 85 and 99 of the judgment under appeal, when assessing, for the purposes of applying the 'one time, last time' principle, first, the relevant date of the grant of the restructuring aid for Tarom and, secondly, that of the end of the restructuring period, it did not put forward any specific legal arguments capable of demonstrating, in accordance with the case-law recalled in paragraph 59 of the present judgment, a manifest distortion of the facts and evidence by the General Court.

77 Such a distortion cannot be inferred either from the alleged contradiction between paragraph 85 of the judgment under appeal and certain information contained in the decision at issue, or from the fact that the General Court disregarded the evidence adduced by the appellant in the action at first instance or refused to attribute probative value to it, by holding, in paragraph 99 of the judgment under appeal, that the appellant had not proved that the restructuring period had ended, in any event, less than 10 years before the measure at issue was granted.

78 Accordingly, the fifth ground of appeal seeks, in reality, to call into question the General Court's definitive assessment of the facts and evidence in paragraphs 85 and 99 of the judgment under appeal and must therefore be rejected as inadmissible.

The sixth ground of appeal

Arguments of the parties

79 By its sixth ground of appeal, Wizz Air submits that the General Court erred in law in finding, in paragraph 89 of the judgment under appeal, that there was no need for the Commission to verify whether the restructuring aid for Tarom, which it classified as existing aid, had become new aid. According to the appellant, in the light of the alarming information available to the Commission, relating to Tarom's accumulated losses over the period from 2004 to 2019, the General Court should have held, in accordance with the judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663), that the Commission was required to investigate the information that was actually in its possession. Moreover, the appellant submits that the Guidelines on State aid for rescuing and restructuring imposed an enhanced duty on the Commission to adduce clear evidence.

80 It follows that the General Court's assessment, in paragraph 89 of the judgment under appeal, that the appellant had not adduced any evidence or indication showing that the conditions agreed at the stage when the loan guarantees granted in the context of the restructuring aid for Tarom had been altered during the implementation period of those guarantees, is vitiated by an error of law.

81 According to the Commission, the sixth ground of appeal is manifestly unfounded.

Findings of the Court

82 It should be noted that the grounds of the judgment under appeal referred to in the sixth ground of appeal form part of the General Court's assessment of the appellant's arguments at first instance alleging that the Commission should have had doubts as to whether the period of at least 10 years, provided for in point 71 of the Guidelines on State aid for rescuing and restructuring, had elapsed since the grant of the restructuring aid for Tarom. The appellant claimed, more specifically, that that aid had been altered, in particular so that Tarom's debts arising from the payments made by the Romanian State, pursuant to the loan guarantees, were converted into a capital increase in favour of that State.

83 In that context, the General Court found, first, in paragraph 88 of the judgment under appeal, that the appellant did not dispute the Commission's assertion that the conditions for calling the loan guarantees, granted in the context of that aid, and the conversion of the debts arising from the payments made by the Romanian State, pursuant to those guarantees, into a capital increase were provided for in various decisions and orders made between 1997 and 2003, even before Romania's accession to the European Union.

84 Secondly, the General Court stated, in paragraph 89 of the judgment under appeal, that the appellant merely claimed in that regard that the Commission ought to have satisfied itself that the call on the guarantees had been made under the conditions initially agreed at the granting stage, but that it had not adduced any evidence or indication that those conditions had been altered during the period of implementation of those various guarantees.

85 In so doing, the General Court did not err in law as regards the allocation of the burden of proof.

86 As is apparent from the case-law referred to in paragraph 43 of the judgment under appeal, to which the General Court referred in paragraph 89 of that judgment, evidence of the existence of doubts as to the compatibility of the aid at issue with the internal market, which requires investigation of both the circumstances in which the decision not to raise objections was adopted and its content, must be adduced by the applicant seeking the annulment of that decision on the basis of a body of consistent evidence (judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 40).

87 In that regard, contrary to what Wizz Air seems to suggest, that allocation of the burden of proof cannot vary according to the type of aid concerned and applies, in particular, to rescue or restructuring aid such as the measure at issue.

88 It follows that the sixth ground of appeal must be rejected as unfounded.

The seventh ground of appeal

Arguments of the parties

89 By its seventh ground of appeal, Wizz Air alleges an error of law in that the General Court failed to examine the third plea in the action at first instance in so far as it alleged infringement of its procedural rights under Article 108(2) TFEU and the existence of serious difficulties justifying the initiation of the formal investigation procedure.

90 In that regard, first, although Wizz Air claimed that the inadequacies identified in the first and second pleas established the existence of serious difficulties requiring the initiation of a formal investigation procedure, the General Court examined those pleas only from the perspective of the substantive assessment, that is to say, in the light of the existence of a manifest error of assessment of the facts or an error of law.

91 However, as the only plea seeking to safeguard its procedural rights, the third plea in its action had, according to Wizz Air, independent content from the first two pleas, given that the examination criterion is different for the purposes of demonstrating the existence of serious difficulties, which should have led to the initiation of a formal investigation procedure.

92 Secondly, the General Court cannot presume that, since it had examined the first two pleas in the action, the appellant's third plea was deprived of its stated purpose. In fact, in all the paragraphs of the judgment under appeal in which the General Court rejected the existence of a manifest error of assessment on the part of the Commission, the existence of serious difficulties could nevertheless be established on the basis, inter alia, of omissions and gaps in the reasoning of the decision at issue.

93 The Commission contends that the seventh ground of appeal should be rejected as unfounded.

Findings of the Court

94 It should be recalled that, 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).

95 Thus, it is for the party applying for annulment of a decision not to raise objections to show that there were doubts concerning the compatibility of the aid measure with the internal market, meaning that the Commission was required to initiate the formal investigation procedure provided for in Article 108(2) TFEU. Such proof must be sought both in the circumstances in which that decision was adopted and in its content, on the basis of a body of consistent 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).

96 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).

97 In the present case, it must be noted, as the General Court stated, as a preliminary point, in paragraph 26 of the judgment under appeal, that the third plea in law in Wizz Air's action at first instance expressly alleged infringement of its procedural rights under Article 108(2) TFEU, in that the Commission had encountered serious difficulties in assessing the compatibility of the measure at issue with the internal market.

98 However, as the General Court held, in essence, in paragraph 28 of the judgment under appeal, the existence of such difficulties may be sought, inter alia, in the Commission's 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).

99 In that regard, it is apparent from Wizz Air's action at first instance that, in support of the third plea in that action, the appellant, in essence, referred to the first and second pleas in that action, claiming that the inadequacies and errors identified in those pleas established the existence of serious difficulties which should have justified the initiation of a formal investigation procedure, those inadequacies or errors vitiating the Commission's assessment in the light of points 43 and 44 of the Guidelines on State aid for rescuing and restructuring and in the light of the 'one time, last time' principle.

100 It is apparent from a reading of the judgment under appeal, and in particular from paragraphs 75 and 109 thereof, that the General Court did in fact examine those complaints from the point of view of the existence of serious difficulties which should have led the Commission to entertain doubts as to the compatibility of the measure at issue with the internal market and to initiate a formal investigation procedure.

101 It follows from the foregoing that the seventh ground of appeal must be rejected as unfounded.

102 Since none of the grounds of appeal put forward by the appellant has been upheld, the appeal must be dismissed in its entirety.

Costs

103 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

104 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 all the costs of the present appeal.

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

1. **Dismisses the appeal;**

2. **Orders Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.) to bear its own costs and to pay those incurred by the European Commission.**

Bonichot Rodin Rossi

Delivered in open court in Luxembourg on 11 January 2024.

A. Calot Escobar
Registrar

J.-C. Bonichot
Acting President of the Chamber