



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 27 June 2013¹

Case C-284/12

Deutsche Lufthansa AG
v
Flughafen Frankfurt-Hahn GmbH

(Request for a preliminary ruling from the Oberlandesgericht Koblenz (Germany))

(State aid — Benefits granted by a public airport operator to a low-cost airline — Decision to initiate a formal investigation procedure — Obligation of Member States' courts to abide by the Commission's assessment of the existence of aid)

1. In these proceedings, the Oberlandesgericht Koblenz refers to the Court for a preliminary ruling a number of questions concerning the interpretation of Articles 107(1) and 108(3) TFEU. These questions have arisen in connection with an action brought by Deutsche Lufthansa AG ('Lufthansa') against Flughafen Frankfurt-Hahn GmbH ('FFH'), the company with a majority public shareholding which operates Frankfurt-Hahn Airport ('Frankfurt-Hahn Airport'), seeking inter alia recovery of the alleged aid which the defendant granted to Ryanair Ltd ('Ryanair') in the form of favourable airport fees and other favourable contractual conditions. The Oberlandesgericht Koblenz asks whether in assessing the existence of State aid for the purposes of applying Article 108(3) TFEU it is bound by the Commission's decision to initiate a formal investigation procedure in relation to the measures at issue in the main proceedings. It also asks the Court about the condition of the selectivity of aid for the purposes of Article 107 TFEU.
2. In its order for reference the Oberlandesgericht Koblenz observes that the main proceedings form part of a series of actions brought before the German courts by competitors of low-cost airlines concerning the alleged subsidies which they have been granted by the public operators of various airports in Germany.²

I – The main proceedings and the questions referred for a preliminary ruling

3. On 26 November 2006 Lufthansa brought proceedings before the Landgericht Bad Kreuznach, complaining about a number of business practices which FFH had established in favour of Ryanair and which, in its view, constituted non-notified State aid granted in breach of Article 108(3) TFEU. It essentially claimed that the airport fees adopted by FFH in 2001 and 2006 were fixed on the basis of contracts concluded previously with Ryanair, which is responsible for over 95% of passenger traffic through Frankfurt-Hahn Airport, and contained conditions which in fact favoured that airline. In

¹ — Original language: Italian.

² — One of those actions, which was brought by Air Berlin against Lübeck Airport, forms the basis of another reference for a preliminary ruling from the Schleswig-Holsteinisches Oberlandesgericht (pending Case C-27/13) in which the same question is raised as to the degree of autonomy which the national court enjoys in establishing the existence of aid where the Commission has initiated, in parallel, a formal investigation procedure under Article 108(2) TFEU.

particular, Ryanair had benefitted from particularly low fees as a result of a reduction in the charges calculated on the basis of the number of departing passengers and a subsidy known as ‘marketing support’ which is granted where new routes are opened.³ Those measures were granted despite the fact that FFH was continuing to make losses. Lufthansa sought an order that the payments made to Ryanair by way of marketing support between 2002 and 2005 and those corresponding to the reduction in charges which had benefitted Ryanair as a result of the schedule of fees adopted by FFH for 2001⁴ be recovered, and that any future aid for the benefit of Ryanair be refrained from.

4. On 16 May 2007, the Landgericht Bad Kreuznach dismissed as unfounded the application brought by Lufthansa.⁵ The appeal which it brought before the Oberlandesgericht Koblenz was in turn dismissed by judgment of 25 February 2009. On 10 February 2011, the Bundesgerichtshof, before which Lufthansa had brought proceedings, set aside that judgment and referred the case back to the Oberlandesgericht Koblenz to establish whether there had been an infringement of Article 108(3) TFEU.

5. On 17 June 2008 the Commission decided to initiate a formal investigation procedure under Article 108(2) TFEU regarding possible State aid granted by the Federal Republic of Germany to FFH and Ryanair.⁶ The measures covered by the decision included the reduction in airport fees and charges and special marketing provisions for the benefit of Ryanair.

6. On 4 January 2012, the Oberlandesgericht Koblenz sent the Commission a request for an opinion pursuant to point 3.2 of the Commission notice on the enforcement of State aid law by national courts (‘the Notice’).⁷ The observations submitted to the Court make clear that that request concerned the grant of marketing support, which is claimed to be start-up aid, and the reduction in airport fees based on the 2006 schedule. The Oberlandesgericht Koblenz essentially asked whether those measures were imputable to the State⁸ and selective. The Commission responded with an opinion of 29 February 2012 in which, with reference to the case-law of the Court of Justice, it stated as a preliminary point that the Oberlandesgericht Koblenz was not required to assess the existence of State aid in this case as it could take the decision to initiate a formal investigation procedure as a basis for drawing all the necessary inferences from the infringement of Article 108(3) TFEU. In that respect it pointed to the contrast between the line taken by the Bundesgerichtshof and the case-law of the Court of Justice. With regard to the question posed by the Oberlandesgericht Koblenz, the Commission stated that the measures in question were both imputable to the State and selective.

7. Since it considered, contrary to what the Commission suggested in its opinion, that it had to assess whether the measures at issue constituted State aid, the Oberlandesgericht Koblenz decided to stay proceedings and referred the following questions to the Court for a preliminary ruling:

‘(1) Does an uncontested decision of the Commission to initiate a formal investigation procedure under the second sentence of Article 108(3) TFEU have the result that, in appeal proceedings concerning the recovery of payments made and an order to refrain from making future payments, a national court is bound by the Commission’s legal opinion in that decision as to whether a measure constitutes State aid?’

3 — According to what Lufthansa stated in its observations, that subsidy was calculated not on the basis of the volume of passengers on the new route, but on the total number of passengers carried by the airline concerned.

4 — According to Lufthansa, those reductions correspond to EUR 2.679 million.

5 — The decision concerned the application of subparagraph 1 of Article 823(2) of the BGB and the possibility of classifying Article 108(3) as a provision for the protection of the applicant.

6 — State aid C 29/08 (ex NN 54/07) – Germany – Flughafen Frankfurt Hahn & Ryanair, OJ 2009 C 12, p. 6.

7 — OJ 2009 C 85, p. 1.

8 — This question concerned in particular the measures granted pursuant to the contract concluded between FFH and Ryanair in 2001 when public authority representatives did not make up the majority of the FFH supervisory board.

(2) If Question 1 is answered in the negative:

Are measures adopted by a public undertaking within the meaning of Article 2(b)(i) of Commission Directive 2006/111/EC⁹ ('the Transparency Directive'), which operates an airport, to be regarded, for the purposes of State aid law, as selective measures within the meaning of Article 107(1) TFEU, simply because they benefit only airlines which use the airport?

(3) If Question 2 is answered in the negative:

(a) Is the criterion of selectivity not satisfied if the public undertaking which operates the airport offers the same conditions, and in a transparent manner, to all airlines which opt to use the airport?

(b) Is this still the case if the airport operator adopts a specific business model (cooperation with 'low-cost carriers', in this instance), which tailors its conditions of use to such customers, with the result that those conditions are not equally attractive to all airlines?

(c) Is there a selective measure, at any rate, if the vast majority of the airport's passengers has been attributable to a single airline for a number of years?

8. By letter of 18 June 2012, the referring court informed the Court that an application for the order for reference to be set aside had been brought by the applicant in the main proceedings.

II – Procedure

9. Written observations were lodged by the parties to the main proceedings, the German, Polish, Belgian and Netherlands Governments and the Commission. Lufthansa, FFH, Ryanair, the German and Belgian Governments, and the Commission presented oral argument at the hearing on 11 April 2013.

III – Analysis

A – *Admissibility of the reference for a preliminary ruling*

10. Although the description of the legal and factual background to the questions referred which is contained in the order for reference made by the Oberlandesgericht Koblenz is undoubtedly scant, it is, in my view, sufficient to enable the Court to give a useful answer to that court and thus to satisfy the requirements laid down in case-law.¹⁰ The plea, which Lufthansa raised in its observations, alleging that the reference for a preliminary ruling is inadmissible must therefore be dismissed.

B – *Question 1*

11. By its first question, the referring court asks the Court, in essence, whether the national court before which the infringement of Article 108(3) TFEU is alleged as part of an action for suspension of the alleged unlawful aid and recovery of aid already paid must accept the assessment of the measures at issue made by the Commission in the decision to initiate a formal investigation procedure despite the fact that that assessment was merely provisional in nature. That court considers that if the answer

9 — Commission Decision 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings (OJ 2006 L 318, p. 17).

10 — See, *inter alia*, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraphs 47 to 49.

is in the affirmative the national courts' power of review would be reduced excessively and observes that the highest German courts have given a negative reply in this regard on the basis in particular of the judgments of the Court of Justice in *Transalpine Ölleitung in Österreich*¹¹ and *SFEI and Others*.¹² It further states that if the national courts were entitled to assess the nature of the measures at issue independently, even after the formal investigation procedure had been initiated or while it was ongoing, the risk of conflicting decisions could be avoided either by asking the Commission for an opinion or referring a question to the Court for a preliminary ruling.

12. The line taken by the higher German courts and adopted by the referring court is itself based on the role which the Court accords to national courts in ensuring compliance with the obligation on Member States under the final sentence of Article 108(3) TFEU not to put proposed aid measures into effect until the Commission has adopted a final decision thereon.

13. As we know, the direct effect of that provision (or more precisely, the final sentence of Article 93(3) EC then in force) has been recognised since the well-known judgment in *Costa v Enel*.¹³ The Court subsequently held that the obligation of non-implementation laid down in the provision in question and, consequently, the protection which individuals can invoke before the national courts by virtue of the direct effect thereof, relates not only to aid projects notified to the Commission, as is evident from the Treaty, but also to any aid measure which a Member State proposes to set up, even where there is no prior notification, and extends to the entire period during which the prohibition remains in force.¹⁴

14. In order to enable the national courts to provide adequate protection for those harmed by the infringement of the final sentence of Article 108(3) TFEU, the Court conferred on the national courts the power to interpret and apply the notion of aid, in particular with a view to determining whether a State measure introduced without prior notification ought to have been subject to the investigation procedure provided for in the Treaty.¹⁵

15. The protection afforded to private individuals before national courts play a part in the effective functioning of the system of monitoring State aid set in place by the Treaty¹⁶ by contributing to the effectiveness thereof, in particular in the absence of any powers of compulsion on the part of the Commission in relation to the recipients of the aid. The central nature of the role accorded to the national courts within that system is affirmed without hesitation by the Commission itself in the Notice – and the State aid action plan¹⁷ which preceded it – which reveals in particular the tendency to reinforce the role and incentivise recourse to private enforcement, in particular on the part of undertakings in competition with the aid recipients.¹⁸

16. In this context, the national courts and the Commission therefore fulfil separate but complementary roles.¹⁹ In particular, it is for the national courts to offer to individuals entitled to rely before the courts on a breach of the obligation laid down in the final sentence of Article 108(3) TFEU the certain prospect that all the necessary legal inferences provided for in national law will be drawn

11 — Case C-368/04 [2006] ECR I-9957.

12 — Case C-39/94 [1996] ECR I-3547.

13 — Case 6/64 *Costa* [1964] ECR 585. See also, inter alia, Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 8; Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 14; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* ('FNCE') [1991] ECR I-5505, paragraph 11; and *SFEI*, loc. cit., paragraph 39.

14 — *Lorenz*, loc. cit., paragraph 8.

15 — Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 14; *Steinike & Weinlig*, loc. cit., paragraph 14; *SFEI*, loc. cit., paragraph 49; *FNCE*, loc. cit., paragraph 10.

16 — See, to that effect, *FNCE*, loc. cit., paragraph 8.

17 — COM(2005) 107 final.

18 — See in particular paragraphs 1 and 5 and 24 of the notice.

19 — See *SFEI*, loc. cit., paragraph 41; Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 74; *Transalpine Ölleitung in Österreich and Others*, loc. cit., paragraph 37; Case C-275/10 *Residex Capital IV* [2011] ECR I-13043, paragraph 26.

both as regards the validity of measures giving effect to the aid and the recovery of financial contributions granted in disregard of the standstill clause.²⁰ Therefore, the remedies available before national courts include preventing the payment of unlawful aid,²¹ recovery thereof²² and interest thereon,²³ damages,²⁴ and interim measures.²⁵

17. From the foregoing it follows, on the one hand, that the protection which the national courts are required to afford to individuals serves to achieve the *objective* pursued by the obligation of non-implementation laid down in the final sentence of Article 108(3) TFEU and, on the other, that the extent of that protection depends on the *scope* of that obligation. I shall now proceed first to consider these two elements, that is to say the objective and scope of the standstill obligation (see No 1 and No 2 below) in order to mark the bounds of the powers conferred on the national courts by virtue of the direct effect afforded to the final sentence of Article 108(3) TFEU (see No 3 below).

1. The objective of the obligation of non-implementation laid down in the final sentence of Article 108(3) TFEU

18. The first sentence of Article 108(3) TFEU imposes on the Member States the obligation to inform the Commission of any plans to grant or alter aid. If, after an initial preliminary examination, the Commission considers that the plan notified is not compatible with the internal market, it is to open the formal investigation procedure laid down in Article 108(2) TFEU (second sentence of Article 108(3) and Article 4(4) of Regulation No 659/1999). As can be seen, the final sentence of Article 108(3) TFEU prohibits the Member State concerned from putting the proposed measure into effect until this procedure has resulted in a final decision of the Commission.²⁶

19. The Court has already held that the prohibition laid down by that provision ‘is designed to ensure that a system of aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 88(2) EC’,²⁷ thus instituting ‘prior control of plans to grant new aid.’²⁸

20. In addition to that function, which is of a more specifically *procedural* nature, the Court also conferred on the prohibition in question an *essential* function consisting in ‘ensuring that *an incompatible aid will never be implemented*’.²⁹ This function, to which the Court expressly ascribes a ‘preservative’ nature in *CELF I*, is first pursued ‘provisionally’ by imposing a standstill obligation during the verification procedure, and then definitively when a negative decision is adopted at the end of that procedure.³⁰ Therefore, the objective of the ‘prohibition’ underlying the obligation of non-implementation is initially pursued by deferring implementation of the proposed aid for as long as doubts remain as to its compatibility with the internal market.³¹ In that context, it is for that

20 — *FNCE*, loc. cit., paragraph 12; *SFEI*, loc. cit., paragraph 40; *van Calster and Others*, loc. cit., paragraph 64; Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49; *Transalpine Ölleitung in Österreich and Others*, loc. cit., paragraph 47; Case C-199/06 *CELF et Ministre de la Culture et de la Communication* (‘*CELF I*’) [2008] ECR I-469, paragraph 45; and *Residex Capital IV*, loc. cit., paragraph 29. See also paragraph 30 of the notice.

21 — See in particular *FNCE*, paragraph 12, and the notice, section 2.2.1.

22 — See in particular *Xunta de Galicia*, loc. cit., paragraph 49; *SFEI*, loc. cit., paragraphs 40 and 68; and *FNCE*, loc. cit., paragraph 12, and the notice, section 2.2.2.

23 — See in particular *CELF I*, loc. cit., paragraphs 53 to 55, and the notice, section 2.2.3.

24 — See in particular *CELF I*, loc. cit., paragraphs 53 to 55; *Transalpine Ölleitung in Österreich*, loc. cit., paragraph 56; Case C-334/07 *P Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 54, and the notice, section 2.2.4.

25 — See in particular *SFEI*, loc. cit., paragraph 52; *Transalpine Ölleitung in Österreich*, paragraph 46. See paragraph 26 et seq. of the notice.

26 — See also Article 3 of Regulation No 659/1999 entitled ‘Standstill clause’.

27 — See Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 17, and *CELF I*, loc. cit., paragraph 36.

28 — See *CELF I*, loc. cit., paragraph 37, and *Lorenz*, loc. cit., paragraph 2.

29 — See *CELF I*, loc. cit., paragraph 47. Italics added.

30 — *Ibid.*

31 — See *CELF I*, loc. cit., paragraph 48.

national court to preserve, until the final decision of the Commission, the rights of individuals faced with ‘a possible breach’ by State authorities of the prohibition laid down by Article 108(3) TFEU,³² by ordering full recovery of aid paid in breach of that prohibition. As the Court ruled subsequently in its judgment in *CELF II*, ‘[t]he objective of the national courts’ tasks is ... to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision.’³³

21. In that regard it is interesting to note that the obligation on the national courts to order repayment of unlawful aid implemented in breach of the standstill obligation ceases once the Commission has found it to be compatible with the internal market by resolving the doubts raised previously. As the Court stated in *CELF I*, the implementation of compatible aid is not contrary to the objective pursued by the final sentence of Article 108(3) TFEU, which consists in preventing the implementation only of incompatible aid.³⁴ On the other hand, such implementation contravenes the more specifically procedural function of the prohibition laid down in that provision, which consists, as we have seen, in guaranteeing that the effects of aid, including compatible aid, do not occur until the Commission has ruled definitively thereon. In those circumstances, the national courts are therefore required to order repayment of interest in respect of the ‘period of unlawfulness’, that is to say from the date on which the aid was made available to the recipient in breach of the obligation of non-implementation until the adoption of the final decision by the Commission.

2. Scope of the obligation of non-implementation laid down in the final sentence of Article 108(3) TFEU

22. According to the findings of the Court, the machinery for review laid down in Article 108(3) TFEU establishes an obligation of prior notification ‘which, as such, necessarily implies the suspensory effect required by the final sentence of Article 93(3)’.³⁵

23. Although it is common ground that that obligation concerns only plans to grant or alter aid, the preventative nature of the machinery for review laid down in Article 108(3) TFEU, the inseparability of the obligation to inform the Commission and the standstill obligations,³⁶ and the procedural importance thereof referred to above, leads me to believe that the prohibition laid down in the final sentence of that provision arises automatically as a result of the Commission being informed. It follows that that obligation is binding on the Member States throughout the review procedure,³⁷ irrespective of the nature of the measures notified, and thus even where they *do not objectively constitute aid*, a possibility expressly provided for in Regulation No 659/1999.³⁸

24. In my view, that interpretation reflects the nature and purpose of the procedure for verifying aid provided for in the Treaty. To allow a Member State to take as a basis, when implementing a measure, a different assessment thereof from that which led it to notify it to the Commission would introduce an element of incoherence and weaken the effectiveness of the final sentence of Article 108(3) TFEU as a means of ‘safeguarding the machinery for review laid down by that article.’³⁹

32 — See *CELF I*, loc. cit., paragraph 38.

33 — See Case C-1/09 *CELF and Ministre de la Culture et de la Communication* (‘*CELF II*’) [2010] ECR I-2099, paragraph 30).

34 — See *CELF I*, paragraphs 47 to 49.

35 — See Case C-332/98 *France v Commission* [2000] ECR I-4833, paragraph 31.

36 — See Case C-332/98 *France v Commission*, loc. cit., paragraph 32.

37 — See Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraph 24; *SFEI*, loc. cit., paragraph 38; *Lorenz*, loc. cit., paragraph 8; and *FCNE*, loc. cit., paragraph 11.

38 — Under Articles 4(2) and 7(2) of Regulation No 659/1999, where the Commission, after a preliminary examination or after the formal investigation procedure, finds that ‘the notified measure does not constitute aid, it is to record that finding by way of a decision’.

39 — See C-332/98 *France v Commission*, loc. cit., paragraph 32.

That applies all the more so as the ever increasing complexity of public interventions in the market often makes it objectively difficult to determine whether they include elements of aid, thus increasing the specific risk that, if the standstill clause is not implemented solely as a result of the notification, measures will be implemented which are in fact incompatible with the internal market.

25. On the other hand, if there has been no notification, the effectiveness of the standstill obligation is linked to the *objective existence of State aid*. A Member State which, without informing the Commission, implements aid within the meaning of Article 107(1) TFEU fails to fulfil its obligations under Article 108(3) TFEU. In the present case, the Court is asked, in essence, to give a preliminary ruling on whether a Member State is also required, *irrespective of the actual nature of the measure at issue*, to suspend implementation thereof until the Commission has adopted a final decision where the latter decides, after a preliminary examination initiated following a complaint or of its own motion, to initiate a formal investigation procedure under Article 108(2) TFEU.

26. Like the Commission and the applicant in the main proceedings, I consider that the answer to this question should be in the affirmative.

27. The obligation to suspend implementation of a measure in respect of which a formal investigation procedure has been initiated is based on the final sentence of Article 108(3) TFEU, as interpreted by the Court,⁴⁰ and, as occurs in the case of a notification, exists *regardless of whether or not the measure in question objectively constitutes aid*.

28. That conclusion follows from an analysis of the case-law of the Court of Justice and the General Court. In its judgment in *Italy v Commission*,⁴¹ the Court of Justice, ruling by way of interim decision on the Commission's objection to the action brought by Italy against the decision to open the formal investigation procedure in respect of certain measures for the benefit of the Tirrenia di Navigazione group, classified in that decision as 'new aid', the Court found, with reference to the judgments in *Spain v Commission (Cenemesa)*⁴² and *Italy v Commission (Italgrani)*,⁴³ that '[r]egarding aid in the course of implementation the payment of which is continuing and which the Member State regards as existing aid, the contrary classification as new aid, *even if provisional*, adopted by the Commission in its decision to initiate the procedure under [the last sentence of Article 108(2) TFEU] in relation to that aid, *has independent legal effects*'.⁴⁴ According to the Court, although 'the classification of the aid corresponds to an objective situation which does not depend on the assessment made at the stage of the initiation of the procedure', that decision means that from the Commission's point of view 'the aid has been and is being unlawfully implemented, in disregard of the suspensory effect, in relation to new aid, which follows from the last sentence of Article [108(2) TFEU]'⁴⁵ and 'necessarily alters the legal position of the measure under consideration ..., particularly as regards the pursuit of its implementation'.⁴⁶ Thus, 'after its adoption there is at the very least a significant element of doubt as to the legality of that measure which, without prejudice to the possibility of seeking interim relief from the court with the power to grant it, *must lead the Member State to suspend payment*, since the initiation of the procedure under Article [108(2) TFEU] excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued'.⁴⁷ In that sense, the decision to open that procedure 'has direct consequences on the suspension of the measures in question'.⁴⁸

40 — See point 12.

41 — Case C-400/99 *Italy v Commission* [2001] ECR I-7303.

42 — Case C-312/90 [1992] ECR I-4117.

43 — Case C-47/91 [1992] ECR I-4145.

44 — Paragraph 57; italics added.

45 — Paragraph 58.

46 — Paragraph 59.

47 — Paragraph 59; italics added.

48 — Paragraph 65.

29. In my view, the passages cited above show with sufficient clarity that the ‘independent legal effects’ of the decision to initiate a formal investigation procedure to which the Court refers, including, in particular, the obligation of the Member State to suspend implementation of the measure concerned, follow from the classification thereof as ‘new aid’.⁴⁹ There is no doubt, as the Court made clear in the judgment in question, that such classification is merely *provisional* in nature, thus allowing the Commission to conclude on the basis of the information gathered during the formal investigation procedure that the measure at issue does not constitute aid within the meaning of Article 107(1) TFEU, or that it constitutes existing aid. None the less, by classifying a measure that is not notified and in the course of implementation as ‘new aid’, and by ordering the initiation of the formal investigation procedure in respect thereof, the Commission has at least serious doubts as to the legality of that measure and its compatibility with the internal market. As the Court has stated, such doubts are sufficient to trigger the safeguard mechanism established by the final sentence of Article 108(3) TFEU and to require the Member State to suspend implementation of the measure concerned.⁵⁰

30. Contrary to the interpretation proposed by FFH, I consider that the scope of the judgment of 9 October 2001 in *Tirrenia* goes beyond cases where the classification of the measure as aid is undisputed and the difference in opinion between the Member State concerned and the Commission relates solely to whether or not it constitutes existing or new aid. Thus, the case which gave rise to that judgment also related to public interventions which, according to the applicant Member State, were wrongly – and in any event after an insufficient examination – classified as aid in the contested decision.⁵¹ At paragraph 69 of the judgment the Court expressly declared the action admissible also in relation to those measures ‘for reasons similar to those set forth in paragraphs 59 and 60’. In the judgment dealing with the substance, given on 10 May 2005, the Court confirms that reading of the judgment,⁵² and clearly indicates that the legal consequences of a decision to initiate a formal investigation procedure are essentially identical both where the Member State concerned regards the measures classified provisionally as new aid as constituting existing aid and where it considers that they do not constitute aid at all.⁵³ The decision contested in the case which gave rise to the judgments in question were, moreover, annulled by the Court precisely because they involved the suspension, without prior discussion with the Member State concerned, of measures which it did not consider to constitute aid⁵⁴ and which the Commission itself, in the decision on partial closure of the formal investigation procedure, implicitly regarded as not satisfying the condition of selectivity.

31. It is also worth pointing out that the General Court has already had occasion to apply the principles established in the above judgment of 9 October 2001 to a situation where the measures in respect of which the formal investigation procedure was initiated did not constitute aid in the view of the Member State concerned.⁵⁵ As the Commission correctly stated in its written observations, there is no reason to draw a distinction between the two cases.

49 — See also Case C-400/99 *Italy v Commission* [2005] ECR I-3657, paragraph 24.

50 — See paragraphs 59 and 64.

51 — See the description of the measures at issue at paragraphs 23 to 26 of the judgment, and paragraph 28.

52 — At paragraph 9 of that judgment the Court, adopting the content of the interlocutory judgment, states that the application had been held admissible ‘on the ground that the Commission had classified the measures at issue as new aid implemented unlawfully, whereas the Italian Government contended that, in some cases, the aid was existing aid ..., and that in other cases there was no element of aid in the measures, which implied that those measures should not be suspended, contrary to the purport of the contested decision’.

53 — See paragraph 29.

54 — See paragraphs 31 and 34 and paragraph 1 of the operative part. I note that in the interlocutory judgment the Court expressly ruled out the possibility that the suspension of that measure arose from a purported order for suspension contained in the contested decision.

55 — Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v Commission* [2002] ECR II-4217, 36 to 42; Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] ECR II-2309, paragraphs 80 to 86; and judgment of 25 March 2009 in Case T-332/06 *Alcoa Trasformazioni v Commission*, paragraphs 33 to 42.

32. It follows from the foregoing that the decision to initiate a formal investigation procedure can entail an obligation on the Member State to suspend measures which would not be subject to the procedure laid down in Article 108(3) TFEU because they do not constitute aid or constitute existing aid. Whilst, in the case of measures which fall within the concept of aid and new aid, the standstill obligation which follows from initiation of the formal investigation procedure is additional to the prohibition laid down in the final sentence of Article 108(3) TFEU, in the case of measures which prove not to constitute such aid, that obligation arises *ex novo* as a consequence of their provisional classification in the decision to initiate the procedure.

33. Contrary to the view which the German Government appears to take in its written observations, the Commission's power to order the Member State concerned, pursuant to Article 11(1) of Regulation No 659/1999, to suspend any aid which is granted unlawfully does not preclude the conclusion that there is an obligation to suspend implementation of the measures subjected to the formal investigation procedure as an effect independent of the decision to initiate that procedure. I would point out, in that connection, that Article 11 of Regulation No 659/1999 constitutes codification of the principles established in *Boussac*,⁵⁶ in which the Court conferred that power on the Commission with a view to counterbalancing the obligation on it to examine the compatibility of non-notified aid without merely being able to declare it unlawful.⁵⁷ Unlike failure to comply with the prohibition on implementation laid down in the final sentence of Article 108(3) TFEU, which can be relied on only before national courts, failure to implement a suspension decision provided for in Article 11 of Regulation No 659/1999 entitles the Commission to bring the matter directly before the Court under the procedure provided for in the second subparagraph of Article 108(2) TFEU. Therefore, two substantially different remedies and procedures are involved.

34. FFH and Ryanair also pointed out that to confer suspensory effect on a decision to initiate a formal investigation procedure would prejudice the rights of defence of the persons involved, including in particular the recipient of the measure at issue, who would suffer the consequences of its suspension without having had the possibility of setting out his point of view before the decision was adopted. In that connection, while it is true that, according to settled case-law, the obligation on the Commission to give the parties concerned, including the recipient of the aid and the entities implementing it, notice to submit their comments is laid down only in connection with the examination under Article 108(2) TFEU,⁵⁸ the persons involved have the right to appeal the decision by which, after the preliminary examination stage, the Commission initiates the formal investigation procedure, and that right is conferred precisely in view of the legal effects which that decision produces. The fact that, in actions against those decisions, the review of the Courts of the European Union is limited on account of the preliminary nature of the assessment carried out by the Commission,⁵⁹ since they are unable to

56 — Case C-301/87 *France v Commission*, loc. cit. As we know, in that judgment, having pointed out that in order for it to be effective, the machinery for review laid down by the Treaty presupposes that measures may be taken to counteract any infringement of the rules laid down in Article 93(3) EC in force at that time, the Court held that once it has established that aid has been granted or altered without notification or having been notified it has been implemented without awaiting the outcome of the formal investigation procedure, the Commission has the power to issue an interim decision requiring the Member State to suspend immediately the payment of such aid pending the outcome of the examination of the aid and, where the Member State fails to comply with that decision, to bring the matter directly before the Court whilst at the same time carrying out the examination on the substance of the matter (paragraphs 18 to 23).

57 — Paragraphs 9 to 23.

58 — Case C-198/91 *Cook v Commission* [1993] I-2487, paragraph 22; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 16; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 34; and Joined Cases C-75/05 P and C-80/05 P *Germania and Others v Kronofrance* [2008] ECR I-6619, paragraph 37.

59 — See *Alcoa Trasformazioni v Commission*, paragraph 61, and Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa v Commission* [2002] ECR II-4217, paragraph 49, in which the Court's review is expressly confined to manifest error of assessment. Incidentally, I note that that limitation of the Court's review would appear to be not entirely consistent with the Court's case-law, according to which 'the [Union] Courts must in principle, regard being had both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article [107(1) TFEU]' (see to that effect, inter alia, Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 111). In my view, it would have been more in keeping with that case-law to rule that also in the case of a decision to initiate a formal investigation procedure the Courts of the European Union undertake a review which is as comprehensive as possible but limited to the question whether, on the basis of the information available to it, the Commission was perfectly justified in concluding provisionally that there is aid or at least that doubts remain in that regard.

rule definitively on the existence of aid, does not, contrary to the assertions made by FHH, infringe the right to adequate judicial protection. Since suspensory measures are involved, that review cannot but be limited to establishing whether the conditions are satisfied to progress to the next stage of the procedure, the initiation of which produces the legal effects which render those measures actionable.

3. The scope of the protection which the national courts are required to afford to individuals who have suffered harm as a result of a possible breach of the final sentence of Article 108(3) TFEU

35. As we have seen at points 22 and 24 above, the obligation of non-implementation laid down in the final sentence of Article 108(3) TFEU arises by reason solely of the notification, where such notification has taken place. Therefore, the national courts are required to draw all the conclusions from any failure to meet that obligation *without* any independent evaluation they carry out pursuant to Article 107(1) TFEU of the measures covered by the notification.

36. However, where the measure concerned was not notified, it is for the national courts before which the final sentence of Article 108(3) TFEU is invoked to establish whether that measure constitutes State aid and is subject as such to the standstill obligation; and, where it finds that it does, it must order the suspension of any further payment and repayment of payments already made. As recalled at point 14 of this Opinion, they are entitled to interpret and apply the notion of aid to that end. Where they are uncertain as to the classification of the measure at issue, they can either seek clarification from the Commission within the framework of the cooperation established by the Notice⁶⁰ or request a preliminary ruling from the Court.⁶¹

37. How is that arrangement affected by the Commission decision to initiate a formal investigation procedure under Article 108(2) TFEU?

38. The Court has already held, in its abovementioned *SFEI* judgment, that the initiation by the Commission of a preliminary examination *or a formal investigation procedure* cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification.⁶²

39. In the view of the referring court and the German Government, that judgment makes clear the power/duty of the national court to interpret and apply the notion of aid *even after initiation of the formal investigation procedure* without being bound by the assessments made by the Commission in the initiation decision. While it is true that in *SFEI* the Court clearly rules that the national courts have jurisdiction to rule on the existence of alleged unlawful aid, even though the measures at issue are simultaneously being examined by the Commission, that ruling is expressly limited to cases in which that institution *has not already taken a position on the classification of the measures as State aid*⁶³ and does not concern the situation where, as in the present case, such a position has been taken, albeit in connection with a decision to initiate a formal investigation procedure. Therefore, without prejudice to the jurisdiction of the national courts to adopt the measures necessary to

60 — *SFEI*, loc. cit., paragraph 50; notice, section 3.

61 — *SFEI*, loc. cit., paragraph 51.

62 — *SFEI*, paragraph 44; see to that effect, previously, also *Lorenz*, paragraph 8, and *FNCE*, paragraphs 10 and 11. According to the Court, any other interpretation would remove the effectiveness of the prohibition laid down in the final sentence of Article 108(3) by encouraging other Member States to disregard it (see *SFEI*, paragraph [4]5).

63 — Paragraph 53 and the operative part. As the Commission correctly highlighted at the hearing, unlike in the present case, in the case which gave rise to that judgment the Commission had only carried out a preliminary examination of the measure in question and when the request for a preliminary ruling was made it had not yet initiated the formal investigation procedure under Article 108(2) TFEU (see paragraph 11 of the judgment and point 7 of Advocate General Jacob's Opinion).

safeguard the rights of private individuals who have suffered harm as a result of an infringement of Article 108(3) TFEU even after the procedure under Article 108(2) has been initiated, *SFEI* does not allow conclusions to be drawn as to the effect of the initiation decision on the exercise of that jurisdiction.

40. In assessing that effect, it must, however be noted that the second and third paragraphs of Article 4(3) TEU requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations under Community law and to refrain from any measure which could jeopardise the attainment of the Treaty's objectives, and this applies to all the authorities of Member States including, for matters within their jurisdiction, the courts.⁶⁴ It follows that a decision to initiate the formal investigation procedure is binding on the courts of the Member States to which it is addressed and that since those courts have to rule on measures intended to form the subject-matter of a future decision of the Commission, they must avoid adopting final measures likely to be incompatible with it.⁶⁵ It is also worth pointing out that, as the Court has made clear, in guaranteeing compliance with the prohibition on implementation laid down in the final sentence of Article 108(3) TFEU, it is incumbent on the Member States' courts to take full account of the Union's interest.⁶⁶

41. In those circumstances and in the light of the considerations set out at points 25 to 34 above, it is possible to draw the following conclusions.

42. By the cumulative effect of the final sentence of Article 108(3) TFEU and the classification as 'new aid' of the measure at issue, the initiation of the formal investigation procedure brings with it an obligation on the Member State concerned to suspend implementation thereof from the date on which the initiation decision was adopted until the final decision is taken, and to do so irrespective of the objective nature of the aid provided by the measure at issue (see in particular point 32 above). Consequently, the national courts will be required to adopt all the measures necessary to ensure that that obligation is fulfilled and to avoid any infringement, *irrespective of any prior assessment of the measure under Article 107(1) TFEU*. Where they have doubts as to the satisfaction in a specific case of the conditions regarding qualification of the measure as aid which allow the formal investigation procedure to be initiated, those courts will be able to refer a question concerning validity for a preliminary ruling pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU.⁶⁷

43. However, during the period preceding the initiation of the formal investigation procedure the operation of the standstill clause laid down in the final sentence of Article 108(3) TFEU is linked to the *objective existence of State aid* (see point 25 above). Any order to recover payments made between the *implementation of the measure at issue and the initiation of the procedure* is therefore conditional on a finding that that measure in fact constitutes aid.

44. Even when making that assessment the national court must take account of the Commission's decision to initiate the procedure under Article 108(2) TFEU which, although adopted following a preliminary examination, nevertheless contains a *position of that institution on the prima facie existence of aid*. Such a position must be regarded as at least sufficient to satisfy the condition relating to the establishment of a prima facie case with a view to adopting a provisional measure. Therefore, even if it considers, contrary to the Commission's preliminary finding, that the measure at issue does

64 — See, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 49.

65 — See, to that effect, as regards the application of Articles 85 and 86 EC, paragraph 47 of the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935.

66 — See *Transalpine Ölleitung*, loc. cit., paragraph 48.

67 — Irrespective of any consideration relating to the limits on the national courts referring of their own their own motion a question concerning validity for a preliminary ruling where the decision concerned has not been challenged within the prescribed period by the individuals against which it is invoked (see to that effect Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 72 to 74), I do not consider that such a question is evident in the request for a preliminary ruling in this case or should be examined by the Court of its own motion (see to that effect Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 56).

not constitute aid, that court will not be able to refuse the request for recovery of payments made in the period between the implementation of the measure and initiation of the formal investigation procedure without first referring to the Court a question concerning validity pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU. However, where national law so permits it will be able to opt not to order final recovery until the Commission has taken a final decision to adopt a provisional recovery, by ordering that the payments be placed in a blocked account until the substance of the matter is resolved.⁶⁸

45. In any event, if the national court has doubts it may be appropriate for it both to consult the Commission, as provided for in section 3 of the Notice, in order to obtain information on the stage reached in the pending proceedings and to seek clarification also in the light of any information at its disposal which was not known to the Commission when it adopted the decision to initiate a formal investigation procedure. For its part, the Commission cannot evade such a request for an opinion by merely referring to the content of that decision.

a) Conclusion on Question 1

46. In the light of the foregoing considerations, I propose that the Court answer Question 1 as follows:

‘A national court hearing an application for the cessation of any payment and the recovery of payments already made under a measure imputable to the State and not notified under the first sentence of Article 108(3) TFEU, in respect of which the Commission has adopted a decision to initiate a formal investigation procedure under Article 108(2) TFEU, is required to adopt all the measures necessary to ensure that the national authorities fulfil the standstill obligation which arises from the cumulative effect of the final sentence of Article 108(3) TFEU and the provisional classification as aid contained in that decision, and to avoid any infringement of that obligation. Those measures include suspension of the measure at issue and recovery of any payments already made.

If it does not agree with the Commission’s classification of the measure at issue in the decision to initiate a formal investigation procedure, that court, in addition to referring to the Court a question concerning validity pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU, will be able, where national law so permits, to opt not to proceed with final recovery until the Commission has taken a final decision and in the meantime to make a provisional order that the payments in favour of the recipient be placed in a blocked account until the substance of the matter is resolved.’

C – Questions 2 and 3

47. It is clear from the order for reference that the Oberlandesgericht Koblenz does not share the interpretation of the condition of selectivity adopted by the Commission in the decision to initiate a formal investigation procedure or the conclusion which that institution reaches as regards the selective nature of the measure at issue. In those circumstances, it was for the national court to refer a question concerning the validity of that decision pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU. However, it is clear that by its second and third question it did not intend to refer such a question but rather a question of interpretation pursuant to subparagraph (a) of that provision, which, moreover, depends on Question 1 being answered in the negative. In the light of the considerations I have set out regarding that question, I therefore propose that the Court does not answer Questions 2 and 3.

68 — See paragraph 62 of the notice. A request to that effect was submitted by Lufthansa with a view to a request for a preliminary ruling and was refused by the Oberlandesgericht Koblenz by order of 12 July 2012.

48. Therefore, the brief considerations below are intended to provide food for thought in the event that the Court does not agree with the foregoing and decides to answer Question 1 in the negative.

49. By its second question the referring court essentially asks whether the fees applied by FFH in 2001 and 2006 must be regarded as selective measures simply because they apply only to airlines which use Frankfurt-Hahn Airport. By its third question, that court asks whether, if Question 2 is answered in the negative, selectivity can be deduced from particular elements which characterise the case. Contrary to the arguments put forward by FFH in its observations, these questions are admissible.⁶⁹

50. Question 2, which I believe should be examined jointly with the first limb of Question 3, should, in my view, be answered in the affirmative. The argument put forward by the referring court, FFH and Ryanair essentially amounts to radically denying the possibility of classifying as State aid the conditions on which a public undertaking offers its services where those conditions are applicable to all its contracting parties without distinction. That argument would exclude *a priori* from the system for the review of State aid intended by the Treaty any anticompetitive benefit financed by public funds and allocated through a public undertaking to specific traders marked by the fact that they maintain commercial relations with it.⁷⁰ As, in my opinion, the Commission correctly observed, such an exclusion would not appear to be in line with either the case-law of the Court according to which public interventions which affect all the traders of a particular economic sector without distinction can also be selective in nature,⁷¹ nor with the various precedents where selective benefits arising from the provision of goods or services by public (or private) undertakings at identical rates or on identical conditions for all operators carrying on a specific activity were regarded as selective.⁷²

51. In the present case, the purported benefits arising from the application of the fees in question are enjoyed only by airlines which enter into commercial relations with FFH and thus a limited number of persons within the economic sector concerned. The fact, highlighted by FFH, that any airline that wishes to do so could use Frankfurt-Hahn Airport – whose capacity would easily adapt to any increase in demand – at the fees charged by it to that end, does not appear to me to be of particular relevance. The fact that the possibility of enjoying the benefits arising from particular rules turns on a decision of the individual operator – in this case the airline which decides to use Frankfurt-Hahn Airport – does not rule out the selectivity of those benefits.⁷³ In this case, however, the fee conditions applied by FFH are, in accordance with a precise business strategy adopted by it, tailored to a particular type of users, namely low-cost airlines, but are not, or are less, desirable for conventional airlines. Therefore, the freedom of choice of conventional airlines is in fact limited, particularly since, as is clear from both the order for reference and the decision to initiate a formal investigation procedure, the fees in question reflect the content of contracts concluded between FFH and Ryanair and are therefore modelled on the requirements of that airline.

69 — According to settled case-law (see inter alia Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 46), the Court may refuse to rule on a question referred only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. None of these situations occur in the present case.

70 — The possible contrary solution, that is to say that the conditions on which a public undertaking offers its goods or services always constitute selective measures, does not appear to me to pose particular problems. Clearly, it does not automatically mean that those conditions must be regarded as aid since that conclusion is possible only if it entails financial benefits arising from public funds which entail a distortion of competition.

71 — In so far as they do not apply to all traders of the Member State concerned, those interventions do not constitute general measures (see Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 33, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraphs 45 to 49).

72 — See, for example, Case C-126/01 *GEMO* [2003] I-13769, in which the effects of the measure at issue, whereby all owners and holders of carcasses of dead animals of a particular weight were able to avail themselves free of charge of the services of private disposal undertakings holding public contracts essentially benefited particular individuals, that is to say farmers and slaughterhouses (see paragraphs 37 to 39, and Joined Cases 67/85, 68/85 and 70/85 *Kwekerij va der Kooy and Others v Commission* [1988] ECR 219) in which the contested preferential tariff charged by Gasunie applied to all undertakings active in glasshouse growing.

73 — A decision of the recipient, for example on investment, is often necessary for the benefits provided for in a particular aid scheme to become available (see, for example, *Unicredito italiano*, loc. cit., paragraph 8, in which the tax benefit in question, which was applicable only within the banking sector, was granted only to banks which merged or engaged in similar restructuring for five consecutive tax years).

52. Finally, I agree with the Commission in considering that the examination of selectivity in a situation such as that in the present case does not require application of the methodology of the two-stage analysis developed by the Court in relation to certain national tax systems and according to which, in order to assess whether a measure is selective, it is necessary to examine whether, within the context of a particular legal system, that measure constitutes a benefit for certain undertakings in comparison with others which are in a comparable legal and factual situation⁷⁴ and, subsequently, whether any differentiation between undertakings is justified by the nature and scheme of the system in question.

53. If the Court considers that that methodology is nevertheless applicable in the present case, I would first point out that to hold, as the referring court and FFH do, that only airlines which wish to establish commercial relations with Frankfurt-Hahn Airport are in a comparable legal and factual situation in respect of the fees in question is the equivalent of saying, on the basis of an essentially circular argument, that only persons who satisfy the criteria or conditions for obtaining the benefits arising from the application of a particular measure are relevant for the purpose of analysing its selective nature.⁷⁵

54. If it is necessary to identify a group of persons who are in a comparable factual and legal situation in respect of the fees in question, that group is, in my view, made up of (at least) all the airlines which are *likely* to use Frankfurt-Hahn Airport and the services included in the abovementioned fees.⁷⁶ Amongst those airlines only those which *actually* use the airport enjoy the purported benefits arising from the application of the fees in question and amongst those airlines, according to the documents before the Court, only Ryanair benefits from fees and other trading conditions covered by prior bilateral negotiations with FFH.⁷⁷

55. If, contrary to what I have suggested in the preceding points, the Court decides to answer Question 2 in the negative, I consider that the matters set out by the referring court in Question 3 [at subparagraphs (b) and c)] and referred to above, that is to say the adoption by FFH of a business model based on cooperation with low-cost airlines and conditions on stop-over use tailored to the needs of those airlines, and the fact that most of the stop-over traffic originates from a single company, show, as part of an overall assessment, that the contested fees are also selective in nature.

74 — As we know, that case-law is based on the judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (Case C-143/99 [2001] ECR I-8365), concerning a reduction on the tax on electricity granted in Austria to undertakings active predominantly in the manufacturing sector; for other precedents see, in particular, Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 47; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54; Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 46; and *British Aggregates*, loc. cit., paragraph 82. The Court of Justice and the General Court have had recourse to a similar methodology of analysis also in various areas beyond that of fiscal measures (see, for example, Case T-475/04 *Bouygues and Bouygues Télécom v Commission* [2007] ECR II-2097; Case C-431/07 P *Bouygues and Bouygues Télécom v Commission* [2009] ECR I-2665; and Case C-501/00 *Spain v Commission* [2004] ECR I-6717).

75 — If that argument had been applied, for example, in *Adria-Wien Pipeline*, only predominantly manufacturing undertakings would have had to have been regarded as being in a comparable legal and factual situation in respect of the measure in question, which consequently could not have been regarded as selective.

76 — Contrary to what FFH maintains in its observations, the decisions relating to Manchester Airport (Decision of 14 June 1999, State aid NN 109/98 – United Kingdom Manchester Airport) and Bratislava Airport (Decision of 27 January 2010, State aid C 12/08 (ex NN 74/07) – Slovakia – Agreement between Bratislava Airport and Ryanair, OJ 2011 L 27, p. 24) do not demonstrate the existence of a Commission practice aimed at limiting the number of persons whose situation can be compared for the purposes of examining the selectivity solely to airlines which use the airport at issue. The assessments contained in those decisions and to which FFH refers concern, respectively, the analysis of the existence of a distortion of competition and the application of the market economy investor criterion, and not the selective nature of the measure at issue.

77 — Although the issue was not specifically raised in either the order for reference or the observations submitted to the Court, I observe finally that in a situation such as that in the present case the analysis of a possible objective justification by ‘the nature and scheme of the system’ tends essentially to be confused with the examination relating to the conformity of the public undertaking’s action – in this case FFH’s management of the commercial relationship with airlines which use Frankfurt-Hahn Airport – to that of a market operator, an examination which is normally carried out when determining whether or not a benefit exists.

IV – Conclusion

56. In the light of the foregoing considerations, I suggest that the Court give the following answer to the questions referred to it by the Oberlandesgericht Koblenz:

A national court hearing an application for the cessation of any payment and the recovery of payments already made under a measure imputable to the State and not notified under the first sentence of Article 108(3) TFEU, in respect of which the Commission has adopted a decision to initiate a formal investigation procedure under Article 108(2) TFEU, is required to adopt all the measures necessary to ensure that the national authorities fulfil the standstill obligation which arises from the cumulative effect of the final sentence of Article 108(3) TFEU and the provisional classification as aid contained in that decision, and to avoid any infringement of that obligation. Those measures include suspension of the measure at issue and recovery of any payments already made.

If it does not agree with the Commission's classification of the measure at issue in the decision to initiate a formal investigation procedure, that court, in addition to referring to the Court a question concerning validity pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU, will be able, where national law so permits, to opt not to proceed with final recovery until the Commission has taken a final decision and in the meantime to make a provisional order that the payments in favour of the recipient be placed in a blocked account until the substance of the matter is resolved.

In the light of the answer given to the first question referred for a preliminary ruling, it is not necessary to answer the second and third questions.