



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 November 2021 *

(Appeal – State aid – Toll-motorway concession – Law providing for an exemption from tolls for certain vehicles – Compensation granted to the concession holder by the Member State for loss of revenue – Shadow toll – Compensation found by the European Commission to be excessive and to include State aid – Commission decision declaring that aid incompatible with the internal market and ordering its recovery – Procedural rights of the aid beneficiary – Commission’s obligation to exercise particular vigilance – Concept of ‘State aid’ – Advantage – Improvement of the concession holder’s expected financial situation – Criterion of the private operator in a market economy – Distortion of the evidence – Breach of the obligation to state reasons – Misreading of the decision at issue – Substitution of grounds – Reversal of the burden of proof – Breach of the principle of primacy of EU law – Judicial review to be conducted by the General Court – Requirements and limits)

In Case C-933/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 December 2019,

Autostrada Wielkopolska S.A., established in Poznań (Poland), represented by O. Geiss, Rechtsanwalt, and T. Siakka, dikigoros,

appellant,

the other parties to the proceedings being:

European Commission, represented by L. Armati, K. Herrmann and S. Noë, acting as Agents,

defendant at first instance,

Republic of Poland, represented by B. Majczyna and M. Rzotkiewicz, acting as Agents,

intervener at first instance,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

* Language of the case: English.

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

Judgment

- 1 By its appeal, Autostrada Wielkopolska S.A. ('AW') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 24 October 2019, *Autostrada Wielkopolska v Commission* (T-778/17, 'the judgment under appeal', EU:T:2019:756), by which the Court dismissed its action seeking the annulment of Commission Decision (EU) 2018/556 of 25 August 2017 on the State aid SA.35356 (2013/C) (ex 2013/NN, ex 2012/N) implemented by Poland for Autostrada Wielkopolska (OJ 2018 L 92, p. 19) ('the decision at issue').

Background to the dispute

- 2 The background to the dispute was set out by the General Court in paragraphs 1 to 37 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.
- 3 On 10 March 1997, following a public tender, the Republic of Poland granted AW a concession for the construction and operation of the section of the A2 motorway between Nowy Tomyśl (Poland) and Konin (Poland) ('the relevant section of the A2 motorway') for a period of 40 years.
- 4 Under the Concession Agreement signed on 12 September 1997 ('the Concession Agreement'), AW committed to obtain, at its own cost and risk, external funding for the construction and operation of the relevant section of the A2 motorway and, in exchange, had the right to collect tolls from the users of the motorway. That agreement also allowed it to increase the toll rates to maximise revenue, provided that they did not exceed the maximum rates defined by vehicle category.
- 5 Upon joining the European Union in 2004, the Republic of Poland transposed into Polish law Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42). Article 7(3) of that directive provides that tolls and user charges may not both be imposed at the same time for the use of a single road section.
- 6 The Polish Parliament therefore adopted the ustawa o zmianie ustawy o autostradach płatnych oraz o Krajowym Funduszu Drogowym oraz ustawy o transporcie drogowym (Law amending the Law on toll motorways and the National Road Fund and the Law on road transport) of 28 July 2005 (Dz. U. No 155, position 1297) ('the Law of 28 July 2005'). That law eliminated the double charging of heavy goods vehicles ('HGVs') for the use of a single road section. Accordingly, HGVs holding a vignette (toll card) for using national roads in Poland were exempted, as from 1 September 2005, from tolls on motorways covered by concession agreements.

- 7 Under the Law of 28 July 2005, the concession holders had to be compensated by the National Road Fund for the loss of revenue caused by the exemption from tolls. That law provided that the concession holders were entitled to a reimbursement equivalent to 70% of the amount obtained by multiplying the actual number of journeys by HGVs bearing a vignette by the shadow-toll rate negotiated with the concession holders for each category of HGV. The reduction to 70% set by that law was intended to offset the expected increase in HGV traffic on the motorways which were the subject of a concession, following the exemption of HGVs from tolls. That law also provided that the shadow-toll rates could not exceed the real rates applied to the corresponding vehicle category. Finally, it specified that the method of compensation was to be determined in each concession agreement.
- 8 With regard to AW, following negotiations with the Polish authorities, the method of compensation and the shadow-toll rates were set out in Annex 6 to the Concession Agreement ('Annex 6'), concluded on 14 October 2015.
- 9 The Republic of Poland explained that the method of compensation laid down by Annex 6 was based on the principle that the expected financial situation of the concession holder should not change following the Law of 28 July 2005. It added that, in order to meet that objective, the expected internal rate of return ('the IRR') on AW's investment in the relevant section of the A2 motorway must stay at the same level as it would have been at if there had been no legislative change, that is without the loss of revenue resulting from the Law of 28 July 2005.
- 10 The parties to Annex 6 ('the contracting parties') agreed that the compensation would be calculated in accordance with a two-step procedure, conducted on the basis of financial models showing the actual up-to-date and expected cash flows and allowing the IRR to be calculated. During the first step, the shadow-toll rates which the Republic of Poland was required to pay to AW were to be determined. During the second step, those rates were to be verified by 30 November 2007 and, if necessary, changed.
- 11 Thus, during the first step, the shadow-toll rates were set on the basis of the following three financial models, presented by AW:
 - the base model showed the financial situation of AW on financial closure in 2000 and assumed that real-toll collection would take place from the beginning until the end of the concession. The IRR was 10.62%;
 - the real-toll model described the financial situation of AW that would have prevailed as of December 2004 if HGVs were not exempted from tolls. The IRR was 10.77%; and,
 - the vignette model described AW's financial situation that would have prevailed as of June 2005 if HGVs were exempted from tolls. In that model, the revenue consisted of shadow-toll compensation for HGVs, and real-toll collection for other vehicles. The shadow-toll rates were set at the maximum levels allowed by the Concession Agreement. The IRR was 8.20%.
- 12 On the basis of those financial models, AW demonstrated that, even applying the maximum shadow-toll rates, the real-toll model's IRR, of 10.77%, would not be reached. For that reason, AW set the shadow-toll rates at the maximum levels allowed by the Concession Agreement.

- 13 With effect from 1 September 2005, HGVs bearing a vignette were exempted from tolls, and AW received monthly compensation calculated on the basis of the number of relevant HGVs using the motorway and the agreed shadow-toll rates.
- 14 During the second step, the contracting parties were required to check how HGV traffic changed as a result of the exemption from tolls, and to adjust the shadow-toll rates accordingly in order to avoid the overpayment or underpayment of compensation. AW was required to submit an up-to-date financial model ('the verification model') showing the impact of those rates on the basic financial indicators of the Concession Agreement, including the IRR. If the verification model's IRR exceeded the real-toll model's IRR, the shadow-toll rates were required to be lowered in order to eliminate the excess rate of return. On the other hand, if the verification model's IRR was lower than the real-toll model's IRR, the rates at issue were required to be increased.
- 15 AW provided the verification model in 2007. In that model, the IRR was 9.20% in June 2006. The verification report attached to that model and presented by AW suggested that the shadow-toll rates should be increased.
- 16 By letter of 28 November 2007, the Generalna Dyrekcja dróg krajowych i autostrad (General Directorate for National Roads and Motorways, Poland) informed AW that in view of doubts regarding the correctness of assumptions made for the purposes of Annex 6, it did not accept the proposed adjusted shadow-toll rates. Notwithstanding that letter, AW continued to receive monthly shadow-toll payments, in accordance with the provisions of that annex. Then, on 13 November 2008, the Polish Minister for Infrastructure made a statement of withdrawal from that annex, claiming, *inter alia*, to have concluded it in error.
- 17 According to the Republic of Poland, AW overvalued the real-toll model's IRR by using out-of-date traffic and revenue forecasts. AW used a traffic and revenue study carried out by the consulting firm Wilbur Smith Associates (WSA) in 1999 ('the 1999 WSA study'), whereas an updated study, from June 2004 ('the 2004 WSA study'), was available. According to the report of 24 September 2010 commissioned by the Polish Ministry of Infrastructure and prepared by PricewaterhouseCoopers (PwC) ('the PwC report'), the use of the traffic and revenue assumptions appearing in the 2004 WSA study instead of those appearing in the 1999 WSA study reduced the IRR in the real-toll model from 10.77 to 7.42%.
- 18 Thus, in the opinion of the Minister for Infrastructure, AW received excessive shadow-toll compensation. Since AW refused to repay the overcompensation claimed by the Republic of Poland, the Minister for Infrastructure requested that legal proceedings be commenced to recover that overcompensation.
- 19 At the same time, AW contested the repudiation of Annex 6 by bringing the case before an arbitral tribunal. By an award of 20 March 2013, ('the arbitral award'), that tribunal decided in favour of AW, finding that that annex was valid and that the Republic of Poland must respect its provisions. By a judgment of 26 January 2018, the Sąd Okręgowy w Warszawie, I Wydział Cywilny (Regional Court, Warsaw, first Civil Division, Poland) dismissed the Minister for Infrastructure's action against the arbitral award. That judgment was the subject of an appeal before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland).
- 20 The system of shadow-toll compensation ceased to apply on 30 June 2011, when the Republic of Poland introduced an electronic toll-collection system that replaced vignettes.

- 21 On 31 August 2012, the Republic of Poland notified the European Commission of a measure consisting of the grant of financial compensation to AW, in the form of shadow tolls, due to the loss of revenue caused by the Law of 28 July 2005.
- 22 On 20 September 2014, the Commission decided to initiate a formal investigation procedure in relation to the notified measure ('the opening decision'). That decision was published in the *Official Journal of the European Union* on 20 September 2014 (OJ 2014 C 328, p. 12).
- 23 On 25 August 2017, the Commission adopted the decision at issue.
- 24 In the first place, as regards whether there was a State aid, the Commission considered that AW had a right to be compensated for the changes made by the Law of 28 July 2005, which had deprived it of the right to charge tolls in respect of HGVs, but that if such compensation improved the expected financial situation of the concession holder in that it went beyond compensation linked to the direct effects of the legislative change, AW would receive an undue advantage constituting State aid.
- 25 With regard to the real-toll model, the Commission considered that AW should have used the available up-to-date traffic and revenue forecasts contained in the 2004 WSA study. It observed that, compared to the 1999 WSA study, the 2004 WSA study contained significantly lower traffic numbers for vehicles in categories 2 and 3 and much lower optimal real-toll rates for vehicles in categories 2 to 4. It took the view that reliance on the real-toll model based on the 1999 WSA study had led to a higher IRR than could reasonably have been expected at the time of the changes brought about by the Law of 28 July 2005, which had resulted in overcompensation in the form of higher shadow-toll payments.
- 26 With regard to the verification of the shadow-toll rates, the Commission took the view that the Republic of Poland had assumed the risk of changes in traffic for the period from the introduction of the shadow-toll system until the 2007 verification. However, it accepted that verification mechanism, on the grounds that it had made it possible to set the shadow-toll rates at a level which avoided overpayment of compensation. The Commission also observed that the verification was done after a period which was limited compared with the whole duration of the Concession Agreement, but which was sufficient to allow the contracting parties to gather the necessary real traffic data and to build reliable traffic forecasts on that basis.
- 27 With regard to the calculation of the overcompensation, the Commission considered that the real-toll model updated by PwC and used by it in its report ('the PwC real-toll model') included the traffic and revenue forecasts of the 2004 WSA study and properly represented the updated forecasts at the date of adoption of the Law of 28 July 2005. The Commission agreed that the PwC real-toll model's IRR, of 7.42%, could be regarded as the IRR that could have been expected by AW just before that legislative change. It took the view that, compared to the PwC real-toll model's IRR, of 7.42%, the IRR of 10.77% used by AW in the negotiations was excessive. Similarly, it pointed out that the vignette model's IRR, of 8.20%, was above 7.42%.
- 28 The Commission observed that, to establish the amount of the overcompensation in the period from September 2005 to October 2007, up until the verification, PwC had used the vignette model to recalculate the shadow-toll rates which should have been applied initially as of September 2005 in order to achieve an IRR of 7.42%. It noted that the amount of the

compensation based on the recalculated shadow-toll rates was compared with the actual payments made to AW. It estimated that, in that period, the overpayments amounted to around EUR 64.7 million.

- 29 The Commission observed that, to establish the amount of the overcompensation in the period after the verification, from November 2007 to June 2011, PwC had used the verification model to recalculate the shadow-toll rates in order to reach an IRR of 7.42%. It noted that the amount of the compensation determined on the basis of the recalculated shadow-toll rates was compared with the actual payments made to AW. It considered that, in that period, the overpayments amounted to around EUR 159 million.
- 30 With regard to AW's argument that the market economy private investor test was met, the Commission responded that that test was not met.
- 31 In the second place, the Commission took the view that as the compensation was made available to AW prior to the notification of that measure to the Commission, the Republic of Poland had not respected the prohibition laid down in Article 108(3) TFEU, and that the aid granted was therefore unlawful. It concluded, moreover, that that aid was incompatible with the internal market, with the result that it had to be recovered in order to re-establish the situation that existed in the market prior to its being granted.

The procedure before the General Court and the judgment under appeal

- 32 By application lodged with the General Court Registry on 28 November 2017, AW brought an action for annulment of the decision at issue.
- 33 In support of that action, AW raised, in essence, six pleas alleging (i) infringement of the right to be involved in the administrative procedure; (ii) infringement of Article 107(1) TFEU owing to the use of an incorrect criterion to determine whether there was an economic advantage and a manifestly incorrect use of that criterion; (iii) infringement of Article 107(1) TFEU due to an incorrect application of the private investor test and an inadequate statement of reasons; (iv) that the Commission based its conclusion as to the incompatibility of the aid on incorrect findings; (v) a manifest error of assessment in the calculation of the amount of State aid; and (vi) a failure to state reasons in the decision at issue.
- 34 By the judgment under appeal, the General Court dismissed the action in its entirety.

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

- 35 AW claims that the Court should:
- set aside the judgment under appeal,
 - annul the decision at issue or refer the case back to the General Court, and
 - order the Commission to pay the costs.
- 36 The Commission contends that the Court should dismiss the appeal and order AW to pay the costs.

The appeal

- 37 In support of its appeal, AW puts forward four grounds.

The first ground of appeal

- 38 The first ground of appeal, which relates to AW's procedural rights, alleges an error of law, a distortion of the evidence and a failure to provide adequate reasons. While contesting AW's arguments, the Commission proposes that the Court reject that ground by making a substitution of reasons.

Arguments of the parties

– AW's argument on appeal

- 39 AW considers that the General Court correctly held, in paragraph 60 of the judgment under appeal, that the Commission had not involved it in the administrative procedure to an adequate extent, which was a breach of an essential procedural requirement that, in itself, should have led to the annulment of the decision at issue. On the other hand, it wrongly stated, in paragraph 61 of that judgment, that it was necessary to establish, in order for the decision to be annulled, that in the absence of such an omission, the legal analysis adopted by the Commission could have been different. Therefore, the General Court applied an incorrect legal criteria and thus erred in law. In addition, the General Court's reasoning in paragraphs 63, 64, 67 and 68 of the judgment is insufficient and contradictory, and was based on a distortion of the evidence.
- 40 In that regard, first of all, AW observes that recitals 76 to 78 of the opening decision establish that a shadow toll had to be calculated in accordance with the most recent traffic forecast and that the Commission had identified the 2004 WSA study as being the most recent. However, in its observations concerning the opening decision, AW identified the Faber Maunsell study conducted in 2005 ('the 2005 FM study') as being the most recent. The Commission and the Republic of Poland discussed the relevance of that study during the period within which the General Court concluded that AW should have been given the opportunity to submit its comments again. If AW had been able to submit evidence to show that, contrary to the Commission's finding following those exchanges, that study could be used, the Commission should have taken it into account as being the most recent study, and the correct level of IRR immediately before the changes brought about by the Law of 28 July 2005 ('the real-toll IRR') could therefore have been fixed at a rate of 8.2% or higher, with the result that there would have been no advantage and no State aid and the outcome of the procedure would have been different.
- 41 Next, AW submits that, in paragraph 67 of the judgment under appeal, the General Court distorted the argument it made, which in fact concerned the lack of opportunity for it to submit its observations on the Republic of Poland's arguments. In addition, if that paragraph must be read as meaning that the 2005 FM study was not taken into account in the Commission's reasoning, the General Court must be regarded as having misconstrued the content of the decision at issue and contradicted itself having regard to its statement that the Commission intended to use the most recent data. If, on the other hand, that paragraph must be read as meaning that a general distinction must be made in the context of AW's procedural rights

between ‘positive statements’ (the 2004 WSA study is the ‘most up-to-date’ study) and ‘negative statements’ (the 2005 FM study must be disregarded) by the Commission, the General Court must be found to have erred in law.

- 42 Finally, the outcome of the procedure could also have been different if AW had had the opportunity of making comments on the alleged short-term nature of the shadow-toll system provided for in Annex 6, by relying in particular on the contradictory nature of that finding with Article 4 of that annex. While the decision at issue does not refer to that finding, the Commission nevertheless invoked it at first instance by pointing out, on the basis of the alleged short-term nature of the shadow-toll system provided for in Annex 6, that any inflation or exchange rate risk was of limited significance. Since it did not advance any other consideration in that regard at the hearing before the General Court, the Commission must be regarded as having already advanced that same consideration during the administrative stage.
- 43 The Commission contends, first of all, that AW’s submission that the fact of being involved in the administrative procedure was in the nature of an essential procedural requirement was based on a misreading of the judgment under appeal. In addition, by contrast with the essential procedural requirement of inviting interested parties to submit their comments by the publication of the opening decision of the formal investigation procedure, the right of interested parties to be involved in the administrative procedure to an appropriate extent is not an essential procedural requirement but a subjective right, the scope of which may depend on the situation of the interested party concerned and the circumstances of the case. Consequently, while not enabling the beneficiary once again to submit comments must be held to be a procedural flaw, *quod non*, according to the Commission, the criterion applied by the General Court in paragraph 61 et seq. of the judgment under appeal is correct.
- 44 As regards AW’s submission, summarised in paragraph 40 of this judgment, the Commission observes that AW suggests not different legal reasoning, but merely a different result, on the basis of different traffic numbers used to carry out the same calculations, which is not capable of showing that the General Court manifestly distorted the evidence. AW thus submits that, if it had been involved in the exchanges which took place with the Republic of Poland, the result of the Commission’s analysis would have been different. According to the Commission, that argument seeks, in fact, to challenge the factual assessment, which falls outside the scope of the Court of Justice’s review at the appeal stage.
- 45 As regards AW’s argument summarised in paragraphs 41 and 42 of this judgment, the Commission recalls that it is not necessary for the judgment under appeal to address one by one every argument advanced before the General Court, that the criticism of not having mentioned an element not invoked by the appellant does not constitute a valid ground and that, consequently, the statements summarised in paragraphs 41 and 42 of this judgment are irrelevant. In addition, according to the Commission, AW acknowledges that the decision at issue does not refer to the alleged short-term nature of the shadow-toll system provided for in Annex 6. In that regard, the General Court simply concluded that AW’s procedural argument was ineffective on the ground that the point in respect of which it invoked the right to be heard did not form part of the reasoning in the decision at issue.
- 46 The Republic of Poland submits that, contrary to AW’s assertions, it was able to submit written and oral comments after the opening decision, in the context of a letter submitted to the Commission on 27 January 2015 and meetings held with that institution on 24 November 2015 and 21 March 2017. In that regard, it points out that, taking into account the fact that aid

beneficiaries are merely interested parties to the procedure, and cannot engage in independent disputes regarding the Commission's action in the course of the administrative procedure, that the opening decision is not vitiated by errors requiring rectification and that the Republic of Poland did not raise new evidence during the course of the formal investigation procedure, the Commission allowed AW to make comments to an extent beyond what it was obliged to do. In particular, AW could have commented on the relevance and significance of the 2005 FM study on the method of calculating the IRR when it submitted it to the Commission, but it preferred, both before the Commission and the General Court, to refer to the 1999 WSA study.

– *The Commission's request for substitution of grounds*

- 47 The Commission considers that the reasoning in paragraphs 58 to 60 of the judgment under appeal is wrong in law since, as a beneficiary of the aid measure in question, AW is a 'party concerned' within the meaning of Article 108(2) TFEU who, according to the case-law, cannot rely on rights of the defence, cannot engage in adversarial debate with the Commission in the same way as a Member State, and has the right to be involved in the administrative procedure only to an extent appropriate to the circumstances of the case. However, the General Court failed to apply that case-law in holding that the Commission should have given AW the opportunity to submit comments again.
- 48 Having found, in paragraph 63 of the judgment under appeal that the opening decision allowed AW to exercise its right to submit observations, the General Court should have found that the circumstances of this case did not require the Commission to go any further. In particular, the diverging interests of AW and the Republic of Poland cannot justify granting AW similar rights to those of that Member State. Similarly, neither the duration nor the intensity of the exchanges with the Republic of Poland were unusual and do not justify, in any event, the grant of an additional right to AW. In finding that the Commission should have granted AW the right to comment on the observations of that Member State, the General Court essentially granted it the right to engage in adversarial debate and distorted the procedure which provides that only the Member State is afforded the opportunity of commenting on all the submissions made by the other interested parties.
- 49 AW submits that the Commission does not rely on an error of law, but merely challenges, without alleging a distortion, the factual assessment made by the General Court that the circumstances of the case required AW to have the opportunity to submit comments again. Since the review of that assessment falls outside the Court of Justice's jurisdiction and the respondents have not sought to refer the case back to the General Court, the Commission's request is inadmissible and would result in the Court of Justice ruling *ultra petita*. In addition, the Commission addressed the various factors individually, whereas the General Court, in paragraph 58 of the judgment under appeal, addressed the specific circumstances of the case together. Moreover, the General Court did not state that AW should have been offered the opportunity to submit comments on all the submissions made and the mere submission of additional comments, having regard in particular to the lack of a complete knowledge of the case file, did not amount to an adversarial debate nor equate to the rights granted to the Member States on that subject.

Findings of the Court

- 50 In the first place, as regards the argument summarised in paragraphs 40 and 41 of this judgment, alleging a distortion of the evidence and a failure to give proper reasons, the purpose of review by the Court of Justice is, primarily, to examine to what extent the General Court took into consideration, in a legally correct manner, all the arguments relied upon at first instance by the appellant (judgment of 22 October 2014, *British Telecommunications v Commission*, C-620/13 P, not published, EU:C:2014:2309, paragraph 55 and the case-law cited).
- 51 In paragraph 60 of the judgment under appeal, the General Court held that, in the particular circumstances of the case, as referred to in paragraph 58 of that judgment, the Commission should have given AW the opportunity to submit comments again.
- 52 In paragraph 61 of the judgment under appeal, the General Court held that the fact that the Commission failed to involve AW in the exchanges with the Republic of Poland which took place after the opening decision, however regrettable it may be, was not such as to lead to the annulment of the decision at issue in so far as, in the circumstances of the case, in the absence of such an omission, the legal analysis adopted by the Commission in the latter decision could not have been different.
- 53 In paragraph 67 of that judgment, the General Court stated, in that regard, that '[AW's] argument that the opening decision, unlike the [decision at issue], did not mention [the 2005 FM study], [could] not succeed. Indeed, the Commission referred to that study in recital 138 of the [decision at issue] only to consider that the study could not be used to calculate the IRR of the project'. It added that the Commission thus 'merely dismissed, as irrelevant, a study relied on by the applicant itself in its observations [and that] in those circumstances, the Commission cannot be accused of not having mentioned [the 2005 FM study] in the opening decision'.
- 54 That paragraph 67 thus sought to respond to the argument in paragraph 39 of the application at first instance, which read as follows:
- '... if [AW] had been informed about the Commission's opinion that [the 2005 FM study] was not reliable ..., because it was supposed to be based solely on traffic forecasts and not revenue forecasts, [AW] could have pointed out that this statement is clearly wrong. It cannot be excluded that the Commission would then have reached a different view on the significance of [the 2005 FM study], which would impact its entire assessment. Likewise, if [AW] had been informed that the Commission agreed with PwC's amendments of the financial models (the models that the Commission could not open before the Opening Decision) it would have sought to rebut this view. Since the Commission put much emphasis on the PwC Report, arguments undermining the credibility of that report are capable of affecting the outcome of the Commission's investigation.'
- 55 It is clear from a reading of both paragraph 67 of the judgment under appeal and paragraph 39 of the application at first instance, as referred to in paragraphs 53 and 54 of this judgment, that AW is correct in law to submit before the Court of Justice that the General Court distorted its argument which concerned its lack of opportunity to submit comments on the arguments of the Republic of Poland. In particular, AW submitted that, if it had had that opportunity, it could have demonstrated that the 2005 FM study was usable and relevant.

- 56 Since the General Court held in paragraphs 60 and 61 of the judgment under appeal, first, that the Commission should have given AW the opportunity to submit comments and, second, that the legal analysis adopted by the Commission in the decision at issue could not have been different, it could not abstain from specifically taking a position on the argument recalled in paragraph 54 of this judgment. In those circumstances, it must be held that the General Court's judgment is vitiated by inadequate reasoning in that regard.
- 57 Therefore, without it being necessary to examine whether the General Court's reasoning, in paragraph 67 of the judgment under appeal, is based on a distortion of the evidence, it must be held that that paragraph is vitiated by an error of law.
- 58 However, in accordance with the settled case-law of the Court of Justice, if the grounds of a decision of the General Court reveal an infringement of EU law but the operative part of the judgment can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the annulment of that decision and a substitution of grounds must be made (judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 48).
- 59 In those circumstances, it is necessary to examine the Commission's request for a substitution of grounds, in which that institution submits, contrary to AW's allegation, that the General Court erred in law in finding that AW should have been heard for a second time during the administrative procedure.
- 60 In that regard, it should be recalled that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its obligations under EU law, for granting the aid. Thus, in order to observe the rights of the defence, where the Member State concerned was not afforded an opportunity to comment on certain information, the Commission may not use it in its decision with regard to that Member State (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 73).
- 61 It is also settled case-law that undertakings which may be beneficiaries of State aid are regarded as being interested parties and that the Commission has the duty, at the examination phase referred to in Article 108(2) TFEU, to invite those parties to submit their comments (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 70).
- 62 Although those interested parties cannot rely on the rights of defence, they have, by contrast, the right to be involved in the administrative procedure followed by the Commission, to an extent appropriate to the circumstances of the case (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 71).
- 63 It must be noted, however, that it follows from Article 108(2) TFEU that, where the Commission decides to initiate the formal investigation procedure in respect of proposed aid, it must give interested parties, including the undertaking(s) concerned, an opportunity to submit their comments. This rule is in the nature of an essential procedural requirement (judgment of 11 December 2008, *Commission v Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 55).

- 64 In that regard, the Court has ruled, in proceedings concerning the application of Article 108(2) TFEU, that publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a procedure has been initiated. That communication is intended to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action. Such a procedure also guarantees to the Member States and the sectors concerned an opportunity to make their views known (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 72).
- 65 In the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role mentioned in preceding paragraph of this judgment and, in that regard, they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 74).
- 66 In addition, the Court has stated that, where the legal rules under which a Member State notified proposed aid change before the Commission takes its decision, the Commission must, with a view to giving its decision, as it is obliged to do, on the basis of the new rules, ask the interested parties to express their views on the compatibility of that aid with those rules. The situation is different only if the new legal rules do not contain any substantial amendments in relation to those previously in force (judgment of 11 December 2008, *Commission v Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 56).
- 67 However, a procedural irregularity will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity that decision might have been substantively different (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 80).
- 68 In that regard, the Court has already held that, as regards the interested parties' procedural rights, where there is a change in the legal regime after the Commission has given the interested parties the opportunity to submit their comments and before the Commission has adopted a decision on proposed aid, and where the Commission bases that decision on the new legal regime without inviting those parties to submit their comments on it, the mere existence of differences between the legal regime on which those parties were given the opportunity to submit their comments and that on which that decision is based is not, as such, capable of leading to the annulment of that decision. Even though the legal regimes at issue have changed, the question arises as to whether, in the light of the provisions of those regimes which are relevant to the case, that change was capable of altering the meaning of the Commission decision (judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 81).
- 69 It follows in particular from that case-law that the failure by the Commission to invite interested parties to submit their comments on a change in the legal regime, such as the entry into force during an administrative procedure relating to State aid of guidelines which the Commission intends to apply in a decision closing that procedure, does not constitute an infringement of an essential procedural requirement.

- 70 As the Commission correctly submits, that reasoning applies a fortiori in the present case, in the light of the failure to allow the beneficiary of the measure under examination to adopt a position on the observations of the Member State concerned on the information provided by that beneficiary.
- 71 Furthermore, although, as the Commission acknowledges, there may be circumstances in which the establishment of facts that are new or different from those referred to in the opening decision or the adoption of substantial amendments to the relevant legal framework may require greater involvement of the interested parties, or even require that a supplementary or corrected opening decision be published, the present case does not give rise to any of those situations.
- 72 In particular, the circumstances referred to by the General Court in paragraphs 58 and 59 of the judgment under appeal are insufficient to establish an obligation for the Commission to grant AW the opportunity to comment on the observations of the Republic of Poland, which amounts to an adversarial debate with that Member State before the Commission.
- 73 In the second place, it follows from the finding in the preceding paragraph of this judgment, namely that the circumstances of the present case are insufficient to establish an obligation for the Commission to grant AW the opportunity to comment on the observations of the Republic of Poland, that AW's arguments, summarised in paragraphs 39 and 42 above, alleging an error of law, must be rejected as ineffective.
- 74 Where such an obligation is not established, as in the present case, it is clear that the question does not arise as to whether the legal analysis adopted by the Commission could have been different if the opportunity to comment on observations of the Member State concerned had been granted.
- 75 Moreover, it follows from the case-law referred to in paragraph 67 above that, contrary to AW's contention, the legal criterion applied by the General Court is not incorrect in itself.
- 76 In the light of all the foregoing considerations, the Commission's request for substitution of grounds must be upheld and the first ground of appeal must be rejected.

The second and third grounds of appeal

- 77 The second ground of appeal, relating to the private investor test, is divided into four parts.
- 78 The third ground of appeal, relating to the existence of an economic advantage, is divided into two parts.

The first parts of the second and third grounds of appeal

- 79 By the first part of the second ground of appeal, relating to inflation and exchange rate risks, AW submits that the General Court misapplied the private investor test, that it substituted its own reasoning for that of the decision at issue, and reversed the burden of proof.
- 80 By the first part of the third ground of appeal, concerning the relevance of a transfer of those risks, AW alleges the misapplication of that criterion in assessing whether there was an economic advantage, a substitution of grounds for those in the decision at issue, a reversal of the burden of proof and inadequate reasoning.

– *Arguments of the parties*

- 81 In the first part of the second ground of appeal AW recalls that the General Court held, in paragraphs 110 to 112 and 170 of the judgment under appeal, that the Commission had rightly held that a hypothetical private investor would not have taken into account the transfer of exchange rate and inflation risks, referred to by AW during the administrative procedure, on the ground that they were not discussed by the contracting parties and that the resulting disadvantages for AW, and even the resulting advantages for the Republic of Poland, were not established.
- 82 However, by thus limiting the examination solely to the options envisaged by the contracting parties in Annex 6, the General Court failed correctly to apply the private investor test which must necessarily cover all the options that a private operator would reasonably have envisaged in such a situation. Furthermore, while it is true that an agreement will capture the parties' final position, it does not, as a rule, set out all the considerations which led them to conclude it. In the present case, the evidence in the file shows that the contracting parties were informed, assisted by expert advisers, and capable of understanding the impact of the shadow-toll rate cap and the differences between a shadow-toll system and a real-toll system. It is also clear from the file that that cap was provided for in Annex 6, in the penultimate paragraph of point 4 of Appendix 1. According to AW, the General Court must therefore be regarded as having distorted that evidence since a contractual clause is, as a rule, discussed between the parties to the contract in question.
- 83 AW submits that, by holding that the Commission was not required to examine the transfer of risks, on the ground that those risks had not been established, the General Court reversed the burden of proof, since it is for the Commission to show that the beneficiary would manifestly not have obtained facilities comparable to those of a hypothetical private investor and that, in that regard, it must take into account any information likely to have a significant influence on the decision-making process of a normally prudent and diligent private operator, in a situation that is as close as possible to that of the Member State concerned. Accordingly, the Commission was required to establish that a private investor would not, a priori, have considered that information to be relevant.
- 84 According to AW, it was therefore for the General Court to establish whether the Commission had taken into account all the available information and whether the statement of reasons for the decision at issue included an examination of the transfer of exchange rate and inflation risks. Instead of carrying out such a review, the judgment under appeal, by substituting its own reasoning, filled a gap in that regard in the decision at issue. The reasoning set out in paragraphs 110 to 112 of the judgment under appeal has no connection with any of the assessments set out in that decision.
- 85 In addition, since exchange rate and inflation risks directly affect the amount of the sums due and the ability to finance such sums for the duration of the concession, it is clearly a factor likely to have a significant influence on a private operator's decision-making process, with the result that the General Court misapplied the private investor test by referring to an investor which is disinterested in its own profits and risks.
- 86 Finally, AW submits that, in paragraph 112 of the judgment under appeal, the reasoning is inadequate, since it is not clear from that paragraph whether the General Court considered that there was a transfer of exchange rate and inflation risks to the Republic of Poland not only when

fluctuations fell below the absolute cap on the shadow-toll rate provided for, but also when they rose above it, *quod non*, in which case the General Court distorted the evidence in the file to the extent that it is clear from it that there is an absolute cap. No other factor mentioned in that paragraph is capable of supporting the conclusion reached by the General Court.

- 87 By the first part of the third ground of appeal, AW submits that the errors vitiating the General Court's assessment of the private investor test, which applies in the present case, also more broadly concern the existence of an economic advantage within the meaning of Article 107(1) TFEU. As regards the errors allegedly made by the General Court in paragraphs 110 to 112 of the judgment under appeal, AW refers to its arguments summarised in paragraphs 81 to 86 of this judgment, showing a misapplication of that test, a failure to state reasons, a substitution of grounds and a reversal of the burden of proof.
- 88 Furthermore, in the last two sentences of paragraph 112 of the judgment under appeal, the General Court carried out a complex economic assessment which exceeded its powers of review and led it to substitute its reasoning for that of the Commission, which, in the decision at issue, did not consider the contents of those last two sentences. Moreover, the reasoning set out in that paragraph is not capable of supporting the conclusion reached by the General Court and distorts the evidence, since HGVs account for 81% of AW's revenues and the General Court does not explain how a disadvantage of the shadow-toll system which has an impact on those revenues could be offset by the fact that 19% of AW's revenues is unaffected by that disadvantage.
- 89 Since the arguments put forward by AW at first instance concern the disadvantages of the shadow-toll system which are not integrated into the calculation of the IRR but which nevertheless affect its financial situation, the General Court's findings on the disadvantages of that system which were included in that calculation are therefore irrelevant. According to AW, the relevant question is whether, from AW's point of view, providing for a higher IRR but which has higher inflation and exchange rate risks would be economically more advantageous than providing for a lower IRR but which has lower inflation and exchange rate risks. However, it is not possible to answer that question without carrying out an assessment of the cap on shadow-toll rates.
- 90 The Commission and the Republic of Poland dispute AW's arguments. The Commission considers, in particular, that it is clear from paragraphs 110 and 111 of the judgment under appeal that Annex 6 does not include any consideration relating to the increase in inflation and exchange rate risks, that it has thus not been proved that the contracting parties intended to take account of such an increase and that the vignette model's IRR communicated by AW at first instance was not presented as including a compensation element corresponding to the inflation and exchange rate risks. Furthermore, the allegation that the burden of proof has been reversed is inadmissible since it is not accompanied by any legal argument to support it. Moreover, the Commission and the Republic of Poland submit that the first parts of the second and third grounds of appeal are unfounded.

– Findings of the Court

- 91 In the first parts of the second and third grounds of appeal, AW alleges that the General Court distorted the evidence and made several errors of law as a result of incorrect applications of the private investor test, a misallocation of the burden of proof, substitution of reasoning and insufficient reasoning in the judgment under appeal.

- 92 As regards, in the first place, the alleged distortions of evidence, it should be recalled that 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 find 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 30 November 2016, *Commission v France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 97 and the case-law cited).
- 93 Therefore, 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 30 November 2016, *Commission v France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 98 and the case-law cited).
- 94 Where an appellant alleges a distortion of the evidence by the General Court, he or she must, pursuant to 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 its Rules of Procedure, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in his or her 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 any need to carry out a new assessment of the facts and the evidence (judgment of 30 November 2016, *Commission v France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 99 and the case-law cited).
- 95 In the present case, the first distortion alleged by AW relates to paragraph 110 of the judgment under appeal, according to which 'it does not appear from Annex 6 that the contracting parties intended to take into account the alleged disadvantages of the shadow-toll system now used by [AW], let alone that they have concluded an agreement in this respect. In particular, that annex does not include any consideration relating to the increase in the risks alleged by [AW]'.
- 96 When AW criticises the General Court for having failed to have regard to the fact that the shadow-toll rate cap is provided for in Annex 6, in the penultimate paragraph of point 4 of Appendix 1, and that that contractual clause was discussed between the contracting parties, it does not submit distortion but in fact contests the General Court's factual assessment according to which the mere presence of the cap does not equate, in the absence of other supporting evidence, to the parties taking into account the transfer of the exchange rate and inflation risks to which AW refers.
- 97 Consequently, as the Commission rightly points out, AW's claims in that regard are inadmissible at the appeal stage.
- 98 The second distortion alleged by AW relates to paragraph 112 of the judgment under appeal, which is worded *inter alia* as follows:

'... pursuant to Annex 6, shadow-toll rates were indexed to fluctuations in the inflation rate and exchange rate, and increased, in addition, every 6 months from 1 September 2007, by an additional factor called WWR. Through the verification mechanism, the Republic of Poland has also taken on board the risks related to traffic and revenue developments and ensured that the IRR would remain at the same level as expected before the amendment of the law during the period from 1 September 2005 to 31 December 2006. In those circumstances, the mere existence

of a shadow-toll rate cap, not indexed to fluctuations in the inflation rate and the exchange rate, cannot be considered as having transferred the inflation and exchange rate risk to the applicant and as justifying the payment of a “premium” to the applicant.’

- 99 In so far as AW criticises the General Court for having thus taken the view that there was a transfer of exchange rate and inflation risks to the Republic of Poland not only when fluctuations are below the absolute cap on the shadow-toll rate provided for, but also when they exceed it, it must be stated that, in the first sentence cited in the preceding paragraph, the General Court merely described the mechanism provided for in Annex 6, and that the second sentence refers not to the exchange rate and inflation risks but to the risks associated with the development of traffic and revenues, and that the third sentence contains a factual assessment based on the evidence referred to in the two preceding sentences.
- 100 That passage of the judgment under appeal does not therefore reveal any distortion of the evidence and AW once again merely challenges a factual assessment which falls within the exclusive jurisdiction of the General Court, and which is inadmissible at the appeal stage.
- 101 The third distortion alleged by AW also relates to paragraph 112 of the judgment under appeal, in so far as it is worded *inter alia* as follows:
- ‘... as regards the impossibility of fixing tolls at the optimal level and the impossibility of benefiting from a higher return than initially planned, it should be noted (i) that [AW] remained free to set the toll rates applicable to vehicles other than HGVs equipped with a vignette, so that it could adapt its commercial strategy to market developments, and that (ii) it had used, as of 1 September 2005, all the possibilities to increase its actual tariffs for HGVs by fixing them at the maximum levels authorised by [the Concession Agreement]. The disadvantages alleged by [AW] could not therefore appreciably affect its expected financial situation.’
- 102 When AW states that HGVs account for 81% of its revenues and claims that the General Court does not explain how a disadvantage of the shadow-toll system with an impact on those revenues could be offset by the fact that 19% of its revenues is not affected by that disadvantage, it does not seek to establish a distortion by the General Court of the contractual clauses in the context of the first of the sentences referred to in the preceding paragraph, but to show that the General Court’s factual assessment that the alleged disadvantages of the shadow-toll system could not significantly alter its expected financial situation is incorrect. That line of argument must therefore also be held to be inadmissible.
- 103 In the second place, as regards the errors of law allegedly committed by the General Court, it should be recalled that, according to the settled case-law of the Court of Justice, in order for a measure to be classified as State aid within the meaning of Article 107(1) TFEU, all the following conditions must be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 27 and the case-law cited).
- 104 Since AW’s arguments in the first parts of the second and third grounds of appeal concern only the third of those conditions, it should be noted that, in accordance with the Court’s equally settled case-law, measures that, whatever their form, are likely directly or indirectly to favour certain undertakings, or fall to be regarded as an economic advantage that the recipient

undertaking would not have obtained under normal market conditions, are regarded as State aid (judgment of 6 March 2018, *Commission v FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 44).

- 105 Having regard to the objective of Article 107(1) TFEU of ensuring undistorted competition, including between public undertakings and private undertakings, the definition of ‘aid’, within the meaning of that provision, cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions under which such an advantage was granted is made, in principle, by applying the private operator principle (judgment of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 103 and the case-law cited).
- 106 In that regard, where there are doubts as to the applicability of that principle, in particular because of the use by the Member State concerned, at the time the measure at issue was adopted, of its powers of public authority, the Member State must establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as a private operator (judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 63 and the case-law cited).
- 107 By contrast, when the private operator principle applies, it is one of the factors that the Commission is required to take into account for the purposes of establishing the existence of aid and is not, therefore, an exception that applies only if a Member State so requests, when it has been found that the constituent elements of ‘State aid’, as laid down in Article 107(1) TFEU, exist (judgment of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 109 and the case-law cited).
- 108 In that case, it is therefore the Commission that has the burden of proving, taking into account, inter alia, the information provided by the Member State concerned, that the conditions for the application of the private operator principle have not been satisfied, so that the State intervention at issue entails an advantage within the meaning of Article 107(1) TFEU (judgment of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 110).
- 109 In that regard, it should be borne in mind that, in order to assess whether the same measure would have been adopted in normal market conditions by a private operator, reference should be made to such an operator in a situation as close as possible to that of the State concerned (see, to that effect, judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 30 and the case-law cited).
- 110 It is in that context that it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from such a private operator (judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 29 and the case-law cited).

- 111 It follows from this that the assessment which the Commission is required, where appropriate, to carry out cannot be limited to just the options that the competent public authority actually took into consideration, but must necessarily cover all the options that a private operator would reasonably have envisaged in such a situation (see, to that effect, judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 29).
- 112 In that regard, first, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private operator, in a situation as close as possible to that of the public operator, must be regarded as being relevant (see, to that effect, judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 60).
- 113 Second, for the purposes of applying the private operator test, the only relevant information was the information that had been available, and the developments that had been foreseeable, at the time when that decision was taken (see, to that effect, judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 61).
- 114 In addition, the Commission is required, in the interests of sound administration of the fundamental rules of the FEU Treaty relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 67 and the case-law cited).
- 115 In so far as AW complains that the General Court went beyond the limits of its power of review, it should be borne in mind that, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the FEU Treaty or of any rule of law relating to its application, or of misuse of powers. Article 264 TFEU provides that, if the action is well founded, the act concerned must be declared void. The Court of Justice and the General Court cannot, therefore, under any circumstances, substitute their own reasoning for that of the author of the contested act (judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 104 and the case-law cited).
- 116 Furthermore, it is settled case-law that the examination which it falls to the Commission to carry out, when applying the private operator principle, requires a complex economic assessment and that, in the context of a review by the Courts of the European Union of complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (judgment of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 100).
- 117 However, the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 64).

- 118 In that connection, the lawfulness of a decision concerning State aid falls to be assessed by the EU judicature in the light of the information available to the Commission at the time when the decision was adopted, which includes that which seemed relevant to the assessment to be carried out in accordance with the case-law referred to in paragraphs 110 to 113 of the present judgment and which could have been obtained, upon request by the Commission, during the administrative procedure (judgment of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraphs 70 and 71).
- 119 It is by having regard to the considerations set out in paragraphs 103 to 118 above that AW's arguments must be examined.
- 120 As regards, first, the complaint that the General Court confined its examination to only the options envisaged by the contracting parties and disregarded the significant influence of the alleged risks on the decision-making process of a private investor, it is indeed apparent from the case-law referred to in paragraphs 110 and 111 above that the examination which the Commission must, where appropriate, carry out cannot be limited solely to the options which the competent public authority actually took into account, but must necessarily cover all the options which a private operator would reasonably have envisaged in such a situation.
- 121 However, it also follows from that case-law that that requirement does not mean that the Commission is required to take into account, in addition, options which a private operator would not reasonably have envisaged in such a situation.
- 122 Furthermore, the issue in the case that gave rise to the judgment of 20 September 2017, *Commission v Frucona Košice* (C-300/16 P, EU:C:2017:706), was the application of the private creditor test to a creditor which sought to maximise the recovery of sums owed to it by an insolvent debtor. It was in that context that the Court held that it was for the Commission to examine, in addition to the recovery options envisaged by the competent public authority, any other option that a private creditor would reasonably have taken into account.
- 123 By contrast, the situation at issue in the present case shows that, in relation to AW, the Republic of Poland was neither in the position of a private creditor nor that of a private investor. Given that that Member State was under an obligation to compensate AW for damage caused to AW in the context of their contractual relations, the criterion to be applied was that of a private debtor who is liable, in the context of a contractual relationship, to pay a sum of money to the other party to the contract on account of damage which it has caused it.
- 124 It must be stated that it is not in the interest of a private debtor to compensate its creditor for exchange rate and inflation risks which that creditor has not raised with it. Since higher compensation would, in principle, be contrary to the interests of a private debtor, it must be held that such a debtor would not have taken such risks into account unless, at the request of the other party to the contract, it was required to do so or if that were in its interests understood more broadly, having regard to the contractual relationship in question.
- 125 Accordingly, the General Court did not err in law when it held, in paragraphs 152 to 154 and 165 to 171 of the judgment under appeal, that a private operator in the Republic of Poland's situation would not, in principle, have agreed to pay an amount higher than that which it had to pay to AW as a result of the harmful event in question and, more specifically, in paragraphs 110 to 112 of that

judgment, that there was no need to take into account the risks allegedly borne by AW which did not appear to have been either the subject of a request by AW during the negotiations with that Member State or otherwise the subject of the discussions between them.

- 126 It follows, secondly, that AW is wrong to complain that the General Court reversed the burden of proof, since the risks alleged by AW must consequently be regarded as not being relevant information liable to have a significant influence on the decision-making process of a normally prudent and diligent private operator in a situation as close as possible to that of the public operator. In those circumstances, contrary to AW's contention, it cannot be held that the Commission was required, in the decision at issue, to state the reasons why it did not take into account the risks alleged by AW.
- 127 Thirdly, in the light of the foregoing considerations, AW cannot validly claim that the General Court substituted its own grounds or that it exceeded the limits of its power of review when it found, in paragraphs 110 to 112 of the judgment under appeal, that the risks invoked by AW were neither relevant to the assessment which the Commission was required to carry out, nor established. The General Court merely assessed the arguments advanced before it and examined whether or not the decision at issue was unlawful having regard to AW's allegations.
- 128 Finally, in so far as AW argues that the reasoning set out in those paragraphs of the judgment under appeal is not capable of supporting the conclusion reached by the General Court in paragraph 113 of that judgment, it is clear that it does not complain of a failure to state reasons in that judgment, but that it criticises the content of the findings of the General Court and invites the Court of Justice to carry out a fresh assessment of the facts, which does not fall within its jurisdiction and must therefore be held to be inadmissible at the appeal stage.
- 129 In the light of all the foregoing considerations, the first parts of the second and third grounds of appeal must be rejected as partly inadmissible and partly unfounded.

Second part of the second ground of appeal

- 130 The second part of the second ground of appeal, relating to the options that a hypothetical private investor would have envisaged, alleges infringement of the private investor test, of the principle of the primacy of EU law, the obligation to state reasons, of the rules of evidence and of the limits of the review to be carried out by the General Court.

– Arguments of the parties

- 131 AW submits that the General Court erred in law in holding that a private investor would have been constrained, when negotiating the amount of the shadow toll, by the provisions and objectives of the Law of 28 July 2005, since it confirmed the Commission's erroneous approach of taking into account only the options envisaged by the Member State concerned. Furthermore, the adequate level of compensation for AW is not a decisive consideration for a private investor, since it is not directly related either to its profitability or to its risk.
- 132 Moreover, if a measure contrary to a national law constituted an advantage, within the meaning of Article 107(1) TFEU, solely because a private investor would not pay any more than what is required by that law, the latter would limit the application of that higher-ranking provision, giving rise to an infringement of the principle of the primacy of EU law.

- 133 Furthermore, AW submits that by taking the view that the Law of 28 July 2005 imposes on the contracting parties limits on the determination of the shadow toll, the General Court gave inadequate reasons for the judgment under appeal, infringed the rules on evidence and substituted a different reasoning from that of the decision at issue. Although that law prohibited real tolls, it also referred to negotiations relating to the compensation method and deadlines for reimbursement. Since that law does not specify the IRR, or that it should compensate only loss of revenue, or the considerations which the State may take into account, or the State's commercial position, it leaves a broad discretion on how to structure the agreement on shadow tolls.
- 134 AW submits that it moreover provided the General Court, as evidence of the scope and content of the Law of 28 July 2005, with the arbitral award that explains the correct interpretation of the Law of 28 July 2005, which the General Court rejected, wrongly and on the ground of inadequate reasoning, as being irrelevant. The fact that that award was not binding on the Commission and that it did not declare the 1999 WSA study to be of greater relevance than the 2004 WSA study is irrelevant as regards the evidential value of that award. The General Court thus reached its conclusions on the basis of incomplete evidence and without any foundation, since there was nothing in the documents before the Court of Justice to support those conclusions. The General Court also disregarded the fact that the examination of the scope and content of the Law of 28 July 2005 required expert knowledge and the Commission did not obtain the required expertise, which is made worse by the fact that the arbitral award and the wording of the Law of 28 July 2005 indicated that the shadow toll had to be negotiated between the contracting parties. Finally, the arbitral award was set aside by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) solely because it contradicted the decision at issue, which does not call into question its probative value as regards the interpretation of that law.
- 135 Furthermore, according to AW, by confirming, in paragraph 153 of the judgment under appeal, the statement – which is unsupported by accurate, reliable and consistent evidence – that appears in paragraph 152 of the decision at issue, according to which Annex 6 grants greater compensation than was required by the Law of 28 July 2005 and that there is a contradiction between the Concession Agreement and that annex, the General Court failed to assess whether the required standard of proof was met. The judgment under appeal is thus vitiated by a failure to state reasons such that AW is unable to ascertain the reasons which led the General Court to adopt its interpretation of that law or to ascertain the reasons for rejecting the argument that the alleged contradiction did not exist.
- 136 The Commission and the Republic of Poland dispute AW's arguments. The Commission considers, in particular, that the complaint that a private investor is not restricted by the provisions and objectives of the Law of 28 July 2005 is inadmissible, since the nature of the error of law is not specified and no legal argument has been put forward in support of such a complaint. Furthermore, since the scope and content of that law constitute matters of fact, the General Court's sovereign appraisal of those matters could be challenged only if it were alleged that they had been distorted, which was neither pleaded nor, a fortiori, proved. Finally, the Commission and the Republic of Poland contend that the second part of the second ground of appeal is unfounded.

– Findings of the Court

- 137 The inadmissibility raised by the Commission concerning AW's arguments in the second part of the second ground of appeal must be rejected at the outset, since they are sufficiently clear and seek a finding of an error of law resulting from the restriction by the General Court of the factors

taken into account for the purposes of the assessment applying the private operator principle, infringement of the principle of the primacy of EU law, a failure correctly to apply the rules relating to the taking of evidence, substitution of grounds and inadequate reasoning in the judgment under appeal.

- 138 Those complaints made by AW relate to paragraphs 152 to 154 of the judgment under appeal, in which the General Court held, *inter alia*, that the Commission had been correct to find that the Law of 28 July 2005 and the Concession Agreement required the Republic of Poland to compensate AW for the sole loss of revenue caused by the changes brought about by that law and that no rational private operator would have agreed to pay an amount exceeding that imposed on it by that law and that contract.
- 139 It has already been pointed out in paragraphs 121 to 125 of this judgment that the General Court was fully entitled to find that a private debtor in the Republic of Poland's situation would not seek to provide compensation to AW that exceeded the consequences flowing from the impact of the Law of 28 July 2005 on their contractual relationship. Since the General Court's assessment is thus consistent with the private operator principle, it must be held that it is not vitiated by an error of law and does not infringe the principle of the primacy of EU law.
- 140 It also follows that AW cannot validly claim that the General Court substituted grounds or exceeded the limits of its power of review, in paragraphs 152 to 154 of the judgment under appeal, in making the findings set out in paragraph 138 of this judgment. The General Court merely assessed the arguments advanced before it and examined whether or not the decision at issue was unlawful having regard to AW's allegations.
- 141 As regards the alleged defective reasoning in the judgment under appeal, first of all, it must be observed that AW challenges only the adequacy of the reasoning of the judgment under appeal in supporting the General Court's findings.
- 142 Next, that argument is based, in part, on a misreading of paragraphs 152 and 153 of the judgment under appeal, since those paragraphs contain neither a finding that Annex 6 grants AW greater compensation than that required by the Law of 28 July 2005, nor that there is a contradiction between the Concession Agreement and that annex, but rather that the amount of compensation to which AW was entitled was the result of an overall assessment of the harmful event caused by that law and the Republic of Poland's obligations under that contract.
- 143 Consequently, since the General Court did not make such findings in those paragraphs of the judgment under appeal, AW's argument that in making them the General Court failed correctly to apply the rules on the taking of evidence is wholly unfounded.
- 144 Finally, as the Commission correctly submitted, AW seeks to obtain a fresh assessment of the facts, in particular of the content of the Law of 28 July 2005, which does not fall within the jurisdiction of the Court of Justice.
- 145 It follows that the second part of the second ground of appeal must be rejected as partly inadmissible and partly unfounded.

Third part of the second ground of appeal

- 146 By the third part of the second ground of appeal, relating to the risk of failure of the negotiations and risk of litigation, AW alleges distortion of the evidence and failure correctly to apply the private investor test and the principle of primacy of EU law, and breaches of the obligation to state reasons, the rules of evidence and the limits of the review to be carried out by the General Court.

– Arguments of the parties

- 147 AW submits that, in the same way as the Republic of Poland’s advisers who considered Annex 6 to be acceptable, a hypothetical private investor would have taken into account the risk that ultimately AW would request the termination of the Concession Agreement or commence litigation as well as the professional opinion of its advisers in that regard. AW submits that the Commission was therefore required to assess that risk and to take that opinion into account, which it failed to do and which the General Court did not criticise.
- 148 In paragraph 165 of the judgment under appeal, the General Court restricted the application of the private investor test solely to the options provided for by the Law of 28 July 2005 and therefore the judgment under appeal is vitiated with the same errors as already identified in the second part of the second ground of appeal. AW submits that the reasoning set out in paragraph 166 of that judgment is circular, inadequate and entails a substitution of grounds as regards the risks of termination and litigation referred to in the preceding paragraph of this judgment.
- 149 In so far as, in paragraph 167 of that judgment, the General Court held that AW also had an interest in avoiding litigation, the General Court again substituted its reasoning for that of the Commission in the decision at issue, did not respond to the argument relating to the point at which AW would no longer have continued the commercial relationship, which would be characterised by the prospect of losses for AW, and distorted the analyses of the Republic of Poland’s advisers. The last sentence of that paragraph also contains an error of logic, and therefore inadequate reasoning, in that it limits consideration of the termination and litigation risks to the period prior to the adoption of the Law of 28 July 2005, even though those risks also exist for the subsequent period.
- 150 The Commission and the Republic of Poland dispute AW’s arguments.

– Findings of the Court

- 151 By its arguments in the third part of the second ground of appeal, which relate to paragraphs 165 to 167 of the judgment under appeal, AW alleges misapplication of the private operator principle, inadequate reasoning, a substitution of grounds and a distortion of the evidence.
- 152 In paragraph 165 of the judgment under appeal, the General Court pointed out, with regard to the alleged risks incurred by a private operator in the event of the failure of the negotiations, that such an operator would have concluded an amendment to the Concession Agreement in order only to compensate AW, in accordance with the Law of 28 July 2005, for the sole loss of revenue caused by that law and that, consequently, it would have neither taken account of those alleged risks nor

agreed to pay higher compensation in that respect. It added that those risks had not been discussed by the contracting parties during the negotiation of Annex 6 and were not taken into account in calculating the amount of compensation paid to AW.

- 153 In paragraph 166 of the judgment under appeal, the General Court recalled that, in the decision at issue, the Commission essentially confined itself to challenging the application of Annex 6 with regard to the data used in the financial models. However, given that the risks alleged to be incurred by a private operator in the absence of a transaction have nothing to do with the relevance of the data used in the financial models, the General Court found that there was no reason to believe that a private operator would have agreed to use the irrelevant data from the 1999 WSA study rather than those of the 2004 WSA study to account for those risks.
- 154 In paragraph 167 of the judgment under appeal, first of all, the General Court added that the risk that the negotiations would fail and the litigation risk would not have been taken into account by a private operator in the negotiations in order to calculate the amount of compensation due to AW, since those risks were unrelated to the loss of revenue caused by the legislative change. It then took the view that AW also had an interest in ensuring that the negotiations were successful and that litigation relating to a claim for damages was avoided. Finally, it noted that AW had not established or even claimed that the advisers to the Republic of Poland considered that the risk of failure of negotiations and the litigation risk had to be taken into account in determining the IRR immediately prior to the changes brought about by the Law of 28 July 2005.
- 155 As regards the alleged distortion of evidence, it suffices to note that, contrary to the requirements recalled in paragraph 94 of this judgment, AW does not specify which evidence is distorted by the finding made by the General Court in the last sentence of paragraph 167 of the judgment under appeal.
- 156 As regards the misapplication of the private operator principle invoked by AW, first of all, it must be borne in mind that the assessment criterion to be applied in the present case was that of a private debtor which was liable, in the context of a contractual relationship, to pay a sum of money to the other party to the contract on account of damage which it had caused to that other party. As has already been stated several times in this judgment, the finding by the General Court that such a debtor would not, in principle, have compensated AW in excess of the amount due by reason of the harmful event is not vitiated by an error of law.
- 157 Next, even if it were accepted that that obligation to pay arose from a broader contractual relationship between the Republic of Poland and AW and that a private debtor in the situation of that Member State could thus have taken into account the risks of failure of the negotiations and of litigation, it would still be necessary for those risks to have been real and that they could have generated higher costs for it than those associated with compensating AW for the consequences for AW of the Law of 28 July 2005.
- 158 Finally, it follows from the findings of fact made by the General Court, set out in paragraphs 165 and 167 of the judgment under appeal, that the reality of such risks had not been established. The General Court observed, in that regard, that that matter had not been discussed between the contracting parties and it is also apparent from the judgment under appeal that the mechanism for compensating agreed losses was intended to ensure, first, the full replacement of lost revenue and, second, that AW was able to repay the loans taken out for the construction of the motorway section in question.

- 159 In those circumstances, the complaint alleging a failure correctly to apply the private operator principle must be rejected as unfounded.
- 160 As regards the alleged substitution of grounds, it should be noted that the General Court examined, in paragraphs 165 to 167 of the judgment under appeal, AW's argument that the Commission had wrongly failed to take into account the risks of failure of the negotiations and of litigation. In that regard, the General Court found that the risks alleged by AW had not been established. The Commission is not, in principle, required to state in its decisions the reasons why it did not take into account matters which have not been established. Accordingly, in those paragraphs of the judgment under appeal, the General Court did not provide reasons which should have appeared in the decision at issue, but rather set out the reasons for rejecting the arguments advanced before it with a view to establishing an alleged failure to state reasons in the decision at issue.
- 161 Finally, under cover of alleging the inadequacy of the reasoning of the judgment under appeal, AW is in fact seeking to obtain from the Court of Justice a fresh assessment of the facts, which does not fall within its jurisdiction.
- 162 Having regard to the foregoing considerations, the third part of the second ground of appeal must be rejected as partly inadmissible and partly unfounded.

The fourth part of the second ground of appeal

- 163 The fourth part of the second ground of appeal, relating to the study of traffic and revenues to be taken into account, alleges a distortion of the decision at issue, substitution by the General Court of a different statement of reasons for that decision, incorrect application of the private investor test, infringement of the principle of the primacy of EU law, infringement of the rules of evidence and failure to state reasons.

– Arguments of the parties

- 164 AW observes that in paragraph 152 of the decision at issue it is stated that 'it is highly questionable' that a private investor would agree to calculate AW's compensation on the basis of the 1999 WSA study rather than on the 2004 WSA study and submits that, in so doing, the Commission had no evidence that that was the case. However, as the burden of proof is on the Commission, that reasoning cannot support its conclusion that the private investor test was not satisfied. Therefore, by stating, in paragraph 153 of the judgment under appeal, that the decision at issue contained sufficient reasons as regards the application of that criterion, the General Court applied an incorrect legal test, distorted the clear meaning of the decision at issue and substituted its own reasoning for that of that decision.
- 165 AW considers that the terms used by the Commission also show, as does the structure of the decision at issue, that the Commission treated the private investor test as an exception which it was required to consider only at AW's request, with the result that paragraph 142 of the judgment under appeal, which found the contrary, is unconvincing.
- 166 AW observes that paragraph 154 of the judgment under appeal rules solely on the respective merits of the 2004 WSA study compared with the 1999 WSA study in order to analyse AW's financial situation prior to the legislative change in question. However, a private investor does

not merely consider that certain elements of a formula could have been chosen differently, but would choose between the option of that formula and other options available depending on their final outcome. The General Court's reasoning does not explain why Annex 6 was not amongst those other options that might have been taken into account by such an investor, with the result that the reasoning of the judgment under appeal on that point is inadequate.

- 167 Furthermore, by taking into account the objective of the Law of 28 July 2005 in its assessment, the General Court made the errors set out in paragraph 82 of the present judgment. Since the reasoning in paragraph 154 does not disclose the option which the General Court considered to be that which a private investor would have envisaged, it is inadequate. In particular, it is not clear whether the General Court considered the agreement reached between the parties with the sole change being the updating of the base financial model with data from the 2004 WSA traffic study, that is to say with a shadow-toll rate cap, or an agreement based on the updated base financial model but without a cap being fixed. In the first case, the General Court's reasoning is contradictory because, according to the General Court, in order to 'ensure compensation', such a cap is not necessary as the IRR would have been 7.42% and, in the second case, it is clear that the shadow-toll rate cap should have been assessed.
- 168 Also in that regard, AW observes that another option open to the private investor might have consisted of an agreement without updating the traffic assumption in the base financial model, but with a lower shadow-toll rate cap which could have led to an IRR of less than 7.42%. A private investor would clearly not pay more simply to use the 'right' study. The 'right' study is therefore, in itself, irrelevant. The private investor test requires an analysis of the 'entire package', with the result that the General Court's analysis constitutes an incorrect application of that test. Similarly, the General Court ignored AW's argument that a private investor would have considered that none of the available studies was fit for purpose, which corresponds to the conclusions of the Republic of Poland's financial adviser, which no investor could have ignored.
- 169 The Commission disputes AW's arguments.

– Findings of the Court

- 170 By the fourth part of the second ground of appeal, AW criticises the General Court for having, in paragraphs 142, 153 and 154 of the judgment under appeal, used incorrect legal criteria, distorted the meaning of the decision at issue, substituted its own reasoning for that of the decision, gave insufficient reasons for the the judgment under appeal and failed to respond to one of its arguments.
- 171 First of all, as regards AW's argument that the General Court wrongly rejected, in paragraph 142 of the judgment under appeal, its argument that the Commission had treated the private investor test as an exception, it should be borne in mind that the General Court held, in that paragraph, that AW was not entitled to raise that argument before it, since 'although the Commission did consider the amount of the overpayment as a result of the PwC report ..., before addressing the private investor test, it definitively decided on the existence of an economic benefit and on the amount of the overpayment only after considering the private investor test ...'.
- 172 In that regard, it must be stated that it is unequivocally clear from the decision at issue that, in paragraphs 125 and 126 of that decision, the Commission carried out its entire analysis of the existence of an economic advantage from the perspective that, under the Concession Agreement, it was for the Republic of Poland to compensate AW for the damage caused by the Law of

28 July 2005 and that compensation in excess of that damage gave rise to an economic advantage within the meaning of Article 107(1) TFEU. It follows that, in substance, that analysis corresponds to the analysis that the Commission was required to carry out in applying the private operator principle.

173 Since that analysis is consistent with that principle, as was, moreover, stated by the Commission in paragraph 152 of the decision at issue and confirmed by the General Court in paragraphs 152 to 154 and 165 to 171 of the judgment under appeal, AW's argument must be rejected as unfounded.

174 Next, as regards AW's criticisms of the last sentence of paragraph 153 of the judgment under appeal, it should be recalled that, in that paragraph, the General Court held that, 'in considering that it was "doubtful" that a reasonable private business entity would agree to calculate the compensation on the basis of the 1999 WSA study rather than on the basis of the more recent [2004 WSA study], [the Commission] made it sufficiently clear that it did not appear from the documents in the file that such an entity would have used the 1999 WSA study and motivated its assessment by emphasising the more recent nature of the 2004 WSA study'.

175 In that regard, it should be borne in mind that the interpretation of a decision on State aid adopted by the Commission in the exercise of its powers is within the scope of a legal assessment to be made by the General Court and the Court of Justice (see, to that effect, judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraphs 102 and 105).

176 Furthermore, the interpretation of a specific paragraph of such a decision must be made in the context of the whole of the decision concerned (see, to that effect, judgment of 26 March 2020, *Larko v Commission*, C-244/18 P, EU:C:2020:238, paragraph 111).

177 In the present case, the Commission's assertion, in paragraph 152 of the decision at issue, that it was 'highly questionable' that a private operator would have had recourse to the 1999 WSA study must therefore be read in the context of the facts of the case, as is apparent in particular from paragraph 135 of the decision at issue, in which the Commission stated that it was necessary to rely on a forecast of traffic and revenues that was contemporaneous with the Law of 28 July 2005.

178 It follows that, contrary to AW's contention, in paragraph 153 of the judgment under appeal the General Court did not use an incorrect legal criterion or distort the meaning of the decision at issue. Nor did it substitute its own reasoning for that of the decision at issue, but rather, by rejecting the arguments AW submitted before it, confirmed the reasoning of that decision.

179 Finally, as regards AW's argument directed against paragraph 154 of the judgment under appeal, it should be noted at the outset that that argument is based on a misunderstanding of the applicable criterion. As the General Court stated, in essence, in that paragraph of the judgment under appeal, a private debtor in the situation of the Republic of Poland, which was liable to pay a sum of money to AW, in the context of their contractual relationship, by reason of the damage which it had caused AW by adopting the Law of 28 July 2005, had the objective of ensuring that AW was compensated solely for the adverse consequences flowing from that law.

180 The reasoning of the General Court according to which, in view of that objective, there is nothing to suggest that a private operator would have agreed to rely on the data in the 1999 WSA study rather than on those of the 2004 WSA study, or that it would have required the appointment of an additional expert or would have preferred to use the data in the 2005 FM study, thus clearly

makes it possible to understand, contrary to what AW claims, that such a private operator would have taken into account, out of all the imperfect evaluation options available, the option that best made it possible to determine the adverse consequences of that law, in order to ensure that the compensation accorded met its contractual obligations without exceeding them.

- 181 It follows that that reasoning applied the appropriate criterion and provides a clear and coherent response to all of AW's arguments summarised in paragraphs 134, 136 and 147 to 150 of the judgment under appeal.
- 182 In so far as AW submits that that reasoning is inadequate in that options other than those adopted by the Commission and confirmed by the General Court should have been taken into account, it is sufficient to point out that, in so doing, AW is in fact asking the Court of Justice to carry out a fresh assessment of the facts, which is not within its jurisdiction.
- 183 Having regard to the foregoing considerations, the fourth part of the second ground of appeal must be rejected as partly inadmissible and partly unfounded.

The second part of the third ground of appeal

- 184 The second part of the third ground of appeal, concerning the level of the real-toll IRR, alleges a failure to state reasons, a failure by the General Court to carry out its review as required, and infringement of the rules of evidence.

– Arguments of the parties

- 185 AW submits that the reasoning in paragraphs 120 to 127 of the judgment under appeal is insufficient to support the rejection of its arguments summarised in paragraph 115 of that judgment. First of all, the General Court merely set out its conclusion without having carried out a complex economic assessment, thus failing to fulfil its obligation to verify whether the decision at issue was based on precise, reliable, consistent and complete evidence and its obligation to comply with the rules on evidence.
- 186 Paragraph 120 of the judgment under appeal deals exclusively with the respective merits of the 1999 and 2004 WSA studies and does not respond to the argument summarised in paragraph 115 of that judgment. The fact that the 1999 WSA study was less relevant than the 2004 WSA study does not mean that the latter was reliable. The reasoning set out in paragraph 121 of that judgment has no connection with the relevant question as to whether the IRR of 7.42% had been adequately identified. Paragraph 122 of the judgment under appeal refers to that argument without providing any reasoning as to why an update of some of the traffic and revenue data in the context of a study on another section on the motorway was irrelevant. In paragraph 123 of that judgment, the General Court again deals with the comparison of the respective merits of the 1999 and 2004 WSA studies and states that the appointment of an expert was not necessary, which is not supported by any reasons and unduly reverses the burden of proof. The reasoning in paragraph 124 of that judgment is also unrelated to that issue. Paragraph 125 of the judgment under appeal concerns only the second argument relating to the 2005 FM study and paragraph 126 thereof relates only to the third argument concerning the PwC real-toll model.

- 187 In addition, the General Court failed to comply with its obligation to verify whether the decision at issue was based on precise, reliable, consistent and complete evidence and did not comply with the rules on evidence, by wrongly holding that the Commission was not required to seek additional information concerning the usability of the 2005 FM study. In that regard, even though the Commission is under an obligation to assess the evidence impartially and thoroughly, it follows from paragraph 138 of the decision at issue that the Commission relied exclusively on information received from the Republic of Poland in order to reject that study as being unusable. In view of the adversarial relationship between that Member State and AW and the fact that that Member State had omitted to mention the 2005 FM study, the Commission should have been more critical and asked the Republic of Poland or third parties for further information.
- 188 The Commission considers that AW criticises the probative value of the evidence, arguing that it was not reliable, by disputing its comprehensiveness and by asserting that an additional report should therefore have been commissioned. By that line of argument AW is seeking, in essence, a re-examination of the assessment made by the General Court, which does not fall within the jurisdiction of the Court of Justice. Furthermore, the Commission and the Republic of Poland dispute AW's arguments on the substance.

– *Findings of the Court*

- 189 By its arguments in the second part of the third ground of appeal, concerning paragraphs 120 to 127 of the judgment under appeal, AW submits that the reasoning of the judgment under appeal is inadequate, that the General Court carried out an inadequate judicial review, failed correctly to apply the rules on evidence, failed to respond to AW's arguments summarised in paragraph 115 of the judgment under appeal and reversed the burden of proof.
- 190 First of all, as regards the General Court's alleged failure to respond to AW's argument summarised in paragraph 115 of the judgment under appeal, it should be noted that, by that argument, AW claimed that the Commission's conclusions concerning the 2004 WSA study were manifestly incorrect because the probative value of the traffic studies was limited and because, in the absence of a reliable traffic study, the contracting parties agreed on a methodology according to which AW's initial expectations in terms of return were used as a basis for calculation but were reduced, by applying a shadow-toll rate cap, to a level that the Republic of Poland found acceptable.
- 191 By that argument, AW thus alleged that the 2004 WSA study had insufficient probative value compared with the 1999 WSA study, to which AW attributed, in essence, sufficient probative value by relying on the methodology agreed between the contracting parties.
- 192 However, contrary to what AW claims, the General Court expressly rejected those arguments in paragraphs 122 to 124 of the judgment under appeal.
- 193 First of all, it stated in those paragraphs that, first, WSA produced a series of studies, which were prepared by the same adviser, using the same methodology, in order to develop traffic and revenue forecasts for the A2 motorway; secondly, the 2004 WSA study, prepared for AW itself, was intended to update the traffic and revenue forecasts previously made; thirdly, that study therefore enabled the traffic and revenue forecasts set out in the 1999 WSA study to be updated, by taking into account the actual traffic and revenue trends on the relevant section of the A2 motorway and the economic development of Poland; fourthly, the 2004 WSA study consequently contains more relevant traffic and revenue forecasts than those contained in the 1999 WSA study

and more accurately reflects the reality of the market at the time of the changes brought about by the Law of 28 July 2005; and, fifthly, that Annex 6 refers to the financial model that the contracting parties agreed should be used for the calculation of the IRR immediately prior to the legislative change, by referring to '[WSA] shareholders' case, which is the update as of 31 December 2004'.

- 194 Second, the General Court concluded, in paragraph 124 of the judgment under appeal, that 'the most recent forecasts prepared by WSA were, in this context, more relevant than the 1999 WSA study'.
- 195 Next, the question whether, in those circumstances, the evidence in the case file demonstrates that the appointment of an additional expert was necessary is a factual assessment of the probative value of that evidence and, contrary to AW's contention, does not reverse the burden of proof.
- 196 Finally, it must be observed that paragraphs 120 to 127 of the judgment under appeal contain a detailed analysis of the evidence in the case file having regard to the arguments put forward by AW before the General Court and provide precise reasoning in relation to the relevance and probative value of each of the items referred to in those paragraphs. In particular, in those paragraphs the General Court examined the probative value of the 1999 and 2004 WSA studies, of the actual traffic data provided by AW to the General Directorate for National Roads and Motorways, of the study carried out in 2005 by the banks' traffic adviser concerning the shadow-toll scenario, referred to in paragraph 125 of the judgment under appeal, and of the 2005 FM study. It also analysed the appropriateness of the PwC real-toll model used by the Commission to calculate the amount of the aid in question.
- 197 AW's argument alleging insufficient reasoning in paragraphs 120 to 127 of the judgment under appeal, insufficient judicial review and failure correctly to apply the rules of evidence must therefore be rejected as unfounded.
- 198 It follows that the second part of the third ground of appeal must be rejected as unfounded.
- 199 Consequently, the second and third grounds of appeal must be rejected as partly ineffective and partly unfounded.

The fourth ground of appeal

- 200 By the fourth ground of appeal, relating to the calculation of the amount of the aid in question, AW submits that the General Court distorted the clear sense of the evidence and that the judgment under appeal is vitiated by a failure to provide adequate reasons.

Arguments of the parties

- 201 AW observes that, in paragraph 192 of the judgment under appeal, the General Court stated that, before the 2007 verification, the shadow-toll was based on an excessively high IRR of 10.77%. It is apparent, first of all, from Annex 6, and in particular from point 3 of Appendix 1 thereto, that the shadow toll was set at a specific amount expressed in Polish zlotys (PLN), without any reference to an IRR. Next, it is apparent from Annex 6, and in particular point 4 of Appendix 1 thereto, that that rate was subject to indexation in accordance with a formula, without any reference to an IRR. Finally, it is apparent from Annex 6, and in particular to clause 4(d) thereof, that the IRR did

not apply until after the verification of the shadow tolls, namely after 1 November 2007. Accordingly, AW submits that finding that the shadow-toll rates prior to October 2007 were determined by use of an IRR distorts the evidence in the case-file.

- 202 Paragraph 193 of the judgment under appeal is also vitiated by a distortion of the evidence, since the General Court found that the verification model did not have the purpose of calculating overcompensation because the Commission had disputed the level of the real-toll model's IRR, even though, prior to the 2007 verification, that IRR played no part in the calculation of the shadow toll. AW further submits that it cannot be inferred from the finding that the verification model did not have the purpose of calculating overcompensation that there was overcompensation prior to the verification.
- 203 The Commission and the Republic of Poland dispute AW's arguments.

Findings of the Court

- 204 In paragraphs 192 and 193 of the judgment under appeal, the General Court found, first, that the amount of the overcompensation calculated by the Commission corresponded to the difference between the payments actually made to AW and the amounts which it should have received on the basis of the IRR established according to the PwC real-toll model; secondly, that for the period from September 2005 to October 2007, the overpayment thus corresponded to the difference between the payments that had actually been made to AW and the compensation calculated on the basis of the IRR which it could have expected immediately prior to the changes brought about by the Law of 28 July 2005; thirdly, that the IRR of 10.77% of the real-toll model used by AW to set shadow-toll rates in the period prior to October 2007 was already too high compared to the IRR it could expect; fourthly, that the verification mechanism provided for in Annex 6 only confirmed the error in that IRR; fifthly, that in those circumstances, that mechanism could not call into question the fact that AW should not have initially benefited from the payment of such large sums during the period from September 2005 to October 2007; and, sixthly, that the verification mechanism provided for in Annex 6 was based on a comparison between the IRR of the verification model and the IRR of the real-toll model and made it possible to adjust shadow-toll tariffs in the light of actual traffic data after the implementation of the shadow-toll system.
- 205 From those findings, the General Court concluded that 'such a mechanism does not have the same purpose as the reasoning followed by the Commission to calculate overcompensation, since the Commission has, in that reasoning, called into question the level of the IRR of the real-toll collection model'.
- 206 It is clear from that reasoning and from that conclusion that, contrary to what AW suggests, that reasoning is not intended to describe the mechanism provided for in Annex 6, but relates to the calculation made by the Commission in order to determine the amount of State aid. In those paragraphs of the judgment under appeal the General Court responded to AW's arguments, summarised in paragraph 191 of that judgment, which sought to establish that there was no overcompensation for the period from September 2005 to October 2007.
- 207 It follows that the fourth ground of appeal is based on a misreading of the judgment under appeal and must therefore be rejected as unfounded.
- 208 Having regard to all the foregoing considerations, the appeal must be dismissed.

Costs

- 209 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.
- 210 Under Article 138(1) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 211 Since AW has been unsuccessful and the Commission has applied for an order for costs, AW must be ordered to bear its own costs and to pay those incurred by the Commission.
- 212 In accordance with Article 140(1) of the Rules of Procedure, which applies, *mutatis mutandis*, to appeal proceedings by virtue of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Republic of Poland, having participated in the proceedings before the Court, must bear its own costs.

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

- 1. Dismisses the appeal;**
- 2. Orders Autostrada Wielkopolska S.A. to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders the Republic of Poland to bear its own costs.**

Arabadjiev

Ziemele

von Danwitz

Xuereb

Kumin

Delivered in open court in Luxembourg on 11 November 2021.

A. Calot Escobar
Registrar

K. Lenaerts
President