Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2016*

(Appeal — State aid — Airport charges — Article 108(2) TFEU — Fourth paragraph of Article 263 TFEU — Decision to initiate the formal investigation procedure — Admissibility of an action for annulment — Person individually concerned — Legal interest in bringing proceedings — Article 107(1) TFEU — Condition relating to selectivity)

In Case C-524/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 November 2014,

European Commission, represented by T. Maxian Rusche, R. Sauer and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Hansestadt Lübeck, successor in law to Flughafen Lübeck GmbH, represented by M. Núñez Müller and I. Ruck, Rechtsanwälte,

applicant at first instance,

supported by:

Federal Republic of Germany, represented by T. Henze and K. Petersen, acting as Agents,

Kingdom of Spain, represented by M.A. Sampol Pucurull, acting as Agent,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça, E. Juhász and A. Prechal, Presidents of Chambers, A. Borg Barthet, J. Malenovský, E. Jarašiūnas (Rapporteur), F. Biltgen, K. Jürimäe and M.C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2016,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2016,

* Language of the case: German.

gives the following

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, 'the judgment under appeal', EU:T:2014:758), by which the General Court, first, annulled Commission Decision C(2012) 1012 final of 22 February 2012 on State aid No SA.27585 and No SA.31149 (2012/C) (ex NN/2012, ex CP 31/2009 and CP 162/2010) — Germany ('the decision at issue'), in so far as that decision concerns the schedule of charges of Lübeck Airport (Germany) adopted in 2006 ('the 2006 schedule'), and, secondly, dismissed the action as to the remainder.

Background to the dispute

2 Lübeck Airport was operated until 31 December 2012 by Flughafen Lübeck GmbH ('FL'). Until 30 November 2005, FL was wholly owned by the applicant at first instance, Hansestadt Lübeck (City of Lübeck). From 1 December 2005 until the end of October 2009, the private New Zealand company Infratil owned 90% of FL and the City of Lübeck owned 10%. From November 2009, FL was again wholly owned by the City of Lübeck. On 1 January 2013, Lübeck Airport was sold to Yasmina Flughafenmanagement GmbH. FL was incorporated into the assets of the City of Lübeck and deleted from the commercial register on 2 January 2013.

3 In accordance with Paragraph 43a(1) of the Luftverkehrs-Zulassungs-Ordnung (Air Traffic Licensing Rules) of 19 June 1964 (BGBl. I, p. 370), in the version in force in 2006 ('the LuftVZO'), FL adopted the 2006 schedule, which was approved by the aviation authority of the *Land* of Schleswig-Holstein. That schedule has been applicable since 15 June 2006 to all airlines using Lübeck Airport, unless an agreement has been concluded between the airport operator and an airline.

4 In 2007, the Commission adopted a decision to initiate the formal investigation procedure in relation to a contract concluded between FL and the airline Ryanair that set airport charges for Ryanair lower than those laid down in the 1998 schedule of charges, which was applicable to Lübeck Airport at the time.

5 Taking the view, inter alia, that the 2006 schedule could also itself contain State aid within the meaning of Article 107(1) TFEU, the Commission, by the decision at issue, initiated the formal investigation procedure provided for in Article 108(2) TFEU in respect of various measures relating to Lübeck Airport, including that schedule.

Proceedings before the General Court and the order under appeal

6 By application lodged at the Registry of the General Court on 19 October 2012, FL brought an action for annulment of the decision at issue in so far as (i) it initiates the formal investigation procedure in relation to the 2006 schedule and (ii) it requires the Federal Republic of Germany to reply to the information injunction in relation to that schedule.

7 In its reply, lodged at the Court Registry on 20 February 2013, the City of Lübeck stated that it was taking the place of FL in order to pursue the action brought by FL.

8 In support of its first head of claim, the City of Lübeck put forward five pleas in law alleging: (i) infringement of the rights of defence of the Federal Republic of Germany; (ii) infringement of the obligation to carry out a diligent and impartial examination; (iii) infringement of Article 108(2)

and (3) TFEU and Articles 4, 6 and 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1); (iv) infringement of Article 107(1) TFEU; and (v) infringement of the duty to state reasons.

9 By the judgment under appeal, the General Court held that the first head of claim was admissible, finding, first, that FL was directly and individually concerned by the decision at issue and therefore had *locus standi* when the action was brought and, secondly, that FL had retained a legal interest in bringing proceedings after Lübeck Airport was sold. As to the merits, it upheld the fourth plea, holding that the decision at issue was vitiated by a manifest error of assessment inasmuch as the Commission had found in it that the advantages established by the 2006 schedule were selective. The General Court therefore annulled the decision at issue in so far as it initiates the formal investigation procedure in relation to that schedule.

Forms of order sought and procedure before the Court of Justice

10 The Commission claims that the Court should:

— set aside the judgment under appeal;

— declare the action at first instance inadmissible or, in the alternative, declare it devoid of purpose;

— also in the alternative, declare that that part of the fourth plea in the action by which the City of Lübeck alleges infringement of Article 107(1) TFEU so far as concerns the condition relating to selectivity is unfounded, and refer the case back to the General Court as regards the other parts of that plea and the first to third and fifth pleas in the action; and

— order the City of Lübeck to pay the costs at first instance and on appeal or, in the alternative, if the case is referred back to the General Court, reserve the decision as to the costs at first instance and on appeal.

11 The City of Lübeck contends that the Court should:

— dismiss the appeal in its entirety, uphold the claims that it put forward at first instance in their entirety, and

— order the Commission to pay the costs.

12 By decisions of the President of the Court of Justice of 26 March and 14 April 2015, the Federal Republic of Germany and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the City of Lübeck.

The appeal

First ground of appeal: the decision at issue was not of individual concern to FL

Arguments of the parties

13 By its first ground of appeal, the Commission criticises the General Court for having held that the decision at issue was of individual concern to FL when, in its submission, it is the supervisory authority of the *Land* and not the operator of the airport which sets the airport charges. In holding, in paragraphs 29 to 35 of the judgment under appeal, that, by the adoption of the 2006 schedule, FL had

exercised powers which were conferred upon it alone, the General Court ignored the rule of national law applicable in the present instance that a schedule relating to airport charges must be approved by the supervisory authority of the *Land*, which is itself bound by the federal legislation on airport charges. The mere fact that the public undertaking which operates the airport is responsible for proposing the schedule does not mean that it is it, and not the State, which has the power to determine its management and the policies which it applies by means of that schedule. In this regard, the General Court's assessment conflicts with that resulting from the judgment of 10 July 1986, *DEFI* v *Commission* (282/85, EU:C:1986:316), in which it was found, in particular, that, under the relevant French legislation, the French Government had the power to determine the management and policies of the organisation concerned and hence to define the interests which that organisation was to protect.

14 The City of Lübeck and the Federal Republic of Germany contend that this ground of appeal should be dismissed.

Findings of the Court

15 As the General Court recalled in paragraph 26 of the judgment under appeal, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 263 TFEU only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, 107; of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 72; and of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 46).

16 In the present instance, in holding the decision at issue to be of individual concern to FL, the General Court found, in paragraph 34 of the judgment under appeal, that inasmuch as that decision relates to the 2006 schedule, it affects a measure of which FL is one of the authors and prevents FL from exercising its own powers as it sees fit. In so determining, the General Court pointed out in particular, in paragraph 29 of that judgment, that, whilst it was true that Paragraph 43a(1) of the LuftVZO provided that the supervisory authority of the *Land*, in this instance the aviation authority of the *Land* of Schleswig-Holstein, had to approve the schedule concerning the charges applicable to an airport, it was, however, clear from that provision that the schedule had to be proposed by the operator of the airport in question and that the supervisory authority had no power of its own to set the charges itself, as it could only authorise or reject the proposed schedule.

17 The General Court also noted, in paragraphs 30 and 31 of the judgment under appeal, that it was clear from the decision at issue and the 2006 schedule that the possibility of applying reduced charges, within the framework of discounts provided for by that schedule, was dependent on an agreement concluded directly between the operator of Lübeck Airport and an airline, without intervention on the part of the supervisory authority, and that it was indeed by means of agreements concluded directly between FL and Ryanair that special charges, derogating from those laid down by the 2006 schedule, had been applied to that airline.

18 The General Court inferred therefrom, in paragraph 32 of the judgment under appeal, that FL was vested, in its capacity as the operator of Lübeck Airport, with a power of its own in respect of the setting of the airport charges applicable to that airport and was not acting solely as an extension of the State by exercising powers conferred solely upon the latter. Thus, according to the General Court, the power to adopt the 2006 schedule lay with FL and not the State authorities, notwithstanding the requirement that the supervisory authority approve that schedule.

19 It is apparent that the General Court thus, in the light of the applicable national law, took the view that FL had — beyond the power to propose to the supervisory authority the schedule setting the airport charges applicable to Lübeck Airport — a power of its own to adopt that schedule.

20 As the Commission challenges that view by its line of argument set out in paragraph 13 of the present judgment, it should be pointed out that, in the case of an interpretation of national law by the General Court, the Court of Justice has jurisdiction, on appeal, only to determine whether that law was distorted, and the distortion must be obvious from the documents on its file (see, to that effect, judgments of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraph 53, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraphs 79 and 80 and the case-law cited).

21 In the present instance, the Commission has not pleaded and, *a fortiori*, has not demonstrated such distortion of national law. Indeed, it has neither contended nor established that the General Court developed reasoning running manifestly counter to the content of the provisions of German law at issue or ascribed to one of those provisions a scope that it manifestly does not have in the light of other material in the file (see, to that effect, judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 81).

22 Therefore, the first ground of appeal must be dismissed as inadmissible.

Second ground of appeal: the City of Lübeck did not have a current legal interest in bringing proceedings

Arguments of the parties

23 By its second ground of appeal, the Commission contends that the General Court erred in law, in paragraph 37 of the judgment under appeal, by holding, first, that FL had a legal interest in bringing proceedings even after the sale of Lübeck Airport to a private investor since the formal investigation procedure had not been closed and the decision at issue therefore continued to produce effects and, secondly, that FL had in any event retained an interest in bringing proceedings in respect of the period before the sale.

24 It submits that, even in the absence of a final decision closing the formal investigation procedure, the decision at issue had ceased to produce its sole legal effect, namely the obligation to suspend the aid measure during the investigation, since no suspension was ordered up until 31 December 2012, and from 1 January 2013, the date on which Lübeck Airport was privatised, the 2006 schedule could no longer be regarded as an aid scheme in the course of implementation because the airport was no longer financed by public funds. The assessment of the General Court is contrary to the Court of Justice's case-law according to which the interest must be vested and present and continues to exist only if the action is liable, if successful, to procure an advantage for the party bringing it. The City of Lübeck has indeed not shown that it had any interest in maintaining its action after the privatisation of the airport.

25 The City of Lübeck and the Federal Republic of Germany contend that this ground of appeal should be dismissed.

Findings of the Court

26 In accordance with the Court's settled case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist when the action is lodged, failing which the action will be inadmissible. That purpose must, like the interest in bringing proceedings, continue to exist until the final decision, failing which there will be no need to adjudicate; this presupposes that the action must

be liable, if successful, to procure an advantage for the party bringing it (judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61 and the case-law cited).

27 In the present instance, in order to reject the Commission's argument that the sale of Lübeck Airport to a private company on 1 January 2013 put an end to the aid scheme in question, so that the obligation to suspend that scheme no longer adversely affected the City of Lübeck and the latter therefore had no current interest in seeking the annulment of the decision at issue, the General Court held, as stated in paragraph 23 of the present judgment, that, since the formal investigation procedure was not closed, that decision still produced effects and that the City of Lübeck at the very least retained an interest in bringing proceedings in respect of the period before the airport was sold.

28 Previously, in paragraph 27 of the judgment under appeal, the General Court noted, referring inter alia to the judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695, paragraphs 52 and 53), that a decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified as 'new aid' entails independent legal effects, particularly as regards the suspension of that measure. It stated that such a decision necessarily alters the legal scope of the measure under consideration and the legal position of the recipient undertakings, particularly as regards the continued application of the measure. It also observed that after the adoption of such a decision there is at the very least a significant element of doubt as to the legality of the measure in the course of implementation which must lead the Member State to suspend its application and that such a decision may also be invoked before a national court called upon to draw all the appropriate conclusions arising from an infringement of the last sentence of Article 108(3) TFEU.

29 In that regard, it should be recalled that the Court of Justice has also held, in the judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 45) and in the order of the Court of 4 April 2014, *Flughafen Lübeck* (C-27/13, not published, EU:C:2014:240, paragraph 27), that where, in accordance with Article 108(3) TFEU, the Commission has initiated a formal investigation procedure with regard to a measure which has not been notified and is in the course of implementation, a national court hearing an application for the cessation of the implementation of that measure and for the recovery of the sums already paid is required to adopt all the measures that are necessary in order to draw the appropriate conclusions from any infringement of the obligation to suspend the implementation of that measure. To that end, the national court may decide to suspend the implementation of the measure in question and order the recovery of the sums already paid. It may also decide to order interim measures in order to safeguard, first, the interests of the parties concerned and, secondly, the effectiveness of the Commission's decision to initiate the formal investigation procedure.

30 Thus, it is clear from the case-law of the Court of Justice that, contrary to the Commission's submissions, the obligation to suspend the implementation of the measure in question is not the only legal effect of a decision to initiate the formal investigation procedure.

31 In the present instance, in the light of that case-law it is apparent that, as the General Court stated, after the privatisation of Lübeck Airport the City of Lübeck remained at least exposed to the risk that a national court might order the recovery of any aid granted when FL owned the airport. The General Court was therefore correct in holding that, in the absence of a final decision of the Commission closing the formal investigation procedure, the effects of the decision at issue endured, so that the City of Lübeck retained an interest in bringing proceedings seeking the annulment of that decision.

32 Consequently, the second ground of appeal must be dismissed as unfounded.

Third ground of appeal: incorrect assessment of the selectivity of the 2006 schedule

Arguments of the parties

33 By its third ground of appeal, the Commission submits that the General Court misinterpreted the condition relating to selectivity for the purposes of Article 107(1) TFEU, in holding, in paragraphs 53 to 55 of the judgment under appeal, that, in order to assess whether a fee scale drawn up by a public entity for the use of goods or services may be selective, it is necessary to determine whether it applies in a non-discriminatory manner to all of the undertakings using or able to use those goods or services and the circumstance in the present instance that the 2006 schedule applies only to airlines using Lübeck Airport is not relevant.

34 That interpretation conflicts with the Court of Justice's case-law according to which a measure is not a general measure of tax or economic policy, and is thus selective, if it applies only to certain sectors of the economy or to certain undertakings in a given sector. As a measure laying down the conditions on which a public undertaking offers its own goods or services never applies to all economic operators, it always constitutes a selective measure.

35 It does not matter that that measure applies in a non-discriminatory manner to all of the undertakings using or able to use those goods or services, as the question of unequal treatment or discrimination is not relevant for deciding whether there is aid. The General Court wrongly relied in this regard on the criterion adopted in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), which applies only to tax measures, and failed to take account of the effect of the judgments of 2 February 1988, *Kwekerij van der Kooy and Others* v Commission (67/85, 68/85 and 70/85, EU:C:1988:38), of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64), of 20 November 2003, *GEMO* (C-126/01, EU:C:2003:622), and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

36 In the alternative, the Commission submits that the General Court also failed to take account, in paragraphs 52 and 53 of the judgment under appeal, of the Court of Justice's case-law according to which, first, the selectivity of a measure is assessed essentially in the light of the measure's effects and, secondly, measures which benefit only one economic sector are selective. It states that, whilst Lübeck Airport is in direct competition with Hamburg Airport (Germany), the advantage conferred by the 2006 schedule benefits only airlines that use the former, a fact which, in its submission, is sufficient to demonstrate that the schedule is selective. The approach adopted by the General Court has the effect of exempting schedules setting airport charges from the State aid rules.

37 In the further alternative, the Commission contends that, assuming that the criterion laid down in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), is applicable for the purpose of establishing the selectivity of rules setting the charges of certain public institutions, the General Court misinterpreted that criterion. In order to determine the set of undertakings which are in a comparable situation, regard should be had not to the scope of the measure in question but to the undertakings which have items of expenditure similar to those of the undertakings favoured by that measure. Furthermore, the 2006 schedule is selective because it does not observe the principle — laid down in Paragraph 43a(1) of the LuftVZO — which applies to all German airports and therefore to all the airlines serving those airports that airport charges must cover costs. By adopting the scope of the 2006 schedule, and not the objective pursued by that provision, as the decisive factor, the General Court erred in law.

38 The Commission contends, finally, that the General Court also erred in law by failing to examine whether the discounts provided for by the 2006 schedule were selective on the ground that only airlines which satisfied certain conditions benefitted from them.

39 The City of Lübeck, the Federal Republic of Germany and the Kingdom of Spain contend that this ground of appeal should be dismissed.

Findings of the Court

40 As the General Court recalled in paragraph 43 of the judgment under appeal, in accordance with settled case-law classification as 'State aid' requires all the following conditions to be fulfilled. First, there must be an 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 (see, inter alia, judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 24).

41 So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of0 'State aid' within the meaning of Article 107(1) TFEU, since this provision prohibits aid 'favouring certain undertakings or the production of certain goods', it is clear from the Court's settled case-law, recalled in paragraphs 45 and 46 of the judgment under appeal, that the assessment of that condition requires it to be determined whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. The concept of 'State aid' does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of which they form part (see judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraphs 41 and 42; of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 82 and 83; of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 74 and 75; and of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 54 and 55).

42 In upholding the plea put forward by the City of Lübeck alleging infringement of Article 107(1) TFEU in that the Commission found in the decision at issue that the 2006 schedule was selective, the General Court stated, first of all, in paragraph 50 of the judgment under appeal, that that finding was based, in the decision at issue, exclusively on the ground that the advantages in question were granted only to airlines using Lübeck Airport.

43 Next, in paragraph 51 of the judgment under appeal, the General Court noted that the fact that the 2006 schedule applied only to those airlines was inherent in the German legal regime on airport charges and in the very nature of rules setting such charges, and that, within the framework of that legal regime, the airlines using other German airports were subject there to schedules of charges which applied specifically to those airports and they were not therefore in a situation comparable to that of the airlines using Lübeck Airport.

44 Furthermore, in paragraph 52 of the judgment under appeal, the General Court held that, although it was clear from the case-law that aid may be selective even where it concerns a whole economic sector, that case-law, developed in particular in the context of national measures of general application, was not directly relevant to the case in point as the measure in question did not concern the whole airport sector, but only the airlines using Lübeck Airport.

45 Finally, in paragraph 53 of the judgment under appeal, the General Court stated, in essence, that the selectivity of a measure by which a public entity lays down a fee scale for the use of its goods or services is assessed by referring to all of the undertakings using or able to use those goods and services and by examining whether all or only some of them obtain or are able to obtain any possible advantage.

46 In the light of those considerations, the General Court held, in paragraphs 54 and 55 of the judgment under appeal, that the mere fact that the 2006 schedule applied only to airlines using Lübeck Airport was not relevant for the purpose of finding that that schedule was selective and that, since it was not disputed that all the airlines could benefit from the pricing provisions of that schedule, 'the Commission was wrong, in the light of the statement of reasons contained in the [decision at issue], to have found that the 2006 schedule was selective'.

47 It is to be noted that, contrary to the Commission's submissions, it certainly does not follow from the case-law of the Court of Justice that a measure by which a public undertaking lays down the conditions for the use of its goods or services is always, and therefore by its very nature, a selective measure for the purposes of Article 107(1) TFEU. The judgments to which it refers, in particular those mentioned in paragraph 35 of the present judgment, do not set out a general rule of that kind.

48 It is, on the contrary, settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87 and the case-law cited).

49 Accordingly, whilst it cannot be ruled out that a measure by which a public undertaking lays down the conditions for the use of its goods or services is selective despite applying to all the undertakings using those goods or services, it is necessary, in order to determine whether that is the case, to have regard not to the nature of that measure but to its effects, by examining whether the advantage which it is supposed to procure in fact benefits only some of those undertakings as opposed to others, although, in the light of the objective pursued by the regime concerned, all of the undertakings are in a comparable factual and legal situation.

50 It follows that the Commission's principal line of argument, set out in paragraph 34 of the present judgment, that a measure laying down the conditions on which a public undertaking offers its own goods or services always constitutes a selective measure, is unfounded.

51 That assessment is not called into question by the Commission's contention, referred to in paragraph 35 of the present judgment, that it does not matter, for the purpose of deciding whether there is aid, that such a measure applies in a non-discriminatory manner to all of the undertakings using or able to use those goods or services or by the argument that the General Court wrongly relied on the case-law relating to tax measures.

52 First, in order to determine whether a measure, although applying generally to a set of economic operators, has the effect of ultimately conferring an advantage only on certain undertakings, it should be examined, as is apparent from the case-law recalled in paragraph 41 of the present judgment, whether certain undertakings are favoured over others which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation.

53 The examination of whether such a measure is selective is thus, in essence, coextensive with the examination of whether it applies to that set of economic operators in a non-discriminatory manner (see, to that effect, judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 53). The concept of selectivity, as the Advocate General states in point 75 of his Opinion, is thus linked to that of discrimination.

54 Secondly, as is also apparent from that case-law, that examination of selectivity must be carried out within the context of 'a particular legal regime'. In order to determine whether a measure is selective, it should therefore be examined whether, within the context of a specified legal regime, that measure constitutes an advantage for certain undertakings over others which are, in the light of the objective

pursued by that regime, in a comparable factual and legal situation (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56, and of 28 July 2011, *Mediaset* v *Commission*, C-403/10 P, not published, EU:C:2011:533, paragraph 36).

55 That examination therefore in principle requires prior definition of the reference framework within which the measure concerned fits. As the Advocate General argues in points 77 and 86 to 89 of his Opinion, this method is not limited solely to the examination of tax measures, the Court having merely observed that the determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56).

56 As for the arguments advanced by the Commission in the alternative, set out in paragraphs 36 to 38 of the present judgment, it should be pointed out in the first place, with regard to the complaint that the effects of the measure concerned were not taken into account, that the General Court examined the legality of the decision at issue in the light of its grounds, according to which the advantages in question were granted only to airlines using Lübeck Airport, and found that those grounds constituted the only reasoning in that decision concerning selectivity.

57 Furthermore, in implicitly holding, in paragraph 53 of the judgment under appeal, that the 2006 schedule is not discriminatory and in finding, in paragraph 55 of that judgment, that it was not disputed that all the airlines using or liable to use Lübeck Airport may benefit from the pricing provisions of that schedule, the General Court took account of the schedule's effects.

58 In the second place, contrary to the Commission's contentions, a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective, as follows from the reasoning set out in paragraphs 41 and 47 to 55 of the present judgment, only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.

59 Likewise, the fact that, in the present instance, Lübeck Airport is in direct competition with Hamburg Airport or other German airports and that only airlines using Lübeck Airport benefit from any advantages conferred by the 2006 schedule is not sufficient to establish that that schedule is selective. In order for the 2006 schedule to be selective, it would have to be established that, within the context of a legal regime under which all those airports fall, that schedule confers an advantage on airlines using Lübeck Airport to the detriment of airlines using the other airports which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.

60 In the third place, as follows from the reasoning set out in paragraphs 52 to 55 of the present judgment, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it must, as the case may be, be examined whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not.

61 In this regard, in paragraphs 32 and 51 of the judgment under appeal the General Court, in the exercise of its power to interpret national law, found — as is clear from paragraphs 16 to 21 of the present judgment — that, in accordance with Paragraph 43a(1) of the LuftVZO, the operator of an airport, exercising a power of its own, draws up the scale of airport fees applicable to that airport.

62 It is clear from that finding that, in the present instance, it is not Paragraph 43a(1) of the LuftVZO or other legislation applicable to all airports — from which the 2006 schedule might have derogated in favour of airlines using Lübeck Airport — that lays down the airport charges applicable to an airport, but the schedule adopted for this purpose by the airport operator itself in the exercise of a power

limited to that airport. Accordingly, it is apparent that, as the Advocate General states in point 112 of his Opinion, the relevant reference framework for examining whether the 2006 schedule had the effect of favouring certain airlines over others which were in a comparable factual and legal situation was that of the regime applicable to Lübeck Airport alone.

63 Accordingly, the General Court did not err in law when, after delimiting in this way the legal regime that was relevant in the present instance, it held that the airlines serving other German airports were not in a situation comparable to that of the airlines using Lübeck Airport.

64 Therefore, after pointing out that the 2006 schedule applied in a non-discriminatory manner to all airlines using or liable to use Lübeck Airport, the General Court was correct in holding, in the light of the statement of reasons for the decision at issue, that the Commission had wrongly found that the schedule was selective.

65 Finally, the General Court cannot be criticised for having failed to examine whether the discounts provided for by the 2006 schedule were selective in that they are said to favour certain airlines using Lübeck Airport to the detriment of other airlines using it. Whilst, as the Commission submits, the decision at issue contains a description of those discounts and a preliminary legal assessment, the fact remains that that assessment concerns only the existence of an advantage for the purposes of Article 107(1) TFEU and that the statement of reasons in the decision at issue concerning selectivity rests solely on the finding that the advantages in question benefitted only the airlines using Lübeck Airport. Therefore, when examining the plea put forward by the City of Lübeck alleging that the Commission had infringed Article 107(1) TFEU in its assessment of the condition relating to selectivity, the General Court was correct in ruling on the legality of the decision at issue in the light solely of the grounds which formed the basis for that assessment.

66 It follows that the arguments advanced by the Commission in the alternative are unfounded.

67 Consequently, the third ground of appeal must be dismissed as unfounded.

Fourth ground of appeal: defects in the reasoning of the judgment under appeal

Arguments of the parties

68 By its fourth ground of appeal, the Commission contends, first, that the judgment under appeal fails to state grounds in three respects. First of all, it does not contain any finding relating to the objective pursued by the measure in question, although it is in the light of that objective that the undertakings in a comparable factual and legal situation are to be determined. Next, it does not contain any reasoning concerning the discounts provided for by the 2006 schedule. Finally, it does not set out why that schedule is so manifestly not selective that the Commission was not entitled to initiate a formal investigation procedure.

69 The Commission submits, secondly, that the General Court's reasoning is contradictory because it applies the case-law relating to the selectivity of tax measures in paragraphs 51 and 53 of the judgment under appeal and then states in paragraph 57 that that case-law is not relevant.

70 The City of Lübeck, the Federal Republic of Germany and the Kingdom of Spain contend that this ground of appeal should be dismissed.

Findings of the Court

71 It is apparent, first, that, in the light of the statement of reasons contained in the decision at issue and the Commission's line of argument set out before the General Court, according to both of which the 2006 schedule was selective on the ground that it applied only to airlines using Lübeck Airport, the General Court amply stated, in the judgment under appeal, the reasons for which it held that such a finding was not possible on the basis of that fact alone. As regards, in particular, determination of the undertakings in a comparable factual and legal situation, it specified in paragraph 51 of the judgment under appeal the reasons for which airlines using other airports were not, within the framework of the legal regime in question, in a situation comparable to that of the airlines using Lübeck Airport.

72 Secondly, for the reasons set out in paragraph 65 of the present judgment, the General Court was not required to adjudicate on the discounts provided for by the 2006 schedule.

73 Thirdly, the General Court had the task not of assessing whether that schedule was manifestly selective or manifestly not selective, but, as will be examined in connection with the fifth ground of appeal, whether the decision at issue was vitiated by a manifest error of assessment.

74 Finally, the Commission's argument relating to contradictory grounds is based on an assertion which is not supported in the slightest.

75 The fourth ground of appeal must therefore be dismissed as unfounded.

Fifth ground of appeal: disregard of the limits on judicial review of a decision to initiate the formal investigation procedure in relation to State aid

Arguments of the parties

76 By its fifth ground of appeal, the Commission submits that the General Court failed to have regard to the fact that a decision to initiate the formal investigation procedure is subject to a limited judicial review, in particular so far as concerns the statement of reasons for it. The Commission explains that a mere preliminary examination of the facts did not enable it to dispel its doubts as to whether the 2006 schedule was selective. The judgment under appeal contains no explanation as to why the schedule was so manifestly not selective that the Commission was not entitled to initiate the formal investigation procedure.

77 The City of Lübeck, the Federal Republic of Germany and the Kingdom of Spain contend that this ground of appeal should be dismissed.

Findings of the Court

78 As the General Court pointed out in paragraph 42 of the judgment under appeal, review by the EU judicature of the legality of a decision to initiate the formal investigation procedure, where the applicant challenges the Commission's assessment of a measure as constituting State aid, is limited to ascertaining whether or not the Commission has made a manifest error of assessment (see, to that effect, judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, EU:C:2011:497, paragraph 61).

79 It follows from what has been held in paragraphs 47 to 55 of the present judgment that the Commission's assessment that the advantages arising from the 2006 schedule were selective for the purposes of Article 107(1) TFEU merely because they were granted solely to airlines using Lübeck Airport, an assessment on the basis of which it decided to initiate the formal investigation procedure in respect of that schedule, is manifestly incorrect.

80 The General Court was therefore correct in holding, in paragraph 59 of the judgment under appeal, that, in view of that reasoning, the decision at issue was vitiated by a manifest error of assessment and in annulling that decision in so far as it concerns the 2006 schedule.

81 The fifth ground of appeal must consequently be dismissed as unfounded.

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

Costs

83 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. Under Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the City of Lübeck has applied for costs, the Commission must be ordered to pay the costs of the present appeal.

84 Pursuant to Article 140(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the Federal Republic of Germany and the Kingdom of Spain are to bear their own costs.

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

1. Dismisses the appeal;

2. Orders the European Commission to bear its own costs and to pay those incurred by Hansestadt Lübeck;

3. Orders the Federal Republic of Germany and the Kingdom of Spain to bear their own costs.

[Signatures]