JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

19 May 2021 (*)

(State aid – Spain – Recapitalisation measures to support undertakings that are systemic and strategic for the Spanish economy in response to the COVID-19 pandemic – Decision not to raise any objections – Temporary Framework for State aid – Measure aimed at remedying a serious disturbance in the economy of a Member State – Measure aimed at the whole of the economy of a Member State – Principle of non-discrimination – Freedom to provide services and freedom of establishment – Proportionality – Criterion requiring that the beneficiaries of the aid are established in Spain – Failure to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Article 107(3)(b) TFEU – Concept of 'aid scheme' – Obligation to state reasons)

In Case T-628/20,

Ryanair DAC, established in Swords (Ireland), represented by F.-C. Laprévote, E. Vahida, V. Blanc, I.-G. Metaxas-Maranghidis and S. Rating, lawyers,

applicant,

v

European Commission, represented by L. Flynn, S. Noë and F. Tomat, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented by L. Aguilera Ruiz and S. Centeno Huerta, acting as Agents,

and by

French Republic, represented by P. Dodeller and T. Stehelin, acting as Agents,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 5414 final of 31 July 2020 on State Aid SA.57659 (2020/N) – Spain – COVID-19 – Recapitalisation fund,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and M. Stancu, Judges,

Registrar: I. Pollalis, Administrator,

having regard to the written part of the procedure and further to the hearing on 24 February 2021,

gives the following

Judgment

Background to the dispute

1 On 20 July 2020, the Kingdom of Spain notified the European Commission, in accordance with Article 108(3) TFEU, of an aid scheme to establish the solvency support fund for strategic enterprises ('the Fund') to support the solvency of viable undertakings, considered systemic or strategic for the Spanish economy, which are experiencing temporary difficulties due to the impact of the COVID−19 pandemic.

2 The Fund provides financing in the form of the purchase of financial instruments and securities issued by non-financial undertakings established in Spain, without limitation as to size or economic sector. The Fund is managed by a Management Board which takes decisions on aid applications and sets out the conditions for the grant of public financial support to the beneficiaries. The Sociedad Española de Participaciones Industriales (Spanish industrial holdings company, 'SEPI'), a public holding company which manages the shareholdings of the Spanish State, is responsible, inter alia, for the prior assessment of applications, the use of funds and the registration of securities acquired by the State. The Management Board submits to the Spanish Council of Ministers for approval decisions on Agreements for granting public financial support. The Management Board of the Fund is an interministerial committee chaired by the President of SEPI and is also composed of representatives of the Ministries of the Economy, Finance, Industry and Energy.

3 The budget for the aid scheme is fixed at EUR 10 billion, financed by the State budget. The Fund's support interventions will, in principle, exceed EUR 25 million per beneficiary. However, aid in excess of EUR 250 million per beneficiary will be notified individually to the Commission. Temporary support operations financed by the Fund will be granted until 30 June 2021.

4 In order to benefit from the aid scheme at issue, undertakings must fulfil a number of cumulative eligibility criteria, which include, in essence:

– being non-financial undertakings which are established in and have their principal places of business in Spain;

– having systemic or strategic importance because they belong to a particular sector of activity, as a result of their links with public health and safety or their influence over the whole economy, their innovation, the essential nature of the services which they provide or their role in achieving the medium-term objectives of ecological transition, digitalisation, increased productivity and human capital;

– being at risk of ceasing operations or having serious difficulties remaining in business in the absence of temporary public support;

– demonstrating that a forced cessation of their activities would have a high negative impact on economic activity or employment at national or regional level;

– establishing medium- to long-term viability as demonstrated in the application by a viability plan to overcome the crisis situation and describing the planned use of the public support;

– presenting a planned schedule of reimbursement of the State support through the Fund;

– not being an undertaking in difficulty on 31 December 2019.

5 In addition, undertakings wishing to benefit from the aid scheme at issue must demonstrate, on the basis of adequate evidence, that sources of private funding from banks and financial markets, are either not available or are accessible at costs that would prevent them from becoming viable.

6 On 31 July 2020, the Commission adopted Decision C(2020) 5414 final on State Aid SA.57659 (2020/N) – Spain COVID-19 – Recapitalisation fund ('the contested decision'), by which it concluded that the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU and

that it is compatible with the internal market, in accordance with Article 107(3)(b) TFEU and the Communication from the Commission of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (OJ 2020 C 91, p. 1), amended on 3 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework'), and, therefore, did not raise any objections to it.

Procedure and forms of order sought

7 By document lodged at the Court Registry on 16 October 2020, the applicant, Ryanair DAC, brought the present action.

8 By document lodged at the Court Registry on the same day, the applicant requested, in accordance with Articles 151 and 152 of the Rules of Procedure of the General Court, that the present action be adjudicated under an expedited procedure. By decision of 10 November 2020, the General Court (Tenth Chamber) granted the request for an expedited procedure.

9 The Commission lodged its defence at the Court Registry on 30 November 2020.

10 Pursuant to Article 106(2) of the Rules of Procedure, the applicant submitted a reasoned request for a hearing on 14 December 2020.

11 On a proposal from the Tenth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

12 By documents lodged at the Court Registry on 18 December 2020 and on 22 December 2020 respectively, the Kingdom of Spain and the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

13 By decisions of 12 January 2021, the President of the Tenth Chamber of the Court granted the Kingdom of Spain and the French Republic leave to intervene.

14 By a measure of organisation of procedure notified on 14 January 2021, the Kingdom of Spain and the French Republic were authorised, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention. On 28 and 29 January 2021 respectively, the French Republic and the Kingdom of Spain lodged their statements in intervention at the Court Registry.

15 By way of a measure of organisation of procedure under Article 89 of the Rules of Procedure, on 5 February 2021 the Court invited the Commission and the Kingdom of Spain to answer two questions at the hearing. The Commission and the Kingdom of Spain complied with that request.

16 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

17 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

18 The Kingdom of Spain and the French Republic contend that the Court should dismiss the action as inadmissible or, in the alternative, as unfounded in its entirety.

Law

19 It should be recalled that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on its merits, without first ruling on its admissibility (see, to that effect, judgments of 26 February 2002, *Council* v *Boehringer*, C−23/00 P, EU:C:2002:118, paragraphs 51 and 52, and of 14 September 2016, *Trajektna luka Split* v *Commission*, T−57/15, not published, EU:T:2016:470, paragraph 84). Therefore, having particular regard to the considerations which led to the present proceedings being expedited and the importance of a swift substantive response, both for the applicant and for the Commission, the Kingdom of Spain and the French Republic, it is appropriate to begin by examining the merits of the action without first ruling on its admissibility.

20 In support of its action, the applicant puts forward five pleas in law, alleging (i) infringement of the principles of non-discrimination, freedom to provide services and freedom of establishment, (ii) infringement of the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition, (iii) the incorrect classification of the measure at issue as an aid scheme, (iv) infringement of the applicant's procedural rights and (v) infringement of the obligation to state reasons.

The first plea in law, alleging an infringement of the principles of non-discrimination, freedom to provide services and freedom of establishment

21 The first plea consists, in essence, of four parts, the first alleging that the aid scheme infringes the principle of non-discrimination, the second, that it is neither necessary nor proportionate to achieve the objective assigned to it, the third, that it restricts the freedom to provide services and the freedom of establishment, and the fourth, that the resulting restriction is unjustified.

The first two parts of the first plea, alleging an infringement of the principle of non-discrimination

22 The applicant submits that the contested decision infringes the principle of non-discrimination, since the measure at issue discriminates against undertakings that are not established in Spain and which do not have their principal places of business within that State. Those undertakings are excluded from the aid, even though they might also have a systemic and strategic importance for the Spanish economy, as is the applicant's case. Such a difference in treatment is neither necessary nor proportionate to the objective pursued, in so far as undertakings that are not established in Spain and which do not have their principal places of business there, but which operate in Spain have encountered the same difficulties caused by the COVID-19 pandemic and their exit from the Spanish market would lead to social hardship and seriously disrupt the Spanish economy. Furthermore, aid could be granted by an alternative and non-discriminatory measure based on the market shares of the undertakings concerned.

23 The Commission, supported by the Kingdom of Spain and the French Republic, disputes the applicant's arguments.

24 Under Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market.

25 According to the case-law, it is clear from the general scheme of the Treaty that the procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Therefore, the Commission cannot declare State aid, certain conditions of which contravene other provisions of the Treaty, to be compatible with the internal market. Similarly, State aid, certain conditions of which contravene the general principles of EU law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the internal market (judgments of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraphs 50 and 51, and of 22 September 2020, *Austria* v *Commission*, C−594/18 P, EU:C:2020:742, paragraph 44).

26 In the present case, it is clear that one of the eligibility criteria for the aid scheme at issue, namely that the beneficiaries must be established in Spain and have their principal places of business in the territory of that Member State, results in different treatment. Undertakings, which are established and have their principal places of business in Spain, are able to benefit from the aid scheme at issue if they also meet the other eligibility criteria. Yet, those undertakings, which are established or have their principal places of business in another Member State, are not eligible to benefit from the measure at issue.

27 If, as the applicant claims, that difference in treatment can be equated with discrimination, it must be examined whether it is justified by a legitimate objective and whether it is necessary, appropriate and proportionate for achieving that objective. Similarly, in so far as the applicant refers to the first paragraph of Article 18 TFEU, it must be pointed out that, according to that provision, any discrimination on grounds of nationality within the scope of application of the Treaties is prohibited 'without prejudice to any special provisions contained therein'. Therefore, it is important to ascertain whether that difference in treatment is permitted under Article 107(3)(b) TFEU, which is the legal basis for the contested decision. That examination requires, first, that the objective of the aid scheme at issue satisfies the requirements of that provision and, second, that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

28 In the first place, with regard to the objective of the aid scheme at issue, it should be recalled that the Kingdom of Spain based that measure on Article 107(3)(b) TFEU (paragraph 5 of the contested decision). The scheme thus aims to remedy the serious disturbance in the Spanish economy caused by the COVID−19 pandemic, as is clear from paragraphs 57 and 58 of the contested decision, which corresponds to one of the conditions laid down in Article 107(3)(b) TFEU. The aid scheme at issue ensures that undertakings considered systemic or strategic for the Spanish economy have sufficient external financing to enable them to re-establish their capital structure during a period in which the functioning of the credit and capital markets is seriously disrupted by the COVID-19 pandemic.

29 It must be held that, since the existence of both a serious disturbance in the Spanish economy as a result of the COVID-19 pandemic and of the significant adverse effects of the latter on the Spanish economy, have been established to the requisite legal standard in the contested decision, the objective of the aid scheme at issue satisfies the conditions laid down in Article 107(3)(b) TFEU.

30 In addition, the criterion of the strategic and systemic importance of the beneficiaries of the aid properly reflects the objective of the aid scheme at issue, namely to remedy a serious disturbance in the Spanish economy within the meaning of Article 107(3)(b) TFEU.

31 In the second place, with regard to ensuring that the conditions for granting aid do not go beyond what is necessary to achieve the objective of the aid scheme at issue and to satisfy the conditions laid down in Article 107(3)(b) TFEU, the following observations should be made.

32 First, as regards the appropriateness and necessity of the aid scheme at issue, it should be noted that, in the present case, the scheme was adopted pursuant, inter alia, to Section 3.11 of the Temporary Framework entitled 'Recapitalisation Measures', paragraphs 44 and 45 of which provide as follows:

> '44 This Temporary Framework sets out the criteria under EU State aid rules, based on which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak. It aims at ensuring that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak. Recapitalisations must therefore not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak. Large undertakings must report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050.

45 At the same time, the Commission underlines that providing national public support in the form of equity and/or hybrid capital instruments, as part of schemes or in individual cases, should only be considered if no other appropriate solution can be found. Moreover, the issuing of such instruments should be subject to stringent conditions because they are highly distortive for competition between undertakings. Such interventions must therefore be subject to clear conditions as regards the State's entry, remuneration and exit from the equity of the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition Against this background, the Commission notes that designing national support measures in a way that meets the EU's policy objectives related to green and digital transformation of their economies will allow for a more sustainable long-term growth, and promote the transformation to the agreed EU objective of climate neutrality by 2050.'

33 Consequently, by adopting the aid scheme at issue, the Kingdom of Spain intended to adopt recapitalisation measures, pursuant to Section 3.11 of the Temporary Framework, in the form of equity loans, hybrid debt or other instruments convertible into equity ('hybrid capital instruments'), share subscriptions ('equity instruments'), subordinated loans or another capital instrument (paragraph 15 of the contested decision) to certain undertakings experiencing temporary difficulties as a result of the adverse effects of the COVID-19 pandemic.

34 The applicant submits, in essence, that it is neither appropriate nor necessary to grant aid only to undertakings which are established in Spain and have their principal places of business in that Member State.

35 In that regard, it should be noted, first of all, that the aid scheme at issue consists of the grant, by the Spanish State, of capital or hybrid instruments, through which, in essence, that Member State temporarily acquires an interest in the capital of the undertakings concerned, as is apparent from paragraph 45 of the Temporary Framework. In view of the nature of the recapitalisation measures at issue, it is legitimate for the Member State concerned to seek to ensure that the undertakings likely to benefit from that scheme have a stable presence on its territory and a durable link with its economy. The authorities of that Member State must be able to monitor, on a continuous and effective basis, the manner in which aid is used, compliance with the governance clauses and all other measures imposed to limit distortions of competition. They must also be able to organise and monitor the subsequent orderly withdrawal of the Spanish State from the capital of those undertakings. To that end, the Member State concerned must have the power to intervene, if necessary, in order to ensure compliance with the conditions and commitments surrounding the grant of the public financial support in question.

36 The eligibility criterion relating to the beneficiaries of the aid being established in Spain and having their principal places of business in the territory of that Member State thus reflects the need for the Member State concerned to ensure a certain stability of their presence and their durable links to the Spanish economy. That criterion requires not only that the beneficiary should have its seat in Spain, but also that its principal places of business be located in that territory, which demonstrates precisely that the aid scheme at issue is intended to support undertakings which are genuinely and enduringly linked to the Spanish economy, which is consistent with the objective of the scheme, which is to remedy the serious disturbance in that economy.

37 By contrast, the existence of such stable and durable links to the Spanish economy is, in principle, less likely in the case of both mere service providers, whose provision of services may, by definition, cease at very short notice, if not immediately, and in the case of undertakings which are established in Spain but which have their principal places of business outside the territory of that State, so that any public financial support intended to support their activities is less likely to contribute to remedying the serious disturbance in the economy of that Member State.

38 Next, it should be noted that the need to ensure that the beneficiaries of the aid in question have a stable and durable link to the Spanish economy underlies the entire aid scheme at issue, as is apparent both from the other eligibility criteria and from the conditions for granting the aid.

39 It is clear that the aid scheme at issue is granted only to undertakings regarded as being of systemic or strategic importance for the Spanish economy. By targeting the aid scheme at issue in this way, the Kingdom of Spain has chosen to support only those undertakings which play a key role in its economy, since their difficulties would seriously affect the general state of the Spanish economy because of their systemic and strategic importance. Accordingly, undertakings which are not regarded as systemic or strategic for the Spanish economy cannot claim the benefit of the aid scheme at issue, even though they are established in Spain and have their principal places of business in the territory of that Member State.

40 Several other eligibility criteria also reflect the need for the Spanish State to ensure that there is a durable link, that is to say, in the medium and long term, between the beneficiaries of the aid and its economy. Thus, the criterion relating to the systemic and strategic importance of the beneficiaries refers in particular to 'their role in achieving the medium-term objectives of ecological transition, digitalisation, increased productivity and human capital'. Another eligibility criterion requires beneficiaries to establish their medium and long-term viability by presenting a viability plan indicating how the undertaking concerned could overcome the COVID-19 crisis and describing the planned use of State aid (paragraph 10(d) of the contested decision). In addition, the undertakings concerned must submit a planned schedule of reimbursement of the nominal investment of the State and measures that would be adopted to ensure that that schedule will be met (paragraph 10(e) of the contested decision). Those criteria thus reflect in a concrete manner the need, first, for the beneficiary in question to be enduringly integrated into the Spanish economy and to continue to be so in the medium and long term, so that it can meet the abovementioned development objectives and, second, for the Spanish authorities to be able to monitor compliance with and implementation of their commitments.

41 The aid scheme at issue also contains a series of *ex post* restrictions designed to limit distortions of competition and to ensure the sound governance of the beneficiaries and the manner in which the aid is used (paragraphs 36 to 39 of the contested decision), and imposes transparency and accountability obligations on the national authorities regarding the use of the aid at issue (paragraph 40 of the contested decision). Thus, by way of example, as long as they have not repaid the aid obtained, beneficiaries are prohibited from taking excessive risks or pursuing aggressive commercial expansion financed by the aid. Similarly, they may not advertise the investment made by the Fund for commercial purposes. The beneficiaries are also prohibited, as long as they have not repaid at least 75% of the aid, from carrying out certain mergers or acquisitions (paragraphs 78 to 81 of the contested decision). Moreover, as long as the aid has not been fully repaid, the beneficiaries cannot make dividend payments (paragraph 82 of the contested decision) and a cap is imposed on the remuneration of their management (paragraph 83 of the contested decision). Furthermore, if after six years from the capital injection by the Fund, the Fund's shareholding is not reduced below 15%, the beneficiary must submit a restructuring plan to the Spanish authorities, which will submit it to the Commission for approval (paragraph 89 of the contested decision). A mechanism will also be put in place in order to avoid the risk of the beneficiary repurchasing shares held by the State, through third parties, at prices lower than those of the State's nominal investment (paragraphs 35 and 74 of the contested decision). Those *ex post* restrictions also demonstrate the need for and the obligation on the Spanish authorities to monitor, on a continuous basis, various aspects of the beneficiary's activities. To that end, they must have the power to intervene, where appropriate, in order to ensure compliance with those restrictions.

42 It is therefore apparent that, by combining the eligibility criteria and the *ex post* restrictions referred to in paragraphs 34 to 40 above, the Kingdom of Spain sought, in essence, to ensure the existence of a durable and reciprocal link between the beneficiaries of the aid and its economy, in order to achieve Spain's medium and long-term economic development.

43 Thus, by limiting the benefit of the aid solely to undertakings of systemic or strategic importance for the Spanish economy, established in Spain and which have their principal places of business in its territory, because of the stable and reciprocal links between them and its economy, the aid scheme at issue is both appropriate and necessary to attain the objective of remedying the serious disturbance in the economy of that Member State.

44 Second, as regards the proportionality of the aid scheme at issue, the applicant submits, in essence, that an undertaking may also have systemic and strategic importance for the Spanish economy, even if it is not established in Spain, so that the objective pursued by that scheme could be achieved by using as a criterion for eligibility not that of the Member State of establishment, but another criterion relating to the market shares of the undertakings concerned.

45 In that regard, while it cannot be ruled out that an undertaking which is not established in Spain and does not have its principal places of business in that Member State may nevertheless be of systemic or strategic importance for the Spanish economy in certain specific circumstances, it should be recalled that the grant of public funds under Article 107(3)(b) TFEU presupposes that the aid provided by the Member State concerned, even though it is in serious difficulty, is capable of remedying the disturbances in its economy, which presupposes that the situation of the undertakings likely to enable the economy to recover is taken into account as a whole and that the criterion of a stable and durable link with the economy of that State is fully relevant.

46 First, the need for a stable and durable link between the beneficiaries of the aid and the Spanish economy, which underlies the aid scheme at issue, would be lacking or at least weakened if the Kingdom of Spain had adopted another criterion allowing the eligibility of undertakings operating in Spain as mere service providers, such as the applicant, since the provision of services may, by definition, cease at very short notice, if not immediately, as is pointed out in paragraph 36 above. Thus, the Kingdom of Spain has no guarantee that the contribution to its economy from undertakings which are not established and which do not have their principal places of business in its territory would be maintained after the crisis, assuming that they were granted the benefit of the recapitalisation measures.

47 Second, the fact that the applicant is the largest airline in Spain, holding approximately 20% of the market in that Member State, or that its exit from that market would lead to social hardship, does not mean that the Commission committed an error of assessment in finding that the aid scheme at issue was compatible with the internal market. That argument is based on the applicant's specific situation in the market for passenger air transport in Spain, whereas the aid scheme at issue is intended to support the whole Spanish economy, without distinction as to the economic sector concerned, so that the Kingdom of Spain has taken account of the overall state of its economy and the prospects for economic development in the medium and long term, and not of the specific situation of any one undertaking.

48 Therefore, by laying down conditions for granting the benefit of a general and multisectoral aid scheme, the Member State in question could legitimately rely on eligibility criteria designed to identify undertakings which are both systemically or strategically important for its economy and have durable and stable links to it.

49 As regards the alternative aid scheme advocated by the applicant, based on an eligibility criterion relating to the market shares of the undertakings concerned, it should be recalled that, according to the case-law, it is not for the Commission to make a decision in the abstract on every alternative measure conceivable since, although the Member State concerned must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used, it is not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective. Although that Member State is not under any such obligation, the applicant is not entitled to ask the Court to require the Commission to take the place of the national authorities in that task of normative prospecting in order to examine every alternative measure possible (see, to that effect, judgment of 6 May 2019, *Scor* v *Commission*, T−135/17, not published, EU:T:2019:287, paragraph 94 and the case-law cited).

50 In any event, the eligibility criterion advocated by the applicant, based on the market shares of the undertakings concerned, does not take sufficient account of the objectives pursued by the aid scheme at issue, which is intended to remedy the serious disturbance in the Spanish economy, taken as a whole, in its diversity and with a view to sustainable economic development. In that connection, it appears that the Spanish legislature did not want to use eligibility criteria based on the size or market share of the

beneficiaries, but rather on considerations of medium and long-term economic development of the Spanish economy, using qualitative rather than quantitative criteria.

51 Therefore, in the contested decision, the Commission approved an aid scheme which was effectively intended to remedy the serious disturbance in the economy of a Member State and which did not exceed, as regards the arrangements for granting aid, what was necessary to achieve the objective of that scheme. It must therefore be held, in the light of the principles referred to in paragraph 27 above, that that scheme does not infringe the principle of non-discrimination and the first paragraph of Article 18 TFEU merely because it favours undertakings established in Spain and which have their principal places of business in that Member State.

52 It is apparent from the foregoing that the objective of the aid scheme at issue satisfies the requirements of the derogation laid down in Article 107(3)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

53 Consequently, the first two parts of the first plea in law must be rejected.

The last two parts of the first plea, alleging an infringement of the principles of freedom to provide services and freedom of establishment

54 The applicant submits, first, that a restriction of the freedom of establishment and the freedom to provide services is lawful if it is justified by an overriding reason relating to the general interest, it is non-discriminatory, and it is necessary and proportionate to the objective of general interest pursued and, second, that those conditions are cumulative and that a restriction is no longer justified even if only one condition is found not to be fulfilled. In the present case, according to the applicant, the aid scheme at issue is, first of all, discriminatory because it treats undertakings differently depending on the Member State in which they are established. Next, the applicant claims that the scheme is not proportionate, in that it goes beyond what is necessary to achieve its objective, given that the latter could be achieved without infringing the freedom of establishment and the freedom to provide services if the aid scheme at issue benefited all undertakings operating in Spain, irrespective of the Member State in which they are established, taking into account, for example, their respective market shares.

55 Finally, according to the applicant, the general interest objective of remedying the serious disturbance in the Spanish economy caused by the COVID-19 pandemic does not make it necessary to assist only undertakings established in Spain, since some of the undertakings operating in Spain under the freedom to provide services, such as the applicant, are equally important to its economy. On the contrary, solely assisting national undertakings leads to the fragmentation of the internal market and the elimination of competitors from other Member States, weakens competition, aggravates the damage caused by the COVID-19 pandemic, ultimately harms the structure of the airline sector and restricts the rights of EU carriers to provide air transport services freely within the internal market, regardless of which Member State issued their licence.

56 As a preliminary point, in so far as the applicant bases its arguments on the existence of discrimination arising from the aid scheme at issue and the lack of proportionality of that scheme, it is appropriate to refer to the examination of the first two parts of the first plea in law.

57 Next, it should be recalled that, first, the provisions of the FEU Treaty concerning freedom of establishment are aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State (see, to that effect, judgment of 6 October 2015, *Finanzamt Linz*, C−66/14, EU:C:2015:661, paragraph 26 and the case-law cited).

58 Second, the freedom to provide services precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, irrespective of whether there is discrimination on the grounds of

nationality or residence (see, to that effect, judgment of 6 February 2003, *Stylianakis*, C−92/01, EU:C:2003:72, paragraph 25).

59 Although the aid scheme at issue is not specifically aimed at the air transport sector, it should be noted that the applicant complains of an alleged restriction on the freedom of establishment and the freedom to provide services mainly in the air transport sector. In that regard, it should be pointed out that, pursuant to Article 58(1) TFEU, the free provision of services in the field of transport is governed by the provisions of the Title relating to transport, namely Title VI of the FEU Treaty. The free provision of services in the field of transport is therefore governed, in primary law, by a special legal regime (judgment of 18 March 2014, *International Jet Management*, C−628/11, EU:C:2014:171, paragraph 36). Consequently, Article 56 TFEU, which enshrines the freedom to provide services, does not apply as such to the air transport sector (judgment of 25 January 2011, *Neukirchinger*, C−382/08, EU:C:2011:27, paragraph 22).

60 Therefore, measures liberalising air transport services may only be adopted under Article 100(2) TFEU (judgment of 18 March 2014, *International Jet Management*, C−628/11, EU:C:2014:171, paragraph 38). However, as correctly noted by the applicant, the EU legislature adopted Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) on the basis of that provision, and its very purpose is to define the conditions for applying in the air transport sector the principle of free provision of services (see, by analogy, judgment of 6 February 2003, *Stylianakis*, C−92/01, EU:C:2003:72, paragraphs 23 and 24).

61 Although it is true that, because of the definition of the scope of the aid scheme at issue, the applicant is deprived of access to recapitalisation measures granted by the Kingdom of Spain, it has not established how that exclusion is such as to deter it from establishing itself in Spain or from providing services to and from Spain. In particular, the applicant fails to identify the elements of fact or law which cause the aid scheme at issue to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which, as was found in the context of the first two parts of the first plea, are nevertheless necessary and proportionate to remedy the serious disturbance in the Spanish economy caused by the COVID-19 pandemic, in accordance with the requirements of Article 107(3)(b) TFEU.

62 Furthermore, in the contested decision, the Commission examined whether the implementation of the aid scheme at issue was compatible with the fundamental freedoms of movement and in particular with the free movement of capital and the freedom of establishment. In that regard, it noted that none of the eligibility criteria, and in particular those relating to the systemic or strategic importance of the beneficiaries for the Spanish economy and the fact that their principal places of business must be located in Spain, cannot be interpreted or applied as making the benefit of the aid subject to the transfer to Spain of their activities carried out in another Member State (paragraphs 46, 59 and 60 of the contested decision). The applicant does not dispute that assessment.

63 It follows from all of the foregoing that none of the parts of the first plea in law can be upheld and that therefore that plea must be rejected.

The second plea in law, alleging an infringement of the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition

64 The applicant claims, first, that the Commission infringed its obligation to weigh the positive effects of the aid in terms of the realisation of the objectives set out in Article 107(3)(b) TFEU against its adverse effects in terms of distortion of competition and the effect on trade between Member States, when examining the compatibility of the aid, which constitutes a manifest error of assessment of the facts and is therefore sufficient grounds for the annulment of the contested decision. Second, the Temporary Framework binds the Commission and constitutes a second separate legal basis requiring the Commission to carry out such a balancing exercise. Third, in the event that the Temporary Framework is interpreted as not requiring such a balancing exercise, the applicant raises a plea of illegality under Article 277 TFEU against the Temporary Framework, on the ground that it is incompatible with Article 107(3)(b) TFEU.

65 The Commission, supported by the Kingdom of Spain and the French Republic, disputes those arguments.

66 Under Article 107(3)(b) TFEU, 'the following may be considered to be compatible with the internal market: … aid to … remedy a serious disturbance in the economy of a Member State'. It follows from the wording of that provision that its authors considered that it was in the interests of the European Union as a whole that one or other of its Member States be able to overcome a major or possibly even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole. That textual interpretation of the wording of Article 107(3)(b) TFEU is confirmed by comparing it to Article 107(3)(c) TFEU concerning 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', in so far as the wording of the latter provision contains a condition relating to proof that there is no effect on trading conditions to an extent that is contrary to the common interest, which is not found in Article 107(3)(b) TFEU (see, to that effect, judgment of 22 September 2020, *Austria* v *Commission*, C−594/18 P, EU:C:2020:742, paragraphs 20 and 39).

67 Thus, in so far as the conditions laid down in Article 107(3)(b) TFEU are fulfilled, that is to say, in the present case, that the Member State concerned is indeed confronted with a serious disturbance in its economy and that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, second, appropriate and proportionate, those measures are presumed to be adopted in the interests of the European Union, so that that provision does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU. In other words, such a balancing exercise would have no *raison d'être* in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive. Indeed, the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular.

68 It must therefore be held that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid at issue against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU, but only to ascertain whether the aid measure at issue is necessary, appropriate and proportionate in order to remedy the serious disturbance in the economy of the Member State concerned. Accordingly, the applicant's argument that the obligation to conduct the balancing test results from the exceptional nature of compatible aid, including aid declared compatible under Article 107(3)(b) TFEU, must be rejected. For the same reasons, the applicant is not justified in relying on the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T−68/15, EU:T:2018:563, paragraphs 210 to 214), in so far as, in that decision, the General Court did not take into account the consequences of the difference in the wording between Article 107(3)(b) and Article 107(3)(c) TFEU, highlighted by the Court of Justice in the judgment of 22 September 2020, *Austria* v *Commission* (C−594/18 P, EU:C:2020:742, paragraphs 20 and 39).

69 Nor may the applicant rely on the obligatory nature of a balancing test on the basis of the Temporary Framework, by arguing that that framework binds the Commission and provides a second separate basis from the Commission's obligation in that respect, because such an obligation does not appear in the Temporary Framework. In particular, Section 1.2 of that framework, referred to by the applicant, relating to 'the need for close European coordination of national aid measures', has a single paragraph, paragraph 10, which has no requirements in that respect. As regards paragraph 16a of that framework, also referred to by the applicant, the balancing exercise mentioned therein concerns the application of Article 107(3)(c) TFEU and not that of Article 107(3)(b) TFEU. Consequently, the applicant cannot rely on that argument.

70 Accordingly, since Article 107(3)(b) TFEU does not require such a balancing exercise, the Temporary Framework does not contradict that provision as it also does not require such a balancing exercise. Thus, the plea of illegality must also be rejected.

71 The second plea in law must therefore be rejected as unfounded.

The third plea in law, alleging, in essence, an incorrect classification of the aid as an aid scheme

72 The applicant claims, in essence, that the Commission committed an error of law by classifying the measure at issue as an aid scheme. According to the applicant, the eligibility criteria are vague and abstract, so that the Spanish authorities responsible for the subsequent selection of beneficiaries enjoy a broad discretion. Furthermore, the composition of the Management Board demonstrates that, in the absence of technical criteria for establishing potential beneficiaries of the aid, the selection of beneficiaries is purely political. According to the case-law of the General Court (judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission*, T−131/16 and T−263/16, under appeal, EU:T:2019:91), a measure is classified as an aid scheme if the national authorities entrusted with its implementation do not have any discretion as regards the determination of the essential elements of the aid in question and as to whether it should be awarded, which is not the case here.

73 The Commission and the Kingdom of Spain dispute the applicant's arguments.

74 It is apparent from the contested decision that the aid measure at issue was classified as an aid scheme and not as individual aid (paragraph 1 of the contested decision).

75 Under Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the [TFEU] (OJ 2015 L 248, p. 9), 'aid scheme' means 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time [or] for an indefinite amount'.

76 In the present case, it is common ground that the aid at issue is not linked to a specific project and is not granted for an indefinite period or for an indefinite amount within the meaning of the second situation referred to in Article 1(d) of Regulation 2015/1589, with the result that that second situation is irrelevant in the present case.

77 Accordingly, it is necessary to determine whether the aid measure at issue constitutes an aid scheme within the meaning of the first situation referred to in Article 1(d) of that regulation.

78 It is settled case-law that, in the specific case of an aid scheme, the Commission may merely study the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 63; of 13 June 2013, *HGA and Others* v *Commission*, C−630/11 P to C−633/11 P, EU:C:2013:387, paragraph 114; of 29 July 2019, *Azienda Napoletana Mobilità*, C−659/17, EU:C:2019:633, paragraph 27; and of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C−362/19 P, EU:C:2021:169, paragraph 65).

79 Accordingly, in the case of such an aid scheme, a distinction must be drawn between the adoption of such a scheme, on the one hand, and the grant of aid on the basis of that scheme, on the other (see, to that effect, judgments of 8 December 2011, *France Télécom* v *Commission*, C−81/10 P, EU:C:2011:811, paragraph 22, and of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C−362/19 P, EU:C:2021:169, paragraph 65).

80 In addition, Advocate General Kokott has stated that the concept of a 'scheme' within the meaning of Article 1(d) of Regulation 2015/1589 is to be given a broad interpretation. In her view, the practical effectiveness of State aid control also militates in favour of a broad interpretation, in so far as Article 1(d)

of that regulation covers a large number of similar cases. The effectiveness of the Commission's work would be jeopardised if Member States were able to prevent an abstract aid scheme from being reviewed by moving it from the statutory to the administrative level. The Commission would then have to deal with all decisions individually, even if they are similar (see, to that effect, Opinion of Advocate General Kokott in *Commission* v *Belgium and Magnetrol International*, C−337/19 P, EU:C:2020:990, points 64 and 65).

81 That being said, it is necessary to ascertain whether, in accordance with the wording of the first situation referred to in Article 1(d) of Regulation 2015/1589, in the first place, the provisions of Spanish law identified by the Commission in the contested decision as constituting the legal basis of the aid scheme at issue enable, in themselves, that is to say, without the need for further implementing measures, the individual grant of aid to undertakings which have applied for it and, in the second place, whether those provisions define in a general and abstract manner the beneficiaries of the aid.

82 In the first place, it should be noted that, in the present case, according to paragraph 7 of the contested decision, the legal basis for the measure at issue is the Real Decreto-ley 25/2020, de 3 de julio, de medidas urgentes para apoyar la reactivación económica y el empleo (Royal Decree-Law 25/2020 of 3 July 2020 on urgent measures to support economic recovery and employment, 'RDL') and the Acuerdo del Consejo de Ministros sobre el funcionamiento del Fondo de Apoyo a la Solvencia de las Empresas Estratégicas (Agreement of the Council of Ministers on the functioning of the Solvency Support Fund for strategic enterprises, 'ACM').

83 In that regard, the Court finds that the RDL and the ACM constitute acts of general application which govern all the characteristics of the aid measure at issue. In accordance with the case-law cited in paragraph 78 above, this allows the Commission to confine itself to examining, in the grounds of the contested decision, the characteristics of that measure, as set out in the abovementioned acts, and to ascertain, on that basis, whether that measure provides an advantage to the beneficiaries over their competitors and is such as to benefit undertakings engaged in trade between Member States, without being obliged to carry out an analysis of the aid granted in each individual case on the basis of that scheme.

84 The RDL and the ACM govern the form of the aid, its amount, the period of its applicability, the eligibility criteria for beneficiaries and the bodies responsible for its application and the procedure to be followed.

85 Thus, as regards the form of the aid, it follows from Article 3(1) and (3) of Annex II to the ACM that the aid may take the form of participating loans or convertible debt ('hybrid capital instruments'), subscription to shares ('equity instruments') or subordinated loans or another capital instrument (paragraph 15 of the contested decision). The total budget of the aid is fixed, according to Article 2(3) of the RDL, at EUR 10 billion, while according to paragraph 3 of the Appendix to the ACM and paragraph 4.1 of Annex II to the ACM, aid in excess of EUR 250 million must be notified individually to the Commission, as required by paragraph 51 of the Temporary Framework (paragraph 14 of the contested decision) and the minimum amount of individual aid granted on that basis is fixed, in principle, at EUR 25 million per beneficiary. As regards the period of applicability of the aid measure at issue, the support from the Fund may be granted until 30 June 2021 at the latest, in accordance with the Appendix to the ACM (paragraph 10 of the contested decision). Article 2 of Annex II to the ACM also sets out an exhaustive list of 13 cumulative eligibility criteria. Similarly, the relevant provisions of the RDL and the ACM set out the bodies responsible for the application of the aid and regulate the procedure to be followed for granting the aid. In particular, the Fund is managed by a Management Board, which is an interministerial committee chaired by the President of SEPI and is also composed of representatives of the Ministries of the Economy, Finance, Industry and Energy. SEPI is responsible, inter alia, for assessing aid applications, using the funds and registering the securities acquired. The Management Board decides by resolution on the outcome of the aid applications and the terms of the financing granted, which will be laid down in an agreement to be signed with the beneficiary. The Management Board must bring those agreements to the Council of Ministers for approval (paragraphs 8 and 9 of the contested decision).

86 Second, as regards the question whether the provisions of the RDL and the ACM allow aid to be granted individually, 'without further implementing measures being required', within the meaning of Article 1(d) of Regulation 2015/1589, it should be noted that the criterion relating to the need for 'further implementing measures' implies that the individual grant of aid can only be achieved by other 'further' measures, which supplement the provisions establishing the aid at issue, by completing or clarifying them.

87 In the present case, Article 2(15) of the RDL expressly provides that the operation, mobilisation of resources and liquidation of the Fund, as well as the eligibility criteria and procedures to be followed, are to be determined in the ACM, 'without any further normative provision being required'. As the Kingdom of Spain confirmed at the hearing, without being contradicted by the applicant on that point, there is no other act of any kind that would supplement the relevant provisions of the RDL and the ACM, by completing or clarifying them. Thus, the aid at issue is granted individually solely on the basis of the provisions of the RDL and the ACM, without any further implementing measures being required.

88 Furthermore, it must be pointed out that the mere fact that a certain procedure must be followed for the individual grant of aid, according to which undertakings wishing to benefit from it must apply for it and the bodies responsible for applying the aid must examine it and, where appropriate, give their consent, does not imply the existence of further implementing measures within the meaning of Article 1(d) of Regulation 2015/1589.

89 Moreover, the applicant does not identify any further implementing measures within the meaning of Article 1(d) of Regulation 2015/1589 that supplement or clarify the relevant provisions of the RDL and the ACM.

90 Accordingly, it must be concluded that the provisions of Spanish law identified by the Commission in the contested decision as being the legal basis for the aid scheme at issue enable, in themselves, that is to say without further implementing measures being required, the individual grant of aid to undertakings which have applied for it.

91 In the second place, as regards the question whether those provisions define in a general and abstract manner the beneficiaries of the aid, the Court finds that the beneficiaries of the aid at issue are not named, but are defined, by virtue of Article 2 of Annex II to the ACM, on the basis of an exhaustive list of 13 cumulative criteria of general application, some of which have been summarised in paragraph 4 above.

92 It follows that the provisions of the ACM define the beneficiaries of the aid in a general and abstract manner, which, moreover, is not disputed by the applicant.

93 Moreover, when questioned at the hearing as to whether, in its view, the aid measure at issue should have been classified as an individual measure and not as an aid scheme, the applicant replied that it is neither, but a kind of '*sui generis*' or 'indefinable' aid. However, suffice it to note in this respect that, while Regulation 2015/1589 distinguishes between aid schemes and individual aid, it does not provide for any other type of aid beyond these two categories (see, to that effect, Opinion of Advocate General Wathelet in *Commission* v *France and IFP Énergies nouvelles*, C−438/16 P, EU:C:2017:951, points 79 and 80).

94 Consequently, the Court concludes that the conditions laid down in Article 1(d) of Regulation 2015/1589 are satisfied, so that the Commission was able to classify, without committing an error of law, the aid measure at issue as an aid scheme.

95 That finding is not affected by the applicant's other arguments.

96 First, the applicant's argument, based on the composition of the Management Board of the Fund, that the selection of beneficiaries is purely political and that that board lacks the technical means to determine the qualification of the potential beneficiary of the aid has no basis in fact. It is apparent in particular from Article 2 of Annex II to the ACM that aid applications are, first of all, examined and assessed by SEPI, which checks, with the assistance of independent experts, that all eligibility criteria are met and that the

information submitted by applicants is accurate and sufficient. This is therefore a technical assessment of the aid applications carried out by SEPI, which constitutes an indispensable step in the procedure for granting aid. The applicant ignores that stage of the procedure. Accordingly, the applicant cannot validly maintain that that procedure is not based on any technical means enabling the qualification of the potential beneficiary of the aid to be defined.

97 Furthermore, the mere fact that the Management Board is composed of representatives of various ministries responsible for taking decisions in the area concerned in no way precludes the measure at issue from being classified as an aid scheme. First, it is perfectly normal, in view of the budgetary implications at issue for the Spanish State and the serious disturbance in the Spanish economy, which the aid at issue is intended to remedy, for the members of that board to hold posts in those ministries. Second, it would be speculative to infer from the composition of the Management Board alone that the grant of aid is the result of political opportunity. There is nothing before the Court to suggest that that would be the case. On the contrary, as the Kingdom of Spain has pointed out, the decisions of the Management Board, and the subsequent approval of the Council of Ministers, are taken on the basis of the technical evaluation of the applications carried out by SEPI. Moreover, during its sessions, the Management Board may also be assisted by SEPI's technical services which carried out the analysis and assessment of applications, as provided for in Article 8(3) of Annex III to the ACM.

98 In any event, the applicant does not put forward any concrete evidence capable of showing that decisions taken on the aid applications are driven by reasons of political opportunity.

99 Second, according to the applicant, the eligibility criteria are vague and abstract, so that the Management Board enjoys a broad discretion for the purposes of their application.

100 In the application, the applicant does not specify which criteria of the 13 eligibility criteria are covered by that argument. However, an overall reading of the applicant's third plea suggests that it appears to be directed primarily at the criterion relating to the strategic and systemic importance of the beneficiary of the aid, which is the only criterion expressly mentioned in that part of the application, as the applicant confirmed at the hearing.

101 In that regard, it should be noted, first of all, that it corresponds to the very nature of an aid scheme that the eligibility criteria are formulated in a general and abstract manner, so that they may be applied to an indefinite number of beneficiaries. That is all the more so in the case of aid, such as that at issue in the present proceedings, which is to be applied to the whole economy of a Member State.

102 Next, that criterion lists a number of specific indications capable of specifying and targeting its application, such as, in particular, the fact that the undertaking in question belongs to the public health or public security sectors, its role in achieving the medium-term objectives of ecological transition or digitalisation, innovative undertakings, or undertakings providing services of an essential nature.

103 Lastly, nor can the applicant rely on the judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T−131/16 and T−263/16, under appeal, EU:T:2019:91, paragraph 87). First, the case which gave rise to that judgment was characterised by the fact that most of the essential elements of the aid measure at issue were not laid down in the acts of Belgian law on which that measure was based. Accordingly, the General Court examined whether the Commission had established to the requisite legal standard the existence of a systematic approach on the part of the Belgian authorities which could itself be classified as an aid scheme. However, unlike in that case, in the present case all the characteristics of the aid scheme at issue are laid down in the acts on which that scheme is based (see paragraphs 84 to 87 above), which, moreover, is in no way based on a systematic approach on the part of the administration, a question which does not even arise in the present case.

104 Second, and in any event, the condition laid down by the Court in paragraph 87 of the judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T−131/16 and T−263/16, under appeal, EU:T:2019:91), to which the applicant refers and according to which, for aid to be classified as an

aid scheme, the authorities responsible for applying that scheme cannot have any margin of discretion as regards the determination of the essential elements of the aid in question and whether it should be awarded, is fulfilled in the present case.

105 In that regard, it should be noted that the purpose of that condition is, in fact, to ensure that the provisions establishing the aid in question contain all the elements relevant to the assessment of its compatibility with the internal market, which would relieve the Commission of the need to carry out an analysis of the aid granted in each individual case, as provided for in the case-law cited in paragraph 78 above. If the national authorities were to have a margin of discretion enabling them to determine, amend, add or derogate from the essential elements of the aid in question, the Commission would not be in a position to assess the compatibility of the aid with the internal market without examining the specific conditions for the grant of aid in each individual case.

106 However, the present case does not fall within that situation. As has been pointed out in paragraph 80 above, Article 2 of Annex II to the ACM contains an exhaustive list of eligibility criteria which must be cumulatively met. The authorities responsible for the implementation of that scheme can therefore neither add other eligibility criteria nor derogate from them, nor may they change their content. Thus, they are required to grant aid if all the criteria are met provided that the total budget of the measure is not exhausted, or to refuse to grant the benefit of the aid if one of those criteria is not met. In that regard, therefore, they have no margin of discretion, but act within the framework of circumscribed powers.

107 Admittedly, when evaluating some of the eligibility criteria, such as that relating to the strategic or systemic importance of the undertaking in question, the authorities responsible for implementing the scheme at issue could be called upon to carry out, sometimes complex, assessments of a multitude of relevant factors. However, the fact that such assessments have to be made does not, as such, preclude the classification of the measure at issue as an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589, having regard, first, to the eligibility criteria expressly set out in the provisions establishing the aid, from which the national authorities may not derogate, which they may not amend or to which they may not add others and, second, to the fact that those eligibility criteria, some of which have been set out in paragraph 4 above, in themselves provide concrete indications to guide the assessments to be made by the national authorities.

108 In its application, the applicant also criticises paragraph 21 of the contested decision on the ground that ‘equally lacking any objective yardstick is the Management Board’s power to “decide in each case the scope of the corporate decisions subject to prior authorization, which will be included in the Agreement on Temporary Public Financial Support”’. However, that argument is based on a partial reading of the contested decision. In paragraph 20 of the contested decision, the Commission stated that, when the State acquires shares, it will enjoy veto rights on some strategic decisions of the undertaking. The Commission made it clear, however, that the exercise of such veto rights would be strictly limited to the objective of the beneficiary’s return to viability and to matters governed by administrative authorisation, such as the dismissal of workers, the choice of less polluting production methods, and to digital solutions. That power of the Management Board therefore does not ‘[lack] any objective yardstick’, as the applicant submits.

109 At the hearing, the applicant also added that the Spanish authorities enjoy a broad discretion in determining the amount and form of the aid. However, that argument was not relied on in the application and the applicant has not submitted any justification for its late submission. Nor can it be regarded as an amplification of the third plea, in which the applicant mentions only the Spanish authorities’ alleged discretion as regards the selection of beneficiaries and the Management Board’s power to decide on the scope of corporate decisions subject to prior authorisation. It must therefore be rejected as inadmissible (see, to that effect, judgments of 1 February 2007, *Sison* v *Council*, C−266/05 P, EU:C:2007:75, paragraph 95; of 16 September 2020, *BP* v *FRA*, C−669/19 P, not published, EU:C:2020:713, paragraph 15; and of 27 September 2012, *Ballast Nedam Infra* v *Commission*, T−362/06, EU:T:2012:492, paragraph 137).

110 Third, in the application, the applicant also claims that ‘the Commission deprived itself of its discretion in reviewing State aid and committed an error in law by allowing Spain to exercise discretion in selecting beneficiaries of the aid scheme’. When questioned at the hearing on the exact scope of that argument, first, the applicant admitted that it overlapped with the argument concerning the classification of the measure at issue as an aid scheme. Second, the applicant added that, by that argument, it claimed that the Commission had misused its powers. However, any misuse of powers constitutes a separate plea in law which was not put forward in the application and cannot therefore be raised, without any justification, for the first time at the hearing. Such a new plea is therefore out of time and inadmissible, in accordance with the case-law cited in paragraph 109 above.

111 In the light of all the foregoing, the third plea in law must be rejected as unfounded.

The fourth plea in law, alleging an infringement of the applicant’s procedural rights

112 The fourth plea, relating to safeguarding the applicant’s procedural rights owing to the Commission’s failure to initiate a formal investigation procedure despite the alleged existence of serious doubts, is in fact subsidiary in nature, in case the Court did not examine the overall assessment of the aid. According to settled case-law, the aim of such a plea is to enable interested parties to be held to have standing, in that capacity, to bring an action under Article 263 TFEU, which otherwise would be unavailable to them (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C−83/09 P, EU:C:2011:341, paragraph 48, and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C−47/10 P, EU:C:2011:698, paragraph 44). The Court examined the first three pleas in the present action, relating to the overall assessment of the aid, so that such a plea is deprived of its stated purpose.

113 Furthermore, it must be pointed out that that plea lacks any independent content. Under that plea, the applicant may, in order to preserve the procedural rights which it enjoys under the formal investigation procedure, rely only on pleas which show that the assessment of the information and evidence which the Commission had or could have had at its disposal during the preliminary examination phase of the measure notified ought to have raised doubts as to the compatibility of that measure with the internal market (see, to that effect, judgments of 22 December 2008, *Régie Networks*, C−333/07, EU:C:2008:764, paragraph 81; of 9 July 2009, *3F* v *Commission*, C−319/07 P, EU:C:2009:435, paragraph 35; and of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C−83/09 P, EU:C:2011:341, paragraph 59), such as the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination phase or the existence of complaints submitted by third parties. It should be noted that the fourth plea repeats in condensed form the arguments raised under the first three pleas, without identifying specific evidence relating to potential serious difficulties.

114 For those reasons, having examined the merits of those pleas, the Court does not consider it necessary to examine the substance of this plea.

The fifth plea in law, alleging an infringement of the obligation to state reasons

115 The applicant submits that the Commission failed to fulfil its obligation to state reasons by failing to assess whether the exclusion of undertakings not established in Spain from the benefit of the aid was consistent with the principles of non-discrimination, freedom to provide services and freedom of establishment.

116 The Commission, supported by the Kingdom of Spain and the French Republic, contends that the fifth plea should be rejected.

117 In that regard, it should be noted that, although the statement of reasons for an EU measure, which is required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the duty to state reasons has been satisfied must be assessed with

reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see judgment of 7 February 2018, *American Express*, C−304/16, EU:C:2018:66, paragraph 75 and the case-law cited).

118 In the present case, as regards the measure at issue, the contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid concerned without opening the formal investigation procedure under Article 108(2) TFEU, which is designed to enable the Commission to be fully informed of all the facts pertaining to that aid.

119 Such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market (judgment of 22 December 2008, *Régie Networks*, C−333/07, EU:C:2008:764, paragraph 65).

120 As regards the context of the contested decision, it is characterised by the COVID−19 pandemic and the extreme urgency in which the Commission, first of all, adopted the Temporary Framework providing both Member States and undertakings affected by the consequences of that pandemic with some guidance, then examined the measures of which it had been notified by those States, in particular pursuant to that framework, and finally adopted the decisions relating to those measures, including the contested decision. In that regard, it is apparent from paragraphs 1 to 6 above that only 11 days elapsed between notification of the aid scheme at issue and the adoption of the contested decision.

121 Despite the nature of the contested decision and the exceptional circumstances surrounding its adoption, it should be noted that it nevertheless contains 92 paragraphs and makes it possible to understand the factual and legal grounds on which the Commission decided not to raise objections to the aid scheme at issue. Thus, in the contested decision, the Commission set out, albeit succinctly in view of the urgency of the matter, the reasons why the aid scheme at issue satisfied the conditions laid down in Article 107(3)(b) TFEU.

122 As regards, in particular, the statement of reasons for the contested decision as regards the exclusion of undertakings not established in Spain from the benefit of the aid, it should be recalled that the Court has already held that the obligation to state reasons is limited, in principle, to the reasons why a given category of operators benefits from a given measure, but does not imply justification for the exclusion of all other operators not in a comparable situation. Since the number of categories excluded from the benefit of a measure is potentially unlimited, the Commission cannot be under a duty to provide specific reasoning in relation to each of them (see, to that effect, judgment of 15 April 2008, *Nuova Agricast*, C−390/06, EU:C:2008:224, paragraph 81). In the present case, since the aid scheme is intended to apply to the whole of the economy of a Member State, so that the number of operators excluded from the benefit of the scheme may potentially be unlimited, the Commission's obligation to state reasons does not go so far as to require it to examine whether all or some of the operators thus excluded are in a situation comparable to that of the beneficiaries of the aid and to justify, where appropriate, the exclusion of all of those operators from receiving the aid.

123 Furthermore, and in any event, since the contested decision sets out, first, the characteristics of the aid scheme, including the eligibility criteria for it, and, second, albeit succinctly, the reasons why the Commission considered that that scheme did not infringe the fundamental freedoms of movement (see, in particular, paragraphs 46, 59 and 60 of the contested decision), it enables both the applicant to exercise its right to an effective remedy, as is apparent from its first plea, which shows that it was able to understand the scope of the contested decision in that regard, and enables the Court to exercise its power of review.

124 The fifth plea in law must therefore be rejected.

125 In the light of all the foregoing, the present action must be dismissed in its entirety.

Costs

126 Under Article 134(1) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission in accordance with the form of order sought by the latter.

127 The Kingdom of Spain and the French Republic are to bear their own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

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

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

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Stancu

Delivered in open court in Luxembourg on 19 May 2021.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.