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

10 May 2023 (*)

(State aid – German air transport market – Aid granted by Germany to an airline in the context of the COVID-19 pandemic – Recapitalisation of Deutsche Lufthansa – Decision not to raise any objections – Temporary Framework for State aid measures – Actions for annulment – Locus standi – Substantial effect on competitive position – Admissibility – Significant market power – Additional measures to preserve effective competition on the market – Obligation to state reasons)

In Joined Cases T-34/21 and T-87/21,

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

applicant in Case T-34/21,

Condor Flugdienst GmbH, established in Neu-Isenburg (Germany), represented by A. Israel, J. Lang and E. Wright, lawyers,

applicant in Case T-87/21,

v

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

defendant,

supported by

Federal Republic of Germany, represented by J. Möller and P.-L. Krüger, acting as Agents,

intervener in Case T-34/21,

by

French Republic, represented by T. Stéhelin, J.-L. Carré and P. Dodeller, acting as Agents,

intervener in Case T-34/21,

and by

Deutsche Lufthansa AG, established in Cologne (Germany), represented by H.-J. Niemeyer and J. Burger, lawyers,

intervener in Cases T-34/21 and T-87/21,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed, at the time of the deliberations, of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure, in particular the decision of 9 June 2022 joining Cases T-34/21 and T-87/21 for the purposes of the oral part of the procedure and the decision closing the proceedings,

further to the hearing on 11 July 2022,

gives the following

Judgment

By their actions on the basis of Article 263 TFEU, the applicants, Ryanair DAC and Condor Flugdienst GmbH ('Condor') seek annulment of Commission Decision C(2020) 4372 final of 25 June 2020 concerning State Aid SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa ('the contested decision').

I. Background to the dispute and events subsequent to the actions being brought

On 12 June 2020, the Federal Republic of Germany notified the European Commission of individual aid, under 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 I, p. 1), as amended on 3 April 2020 (OJ 2020 C 112 I, p. 1) and 8 May 2020 (OJ 2020 C 164, p. 3) ('the Temporary Framework'), in the form of a recapitalisation of EUR 6 billion ('the measure at issue') granted to Deutsche Lufthansa AG ('DLH').

DLH is the parent company of the Lufthansa Group, which, inter alia, comprises Lufthansa Passenger Airlines, Brussels Airlines SA/NV, Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG.

The measure at issue is intended to restore the balance sheet position and liquidity of the undertakings in the Lufthansa Group in the exceptional situation caused by the COVID-19 pandemic. The aid is financed and managed for the German Government by the Wirtschaftsstabilisierungsfonds (Economic Stabilisation Fund, Germany) ('the ESF'), a public entity that provides financial support at short notice to German companies affected by the COVID-19 pandemic.

The measure at issue consists of the following three elements:

an equity participation of EUR 306 044 326.40;

a 'silent participation' of EUR 4 693 955 673.60, which is a hybrid capital instrument treated as equity under international accounting standards ('Silent Participation I'); and

a 'silent participation' of EUR 1 billion with the features of a convertible debt instrument ('Silent Participation II').

The measure at issue is part of a wider series of support measures for the Lufthansa Group, which may be summarised, at the time the contested decision was adopted, as follows:

a State guarantee of 80% on a loan of EUR 3 billion which the Federal Republic of Germany intended to grant to DLH under an aid scheme already approved by the Commission (Commission Decision C(2020) 1886 final of 22 March 2020 on State Aid SA.56714 (2020/N) – Germany – COVID-19 measures);

a State guarantee of 90% on a loan of EUR 300 million which the Republic of Austria intended to grant to Austrian Airlines under an aid scheme already approved by the Commission (Commission Decision C(2020) 2354 final of 8 April 2020 on State aid SA.56840 (2020/N) – Austria – COVID-19: Austrian liquidity assistance scheme);

a loan of EUR 150 million, which the Republic of Austria planned to grant to Austrian Airlines to compensate it for the damage resulting from the cancellation or rescheduling of its flights in the context of the COVID-19 pandemic;

EUR 250 million in liquidity support and a loan of EUR 40 million which the Kingdom of Belgium planned to grant to Brussels Airlines;

a State guarantee of 85% on a loan of EUR 1.4 billion granted by the Swiss Confederation to Swiss International Air Lines and Edelweiss Air.

On 25 June 2020, the Commission adopted the contested decision, by which it found that the measure at issue constituted State aid that was compatible with the internal market under Article 107(3)(b) TFEU and the Temporary Framework. On 20 November 2020, the Commission published information about that decision in the *Official Journal of the European Union* (OJ 2020 C 397, p. 2).

On 14 December 2021, after the present actions had been brought, the Commission adopted Decision C(2021) 9606 final, correcting the contested decision ('the correcting decision').

II. Forms of order sought

In the application lodged in Case T-34/21, Ryanair claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

In a response to the measure of organisation of procedure of 11 May 2022, lodged on 26 May 2022, Ryanair claims, in essence, that the contested decision, as rectified by the correcting decision, should be annulled and that the Commission should be ordered to pay the costs.

In Case T-87/21, Condor claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

By a statement of modification lodged on 22 March 2022, Condor claims in addition that the Court should annul the contested decision, as rectified by the correcting decision, and order the Commission to pay the costs.

The Commission contends that the Court should:

dismiss the actions;

order the applicants to pay the costs.

DLH contends that the actions should be dismissed and that the applicants should be ordered to pay the costs. The Federal Republic of Germany and the French Republic, which intervened only in Case T-34/21, contend that the action in that case should be dismissed. The Federal Republic of Germany also contends that Ryanair should be ordered to pay the costs.

III. Law

A. Admissibility of the actions

1. Ryanair's standing to bring proceedings

First, Ryanair argues that it is an interested party for the purposes of Article 108(2) TFEU and Article 1(h) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p.9) and that it therefore has standing to bring proceedings in order to protect its procedural rights. Second, Ryanair submits that its competitive position on the market has been substantially affected by the measure at issue and that it is also entitled to contest the contested decision on the merits.

The Commission does not dispute the admissibility of the action.

However, the French Republic maintains that Ryanair has not shown that its competitive position has been substantially affected by the measure at issue.

It should be borne in mind that where the Commission adopts a decision not to raise objections on the basis of Article 4(3) of Regulation 2015/1589, as in the present case, it declares not only that the measures concerned are compatible with the internal market, but also, by implication, that it refuses to initiate the formal investigation procedure laid down in Article 108(2) TFEU and Article 6(1) of that regulation (see judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 42 and the case-law cited). If, following the preliminary examination, it finds that the measure notified raises doubts as to its compatibility with the internal market, the Commission is required to adopt, on the basis of Article 4(4) of Regulation 2015/1589, a decision initiating the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of that regulation. Under the latter provision, such a decision is to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which must not as a rule exceed one month (judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 46).

In the present case, the Commission decided, at the end of a preliminary examination, not to raise objections to the measure at issue on the ground that it was compatible with the internal market pursuant to Article 107(3)(b) TFEU. Since the formal investigation procedure was not initiated, the interested parties that could have submitted comments during that stage were deprived of that possibility. In order to remedy this, they are entitled to challenge the Commission's decision not to initiate the formal investigation procedure before the EU judicature. Accordingly, an action brought by an interested party, for the purposes of Article 108(2) TFEU, for annulment of the contested decision would be admissible in so far as that party would be seeking to safeguard the procedural rights available to it under that latter provision (see judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 56 and the case-law cited).

In the light of Article 1(h) of Regulation 2015/1589, an undertaking competing with the beneficiary of an aid measure is an 'interested party' for the purposes of Article 108(2) TFEU (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 50; see also, to that effect, judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 59).

In the present case, it is not disputed that Ryanair competes with the Lufthansa Group and that, therefore, it is an interested party within the meaning of Article 1(h) of Regulation 2015/1589, having standing to bring proceedings in order to safeguard its procedural rights under Article 108(2) TFEU.

As to Ryanair's standing to challenge the contested decision on the merits, it must be borne in mind that the admissibility of an action brought by a natural or legal person against an act which is not addressed to them, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that they be accorded standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to them. Second, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 59 and 91, and of 13 March 2018, *Industrias Químicas del Vallés* v *Commission*, C-244/16 P, EU:C:2018:177, paragraph 39).

Given that the contested decision, which was addressed to the Federal Republic of Germany, does not constitute a regulatory act under the fourth paragraph of Article 263 TFEU, since it is not an act of general application (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 56), the Court must determine whether the applicant is directly and individually concerned by that decision, for the purposes of that provision.

In that regard, it is clear from settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned 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 those 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, p. 107; of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 22; and of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 53).

Accordingly, where an applicant calls into question the merits of a decision appraising aid, taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as a party 'concerned' for the purposes of Article 108(2) TFEU cannot suffice to render the action admissible. It must then demonstrate that it has a particular status for the purposes of the case-law referred to in paragraph 24 above. That applies in particular where the applicant's position on the market concerned is substantially affected by the aid to which the decision at issue relates (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37 and the case-law cited).

In that regard, the Court of Justice has held that demonstration by the applicant of a substantial effect on its market position does not entail a definitive ruling on the competitive relationship between the applicant and the undertakings in receipt of aid, but requires only that the applicant adduce pertinent reasons to show that the Commission's decision may harm its legitimate interests by substantially affecting its position on the market in question (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 57 and the case-law cited).

It is thus apparent from the case-law of the Court of Justice that the substantial adverse effect on the applicant's competitive position on the market in question results not from a detailed analysis of the various competitive relationships on that market, allowing the extent of the adverse effect on its competitive position to be established specifically, but, in principle, from a prima facie finding that the grant of the measure covered by the Commission's decision leads to a substantial adverse effect on that position (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 58 and the case-law cited).

It follows that that condition may be satisfied if the applicant adduces evidence to show that the measure concerned is liable to have a substantial adverse effect on its position on the market at issue (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 59 and the case-law cited).

As regards the factors accepted by the case-law for the purpose of establishing a substantial adverse effect of that kind, it should be borne in mind that the mere fact that an act may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned is in a competitive relationship with the beneficiary of that act cannot suffice for that undertaking to be regarded as being individually concerned by that act. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 60 and the case-law cited).

Demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in the applicant's commercial or financial performance, such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can also have an adverse effect on the competitive situation of an operator in other ways, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 61).

In addition, the case-law does not require that the applicant provide information as to the size or geographical scope of the markets at issue, or as to its market shares and those of the recipient of the aid measure at issue or of other competitors on those markets (see, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 65).

It is in the light of those principles that it is necessary to examine whether Ryanair has adduced evidence to show that the measure at issue is liable to have a substantial adverse effect on its position on the market concerned.

In that regard, Ryanair submits that it is the closest and most relevant competitor of the Lufthansa Group. Accordingly, in 2019 it was the second-largest airline on the German and Belgian markets after the Lufthansa Group and the third largest on the Austrian market. In addition, in that same year, it competed directly with the Lufthansa Group on 96 routes departing from or arriving in Germany, 27 of which were operated only by it and the Lufthansa Group, while there were few competitors on the remaining routes. As regards Belgium and Austria, Ryanair is in direct competition with the Lufthansa Group on 46 and 35 routes respectively, certain of which are operated only by it and that group. Moreover, several of the routes concerned are of economic importance in that they connect large cities in Europe and beyond.

The French Republic contends, however, that Ryanair has not adduced evidence capable of demonstrating that it is substantially affected by the measure at issue at the relevant airports, as identified in the contested decision. In particular, the measure at issue does not have a substantial effect on Ryanair's competitive position at the airports of Vienna (Austria), Brussels (Belgium), Hamburg (Germany) and Palma de Mallorca (Spain), where, according to the contested decision, the Lufthansa Group did not have significant market power ('SMP'). Furthermore, Ryanair is not one of the Lufthansa Group's main competitors at Munich Airport (Germany), while at Frankfurt Airport (Germany), it has a low level of operations despite the fact that it is the second-largest airline, after the Lufthansa Group.

In the first place, the objection put forward by the French Republic raises the question, as a preliminary matter, of whether the evidence adduced by Ryanair and summarised in paragraph 33 above lacks any relevance for the purpose of assessing its standing to bring proceedings in that it does not refer specifically to its competitive position at the airports referred to in paragraph 34 above. That objection results, in essence, from the fact that the Commission identified the relevant markets for passenger air transport services in the contested decision according to the 'airport-by-airport' approach. Under that approach, each airport is defined as a distinct market, without differentiating between the specific routes operated to or from that airport.

Ryanair argues in the fifth part of its first plea, inter alia, that the Commission was wrong to take that approach and that it should have defined the markets at issue under an approach based on pairs of cities, designated as the point of origin and the point of destination ('the O&D approach').

In that regard, it should be borne in mind that it is not necessary, at the stage of examining the admissibility of an action, to give a definitive ruling on the definition of the market for the products or services at issue or on the competitive relationship between the applicant and the beneficiary. It is sufficient, in principle, for the applicant to show that, prima facie, the grant of the measure at issue leads to a substantial adverse effect on its competitive position on the market (see the case-law cited in paragraphs 26 and 27 above).

Consequently, at the stage of examining the admissibility of an action, where the definition of the market at issue is challenged as to its merits by the applicant, as in the present case, it is sufficient to assess whether the definition of the market at issue put forward by the applicant is plausible, that being without prejudice to the substantive examination of that issue.

In the present case, the Court considers that defining the markets for passenger air transport services according to the O&D approach, as advocated by Ryanair, is prima facie plausible. It need only be observed that, as regards the airline sector, the Court has accepted that the Commission could employ that approach in order to define the relevant markets, in particular in the area of merger control (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraphs 139 and 140 and the case-law cited).

The information provided by Ryanair, summarised in paragraph 33 above, is therefore relevant for the purpose of examining its standing to bring proceedings.

In the second place, it is apparent from that information, the accuracy of which is not contested by the parties, and which is furthermore confirmed by the evidence provided by Ryanair in these proceedings, that Ryanair and the Lufthansa Group were, before the adoption of the contested decision, in competition on a large number of routes between pairs of cities, defined as points of origin and points of departure ('O&D routes') to and from Belgium, Germany and Austria, and that Ryanair and the Lufthansa Group were the only competitors on a considerable number of O&D routes. Nor do the parties contest the fact that Ryanair is the second-largest airline, after the Lufthansa Group, on the Belgian and German markets and the third largest on the Austrian market.

In the third place, and in any event, it must be stated that the Commission, in the contested decision, identified Ryanair as one of the main competitors of the Lufthansa Group at several of the relevant airports. Accordingly, it is apparent from paragraphs 188 and 189 of the contested decision that Ryanair was the second- and third-largest competitor of the Lufthansa Group at Frankfurt Airport, in terms of the number of slots held, during the 2019/2020 winter season and the 2019 summer season of the International Air Transport Association (IATA) respectively. It was also the second-largest airline in terms of the number of aircraft based at that airport during those seasons. Similarly, according to the contested decision, Ryanair was the Lufthansa Group's closest competitor at Düsseldorf (Germany) and Vienna (Austria) airports.

In the fourth place, Ryanair submits that it was pursuing expansion goals on the Belgian, German and Austrian markets, launching, respectively, 9, 75 and 28 new routes on those markets in 2019, which is also not disputed. In addition, according to Ryanair, the Lufthansa Group could use the capital obtained through the measure at issue to lower its prices and strengthen its competitive position on the market to Ryanair's detriment, particularly in the context of the COVID-19 pandemic, which has impacted all airlines.

In that regard, it is apparent from paragraph 16 of the contested decision that without the measure at issue DLH risked becoming insolvent, which could have caused the collapse of the Lufthansa Group as a whole. Furthermore, according to a report of May 2020 by the Fondation pour l'innovation politique, submitted by Ryanair and entitled 'Before COVID-19, air transportation in Europe: an already fragile sector', the content of which has not been contested by the parties, it was 'likely that Ryanair and Wizz Air will emerge from the [COVID-19] crisis without too much damage and will even have enough financial resources, especially through indebtedness and the purchase of bankrupt companies, to take part in the probable restructuring of air transport in Europe'. It thus follows that Ryanair was in a relatively strong position in relation to the traditional airlines, such as those belonging to the Lufthansa Group, which faced a risk of insolvency or even exit from the market.

The factors set out in paragraphs 33 to 44 above, taken together, show that Ryanair has demonstrated that the grant of the measure at issue led prima facie to a substantial adverse effect on its competitive position on the market by causing, inter alia, the loss of an opportunity to make a profit or a less favourable development than would have been the case without such a measure (see the case-law cited in paragraph 30 above).

That finding is not called into question by the objection raised by the French Republic that Ryanair has not shown that the contested decision affects it by reason of circumstances that differentiate it from all the other competitors of the Lufthansa Group.

The condition that there be a substantial effect on the applicant's competitive position is a factor that is particular to that applicant, which must be assessed solely in relation to its market position prior to the grant of the measure at issue or in its absence. It is therefore not a matter of comparing the situation of all the competitors operating on the market in question (see, to that effect, Opinion of Advocate General Szpunar in *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2020:862, point 58). Moreover, as observed in paragraph 31 above, the Court of Justice has explained that it is not necessary for the applicant to provide information concerning its market shares, those of the beneficiary or of other competitors on that market. It thus follows that, in order to show that there has been a substantial effect on its competitive position, the applicant cannot be required to establish, with supporting evidence, what the competitive situation of its competitors is and to differentiate itself from that situation.

In addition, it is important to observe that the case-law cited in paragraph 24 above foresees two different criteria for showing that persons other than those to whom a decision is addressed are individually concerned by that decision, namely that the contested 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'. That case-law does not therefore require an applicant to show that, in every case, its factual circumstances are different from those of any other person. It is sufficient that the contested decision affects the applicant by reason of certain attributes which are peculiar to it.

That is the case here. All of the factors referred to in paragraphs 33 to 44 above tend to show, in a sufficiently plausible manner, that Ryanair's position on the markets concerned was characterised by certain attributes peculiar to it, such as its significant presence on those markets, the fact that it is the closest competitor of the beneficiary on certain of them, its plans for expansion on the Belgian, German and Austrian markets, and its relatively strong financial situation in comparison with the weak position of the beneficiary, thus putting it in a position that may allow it to gain market share, in the absence of the aid, to the detriment of the beneficiary.

In the light of all the foregoing, it must be held that Ryanair has shown to the requisite legal standard that the measure at issue was liable to have a substantial effect on its competitive position on the market concerned.

As to the whether Ryanair is directly concerned by the contested decision, it is important to observe that, according to settled case-law, a competitor of a beneficiary of aid is directly concerned by a Commission decision authorising a Member State to pay the aid when there is no doubt as to that State's intention to do so (see, to that effect, judgment of 5 May 1998, *Dreyfus* v *Commission*, C-386/96 P, EU:C:1998:193, paragraphs 43 and 44, and of 15 September 2016, *Ferracci* v *Commission*, T-219/13, EU:T:2016:485, paragraph 44 and the case-law cited), as is the case in this instance.

Ryanair is therefore entitled to challenge the contested decision on the merits.

2. The standing of Condor to bring proceedings

First, Condor claims that it is an interested party for the purposes of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589 and that it therefore has standing to bring proceedings in the present case in order to safeguard its procedural rights, on the ground that it is a competitor of the Lufthansa Group. Second, Condor submits that its position on the market has been substantially affected by the measure at issue and that it is therefore also entitled to challenge the contested decision on the merits.

The Commission does not dispute that Condor is an interested party and that it therefore has standing to bring proceedings in order to safeguard its procedural rights. However, it states that it 'doubts' that Condor has shown to the requisite legal standard that it was substantially affected by the measure at issue.

In the first place, it is common ground that Condor is a competitor of the Lufthansa Group and that it is therefore an interested party for the purposes of Article 1(h) of Regulation 2015/1589 and Article 108(2) TFEU (see the case-law cited in paragraph 20 above). Consequently, Condor has standing to bring proceedings in order to safeguard its procedural rights.

In the second place, as regards whether Condor also has standing to challenge the contested decision on the merits, it must be observed that in order to demonstrate that the measure at issue has a substantial effect on its competitive position on the market, the applicant submits, first, that it is the Lufthansa Group's only competitor on 51 O&D routes to and from Germany and that it is in direct competition with that group on 79 other routes. In addition, on the 130 routes in total operated by both Condor and the Lufthansa Group, those airlines offered a total of 18.6 million seats, of which Condor offered 6.33 million.

Without disputing the accuracy of those figures, the Commission submits that Condor has failed to specify the source for that information and the period to which it relates.

While it is true, as the Commission asserts, that Annex C.1 to Condor's reply, which includes the list of O&D routes referred to in paragraph 56 above, provides neither the source of the data in that annex nor the period to which they relate, it is nevertheless the case that that annex must be read in conjunction with the written pleadings lodged by Condor. In that regard, it is apparent from Condor's application that the data in question originate from the 'SRS' Analyser, an IATA partner, which is an online database containing a large amount of data on various airlines' routes, schedules and number of seats, as consulted online on 1 December 2020. The Commission does not dispute the reliability of that source. In addition, Condor states in its application that those data relate to the period from April 2019 to March 2020, a period corresponding approximately to the IATA 2019 summer season and the 2019/2020 winter season, and thus to the period examined in the contested decision.

The objection raised by the Commission must therefore be rejected.

Having clarified that issue, the Court considers, for the reasons set out in paragraphs 34 to 39 above, applied *mutatis mutandis*, that the information provided by Condor and summarised in paragraph 56 above is relevant for the purpose of examining whether the measure at issue is prima facie liable to have a substantial effect on its competitive position on the market, that being without prejudice to the substantive examination of the definition of the relevant market.

It is apparent from that information that Condor and the Lufthansa Group were in competition on a large number of O&D routes to and from Germany, that Condor was the group's only competitor on many of those routes, and that the number of seats available on the flights operated by Condor on all those routes was substantial.

Second, it should be observed, as Condor has done, that, in paragraphs 188, 189, 195, 196 and 202 of the contested decision, the Commission itself identified Condor as being the second- and third-largest airline at Frankfurt Airport, in terms of slots, during the IATA 2019 summer season and the 2019/2020 winter season respectively. Furthermore, again according to the Commission's findings, Condor was the second-largest airline at Munich and Düsseldorf airports, in terms of based aircraft, and the third-largest in terms of slots at Munich Airport during the IATA 2019 summer season. It thereby follows that Condor, according to the contested decision itself, has been identified as being one of the main competitors to the Lufthansa Group at several of the airports examined in that decision.

Third, Condor submits that it had a long-standing commercial relationship with the Lufthansa Group, as shown by the agreement on feeder traffic that it had concluded with that group. In that regard, it is not disputed that Condor, which, inter alia, operates long-haul leisure flights, depends to a large extent on feeder traffic from short-haul flights operated by the Lufthansa Group in order to fill its flights. According to Condor, that group was the only airline operating a network at any of the German airports capable of providing sufficient feeder traffic. According to Condor, which is not contradicted on this point, approximately 25% of all the passengers on any of its long-haul flights use a feeder or a de-feeder flight operated by the Lufthansa Group. The latter also provides 90% of the 'indirect' passengers who fly on long-haul flights operated by Condor. It is apparent from those factors that the feeder traffic thus generated by the Lufthansa Group is of particular importance for Condor's operations.

Fourth, as observed in paragraph 44 above, it is apparent from the contested decision that without the measure at issue DLH risked becoming insolvent, which could have caused the collapse of the Lufthansa Group as a whole.

However, according to Condor, the measure at issue enabled the Lufthansa Group to remain on the market and even to launch new routes which it did not operate previously.

In the light of all the foregoing factors, it should be found that Condor has shown to the requisite legal standard that the measure at issue was liable to have a substantial effect on its competitive position on the markets for the transport of passengers by air.

For the same reasons as those set out in paragraph 51 above, Condor is also directly concerned by the contested decision, with the result that it is entitled to challenge the contested decision on the merits.

B. *Substance*

In support of its action in Case T-34/21, Ryanair puts forward five pleas in law, alleging respectively, first, misapplication of the Temporary Framework and misuse of powers; second, misapplication of Article 107(3)(b) TFEU; third, infringement of certain specific provisions of the FEU Treaty and certain general principles of EU law, namely non-discrimination, the freedom to provide services and freedom of establishment; fourth, failure by the Commission to initiate the formal investigation procedure provided for in Article 108(2) TFEU; and, fifth, infringement of the obligation to state reasons.

In particular, the first plea consists of seven parts, concerning, respectively: (i) DLH's eligibility for the aid under the Temporary Framework; (ii) the existence of other more appropriate measures and whether they entailed fewer distortions to competition; (iii) the amount of the recapitalisation; (iv) the remuneration and exit of the State; (v) whether the beneficiary held SMP on the relevant markets and the structural commitments imposed in order to preserve effective competition on those markets; (vi) the prohibition of aggressive commercial expansion financed by the aid; and (vii) misuse of powers.

In support of its action in Case T-87/21, Condor raises three pleas in law, alleging respectively, first, infringement by the Commission of its obligation to initiate the formal investigation procedure provided for in Article 108(2) TFEU; second, a manifest error of assessment in that the Commission found that the measure at issue was compatible with the internal market under Article 107(3)(b) TFEU; and, third, infringement of the obligation to state reasons. The Court observes that there is a partial overlap in content between the first two pleas. When questioned on that matter at the hearing, Condor confirmed that overlap, indicating that those pleas were raised in anticipation of the Court's decision on the admissibility of the action and that they concerned, in essence, the same issues. Since the Court has held that Condor is entitled to challenge the merits of the contested decision, those two pleas should be examined together. In essence, four issues are raised, namely the eligibility of the beneficiary for the aid under the Temporary Framework, the amount of the recapitalisation, the prohibition of aggressive commercial expansion financed by the aid, and the existence of SMP on the part of the beneficiary on the relevant markets, as well as the structural commitments.

It thus follows that the first plea in Case T-34/21 and the first two pleas in Case T-87/21 in part raise questions that are similar, which should be examined together, and in part raise questions that are different. All of those questions may be grouped together into six issues, as follows:

DLH's eligibility for the aid (first part of the first plea in Case T-34/21 and second part of the first plea in Case T-87/21);

whether there were other measures that were more appropriate and that created fewer distortions to competition (second part of the first plea in Case T-34/21);

the amount of the aid (third part of the first plea in Case T-34/21 and second part of the first and second pleas in Case T-87/21);

the remuneration and exit of the State (fourth part of the first plea in Case T-34/21);

the prohibition of aggressive commercial expansion financed by the aid (sixth part of the first plea in Case T-34/21 and first part of the first plea and second part of the second plea in Case T-87/21);

whether the beneficiary held SMP on the markets at issue and the structural commitments (fifth part of the first plea in Case T-34/21 and first part of the first and second pleas in Case T-87/21).

It is appropriate first of all to make some preliminary observations before examining those issues and, if necessary, the other pleas raised by the applicants.

1. *Preliminary observations*

(a) *The intensity of judicial review*

As a preliminary point, it should be borne in mind that the assessment of the compatibility of aid measures with the internal market, under Article 107(3) TFEU, falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 37).

In that regard, it is settled case-law that the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments (see judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 38 and the case-law cited). Article 107(3) TFEU confers on the Commission broad discretion to allow aid by way of derogation from the general prohibition laid down in Article 107(1) TFEU, inasmuch as the determination, in those cases, of whether State aid is compatible or incompatible with the internal market raises problems which make it necessary to examine and appraise complex economic facts and conditions (judgments of 18 January 2012, *Djebel – SGPS* v *Commission*, T-422/07, not published, EU:T:2012:11, paragraph 107, and of 1 March 2016, *Secop* v *Commission*, T-79/14, EU:T:2016:118, paragraph 29). In that context, judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see judgment of 11 September 2008, *Germany and others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 59 and the case-law cited).

However, in the exercise of that discretion, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States. In adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 39 and 40). Nevertheless, the adoption of guidelines by which the Commission limits its discretion does not relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU. Consequently, the Commission may authorise proposed aid that departs from those guidelines in exceptional circumstances (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 41 and 43).

Accordingly, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty (see judgment of 2 December 2010, *Holland Malt* v *Commission*, C-464/09 P, EU:C:2010:733, paragraph 47 and the case-law cited). It is therefore for the Courts of the European Union to determine whether the Commission has observed the rules which it adopted (see judgment of 8 April 2014, *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraph 29 and the case-law cited).

Furthermore, in the context of the review conducted by the Courts of the European Union on complex economic assessments carried out by the Commission in the field of State aid, it is true that it is not for those Courts to substitute their own economic assessment for that of the Commission. However, the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraphs 75 and 76; see, also, judgment of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 79 and the case-law cited). Likewise, the Courts of the European Union must review the Commission's interpretation of information of an economic nature (see, to that effect, judgment of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 56).

Consequently, although the review carried out by the Courts of the European Union is limited as regards the complex economic and social assessments made by the Commission, as is apparent from the case-law referred to in paragraph 74 above, that review is, by contrast, comprehensive as regards the evaluations made by the Commission which do not involve such assessments or as regards questions of a strictly legal nature.

(b) *The probative value of the expert reports*

In Case T-34/21, Ryanair relies in various respects on several expert reports, including:

a report drawn up by Oxera entitled 'Assessment of the Commission's analysis of the proportionality of the aid to DLH' of 21 January 2021 ('Oxera report I');

a report by Oxera called 'Assessment of the Commission's approach to determining SMP and competitive distortions' of 21 January 2021 ('Oxera report II');

the report by the Fondation pour l'innovation politique referred to in paragraph 44 above;

a report entitled 'Rating Action: Moody's downgrades Lufthansa to Ba1, ratings placed on review for downgrade' of 17 March 2020 by Moody's ('the Moody's report'); and

a report with the title 'European Airlines, All is not what it seems' of 17 April 2020 written by J. Hollins, R. Joynson and D. Maglione of Exane BNP Paribas ('the Exane report').

The Court, as a preliminary point, must assess the probative value of those reports.

In that regard, it should be borne in mind that given that there is no legislation at EU level governing the concept of proof, the Courts of the European Union have laid down a principle of unfettered production of evidence or freedom as to the form of evidence adduced, which is to be interpreted as the right to rely, in order to prove a particular fact, on any form of evidence, such as oral testimony, documentary evidence, confessions, expert reports and so on. Correspondingly, it is settled case-law that the determination of reliability or, in other words, the probative value of an item of evidence is a matter for those Courts. Accordingly, in order to establish the probative value of a document, it is necessary to take account of several factors, such as the origin of the document, the circumstances in which it was drawn up, the person to whom it was addressed and its content, and to consider whether, according to those aspects, the information it contains appears sound and reliable (see judgment of 2 July 2019, *Mahmoudian* v *Council*, T-406/15, EU:T:2019:468, paragraphs 136 and 137 and the case-law cited).

In the present case, in the first place, as regards the Moody's and Exane reports, it should be noted that those reports were not prepared at the request of Ryanair, they have no connection with these judicial proceedings and their authors are third parties whose expertise, reputation and independence with respect to Ryanair are not in dispute.

In the second place, as regards the Oxera reports I and II, it should be observed that they were prepared at Ryanair's request for the purpose of the present proceedings.

However, the Commission, the Federal Republic of Germany, the French Republic and DLH neither dispute the probative value of those reports nor challenge the accuracy or veracity of the factual and financial information they contain.

In addition, the Court observes that those reports were drawn up on the basis of information that was publicly available or which originated from reputable and reliable sources that were independent of Ryanair. The Oxera reports I and II are based on information from sources such as the Airports Council International (ACI) Europe association, IATA, several ratings agencies such as Moody's, the Kroll Bond Rating Agency and S&P, the *Financial Times*, DLH or other airlines, the German authorities and the contested decision itself.

Lastly, while it is true that those reports post-date the adoption of the contested decision, the fact remains that they are based on data that existed at the time the contested decision was adopted. In that regard, according to the case-law, the fact that the review carried out by the Court hearing an application for annulment is carried out solely by reference to the elements of fact and of law existing on the date of adoption of the contested decision is without prejudice to the possibility afforded to the parties, in the exercise of their rights of defence, of supplementing them by evidence established after that date, but for the specific purpose of contesting or defending that decision (see judgment of 27 September 2006, *GlaxoSmithKline Services* v *Commission*, T-168/01, EU:T:2006:265, paragraph 58 and the case-law cited).

In those circumstances, the Court finds that the reports referred to in paragraph 79 above have probative value.

2. The eligibility of DLH for the aid

In Case T-34/21, Ryanair puts forward three complaints concerning the eligibility of DLH for the aid, alleging, respectively, infringement of the conditions laid down in points 49(a), 49(b) and 49(c) of the Temporary Framework. That third complaint and the arguments raised by Condor in Case T-87/21 to the effect that the Commission disregarded the conditions set out in point 49(c) of the Temporary Framework overlap. Those complaints should be examined in turn.

(a) Infringement of point 49(a) of the Temporary Framework

Ryanair argues in essence that the Commission has not shown that, without the aid, the beneficiary would necessarily become insolvent or face serious difficulties in maintaining its operations, for the purposes of point 49(a) of the Temporary Framework. In addition, the Commission confused the concepts of illiquidity, which arises when an undertaking is unable to pay its debts when they are due, and insolvency, which occurs when the total value of the undertaking's liabilities exceeds that of its assets.

The Commission, supported by the Federal Republic of Germany and DLH, disputes those arguments.

Point 49 of the Temporary Framework, which appears in section 3.11.2, entitled 'Eligibility and entry conditions', sets out the conditions that a recapitalisation measure granted in the context of the COVID-19 pandemic must fulfil for a potential beneficiary to be considered eligible for that measure.

The first of those conditions, laid down in point 49(a) of the Temporary Framework, requires establishing that without the State intervention the beneficiary would go out of business or would face serious difficulties in maintaining its operations. The Commission based its finding that that condition was satisfied on the second situation. In accordance with that same point of the Temporary Framework, those difficulties may be shown by the deterioration, in particular, of the debt-to-equity ratio of the beneficiary of the State intervention or similar indicators.

In paragraphs 96 to 98 of the contested decision, the Commission noted that DLH's impaired equity position severely affected its liquidity and threatened it with insolvency in the short term. That finding was based on internal documents and financial projections for the years 2020 to 2026, provided by the German Government. They showed that DLH's equity would decrease significantly by the end of 2020 as compared to 2019 and that, despite measures taken in 2020 to obtain liquidity, it would face 'technical illiquidity', which meant that the liquid assets available to it would not be sufficient to repay its debts when they became due, something which Ryanair does not dispute. The Commission thus concluded that the measure at issue would prevent DLH's insolvency and that, consequently, in the absence of a capital increase, it would face serious difficulties in maintaining its operations.

It should, in addition, be observed that in the contested decision the Commission pointed to a deterioration in DLH's debt-to-equity ratio, as provided for in point 49(a) of the Temporary Framework (see Table 1 in paragraph 117 of the contested decision). Ryanair does not dispute those figures.

Accordingly, the Commission did not infringe point 49(a) of the Temporary Framework.

The argument raised by Ryanair, based on a distinction between the concepts of illiquidity and insolvency, must be rejected as ineffective. Point 49(a) of the Temporary Framework does link eligibility for the aid to those concepts but makes it dependent, inter alia, on the undertaking in question facing serious difficulties in maintaining its operations.

As regards the claim that the Commission failed to demonstrate that it was not possible to envisage another, less distortive, measure for targeting the beneficiary's liquidity problems, that argument overlaps with the issue raised in the second part of the first plea, which will be examined below.

The present complaint must therefore be rejected as unfounded.

(b) Infringement of point 49(b) of the Temporary Framework

Ryanair complains, in essence, that the Commission infringed point 49(b) of the Temporary Framework in that it did not demonstrate the systemic nature of DLH for the German economy.

The Commission, supported by the Federal Republic of Germany and DLH, disputes that line of argument.

Point 49(b) of the Temporary Framework provides that the planned recapitalisation measure must be in the common interest. The existence of such a common interest may be shown if the measure at issue is aimed at avoiding social hardship and market failure due to a significant loss of employment, the exit of an innovative or a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned.

The Commission noted in paragraph 99 of the contested decision that DLH was of systemic importance for the German economy in several respects, namely, notably, for employment, connectivity and foreign trade, and that, therefore, it was in the common interest to intervene. In particular, it is apparent from paragraphs 36 to 38 of the contested decision that, first, DLH is a major employer, with more than 135 000 staff, including 73 000 at the airport hubs in Germany. Second, given that it operates flights to 301 destinations in 100 countries, DLH plays an important role in Germany's connectivity, not only for short-haul but also for long-haul flights. Third, DLH contributes to a significant part of the volume of foreign trade by air freight in Germany, which is of great importance for an export-oriented economy such as that of Germany. In addition, it is apparent from paragraph 14 of the contested decision that DLH's air freight services also played a vital role in the transport of protective masks and medical material from China to Europe during the COVID-19 pandemic. Lastly, paragraph 36 of the contested decision shows that DLH's operations make an important contribution to the budget of the State in the form of social security contributions, income tax payments and taxes on air transport.

It must be stated that Ryanair does not dispute those figures, but argues, in essence, that they are not sufficient to show that DLH is of systemic importance for the German economy. According to Ryanair, the concept of a systemically important company within the meaning of point 49(b) of the Temporary Framework must be interpreted as referring to undertakings whose failure would lead to the collapse of the entire sector in which they operate.

However, the interpretation advocated by Ryanair cannot succeed. There is nothing in the wording of point 49(b) of the Temporary Framework to suggest that only undertakings whose exit from the market would lead to the collapse of an entire sector are eligible for aid. Furthermore, an overall reading of point 49(b) of the Temporary Framework, and in particular of the examples of cases in which it is in the common interest to intervene, such as the risk of social hardship, of a significant loss of employment or even of disruption to an important service, shows that the interpretation put forward by Ryanair is too restrictive.

In support of that interpretation, Ryanair refers in addition to the Commission's decision-making practice in the financial sector and to the State aid rules applicable in that sector (in particular, the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2013 C 216, p. 1), and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338). In that regard, it is sufficient to observe that the legality of the contested decision must be assessed solely in the context of Article 107(3)(b) TFEU and the Temporary Framework, and not in the light of an alleged earlier practice (see, to that effect, judgment of 27 February 2013, *Nitrogénművek Vegyipari* v *Commission*, T-387/11, not published, EU:T:2013:98, paragraph 126 and the case-law cited); nor indeed should it be assessed in the light of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, or Directive 2013/36, referred to by Ryanair, since they are not applicable in the present case.

The other arguments put forward by Ryanair must also be rejected.

First, contrary to what Ryanair maintains, the Commission was under no obligation to assess whether DLH could easily be replaced by other airlines. Such a requirement is not set out in point 49(b) of the Temporary Framework, which is the rule allegedly infringed.

Second, the fact that the Commission did not provide any market share for DLH in the contested decision in order to prove its systemic importance for the German economy is not capable of invalidating the Commission's analysis on that point. An undertaking's systemic importance may be established on the basis of many other factors, such as those summarised in paragraph 101 above, which establish to the requisite legal standard that the condition laid down in point 49(b) was satisfied.

Third, Ryanair's argument that the Commission relied on the information provided by the Federal Republic of Germany, without performing its own 'autonomous' assessment, has no basis in fact. It is apparent from footnotes 25 and 26 to the contested decision that the Commission also verified certain information by reference to independent sources, such as IATA. In addition, it is apparent from paragraph 99 of the contested decision that the Commission assessed the evidence submitted by the Federal Republic of Germany and found it to be reliable.

Fourth, Ryanair complains that the Commission failed to examine the possibility of a reduction in the size or operations of DLH. However, it must be observed that point 49(b) of the Temporary Framework does not prescribe such a condition for eligibility.

Consequently, this complaint must be rejected as unfounded.

(c) Infringement of point 49(c) of the Temporary Framework

In the first part (third complaint) of its first plea, Ryanair claims in essence that the Commission infringed point 49(c) of the Temporary Framework by reaching the conclusion that DLH was unable to obtain financing on the markets at affordable terms and that, in that regard, the Commission failed to take account of all the relevant factors. Condor, in the second part (first complaint) of its first plea, submits that the Commission's analysis in that respect is incomplete and insufficient and therefore reveals the existence of serious doubts.

The Commission, supported by DLH, disputes those arguments. It contends, in essence, that the applicants have not adduced any concrete evidence that market financing was available to the beneficiary at affordable terms, taking account of the latter's financing needs and the time constraints.

Point 49(c) of the Temporary Framework states that, in order to be eligible for a recapitalisation measure, the beneficiary must, inter alia, be unable to find financing on the markets at affordable terms.

In paragraphs 21 to 24 and 100 of the contested decision, the Commission concluded that that condition was fulfilled on the ground, inter alia, that DLH would be unable to obtain financing on the debt markets since investors would not be willing to provide funds without sufficient securities to protect their claims in the event of default. According to the Commission, DLH would not have had sufficient collateral for securitised debt instruments over the entire amount at issue. In addition, the Commission stated that the total amount of EUR 9 billion needed to preserve the continuity of the group's economic activity during and after the COVID-19 outbreak exceeded the total volume of debt issued in Europe in the preceding months.

Ryanair counters, in essence, that the Commission failed to examine whether it was possible for DLH to find at least part of its financing on the markets by offering collateral for securitised debt, such as its fleet of aircraft, its slots or its frequent-flyer programme.

In that regard, it must be stated that the question of whether DLH was unable to obtain financing on the markets at affordable terms involves complex economic assessments relating to the beneficiary's overall financial situation and the functioning of the financial markets, with the result that the review conducted by the Courts of the European Union of that type of assessment is limited. However, in accordance with the case-law referred to in paragraph 77 above, the Courts of the European Union must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

In the present case, it must be stated, as Ryanair has done, that, in the period preceding the adoption of the contested decision, the Lufthansa Group owned 86% of its fleet of 763 aircraft, that 87% of the aircraft it owned were unencumbered, and that the book value of that fleet was approximately EUR 10 billion. Those findings emerge in a clear, unequivocal and consistent manner from several items of evidence in the file in Case T-34/21, namely a statement of 19 March 2020 by the chief financial officer of DLH itself, the Oxera report I and the Moody's and Exane reports. The Oxera report I and the Moody's report also show that DLH was able to use its fleet as collateral in order to raise funds on the financial markets.

Furthermore, the Oxera report I states that the book value of the Lufthansa Group's spare parts was EUR 2.3 billion at the end of 2019. That report also shows that, taking into account a potential asset value decline of 20% to 50% due to the COVID-19 pandemic and a loan-to-value ratio (LTV) of 40% to 60%, DLH could have raised between EUR 1 and 3.7 billion in debt financing by using its aircraft and spare parts as collateral.

The Commission and the interveners do not dispute the accuracy and reliability of those data.

In addition, it is apparent from the documents before the Court that Ryanair had drawn the attention of both the German Government and the Commission to that evidence, and in particular to the statement by DLH's chief financial officer referred to in paragraph 118 above, even before the contested decision was adopted, by letters of 1 April 2020 and 3 April 2020 respectively.

In the contested decision the Commission merely asserted that DLH did not have 'sufficient collateral' to obtain financing instruments on the markets 'over the entire amount' of the aid.

However, first, the Commission did not substantiate that assertion in any way. There is nothing in the contested decision to indicate that the Commission assessed the possible availability of collateral, such as DLH's unencumbered aircraft, their value and the terms for any loans that it may have been possible to obtain on the financial markets against such collateral.

Yet that is an important aspect of the condition laid down in point 49(c) of the Temporary Framework. An evaluation of an undertaking's inability to obtain financing on the markets at affordable terms implies determining, in particular, whether that undertaking could offer collateral allowing it to have access to such financing. Furthermore, the terms for such financing depend, inter alia, on the type and value of such collateral. There is nothing in the contested decision to show that the Commission examined those issues.

Second, the Commission's assertion in paragraph 22 of the contested decision that the 'collateral' – not specified in the contested decision – would not be sufficient to cover the 'entire amount' of the funds necessary is based on a false premiss, that the financing that can be obtained on the markets must necessarily cover all the beneficiary's needs.

In that regard, it must be observed, as Condor has done, that the Commission's reference in paragraph 22 of the contested decision to a total amount of 'EUR 9 billion', as the amount that DLH would allegedly be unable to obtain on the markets, does not match the amount of the measure at issue, determined at EUR 6 billion (paragraph 26 of the contested decision). Consequently, the Commission in any event based its assertion on a higher amount than that constituting the object of the measure at issue, which calls into question the very basis of its assessment.

Furthermore, neither the wording, purpose or context of point 49(c) of the Temporary Framework provide support for the view expressed by the Commission in paragraph 22 of the contested decision.

There is nothing in the wording of point 49(c) of the Temporary Framework to show that the beneficiary must be incapable of finding financing on the markets for the entirety of its needs.

As regards the purpose of point 49(c) of the Temporary Framework and the context of which it is part, it should be observed that that condition is intended to limit State intervention and, thereby, the use of public resources, solely to those cases where the beneficiary is unable to obtain financing on the financial markets at affordable terms. That purpose would be undermined if public resources were to be spent in order to cover the totality of the funding needed by the undertaking concerned, even though it was capable of obtaining a non-negligible part of its needs, on the markets.

That finding is corroborated both by point 44 of the Temporary Framework, which states that recapitalisations must not exceed the minimum needed to ensure the viability of the beneficiary, and, more widely, by the general principle of proportionality, which requires that measures adopted by EU institutions must not exceed what is appropriate and necessary to attain the objective pursued (see, to that effect, judgments of 17 May 1984, *Denkavit Nederland*, 15/83, EU:C:1984:183, paragraph 25, and of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 144 and the case-law cited).

Furthermore, the Court has had occasion to hold that, in presuming that no financial establishment would act as a guarantor for a firm in difficulty, and, therefore, that no corresponding guarantee premium benchmark could be found on the market, the Commission, inter alia, failed to fulfil its obligation to carry out an overall assessment, taking into account all the relevant evidence in the case enabling it to determine whether the beneficiary would manifestly not have obtained the necessary financing on the markets (see, to that effect and by analogy, judgments of 12 March 2020, *Elche Club de Fútbol* v *Commission*, T-901/16, EU:T:2020:97, paragraph 132, and of 12 March 2020, *Valencia Club de Fútbol* v *Commission*, T-732/16, EU:T:2020:98, paragraph 134). It follows that the Commission cannot presume, without substantiating its findings to the requisite legal standard, that an undertaking, such as the beneficiary in the present case, would not have access to the financial markets.

In the present case, the Commission failed to assess whether the beneficiary could have raised a non-negligible part of the necessary financing on the markets. It therefore failed to take into account all of the relevant evidence for the purpose of examining the condition laid down in point 49(c) of the Temporary Framework.

None of the arguments put forward by the Commission calls that finding into question.

First, the Commission's argument that it would have been impossible for DLH to obtain possible financing on the markets, including against the collateral referred to in paragraphs 118 and 119 above, in a short period of time and in the financial context affected by the COVID-19 pandemic, cannot succeed. The contested decision does not show that the Commission analysed the time required for obtaining possible financing on the markets against that collateral. In addition, according to the statement by DLH's chief financial officer of 19 March 2020, the Lufthansa Group was 'financially well equipped to cope with an extraordinary crisis situation such as [the COVID-19 crisis]', in particular because it owned '[86%] of the Group's fleet, which is largely unencumbered and [had] a book value of around [EUR] 10 billion'. Moreover, the Oxera report I factors in a significant decrease in the value of its collateral precisely because of the pandemic.

Second, the Commission criticises the applicants for failing to demonstrate that DLH could obtain such financing on the markets 'at affordable terms'. However, it is for the Commission to demonstrate, as required by point 49(c) of the Temporary Framework, that the beneficiary is not able to find financing on the markets at affordable terms. An applicant cannot be required to carry out tasks which, properly speaking, belong to the instruction and investigation of the case (see, to that effect and by analogy, judgment of 9 April 2019, *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, not published, EU:T:2019:232, paragraph 171). In the present case, the contested decision did not in any way examine the conditions in which the beneficiary could have obtained financing, if at all, on the markets against the abovementioned collateral.

Furthermore, as Ryanair submits, the Commission's argument amounts to imposing an unreasonable burden of proof on the applicant by requiring it, in reality, to produce a private funding offer addressed to DLH in order to establish the conditions in which such financing would have been available to it. However, it is not permissible to impose an unreasonable burden of proof on an applicant (see, to that effect and by analogy, judgment of 8 July 2008, *Huvis* v *Council*, T-221/05, not published, EU:T:2008:258, paragraph 78).

Accordingly, it must be found that the Commission failed to take account of all the relevant evidence that must be taken into consideration in order to assess the compliance of the measure at issue with point 49(c) of the Temporary Framework.

Consequently, the complaint made by Ryanair based on an infringement of point 49(c) of the Temporary Framework must be upheld, as must, as a result and a fortiori, that of Condor alleging the existence of serious doubts in that regard, without it being necessary to examine their other arguments put forward in relation to this issue.

3. The existence of other measures that were more appropriate and less distortive to competition

Ryanair argues in essence that the Commission infringed point 53 of the Temporary Framework in that it failed to examine whether the measure at issue was the most appropriate and the least likely to distort competition. Accordingly, the Commission did not compare the recapitalisation instruments available and did not analyse the distortions to competition generated by the measure at issue or by 'other possible aid instruments'.

The Commission, supported by DLH, contests Ryanair's arguments.

Section 3.11.3 of the Temporary Framework, entitled 'Types of recapitalisation measures', contains points 52 and 53. Point 52 sets out the recapitalisation measures that the Member States may adopt during the COVID-19 pandemic, namely equity instruments, in particular the issuance of new common or preferred shares, and instruments with an equity component (referred to as 'hybrid capital instruments'), in particular profit participation rights, silent participations and convertible secured or unsecured bonds.

Point 53 of the Temporary Framework states:

'The State intervention can take the form of any variation of [those] instruments, or a combination of equity and hybrid capital instruments. … The Member State must ensure that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary's recapitalisation needs, while at the same time being the least distortive to competition.'

In paragraphs 104 to 108 of the contested decision, the Commission described the recapitalisation measure at issue, explaining that it was a combination of equity and hybrid capital instruments. It observed, in particular, that the silent participation was a flexible instrument as regards the participation of the silent partner in the profits and losses of the beneficiary or in its decision-making. The Commission also explained that neither the ESF nor DLH had any interest in the ESF holding more than 20% of the equity capital, which is why they had chosen the specific structure of the recapitalisation at issue. According to the Commission, the combination of the instruments chosen would make it possible to restore the capital structure of DLH and allow it to return as soon as possible to the capital markets, while limiting the State participation to the minimum necessary to protect the financial interests of Germany, without acquiring control over DLH.

In the present case, it must be stated, as the Commission has done, that a recapitalisation measure and the conditions attached thereto may be regarded as being appropriate to address the recapitalisation needs of the beneficiary concerned, while being the least distortive to competition, in terms of point 53 of the Temporary Framework, as long as they meet the various requirements laid down for that purpose in that framework, which relate to the amount of the recapitalisation, the remuneration and exit of the State, governance and the prevention of undue distortions to competition, and to the exit strategy of the State from the participation resulting from the recapitalisation. The reference in point 53 of the Temporary Framework to the 'conditions attached [to the measure at issue]' refers to requirements, such as those mentioned in the previous sentence, whose very purpose is to ensure that the measure at issue and the conditions attached thereto do not exceed what is appropriate to address the recapitalisation needs of the beneficiary concerned, while being the least distortive to competition. Consequently, if the abovementioned requirements are satisfied, the recapitalisation instrument chosen must be regarded as complying with point 53 of the Temporary Framework.

As a result, this complaint is tributary to the arguments raised by Ryanair in the other parts of its first plea, which concern some of the other requirements referred to in paragraph 144 above, namely the amount of the recapitalisation (third part of the first plea), the remuneration and exit of the State (fourth part of the first plea), and also governance and the prevention of undue distortions to competition (fifth and sixth parts of the first plea). The merits of the present complaint are therefore dependent on the review of those other parts of the first plea, which are examined below.

In so far as Ryanair, in the reply and at the hearing, also appears to criticise the Commission for having failed to examine whether a type of aid measure other than a recapitalisation would have been more appropriate and less likely to give rise to distortions to competition, it must be held, without prejudice to the admissibility of that line of argument, that it is too general and abstract. In its written pleadings, Ryanair simply referred to 'other possible aid instruments', without, however, explaining exactly what those other instruments were and why they would be more appropriate and less distortive to competition than the notified measure. At the hearing, Ryanair stated that in its view the Commission should have taken account of 'the entire universe of alternative funding options that were available' and 'all available options', while referring, without any further explanation, to bridging or short-term loans as a possible alternative to the notified measure.

However, according to the case-law, the Commission is not required to take a decision on every other possible aid measure. It is not required to prove, positively, that no other conceivable aid measure, which by definition would be hypothetical, would be more appropriate and less distortive to competition (see, to that effect and by analogy, judgment of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 94 and the case-law cited).

It is true, as Ryanair states, that the Court of Justice has also held that when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 50 and the case-law cited). However, there is nothing in the present case to indicate that the Commission was faced with a choice between several appropriate measures, as set out in that case-law.

Accordingly, the argument that Ryanair seems to put forward, which is summarised in paragraph 146 above, must be rejected as unfounded.

4. *The amount of the aid*

In the third part of its first plea, Ryanair, in essence, raises three complaints concerning the amount of the aid, related, first, to the interpretation of point 54 of the Temporary Framework, second, to the application of that point to this case, and third, to certain public statements made by DLH. That last complaint and a similar one raised by Condor in the second part of its first plea overlap.

(a) *Interpretation of point 54 of the Temporary Framework*

Ryanair submits that the Commission incorrectly equated the concept of the viability of the beneficiary, within the meaning of point 54 of the Temporary Framework, with access by that beneficiary to the capital markets, thereby failing to assess the latter's prospects of returning to profitability and the internal measures that DLH could adopt for that purpose. Referring to the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines on aid for rescuing and restructuring'), the Communication from the Commission on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ 2009 C 195, p. 9) and the Communication from the Commission entitled 'The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ 2008 C 270, p. 8) (together, 'the communications applicable in the context of the financial crisis'), Ryanair argues that the Commission failed to carry out an assessment of DLH's return to profitability on the basis of its business plan, as well as according to a base-line and worst-case scenario.

The Commission, supported by DLH, contests Ryanair's arguments.

Point 54 of the Temporary Framework states that in order to ensure the proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary concerned, and should not go beyond restoring the capital structure of the beneficiary to that pre-dating the COVID-19 outbreak, namely the situation on 31 December 2019.

Ryanair and the Commission disagree as to whether the Commission, in determining whether the measure at issue exceeds the minimum needed to ensure the 'viability' of the beneficiary concerned, must assess whether that measure enables the beneficiary to return to profitability.

In that regard, it should be noted that point 54 of the Temporary Framework makes no reference to the profitability of the beneficiary concerned.

Furthermore, several parts of the Temporary Framework show that the principal objective of the planned aid measures is, in essence, to ensure that the beneficiaries concerned are able to cover their liquidity needs in order to allow operational continuity during and after the COVID-19 pandemic. Accordingly, point 9 of the framework states that well-targeted public support is needed 'to ensure that sufficient liquidity remains available in the markets' and 'to preserve the continuity of economic activity during and after the COVID-19 outbreak'. Similarly, according to point 11, the framework 'sets out the possibilities Member States have under EU rules to ensure liquidity and access to finance for undertakings … that face a sudden shortage in this period in order to allow them to recover from the current situation'. In turn, point 18 of the Temporary Framework provides that 'State aid is justified … for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability'.

The Temporary Framework is thus not intended to restore 'a positive return' for the beneficiary or its profitability, or to ensure that it becomes profitable as a result of the aid, but merely to guarantee its operational continuity during and after the COVID-19 pandemic, in particular by re-establishing the capital structure that existed before the outbreak of the pandemic.

Consequently, point 54 of the Temporary Framework must be interpreted as meaning that the amount of recapitalisation must be restricted to the minimum needed to ensure that the beneficiary remains operational during and after the COVID-19 pandemic, while restoring the capital structure that it had before that crisis, that is to say, that corresponding to the situation on 31 December 2019.

That finding is not called into question by the arguments put forward by Ryanair based on an analogy with the Guidelines on aid for rescuing and restructuring or the communications applicable in the context of the financial crisis. There are in fact no grounds for such an analogy.

First, an analogy with the communications applicable in the context of the 2008 financial crisis is not appropriate since, as the Commission observes, that crisis was caused, at least in part, by the excessive risks that were taken by various financial institutions, whereas the COVID-19 pandemic is a health crisis.

Second, it is also necessary to reject the analogy with the Guidelines on aid for rescuing and restructuring, by which Ryanair seeks to impose a duty on the Commission to ascertain whether the beneficiary has adopted internal measures to downsize its assets and its operations. The objective of State support in the context of State aid for rescuing and restructuring is to remedy previously existing internal difficulties affecting the beneficiary concerned, which is an 'undertaking in difficulty'. Accordingly, rescue aid is intended to make it possible to keep that beneficiary afloat for the short time needed to work out a restructuring or liquidation plan, which normally entails reductions in or abandonment of the affected activities (points 26 to 30 of the Guidelines on aid for rescuing and restructuring). By contrast, a beneficiary of recapitalisation aid in the context of the COVID-19 pandemic has not played any role in the events undermining its viability and will therefore not necessarily need to restructure in order to overcome the temporary difficulties caused by the COVID-19 pandemic.

Consequently, this complaint must be rejected as unfounded.

(b) *The application of point 54 of the Temporary Framework in the present case*

Ryanair argues that the Commission made a number of manifest errors of assessment in calculating the amount of aid needed to ensure the viability of DLH.

Before examining those arguments, contested by the Commission and DLH, it is appropriate to summarise the considerations in the contested decision which formed the basis for the Commission's finding that the measure at issue complied with point 54 of the Temporary Framework.

In the first place, the Commission stated in paragraphs 122 and 123 of the contested decision that the Lufthansa Group had a positive cash position of EUR 2-3 billion on 31 December 2019 (that is to say, before the COVID-19 pandemic). At the time the contested decision was adopted, the Lufthansa Group forecast a negative cash position on 31 December 2020. Following the proposed recapitalisation the cash position of the group was expected to increase to EUR 1-2 billion on 31 December 2020.

In the second place, in paragraphs 124 to 126 of the contested decision the Commission examined the impact of the measure at issue on the Lufthansa Group's net debt-to-equity ratio and compared it with the debt-to-equity ratio of a sample of peer airlines as it stood on 31 December 2019. It thus found that the expected debt-to-equity ratio of the Lufthansa Group on 31 December 2020, following the recapitalisation would be significantly higher than the third quartile of the ratio of the companies included in the sample as at 31 December 2019.

In the third place, the Commission noted that its analysis was corroborated by the development of the dynamic gearing ratio, namely the ratio of net financial liabilities to Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA) of the Lufthansa Group.

(1) Appropriateness of the debt-to-equity ratio

Ryanair submits in essence that the Commission was wrong to assess the impact of the measure at issue on DLH's financial position solely as regards the expected evolution of the net debt-to-equity ratio, instead of considering a range of other relevant financial parameters. It argues that credit rating agencies do not typically take that ratio into account when assessing the solvency of airlines.

The Commission disputes that argument.

As is apparent from paragraph 166 above, the Commission examined the impact of the measure at issue on the debt-to-equity ratio of the Lufthansa Group in order to verify that that measure did not exceed the minimum needed to ensure the viability of the beneficiary. In particular, the examination of the effect of the measure at issue on that ratio is intended to assess the expected changes to DLH's credit rating following the planned recapitalisation. Indeed, access to market financing is, to a certain extent, dependent on that rating. The question therefore arises as to whether the debt-to-equity ratio is an appropriate financial measure for forecasting changes to the beneficiary's credit rating following the measure at issue.

In that regard, it should be noted that the determination and analysis of the relevant economic indicators for evaluating whether the aid at issue exceeds the minimum needed to ensure the viability of the beneficiary concerned involves a complex economic assessment. Judicial review of such decisions is therefore confined to establishing that the rules of procedure and those relating to the duty to give reasons have been complied with, that the facts are accurate, and that there has been no manifest error in the assessment of the facts and no misuse of powers.

The parties agree that the debt-to-equity ratio describes a company's capital structure. That ratio shows, inter alia, the relative proportion of debt and equity used to finance a company's operations and thus its level of leverage. Accordingly, a high debt-to-equity ratio shows high leverage, while a low debt-to-equity ratio indicates limited leverage. In general, a company with a high debt-to-equity ratio is regarded as a higher risk for lenders and investors.

Ryanair's arguments are not capable of demonstrating that the Commission made a manifest error of assessment in basing its analysis on that ratio in particular. Although Ryanair claims that credit rating agencies 'typically' consider other ratios, such as the ratio of net financial liabilities to EBITDA, debt to revenue, profitability, liquidity and solvency ratios, cash burn (the total amount of liquidity over a period of months in which that liquidity is exhausted), and qualitative aspects, such as a company's business profile, its financial policy and the strength of the competition, it stated in its answer to the measure of organisation of procedure that in the airline industry the debt-to-equity ratio provided a 'limited measure' of a company's financial leverage. It also explained that the net debt-to-equity ratio and the ratios of net debt to EBITDA and of debt to revenue could provide useful insights into a company's financial health. Accordingly, Ryanair itself appears to accept that the debt-to-equity ratio is not entirely irrelevant for the purpose of assessing the impact of the measure at issue on the beneficiary's solvency.

It is also apparent from the Commission's reply to a measure of organisation of procedure that a company's capital structure is taken into account by credit rating agencies and that, to that end they, inter alia, take into consideration the net debt-to-equity ratio. The Commission refers in that regard to several online sources from rating agencies.

On the basis of the documents before the Court, it appears in fact that rating agencies take many financial parameters into account when assessing the credit rating of a particular company and that each agency may use different parameters, with the result that there is no single list of parameters that is uniformly referred to. In addition, according to those documents, the net debt-to-equity ratio may be among the parameters taken into account by certain rating agencies.

As regards the question whether the net debt-to-equity ratio was the most appropriate for measuring the expected impact of the recapitalisation on the beneficiary's credit rating and whether the Commission should have also taken other parameters into account, it is sufficient to note, as does the Commission, that the latter institution also analysed the impact of the recapitalisation on the dynamic gearing ratio, which represents the ratio of net debt to EBITDA, as the parties confirmed at the hearing. The dynamic gearing ratio is a coverage ratio and, according to Ryanair itself, coverage ratios are widely used by credit rating agencies.

Consequently, Ryanair has not shown that the Commission made a manifest error of assessment by using the net debt-to-equity ratio and the dynamic gearing ratio as reference points in order to analyse whether the measure at issue exceeded the minimum needed to ensure the viability of the beneficiary.

(2) The sample of airlines

As observed in paragraph 166 above, the Commission went on to compare DLH's expected debt-to-equity ratio following its recapitalisation with that of a sample of 10 airlines as of 31 December 2019, 4 of which had a credit rating ranging between B+ and BBB. The Commission thus found that the ratio forecast for DLH was significantly higher than that of the third quartile of the distribution of the same ratio of the airlines included in the sample, namely the worst performing companies.

Ryanair contests that assertion. It argues in the reply, referring to certain rating agency reports, that six airlines – or five of them, according to its reply to the measure of organisation of procedure – included in the sample had a credit rating above or slightly below 'investment' grade. Consequently, in Ryanair's view, the approach followed in the contested decision cannot be considered to be conservative and it could not be ruled out that less aid might have been sufficient to restore DLH's access to the capital markets by the end of 2020.

In that regard, it must be held that this complaint is belated and is therefore inadmissible. Accordingly, under Article 84(1) of the Rules of Procedure of the General Court, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application and which is closely connected therewith must be declared admissible (see judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 66 and the case-law cited).

In the present case, since Ryanair did not raise any argument in the application concerning the characteristics of the companies included in the sample, that argument, put forward for the first time in the reply, cannot be regarded as amplifying a line of argument put forward previously, within the meaning of the case-law cited above.

In those circumstances, this complaint must be rejected as inadmissible.

In any event, it should be observed that the Commission found that the expected net debt-to-equity ratio of the Lufthansa Group as at 31 December 2020, following the recapitalisation of DLH, would be significantly higher than the third quartile of the ratio of the airlines included in the sample as at 31 December 2019. It is thus the case that the net debt-to-equity ratio of the beneficiary concerned as a result of the measure at issue would still be far worse than that of the worst performing companies in the sample. The basis for the comparison used by the Commission was therefore cautious, or even conservative. In those circumstances, the question whether four of the airlines included in that sample had a credit rating ranging between B+ and BBB on 31 December 2019, as the Commission found in the contested decision, or five or six of them did, as Ryanair claims, is not capable of having a decisive influence on the conclusion reached by the Commission. This complaint is thus in any event unfounded.

(3) The credit rating necessary for access to the financial markets

The Commission stated in paragraph 125 of the contested decision that a BBB credit rating was 'normally considered as the minimum rating allowing a company to easily get access to market financing'. It explained in paragraph 127 of the decision that DLH expected to return to an 'investment' grade at a future date, which was redacted. The Commission thus found that the recapitalisation would enable DLH to address the negative effects of the COVID-19 pandemic and restore its access to the financial markets.

Ryanair submits that a BBB credit rating does not represent the minimum rating that enables the beneficiary to access the financial markets. Even a rating below that level would permit the beneficiary to gain access to those markets. Consequently, by accepting an inappropriate benchmark, the Commission overestimated the amount of aid needed.

In that regard, it is apparent from the Oxera report I that a BBB credit rating is higher than that which investors usually require for airlines to be able to obtain financing on capital markets. The report explains that a study of a sample of European and North American airlines showed that before the COVID-19 pandemic the average credit rating in the corresponding sector that permitted access to the capital markets was Ba2, or two points below the rating of BBB.

The Commission does not dispute the fact that a credit rating of Ba2 is sufficient to enable airlines to obtain market financing. However, it submits that it did not make a manifest error of assessment in using the BBB credit rating as the benchmark since such a rating would enable the beneficiary concerned to find financing on the markets at affordable terms.

In that regard, it should be borne in mind that, according to point 49(c) of the Temporary Framework, an undertaking is eligible for a recapitalisation measure only if it 'is not able to find financing on the markets at affordable terms'. It follows, by necessary implication, that such a measure must be limited to the minimum needed to enable the undertaking to obtain financing on the markets at affordable terms. Ryanair does not dispute the fact that a BBB credit rating permits financing at affordable terms.

Furthermore, and in any event, as explained in paragraph 183 above, the Commission's analysis of the impact of the measure at issue on the debt-to-equity ratio was also based on a comparison with a sample of airlines, which showed that DLH's ratio after the aid would still be worse than that of its poorest performing competitors. That comparison was based on the third quartile of the ratio of the companies included in the sample as at 31 December 2019, which demonstrates that the approach adopted by the Commission was conservative.

Accordingly, this complaint must be rejected as unfounded.

(4) Inadequate analysis of DLH's business plan

Ryanair submits that the Commission did not analyse DLH's business plan to the requisite legal standard. First, the Commission should have examined whether DLH was able to further reduce its costs in the short term. Second, it should have assessed whether DLH could have structurally lowered its cost base and increased its profitability in the short- to medium-term to minimise the amount of the aid.

However, as has already been pointed out in paragraph 161 above, the Temporary Framework does not seek, when aid is granted, to oblige the beneficiary to reduce its costs or to carry out a restructuring.

Consequently, the present complaint must be rejected as unfounded.

(5) The sensitivity tests

Ryanair argues that the sensitivity tests carried out by the Commission in paragraphs 129 and 130 of the contested decision are 'insufficient' and that it should have carried out 'a wide range of stress tests'.

However, Ryanair's argument is not clear and does not enable the Court to assess its merits. The applicant does not criticise the sensitivity tests carried out by the Commission as such, but merely states that they are 'insufficient'; nonetheless, it does not specify the nature or scope of the additional tests that it demands.

Under Article 76(d) of the Rules of Procedure, an application is to contain, inter alia, a summary of the pleas in law relied on. In accordance with the case-law, this means that the information given in the application must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if appropriate without further information. Consequently, it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself, in order to guarantee legal certainty and the sound administration of justice (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 356 and the case-law cited). However, that is not the case here.

The present complaint must therefore be rejected as inadmissible.

(6) The comparison with other airlines

Ryanair claims that a 'quick comparison' with low-fare airlines and even certain legacy airlines such as IAG suggests that the aid at issue went beyond its stated purpose of avoiding DLH's insolvency owing to the fact that it changed 'the ranking order of airlines' in that regard.

That argument lacks clarity. Ryanair's written pleadings do not show, with the requisite clarity and precision, what that 'quick comparison' consists of and whether it is based on comparable situations. Nor is any greater clarity provided by the mere reference to the fact that the aid at issue meant that DLH 'progressed in the ranking order of airlines with the largest capacity to withstand full traffic stop'.

Consequently, this complaint must be rejected as inadmissible (see the case-law cited in paragraph 196 above).

(c) The public statements by DLH

The applicants argue that the remarks made by the chief executive officer of DLH on 3 June 2020, during an analysts' conference, that 'the group's bailout from the German government, of EUR 9 billion, is larger than what it needs to survive, and is designed to ensure the airline maintains a "global leading position"', showed that the aid was not limited to the minimum needed. They complain that the Commission failed to take that statement into account. Also, they both allege a failure to state reasons in that regard. Ryanair in addition cites comments by DLH's main shareholder, reported by the *Financial Times* on 17 June 2020 in an article entitled 'Lufthansa bailout jeopardy as top shareholder seeks other options', that a deeper restructuring of DLH was a credible alternative to the aid. Condor refers to another statement by DLH's chief executive officer of 21 January 2021, reported in a *Politico* article of the same date, headlined 'Lufthansa CEO: Airline unlikely to need full €9B German aid package'.

In the first place, as regards the comments made by the chief executive officer of DLH on 3 June 2020, the Commission does not dispute their content. It explains that it was aware of them and that it had questioned the German authorities in that regard during the administrative procedure. However, according to the Commission, given that a concrete assessment of the proportionality of the aid based on the Lufthansa Group's data and financial forecasts showed that the measure at issue complied with all the conditions laid down in the Temporary Framework, those comments were not by themselves capable of justifying a different finding.

First, as regards the complaint alleging a failure to provide reasons, it should be observed that, according to the case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. Accordingly, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 22 June 2004, *Portugal* v *Commission*, C-42/01, EU:C:2004:379, paragraph 66; of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79; and of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 125).

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. 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 internal market (see, to that effect, judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 65).

In addition, according to the case-law, although the Commission is not obliged to adopt a position on all the arguments relied on before it, it is nevertheless required to set out the facts and the legal considerations having decisive importance in the structure of the decision concerned (see judgment of 8 April 2014, *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraph 132 and the case-law cited).

In the present case, it is true that the Commission neither referred to nor commented on the remarks at issue in the contested decision. However, given that the examination by the Commission of the compatibility of the measure at issue with the internal market is based on a specific, quantified and verifiable assessment of the conformity of that measure with the requirements laid down in the Temporary Framework, it must be held that the comments made by an executive of the beneficiary concerned are not of decisive importance in the scheme of the contested decision. Consequently, the Commission's obligation to state reasons does not go so far as to require it to provide specific reasoning with regard to the comments made by an executive of that beneficiary.

Accordingly, the complaint alleging a failure to state reasons must be rejected.

Second, as to substance, it must be held that those remarks are not by themselves capable of invalidating the Commission's finding that the amount of the aid was limited to the minimum needed to ensure the viability of the beneficiary. That finding is based on an economic analysis of certain financial parameters, whereas the remarks in question, which might, moreover, pursue a variety of different objectives, contain only general assertions.

In the second place, the same reasoning applies to the remarks made by DLH's main shareholder.

In the third place, as regards the statement by the chief executive officer of DLH of 21 January 2021, it is sufficient to observe, in addition to what is stated above, that the lawfulness of the contested decision cannot in any event be challenged on the basis of events occurring after the adoption of that decision (see judgment of 9 February 2022, *Sped-Pro* v *Commission*, T-791/19, EU:T:2022:67, paragraph 82 and the case-law cited).

Consequently, the applicants' complaints concerning the statements made by DLH must be rejected as unfounded.

(d) Whether an additional indirect advantage was granted to the Lufthansa Group

Condor argues that the measure at issue enabled DLH to gain preferential access to the financial markets and to lower its financing costs. The Commission failed to assess the indirect advantages of the measure at issue, demonstrated by the fact that after the aid was authorised DLH issued bonds worth a total of EUR 3.2 billion at very low interest rates of between 2% and 3.75%.

The Commission replies that the very purpose of the measure at issue was to allow DLH to finance itself independently on the credit markets in order to overcome the effects of the COVID-19 pandemic.

In that regard, it must be borne in mind that the review of the lawfulness of a decision is to be carried out solely in the light of the factual and legal elements existing on the date of the adoption of the contested decision (see the case-law cited in paragraph 210 above). In the present case, Condor relies on events which occurred after the contested decision, which therefore have no relevance for the examination of the lawfulness of the contested decision.

In any case, the Court notes, as the Commission does, that the very purpose of the measure at issue was to allow DLH to finance itself on the credit markets. That advantage is therefore an inherent part of the measure at issue. Contrary to Condor's submission, that does not constitute an indirect or additional advantage.

Accordingly, this complaint must be rejected as unfounded.

In the light of the foregoing, it is therefore necessary to reject all the arguments raised by the applicants concerning the amount of the aid.

5. The remuneration and exit of the State

In the fourth part of its first plea, Ryanair argues in essence that the Commission infringed the conditions laid down in the Temporary Framework as regards the remuneration and exit of the State. That part consists of four complaints, which are examined below.

(a) The interest rate for the silent participations

Ryanair submits, in essence, that the Commission infringed the Temporary Framework by accepting a fixed rate of interest for the remuneration of the silent participations, whereas point 66 of the framework requires variable rates based on the one-year Interbank Offered Rate (IBOR) with the addition of a fixed risk premium that increases over time.

The Commission, supported by the French Republic and DLH, contests Ryanair's arguments.

The Temporary Framework lays down specific rules concerning the remuneration of equity instruments (points 60 to 64) and hybrid capital instruments (points 65 to 70). In the present case, as observed in paragraph 5 above, the measure at issue consists of an equity instrument (EUR 300 million) and two hybrid capital instruments, Silent Participations I and II. Ryanair challenges solely the remuneration of Silent Participations I and II in this complaint.

Under point 66 of the Temporary Framework the minimum remuneration of hybrid capital instruments until they are converted into equity-like instruments is to be at least equal to the base rate (one-year IBOR or equivalent as published by the Commission), plus a premium that is set out in a table under that point and which increases over time.

Accordingly, as the Commission indeed acknowledges, point 66 of the Temporary Framework in fact prescribes the application of variable rates for the remuneration of hybrid capital instruments.

In the present case, it is apparent from paragraphs 46 and 56 of the contested decision that the remuneration for Silent Participations I and II, which is the same in both cases, is as follows: 4% in 2020 and 2021; 5% in 2022; 6% in 2023; 7% in 2024; 8% in 2025 and 2026; and 9.5% in 2027 and the subsequent years. It is thus apparent, as the parties accept, that the remuneration for Silent Participations I and II is set at a fixed rate.

In paragraph 147 of the contested decision, the Commission explained that in order to compare the remuneration of Silent Participations I and II, expressed in fixed rates, with the minimum remuneration laid down in the Temporary Framework, expressed in variable rates, it converted the fixed rates into variable rates by taking into account market implicit swap rates on the date of the written request for the capital injection, namely 27 March 2020. The figures relating to that conversion are set out in Table 4 of the contested decision, as follows:

Remuneration SP I	1st year	2nd year	3rd year	4th year	5th year	6th year	7th year	8th year
(variable rates. 1-year IBOR +)	[*confidential*][1]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]
Difference with minimum TF margins	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]	[*confidential*]

In paragraph 148 of the contested decision, the Commission found that the remuneration for Silent Participation I was 'at least, on average […] higher than the minimum required under the Temporary Framework'. The Commission reached the same conclusion with respect to Silent Participation II (paragraph 154 of the contested decision).

In that regard, it should be noted that point 59 of the Temporary Framework provides that, as an alternative to the remuneration methodologies set out therein, it is possible to use other remuneration methods, provided that they lead overall to a similar outcome with regard to the incentive effects on the exit of the State and a similar impact overall on the State's remuneration.

The Commission was therefore entitled, in accordance with point 59 of the Temporary Framework, to accept fixed rates for the remuneration of the hybrid capital instruments at issue, as an alternative to the variable rates set out in the Temporary Framework, provided that the abovementioned conditions are satisfied.

It is therefore necessary to examine whether the methodology for the remuneration of Silent Participations I and II set out in the contested decision leads overall to a similar outcome to that intended by the Temporary Framework with regard to the incentive effects on the exit of the State and whether it has a similar impact overall on the State's remuneration.

That question involves complex economic assessments, such that the review of the Courts of the European Union is limited (see the case-law cited in paragraph 74 above).

In the present case, first, it is necessary to reject Ryanair's argument that the Commission erred in relying on interest rate swap contracts (swap rates) for the purpose of converting the fixed rates into variable rates. Ryanair does not dispute the fact that DLH was able to convert a fixed rate into a variable rate precisely by using such interest rate swap contracts and that, more generally, such conversions are frequently employed on the markets. Consequently, that method of conversion was a plausible means of determining whether the remuneration for Silent Participations I and II, based on fixed rates, would lead to a similar impact overall on the State's remuneration.

Second, it is apparent from Table 4 of the contested decision, reproduced in paragraph 225 above, that the remuneration as thus converted is higher for the first seven years than that provided for in the Temporary Framework, with the exception of that for the eighth year. It was on that basis that the Commission concluded that the 'average' remuneration as thus converted was higher than that provided for in the Temporary Framework. Contrary to Ryanair's argument, the reference to the 'average' of those rates is justified since it shows that the impact of the variable rates in question is 'similar overall' to, or even greater than, the remuneration laid down by the framework, for the purposes of point 59 thereof.

Third, Ryanair argues that fixed rates are more favourable to the beneficiary inasmuch as the risk of a significant increase in variable rates, in line with the one-year IBOR rate, as set out in the Temporary Framework, would be borne by the Federal Republic of Germany and not the beneficiary. It is true that changes in IBOR rates would normally be borne by the beneficiary concerned if the variable rates laid down in point 66 of the Temporary Framework were to be applied as such. However, as the Commission rightly observes, those rates can both increase and decrease, such that it was impossible to foresee, when the contested decision was adopted, whether, following that decision, the application of fixed rates would be more advantageous to the beneficiary.

Fourth, it is common ground that the fixed rates at issue increase over time, with the result that the incentive effects on the exit of the State from the beneficiary's capital, as required by point 59 of the Temporary Framework, are guaranteed.

Accordingly, the present complaint must be rejected as unfounded.

(b) The remuneration for Silent Participation I

Ryanair submits, in essence, that, in view of the high level of risk associated with Silent Participation I and its potentially unlimited maturity, the Commission should have required higher remuneration for that participation than for Silent Participation II.

The Commission disputes that line of argument.

In paragraph 149 of the contested decision, the Commission stated that Silent Participation I was treated as equity under International Financial Reporting Standards (IFRS) and that it had many features of equity-like instruments. This made it riskier for investors, owing to the fact that that hybrid capital instrument was very close to equity in terms of seniority, it was not convertible into shares, the payment of coupons was only at DLH's discretion and because it had a potentially unlimited maturity. The Commission thus found that the high remuneration for that participation, which was above the minimum required under point 66 of the Temporary Framework, took into consideration the additional risk borne by the State.

It is consequently clear, as Ryanair argues, that the risks associated with Silent Participation I are higher than those connected with Silent Participation II.

However, it remains the case that the remuneration for Silent Participation I, as converted into variable rates, is overall higher than that provided for in point 66 of the Temporary Framework (see paragraphs 224 to 235 above) and therefore complies with that latter point and with point 59 thereof. The mere fact that that remuneration is the same as that laid down for Silent Participation II does not cause it to be contrary to the requirements of the Temporary Framework.

This complaint must therefore be rejected as unfounded.

(c) The absence of a step-up mechanism for increasing remuneration

Ryanair argues that the Commission infringed points 61 and 68 of the Temporary Framework by not providing a step-up mechanism for increasing the remuneration for the equity participation and for Silent Participation II after its possible conversion into equity. The reasons put forward in the contested decision cannot justify that deviation from the requirements of the Temporary Framework. Consequently, the remuneration for the State accepted by the Commission, which is not accompanied by any step-up or similar mechanism, does not lead to a 'similar outcome' with regard to the incentive effects on the exit of the State, within the meaning of point 62 of the Temporary Framework.

The Commission, supported by the French Republic, disputes Ryanair's arguments, referring, in essence, to the grounds of the contested decision.

This complaint concerns the absence of a step-up mechanism for increasing the remuneration, first, in respect of the equity participation and, second, after the possible conversion of Silent Participation II into equity.

In the first place, as regards the remuneration for equity instruments, such as the equity participation, point 61 of the Temporary Framework states that, 'any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections'. That increase in remuneration may take the form of additional shares granted to the State or other mechanisms, and should correspond to a minimum 10% increase in the remuneration of the State four years after the capital injection, if the State has not sold at least 40% of its equity participation resulting from that injection. If, six years after the capital injection, the State has not sold in full its equity participation resulting from that injection, the step-up mechanism is to be activated again.

Point 62 of the Temporary Framework provides that the Commission may accept alternative mechanisms, provided they lead overall to a similar outcome with regard to the incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

In the present case, it is common ground that the remuneration for the equity participation does not provide for a step-up mechanism within the meaning of point 61 of the Temporary Framework.

Nevertheless, the Commission found in paragraph 142 of the contested decision that the 'overall structure' of the measure at issue constituted an 'alternative' step-up mechanism. In that regard, the Commission, in paragraph 140 of the contested decision, emphasised the interconnected nature of the three components of the measure at issue, which, in its view, justified taking into account their combined incentive effects regarding the State's exit. Accordingly, the Commission referred in paragraphs 139 and 141 of the contested decision to several factors: the significant discount at which the Federal Republic of Germany had acquired the shares in DLH; the fact that the presence of the State as a shareholder of DLH was undesirable for the beneficiary; the fact that Silent Participations I and II had increasing coupons; and that the likelihood of conversion of a part of Silent Participation II into shares increased with time, which would cause the dilution of existing shareholdings in favour of the State. It also referred to the behavioural commitments, in particular the prohibition on paying dividends, which would remain in force until the aid was redeemed in full. On the basis of those factors, the Commission concluded that the 'overall structure' of the measure at issue included sufficiently strong incentives for the exit of the State from the beneficiary's capital.

It is therefore necessary to examine whether the Commission was entitled to conclude, on the basis of the abovementioned factors, that the equity participation included an 'alternative' mechanism to that of the step-up, within the meaning of point 62 of the Temporary Framework. To that end, it is necessary to determine whether those factors overall lead to a similar outcome with regard to the incentive effects on the exit of the State and whether they have a similar impact overall on the State's remuneration, as required by point 62 of the Temporary Framework.

In that regard, it is important to point out that the Temporary Framework, in the version applicable *ratione temporis*, does not provide for any derogation from the obligation to require either a step-up mechanism or an alternative mechanism leading to the same result.

It must be stated that, in the present case, the equity participation is not accompanied by any step-up mechanism.

Furthermore, it should be observed, as Ryanair has done, that none of the grounds put forward in the contested decision demonstrates that the equity participation was accompanied by an 'alternative' mechanism to that of the step-up.

First, the Commission refers in the contested decision to the fact that the price of the shares acquired by the Federal Republic of Germany, EUR 2.56 per share, was significantly below the average price of the shares in DLH over the 15 days preceding the request for a capital injection, namely EUR 9.12 per share, or a discount of 71.9%, and that that discount therefore offered the State sufficient remuneration 'at entry' into the beneficiary's equity. According to the Commission, that remuneration is thus higher than that which would have resulted from the application of a step-up mechanism, if the Federal Republic of Germany would not have benefited from that discount.

However, it must be found that the price of the shares acquired by the State on its entry into the equity of the beneficiary concerned does not have a sufficiently close connection with the subject matter and purpose of the step-up mechanism or one that is an alternative to it for the purposes of point 62 of the Temporary Framework.

On the one hand, the price at which the State acquires shares on entry into the capital of the beneficiary concerned is governed by point 60 of the Temporary Framework, according to which a capital injection by the State, or an equivalent intervention, is to be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection. The abovementioned acquisition price therefore complies with point 60 of the Temporary Framework. However, the fact that the equity participation complies with point 60 does not mean that it could derogate from the obligation to provide for a step-up mechanism, as required by point 61 of the Temporary Framework, or for an alternative mechanism within the meaning of point 62 thereof. In fact, these are two distinct requirements in that framework, which concern different issues. The necessity to establish such a mechanism is by no means conditional on the initial purchase price of the shares.

On the other hand, the objective pursued by the step-up mechanism is different from that underlying the rule on the initial purchase price of the shares. The objective of that mechanism is to cause the State's shareholding to become more onerous over time by increasing the latter's share of the company's equity, even without a further injection of capital by the State. That mechanism is therefore intended to be an *ex post* incentive to the beneficiary concerned to buy back that shareholding as quickly as possible, since the mechanism is only activated, if necessary, in the fourth and then the sixth year respectively after the capital injection. By contrast, the requirements as to the purchase price of the shares are intended, in essence, to ensure that the price at which the State acquires its shares does not exceed their market price. That price therefore has an *ex ante* impact on the situation of the beneficiary concerned, that is to say, at the time the State enters the capital of that beneficiary, and it is not necessarily intended to increase over time the incentive, for the beneficiary, to buy back that shareholding, since the price of the shares may rise as well as fall.

Consequently, the price of the shares at the time of the State's entry into the capital of the beneficiary concerned does not lead overall to a similar outcome with regard to the incentive effects on the exit of the State, as required under point 62 of the Temporary Framework.

Second, the fact referred to by the Commission in the contested decision that the State's shareholding in DLH is 'undesirable' is irrelevant since such an assertion is subjective and lacks any legal force.

It is necessary to make the following observation as regards the assertion, made in paragraph 141 of the contested decision, that DLH could ask the State to sell its entire shareholding on condition, first, that DLH has repaid Silent Participations I and II, including any interest, and, second, that the price of the shares at the time of sale is equal to the higher of either the market price or EUR 2.56 per share plus 12% per annum, calculated for the period between the acquisition and the sale. As regards the fact that DLH could only request that the State sell its entire shareholding after it has repaid, inter alia, Silent Participation II, including any interest, it must be held that that possibility necessarily concerns the possible repayment of that participation before its conversion into equity. However, the requirement to provide for a step-up or alternative mechanism with respect to hybrid capital instruments applies after their conversion into equity, as is apparent from point 68 of the Temporary Framework. Consequently, the possibility referred to above has no relation to DLH's situation after the eventual conversion of Silent Participation II into equity, when the inclusion of such a mechanism must, as a rule, be provided for, as is apparent from paragraphs 264 to 266 below. In addition, as regards the price of the shares at the time they are sold back by the State, it is sufficient to observe that that price is governed by point 63 of the Temporary Framework, which lays down a separate requirement that is additional to, but does not replace, the requirement relating to the inclusion of a step-up or similar mechanism.

Third, the Commission also puts forward the fact that the interest rate that provides remuneration for Silent Participations I and II increases over time. However, that too is a separate requirement laid down by the Temporary Framework for hybrid capital instruments until their conversion into equity-like instruments, namely that set out in point 66 of the framework, which does indeed provide for interest rates which increase over time. That requirement therefore has an entirely different field of application to that of the requirement, flowing from points 61 and 62 of the framework, to provide for a step-up mechanism or another mechanism that is similar.

Nor can the fact, referred to in the contested decision, that the likelihood of the conversion of a part of Silent Participation II into equity increases over time serve to waive the obligation to include a step-up or alternative mechanism, within the meaning of point 62 of the Temporary Framework. On the contrary, in accordance with point 68 of the Temporary Framework, it is precisely after such a conversion that a mechanism of that kind 'must be included' with respect to hybrid capital instruments, such as Silent Participation II. In other words, that conversion triggers the obligation to make provision for such a mechanism. It can therefore under no circumstances serve to justify the absence of that mechanism.

Fourth, the fact that DLH will be subject to the behavioural commitments set out in section 3.11.6 of the Temporary Framework, such as, in particular, a ban on paying dividends, likewise does not replace the obligation to establish a step-up or an alternative mechanism within the meaning of point 62 of the Temporary Framework, since that too is a matter of separate requirements which are additional to, but are not a substitute for, the requirement set out in points 61 and 62 of the framework.

Consequently, it follows from the foregoing that the Commission has not demonstrated to the requisite legal standard that the 'overall structure' of the measure at issue, and in particular the combined effects of its three interconnected components, led overall to incentive effects on the exit of the State from the beneficiary's capital that were comparable to the incentive effects generated by a step-up or a similar mechanism, within the meaning of point 62 of the Temporary Framework.

In the second place, as regards Silent Participation II, which is a hybrid capital instrument, it is also common ground that that participation is likewise not accompanied by any step-up mechanism. However, under point 68 of the Temporary Framework, after the conversion into equity of the hybrid capital instrument in question, a step-up mechanism 'must be included' to increase the remuneration of the State, and to incentivise the beneficiaries concerned to buy back the State capital injections. If the equity resulting from the State's COVID-19 intervention is still owned by the State two years after the conversion into equity, the State is to receive a share of the beneficiary concerned, in addition to its remaining participation resulting from the State's conversion of the hybrid capital instruments as defined in the context of the COVID-19 pandemic. That additional share of ownership is to be at a minimum 10% of the remaining participation resulting from the State's conversion of those hybrid capital instruments. The Commission may accept alternative step-up mechanisms provided they have the same incentive effect and a similar overall impact on the State's remuneration.

The Commission found in essence in paragraphs 159 to 161 of the contested decision that Silent Participation II was accompanied by an alternative step-up mechanism, putting forward some of the grounds which it had relied on with regard to the equity participation. Consequently, for the reasons set out in paragraphs 252 to 257 above, those grounds are not sufficient to justify the absence of a step-up mechanism or another mechanism that satisfies the conditions laid down in point 68 of the Temporary Framework.

Lastly, as regards point 70 of the Temporary Framework, referred to in passing by the Commission in paragraph 160 of the contested decision, it should be noted that that point states that, 'since the nature of hybrid instruments varies significantly, the Commission does not provide guidance for all types of instruments'. However, the Commission did not provide any explanation in the contested decision of the specific features of the nature of Silent Participation II that would distinguish it from other types of hybrid capital instruments such that point 70 would have any relevance to the present case. In any case, that point provides that, 'hybrid instruments shall in any event follow the principles [referred to in the preceding paragraphs of the framework]'. Consequently, point 70 of the Temporary Framework does not relieve the Commission of the obligation to verify that the hybrid capital instrument at issue conforms to the principles set out in that section of the Temporary Framework, including the one that relates to the need to ensure that the hybrid capital instrument concerned is accompanied by a mechanism likely to lead to incentive effects on the exit of the State from the capital of the beneficiary concerned that are similar to those that are integral to the step-up mechanism.

Ryanair is thus correct in maintaining that all the justifications put forward by the Commission in the contested decision relate, in reality, to other, separate requirements envisaged by the Temporary Framework, which do not replace but are additional to the requirement to establish a step-up or similar mechanism for any recapitalisation measure by means of equity instruments or hybrid capital instruments, after their conversion into equity.

It is clear from all the foregoing that the equity participation and Silent Participation II, at the time of its conversion into equity, are not accompanied by any step-up or similar mechanism, contrary to the requirements of the Temporary Framework.

It is true that the General Court has had occasion to hold that the Commission, owing to the very specific characteristics of a disputed recapitalisation measure, which consisted of a pro rata participation by the State and private shareholders, was entitled to approve that measure even though it derogated from points 61 and 62 of the Temporary Framework, since a step-up mechanism would in reality have required the State to reduce its shareholding in the beneficiary to a level below what it was before the disputed measure was implemented (judgment of 22 June 2022, *Finnair* v *Commission (Finnair II; COVID-19)*, T-657/20, under appeal, EU:T:2022:390, paragraphs 75 and 76). However, the measure at issue in the present case does not consist of a pro rata participation by the State and private shareholders. Moreover, the Commission does not refer to any exceptional circumstance or other specific attribute capable of justifying a derogation from the requirement to establish a step-up or similar mechanism; rather, it claims to have approved an alternative mechanism accompanying the measure at issue, which, however, it has not demonstrated to the requisite legal standard, as is apparent from paragraphs 255 to 266 above. Accordingly, in contrast to the case which gave rise to the judgment cited above, the application of such a mechanism in the present case would have the effect of encouraging the beneficiary to buy back the State's shareholding, reducing the latter's share of its equity to the level that existed before the implementation of the measure at issue.

Consequently, the Commission infringed points 61, 62, 68 and 70 of the Temporary Framework in that it failed to require the inclusion of a step-up or similar mechanism in the remuneration for the equity participation and for Silent Participation II, at the time of the latter's conversion into equity.

The present complaint is therefore well founded and must be upheld.

(d) The price of the shares at the time of conversion of Silent Participation II

Ryanair complains that the Commission accepted a price for the shares, at the time of the conversion of Silent Participation II into equity, which infringes point 67 of the Temporary Framework. The reasons given in the contested decision to justify that derogation are not sufficient. In particular, the possibility for the Commission to 'postpone' its decision in that regard is not provided for in the Temporary Framework.

The Commission disputes Ryanair's arguments on the basis of the grounds set out in the contested decision.

Under point 67 of the Temporary Framework, the conversion of hybrid capital instruments into equity is to be conducted at a level that is 5% or more below the Theoretical Ex-Rights Price (TERP) at the time of the conversion.

In paragraph 158 of the contested decision, the Commission observed that part of Silent Participation II, namely Silent Participation II-A, could be converted into shares at a fixed price of EUR 2.56 per share, while another part, Silent participation II-B, could be converted at the trading price of the shares at the time of conversion, minus 10% or 5.25%, depending on the triggering event. The Commission explained in that regard that 'all those conversion prices can be expected to be in line with the requirement laid down in point 67 of the Temporary Framework', while acknowledging that 'there may exist a market share price below which point 67 of the Temporary Framework would not be met'; in that case, the Federal Republic of Germany had undertaken to seek the Commission's authorisation before exercising its right of conversion.

In that regard, first, it should be noted that the price of the shares at the time of the conversion of Silent Participation II into equity, as approved in the contested decision, is not determined on the basis of the TERP, that is to say, the theoretical market price of the shares following a new rights issue, which, however, is what is required by point 67 of the Temporary Framework.

As far as Silent Participation II-A is concerned, that price, set at EUR 2.56 per share, has no connection at all with the methodology required by point 67 of the Temporary Framework.

In addition, as regards Silent Participation II-B, the price is based on the trading price at the time of conversion, minus 10% or 5.25%, depending on the triggering event. However, the TERP does not correspond to the actual trading price of the shares at the time of conversion. Despite that, the Commission provides no explanation in the contested decision as regards the connection, as it sees it, between the requirement for a price '5 percent or more below TERP', set out in point 67 of the Temporary Framework, and the trading price at the time of conversion, minus respectively 10% or 5.25%, as prescribed for Silent Participation II-B.

It thus follows that the Commission has neither explained the reasons why it was justified to set or calculate the price of the shares at the time of the conversion of Silent Participation II into equity without following the methodology laid down in point 67 of the Temporary Framework, nor has it put forward any exceptional circumstance capable of explaining that non-compliance with that methodology.

Second, the Commission acknowledged in paragraph 158 of the contested decision that the price which it had accepted might not comply with point 67 of the Temporary Framework. However, it found that the measure at issue satisfied the requirements set out in that point on the ground that the Federal Republic of Germany had undertaken to seek its authorisation if the price calculated in accordance with point 67 was below that set out in the measure at issue.

The question therefore arises whether the Commission was entitled to depart from the rule laid down in point 67 of the Temporary Framework on the ground that the Member State concerned would seek the Commission's authorisation before exercising its conversion right.

However, the Commission has not referred, either in the contested decision or in its written pleadings before the Court, to any part of the Temporary Framework, any other legal rule or any exceptional circumstance which might have allowed it to derogate from point 67 of the Temporary Framework.

The mere circumstance that the Federal Republic of Germany has undertaken to seek the Commission's authorisation if the price at issue is not compliant with the requirements of point 67 of the Temporary Framework cannot justify such a derogation. The Commission cannot be permitted to depart from the rules laid down in the Temporary Framework on the ground that the Member State concerned undertakes to seek its authorisation *ex post*. In that regard, it should be borne in mind that aid granted by Member States is subject to a system of prior authorisation under Article 108(3) TFEU. Accordingly, an aid measure must be declared compatible with the internal market *ex ante*, before it may be implemented. The Commission cannot therefore postpone its decision on the compatibility of an aid measure with the internal market if it finds, as in the present case, that an aspect of that measure is liable to infringe the rules applicable in that area.

In the present case, moreover, the undertaking given by the Member State concerned was not capable of guaranteeing that the rule set out in point 67 of the Temporary Framework would be complied with. The Federal Republic of Germany did not commit itself, in substantive terms, to ensure, at the appropriate time, that the price of the shares of Silent Partnership II, at the time of its conversion into equity, would comply with the requirements of point 67, for example by undertaking to adjust that price to the level laid down in the aforementioned point of the Temporary Framework, but only, as a matter of procedure, to seek the Commission's authorisation before exercising its right to conversion.

Accordingly, the Commission in fact merely postponed its decision in that regard, which it indeed acknowledges in its written pleadings, even though it was aware of the fact that the price of the shares at the time of the conversion of Silent Participation II into equity could very well prove to be incompatible with point 67 of the Temporary Framework.

It is important to observe in that regard that the Commission cannot, as a general rule, depart from the rules of the Temporary Framework that it has imposed on itself, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see the case-law cited in paragraph 75 above).

In the light of the foregoing, it must be found that the Commission infringed point 67 of the Temporary Framework.

This complaint is therefore well founded and must be upheld.

6. Governance and prevention of undue distortions of competition

(a) The prohibition on aggressive commercial expansion financed by the aid

The applicants argue in essence that the contested decision does not provide for safeguards against aggressive commercial expansion by the beneficiary concerned, contrary to point 71 of the Temporary Framework. Condor refers, inter alia, to an online article dated 19 March 2019, headlined 'Lufthansa eyes Condor and its market niche', which allegedly demonstrates the risk of such aggressive commercial expansion. In addition, according to Ryanair, the contested decision is vitiated by a failure to state reasons in that regard.

The Commission disputes that line of argument, reproducing, in essence, the grounds of the contested decision.

Point 71 of the Temporary Framework states that in order to prevent undue distortions of competition, the beneficiaries concerned must not engage in aggressive commercial expansion financed by State aid or beneficiaries taking excessive risks. As a general principle, the smaller the equity stake of the Member State and the higher the remuneration, the less there is a need for safeguards.

In point 163 of the contested decision, the Commission stated that DLH's business plan envisaged a prudent and progressive return to its standard volume of activity and that the Lufthansa Group would comply with the conditions referred to in section 3.11.6 of the framework. It found, on that basis, that the requirements laid down in point 71 of the Temporary Framework were met.

Although succinct, the statement of reasons in the contested decision in that regard sets out sufficiently the factual and legal considerations that have decisive importance in the scheme of that decision, for the purposes of the case-law cited in paragraph 205 above, with the result that the complaint alleging a failure to state reasons must be rejected.

As to the substance, it is sufficient to observe that the Commission carried out an examination of DLH's business plan, which envisaged a prudent and progressive return to its 'standard' volume of activity. In so far as that plan is based on the prospects for the development of the beneficiary's scheduled or expected operations, the Commission was entitled to base its analysis of the risk of aggressive commercial expansion financed by the aid on its examination of that plan. The fact that that analysis showed that the beneficiary concerned forecast only a prudent and progressive return to the level of activity that it had before the outbreak of the COVID-19 pandemic tends to show that it did not plan to engage in aggressive commercial expansion financed by the aid at issue, as the Commission rightly considered.

In addition, it should be borne in mind that point 74 of the Temporary Framework states that as long as at least 75% of the recapitalisation measures have not been redeemed, the beneficiary of the aid at issue is prevented from acquiring a stake of more than 10% in competitors or other operators in the same line of business, including upstream and downstream operations. It is common ground that the beneficiary is subject to that condition and that it is also intended to prevent the beneficiary from engaging in aggressive commercial expansion financed by the aid. That requirement is thus capable of addressing the concern expressed by Condor that the beneficiary may acquire it as a result of the aid, as allegedly shown by the article referred to in paragraph 289 above.

Accordingly, it must be found that the applicants have not shown that the Commission infringed point 71 of the Temporary Framework. Their complaints must therefore be rejected as unfounded.

(b) The existence of SMP on the part of the beneficiary on the relevant markets and the structural commitments

By the fifth part of its first plea, Ryanair claims, in essence, that the Commission infringed point 72 of the Temporary Framework. Ryanair essentially raises three sets of complaints relating to: the definition of the relevant markets; whether the beneficiary concerned holds SMP on those markets; and to the effectiveness and sufficiency of the structural commitments imposed on the beneficiary.

By the first part of its first and second pleas, Condor also submits that the Commission infringed point 72 of the Temporary Framework, raising in essence the same three sets of complaints referred to in paragraph 297 above.

It is appropriate to examine those three sets of complaints in turn.

(1) The definition of the relevant markets

(i) The method for defining the relevant markets

The applicants argue in essence that the Commission erred by failing to examine the effects of the measure at issue on the various markets for passenger air transport services as defined as pairs of cities between a point of origin and a point of destination ('the O&D markets'). The Commission thereby departed from its consistent decision-making practice in relation to the control of concentrations in the airline sector, which involves defining the markets on the basis of the O&D approach.

Condor adds that the Commission also failed to take into account the market for the provision of feeder traffic.

The Commission, supported by the French Republic and DLH, maintains that it is not incorrect to identify the relevant markets according to the 'airport-by-airport' approach, reproducing, in essence, the reasons given in that regard in the contested decision.

Point 72 of the Temporary Framework provides that if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with SMP on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioural commitments, such as those set out in the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p.1; 'the Notice on remedies').

The Commission found in the contested decision that the markets on which the beneficiary in question operated were the markets for the provision of passenger air transport services to and from the airports served by that beneficiary. It thus identified the relevant markets according to the 'airport-by-airport' approach. Under that approach, each airport is defined as a distinct market, without distinguishing between the various O&D routes to or from that airport. According to the Commission, that approach was justified by the fact that the measure at issue was intended to preserve the overall ability of the beneficiary concerned to operate air transport services, in particular ensuring the preservation of its assets and its rights to operate in the medium and long term. Those assets and rights were not assigned, in principle, to any particular route. That was particularly true for slots at a coordinated airport, which could be highly valuable and could be used on any route to and from the airport.

The Commission thus concluded that the measure at issue supported the operations of the Lufthansa Group and could therefore potentially affect competition on all routes originating from and arriving at an airport at which that group holds slots, regardless of the specific competitive position of the group on any of those routes. It was thus not appropriate, according to the Commission, to analyse the impact of the measure at issue on each of those routes separately. Instead of that approach, it is appropriate to define the relevant markets as the airports at which the beneficiary supplied passenger air transport services.

Accordingly, the parties disagree as to whether, for the purpose of applying point 72 of the Temporary Framework, the markets for the provision of passenger air transport services should be defined according to the 'airport-by-airport' approach, as the Commission found in the contested decision, or according to the O&D approach, as the applicants maintain.

That question involves complex economic assessments, such that the review of the Courts of the European Union is limited (see the case-law cited in paragraph 74 above).

In that regard, first, it should be noted that point 72 of the Temporary Framework does not specify the method that should be used for defining the relevant markets.

Second, as footnote 1 to the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5) states, the focus of assessment in State aid cases is the recipient of the aid at issue and the industry or sector concerned rather than identification of competitive constraints faced by that recipient.

Third, it should be borne in mind that in the context of the examination of aid measures that may be authorised in accordance with Article 107(3)(b) TFEU, the Commission must ensure that those measures are intended in particular to remedy a serious disturbance in the economy of a Member State. In particular, the Temporary Framework forms part of the overall effort of Member States to tackle the effects of the COVID-19 outbreak on their economy and is intended to clarify the possibilities Member States have under EU rules to ensure liquidity and access to finance for undertakings (point 11 of the Temporary Framework). As far as recapitalisation measures in particular are concerned, the Temporary Framework aims at ensuring that the economic disruption caused by the pandemic does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak. At the same time, the Commission must ensure that recapitalisations do not exceed the minimum needed to ensure the viability of the beneficiary and that they do not go beyond restoring the capital structure of the beneficiary to that which predated the COVID-19 outbreak.

That type of aid measure is therefore intended to remedy a serious disturbance in the economy of a Member State by supporting, in particular, the viability of the undertakings affected by the COVID-19 pandemic so as to restore their capital structure to the level existing before the pandemic. Those aid measures thus target the overall financial situation of the beneficiary and, more generally, that of the economic sector concerned.

Fourth, as regards specifically the measure at issue, it should be observed that that measure seeks to ensure, in essence, that the companies of the Lufthansa Group have sufficient liquidity and that the disruptions caused by the COVID-19 pandemic do not undermine their viability (paragraph 18 of the contested decision). The effects of that aid therefore apply to the overall financial situation of that group. Indeed, the measure at issue is aimed at restoring the beneficiary's capital structure as it existed prior to the COVID-19 outbreak and not at supporting the beneficiary's presence on a particular route.

Consequently, the Commission was right to state in the contested decision that the measure at issue was aimed at preserving the beneficiary's assets and its rights to operate in the medium and long term and, therefore, its overall ability to operate air transport services and that, as a result, it was not appropriate to analyse the impact of the measure at issue on each O&D market taken in isolation.

Fifth, the arguments put forward by the applicants that seek to call into question the 'airport-by-airport' approach followed by the Commission in the contested decision are based, in essence, on an analogy with the method for defining markets applied in the area of merger control, in which the relevant markets are determined according to the O&D approach.

However, that analogy does not take sufficient account of the specific features of the Temporary Framework and the measure at issue.

In the present case, the measure at issue does not lead to a strengthening of the position of the beneficiary concerned on certain O&D markets as opposed to others. More specifically, a recapitalisation measure produces effects on the overall situation of the beneficiary concerned since the funds provided to that beneficiary are not allocated to particular routes and they therefore do not have a direct link with particular O&D markets rather than others.

Consequently, there is no inconsistency in the fact that the Commission may have taken a different approach to defining the markets in the contested decision, on the one hand, and in its decision-making practice in the area of merger control, on the other (see, to that effect and by analogy, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 148).

It is for the same reasons that the applicants cannot succeed with their argument, based on the same analogy with the decision-making practice in the area of merger control, that the relevant markets should be defined according to both the O&D and the 'airport-by-airport' approach.

Moreover, it must be observed that even in the area of concentrations the Commission has had occasion to define the relevant markets solely on the basis of the 'airport-by-airport' approach where the merger consisted of a purchase of assets, in particular airport slots, from an airline that had ceased operating and had thus withdrawn from all the O&D markets. The General Court accepted that approach on the grounds, inter alia, that the slots which were the subject of the merger could be used on all O&D routes to and from the airports concerned (see, to that effect, judgments of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-240/18, EU:T:2021:723, paragraph 57, and of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-296/18, EU:T:2021:724, paragraph 80). A recapitalisation measure such as the measure at issue has an effect that is similar to a concentration that essentially relates to slots, in that, like those slots, the funds provided to DLH are not allocated to specific routes and may be used for operating any O&D route from an airport.

Sixth, given that identifying a separate market for feeder traffic, as claimed by Condor, requires the application of the O&D approach, as acknowledged by the parties at the hearing, the Court must for the same reasons reject Condor's argument by which it criticises the Commission for failing to take account of that feeder traffic market. The purpose of the measure at issue is not to support the operations of the beneficiary concerned on certain O&D routes for which it provides feeder traffic to Condor while excluding others.

Lastly, the argument put forward by the applicants based on the wording of point 72 of the Temporary Framework, which refers to undertakings with SMP on 'at least one of the relevant markets', is irrelevant. It is evident that that statement does not seek to impose a particular method for defining the markets on the Commission, but aims to make clear that it is sufficient for the beneficiary to have SMP on only one of the markets on which it operates for the requirements laid down in that point to be applied. Accordingly, if it were to be found that the beneficiary had SMP at only one airport, that would be sufficient for the requirements laid down in point 72 of the Temporary Framework to be applied in respect of that airport.

Consequently, it must be held that the Commission was entitled, without making a manifest error of assessment, to define the markets at issue, for the purpose of applying point 72 of the Temporary Framework, according to the 'airport-by-airport' approach.

(ii) The application of the 'airport-by-airport' approach

In the alternative, Ryanair argues that even if it were assumed that the 'airport-by-airport' approach was correct, the Commission erred in its application of that approach. It puts forward a number of complaints in that regard, which the Commission disputes on the basis of the grounds set out in the contested decision.

Before examining those complaints, it should be noted that the Commission found in paragraphs 172 and 173 of the contested decision that only the coordinated airports at which the Lufthansa Group had a base were 'relevant' for the purpose of applying point 72 of the Temporary Framework. Applying those criteria, the Commission identified 15 airports where the Lufthansa Group had a base during the IATA 2019 summer season and the 2019/2020 winter season, 9 of which were coordinated, namely Berlin, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart and Vienna airports. The Commission went on, in section 3.3.6.3 of the contested decision, to examine whether the group held SMP solely at those nine airports.

– *The exclusion of the airports at which the Lufthansa Group did not have a base*

Ryanair criticises the Commission for limiting its examination solely to the airports where the Lufthansa Group had a base. It argues that an airline may operate to and from airports where it does not have a base. In addition, it considers that the contested decision lacks reasoning in that regard.

The Commission contests those arguments.

In the first place, as regards the complaint alleging a failure to state reasons, it should be observed that in paragraph 237 of the contested decision the Commission stated that the requirement to establish a base was necessary to allow for genuine competition, thus ensuring the effectiveness of the measure at issue. In paragraph 240 of the contested decision, the Commission explained that that requirement supported the entry or expansion of a viable competitor and placed the Lufthansa Group under the threat of competition on most of the routes to or from the airport concerned. While it is true that those paragraphs of the contested decision do not relate to the identification of the relevant airports, but to the requirement that a purchaser must establish a base at Frankfurt and Munich airports as a condition for acquiring the slots which are the object of the structural commitments, they nevertheless show in a clear and unequivocal manner the key considerations that led the Commission to find that the criterion relating to the possession of a base at a given airport was relevant for the purpose of identifying the airports at which the Lufthansa Group was likely to enjoy SMP.

In the second place, as to the merits, it should be observed that the fact that an air carrier has a base at a given airport tends to show that it is established at that airport on a long-term basis, which enables it to exert a more sustained level of competitive pressure on its competitors operating at the same airport.

According to the case-law, the possession of a base confers certain advantages, such as the flexibility to switch between routes, the redeployment of aircraft, the minimising of disruption costs, the exchange of crews, customer care and brand awareness (see, to that effect, judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 269).

In addition, the establishment of a base at a particular airport generally implies that some of the carrier's staff are assigned to that base. Furthermore, as the Commission submits, the aircraft stationed at that base may be deployed on any of the O&D routes departing from it. It follows that a carrier that possesses a base at a particular airport is in a better position to invest in establishing a stable and long-term commercial presence than a carrier operating at that airport with no base there.

In the light of the foregoing, it must be held that Ryanair has not demonstrated to the requisite legal standard that the Lufthansa Group was likely to have SMP at the airports at which it had no base. The Commission was therefore entitled to exclude those airports from its analysis.

Accordingly, the present complaint must be rejected as unfounded.

– *Airports outside the European Union*

Ryanair argues that the Commission erred in excluding from its analysis Zurich and Geneva airports in Switzerland and a 'number of Turkish airports (e.g., Izmir and Antalya)', where the Lufthansa Group has bases.

The Commission, supported by the French Republic, contends, in essence, that the rules on State aid apply only within the territory of the European Union.

Article 13 of the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ 2002 L 114, p. 73) sets out rules on State aid which are modelled on Articles 107 to 109 TFEU. According to Article 14 of that agreement, the Commission and the Swiss authorities are to keep under constant review all systems of aid existing respectively in the Member States and in Switzerland. That agreement therefore does not grant the Commission the power to examine State aid concerning Switzerland, still less to impose structural measures that are to be applied in that country. Nor is there any agreement to that effect concerning Türkiye.

The arguments put forward by Ryanair on that point fail to convince. The mere fact that the abovementioned Swiss and Turkish airports are connected to airports within the European Union is irrelevant. That argument is based on a logic that pertains to the O&D approach and not to the 'airport-by-airport' approach. Accordingly, while it is true that the methodology that is inherent to the O&D approach allows the Commission, in the context of merger control, to analyse the effects of a concentration on O&D markets in which one of the two cities is located in the European Union and the other outside it, the 'airport-by-airport' approach cannot, by contrast, have the effect of extending the Commission's territorial jurisdiction in order to examine whether the beneficiary holds SMP at airports located in non-member countries and, as the case may be, impose structural measures at those airports.

Nor, likewise, can Ryanair rely on the case-law according to which the Commission has territorial jurisdiction to apply Articles 101 and 102 TFEU to practices adopted outside the European Union if it is established that those practices have produced qualified effects or have been implemented in the European Union. According to the case-law, the substantial, immediate and foreseeable effects that such practices are capable of having within the European Economic Area (EEA) justify the Commission's jurisdiction (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 18 and 44 to 49).

That case-law, which concerns practices prohibited by Articles 101 and 102 TFEU that are adopted outside the European Union, but which produce qualified effects on EU territory, cannot be transposed to the field of State aid. The effects that a State aid measure granted by a Member State may in some circumstances have on competition in countries outside the territory of the European Union are not covered by EU State aid rules. The Commission thus has no jurisdiction to examine whether the Lufthansa Group holds SMP at an airport located in a non-EU country or to oblige that group, where relevant, to divest some of the slots it holds at such an airport.

The present complaint must consequently be rejected as unfounded.

– *The exclusion of the non-coordinated airports*

Ryanair complains that the Commission, which the latter contests, failed to assess the position of the Lufthansa Group at non-coordinated airports, where there are barriers to entry other than the lack of available slots. Ryanair refers to five airports at which the Lufthansa Group has a base and which, according to IATA, are considered as 'Level 2' airports in terms of their potential for congestion.

In the first place, it should be borne in mind that the Commission explained in paragraph 181 of the contested decision that it had used the classification of 'coordinated airport' under Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1) as a first proxy for determining a high level of congestion at an airport. According to the Commission, such a classification means that demand for airport infrastructure at those airports, in particular slots, significantly exceeds the airport's capacity and that an expansion of airport infrastructure to meet demand is not possible in the short term.

Ryanair does not deny that, at non-coordinated airports, there are sufficient available slots to enable the entry or expansion of a competitor. The offer of available slots at those airports generally exceeds demand.

In those circumstances, Ryanair has not demonstrated, with supporting evidence, that the Lufthansa Group holds SMP at a specific non-coordinated airport.

In the second place, Ryanair merely maintains that the 'Level 2' airports, as classified by IATA, at which the Lufthansa Group has a base, should also have been taken into consideration by the Commission.

It is apparent from the documents before the Court that the 'Level 2' category of airport, according to the IATA classification, corresponds to a 'schedules facilitated airport' under Article 2(i) of Regulation No 95/93, in the version in force when the contested decision was adopted. According to that provision, a 'schedules facilitated airport' is defined as 'an airport where there is potential for congestion at some periods of the day, week or year which is amenable to resolution by voluntary cooperation between air carriers and where a schedules facilitator has been appointed to facilitate the operations of air carriers operating services or intending to operate services at that airport'.

It thus follows that 'Level 2' airports generally have sufficient available slot capacity, except for 'some periods of the day, week or year'. However, those occasional problems may generally be resolved by voluntary cooperation between air carriers, with the result that the emergence of any possible barrier to entry or expansion arising from the non-availability of slots at certain specific periods may in principle be avoided.

In any event, Ryanair's argument is made in general terms in that it has not demonstrated, with supporting evidence, that the Lufthansa Group holds SMP at a specific schedules facilitated airport.

Consequently, this complaint must be rejected as unfounded.

– *The classification of Hannover Airport as a coordinated airport*

Ryanair argues that the Commission failed to classify Hannover Airport (Germany) as a coordinated airport and, consequently, it did not assess whether the Lufthansa Group held SMP at that airport during the IATA 2019 summer and 2019/2020 winter seasons.

It is now common ground that the Commission made an error of fact in the contested decision in finding that Hannover Airport was not coordinated and in failing to examine whether the Lufthansa Group had SMP at that airport. Following a measure of organisation of procedure of 15 November 2021, which concerned, inter alia, that question, the Commission adopted the correcting decision (see paragraph 8 above) on 14 December 2021, in which it acknowledged that it had made an error since Hannover Airport was in fact a coordinated airport. It assessed in that decision whether the Lufthansa Group held SMP at that airport and found that that was not the case.

In its response to the measure of organisation of procedure, Ryanair submits, in essence, that the correcting decision cannot *ex post* remedy the error in the contested decision concerning the classification of Hannover Airport as a coordinated airport and that, in addition, the Commission's assessment in that decision of whether the beneficiary concerned enjoyed SMP at that airport is wrong.

Condor, for its part, does not dispute the Commission's competence to correct the contested decision in the course of the proceedings, but submits that it failed to correct the substantive errors vitiating the contested decision, as amended by the correcting decision.

Under Article 86(1) of the Rules of Procedure, where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor. The Rules of Procedure therefore allow an EU institution, body, office or agency to amend the act that is contested in the course of the proceedings.

Similarly, according to the case-law, where a decision is, during the proceedings, replaced by another decision with the same subject matter, this is to be considered a new factor allowing the applicant to adapt its heads of claim and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court (judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 23).

Accordingly, and without prejudice to the decision as to costs, Ryanair's argument that the Commission is not permitted to amend the contested decision in the course of the proceedings must be rejected and consequently, the Court rules that the error made initially in the contested decision, in that the Commission failed to classify Hannover Airport as a coordinated airport, has been rectified by means of the correcting decision.

The arguments put forward by Ryanair and Condor concerning the Commission's assessment in the correcting decision as to whether the beneficiary held SMP at that airport will be examined below.

Ryanair's complaint must therefore be rejected as unfounded.

(iii) Conclusion on the identification of the relevant markets

It follows from paragraphs 300 to 357 above that all of the arguments raised by the applicants concerning the definition of the relevant markets must be rejected as unfounded.

(2) Whether the beneficiary concerned held SMP at the relevant airports

In the fifth part of its first plea, Ryanair claims, first, in essence, that the assessment of the existence of SMP is by nature forward-looking and criticises the Commission for basing its review of the market power of the Lufthansa Group on a single factor, namely the availability of slots, without stating why other factors were irrelevant.

Second, it argues that the Commission made a manifest error of assessment in finding that the beneficiary concerned did not enjoy SMP at Düsseldorf and Vienna airports. In addition, it applied the 'airport-by-airport' approach inconsistently by drawing conflicting conclusions regarding the Lufthansa Group's SMP at airports where the results of the Commission's own analysis were, however, similar. In particular, Ryanair submits that the criteria which allowed the Commission to find that the Lufthansa Group held SMP at Frankfurt and Munich airports should have led it to reach the same conclusion as regards Düsseldorf and Vienna airports. The figures related to the share of slots held by the group at all those airports, the levels of congestion and the highest slot share held by that group in three hourly bands are not materially different. In its reply to the measure of organisation of procedure, Ryanair adds that the Commission's assessment in the correcting decision, that the Lufthansa Group did not have SMP at Hannover Airport, is also incorrect.

Condor submits in essence, in the first part of its first plea, that the Commission erred in its assessment of the Lufthansa Group's SMP at the airports concerned and that its analysis was insufficient and incomplete in that regard in that it examined only criteria relating to airport capacity, such as slots, which, however, constituted only one of several factors that had to be taken into consideration. The only markets it thus took into account were those directed towards demand for airport capacity. However, the Commission should have also considered indicators related to actual market shares regarding flights and therefore markets directed towards demand for passenger air transport services. Accordingly, if the Commission had taken account of such indicators, for example the market shares held by the Lufthansa Group in terms of the frequency of flights and seats offered at the respective airports, it would have had serious doubts in relation to the question whether the Lufthansa Group held SMP not only at Munich and Frankfurt airports, but also at Düsseldorf, Hamburg, Stuttgart, Vienna, Brussels and Hannover airports. In the statement of modification, Condor submits that the same errors and deficiencies also vitiate the correcting decision.

The Commission, supported by DLH and the French Republic, disputes the applicants' arguments on the basis, in essence, of the grounds set out in the contested decision.

Before examining the applicants' arguments, the Court considers that it is necessary to clarify, as a preliminary matter, the concept of SMP.

(i) The concept of SMP

The concept of SMP is not defined in the Temporary Framework nor is it defined more generally in the field of State aid.

That concept is derived from Article 63(2) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36). That provision states that an undertaking is to be deemed to have SMP if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

According to recital 161 of Directive 2018/1972, the definition of SMP used in that directive is 'equivalent to the concept of dominance as defined in the case-law of the Court of Justice [of the European Union]'.

The General Court considers that there is no objective reason to interpret the concept of SMP within the meaning of point 72 of the Temporary Framework differently from that stemming from Directive 2018/1972. Moreover, the parties agree that that concept must be interpreted in a uniform manner.

Accordingly, the concept of SMP within the meaning of point 72 of the Temporary Framework must be regarded, in essence, as equivalent to that of a dominant position under competition law.

In that regard, it should be borne in mind that, according to settled case-law, a dominant position is defined in EU law as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers (judgments of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 65, and of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 38).

In addition, it has been held that a market share of 50% or more constituted a presumption of the existence of a dominant position (see, to that effect, judgment of 3 July 1991, *AKZO* v *Commission*, C-62/86, EU:C:1991:286, paragraph 60). Furthermore, in its judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission* (27/76, EU:C:1978:22, paragraphs 107 to 113), the Court of Justice stated that the fact that an undertaking had a market share of 40% to 45% did not of itself permit the conclusion that it held a dominant position, but that such a conclusion could arise from that circumstance, taken together with other factors, such as, in particular, the strength and number of competitors. The Court of Justice held in that case that a dominant position existed on account of a market share of 40% to 45%, combined with the fact that that market share was several times greater than that of its best-placed competitor, the others coming far behind.

Lastly, it should be noted that, contrary to what is maintained by Ryanair, the assessment of the existence of SMP is not by nature forward-looking. That assessment must be made with reference to the situation existing at the time the measure at issue is notified. If the beneficiary does not enjoy SMP at the time of that notification, point 72 of the Temporary Framework does not apply. The Commission is therefore not required to examine whether the beneficiary might acquire SMP following the grant of the aid.

It is in the light of those considerations that the Court must examine the arguments put forward by the applicants.

(ii) The criteria for assessing SMP

In paragraph 179 of the contested decision, the Commission stated that it would assess whether the Lufthansa Group held SMP at the relevant airports by examining three factors, namely, first, its slot holdings at those airports, second, the level of congestion at those airports, and third, the number of slots held by competitors. It is apparent from other paragraphs in the contested decision that the Commission also took into account the number of aircraft based at some of the relevant airports used by that group and its competitors.

In section 3.3.6.4 of the contested decision, the Commission, on the basis of the abovementioned criteria, examined whether the Lufthansa Group held SMP at nine coordinated airports, namely Berlin Tegel, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart and Vienna airports. In the correcting decision the Commission also examined, on the basis of the same criteria, whether that group held SMP at Hannover Airport.

Ryanair and Condor submit, in essence, that the Commission erred in concentrating on criteria relating to airport capacity, to the exclusion of other equally relevant factors, such as the actual market shares of the beneficiary and its competitors (see paragraphs 359 to 361 above).

First, it should be observed, as the applicants have done, that the criteria which served as the basis for the Commission's assessment of whether the Lufthansa Group held SMP at the relevant airports related mainly to airport capacity. Indeed, a 'slot holding' is defined in paragraph 180 of the contested decision as the 'ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group) … at an airport and the total available slots at that airport (i.e., the airport capacity)'. The 'congestion rate', in turn, corresponds to the proportion of slots allocated to all airlines at the airport concerned in relation to the total capacity of the airport in terms of slots. Those criteria therefore relate, in essence, to airport capacity and concern access by the beneficiary and its competitors to airport infrastructure at the airports concerned.

However, in paragraph 170 of the contested decision, the Commission defined the markets at issue as the markets for passenger air transport services. It is therefore necessary to examine whether the criteria referred to in paragraph 373 above constitute the entirety of the relevant factors which the Commission was required to take into account for the purpose of assessing whether the beneficiary of the aid held SMP on the markets for passenger air transport services.

In that regard, it must be observed that while it is true that the criteria referred to in paragraph 373 above are relevant for the purpose of assessing the existence of SMP, given that access to slots is an important barrier to entry for the provision of passenger air transport services, which the applicants, moreover, do not dispute, the fact remains that factors relating to the provision of passenger air transport services are also of particular importance in that they provide information about the market shares held by the beneficiary and its competitors on the market for passenger air transport services.

In fact, the slot holdings of the beneficiary concerned and its competitors do not provide direct information about their shares of the market for passenger air transport services. First, it is common ground that the different sizes of aircraft operated by air carriers in the slots assigned to them means that the number of seats they offer may vary considerably within a given slot. Second, it is likewise not disputed that air carriers can operate a different number of flights, depending on their schedule or efficiency, during a given slot. Accordingly, the slot holdings are not therefore a source of direct information about the provision of passenger air transport services since they do not include the abovementioned parameters, which, depending on the situation, could have a significant impact on the provision of flights and seats on the markets for those services.

Moreover, it is apparent from the file before the Court, in particular the data provided by Condor, whose accuracy is in addition not challenged by the Commission, the Federal Republic of Germany, the French Republic or DLH, that the market shares of the beneficiary concerned, expressed in terms of frequencies (the number of flights) and seats offered to and from the relevant airports, exceed, sometimes considerably, the share of slots that it holds, as set out in the contested decision.

However, in the contested decision, the Commission did not take into consideration the market shares of the beneficiary concerned and its competitors on the market for the provision of passenger air transport services.

Yet, given that the Commission defined the markets in question in the contested decision as the markets for passenger air transport services, it could not disregard factors directly related to the provision of those services.

Second, it should be borne in mind that, for the purpose of assessing SMP, a concept which is similar or even equivalent to that of a dominant position (see paragraph 368 above), market shares provide useful first indications on the structure of the market and the relative importance of the undertakings that are active on it. Accordingly, if the market share is high and held for a long time, it is very likely that that factor will constitute an important preliminary indication of the existence of a dominant position (see, to that effect, judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraphs 39 to 41; of 3 July 1991, *AKZO* v *Commission*, C-62/86, EU:C:1991:286, paragraphs 59 and 60; and of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraphs 90 to 92).

Similarly, the Courts of the European Union have stated on numerous occasions that the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among those factors a highly important one is the existence of very large market shares (judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 39). Accordingly, the relationship between the market shares of the undertaking at issue and its competitors, especially those of the next largest, is relevant evidence of the existence of a dominant position (judgment of 23 February 2006, *Cementbouw Handel* & *Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 201 and the case-law cited; see also, to that effect, judgment of 17 December 2003, *British Airways* v *Commission*, T-219/99, EU:T:2003:343, paragraphs 210 and 211). Moreover, in certain cases, the existence of a dominant position may even be presumed on the basis of market shares alone if they exceed the threshold of 50% (see the case-law cited in paragraph 370 above).

Accordingly, it was incumbent on the Commission to take into consideration all the relevant factors for assessing the existence of SMP, relating both to barriers to entry and expansion and to the market shares held by the beneficiary concerned and its competitors on the market for passenger air transport services.

In the light of all the foregoing, it must be found, as the applicants have observed, that the Commission, by solely examining factors that related, in essence, to barriers to entry and expansion with regard to airport capacity, failed to take into consideration all the factors that were relevant in the present case for assessing the market power of the beneficiary concerned at the relevant airports, thereby making a manifest error of assessment that vitiates the contested decision, as rectified by the correcting decision.

This complaint is therefore well founded and must be upheld.

(iii) Whether the Lufthansa Group held SMP at the relevant airports

Ryanair submits that the Commission made a manifest error of assessment by finding, on the basis of the criteria that it examined, that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports. In addition, according to Ryanair, even assuming that the position of the Lufthansa Group at Frankfurt and Munich airports was stronger than that at Düsseldorf and Vienna airports, the fact nevertheless remained that the group also enjoyed SMP at those latter airports. In its reply to the measure of organisation of procedure, Ryanair adds that the Commission wrongly held in the correcting decision that the Lufthansa Group did not have SMP at Hannover Airport. It relies in that regard on data relating to the share of flights and seats of the Lufthansa Group and its competitors operated from that airport.

In addition, Ryanair claims, in essence, that the Commission applied point 72 of the Temporary Framework inconsistently in that it found, based on factors that are not materially different, that the Lufthansa Group held SMP at Frankfurt and Munich airports but not at Düsseldorf and Vienna airports.

Condor maintains – referring to data relating to the market shares of the Lufthansa Group in terms of frequency (flights operated) and seats at Düsseldorf, Vienna, Brussels, Stuttgart and Hamburg airports during the IATA 2019 summer and 2019/2020 winter seasons, which show that that group's market shares often exceeded 50% – that if the Commission had taken those indicators into account, it would have had serious doubts when assessing the Lufthansa Group's SMP at those airports. In its statement of modification, Condor adds that that is also the case as regards Hannover Airport, referring to the same type of data.

In the contested decision, the Commission, referring solely to the criteria mentioned in paragraph 373 above – namely the Lufthansa Group's slot share at those airports, the level of congestion there, and, in respect of certain airports, the share of slots held by competitors and the number of aircraft operated by the group and its competitors – found that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports during the IATA 2019 summer season and the 2019/2020 winter season; however, that was not the case as regards the other relevant airports.

In the first place, as regards the data submitted by Condor, the accuracy of which is not disputed by the Commission, the Federal Republic of Germany, the French Republic or DLH, it should be observed that it is apparent from those figures that the Lufthansa Group's market shares, in terms of frequencies, range from 50% to 62% at Düsseldorf, Vienna, Brussels, Stuttgart and Hamburg airports during the IATA 2019 summer season, and from 47% to 57% at those same airports during the IATA 2019/2020 winter season. In terms of seats, the group's market share ranges from 47% to 57% at those airports during the IATA 2019 summer season and from 44% to 56% during the IATA 2019/2020 winter season. For Hannover Airport, those figures are, respectively, 45% to 46% for the Lufthansa Group's share of the frequencies in the summer and winter season, and 45% to 48% for its share of seats at that airport during those same seasons.

Furthermore, Ryanair, in its response to the measure of organisation of procedure, also presents similar data on Hannover Airport, which show that the Lufthansa Group's share of frequencies and seats is between 42% and 46% depending on the season, while that of its competitors is between 3% and 13%.

However, it is not for the Court to substitute its own economic assessment for that of the Commission (see, to that effect, judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 116 and the case-law cited) by proceeding to carry out an evaluation, for the first time, of the impact of the indicators cited by the applicants and their relationship with the criteria already examined by the Commission in the contested decision for the purpose of assessing whether the beneficiary concerned held SMP at the abovementioned airports.

It would be for the Commission, in the event of the contested decision being annulled, to carry out an overall assessment of both the criteria which it took into account in the contested decision, and which are referred to in paragraph 373 above, and of the relevant criteria relating to the market shares of the beneficiary and its competitors on the market for the provision of passenger air transport services.

In the second place, as regards Ryanair's argument that the Commission could not conclude, on the basis of the criteria it examined, that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports, it should be observed, as regards Düsseldorf Airport, that the factors taken into account by the Commission, as set out in the contested decision, are as follows:

Airport/ season	LH Group slot holding	LH Group highest slot holdings	Congestion rate	Highest congestion rates	Number of aircraft	Numbers of competitor aircraft
DUSS summer 2019	[40-50]%	[55-65]% [50-60]% [50-60]%	[80-90]%	[90-100]% [90-100]% [90-100]%	40-50	Ryanair: 7 TUIfly: 7 Condor: 5 easyJet: 2
DUSS winter 2019/2020	[30-40]%	[50-60]% [45-55]% [35-45]%	[60-70]%	[90-100]% [80-90]% [70-80]%	40-50	Ryanair: 7 TUIfly: 7 Condor: 5 easyJet: 2

Those figures show that the Lufthansa Group's average slot holding at Düsseldorf Airport during the IATA 2019 summer season, namely [40-50]%, exceeds the 40% threshold, which, according to the case-law on the concept of a dominant position, is a preliminary indication, among others, that must be taken into account (see, by analogy, the case-law cited in paragraph 370 above). That holding is even higher ([50-60]% to [55-65]%) during peak hours.

Furthermore, the average congestion rate at that airport during the IATA 2019 summer season is very high, at [80-90]% and rising to [90-100]% during peak hours. According to the contested decision, a congestion rate of less than 60% would not prima facie be problematic (paragraph 182 of the contested decision). Conversely, a congestion rate above 60%, as in the present case, would be.

In addition, the competition faced by the Lufthansa Group at that airport is very weak and fragmented. According to the one piece of information concerning the Lufthansa Group's competitors there, they deploy only 7 (Ryanair and TUIfly), 5 (Condor) and 2 (easyJet) aircraft at that airport, while the Lufthansa Group has between 40 and 50.

An overall assessment of those criteria demonstrates the existence of a very high slot holding, including during peak hours, on the part of the Lufthansa Group, a very high congestion rate, characterised by almost complete congestion during peak hours, and the weak position of the group's competitors.

Consequently, on the basis of those criteria alone, the Commission could not properly find that the Lufthansa Group did not hold SMP at Düsseldorf Airport, at least during the IATA 2019 summer season.

Second, as Ryanair argues, the criteria which led the Commission to find that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports are not materially different from those concerning Düsseldorf Airport, at least as regards the IATA 2019 summer season. The figures concerning that latter airport, as set out in the contested decision and referred to in paragraph 396 above, are in essence comparable with or even exceed those characterising the competitive situation at Frankfurt and Munich airports during the IATA 2019/2020 winter season, in respect of which the Commission found that the Lufthansa Group held SMP.

Next, as regards Vienna Airport, the factors taken into account by the Commission can be summarised as follows:

Airport/ season	LH Group slot holding	LH Group highest slot holdings	Congestion rate	Highest congestion rates	Number of aircraft	Numbers of competitor aircraft
VIE summer 2019	[35-45]%	[50-60]% [50-60]% [50-60]%	[70-80]%	[80-90]% [80-90]% [80-90]%	80-90	Ryanair: 8 Wizzair: 5
VIE winter 2019/2020	[25-35]%	[40-50]% [40-50]% [40-50]%	[50-60]%	[70-80]% [60-70]% [60-70]%	80-90	Ryanair: 8 Wizzair: 5

Those figures show that the Lufthansa Group's average slot holding at Vienna Airport during the IATA 2019 summer season, namely [35-45]% [*confidential*]. In addition, that share is even higher ([50-60]%) during peak hours.

Furthermore, the average congestion rate at that airport during the IATA 2019 summer season is very high, namely [70-80]%, rising to [80-90]% during peak hours. According to the contested decision, a congestion rate of less than 60% would not prima facie be problematic (paragraph 182 of the contested decision). Conversely, a congestion rate above 60%, as in the present case, would be.

In addition, the competition faced by the Lufthansa Group at Vienna Airport is very weak and fragmented. According to the one piece of information that was given concerning the Lufthansa Group's competitors at that airport, they deploy only 8 (Ryanair) and 5 (Wizzair) aircraft, while the Lufthansa Group has 80 to 90.

An overall assessment of those criteria demonstrates the existence of a high slot holding, including during peak hours, on the part of the Lufthansa Group, a very high congestion rate, characterised by almost complete congestion during peak hours, and the weak position of the group's competitors.

Consequently, on the basis of those criteria alone, the Commission could not properly find that the Lufthansa Group did not hold SMP at Vienna Airport, at least during the IATA 2019 summer season.

In any event, as Ryanair argues, the criteria which led the Commission to find that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports are not materially different from those concerning Vienna Airport, at least as regards the IATA 2019 summer season. Indeed, the figures concerning that latter airport, as set out in the contested decision and referred to in paragraph 403 above, are in essence comparable with or even exceed the figures characterising the competitive situation at Frankfurt and Munich airports during the IATA 2019/2020 winter season, in respect of which the Commission found that the Lufthansa Group held SMP.

(iv) Conclusion on whether the beneficiary had SMP at the relevant airports

It follows from paragraphs 373 to 386 above that the Commission did not take into consideration all the relevant factors for assessing whether the beneficiary held SMP at the relevant airports. The Commission must therefore carry out a new overall assessment of all the relevant criteria (see paragraph 395 above) in order to assess whether the Lufthansa Group held SMP at the relevant airports other than Frankfurt and Munich airports.

Furthermore, and in any event, the Commission could not properly find, on the sole basis of the criteria which it applied, that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports, at least during the IATA 2019 summer season.

Accordingly, the applicants' complaints are well founded and must be upheld.

(3) The structural commitments

In the contested decision the Commission, on the basis of point 72 of the Temporary Framework, imposed structural commitments on the beneficiary concerned, consisting, in essence, in the divestiture of slots at the airports where it was considered to enjoy SMP, namely at Frankfurt and Munich airports during the IATA 2019 summer and 2019/2020 winter seasons.

Ryanair, in the fifth part of its first plea, and Condor, in the first part of both its first and second pleas, dispute several aspects of those commitments.

(i) Preliminary considerations

Point 72 of the Temporary Framework states that if the beneficiary is an undertaking with SMP on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioural commitments foreseen in the Notice on remedies.

Since point 72 of the Temporary Framework expressly refers, as regards structural or behavioural commitments, to the Notice on remedies, it should be observed that that notice provides that the commitments proposed have to eliminate the competition concerns entirely and be comprehensive and effective from all points of view and, furthermore, must be capable of being implemented effectively within a short period of time (see paragraph 9 of the Notice on remedies).

Structural commitments, in particular divestitures, proposed by the parties will meet these conditions only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise (see paragraph 10 of the Notice on remedies).

The Commission must also consider all relevant factors relating to the proposed remedy itself, including, inter alia, the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market (see paragraph 12 of the Notice on remedies).

The intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser in whose hands it will become an active competitive force in the market. The potential of a business to attract a suitable purchaser is an important element of the Commission's assessment of the appropriateness of the proposed commitment (paragraph 47 of the Notice on remedies).

The case-law has confirmed the aforementioned criteria, stating that, in order to be accepted by the Commission, the parties' commitments have to be proportionate to the competition problem identified by the Commission in its decision and eliminate it entirely (see, to that effect and by analogy, judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 307); they must also be comprehensive and effective from all points of view (see, to that effect and by analogy, judgment of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 52).

That being said, it is necessary to take account of the specific features of the law on State aid and, more particularly, the Temporary Framework, of which the requirement at issue is part. In the field of mergers, the Commission, after concluding that a concentration would give rise to a significant impediment to competition, may accept commitments submitted by the parties in order to resolve the competition concerns it has found and render the concentration compatible with the internal market. However, the commitments imposed under point 72 of the Temporary Framework have a different objective. Given that the objective of the aid granted under that framework is, in essence, to ensure the operational continuity of viable undertakings during the COVID-19 pandemic, the commitments under that point must be designed so as to ensure that, after the aid has been granted, the beneficiary will not become more powerful on the market than it was before the COVID-19 outbreak and that effective competition on the markets concerned will be maintained.

As regards the judicial review of the commitments entered into, it is apparent from the case-law that the Commission enjoys a broad discretion in assessing whether such commitments are sufficient (see, to that effect and by analogy, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 295 and the case-law cited). Accordingly, given the complex economic assessments which the Commission is required to carry out in exercising the discretion which it enjoys with respect to examining the commitments proposed by the parties to the concentration, the applicant must, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient, show that the Commission has committed a manifest error of assessment (see, to that effect, judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 187).

However, whilst the Courts of the European Union recognise that the Commission has a margin of discretion with regard to economic matters, that does not mean that they must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must they establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgments of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraphs 116 and 117 and the case-law cited, and of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 30 and the case-law cited; see, also, the case-law cited in paragraph 77 above).

It is in the light of those considerations that the applicants' arguments concerning various aspects of the commitments at issue must be examined. Their arguments may be divided into two groups of complaints, the first relating to the scope of the commitments and the second to the procedure and arrangements for the divestiture of slots.

(ii) The scope of the commitments

– *The fact that the commitments are limited to the divestiture of slots*

The applicants argue that the Commission did not provide a sufficient explanation of how the divestiture of a certain number of slots constituted the most effective measure for preventing undue distortions of competition and why other additional measures were not necessary.

The Commission disputes the applicants' arguments, referring to the grounds of the contested decision.

It is apparent from paragraph 221 of the contested decision that the commitments at issue comprise, first, the divestiture of 24 slots a day at each of Frankfurt and Munich airports during the IATA 2019 summer and 2019/2020 winter seasons and of 'additional assets', as required by the Slot Coordinator to allow for the transfer of slots; and second, the Lufthansa Group is to make available, at the request of the purchaser, (i) access to airport infrastructure or facilities at the two airports on the same terms as those granted to DLH, (ii) overnight parking stands, and (iii) relevant staff.

Ryanair's argument that the commitments at issue are limited solely to the transfer of slots therefore has no factual basis, as the Commission rightly observes.

It is nevertheless true that the core of those commitments concerns the transfer of slots in so far as the other commitments appear to be of an ancillary nature, being intended, in essence, to ensure the viability of the transfer of the slots. It is in those circumstances that the applicants complain that the Commission did not adequately explain why other additional measures were not needed to maintain effective competition at those airports.

It is apparent, in that regard, from paragraphs 224 to 227 of the contested decision that a lack of access to slots constitutes a significant barrier to entry or expansion at Europe's busiest airports and that, as a result, commitments consisting in divesting such slots remove that main barrier to entry and expansion. For that reason, such commitments are, according to the Commission, the most effective measure for preventing undue distortions of competition. Furthermore, those commitments are 'attractive' from the point of view of a competitor since they allow for the development of structural competition with the Lufthansa Group on the markets where it holds SMP.

In the light of the foregoing, the applicants' argument that the contested decision is vitiated by a failure to state reasons in that regard must be rejected. The Commission clearly explained the reasons why it considered that the divestiture of slots was capable of preserving effective competition on the markets at issue.

As to the substance, it should be observed that, in accordance with the case-law and as the Commission states, the main barrier to entry in the air transport sector is the lack of available slots at large airports. Consequently, it is necessary to determine whether the Commission erred in finding that, in the present case, the divestiture of slots provided for in the commitments package could be an effective way to preserve effective competition. In that context, it is for Ryanair to adduce evidence that the divestiture of slots as provided for by the commitments at issue was not sufficient to remedy the competition problems raised (see, to that effect, judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 166).

In the present case, the applicants do not dispute the fact that a lack of available slots constitutes a significant barrier, or even the main barrier, to entry or expansion at busy airports. Nor do they deny that the emergence of a strong and viable competitor at such an airport implies that it must have a portfolio of slots enabling it to exert effective competitive pressure on the dominant carrier. In those circumstances, it cannot be denied that the transfer of slots, and the ancillary commitments, is in principle an efficient measure for maintaining effective competition on the markets at issue.

Consequently, this complaint must be rejected as unfounded.

– *The absence of commitments concerning feeder traffic*

Condor submits that the Commission should also have imposed commitments in respect of feeder traffic in the form of a Special Prorate Agreement, as the Commission has done in certain merger cases. In that regard, Condor argues that the Lufthansa Group provided a large share of the feeder traffic for its long-haul flights; that the group has the ability to foreclose it from the market for long-haul flights, as evidenced by the termination of the feeder traffic agreement concluded with Lufthansa; and that that group has an incentive to foreclose Condor and divert customers to its own flights. It also states that foreclosure of the market by the Lufthansa Group will negatively affect competition, in that Condor's exclusion will result in the beneficiary concerned having a monopoly position, both on the domestic market and on the markets for long-haul flights to leisure destinations.

However, it must be stated that the type of commitment advocated by Condor is necessarily based on the specific identification of certain O&D routes which would be affected by the foreclosure risk it claims. However, as is apparent from paragraphs 306 to 313 above, it was not appropriate to identify the markets at issue under the O&D approach. The Commission cannot therefore be criticised for having failed to require commitments concerning certain specific O&D routes.

Consequently, the present complaint must be rejected as unfounded.

– *The complaint that there is frequently a lack of compliance with slot divestitures and the obligation to use the divested slots*

First, Condor claims that there is often a lack of compliance with slot divestiture commitments. It observes that of the 14 decisions taken in the passenger air transport sector in which the Commission authorised a merger subject to a slot divestiture commitment, the divestiture was implemented in only three cases. Second, it criticises the obligation imposed on remedy takers to make use of the slots obtained, on the ground that that obligation would exclude most small air carriers.

Those arguments must be rejected. First, as the Commission rightly states, the examples cited by Condor concern the divestiture of slots on specific O&D markets, whereas the divestiture at issue is not linked to any O&D route and it can therefore be used freely on any connection, at the choice of the acquirer, which increases its attractiveness. Condor therefore cannot validly extrapolate any head of claim on the basis of the aforementioned examples, given their different scope.

Second, contrary to what is argued by Condor, the obligation imposed on the remedy taker to make use of the slots obtained is fully justified in that it seeks to avoid a reduction in the overall volume of the services at issue following the divestiture, as the Commission noted in paragraph 234 of the contested decision. Moreover, a remedy taker that does not make use of the slots acquired would clearly not be able to exert an effective competitive constraint on the beneficiary concerned, contrary to the requirements of point 72 of the Temporary Framework.

Consequently, this complaint must be rejected as unfounded.

– *The number of slots to be divested*

First, Ryanair argues that the divestiture of 24 slots per day at Frankfurt and Munich airports is manifestly insufficient to preserve effective competition at those airports, that figure being insignificant in relation to the number of turnarounds at those airports and the number of the Lufthansa Group's aircraft based there. Second, it states that those slots amount to only 5% of the slots held by the Lufthansa Group at those airports. Third, it alleges a failure to state reasons since the Commission did not set out the grounds for finding that the divestiture of 24 slots would be sufficient.

Similarly, Condor submits that the divestiture of only 24 slots per day at Frankfurt and Munich airports is insufficient and very limited, since those slots represent only between 2.4% and 3.2% of the number of frequencies operated by the Lufthansa Group at those airports. In its third plea, it adds that the contested decision is vitiated by flawed reasoning as regards the sufficiency of the divestiture of slots at issue.

As a preliminary point, it is necessary to reject some of Ryanair's arguments since they are based on a misreading of the contested decision.

First, Ryanair is wrong to assert that the Commission permitted the Lufthansa Group to choose to divest fewer than 24 slots. It is true that the Commission stated in paragraphs 71 and 221 of the contested decision that that group must divest 'up to' 24 slots per day. Nevertheless, in paragraph 228 of the decision, the Commission refers to '24 slots/day', thus omitting the words 'up to'.

In any event, and as the Commission observes, the words 'up to' used in the contested decision must be understood as meaning that a potential acquirer might wish to acquire fewer than 24 slots and not that the Lufthansa Group could choose to divest less than 24 slots per day. Otherwise the commitments at issue would be rendered meaningless in that they would give the Lufthansa Group the freedom to choose the number of slots that it wishes to divest.

Second, Ryanair's argument that the commitments at issue limit the attractiveness of the slots for new entrants, which typically require a number of 'early morning departure slots and late evening arrival slots', is based on a manifestly incorrect reading of the contested decision. It is apparent from paragraphs 71 and 221 of the decision that the Lufthansa Group must, on request, divest at least six slots in any hourly band, which therefore includes peak times, according to the choice made by the remedy taker. The only limitation consists in allowing that group to refuse to divest more than six slots in three one-hour periods of its choice. In other words, the Lufthansa Group could limit the divestiture to six slots per hourly period with respect to only three hourly periods per day.

Moreover, the justification for that limit put forward in the contested decision is convincing. In the absence of such a limitation, the Lufthansa Group would have been obliged, in some circumstances, to divest all of its slots in two or three consecutive hourly periods, which could have had the effect of disrupting its hub-and-spoke network. The explanation set out in footnote 113, that a hub-and-spoke system such as that of the Lufthansa Group consists in an air carrier concentrating its arrivals and departures in banks of two- to three-hour intervals, resulting in a large number of arrivals followed by a large number of departures, that not being disputed by Ryanair, attests to that risk.

Accordingly, the limitation in question is based on a justified balancing of the legitimate commercial interests of the beneficiary concerned, consisting in safeguarding its hub-and-spoke model, against the attractiveness of the slot portfolio to be divested. With regard to that latter issue, the limitation in question, far from setting aside certain time bands exclusively for that beneficiary, enables a remedy taker to obtain slots in any hourly period, including, therefore, those which are of particular importance to the Lufthansa Group.

Third, as regards the applicants' complaints alleging a failure to state reasons or inadequate reasoning, inasmuch as the Commission did not explain why it considered that a divestiture of 24 slots was sufficient, it should be noted that the Commission stated in paragraph 228 of the contested decision that the number of slots sufficed for a competitor to establish viable operations at those two airports, for example by basing four aircraft there and operating three rotations per day with each of those aircraft on routes of its own choice, given that the slots to be divested are not linked to any specific O&D route. According to the Commission, the divestiture of 24 slots will enable the beneficiary's competitors to achieve economies of scale and scope and thus compete more effectively with the Lufthansa Group.

Although succinct, the statement of reasons on that matter in the contested decision sets out to the requisite legal standard the considerations which led the Commission to find that the divestiture of 24 slots was sufficient to preserve effective competition on the markets at issue, within the meaning of point 72 of the Temporary Framework. These complaints must therefore be rejected.

As to the substance, it is sufficient to observe that the divestiture of 24 slots would enable the entry of a new competitor of similar size to those already present on the markets at issue or would allow a not insignificant strengthening of the position of already existing competitors. Since that divestiture would make it possible to operate four aircraft, as stated by the Commission in paragraph 228 of the contested decision, it would lead to the creation of a competitive constraint that is comparable to that exerted by the beneficiary's existing competitors, whose fleets at Frankfurt and Munich airports range between 3 and 10 aircraft, as is apparent from paragraphs 189 and 196 of the contested decision.

Similarly, the fact put forward by Ryanair, on the assumption it is proven, that the number of slots to be divested amounts only to approximately 5% of the slots held by the Lufthansa Group at those airports – which means, in essence, that divestiture of those slots would result in a slot share of between 2% and 3% at the airports in question – shows that that share would be similar to that of the beneficiary's competitors present at those airports, which, according to paragraphs 188 and 195 of the contested decision, ranges from 1% to 4%.

Besides, the applicants do not specify the number of slots that would, in their view, be sufficient to maintain effective competition on the markets at issue. It follows, in those circumstances, that since the number of slots to be divested corresponds approximately to a slot holding that is comparable to that of certain of the beneficiary's competitors at those airports, there is no reason to call into question the Commission's finding that the divestiture of those slots was sufficient to maintain effective competition on the markets in question.

In the light of the foregoing, the present complaints must be rejected as unfounded.

– *The requirement that new entrants must establish a base of at least four aircraft at the airports at issue*

According to paragraphs 73 and 236 of the contested decision, to be able to obtain the slots which are the object of the commitments at issue, a potential purchaser that is a new entrant must inter alia intend to establish a base of at least four aircraft, while a potential purchaser that is a carrier already based at Frankfurt or Munich airport must intend to expand that base.

As regards the procedure for divesting the slots, the contested decision provides for two stages. During the first stage only 'new entrants' –carriers without a base at Frankfurt and Munich airports – are eligible, provided, inter alia, that they undertake to establish a base of at least four aircraft there (paragraphs 71 and 72 of the contested decision). Carriers already having a base at those airports become eligible only if, after three IATA seasons, no new entrant has acquired the slots to be divested.

Ryanair submits, in essence, that the Commission did not put forward any reason in the contested decision capable of justifying the requirement that a new entrant must establish a base at the airports at issue. As to substance, that requirement is alleged to constitute a disproportionate hurdle to the implementation of the commitments at issue in that it increases the entry costs for competitors, with it being clear that an airline can operate effectively at an airport without having a base there. Combined with the requirement to station at least four aircraft there, that condition precludes the various airlines that are able to operate the 24 slots with only two aircraft.

First, as is apparent from paragraph 327 above, paragraphs 237 and 240 of the contested decision explain to the requisite legal standard why the Commission considered that the requirement at issue was appropriate, with the result that the argument alleging failure to state reasons must be rejected.

Second, as regards the substance, it must be held, as follows from the contested decision, that the requirement to establish a base of at least four aircraft at an airport is intended to ensure that the future competitor is established at that airport on a long-term basis, which will enable it to exert a more sustained level of competitive pressure on its competitors that also operate there (also see paragraph 328 above).

As is apparent from paragraph 240 of the contested decision, the fact of having a base means that the aircraft stationed at that airport may be rapidly deployed on any route, such that the competitive pressure on the beneficiary concerned will be more sustained than that exerted by a carrier without a base, which has no connection with that airport and therefore does not have that flexibility.

Moreover, Ryanair does not challenge in a serious fashion the Commission’s assertion that the market investigations which it has carried out in its previous merger and antitrust decisions have shown that operating a sizeable base at a given airport was capable of exerting material competitive pressure on the carrier at issue.

It is true, as Ryanair submits, that the requirement at issue involves additional entry costs, such as fixed costs (in particular for parking), and costs connected with staff and the maintenance and repair of aircraft, which could be avoided or reduced if the carrier decided to operate at the airport in question without a base. However, it is precisely because of that commitment that the future competitor is deemed to have a long-term and stable presence which will enable it to exert stronger competitive pressure on the beneficiary.

In addition, Ryanair states that, according to its business model, a carrier could operate the 24 daily slots on short-haul destinations with only two aircraft. According to Ryanair, for carriers operating according to that model, the requirement to base at least four aircraft at the airports concerned could thus impose a sub-optimal use of resources on them, increase their costs and thereby make the portfolio of slots subject to divestiture less attractive.

However, it must be observed that Ryanair has not shown that that economic model, based on the practices of low-cost airlines at small regional airports, is feasible at large airports such as Frankfurt and Munich. In any event, and as the Commission states, the requirement at issue applies without distinction to any potential purchaser and cannot therefore vary according to the particular economic model of a specific carrier. Accordingly, Ryanair has not demonstrated to the requisite legal standard that that requirement would entail a sub-optimal use of resources at large airports, such as Frankfurt and Munich, and thereby reduce the attractiveness of the divestiture of slots.

Accordingly, this complaint must be rejected as unfounded.

– *The exclusion of competitors already based at Frankfurt and Munich airports*

As already observed in paragraph 457 above, the slot divestiture procedure is intended to take place in two stages (paragraph 231 of the contested decision). In a first stage, the slots are to be offered ‘to new entrants’ only. If the slots have not been divested to a ‘new entrant’ after three IATA seasons following the full re-establishment of the ‘use-it-or-lose-it slot rule’, they will, in a second stage, be made available to carriers which already have a base at those two airports.

It follows that, during the first stage of the procedure, the competitors to the Lufthansa Group which already possess a base at Frankfurt and Munich airports are not eligible to acquire the portfolio of slots to be divested.

According to Ryanair, the preference given to new entrants which do not have a base at Frankfurt and Munich airports will lead to the exclusion of the second-, third- and fourth-largest airline groups in Germany, namely Ryanair, easyJet and Condor. That preference thus undermines the requirement laid down in the Temporary Framework to maintain effective competition on the market. Unlike competitors already based at those airports, new entrants will have to take risks and incur additional costs to establish a base there. That requirement thus has the effect of further fragmenting the competitive structure at those two airports by excluding, during the first phase of the commitments, the most significant competitors of the Lufthansa Group.

Condor adds that the effect of that requirement is to exclude Ryanair and easyJet from the first stage of the procedure because those competitors to the beneficiary are already based at Frankfurt and Munich airports respectively. Furthermore, the Commission should have analysed whether the exclusion of carriers already based at the airports concerned was necessary. According to Condor, that exclusion significantly reduces the likelihood of the divestiture taking place. At the very least, the Commission should have consulted the market actors in order to ascertain whether a potential purchaser that was not based at those airports was likely to be interested in those slots.

As a preliminary point, it should be borne in mind that the Commission must consider all the relevant factors relating to the proposed commitment, judged by reference to the structure and particular characteristics of the market at issue, including the position of the parties and other players on the market (see paragraph 418 above).

The Court finds that the Commission failed to examine, in the contested decision, whether it was appropriate to exclude the competitors already based at Frankfurt and Munich airports from the first stage of the procedure, by reference to the structure and particular characteristics of the market at issue, including the position of the parties and other players on the market. The Commission does not put forward any reason in the contested decision capable of demonstrating that that exclusion was likely to maintain effective competition on the relevant markets, within the meaning of point 72 of the Temporary Framework, and that it was necessary for that purpose.

First, such an examination was all the more necessary in the present case since the structure of the market at Frankfurt and Munich airports is characterised, according to the contested decision itself, by the much greater weight of the Lufthansa Group in comparison with that of its closest competitors. As is apparent from paragraphs 188, 189, 195 and 196 of the contested decision, the share of slots held by the latter is marginal (between 1% and 4%) while the number of aircraft based at those airports is just as minimal in comparison with those of the Lufthansa Group.

Second, in those circumstances, and as Ryanair maintains, the preference given to new entrants would result in the entry of a new competitor whose position would be comparable to that of the competitors already based at those airports, owing to the size of the slot portfolio and the number of aircraft that it will have to base at those airports, namely four, given that the number of competitor aircraft already based at those airports ranges from 2 to 10. Thus, the Commission did not analyse whether the exclusion of competitors already based at Frankfurt and Munich airports would have the effect of further fragmenting competition at those airports rather than reinforcing it.

Third, as Ryanair and Condor point out, excluding competitors with a base at those airports from the first stage of the procedure de facto makes the Lufthansa Group’s closest competitors ineligible during that first stage. Yet, according to the contested decision, competitors with a base were the closest competitors to the Lufthansa Group at Frankfurt and Munich airports.

Fourth, and as Ryanair explains, the entry of a carrier without a base at those airports would involve a certain amount of investment and therefore a cost to entry which the competitors already possessing a base at those airports would not necessarily incur or would incur to a lesser degree. As a result, those latter competitors could be better placed to acquire the slot portfolio at issue and increase the competitive pressure that they already exert on the Lufthansa Group.

Fifth, contrary to what is claimed by the Commission, the fact that carriers which already have a base at the airports concerned may become eligible during the second stage of the procedure does not call the foregoing into question. Indeed, they become eligible only if the first stage of the procedure has been unsuccessful. Their eligibility therefore depends on the failure of the first stage and is therefore uncertain in nature.

In those circumstances, it was incumbent on the Commission to examine whether the preference given to new entrants and the exclusion of existing competitors during the first stage of the procedure was appropriate and necessary in order to preserve effective competition, having regard to the structure and particular characteristics of the markets at issue. However, the contested decision does not include any analysis in that regard.

It follows that, by excluding the competitors that already have a base at Frankfurt and Munich airports from the first stage of the slot divestiture procedure at issue, the Commission failed to examine all the relevant factors relating to the proposed commitment, assessed in the light of the structure and particular characteristics of the markets at issue, including the position of the beneficiary and its competitors on those markets. It therefore made a manifest error of assessment.

The present complaint is therefore well founded and must be upheld.

(iii) The procedure and arrangements for the divestiture of the slots

– *The timing of the slot divestiture*

Ryanair argues that the contested decision is vitiated by a ‘counterproductive’ error of assessment in that it provides that the slots are to be offered for divestiture only after the lifting of the full or partial suspension of the ‘use-it-or-lose-it’ rule. It submits that that divestiture should have been mandated immediately.

Paragraph 232 of the contested decision states that the commitment to divest the slots will apply for six full consecutive IATA seasons after the last season for which the ‘use-it-or-lose-it rule’ does not apply in full. Paragraph 234 of the contested decision states, moreover, that the period during which slots will be available to be divested will last at least until the projected recovery of air traffic to the level of 2019, after the end of the COVID-19 pandemic, which will allow competitors to benefit fully from the divestiture at issue.

In the light of the foregoing, it appears, as the Commission argues, that Ryanair’s argument is based on a misreading of the contested decision. It is the end rather than the beginning of the divestiture period which is determined in relation to the last season for which the ‘use-it-or-lose-it rule’ does not apply in full. While it is true that the contested decision does not explicitly state when that divestiture is to begin, the fact remains that it also does not provide for any postponement of that divestiture. It is on that basis that the Commission asserted before the Court, without being contradicted, that the slots at issue were offered for divestiture from September 2020, a few months after the contested decision was adopted.

Accordingly, the present complaint must be rejected as unfounded.

– *Procedural irregularity*

The Commission stated in paragraph 239 of the contested decision that in the event of tied bids it would give preference to the bid ranked as the best by DLH. For that purpose, DLH may use any criteria of its choice, provided that they are transparent, such as the existence of State support for potential purchasers, compliance with labour standards or the bidding price.

Ryanair argues that the rule that in the event of tied bids the Commission will favour the bid ranked best by DLH amounts to a conflict of interests since it allows DLH to choose its own competitor.

It should be borne in mind that the right to have one's affairs handled impartially by the institutions of the European Union, guaranteed by Article 41(1) of the Charter of Fundamental Rights of the European Union, constitutes a general principle of EU law (see, to that effect, judgment of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraph 41). The requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as the arbiter of the system at issue responsible for the matter may not show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as the arbiter must offer sufficient guarantees to exclude any legitimate doubt as to any possible bias (see, to that effect, judgment of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraphs 42 and 43). The defect of bias thus constitutes a procedural irregularity, of which a conflict of interests is merely one variant (see, to that effect, judgment of 10 February 2021, *Spadafora* v *Commission*, T-130/19, not published, EU:T:2021:74, paragraphs 82 and 99).

In the present case, it should be observed that while it is true that, according to the contested decision, the Commission, in the event of tied bids, will give preference to the one ranked best by DLH, the fact remains that such a situation is exceptional in nature. Next, DLH's choice is circumscribed by criteria which must be transparent, such as those referred to in paragraph 485 above. The transparency requirement thus ensures that the criteria adopted by DLH would not be arbitrary and would be announced in advance. Furthermore, while it is true that the criteria referred to above were cited in the contested decision by way of example, it is nevertheless apparent from them that the criteria to be applied must be objective in nature. Lastly, and above all, it is clear from the second indent of paragraph 236 of the contested decision that, in order to be eligible, the purchaser must be 'independent of' and 'unconnected with' the Lufthansa Group. In those circumstances, the risk of a conflict of interests criticised by Ryanair has not been demonstrated.

Consequently, this complaint must be rejected as unfounded.

– *The absence of a sale procedure*

Ryanair submits that the contested decision does not describe the procedure for the sale of the slots and that there is therefore no guarantee that that sale will be timely, at market price and conform with the other conditions of the contested decision.

However, in paragraphs 74 and 75 of the contested decision, the Commission explained the stages of the divestiture procedure and the eligibility and assessment criteria that it would apply. Those paragraphs also make clear that the price offered for all the assets is not part of the evaluation criteria applied by the Commission.

It must therefore be held that Ryanair's argument is based on a partial reading of the contested decision. In addition, it does not criticise any specific aspect of the divestiture procedure.

In those circumstances, the present complaint must be rejected as unfounded.

– *Remuneration for the slot divestiture*

Condor submits, first, that the Commission failed to fulfil its obligation to state reasons in that it did not explain how the requirement to pay for the divestiture of the slots at issue, rather than requiring their transfer free of charge, as foreseen by Article 8b of Regulation No 95/93, makes the commitments sufficiently attractive to a potential purchaser. Second, according to Condor, the commitments at issue conflict with the principle of non-compensation that applies to slot divestitures in the context of antitrust or merger cases under Article 8b of Regulation No 95/93. It argues that that principle also applies, by analogy, to State aid.

The Commission disputes that line of argument by referring to the grounds of the contested decision, according to which there is no minimum price for the divestiture at issue. It adds that price is not a criterion taken into consideration by it, but only by DLH in the unlikely event of tied bids.

In paragraph 74 of the contested decision the Commission stated that potential purchasers had to offer a price for the divested slots and assets, that the bidding price would be taken into account in tied bids and that the divestiture would not be subject to a minimum price.

It thus follows, as the Commission indeed acknowledges, that while it is true that there is no minimum price, the fact remains that the purchasers must pay a price to acquire the slots and assets at issue. When questioned in that regard as part of the measure of organisation of procedure, the Commission stated that the price had to cover both the slots subject to divestiture and the assets associated with them and that the price was payable to DLH. It is therefore common ground that remuneration must be provided for the divestiture of the slots at issue.

However, there is nothing in the contested decision to show why the Commission considered it appropriate, in a case such as the present one, to require that the divestiture of the slots at issue be subject to remuneration, even though such a requirement was liable to reduce the attractiveness of those slots and, therefore, the effectiveness of the related commitments.

Similarly, there is nothing in the contested decision to show that the Commission assessed whether the requirement for remuneration at issue was compatible with the conditions laid down in Regulation No 95/93. An assessment of that kind was all the more necessary in the present case since the commitments at issue consisted, in essence, of a divestiture of slots required by a public authority in the exercise of its powers and since that regulation contains specific rules in that regard.

It must be added that, in those circumstances, the requirement that the divestiture of slots should be remunerated and not free of charge was of decisive importance in the scheme of the contested decision (see the case-law cited in paragraph 205 above), with the result that the Commission was obliged to state the reasons why it considered that that requirement complied with the applicable rules.

Given the absence of any indication in the contested decision as to the reasons which led the Commission to find that the slot divestiture at issue should be carried out in return for remuneration and not carried out free of charge, and that that requirement would not have the effect of reducing the attractiveness of those slots and, therefore, the effectiveness of the related commitments, it must be held that the Commission failed to fulfil its obligation to state reasons.

Consequently, this complaint is well founded in that the Commission failed to fulfil its obligation to state reasons, without it being necessary to examine Condor's other arguments related to the remuneration for the slot divestiture.

(iv) Conclusion on the complaints concerning the commitments at issue

In the light of the foregoing, it must be held that the contested decision is unlawful as regards the following aspects of the commitments at issue:

the exclusion of the competitors already based at Frankfurt and Munich airports from the first stage of the slot divestiture procedure (paragraphs 467 to 480 above); and

the requirement that the divestiture of the slots should be remunerated (paragraphs 494 to 502 above).

7. Conclusion on the pleas alleging misapplication of the Temporary Framework

It follows from all the foregoing considerations that the contested decision is vitiated by several errors or irregularities relating to:

the eligibility of the beneficiary concerned for the aid at issue under point 49(c) of the Temporary Framework (first part of the first plea in Case T-34/21 and second part of the first plea in Case T-87/21) (paragraphs 112 to 138 above);

the absence of a step-up or similar mechanism under points 61, 62, 68 and 70 of the Temporary Framework (fourth part of the first plea in Case T-34/21) (paragraphs 242 to 271 above);

the price of the shares at the time of conversion of Silent Participation II, under point 67 of the Temporary Framework (fourth part of the first plea in Case T-34/21) (paragraphs 272 to 288 above);

the existence of SMP at the relevant airports other than Frankfurt and Munich and, in any event, at Düsseldorf and Vienna airports, during the IATA 2019 summer season (fifth part of the first plea in Case T-34/21 and first part of the first plea in Case T-87/21) (paragraphs 373 to 412 above);

the aspects of the commitments referred to in paragraph 503 above (fifth part of the first plea in Case T-34/21 and first part of the first plea in Case T-87/21) (paragraphs 467 to 480 and 494 to 502 above).

Each one of those errors is, in itself, capable of justifying the annulment of the contested decision, as rectified by the correcting decision.

Consequently, the contested decision, as rectified by the correcting decision, must be annulled, without it being necessary to examine the other pleas and complaints put forward by the applicants.

IV. Costs

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 Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by Ryanair in Case T-34/21 and by Condor in Case T-87/21, in accordance with the forms of order sought by those parties.

In accordance with Article 138(1) and (3) of the Rules of Procedure, the Federal Republic of Germany, the French Republic and DLH are to bear their own costs in Case T-34/21. Similarly, the Federal Republic of Germany and DLH are to bear their own costs in Case T-87/21.

On those grounds,

THE GENERAL COURT

hereby:

Annuls Commission Decision C(2020) 4372 final of 25 June 2020 concerning State Aid SA.57153 – Germany – COVID-19 – Aid to Lufthansa, as corrected by Commission Decision C(2021) 9606 final of 14 December 2021;

Orders the European Commission to bear its own costs and to pay those incurred by Ryanair DAC in Case T-34/21 and by Condor Flugdienst GmbH in Case T-87/21;

Orders the Federal Republic of Germany, the French Republic and Deutsche Lufthansa AG to bear their own costs in Case T-34/21;

Orders the Federal Republic of Germany and Deutsche Lufthansa to bear their own costs in Case T-87/21.

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Petrlík

Delivered in open court in Luxembourg on 10 May 2023.

T. Henze S. Papasavvas

Acting Registrar President

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[*] Language of the case: English.

[1] Confidential information redacted.