

СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ  
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA  
SOUDNÍ DVŮR EVROPSKÉ UNIE  
DEN EUROPÆISKE UNIONS DOMSTOL  
GERICHTSHOF DER EUROPÄISCHEN UNION  
EUROOPA LIIDU KOHUS  
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ  
COURT OF JUSTICE OF THE EUROPEAN UNION  
COUR DE JUSTICE DE L'UNION EUROPÉENNE  
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH  
SUD EUROPSKE UNIE  
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA



LUXEMBOURG

EIROPAS SAVIENĪBAS TIESA  
EUROPOS SĄJUNGOS TEISINGUMO TEISMAS  
AZ EURÓPAI UNIÓ BÍRÓSÁGA  
IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA  
HOF VAN JUSTITIE VAN DE EUROPESE UNIE  
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ  
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA  
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ ÚNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

OPINION OF ADVOCATE GENERAL  
BIONDI  
delivered on 16 October 2025 <sup>1</sup>

**Case C-457/23 P**

**Deutsche Lufthansa AG**  
v  
**Ryanair DAC,**  
**Condor Flugdienst GmbH,**  
**European Commission,**  
**Federal Republic of Germany,**  
**French Republic**

(Appeal — State aid — German air-transport market — Aid granted to an airline by the Federal Republic of Germany in the context of the COVID-19 pandemic — Temporary framework for State aid measures — Recapitalisation of Deutsche Lufthansa AG — Decision by the European Commission not to raise objections)

<sup>1</sup> Original language: English.

Table of contents

I.	Introduction.....	3
II.	Preliminary observations .....	4
	A. The aim, scope and legal nature of the TF.....	4
	B. The standard of judicial review .....	7
	C. Flexibility in the application of the TF .....	8
III.	On the appeal .....	9
	A. The first ground of appeal.....	9
	1. First part of the first ground of appeal .....	11
	2. Second part of the first ground of appeal .....	11
	(a) First plea .....	11
	(b) Second plea.....	12
	(c) Third plea.....	15
	(d) Fourth plea .....	15
	(e) Conclusions on the second part of the first ground of appeal .....	17
	3. Third part of the first ground of appeal .....	17
	(a) First plea .....	17
	(b) Second plea.....	20
	(c) Third plea.....	21
	(d) Fourth plea .....	22
	(e) Fifth plea.....	24
	(f) The pleas put forward by the Commission and the Federal Republic of Germany alleging a violation of their right to a fair hearing.....	25
	(g) Conclusion on the first ground of appeal.....	26
	B. The second ground of the appeal .....	26
	1. On the alternative mechanism accompanying the equity participation	26
	(a) On the first plea .....	27
	(b) On the second plea.....	30
	2. On the alternative mechanism accompanying the SP II.....	32
	3. Conclusion on the second ground of appeal .....	32
	C. Third ground of appeal .....	32
	D. Fourth ground of appeal.....	37
	1. First plea alleging that the General Court erred in law in concluding that the Commission had to consider additional factors in establishing SMP	

2.	Second plea alleging that the General Court erred in law in concluding that DLH did not hold SMP at Düsseldorf and Vienna airports .....	41
E.	Fifth ground of appeal.....	43
F.	Sixth ground of appeal.....	49
G.	Conclusions on the appeal and costs.....	52
IV.	Conclusion .....	52

## I. Introduction

1. On 12 June 2020, the Federal Republic of Germany notified the European Commission of a proposed individual aid measure, under Article 107(3)(b) TFEU and the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak<sup>2</sup> (‘the TF’), in the form of a recapitalisation of EUR 6 billion (‘the concerned measure’) granted to Deutsche Lufthansa AG (‘DLH’).<sup>3</sup> The concerned measure, which was a part of a wider series of support measures for the Lufthansa Group (‘LH Group’), consisted of three elements, namely a 20% equity participation and two silent participations (‘SP I’ and ‘SP II’).

2. On 25 June 2020, the Commission adopted a decision, by which it found that the concerned measure constituted State aid that was compatible with the internal market under Article 107(3)(b) TFEU and the TF (the ‘decision at issue’).<sup>4</sup> Ryanair DAC and Condor Flugdienst GmbH (‘Condor’) brought each an action for annulment against said decision.<sup>5</sup>

3. By a judgment of 10 May 2023, *Ryanair and Condor Flugdienst v Commission (Lufthansa; COVID-19)*,<sup>6</sup> the General Court annulled the decision at issue (the ‘judgement under appeal’). According to the General Court, this decision was vitiated by several errors or irregularities relating to the application of the TF, each of them capable of justifying its annulment.<sup>7</sup>

4. By its appeal, DLH, supported by the Commission and the Federal Republic of Germany, now seeks to have set aside this judgment.

<sup>2</sup> Communication from the Commission of 19 March 2020 (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). In May 2022, the Commission announced a progressive phase-out of the TF. The expiry date for most of the tools provided was the 30 June 2022. However, Member States were allowed to put in place investment and solvency support measures until 31 December 2022 and 31 December 2023 respectively. In addition, the conversion and restructuring of debt instruments, such as loans and guarantees, into other forms of aid, such as direct grants, were possible until 30 June 2023.

<sup>3</sup> 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.

<sup>4</sup> Commission Decision C(2020) 4372 final of 25 June 2020 on State Aid SA.57153 (2020/N) – Germany – COVID-19 - Aid to Lufthansa. Information about that decision was published on 20 November 2020 (OJ 2020 C 397, p. 2). On 14 December 2021, the Commission adopted Decision C (2021) 9606 final, correcting the decision at issue (‘the correcting decision’).

<sup>5</sup> The Federal Republic of Germany and the French Republic intervened in support of the Commission in case T-34/21.

<sup>6</sup> T-34/21 and T-87/21, ‘the judgment under appeal’ EU:T:2023:248.

<sup>7</sup> See judgement under appeal, points 504 and 505.

## II. Preliminary observations

5. Despite its length and the many specific grounds and arguments submitted by all parties, the present appeal raises essentially two questions. First, the extent of the discretion and flexibility enjoyed by the Commission in applying or deviating from the TF. Second, the standard of judicial review employed by the General Court when assessing the conformity of the decision at issue with certain specific criteria laid down in the TF itself. It is rather obvious that the answer to the latter depends on how the former is actually framed, which in turn largely depends on the aim, the scope and the legal nature of that instrument. Despite the TF no longer being applicable, the present case is of horizontal importance in State aid law, given the proliferation and the growing importance of similar instruments over the years.

### A. The aim, scope and legal nature of the TF

6. First, as concerns the aim and scope of the TF it should be noted that its legal bases is to be found in Article 107(3)(b) TFEU,<sup>8</sup> with the view of complementing other possibilities available, namely Article 107(2)(b) TFEU,<sup>9</sup> in order to deal with emergencies and to support Member State coping with them. In the context of the global COVID-19 pandemic, recourse to a Treaty emergency-related legal basis was arguably fully justified, as all Member States were, to varying degrees, affected by a serious disturbance of their economy.<sup>10</sup> There is thus no question that the TF was mainly devised to ensure that sufficient liquidity remained available to businesses of all types and to preserve the continuity of economic activities during and after the tragic COVID-19 outbreak. The TF also served other complementary but equally fundamental aims, namely to apply State aid rules in a ‘targeted and proportionate’ manner to ensure that national support measures were effective in helping affected undertakings during the COVID-19 outbreak and to frame national support measures into the State aid control system so as to guarantee that the EU Internal Market was not fragmented and that the level playing field stayed intact.<sup>11</sup> The TF did not indeed suspend the application of state aid rules, it simply adapted them to the emergency situation.

<sup>8</sup> Article 107(3)(b) TFEU allows the Commission to authorize aid to remedy a serious disturbance in the economy of a Member State.

<sup>9</sup> Article 107(2)(b) TFEU requires the Commission to, *de jure*, declare aid ‘to make good the damage caused by natural disasters or exceptional occurrences’ as compatible with internal market.

<sup>10</sup> As it was the case for the 2008 financial crisis, see Opinion of Advocate General Wahl in *Kotnik and Others* (C-526/14, EU:C:2016:102, paragraph 56) and judgment of 30 September 2003, *Freistaat Sachsen and Others v Commission* (C-57/00 P and C-61/00 P, EU:C:2003:510, paragraphs 97 and 98).

<sup>11</sup> See TF, point 10.

7. It should also not be forgotten that the TF has been a sort of living instrument, having been redrafted, updated, and modified seven times.<sup>12</sup> For every new version, as the Commission gained more experience and knowledge of the COVID-19 repercussions on the EU internal market, more specific and detailed criteria on the compatibility of national measures were gradually introduced. There are many examples, none more fitting than the provisions on recapitalisation added in the third version of the TF.<sup>13</sup> Not only were beneficiaries subject to many limitations, but also, for measures above EUR 250 million granted to undertakings with significant market power ('SMP'), the TF required that Member States must propose additional measures to preserve effective competition, such as structural or behavioural commitments.<sup>14</sup> The imposition of antitrust conditions and restorative remedies within the TF reaffirmed the intention to preserve the level playing field and ensure non-discriminatory open access to the market.

8. Second, as concerns the legal nature of the TF, it must be recalled that, as repeatedly confirmed by our Court, in the assessment of the compatibility of aid measures with the internal market under Article 107(3) TFEU, the Commission enjoys a wide discretion and, in exercising this discretion, it may adopt *soft law* instruments, in order to establish the criteria on the basis of which it proposes to conduct this assessment.<sup>15</sup>

9. These instruments – needless to add – must be always compliant with the Treaty.<sup>16</sup> Consequently, as clarified by the Court, the Commission may not disregard Article 107(3) TFEU by adopting guidelines vitiated by an error of law or a manifest error of assessment, nor may it waive, by the adoption of guidelines, the exercise of the discretion that that provision confers on it.<sup>17</sup>

<sup>12</sup> Indeed, the Commission enjoys the discretion, following a review and consultation, to amend, modify (or even repeal) its guidelines at any time and to subject them to a time limit. The Commission is actually bound to keep its guidelines under continuous review for the purposes of anticipating any major developments not covered by those measures, see judgment of 8 March 2016, *Greece v Commission* (C-431/14 P, EU:C:2016:145, paragraph 71).

<sup>13</sup> OJ 2020 C 164, p. 3.

<sup>14</sup> See TF, point 72. These commitments were to be applied in line with the provisions of Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (EC) (OJ 2008, C 267, p. 1, 'Notice on remedies').

<sup>15</sup> See, *inter alia*, judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, 'Kotnik judgement', paragraphs 38 and 39).

<sup>16</sup> See, *inter alia*, judgments of 11 September 2008, *Germany and Others v Kronofrance* (C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 65) and of 2 December 2010, *Holland Malt v Commission* (C-464/09 P, EU:C:2010:733, paragraph 47 and the case-law cited).

<sup>17</sup> See judgment of 8 March 2016, *Greece v Commission* (C-431/14 P, EU:C:2016:145, paragraph 71).

10. By adopting such guidelines, communications or any other instruments of the wide soft law constellation, and by announcing, through their publication, that they will henceforth apply to the cases to which they relate, the Commission, therefore, imposes a limit on the exercise of its discretion and, as a general rule, cannot depart from those instruments, 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.<sup>18</sup>

11. Thus, these soft law instruments are meant to circumscribe the Commission's discretion not to expand it. Moreover, through the general principles of EU, they serve as parameters guiding judicial review of how the Commission exercises its discretion.

12. The Court has also clarified that the adoption of guidelines 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.<sup>19</sup> Therefore, Member States retain the right to notify the Commission of proposed State aid, which do not meet the criteria laid down by these guidelines.<sup>20</sup> However, in so doing, they run the risk that a Commission decision declaring that aid incompatible with the internal market will be taken against them, since such guidelines establish conditions designed to ensure that State aids granted within their scope of application are in line with EU law and the Commission may deviate from such conditions only in exceptional circumstances.<sup>21</sup> Thus, though not binding on Member States,<sup>22</sup> soft law instruments provide for a guidance that circumscribe and channel Member States measures.

13. These well-known principles evidently apply to the TF, the reference framework to assess the compatibility with the internal market of a State measure granted in the context of COVID-19. The Court has indeed clearly stated that such instrument binds the Commission.<sup>23</sup> Therefore, in line with the recalled established case-law, if a Member State notifies it of a proposed State aid which complies with the criteria laid down in the TF, the Commission must, as a general rule, authorise that proposed aid. On the other hand, the Member States retain the right to notify the Commission of proposed State aid, which do not meet the

<sup>18</sup> See judgment of 7 November 2024, *Ryanair v Commission* (C-588/22 P, EU:C:2024:935, 'Finnair II judgement', paragraph 58 and the case-law cited).

<sup>19</sup> See *Kotnik judgement*, paragraph 41 and judgment of 31 January 2023, *Commission v Braesch and Others* (C-284/21 P, EU:C:2023:58, paragraph 93).

<sup>20</sup> See *Kotnik judgement*, paragraph 43.

<sup>21</sup> See, to that effect, judgment of 31 January 2023, *Commission v Braesch and Others* (C-284/21 P, EU:C:2023:58, paragraphs 92 and 95).

<sup>22</sup> See, to that effect, *Kotnik judgement*, paragraph 44.

<sup>23</sup> See *Finnair II judgement*, paragraph 59.

criteria laid down by the TF, and the Commission may authorise such proposed aid in exceptional circumstances.<sup>24</sup>

## **B. The standard of judicial review**

14. The submission to judicial review of the exercise of executive's discretionary decision-making is indeed a basic principle of every legal system based on the rule of law. However, as such an exercise involves complex economic, technical and social assessments as well as policy choices, this review is subject to limits intended to preserve a certain institutional balance between executive and judicial powers and to take account of the lack of technical expertise of non-specialised judiciary.

15. 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,<sup>25</sup> which, as highlighted above, enjoys a wide discretion, the exercise of which involves complex economic and social appraisals. Accordingly, it is settled case-law of the Court that the review of these appraisals 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.<sup>26</sup> It is not for that judicature to substitute its own economic appraisal for that of the Commission.

16. Nevertheless, it is precisely in consideration of the Commission's discretion in applying Article 107(3) TFEU that a rigorous judicial review, albeit within the limits expressed above, is crucial. The Court has clearly expressed such a need by stating that 'where the [EU] institutions have a (...) power of appraisal, respect for the rights guaranteed by the [EU] legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present'.<sup>27</sup>

<sup>24</sup> See, by analogy, *Kotnik judgement*, paragraph 43.

<sup>25</sup> See, *inter alia*, *Kotnik judgement*, paragraph 37.

<sup>26</sup> According to the well-known formula in the judgment of 11 July 1985, *Remia and Others v Commission* (42/84, EU:C:1985:327, paragraph 34), coined by the Court in the context of EU competition law and exported, *inter alia*, in the field of State aids. See judgments of 26 September 2002, *Spain v Commission* (C-351/98, EU:C:2002:530, paragraph 74) and judgment of 4 October 2024, *E. Breuninger v Commission* (C-124/23 P, EU:C:2024:860, paragraph 30).

<sup>27</sup> See judgment of 21 November 1991, *Technische Universität München* (C-269/90, EU:C:1991:438, paragraph 14).

17. The Court has made it clear that the margin of discretion enjoyed by the Commission in conducting complex economic assessments, in particular in the area of State aids, does not imply that the EU judicature must refrain from reviewing the Commission’s interpretation of economic data.<sup>28</sup> Not only must the EU Courts, *inter alia*, establish 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.<sup>29</sup>

18. Thus, the intensity of the judicial review of economic assessments depends actually on the degree of their complexity as well as on the fact that they imply policy or objective choices. Therefore, particular attention must be paid to avoid the risk that the automatic recourse to a general formula on the marginal review of ‘complex economic assessments’ may lead to entire categories of appraisals conducted by the Commission automatically escaping a sufficiently intense degree of judicial review.

19. Lastly, in my view the very specific nature of *soft law* instruments in the area of State aids, TF included, should not be confused with the correct standard of judicial review that the Courts of the European Union must exercise. Such instruments may be *soft*, as they derogate from standard law making and institutional requirements, consultation and publication, but, once adopted, there are no reasons why review of the way they are applied should not be *hard*, that is to say subject to the same intensity (and limits) applied by EU Courts to the application of EU hard law measures.

### C. Flexibility in the application of the TF

20. The TF contains several ‘open rules’, namely on recapitalisation,<sup>30</sup> allowing the Commission to accept alternative solutions to those expressly envisaged in the provisions of the TF. The question therefore arises as to the discretion enjoyed by the Commission under such rules to divert from the TF.

21. Those rules aim to offer limited flexibility in cases where a formalistic ‘tick-the-box’ application of the TF is not feasible, allowing the Commission to carry out a more ‘global assessment’ of the measure’s structure and effects.<sup>31</sup>

<sup>28</sup> See judgment of 2 September 2010, *Commission v Scott* (C-290/07 P, EU:C:2010:480, paragraph 64).

<sup>29</sup> See judgment of 15 February 2005, *Commission v Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39) in the field of mergers, and, in the area of State aids, judgments of 2 September 2010, *Commission v Scott* (C-290/07 P, EU:C:2010:480, paragraph 64) and of 20 September 2018, *Spain v Commission* (C-114/17 P, EU:C:2018:753, paragraph 104).

<sup>30</sup> See, for instance, points 62 and 68 of the TF.

<sup>31</sup> The ‘tick the box’ and ‘the global assessment’ application of the TF is a distinction made by the Commission itself at the hearing.

However, this flexibility cannot be equated with full discretion, unconstrained by the guidelines the Commission itself published. Flexibility through ‘open rules’ under the TF cannot mean *carte blanche* for the Commission, which is in principle bound by the rules it adopts. Any looser interpretation would contradict the settled case law on the binding effect of guidelines, diminish the effectiveness of judicial review, and erode legal certainty by potentially letting the Commission use the openness of the TF’s language to circumvent its own self-imposed rules.

22. Furthermore, a national measure which does not comply with all the conditions of the relevant guidelines — in this case the TF — should in principle be prohibited, unless it can be clearly demonstrated that exceptional circumstances impose that it should be assessed directly under the Treaty.<sup>32</sup> In other words, when neither the ‘tick the box’ method nor the ‘global assessment’ method are suited, a national measure can potentially be accepted through the application of Article 107(3) TFEU only in exceptional circumstances. A lax interpretation by the Commission of guidelines, effectively circumventing its self-imposed rules, conflicts with that case-law, which aims at ensuring in particular the respect of the general principle of equal treatment.

23. It is on the basis of all the forgoing consideration that I will now examine the present appeal.

### **III. On the appeal**

24. In support of its appeal, DLH puts forward six pleas in law.

#### **A. The first ground of appeal**

25. By its first ground of appeal, DLH, supported by the Commission and the Federal Republic of Germany, challenges paragraphs 112 to 138 of the judgment under appeal, alleging an erroneous interpretation of point 49(c) of the TF and the application of an incorrect standard of review.

26. Point 49 of the TF lays down four ‘eligibility and entry’ conditions that ‘COVID-19 recapitalisation measures’<sup>33</sup> must fulfil. In paragraphs 112 to 138 of the judgement under appeal, the General Court examined and upheld the complaints made by Ryanair and Condor based on an infringement of point 49(c) of the TF, according to which, 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.

<sup>32</sup> See paragraphs 12 and 13 of this Opinion.

<sup>33</sup> This definition refers to recapitalisation schemes and individual recapitalisation measures of Member States for non-financial undertakings under the TF, not covered by section 3.1 of that instrument, see point 46 of the TF.

27. First, the General Court found that, in the period preceding the adoption of the decision at issue, the LH Group owned the large majority of its fleet and DLH was able to use its aircraft, as well as spare parts, as collateral in order to raise funds on the financial markets. According to the General Court, these findings emerged ‘in a clear, unequivocal and consistent manner from several items of evidence’ submitted by Ryanair,<sup>34</sup> on which Ryanair had drawn the attention of both the German Government and the Commission prior to the adoption of the decision at issue<sup>35</sup> (paragraphs 118-121 of the judgement under appeal). Second, the General Court observed that, in the decision at issue, 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 without substantiating that assertion in any way. In particular, nothing in the decision at issue indicated that the Commission had 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 (paragraphs 122-124 of the contested judgement). In this respect, the Commission could not proceed by presumptions (paragraph 131 of the contested judgement). Finally, the General Court stated that the Commission’s assertion in paragraph 22 of the decision at issue that DLH ‘collateral’ would not be sufficient to cover the ‘entire amount’ of the funds necessary was based on a false premise, that the financing that can be obtained on the markets must necessarily cover all the beneficiary’s needs. Neither the wording, nor the purpose or context of point 49(c) of the TF would provide support for this view. By relying on such a false premise and, therefore, by failing to assess whether DLH could have raised a *non-negligible part* of the necessary financing on the markets, the Commission had failed to take into account all of the relevant elements for the purpose of examining the condition laid down in point 49(c) of the TF. Both point 44 of the TF, which states that recapitalisations must not exceed the minimum needed to ensure the viability of the beneficiary, and, more widely, the general principle of proportionality would corroborate that finding (paragraphs 125, 127-130 and 132 of the judgement under appeal). Furthermore, the General Court found that the Commission had, in any event, based its assertion on a higher amount (EUR 9 billion) than that constituting the object of the concerned measure (EUR 6 billion, according to recital 26 of the decision at issue), which ‘[called] into question the very basis of its assessment’ (paragraph 126 of the judgement under appeal).

28. The first ground of appeal is divided into three parts.

<sup>34</sup> Namely a statement of 19 March 2020 by the chief financial officer of DLH itself (‘statement of March 2020’), 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’) and 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’).

<sup>35</sup> The General Court refers to two letters of 1 April 2020 and 3 April 2020 addressed by Ryanair respectively to the German Government and the Commission.

### ***1. First part of the first ground of appeal***

29. DLH claims that the General Court has distorted the Commission's arguments in recitals 22 and 100 of the decision at issue. In its view, the General Court was not entitled to infer from these recitals that, in the Commission's view, the financing on private markets 'must necessarily' always cover all the beneficiary's needs.

30. I note that, in the decision at issue, the Commission's assessment on the eligibility of the concerned measure under point 49(c) of the TF comprises only one recital, i.e., recital 100. In the first sentence of this recital,<sup>36</sup> the Commission refers back to recitals 21-24, under section 2.3 of that decision, describing the object of the measure. Recitals 22 and 23 reproduces the arguments of the German authorities on the eligibility under point 49(c) of the TF. These recitals deal exclusively with the inability of DLH to raise, either on the debt side or on the equity side, sufficient resources to cover 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. Instead, no analysis at all on DLH's ability to find financing for only *a part* of this amount – or of the amount of EUR 6 billion set by the concerned measure – is provided. In those circumstances, the General Court interpreted correctly recitals 22 and 100 of the decision at issue as expressing the view that, under point 49(c) of the TF, the financing that can be obtained on the markets must necessarily cover all the beneficiary's needs. It is worth noting that, in its written submissions, the Commission does not maintain a different interpretation of those recitals.

31. In the light of the above, the first part of the first ground of appeal must, in my view, be rejected.

### ***2. Second part of the first ground of appeal***

32. DLH, supported by the Commission and the Federal Republic of Germany, submits that the General Court erred when it held that the Commission was required to assess, at the stage of eligibility analysis in point 49(c) of the TF, whether a non-negligible part of the funding needs of a beneficiary could be financed on the markets. DLH raises four pleas in this respect.

#### ***(a) First plea***

33. DLH claims that the wording of point 49(c) of the TF does not support the General Court's view, which is based on an incomplete and erroneous reading of that provision.

34. This plea must, in my view, be dismissed.

<sup>36</sup> The second sentence of recital 100 of the decision at issue concerned the availability to DLH of horizontal measures in the Federal Republic of Germany.

35. Contrary to what DLH maintains, the ‘open and broad’ wording of point 49(c) of the TF is perfectly compatible with the interpretation proposed by the General Court, according to which undertakings are eligible for recapitalisation measures under the TF only insofar as and *to the extent that* they are not able to find financing on the markets.

36. It is true, as claimed by both DLH and the Commission, that it can be inferred from the whole text of point 49(c) of the TF that the determinative criterion, in order to establish eligibility, is whether the beneficiary is able to secure sufficient funding to ensure its ‘viability’.<sup>37</sup>

37. However, such a reading does not conflict with the interpretation adopted by the General Court, according to which when the beneficiary is capable of raising on the markets a (non-negligible) part of the funding needed in order to stay viable, the condition laid down in such a provision is not met *for the entirety* of its needs.

**(b) *Second plea***

38. DLH maintains that the General Court misinterpreted the purpose of point 49(c) of the TF and erred by transposing the minimum-necessary principle enshrined in the proportionality analysis to the eligibility analysis. According to DLH, point 49 of the TF is the entry point for the assessment of a notified measure, allowing the Commission to verify whether a notified measure complies with general and more formal criteria. The purpose of point 49 of the TF, and particularly the purpose of the condition laid down under c), would thus not be to implement a detailed analysis of whether a public intervention is limited to the minimum necessary, which is part of proportionality test under point 54 of the TF.<sup>38</sup> Both the Commission and the Federal Republic of Germany align with DLH’s view.

39. In paragraph 129 of the judgement under appeal, the General Court held that the condition laid down in point 49(c) of the TF 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’.

<sup>37</sup> Be it by obtaining financing on the markets at affordable terms or through the horizontal liquidity measures existing in the Member State concerned or by a combination of both.

<sup>38</sup> According to point 54 of the TF ‘[i]n order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019’.

40. Based on its very wording, such an interpretation of the purpose of that provision cannot, in my view, be seriously contested.<sup>39</sup> As DLH itself acknowledges, each of the conditions laid down in aforementioned point 49 meets a particular purpose. There is little doubt that the one under c) serves the purpose of preventing Member States to incur public expenditure in order to help undertakings that are capable of finding alternative forms of financing. In the context of the COVID-19 pandemic, avoiding such expenditures was crucial, due to the large number of undertakings affected in all sectors of the economy and the necessity, for Member States, to address priorities in order to allocate their finite resources.

41. With that clarified, DLH claims must, in my view, be rejected for the following reasons.

42. First, it is true, as rightly held by DLH, that point 49 of the TF is the ‘entry point’ for the assessment of a measure notified under such instrument. However, this does not necessarily imply that the Commission is not required to conduct a full and detailed analysis of all the relevant factors in order to verify that the conditions laid down in that point are met.

43. Overall, such conditions aim, in essence, to exclude recapitalisation measures which are not *necessary* in the light of the objectives pursued by the TF or do not respond to a common interest and cannot, therefore, be declared compatible with the internal market. When an undertaking is able to obtain a substantial or a non-negligible part of its financial needs on the markets at affordable terms, a recapitalisation measure intended to cover the totality of these needs cannot be deemed ‘necessary’.<sup>40</sup>

44. I am therefore unable to share the view that, in the context of point 49(c) of the TF, it is sufficient for the Commission to take as a basis the total financing needs of the beneficiary and assess whether they can be entirely obtained on the markets. The argument put forward by the Commission that point 49(c) of the TF is, by definition, a binary exercise — meaning that in case the condition laid down in that point is not fully met, the undertaking will not be eligible for recapitalization — is misconceived. This reasoning places indeed greater weight on the potential adverse economic consequences for the beneficiary of a rejected non-complaint measure over the proper assessment of the measure itself.

45. Following the interpretation of point 49(c) of the TF proposed by DLH, the Commission and the Federal Republic of Germany would result in situations in

<sup>39</sup> DLH does not seem to call into question the interpretation of the purpose of point 49(c) of the TF retained by the General Court (or, in any case, does not substantiate such a claim), nor does the Commission do so.

<sup>40</sup> See, to that effect, judgement of 22 June 2022, *Ryanair v Commission (Finnair II; COVID-19)* (T-657/20, EU:T:2022:390, the ‘*Finnair II General Court’s judgement*’, paragraphs 53 and 54). The appeal against that judgment was dismissed by the *Finnair II judgement*.

which a measure under section 3.11 of the TF is considered eligible even though its beneficiary is able to obtain financing on the markets for almost all of the amount of the aid, except that for a marginal part. Such an outcome would not be compatible with the principle of proportionality and would go against the requirements set by point 19 of the TF.<sup>41</sup>

46. Second, as concerns the claim that the General Court has shifted part of the proportionality test under point 54 of the TF to the eligibility assessment, it must be observed that the first leg of that test requires the Commission to verify that the amount of the COVID-19 recapitalisation does ‘not exceed the minimum needed to ensure the viability of the beneficiary’.

47. It seems to me that such a verification differs fundamentally from the assessment that the Commission must conduct under point 49(c) of the TF, as interpreted by the General Court in paragraphs 127-131 of the judgement under appeal. Evaluating whether, and to what extent, the beneficiary of a notified recapitalisation measure can find alternative forms of financing in order to cover its needs differs from evaluating whether the measure goes beyond what is necessary to ensure the beneficiary’s viability. The purpose of point 54 of the TF is also different, it being to ensure that the beneficiary does not receive more aid than what is necessary in order to restore liquidity and ensure its viability.

48. It is therefore not inconsistent, in the system of the TF, that these two assessments have been embedded in different provisions, regardless of whether they both aim to give expression to the principle of proportionality.<sup>42</sup>

49. In any event, even assuming that DLH is right in considering that the General Court has shifted to the eligibility stage an assessment which is part of the evaluation under point 54 of the TF, its argument is far too formalistic. Assuming the Commission has to verify, in its analysis of the proportionality of a recapitalisation measure notified under the TF, whether such a measure covers more than the beneficiary’s needs that the latter is unable to satisfy on the markets, it matters little at what stage this verification is done. In the present case, it does not appear that the Commission has conducted such an assessment in examining the proportionality of the aid under point 54 of the TF either.

<sup>41</sup> According to point 19 of the TF, Member States must show that the State aid measures notified to the Commission under this Communication are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned.

<sup>42</sup> It is worth noting that, before the General Court, Condor has challenged DLH’s assessment on the possibility of finding financing on the markets as part of its plea claiming an ‘insufficient and incomplete analysis regarding the proportionality of the aid’. In reorganising Ryanair’s and Condor’s pleas, in paragraph 71 of the judgement under appeal, the General Court has followed the structure of the TF, separating the analysis of DLH’s eligibility under point 49(c) (paragraphs 112-138 of that judgement) from that of the amount of the aid under point 54 (paragraphs 150-217 of the same judgement).

**(c) Third plea**

50. DLH, supported by the Commission, alleges that the General Court contradicted itself in paragraphs 150-217 of the judgement under appeal by rejecting as unfounded all the complaints raised by Ryanair and Condor concerning the amount of the aid.

51. In that regard, it suffices to note that all the pleas examined and rejected by the General Court in these paragraphs related to the interpretation of point 54 of the TF or to its application to the present case. In essence, Ryanair and Condor reproached the Commission either for having incorrectly calculated the amount of aid needed to ensure the viability of DLH or for having failed to assess correctly the extent of the advantage granted by the concerned measure. None of these complaints addressed the question whether the aid was limited to the amount which DLH was not capable of obtaining on the markets.

52. Consequently, no contradiction exists between the reasoning of the General Court in the aforementioned paragraphs of the judgement under appeal and those framing the analysis of point 49(c) of the TF.<sup>43</sup> The present plea must therefore, in my view, be rejected.

**(d) Fourth plea**

53. DLH claims that the extensive interpretation of point 49(c) of the TF adopted in the judgement under appeal conflicts with the General Court's own case-law in the judgment of 19 May 2021, *Ryanair v Commission (Spain; Covid-19)*,<sup>44</sup> and in the *Finnair II General Court's judgement*. Referring to the latter, DLH puts forward an additional plea, claiming that the General Court violated the principle of equal treatment by applying a stricter standard of interpretation of point 49(c) of the TF, despite the fact that the recapitalisations of Finnair and DLH concerned an almost identical scenario.

54. As regards the first of the aforementioned judgements, DLH refers to the part of the reasoning of the General Court by which the latter rejected a claim advocating an alternative criterion to the ones chosen by the Member State concerned for the eligibility to the aid scheme at stake.<sup>45</sup> In paragraph 49 of that

<sup>43</sup> The same goes for paragraphs 186 to 189 of the judgment under appeal, referred to by the Commission. In these paragraphs, the General Court stated that the Commission had not committed a manifest error of assessment in using the BBB credit rating as a benchmark, since it was not contested that such a rating permits financing at affordable terms. Contrary to what the Commission seems to imply, it did not address the question, discussed in paragraphs 125-132 of the judgement under appeal, whether DLH was capable of finding financing on the markets at affordable terms for at least a non-negligible part of its needs, *given the collaterals it could offer*.

<sup>44</sup> T-628/20, EU:T:2021:285.

<sup>45</sup> I note that a similar reasoning can be found in paragraphs 146 and 147 of the judgement under appeal, where the General Court rejected a plea drawn from a violation of point 53 of the TF,

judgement, the General Court stated that, in assessing COVID-19 measures, the Commission ‘is not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective’ and must not engage in ‘normative prospecting in order to examine every alternative measure possible’.<sup>46</sup>

55. In that regard, I recall that, in paragraphs 125-132 of the judgement under appeal, the General Court has considered that the Commission had not correctly interpreted the scope of the condition laid down under point 49(c) of the TF and, consequently, not sufficiently proven that this condition was satisfied for the totality of the amount of the notified measure. Therefore, contrary to what DLH implies, the General Court did not impose on the Commission the burden of assessing every hypothetical alternative and equally legitimate measure that could possibly be implemented in place of the notified one, but simply to positively establish that the notified measure complies with point 49(c) of the TF.

56. As far as the *Finnair II General Court’s judgement* is concerned, DLH claims that the Commission was not required to analyse whether the beneficiary could have obtained a non-negligible part of the financing on the market.<sup>47</sup> The General Court would have accordingly endorsed an interpretation of point 49(c) of TF whereby all the beneficiary’s liquidity needs form the basis of the eligibility analysis.

57. I do not share such a reading of the *Finnair II General Court’s judgement*. It appears from paragraphs 50, 51 and 53 of said judgement that it was only after having exploited all the available market solutions without succeeding in obtaining financing that would have enabled it to cover all its liquidity needs that Finnair submitted a request for a recapitalisation measure to the Republic of Finland.<sup>48</sup> That measure was therefore meant to cover only the liquidity needs that Finnair had proved to be unable to satisfy by other means.

relying on the same case-law as in paragraph 49 of the judgement of 19 May 2021, *Ryanair v Commission (Spain; Covid-19)* (T-628/20, EU:T:2021:285).

<sup>46</sup> See paragraph 49 of judgment of 19 May 2021, *Ryanair v Commission (Spain; Covid-19)* (T-628/20, EU:T:2021:285).

<sup>47</sup> DLH refers to paragraph 53 of the *Finnair II General Court’s judgement*, claiming that in this paragraph the General Court held that Finnair was eligible for a recapitalisation aid given that it did not succeed in obtaining financing on the markets that would have enabled it to cover all its liquidity needs.

<sup>48</sup> Finnair had attempted to obtain financing on the credit markets and had succeeded in obtaining a credit facility and in negotiating a facility for the sale and leaseback of its unencumbered aircraft in order to obtain additional funding (paragraph 50 of the *Finnair II General Court’s judgement*). Despite those measures, its equity was expected to fall significantly in comparison with the situation that existed before the COVID-19 pandemic (paragraph 51 of the *Finnair II General Court’s judgement*).

58. It is therefore without contradicting itself that, in the present case, the General Court rejected an interpretation of point 49(c) of the TF whereby, in order to meet the condition laid down in that point, it suffices to prove that the beneficiary is not able to satisfy the totality of its liquidity needs on the markets.

59. In the light of the foregoing, the fourth plea of the second part of the first ground of appeal must, in my view, be rejected. Likewise, the additional plea put forward by DLH claiming a violation of the principle of the equal treatment must be rejected, in that it has no factual basis.

**(e) *Conclusions on the second part of the first ground of appeal***

60. For the reasons stated, all the pleas raised by DLH in support of the second part of its first ground of appeal must, in my view, be rejected, as must, consequently, that part in its entirety.

**3. *Third part of the first ground of appeal***

61. By the third part of its first ground of appeal, DLH supported by the Commission and the Federal Republic of Germany, claims that, in paragraphs 117 and 131-135 of the judgement under appeal, the General Court erred in law by requiring the Commission to seek additional information in order to assess compliance with point 49(c) of the TF. It submits also that the General Court drew its own conclusions on DLH's financing availabilities, substituting its own assessment of complex economic circumstances for that of the Commission, without previously establishing its implausibility. DLH puts forward five pleas.

**(a) *First plea***

62. DLH, supported by the Commission and the Federal Republic of Germany, claims that the General Court misapplied the Court's case-law on the extent of the Commission's obligations during the preliminary examination of a notified State aid measure. DLH refers in particular to the judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*.<sup>49</sup>

63. In that judgment, the Court, in line with its established case-law, reiterated that the lawfulness of a decision not to raise objections at the end of a preliminary examination procedure must be assessed by the EU Courts in the light not only of the information available to the Commission at the time when the decision was adopted, but also of the information which could have been available to it. The information which 'could have been available' to the Commission includes that which seemed relevant to the assessment to be carried out in the preliminary

<sup>49</sup> See judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663, 'Tempus judgement').

examination phase<sup>50</sup> and which could have been obtained, upon request by the Commission, during the administrative procedure.<sup>51</sup> However, it is not for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain.<sup>52</sup>

64. I am of the view that, in the present case, the General Court did not misinterpret the scope of the Commission’s obligations that I have just outlined.

65. As recalled in paragraph 27 of this Opinion, the General Court held, essentially, that the examination carried out by the Commission during the administrative procedure was insufficient or incomplete for two reasons. First, the Commission had failed to assess the possible availability of DLH’s unencumbered aircraft as collateral in order to have access to financing on the markets at affordable terms, notwithstanding the evidence on which Ryanair had drawn its attention. Second, the Commission had failed to assess whether such collaterals could have allowed DLH to raise a non-negligible part of the necessary financing on the markets.

66. By criticizing the Commission for having failed to inquire into the possibility for DLH to find financing on the markets using its fleet as collateral, the General Court did not impose on it an obligation to seek information of its own motion in the absence of any evidence calling for further investigation. It merely required the Commission to make use of the relevant information already in its possession, namely the statement of March 2020<sup>53</sup> referred to by the General Court in paragraph 118 of the judgement under appeal, which contained the data on the value of DLH’s unencumbered aircraft, as reported in that same paragraph as well as in paragraph 134 of the judgement.<sup>54</sup>

67. In that regard, I observe, in the first place, that it is hardly questionable that the type and value of the assets owned by the beneficiary and their availability as collateral is, in principle, relevant information in order to assess its ability to obtain financing on the markets under point 49(c) of the TF.<sup>55</sup> In the second

<sup>50</sup> According to the Court’s case-law the lawfulness of a decision not to raise objections at the end of a preliminary examination procedure depends on the question whether the assessment of the information and evidence which the Commission had at its disposal should objectively have raised doubts as to the compatibility of the measure notified with the internal market, given that such doubts must lead to the initiation of a formal investigation procedure. See *Tempus judgement*, paragraph 38.

<sup>51</sup> See the *Tempus judgement*, paragraph 42 and 43 and the case-law cited.

<sup>52</sup> See the *Tempus judgement*, paragraph 45 and the case-law cited.

<sup>53</sup> See footnote 34 of this Opinion.

<sup>54</sup> The Commission does not contest that it had knowledge of such a statement.

<sup>55</sup> See paragraph 124 of the judgement under appeal.

place, it seems to me that the mere fact, highlighted by DLH and the Commission, that the statement of March 2020 predated of more than two months the notification of the measure at issue is not sufficient in itself – even in the context of rapid changes induced by the pandemic – to call automatically into question the accuracy of these data at the time when the preliminary examination procedure was being conducted.<sup>56</sup>

68. Therefore, in my view, the General Court did not err in concluding that the Commission was required to take that information into consideration and to examine, including by seeking further evidence, the conditions in which DLH could have obtained financing on the markets against the abovementioned collateral.<sup>57</sup>

69. Furthermore, it appears clearly from a full reading of paragraph 132 of the judgement under appeal that, in stating that the Commission had failed to take into account ‘all of the relevant evidence’<sup>58</sup> for the purpose of examining the condition laid down in point 49(c) of the TF, the General Court referred to the lack of any assessment on DLH’s ability to raise a non-negligible part of the necessary financing on the markets. Therefore, contrary to what the Commission alleges, it cannot be inferred from that statement that the General Court has imposed an exceedingly large obligation on the Commission to seek and examine information of which it was unaware as regards its existence or relevance.

70. Finally, the arguments put forward by DLH, the Commission, and the Federal Republic of Germany — by which these parties seek to call into question the assessment of the probative value of the evidence relied on by the General Court in paragraphs 118 and 119 of the judgement under appeal — must be rejected as inadmissible. According to a settled case-law, it is, in principle, for the General Court alone to make such an assessment.<sup>59</sup>

<sup>56</sup> Similarly, DLH’s arguments aiming at criticizing the data contained in the statement of March 2020 as a basis for a prudent calculation of the collateral available to DLH, given the context of the market environment at the time of the pandemic, are not such as to deprive these data of their pertinence.

<sup>57</sup> See paragraph 134 of the judgement under appeal. It is worth observing that, in the reasoning of the General Court, it is the information contained in the statement of March 2020 that should have induced the Commission to examine the possibility for DLH to finance at least part of its needs on the markets by offering its aircraft as collateral. The Oxera report I and the Moody’s report were only meant to substantiate the data contained in that statement.

<sup>58</sup> See the second sentence of paragraph 132 of the judgement under appeal. It is worth mentioning, in that respect, that the word ‘evidence’ constitutes the English – in my view improper – translation of the word ‘éléments’ in the French version of the judgement under appeal. The expression ‘tous les éléments pertinents’ indicates the different components of the assessment that the Commission was required to conduct and not the evidence on which it should have relied.

<sup>59</sup> See judgment of 10 September 2024, *Commission v Ireland and Others* (C-465/20 P, EU:C:2024:724, paragraph 247 and the case-law cited).

71. It follows from the foregoing that the present plea must, in my opinion, be rejected as unfounded.

**(b) *Second plea***

72. DLH, supported by the Commission and the Federal Republic of Germany, alleges that the General Court erred in law in concluding that the Commission had not examined whether DLH could have obtained financing on the markets at affordable terms by offering collateral. They refer in particular to recital 22 of the decision at issue, where the Commission has indicated that ‘DLH would not have sufficient collateral for securitized debt instruments over the entire amount at current loan to values and market values’.

73. In this regard, I note that, in paragraph 122 of the judgment under appeal, the General Court acknowledged that, in the decision at issue, the Commission had assessed whether DLH had ‘sufficient collateral’ to obtain financing instruments on the markets. However, it considered that that assertion was fully unsubstantiated, that the guaranties referred to by the Commission were unidentified and that nothing in the decision at issue indicated that the availability of DLH’s unencumbered aircraft as collateral had been examined.<sup>60</sup> The General Court also observed that recital 22 of the decision at issue referred explicitly only to DLH’s capability of finding financing over the entire amount of its needs [EUR 9 billion] and that the Commission had failed to assess whether DLH could have raised a non-negligible part of the necessary financing on the markets.<sup>61</sup>

74. Neither DLH nor the Commission or the Federal Republic of Germany submit elements allowing these findings to be called into question.

75. First, the Federal Republic of Germany’s claim that the General Court distorted recital 22 of the decision at issue overlaps with the complaint raised by DLH in the first part of its first ground. I therefore refer back to the analysis in paragraphs 29 to 30 of this Opinion, where I proposed to reject that complaint.

76. Second, the extensive references made by DLH to the Federal Republic of Germany’s submissions during the administrative procedures<sup>62</sup> do not demonstrate that the question of whether DLH could have used its unencumbered aircraft as collateral to obtain financing on the markets had been addressed, let

<sup>60</sup> See paragraph 123 and 125 of the judgement under appeal.

<sup>61</sup> See paragraphs 125 and 132 of the judgement under appeal.

<sup>62</sup> DLH refers to its response of 8 June 2020 to the questions raised by the Commission on 19 May 2020 (‘the response of 8 June 2020’). It refers also to two items of evidence produced in annex A.2 to that response, namely a presentation of the Deutsche Bank on the lack of financing options available to DLH and a failed attempt to raise money via a promissory note. These pieces of evidence attested, in its view, the troubles it ran into when seeking financing during the pandemic without prior State support.

alone examined, in that procedure.<sup>63</sup> In addition, all the arguments put forward by DLH in order to establish that such an option was not viable refer to the totality of the amount of EUR 9 billion<sup>64</sup> and are therefore insufficient to dispute the reasoning of the General Court.

77. Third, a fair number of the arguments advanced by DLH, the Commission, and the Federal Republic of Germany engage in proving that it was unlikely that DLH could have managed to finance all or a substantial part of its funding needs on the markets. These arguments aim at justifying *a posteriori* the absence, in the decision at issue, of any assessment on a possible partial financing through collateralized debt and are therefore ineffective at establishing that such an assessment had actually been carried on by the Commission.

78. Finally, the Federal Republic of Germany's allegation, according to which the Commission was not obliged to further comment on the use of collateral by DLH, since a decision under Article 108(3) TFEU must simply set out the reasons why the assessment of the compatibility of the notified measure with the internal market does not give rise to serious difficulties, is based on a misinterpretation of the judgement under appeal. In paragraphs 118 to 138 of that judgement, the General Court found that the assessment conducted for the purpose of establishing whether the measure at issue complied with point 49(c) of the TF was insufficient and incomplete and not that the Commission had failed to state reasons in that regard.

79. In the light of the foregoing, I am of the view that this second plea is also unfounded and must be rejected.

**(c) *Third plea***

80. DLH alleges that, in paragraph 120 of the judgement under appeal, the General Court distorted its statement of intervention as well as the defence of the Commission by stating that they had not disputed the data provided by Ryanair's expert in its Oxera report I and reproduced in paragraphs 118 and 119 of that judgement.

<sup>63</sup> The statement made by DLH that the Commission had 'verified that aircraft collateral would have only allowed for a very limited amount in financing, particularly because aircraft financing transactions came to a complete standstill as DLH's potential lenders appeared to have halted their business completely following the COVID-19 outbreak' isn't in any way, or at least not sufficiently, substantiated.

<sup>64</sup> It appears from the response of 8 June 2020 that the Commission had asked, *inter alia*, DLH to explain why it was not able to find financing on the markets at affordable terms since the outbreak of the COVID-19 pandemic and to substantiate its arguments with evidence. DLH's answer to that question was focused on DLH's overall funding need of EUR 9 billion and on the impossibility to raise the entirety of such an amount in debt capital markets. Moreover, the evidence provided by DLH related mainly to unsecured financing.

81. In order to appreciate this plea, it is important to note that the data whose ‘accuracy and reliability’ has not been disputed, according to the General Court findings in paragraph 120 of the judgement under appeal, are enumerated in paragraphs 118 and 119 of that judgement. They relate to the consistency of the LH Group fleet, the value of its unencumbered aircraft and spare parts and the ability for DLH to raise between EUR 1 and 3.7 billion in debt financing by using these assets as collateral.

82. It appears from its statement of intervention before the General Court that DLH has actually disputed Ryanair’s arguments drawn from the Oxera report I concerning other airlines’ ability to secure alternative financing on the market through securitized debt funding. However, it does not emerge that DLH had called into question the data on the value of the assets specified in paragraph 81 of this Opinion. As concerns its capacity to use its fleet as collateral, DLH confined itself to indicate that it did not have ‘sufficient collateral for securitized debt instruments over the required amount of EUR 9 billion’, while admitting that its aircraft collateral would have allowed financing transactions but only ‘for a very limited amount’, without further specifications.

83. Therefore, it appears that the General Court did not distort DLH’s statement of intervention. The same is true for the Commission’s defence, which also focused on the reliability of the data contained in Oxera report I concerning other airlines’ alternative financing solutions.

84. As a result, the present plea must, in my view, be rejected as unfounded.

**(d) *Fourth plea***

85. DLH, supported by the Commission and the Federal Republic of Germany, alleges that, drawing its own conclusions on DLH’s financing availabilities, the General Court has put forward its own assessment of complex economic circumstances and substituted it for that of the Commission. In doing so, the General Court encroached upon the broad discretion enjoyed by the Commission when undertaking complex economic assessments, instead of limiting itself to reviewing the lawfulness of that assessment.

86. It must be observed, in that respect, that the General Court acknowledged, in paragraph 117 of the judgement under appeal, that the question of whether DLH was unable to obtain financing on the markets at affordable terms involved complex economic assessments, subject to a limited review. However, it concluded that, in conducting such an assessment, the Commission had not taken into account ‘all of the relevant [elements]<sup>65</sup> for the purpose of examining the condition laid down in point 49(c) of the TF’.<sup>66</sup>

<sup>65</sup> See footnote 58 of this Opinion.

<sup>66</sup> See paragraph 132 of the judgement under appeal.

87. Therefore, contrary to the allegations made by DLH, the Commission and the Federal Republic of Germany, the General Court did not engage in a financial market analysis substituting its own economic assessment for that of the Commission. It held, based on the evidence adduced by Ryanair, that the examination conducted by the Commission was insufficient or incomplete, in that it failed to address the question of the availability of collateralized debt financing, which constituted ‘an important aspect of the condition laid down in point 49(c) of the [TF]’.<sup>67</sup>

88. In so doing, the General Court applied the case-law recalled in paragraph 17 of this Opinion, according to which it is its task to establish whether the evidence relied on 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.<sup>68</sup>

89. The failure to take account essential factors amounts to a manifest error of assessment of the facts,<sup>69</sup> which, in itself, challenges the plausibility<sup>70</sup> of the analysis conducted by the author of the contested act.<sup>71</sup> Moreover, the finding of an insufficient or incomplete examination calls into question the lawfulness of a decision not to raise objection, such as the decision at issue, in that constitutes an

<sup>67</sup> See paragraph 124 of the judgement under appeal. The arguments put forward by the Commission against General Court’s statement on the importance of the assessment of possible financing through collateralization are limited to general assertions, incapable at calling into question the validity of that statement. In that regard, I note that point 49(c) of the TF does not distinguish between debt financing and capital financing. The Commission itself acknowledges that ‘an adequate combination of debt and equity instruments may effectively provide the overall support required by an undertaking’. Certainly, it clarifies right after that ‘it is by no means certain that the debt component (and *a fortiori* collateralized debt financing) could or should often represent a non-negligible part of that overall funding’ (see paragraph 26 of the Commission’s Response). However, that is precisely the examination that, according to the General Court, the Commission was required to conduct and failed to do.

<sup>68</sup> See also paragraphs 77 and 117 of the judgement under appeal.

<sup>69</sup> See, to that effect, judgment of 28 November 2024, *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* (C-269/23 P and C-272/23 P, EU:C:2024:984, paragraph 126 and the case-law cited).

<sup>70</sup> In this respect, I observe that the Court has certainly stated that a manifest error may be established by evidence which renders implausible the Commission’s assessment of the facts in its decision, but it has by no means reduced the broad notion of ‘manifest error of assessment’ to that unique hypothesis. See judgement of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding v Commission* (C-148/19 P, EU:C:2020:354, paragraph 72).

<sup>71</sup> Of course, the identification of relevant facts for the purpose of an economic assessment may involve in itself the exercise of a discretionary power, as the Commissions underlines. However, it is only by reviewing such relevance that the General Court may exercise a meaningful control over the soundness of Commission’s assessments. That is why, according to the case-law cited in paragraphs 15 to 17 of this Opinion the EU Courts are bound to investigate the relevance of these facts and their comprehensiveness.

indication of the existence of serious difficulties in the assessment of the notified measure.<sup>72</sup>

90. For the reasons set out above, the present plea is in my view unfounded and must be rejected.

**(e) Fifth plea**

91. DLH, supported by the Commission and the Federal Republic of Germany, contests the statement contained in paragraph 126 of the judgement under appeal, according to which the Commission had incorrectly based its assessment on DLH’s capability of finding financing on the markets on an amount higher than that constituting the object of the concerned measure (EUR 9 billion instead of EUR 6 billion).

92. As I have already recalled, the concerned measure was a part of a wider series of support measures for the LH Group. Among these were a EUR 3 billion State loan implemented through the German State-owned promotional bank Kreditanstalt fuer Wiederaufbau (‘KfW’).

93. It is true that the decision at issue sets out that DLH had a total funding requirement of EUR 9 billion to ensure its viability.<sup>73</sup> However, the concerned measure, in reference to which the first limb of the eligibility condition laid down in point 49(c), of TF should be verified, amounted to EUR 6 billion. The remaining EUR 3 billion were expected to be covered by the aforementioned loan, that is to say a horizontal measure whose availability is to be considered under the second limb of that condition. The General Court’s statement is therefore correct.

94. DLH, the Commission, and the Federal Republic of Germany allege that the reason why recital 22 of the decision at issue mentioned the amount of EUR 9 billion was that DLH’s recapitalisation was required by KfW as a prerequisite for granting the loan. I do not exclude that the existence of such a link between the two measures could justify the reference made by the Commission to the totality of DLH’s financing needs, even though no such justification can be found in the part of the decision at issue pertaining to the assessment under point 49(c) of the TF.

95. In any event, even if the present plea is declared founded by the Court, it would not suffice in itself to call into question the conclusion of the General Court on the existence of an infringement of point 49(c) of the TF.

<sup>72</sup> See, *inter alia*, *Tempus judgement*, paragraph 41.

<sup>73</sup> See recital 6 and note 6 of the decision at issue.

**(f) *The pleas put forward by the Commission and the Federal Republic of Germany alleging a violation of their right to a fair hearing***

96. The Commission submits that, at paragraphs 118 and 119 of the judgment under appeal, the General Court identified on its own motion specific elements of information from the annexes of the file but did not give the Commission or the intervening parties the opportunity to respond to those arguments, on which it eventually significantly relied on for its assessment. The Federal Republic of Germany advances, in essence, the same grievance.

97. I note that these submissions are different in nature<sup>74</sup> from – if not diametrically opposed<sup>75</sup> to – those raised by DLH in its third plea, to the point that their admissibility seems questionable.<sup>76</sup>

98. They should, in any event, be dismissed on the merits. In that regard, it suffices to note that the General Court did not raise any plea in law by its own motion,<sup>77</sup> nor did it rely on data that were not accessible to the Commission or to the interveners at first instance and that they were not able to debate or be heard on.<sup>78</sup> Besides, Ryanair's arguments on the consistency and value of LH Group fleet and on the ability of DLH to raise at least part of its financing needs on the markets offering its aircraft and spare parts as collateral were clearly put forward in its written submissions before the General Court, in particular in its response to DLH's statement of intervention.<sup>79</sup>

<sup>74</sup> DLH alleges a misinterpretation of its written submissions before the General Court, while the Commission and the Federal Republic of Germany claim a violation of their right to a fair hearing.

<sup>75</sup> DLH claims that both itself and the Commission have disputed the data on which the General Court relied on, while the Commission and the Federal Republic of Germany allege that they did not have the opportunity to comment on them.

<sup>76</sup> According to the Court's case-law, it is apparent from Articles 172, 174, 176 and 178 of the Rules of Procedure of the Court of Justice, read together, that the response may not seek the annulment of the decision of the Court on the basis of distinct and independent grounds from those raised in the appeal, since such grounds may only be raised as part of a cross-appeal [see judgments of 30 May 2017, *Safa Nicu Sepahan v Council* (C-45/15 P, EU:C:2017:402, paragraph 20) and of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others v Commission* (C-817/18 P, EU:C:2020:637, paragraph 47)].

<sup>77</sup> The judgment of 2 December 2009, *Commission v Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 56), on which the Commission relies, is therefore not relevant.

<sup>78</sup> All of these data were contained in annexes to Ryanair's written submission and formed part of the General Court's file.

<sup>79</sup> Notwithstanding the fact that, as observed by the Commission, Ryanair's written submission before the General Court did not specifically refer to the part of the Oxera I report mentioned in paragraph 119 of the judgment under appeal.

**(g) Conclusion on the first ground of appeal**

99. In the light of all the foregoing considerations, I suggest the Court reject the first ground of appeal.

**B. The second ground of the appeal**

100. By its second ground of appeal DLH, supported by the Commission and the Federal Republic of Germany, challenges paragraphs 242 to 270 of the judgment under appeal, alleging that the General Court erred in law when it found that neither the equity participation nor SP II were accompanied by ‘alternative mechanisms’ within the meaning of points 62 and 68 of the TF.

**1. On the alternative mechanism accompanying the equity participation**

101. According to point 61 of the TF, ‘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’.<sup>80</sup> Pursuant to point 62 of the TF, ‘[t]he Commission may accept alternative mechanisms, provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and have a similar overall impact on the State’s remuneration’.

102. In the present case, it is undisputed that the remuneration for the equity participation does not provide for a step-up mechanism within the meaning of point 61 of the TF. Nevertheless, the Commission considered, in recitals 136 to 142 of the decision at issue, that the ‘overall structure’ of the concerned measure constituted an alternative mechanism in line with point 62 of the TF regarding the State’s remuneration and the beneficiary’s incentives to buy back the State’s capital injection. As regards the remuneration for the State, the Commission observed that the Federal Republic of Germany would acquire the shares in DLH at a discount of 71,9% on the maximum share price (‘MSP’) fixed in point 60 of the TF.<sup>81</sup> Such a discount conferred on the Federal Republic of Germany a significantly higher ownership at entry (a 20% participation) than what it would have had at the MSP, even after the two step-ups provided for in point 61 of the TF. As regards the incentive effects on the exit of the State, the Commission considered that the different components of the concerned measure (the equity participation, SP I and SP II) were tightly interconnected, and that their combined effects regarding exit incentives should be taken into account. Accordingly, in

<sup>80</sup> The 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, and six years after the capital injection, if the State has not sold in full its participation.

<sup>81</sup> The MSP in point 60 of the TF corresponds to the average price of the shares over the 15 days preceding the request for a capital injection. For DLH, that price was EUR 9,12 per share. The concerned measure provided for a price of EUR 2,56 per share.

recitals 139 and 141 of the decision at issue, the Commission referred to several factors, which are listed in paragraph 248 of the judgement under appeal, justifying that conclusion.<sup>82</sup>

103. In the judgement under appeal, the General Court concluded that the Commission infringed points 61 and 62 of the TF in that it failed to require the inclusion of a step-up or similar mechanism in the remuneration for the equity participation (paragraph 270 of the judgement under appeal).

104. DLH raises two pleas against that conclusion.

**(a) *On the first plea***

105. By its first plea, DLH maintains that, in assessing whether the equity participation was subject to an alternative mechanism pursuant to point 62 of the TF, the General Court adopted an erroneous formalistic approach, removing almost completely the broad discretion enjoyed by the Commission, overstepping the limits of judicial review and misinterpreting the TF.

106. In that regard, it must be firstly noted that DLH's arguments are partly based on a misreading of the judgment under appeal. Contrary to what has been advocated by DLH, the General Court did not hold that the Commission could not consider the combined effects of the concerned measure regarding exit incentives to validate an alternative mechanism to the step-up mechanism pursuant to point 62 of the TF. Rather, following a review of the Commission's analysis, the General Court concluded that the latter had not 'demonstrated to the requisite legal standard' that the 'overall structure' of the concerned measure led to incentive effects on the exit of the State comparable to those of a step-up or similar mechanism, within the meaning of point 62 of the TF.<sup>83</sup>

107. Secondly, it is apparent from the principles recalled in paragraphs 15 to 18 of this Opinion that, in paragraphs 249 to 262 of the judgement under appeal, the General Court did not overstep the limits of the judicial review on the assessments the Commission is required to undertake in ascertaining the compliance with point 62 of the TF.<sup>84</sup> In these paragraphs, the General Court limited itself to

<sup>82</sup> These factors are: i) the significant discount at which the Federal Republic of Germany had acquired the shares in DLH; ii) the fact that the presence of the State as a shareholder of DLH was undesirable for the beneficiary; iii) the fact that SP I and II had increasing coupons; iv) the likelihood of conversion of a part of SP II into shares increased with time, which would cause the dilution of existing shareholdings in favour of the State and v) the behavioural commitments, in particular the prohibition on paying dividends, which would remain in force until the aid was redeemed in full.

<sup>83</sup> See paragraph 263 of the judgement under appeal.

<sup>84</sup> As DLH acknowledged, the General Court correctly recalled, in paragraphs 73 to 78 of the judgment under appeal, the settled case-law regarding the wide discretion enjoyed by the Commission when conducting complex economic assessments and the consequently limited scope of the review carried out by the EU Courts as regards these assessments.

verifying, the relevance of the factors relied on by the Commission and the economic and legal soundness of the conclusions drawn from them. Merely restating the broad discretion enjoyed by the Commission in applying point 62 of the TF, DLH fails to demonstrate the complex nature of the appraisals in recitals 139 to 141 of the decision at issue and to substantiate its allegation that the General Court has substituted its own assessment for that of the Commission.

108. Thirdly, regarding the alleged misinterpretation of the TF, I recall that, according to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording but also of the context in which it occurs and the objectives pursued by the rules of which it is part.<sup>85</sup> Every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.<sup>86</sup> The origins of a provision of EU law may also provide information relevant to its interpretation.<sup>87</sup> These principles, guiding the interpretation of EU law provisions, are equally applicable when the EU Courts are called to interpret the Commission’s guidelines in the field of State aids, regardless of their nature of soft law.<sup>88</sup>

109. Although point 62 of the TF, providing the possibility for the Commission to accept alternative mechanisms to the standard step-up mechanism laid down in point 61 of the TF, is not explicitly construed as a derogation to the latter, its scope should, in my view, be interpreted restrictively in the light of its objective.

110. Point 62 of the TF aims to offer limited flexibility in cases where a ‘tick-the-box’ compliance to the rules of the TF on remuneration and exit of the State is not feasible, allowing the Commission to carry out a ‘global assessment’ of the measure at stake, its structure and its effects.<sup>89</sup> However, it still requires that the alternative mechanism offer a similar outcome to the standard step-up mechanism explicitly listed in the TF, both in terms of exit incentives and remuneration for the State. It follows that, when departing from the standard step-up mechanism laid down in point 61 of the TF, the Commission must be able to demonstrate clearly that the alternative mechanism ensures such a similar outcome. In this

<sup>85</sup> See judgments of 17 November 1983, *Merck* (292/82, EU:C:1983:335, paragraph 12), and of 10 July 2025, *Sánchez Romero Carvajal Jabugo* (C-322/24, EU:C:2025:556, paragraph 35).

<sup>86</sup> See judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 20), and of 3 September 2024, *Illumina and Grail v Commission* (C-611/22 P and C-625/22 P, EU:C:2024:677, paragraph 127).

<sup>87</sup> See judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 50), and of 8 May 2025, *KG and WA* (C-236/24, EU:C:2025:321, paragraph 21).

<sup>88</sup> See judgment of 12 October 2023, *Est Wind Power* (C-11/22, EU:C:2023:765, point 46).

<sup>89</sup> See paragraph 21 of this Opinion.

context, the *Finnair II judgement*, referred to namely by the Commission, cannot be of any help. The degree of flexibility the Court acknowledged to the TF in that judgement<sup>90</sup> cannot justify a departure from the requirements it lays down if no exceptional circumstances have been demonstrated by the Member State.<sup>91</sup>

111. Finally, the allegation that the General Court has excluded the relevance under point 62 of the TF of any of the factors listed in paragraph 248 of the judgement under appeal, on account that the underlying issues and subject-matters are governed by separate provisions and requirements, is equally based on a partial reading of that judgement.

112. Concerning the initial share purchase price, it is true that in paragraph 255 of the judgement under appeal, the General Court has underlined that points 60 and 61 of the TF lay down two distinct requirements. However, far from relying on that sole statement, the General Court explained that mechanisms under points 61 and 62 of the TF have an *ex-post* incentive to buy back the State's shareholding as quickly as possible, while the share purchase price has, by contrast, an *ex-ante* impact on the situation of the beneficiary and is not necessarily intended to increase such an incentive, 'since the price of the shares may rise as well as fall'.<sup>92</sup> The fact, underlined by DLH, that the concerned measure assured an 'overcompliance' to the TF, due to the high discount accorded to the Federal Republic of Germany on the MSP, does not bring that conclusion into question. Nor does it the fact, equally relied on by DLH, that such a discount assured to the Federal Republic of Germany a 20% share and a blocking minority. The TF does not make the requirement of a step-up or equivalent mechanism dependant on the importance of the public shareholding purchased<sup>93</sup> or its price.

113. Similar considerations may be formulated regarding the price of the shares at the time they are sold back by the State, the increasing interest rate for SP I and II, as well as the behavioural commitments subscribed by DLH, referred to respectively in paragraphs 259, 260 and 262 of the judgement under appeal.

<sup>90</sup> In the *Finnair II judgement* the Court found that the 'General Court applied [the] case-law correctly by examining whether the Commission had been entitled to find that specific exceptional circumstances existed (...) which, in a particular case, may enable it to authorise an aid measure under Article 107(3)(b) TFEU, even though that measure does not meet all the requirements of the Temporary Framework.' No such assessment was carried in the case at hand.

<sup>91</sup> I note that the Federal Republic of Germany has not invoked exceptional circumstances for not applying the TF.

<sup>92</sup> See paragraph 256 of the judgement under appeal.

<sup>93</sup> I note, incidentally, that the decision at issue is not based on such specific ground. In any case, according to the TF, the step-up mechanism is deemed to be applicable even in situations where the State's participation in the beneficiary, resulting from the capital injection, exceeds the level acquired by the Federal Republic of Germany in the present case (see the example in footnote 49 of the TF).

114. Given that these factors are covered by points 63, 66 and 72 of the TF, which laid down specific requirements, the General Court was right in considering that the Commission could not base itself on the compliance (or overcompliance) to such requirements in order to establish the existence of an alternative mechanism for the purpose of point 62 of the TF.<sup>94</sup> According to the TF, recapitalisation measures ‘should be subject to stringent conditions’,<sup>95</sup> which are laid down in sections 3.11.2, and 3.11.4 to 3.11.7. A reasoning by which the Commission considers that one of these conditions is complied with by simply relying on the fact that all the others are fulfilled, would amount to disregarding the compulsory character of the condition at issue and to circumvent its application.

115. The incidence of such factors in order to ensure compliance to point 62 of the TF must be established by the Commission. That is precisely what, according to the General Court, the Commission has failed to do in the decision at issue.

116. In the light of the foregoing, the first plea raised by DLH must in my view be rejected.

**(b) *On the second plea***

117. By its second plea, DLH alleges that the General Court put forward an inaccurate legal characterization of the facts and drew from them mistaken legal conclusions.

118. First, DLH complains that the General Court held that the various factors relied on by the Commission could not be considered in order to establish compliance to point 62 of the TF. This plea reproduces, in essence, the same arguments put forward in support of DLH’s first plea, criticizing the formalistic approach allegedly followed by the General Court. As previously said, these arguments are based on an incorrect reading of the judgement under appeal.<sup>96</sup> Nowhere in that judgment did the General Court claim that these factors could not at all be considered. Rather, they were deemed insufficient to justify the absence of a step-up mechanism or another mechanism that satisfies the conditions laid down in points 62 of the TF.

119. Second, DLH alleges that the General Court distorted the purpose of the points 60 to 62 of the TF when it stipulated that alternative mechanisms to a step-up must also always include an increasing remuneration over time and has to be an *ex-post* incentive for a timely State exit. This complaint must also be rejected. The interpretation of points 61 and 62 of the TF laid down by the General Court is

<sup>94</sup> See also paragraph 267 of the judgement under appeal.

<sup>95</sup> See point 45 of the TF.

<sup>96</sup> See paragraph 106 of this Opinion.

perfectly in line with the wording and purpose of these provisions,<sup>97</sup> as well as with the general principles on remuneration and redemption of COVID-19 recapitalisation outlined in points 55 to 59 of the TF.<sup>98</sup>

120. With its remaining arguments, DLH, supported by the Commission and the Federal Republic of Germany, alleges a distortion of facts by the General Court. In this respect, I recall that, in accordance with the settled case-law, the General Court has exclusive jurisdiction, first, to establish the facts, and, second, to assess those facts.<sup>99</sup> The assessment of the facts and evidence does not, save where they are distorted, constitute a point of law, which is subject, as such, to review by the Court on appeal.<sup>100</sup> Therefore, where an appellant alleges distortion of evidence or facts by the General Court, it must show the errors of appraisal which, in its view led to such distortion. In addition, that distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts.<sup>101</sup> These requirements are, in my view, not met, in the present case. DLH essentially seeks a fresh assessment of the facts by the Court through a mere repetition of the arguments put forward before General Court or by submitting new facts and arguments, inadmissible at the stage of the appeal and, in any case, insufficiently circumstantiated.<sup>102</sup>

<sup>97</sup> As seen, point 61 of the TF requires an 'increase in the remuneration of the State' to incentivize the beneficiary to buy back the State capital injection. Point 62 of the TF requires that any 'alternative mechanism' has a 'similar outcome', implying, contrary to what DLH maintains, that a deviation to point 61 must in any case ensure the same effect of making the public participation more burdensome over time.

<sup>98</sup> According to point 55 of the TF, Member States 'must put a mechanism in place to gradually incentivise redemption' and point 58 of the TF states that 'recapitalisation measures need to contain appropriate incentives for undertakings to redeem the recapitalisation and look for alternative capital when market conditions permit, by requiring a sufficiently high remuneration for the recapitalisation'. These provisions contain, in my view, a clear reference to incentives supposed to work *ex post*. Point 59 of the TF is nothing more than a paraphrase of point 62.

<sup>99</sup> See judgments of 1 October 2014, *Council v Alumina* (C-393/13 P, EU:C:2014:2245, paragraph 16) and of 9 December 2020, *Groupe Canal + v Commission* (C-132/19 P, EU:C:2020:1007, paragraph 68).

<sup>100</sup> See judgments judgment of 18 December 2008, *Les Éditions Albert René v OHIM* (C-16/06 P, EU:C:2008:739, paragraph 80) and of 4 October 2024, *García Fernández and Others v Commission and SRB* (C-541/22 P, EU:C:2024:820, paragraph 211).

<sup>101</sup> See, to that effect, judgments of 25 June 2020, *SatCen v KF* (C-14/19 P, EU:C:2020:492, paragraph 105 and the case-law cited), and of 3 July 2025, *Glonatech v REA* (C-114/24 P, EU:C:2025:520, paragraph 108).

<sup>102</sup> DLH — supported by the Federal Republic of Germany — claims that a step-up mechanism, as envisaged in point 61 of the TF, would have been incompatible with German Stock Corporation Law and EU secondary law with regard to the equity participation of the German State. These alleged legal constraints were not raised before the General Court and thus constitute new factual assertions inadmissible at this stage of the proceedings. Moreover, DLH and the Federal Republic of Germany merely refer to potential incompatibilities without substantiating how or why those would preclude a step-up mechanism.

121. In the light of the foregoing, the present plea must also be dismissed.

## **2. *On the alternative mechanism accompanying the SP II***

122. In contesting the General Court’s conclusion on the absence of an alternative mechanism accompanying the SP II pursuant to point 68 of the TF,<sup>103</sup> DLH relies on the same arguments invoked in support of its submission on equity participation.<sup>104</sup> I would therefore refer, *mutatis mutandis*, to the considerations set out above in order to dismiss this plea.

123. The Commission has put forward an autonomous plea, according to which the General Court has ruled *ultra petita* when it found, in paragraph 270 of the judgement under appeal, that the Commission had infringed point 70 of the TF.<sup>105</sup> In this respect, I will confine myself to say that, even assuming that this plea is well founded, it would not allow to question the other infringements, namely to points 61, 62 and 68 of the TF, on the basis of which Ryanair’s complaint on the absence of a step-up mechanism for increasing remuneration has been upheld. It would therefore not help in setting aside this part of the judgement under appeal.

## **3. *Conclusion on the second ground of appeal***

124. For the reasons that I have given, the second ground of appeal must, in my view, be dismissed.

## **C. *Third ground of appeal***

125. By its third ground of appeal, DLH challenges paragraphs 272 to 288 of the judgment under appeal, in which the General Court found that the Commission had infringed point 67 of the TF by accepting a price for the shares, at the time of the conversion of SP II into equity, which did not follow the methodology set out in that point.

126. According to point 67 of the TF, the conversion of hybrid capital instruments into equity ‘shall be conducted at 5 percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion’.

<sup>103</sup> Point 68 of the TF contains provisions similar to those in points 61 and 62 of that instrument as concerns hybrid capital instruments after their conversion into equity.

<sup>104</sup> In paragraph 265 of the judgement under appeal, the General Court relied as well on the same reasons set out in paragraphs 252 to 257 of that judgement on the equity participation.

<sup>105</sup> Point 70 of the TF provides that ‘[s]ince the nature of hybrid instruments varies significantly, the Commission does not provide guidance for all types of instruments. Hybrid instruments shall in any event follow the principles mentioned above, with remuneration reflecting the risk of the particular instruments.’

127. In the present case, SP II was composed of two tranches ('SP II-A' and 'SP II-B'), depending on the event triggering the conversion into equity. SP II-A could be converted into shares at a fixed price of EUR 2.56 per share,<sup>106</sup> while SP II-B, could be converted at the trading price of the shares at the time of conversion, minus 10% or 5.25%.<sup>107</sup> In recital 158 of the decision at issue, the Commission explained, on one hand, that '[a]ll those conversion prices [could] be expected to be in line with the requirement laid down in point 67 of the [TF], although there may exist a market share price below which point 67 of the [TF] would not be met'. On the other hand, it pointed out that the Federal Republic of Germany had undertaken to seek its agreement on the exercise of the conversion option, 'in case the maximum conversion price calculated using the methodology of TERP at the time of conversion minus 5% [was] below the conversion prices set out for SP II (tranches A or B) at the time of conversion'.

128. In the judgement under appeal, the General Court considered, first, that the Commission had neither explained the reasons why it was justified to set or calculate the price of the shares at the time of the conversion of SP II into equity without following the methodology required by point 67,<sup>108</sup> nor had it put forward any exceptional circumstance capable of explaining that non-compliance.<sup>109</sup> Second, the General Court held that the Commission was not entitled to depart from the rule laid down in that point on the ground that the Member State concerned would seek the Commission's authorisation before exercising its conversion right. In that respect, it underlined that, according to the system of prior authorisation under Article 108(3) TFEU, an aid measure must be declared compatible with the internal market *ex ante*, before it may be implemented.<sup>110</sup>

129. DLH puts forward two pleas in support of its third ground of appeal.

130. With its first plea, supported by the Commission and the Federal Republic of Germany, it submits that the General Court failed to take into account point 59 of the TF, which permits the use of alternative remuneration methodologies. It argues that the conversion prices overall lead to a similar outcome to that pursued by point 67 and that, in the present case, a different method of calculation of the conversion price was necessary, as it was not possible to calculate a TERP.

<sup>106</sup> The conversion of SP II-A was possible only in the event of a takeover offer or acquisition of control (section 2.10.1.3.1 of the decision at issue).

<sup>107</sup> Depending on the triggering event (10%, if there is an exercise of the conversion right for the purpose of protecting the State from dilution and 5,25% if the exercise of the conversion right is triggered by non-payment, section 2.10.1.3.2 of the decision at issue).

<sup>108</sup> The General Court noted that the price set out for SP II-A had no connection at all with the methodology required by point 67 of the TF and that, unlike the price for SP II-B, the TERP does not correspond to the actual trading price of the shares at the time of conversion.

<sup>109</sup> See paragraphs 277 to 279 of the judgement under appeal.

<sup>110</sup> See paragraph 283 of the judgement under appeal.

131. In that it contends the interpretation and the application of points 59 and 67 of the TF made by the General Court, this plea raises, as a whole, a point of law, which is subject, as such, to review by the Court. However, for the reasons that I will explain, I am of the opinion that it is unfounded on the merits.

132. Point 59 of the TF does indeed permit alternative solutions to the remuneration methodologies set out therein. The Commission did refer to that point in recital 134 of the decision at issue, when outlining the general principles relating to the remuneration and exit of the State. In the following recital, the Commission made clear that it would have assessed compliance of the concerned measure with those general principles. It follows that the Commission undoubtedly considered the possibility of relying on alternative remuneration methodologies throughout its assessment, included with regard to the hybrid capital instruments.

133. However, first, I note that point 67 of the TF is drafted in a prescriptive manner and, unlike points 62 and 68, which expressly authorise the Commission to accept alternative mechanisms, it does not provide for such a possibility. In my view, these elements cast some doubts on the correctness of the reading proposed by DLH, according to which point 59 of the TF allows the Commission to derogate to the calculation method set out in point 67 of TF.

134. Second, this latter point fixes a maximum conversion price. Hence, the question arises whether it makes sense to apply a test of the ‘similar outcome’ to such a prescription. In the same vein, one may wonder how an *ex ante* fixed conversion price, as the one set out for SP II-A, and conversion prices calculated using alternative parameters, as those set out for SP II-B, may possibly lead to a predictable systematic respect of that maximum price. The Commission had well in mind the not simply theoretic possibility of a deviation from the result pursued by point 67 of the TF, as it appears from the drafting of recital 158 of the decision at issue.

135. Third, the Commission made no reference whatsoever to point 59 of the TF in the decision at issue to justify the departure from point 67 of the TF with respect to conversion prices for SP II-A and SP II-B.<sup>111</sup> Nor did the Commission explicitly assert, before the General Court,<sup>112</sup> that an alternative measure was adopted in accordance with the aforementioned point 59. As the General Court observed, in paragraph 282 of the judgement under appeal, the Commission did not refer, in the decision at issue or in its written pleadings before the Court, to any part of the TF, any other legal rule, or any exceptional circumstance, which might have allowed it to derogate from point 67 of the TF.<sup>113</sup> Therefore, it seems

<sup>111</sup> I note, *en passant*, that the terminology used in recital 158 of the decision at issue seems to me hardly compatible with a ‘green light’ to use an alternative remuneration methodology under point 59 of the TF.

<sup>112</sup> At least during the written procedure.

<sup>113</sup> This finding has not been contested before the Court.

that, while the Commission defended the remuneration methodologies used as compatible with that point, it only invoked point 59 of the TF and a line of reasoning based on alternative mechanisms for the first time before the Court. This probably explains why the General Court did not explicitly mention this latter point in paragraphs 272 to 288 of the judgment under appeal and why it found that the Commission had not put forward any exceptional circumstance capable of justify the non-compliance with the methodology in point 67 of the TF.<sup>114</sup>

136. Fourth, even in such circumstances, the General Court did not disregard the possibility for the Commission to rely on an alternative remuneration methodology for the conversion price of hybrid capital instruments into equity. It actually found, in paragraph 279 of the judgement under appeal, that the Commission had not justified a deviation from the methodology laid down in point 67 of the TF. However, such a justification implied demonstrating that the selected alternative methodology overall led to a similar outcome to that pursued by that point. It seems to me that it can hardly be disputed that such a demonstration has not been provided. On the contrary, the Commission itself acknowledged that the maximum conversion price calculated by reference to the TERP could not always be met, thereby accepting that, in some cases, the alternative methodology chosen was likely to disregard both point 67 and, therefore, point 59 of the TF.

137. Finally, concerning DLH's allegation that it was not possible, in the present case, to calculate the TERP, it suffices to say that at no point of the decision at issue such an impossibility arises or is invoked in order to justify the departure from point 67 of the TF.<sup>115</sup> Moreover, the question whether that calculation was feasible, falls within the scope of the assessment of the facts, which is a matter for the General Court. The same can be said of the argument put forward by the Commission according to which the methodology for calculating the conversion prices for SP II was more beneficial to the State than the one resulting from the application of the TF. In any case, overall, DLH, as well as the Commission, seems more to be trying to justify *a posteriori* a deviation from the relevant rules in the TF than properly invoke an insufficient or wrong assessment of facts by the General Court.

138. With its second plea, DLH, supported by the Commission, argues that the risk of non-compliance with point 67 of the TF was merely theoretical and that the envisaged request for authorisation to the Commission was intended to ensure

<sup>114</sup> As seen and as rightly noted by DLH, where a valid alternative mechanism is established, the Commission is not required to show the existence of exceptional circumstances that would justify setting aside the TF and reverting to a direct assessment under the Treaty.

<sup>115</sup> In that respect, I note that the Federal Republic of Germany committed to seek for the Commission's authorization in the case that the conversion price exceeds the price that would be obtained by using the methodology of the TERP at the time of conversion minus 5%, which suggests that the calculation of the TERP was actually possible.

compliance, and not constructed as a derogation or a postponement of the decision. Additionally, DLH claims that the alternative mechanism selected ensured an *ex ante* compliance with point 67, given that, according to recital 158 of the decision at issue, the agreement from the Commission ought to be sought and obtained before the conversion took place.

139. This plea too must, in my view, be dismissed.

140. By reporting after the adoption of the decision at issue its final assessment on the compliance with one of the requirements of the TF, the Commission has renounced to conduct a full *ex ante* appraisal of the compatibility of the concerned measure with the internal market, as required by Article 108(3) TFEU. As the General Court rightfully held, the Commission is not permitted to accept a deviation from the rules laid down in its guidelines at the time of issuing of its compatibility decision on the sole ground that the Member State concerned undertakes to seek a further authorisation.<sup>116</sup>

141. Contrary to what DLH maintains, recital 158 of the decision at issue does not provide for an ‘additional layer of security’, ensuring ‘maximum compliance’ to the TF. Rather, it authorizes a departure from the rules laid down in that instrument, replacing a *ex ante* non-compliance assessment under the TF with an *ex post* procedural requirement and agreement to proceed. Moreover, it is clear from the drafting of recital 158 of the decision at issue that, while the Federal Republic of Germany committed to seek (and to obtain) the Commission’s agreement before exercising its right to conversion, yet it did not commit to ensure that the price of conversion for SP II would comply with the requirements of point 67 of the TF.<sup>117</sup> No misreading of the decision at issue can be reproached to the General Court on that point.<sup>118</sup>

142. Recital 158 of the decision at issue not only postponed the decision on the suitability of the conversion price to the date when that conversion will take place. It accepted without any justification a methodology recognized *ex ante* as unfitted to ensure the result pursued by point 67, while leaving opened the possibility to deviate from that point *ex post*, namely at the stage of its implementation.

<sup>116</sup> In particular, when, as in it did in recital 158 of the decision at issue, the Commission has acknowledged the possible non compliance with the applicable rules. I observe that the present case differs from that which gave rise to the judgement of 28 September 2023, *Ryanair v Commission* (C-320/21 P, EU:C:2023:712, paragraphs 63 and 64), where the Court held that the General Court had not erred in law by accepting that the Commission could rely on the commitment taken by the Swedish authorities to submit the detailed calculation method which would be used to quantify the damage suffered by the beneficiary *ex post*. In that case, the General Court had concluded that the Commission’s decision contained a sufficiently precise statement of the method for calculating that damage for the purpose of Article 107(2)(b) TFEU, as interpreted by the Court, therefore rejecting Ryanair’s claim that the Court had neglected its duty to assess the compatibility of the measure at issue with the internal market.

<sup>117</sup> See also footnotes 36 and 40 of the decision at issue.

<sup>118</sup> See paragraph 284 of the judgement under appeal.

143. In the light of all the foregoing considerations, I suggest to the Court to reject the third ground of appeal.

#### **D. Fourth ground of appeal**

144. By its fourth ground of appeal, DLH challenges paragraphs 373 to 412 of the judgment under appeal. DLH raises two pleas. First, it argues that the General Court erred in law and overstepped the limits of its judicial review when it found that the Commission had to consider additional factors when assessing the existence of SMP for the application of point 72 of the TF. Second, DLH contends that the General Court erroneously concluded that the Commission could not properly find that DLH did not hold SMP at Düsseldorf and Vienna airports ‘at least’ during the IATA 2019 summer season.

145. According to point 72 of the TF, 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 and, in particular, offer structural or behavioural commitments foreseen in the Notice on remedies.

##### ***1. First plea alleging that the General Court erred in law in concluding that the Commission had to consider additional factors in establishing SMP***

146. In the decision at issue, the Commission considered that the markets in which the beneficiary operates that were relevant for the purposes of assessing the distortive effects of the concerned measure on competition were the markets for the provision of passenger air transport services to and from the airports served by DLH. The Commission assessed whether the LH Group held SMP at the relevant airports<sup>119</sup> by examining three factors, namely, its slot holdings at those airports, the level of congestion at those airports, and the number of slots held by competitors.<sup>120</sup> Based on these factors, the Commission concluded that LH Group held SMP only at Frankfurt and Munich airports during the IATA 2019 summer season and the 2019/2020 winter season.

147. In the judgement under appeal, the General Court found that, by solely examining factors that related, in essence, to barriers to entry and expansion with regard to airport capacity, the Commission had not taken into consideration all the relevant factors for assessing the existence of SMP on the market for passenger air

<sup>119</sup> Nine coordinated airports (i.e. airports with high level of congestion, see recital 181 of the decision at issue), namely Berlin Tegel, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart and Vienna airports, plus, in the correcting decision, Hannover Airport.

<sup>120</sup> See recital 179 of the decision at issue. As recalled by the General Court, the Commission also took into account the number of aircraft based at some of the relevant airports used by the group and its competitors (see paragraph 373 of the judgement under appeal).

transport services. According to the General Court, the Commission had disregarded the factors directly related to the provision of those services – such as the number of flights operated or seats offered in the slots assigned – capable of giving direct information on the market shares of DLH and its competitors on that market.<sup>121</sup> By not taking into consideration these factors, despite the importance of market shares as an indicator of SMP,<sup>122</sup> the Commission made a manifest error of assessment, vitiating the decision at issue as well as the correcting decision.

148. DLH, supported by the Commission and the Federal Republic of Germany, claims that the General Court has failed to establish a manifest error of assessment, has overstepped the boundaries of judicial review, substituting the Commission’s reasoning by its own, and has made a manifestly incorrect assessment of the evidence. According to them, the criteria examined in the decision at issue were accurate and a sufficient indicator for the market position of DLH at the relevant airports, and the factors identified by the General Court had no significant additional probative value. Moreover, the General Court did not provide an adequate reason why the Commission was required to consider these factors but limited itself to an overly vague reference to ‘all the relevant factors’.

149. I observe, first, that, in reviewing the Commission’s choice of the relevant criteria to identify SMP, the General Court applied the manifest error of assessment standard, making clear that the scope of its review was limited in that respect.<sup>123</sup> DLH’s claim must therefore be rejected insofar as it argues that the General Court has failed to recognize the broad margin of discretion enjoyed by the Commission in such field.

150. Second, contrary to what DLH claims on the basis of a partial and incorrect reading of the judgement under appeal, the General Court indicated precisely which factors the Commission failed to take into consideration and why these factors were relevant in the case at hand.<sup>124</sup> The General Court gave adequate reasons why the Commission was required to consider them.

151. Third, I have already recalled that it is the General Court’s task to establish whether the evidence relied on contains all the relevant information that must be

<sup>121</sup> See paragraphs 376 to 382.

<sup>122</sup> In paragraph 368 of the judgement under appeal, the General Court held that the concept of SMP within the meaning of point 72 of the TF is to be regarded as equivalent to that of a dominant position under competition law. In paragraphs 383 and 384, it relied, by analogy, on the case-law on the assessment of a dominant position.

<sup>123</sup> Paragraph 386 of the judgment under appeal.

<sup>124</sup> In paragraphs 378 to 382 of the judgement under appeal, the General Court observed that the criteria applied in the decision at issue mainly related to airport capacity and that, having defined the relevant markets as the markets for passenger air transport services, the Commission could not disregard factors directly related to the provision of those services, namely flight frequencies and seats offered.

taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.<sup>125</sup> Moreover, as also recalled, the failure to take account of essential factors amounts to a manifest error of assessment of the facts, which, in itself, challenges the plausibility of the analysis conducted by the author of the contested act.<sup>126</sup> Therefore, the General Court could consider, without overstepping the scope of its review or substituting the Commission's assessment (or reasoning) by its own, that the Commission had made such an error by failing to take into consideration factors likely to have a significant impact<sup>127</sup> for assessing DLH's market power for the purpose of point 72 of the TF.

152. Fourth, the General Court simply affirmed the relevance of such factors and the insufficiency of the criteria examined by the Commission, while explicitly refraining to carry out an evaluation of the impact of the former and their relationship with the latter, which would have implied a substitution of its own economic assessment for that of the Commission.<sup>128</sup> By annulling the decision at issue, the General Court did not provide an alternative assessment, it left it to the Commission to conduct that assessment in the light of all the relevant factors.

153. Fifth, the General Court did not call into question the adequacy of the metrics used by the Commission. On the contrary, it acknowledged their relevance as indicators of barriers to entry and expansion. However, it considered that they were not sufficient, as they did not inform on the market shares held by DLH and its competitors on the relevant market. To support its conclusion on the importance of including factors related to the market for the provision of passenger air transport services, the General Court relied on data in the file, which were not disputed before it, according to which DLH's market shares, expressed in terms of frequencies (the number of flights) and seats offered to and from the relevant airports, exceeded, sometimes considerably, the share of slots set out in the decision at issue.<sup>129</sup> DLH has not claimed a distortion of evidence in this respect.

154. Sixth, I am not convinced by the argument put forward by the Commission according to which market shares in terms of frequencies and seats either necessarily overlap with the metrics used in the decision at issue (and can be derived from them) or are also measures of airport capacity. While it is true that,

<sup>125</sup> Paragraph 17 of this Opinion.

<sup>126</sup> Paragraph 89 of this Opinion.

<sup>127</sup> See paragraph 379 of the judgement under appeal, *in fine*.

<sup>128</sup> See paragraph 394 of the judgement under appeal.

<sup>129</sup> See paragraph 380 of the judgement under appeal. See also paragraphs 392 and 393 of that judgement.

according to Regulation No 95/93,<sup>130</sup> a slot only gives the right for one landing or take-off at a specific time,<sup>131</sup> air carriers still have a margin in deciding the frequency of their flights, the rule ‘use it or lose it’ being applicable up to 80% of the slots assigned to each carrier.<sup>132</sup> Moreover, that argument seems to be contradicted by the undisputed data relied on by the General Court.

155. Lastly, DLH supported by the Commission, argues that the criteria followed in the decision at issue are in line with the practice and the case-law in merger cases. However, the cases on which DLH and the Commission rely involved the acquisition of slots from carriers which had ceased operations and were no longer present in the market for the provision of passengers air transport services,<sup>133</sup> while the concerned measure is intended to allow DLH to continue operations on that market. Thus, if market shares in terms of frequency and seats do not bare any meaning in the first case, they may be relevant indicators of market power in the second, as the data on which the General Court relied tend to show. The fact that, when reviewing the definition of the relevant markets, the General Court held that a recapitalisation measure such as the concerned measure has an effect similar to a concentration related to slots<sup>134</sup> does not automatically call into question the relevance of market shares in the provision of air transport services at the relevant airports when assessing SMP.

<sup>130</sup> Council Regulation (EEC) of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), amended by Regulation (EC) No 894/2002 of the European Parliament and of the Council of 27 May 2002, Regulation (EC) No 1554/2003 of the European Parliament and of the Council of 22 July 2003, Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009, and Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020.

<sup>131</sup> See Article 2(a) of Regulation No 95/93.

<sup>132</sup> Regulation No 95/93, Article 10(2). The argument, put forward by the Commission, that this factor is of little significance for the congested airport where DLH could be deemed to enjoy market power calls for an assessment of the facts, which is for the General Court alone to make.

<sup>133</sup> See judgments of 20 October 2021, *Polskie Linie Lotnicze 'LOT' v Commission* (T-240/18, EU:T:2021:723, paragraph 57) and judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT' v Commission* (T-296/18, EU:T:2021:724, paragraph 80), to which DLH and the Commission refer.

<sup>134</sup> See paragraph 319 of the judgement under appeal, where the General Court quoted the judgments of 20 October 2021, *Polskie Linie Lotnicze 'LOT' v Commission* (T-240/18, EU:T:2021:723, paragraph 57) and judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT' v Commission* (T-296/18, EU:T:2021:724, paragraph 80). The parallel made by the General Court relied on the fact that the funds provided to DLH were not allocated to specific routes and could be used for operating any O&D route from an airport.

**2. *Second plea alleging that the General Court erred in law in concluding that DLH did not hold SMP at Düsseldorf and Vienna airports***

156. DLH, supported by the Commission and the Federal Republic of Germany, claims that the General Court failed to show that the Commission made a manifest error of assessment by finding that DLH did not hold SMP at Düsseldorf and Vienna airports. This plea is directed against paragraphs 388 to 412 of the judgement under appeal.

157. For both Düsseldorf and Vienna airports, the General Court observed that an overall assessment of the criteria taken into account by the Commission demonstrated the existence of a very high slot holding, including during peak hours,<sup>135</sup> on the part of the Lufthansa Group, a very high congestion rate and the weak position of the group's competitors. It consequently concluded that, on the basis of those criteria alone, the Commission could not properly find that the LH Group did not hold SMP at these airports, at least during the IATA 2019 summer season.<sup>136</sup> Furthermore, the General Court observed that the criteria that led the Commission to find that the LH Group enjoyed SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf and Vienna airports, at least as regards the IATA 2019 summer season.<sup>137</sup>

158. As a preliminary remark, I note that, in the event that, as I suggest, the Court should reject the first plea of the present ground of appeal, the error of assessment identified by the General Court as regards the criteria chosen by the Commission to assess whether the LH Group held SMP would also be confirmed for Düsseldorf and Vienna airports. The present plea would in that case be ineffective.<sup>138</sup> I will, in any event briefly examine it.

159. DLH, supported by the Commission and the Federal Republic of Germany, argues, in the first place, that the General Court overstepped the limits of its judicial review, by interfering with the Commission's margin of discretion and substituting its own analysis of the market for that of the Commission.

160. On this point, I would observe that DLH once again relies on a restrictive interpretation of the limits of judicial review by the EU Courts of complex

<sup>135</sup> Between 40-50% for the Düsseldorf airport (50-60% to 55-65% during peak hours) and between 35-45% (50-60% during peak hours), for the Vienna airport. The figures concerned the IATA 2019 summer season (paragraph 397 of the judgment under appeal).

<sup>136</sup> See paragraphs 396-401 of the judgement under appeal for the Düsseldorf airport and paragraphs 403-407 for the Vienna airport.

<sup>137</sup> The General Court found that the figures concerning Düsseldorf and Vienna airports, as set out in the decision at issue, were in essence comparable with or even exceeded 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 LH Group held SMP (see paragraphs 402 and 409 of the judgement under appeal).

<sup>138</sup> See paragraph 411 of the judgement under appeal.

economic assessments, which, for the reasons already stated, I do not share. In the present case, it is apparent from paragraphs 396-407 of the judgement under appeal that the General Court limited itself to stating that the data on which the Commission had relied on did not permit in themselves to support the conclusion that LH Group did not hold SMP at Düsseldorf and Vienna airports. For the rest, the General Court expressly refrained from substituting its own economic assessment for that of the Commission.<sup>139</sup>

161. DLH claims also that the reasoning of the judgement under appeal is overly vague and insufficient to find a manifest error of assessment, and that the General Court did not state adequate reasons.

162. This claim must be rejected. The General Court based its reasoning on the data taken into account by the Commission and clearly indicated why these data could not, in themselves, bring the Commission to exclude DLH's SMP for the Düsseldorf and Vienna airports. Paragraphs 396-407 contain a sufficient statement of reasons in this respect.

163. Lastly, according to DLH, the Commission was correct to find that DLH did not hold SMP at Düsseldorf and Vienna airports. On one hand, the SMP metrics with respect to Düsseldorf and Vienna airports differed materially from those with respect to Frankfurt and Munich airports, DLH's share of slot holdings being significantly higher in the latter airports compared to the former. Moreover, contrary to the General Court's assumptions, an average slot holding of 44% or 46% is not sufficient to presume dominance according to the case-law and the consistent Commission's practice in merger control cases. On the other hand, comparing data for 2019 IATA summer seasons with data for 2019/2020 IATA winter seasons, as did the General Court, is inappropriate since, in the airline industry, summer and winter seasons are entirely different periods.

164. Contrary to what Condor argues, that claim is not purely factual but calls into question a legal characterization of facts by the General Court and is therefore admissible. That being said, it must, in my view, be rejected.

165. First of all, contrary to what DLH and the Commission assume, the General Court did not base itself on the presumption that an average slot-holding exceeding a 40% threshold would be indicative of a dominant position, and thus of SMP. In paragraph 397 of the judgement under appeal, the General Court, referring by analogy to the case-law on the assessment of dominant position,<sup>140</sup> explicitly affirmed that a market share exceeding 40% is a 'preliminary indication, among others, that must be taken into account', and not a determinative element

<sup>139</sup> See paragraph 394 of the judgement under appeal.

<sup>140</sup> See judgments of 3 July 1991, *AKZO v Commission* (C-62/86, EU:C:1991:286, paragraph 60) and of 14 February 1978, *United Brands and United Brands Continentaal v Commission* (27/76, EU:C:1978:22, paragraphs 107-113).

by itself, in order to assess SMP.<sup>141</sup> In this respect, it must be borne in mind that the General Court did not hold that the LH Group enjoyed SMP at the airports of Düsseldorf and Vienna. It just concluded that the criteria on which the Commission based itself were not sufficient to exclude it therefore and that the conclusions drawn from them were inconsistent.

166. As concerns the argument according to which the General Court erred in comparing the slot holdings and congestion rates between Düsseldorf and Vienna airports during IATA 2019 summer season, on one hand, and Munich and Frankfurt airports during IATA 2019/2020 winter season, on the other hand, I tend to agree with Ryanair that this comparison is not in itself erroneous, since holding shares is a relative measure. To the extent that the Commission has not considered that higher holding shares were necessary in order to assess SMP during summer season than during winter season, such a comparison remains valid.

167. In any event, the conclusion that the Commission could not, on the basis of the sole data set out in the decision at issue, find that LH Group's did not hold SMP at Düsseldorf and Vienna airports is self-standing. It is only in the alternative that the General Court found that such a conclusion was also inconsistent, since the criteria which had led the Commission to find that the LH Group enjoyed SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf and Vienna airports.<sup>142</sup> Insofar as DLH claims that these criteria differ, it raises a factual argument falling outside the competence of the Court.

168. In the light of all the foregoing, I am of the view that the fourth ground of appeal must be rejected in its entirety.

#### **E. Fifth ground of appeal**

169. By its fifth ground, challenging paragraphs 467 to 480 of the judgment under appeal, DLH, supported by the Commission and the Federal Republic of Germany, submits that the General Court erred in law and substituted its own assessment for that of the Commission when reviewing the structural commitments imposed under point 72 of the TF. DLH and the Commission further argue that the General Court adopted a contradictory reasoning.

170. The concerned measure was subject to the Federal Republic of Germany's commitment that DLH would divest slots and additional assets to the benefit of one air carrier at the Frankfurt airport FRA and one air carrier at Munich airport.<sup>143</sup> The slot divestiture procedure was designed in two stages.<sup>144</sup> First, the

<sup>141</sup> DLH's references to case-law and decisional practice on dominance must therefore be dismissed as irrelevant.

<sup>142</sup> See paragraphs 401-402 and 408-409 of the judgement under appeal.

<sup>143</sup> Recital 70 of the decision at issue.

slots were to be offered to ‘new entrants only’ – i.e. carriers without a base at Frankfurt and Munich airports –, provided, *inter alia*, that they undertake to establish a base of at least four aircraft there. Second, if the slots had 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 would be made available to an air carrier which already had a base at those two airports (‘based carriers’) for the expansion of its existing base.<sup>145</sup> As a result, the competitors to the LH Group, which already possessed a base at Frankfurt and Munich airports, were not eligible to acquire the portfolio of slots to be divested during the first stage of the procedure.

171. In the judgment under appeal, the General Court concluded that, by excluding the based carriers from the first stage of the slot divestiture procedure, the Commission had 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, thereby making a manifest error of assessment.<sup>146</sup>

172. In the first place, DLH, supported by the Commission and the Federal of Germany, argues that the General Court improperly interfered with the Commission's wide discretion when approving structural commitments pursuant to point 72 of the TF, substituted its own assessment for that of the Commission and contradicted its own case-law in *Niki Luftfahrt v Commission*.<sup>147</sup>

<sup>144</sup> Recital 231 of the decision at issue.

<sup>145</sup> Recitals 72 and 231 of the decision at issue.

<sup>146</sup> Judgment under appeal, paragraph 479. The General Court established five reasons why the Commission's analysis was incomplete/lacking: i) the much greater weight of the LH Group in comparison with that of its closest competitors; ii) there was no analysis on whether the appearance of new entrants and the exclusion of competitors already based ‘would have the effect of further fragmenting competition at those airports’; iii) the exclusion of based carriers from the first stage of the procedure *de facto* made the Lufthansa Group's closest competitors ineligible during that first stage; iv) the competitors already based at the two airports would have – in contrast to new entrants – incurred lower costs as a result of the acquisition of slots and ‘could be better placed to acquire the slot[s] and increase the competitive pressure’; v) the eligibility of based carriers depended on the failure of the first stage and was therefore uncertain in nature (see paragraphs 473-477 of the judgement under appeal).

<sup>147</sup> Judgment of 13 May 2015, *Niki Luftfahrt v Commission* (T-162/10, EU:T:2015:283, paragraph 295), where the General Court held, in the context of the control of concentrations, that the ‘fact that other commitments might also have been accepted, or might even have been more favourable to competition, cannot justify annulment of that decision in so far as the Commission was reasonably entitled to conclude that the commitments set out in the decision served to dispel the serious doubts’. This reasoning is indeed present in the General Court's case-law on concentrations and has been for a while (see, for example, judgments of 4 July 2006, *easyJet v Commission*, T-177/04, EU:T:2006:187, paragraph 128; and of 13 November 2024, *Iliad Italia v Commission*, T-692/20, EU:T:2024:825, paragraph 59). However, it has never been clearly endorsed by the Court. In any case, as I will demonstrate below, I do not think the General Court contradicted its own case law.

173. Much like for other aspects of the decision at issue discussed above, the complex economic assessments which the Commission is required to carry out when examining commitments justifies it having quite a broad discretion when assessing their appropriateness and sufficiency. This inevitably has an effect on the EU Court's powers within its judicial review of the commitments accepted, as detailed above in paragraphs 15 to 18 of this Opinion and as the General Court itself recalled in the judgment under appeal.<sup>148</sup> However, such discretion is not unlimited. In particular, it does not exempt the Commission from judicial review of the sufficiency of the evidence relied on and of the soundness of the conclusions drawn from it. Nor does it exempt the Commission from a review of its interpretation of economic data and of the respect of the limits it imposes on its own margin of discretion when it adopts guidelines.<sup>149</sup> As the General Court correctly detailed in the judgment under appeal,<sup>150</sup> the commitments entered into pursuant to point 72 of the TF must not only comply with the TF but also with the conditions laid down in the Notice on remedies, to which that point expressly refers. Therefore, both the TF and the Notice on remedies outline and limit the scope of the Commission's margin of discretion when it comes to its assessing commitments under the aforementioned point.

174. Contrary to what DLH, the Commission, and the Federal Republic of Germany claim, in my opinion, the General Court did not substitute the Commission's assessment, nor did it propose an alternative commitment structure. It simply reviewed the Commission's analysis and found that the Commission had failed to take into account all the relevant factors relating to the proposed assessment, as specifically required by paragraph 12 of the Notice on remedies.<sup>151</sup> It held that the Commission had failed to examine whether the exclusion of existing competitors during the first stage of the slot divestiture procedure was appropriate and necessary in order to preserve effective competition, pursuant to point 72 of the TF,<sup>152</sup> while explaining the reasons why such an examination was

<sup>148</sup> See judgment under appeal, paragraphs 422 and 423.

<sup>149</sup> See paragraphs 17 and 21 of this Opinion.

<sup>150</sup> See the General Court's preliminary considerations detailed from paragraphs 415 to 423 of the judgment under appeal.

<sup>151</sup> Pursuant to paragraph 12 of the Notice on remedies the Commission must consider 'all relevant factors relating to the proposed remedy', particularly their 'type, scale and scope (...), 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'. Although the General Court did not mention explicitly the Commission's Notice on remedies in paragraphs 478 and 479 of the judgement under appeal, it clearly referred to paragraph 12 of that Notice, whose content is reproduced in paragraph 418.

<sup>152</sup> See paragraphs 478 and 479 of the judgement under appeal. Although, in these paragraphs, the General Court did not mention explicitly the Commission's Notice on remedies, it clearly referred to paragraph 12 of that Notice, whose content is reproduced in the preliminary considerations at paragraph 418 of that judgement.

necessary in the case at issue.<sup>153</sup> In particular, the General Court expressed reservations regarding the Commission’s assessment, as it did not analyse whether the exclusion of based carriers could have the effect of further fragmenting competition at those airports.<sup>154</sup>

175. By pointing out the shortcomings of the Commission's assessment, giving clear examples to illustrate its doubts and ultimately finding the analysis to be manifestly incomplete and not in line with the rules framing the exercise of Commission’s discretion, the General Court did not go beyond the scope of its review of a complex economic assessment, as outlined in the Court’s case-law.

176. In its written submissions, the Commission briefly argues that paragraph 12 of the Notice on remedies, namely the specific requirement of considering ‘the structure and characteristics of the market, including the position of the parties and other players’, is a provision of ‘general nature’, which does not require it to specifically assess under those criteria each and every aspect of proposed commitments’.

177. The Commission’s argument is unconvincing particularly given the specific features of the TF, which must necessarily be taken into account in assessing the adequacy and sufficiency of the commitments imposed under point 72 of such instrument. In the light of these features, such commitments must be designed 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 the General Court has rightly observed.<sup>155</sup> Therefore, taking into account the structure and characteristics of the market, including the position of the existing competitors of the beneficiary, as required in paragraph 12 of the Notice on remedies, is manifestly relevant for the purpose of point 72 of the TF. This is all the more evident given that, as stressed in point 45 of the TF, aids in the form of equity and/or hybrid capital instrument are highly distortive for competition.

178. In this context, not addressing the concerns relating to a further fragmentation of the competition within its assessment might well amount to a manifest error of assessment on the Commission’s part that the General Court was entitled to establish.<sup>156</sup> This is especially the case in a situation where the Commission itself, in assessing the existence of SMP, had acknowledged that competition faced by the LH Group on Frankfurt and Munich airports was weak

<sup>153</sup> See footnote 146 of this Opinion.

<sup>154</sup> See paragraph 474 of the judgment under appeal.

<sup>155</sup> See paragraph 421 of the judgement under appeal.

<sup>156</sup> Consequently, no conflict with judgment of 13 May 2015, *Niki Luftfahrt v Commission* (T-162/10, EU:T:2015:283, paragraph 295) can be found.

and fragmented.<sup>157</sup> The same can be said regarding the existing disproportion in weight between the beneficiary and its closest competitors.

179. In the light of the foregoing, I am of the view that the General Court did not substitute its own assessment for that of the Commission, nor did it contravene its own case-law, when it concluded that the Commission made a manifest error of assessment when it failed to examine, in the decision at issue, whether it was appropriate to exclude the competitors already based at Frankfurt and Munich airports from the first stage of the divestiture procedure.

180. In the second place, DLH, supported by the Commission, submits that the reasoning in paragraphs 473, 474, and in paragraph 476 of the judgment under appeal are in direct contradiction with the General Court's findings in paragraphs 452 and 463 respectively of that same judgment.

181. I am unable to find such contradictions.

182. First, in paragraph 452 of the judgement under appeal, the General Court concluded that the number of slots to be divested would have enabled the entry of a new competitor of similar size to those already present on the market, leading to the creation of a competitive constraint comparable to that exerted by the existing competitors.

183. That conclusion is not contradicted by paragraphs 473, in which the General Court underlined the greater weight of the LH Group in comparison with that of its closest competitors, particularly in terms of the number of aircraft based at Munich and Frankfurt airports. Such an imbalance would have persisted even after the divestiture, the size of the new competitor being comparable to that of the competitors already based in those airports. A contradiction does not exist in respect of paragraph 474 of the judgement under appeal either. Actually, the first sentence of that paragraph reproduces almost word for word the first sentence of paragraph 452, concerning the comparable size of a new entrant with that of the existing competitors.<sup>158</sup> However, paragraph 474 addresses a question regarding the impact of the exclusion of competitors already based at Frankfurt and Munich airports from the first stage of the divestiture procedure on the level of fragmentation of the competition at those airports. No contradiction whatsoever can be found with paragraph 452, which addresses a different question regarding the sufficiency of the number of slot to be divested.

<sup>157</sup> Recitals 190 and 197 of the decision at issue.

<sup>158</sup> According to paragraph 474 '(...) 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'.

184. Second, the claim that paragraph 476 of the judgement under appeal contradicts paragraph 463 of that judgement is similarly based on a partial reading of the judgement under appeal. The General Court’s conclusion that competitors already possessing a base at Frankfurt and Munich airports could be better placed to increase the competitive pressure on DLH, since they would incur less costs, is not in contradiction with the rejection of Ryanair’s claim that the requirement imposed on new entrants to establish a base was disproportionate because it increased entry costs. In paragraph 463 of the judgement under appeal, the General Court cleared that requirement after weighing the additional entry costs imposed on new entrants and the gains in terms of stronger competitive pressure on DLH. When it came to the review of the appropriateness of the exclusion of existing competitors during the first stage of the divestiture procedure, the General Court looked at the high entry costs for new entrants from a different perspective, namely its impact on the efficacy of the divestiture procedure.<sup>159</sup>

185. Finally, the Federal Republic of Germany has put forward an autonomous plea, arguing that the ‘far-reaching approach’ adopted by the General Court in paragraph 472 et seq. of the judgment under appeal, and the excessive requirements imposed on the additional structural commitments in point 72 of the TF, essentially result in the scope of Article 107(3)(b) TFEU being restricted. Point 72 of the TF aims at mitigating additionally the restrictions on competition of an aid, which has already been deemed proportionate under such a provision of the Treaty. The General Court therefore failed to take account of the interaction between the TF and primary law.

186. This plea, which raises concerns regarding its admissibility<sup>160</sup>, is in any event manifestly unfounded. The Federal Republic of Germany does not call into question the conformity to Article 107(3)(b) of point 72 of the TF, in that it imposes, for recapitalisation measures above a certain threshold, the adoption of additional measures aiming at preserving competition in markets where the beneficiary enjoys SMP and subject to which the aid may be considered compatible. It only disputes the way the General Court conducted the review of such measures in the case at hand. However, commitments taken for measures that fall under Article 107(3)(b) TFEU and under point 72 of the TF are not exempt from a proper assessment of their adequacy and sufficiency in order to ensure the compatibility of these measures.

187. In this context, it is useful to remind that the purpose of commitments under point 72 of the TF and under the Notice on remedies is to eliminate entirely the concern that the recapitalization measure at issue might significantly impede

<sup>159</sup> In that respect, I note that, excluding established competitors from the first stage of the procedure could significantly reduce the chances that the divestiture would actually occur, making the commitment potentially incompatible with namely paragraphs 10 (requisite degree of certainty that it will be possible to implement the divestiture) and 47 (potential of a business to attract a suitable purchaser) of the Notice on remedies.

<sup>160</sup> See footnote 76 of this Opinion.

effective competition on the markets where the beneficiary enjoys SMP and to dispel the doubts on the compatibility of such measure with the internal market.<sup>161</sup> Therefore, it is the duty of the Commission to ensure that the commitments imposed are sufficiently likely to be effectively and timely implemented, even by enhancing the attractiveness of the remedy.<sup>162</sup> In turn, it is for the EU Court's to review the Commission assessment, within the limits already illustrated. For the reasons explained above, these limits have not been overstepped in the present case. The plea raised by the Federal Republic of Germany must therefore be rejected.

188. In the light of all the foregoing considerations, I suggest to the Court to reject the fifth ground of appeal.

#### **F. Sixth ground of appeal**

189. By its sixth ground of appeal, challenging paragraphs 496 to 502 of the judgment under appeal, DLH, supported by the Commission and the Federal Republic of Germany, contends that the General Court erred in law in finding that the Commission failed to state adequate reasons for requiring remuneration for the divestiture of the slots at issue.

190. According to settled case-law, the obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the act at issue. The statement of reasons required by that article must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that act in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to carry out its review. In that regard, 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 for an act meets the requirements of that article 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.<sup>163</sup>

191. As regards, specifically, a decision not to raise objections under Article 108(3) TFEU, like in the present case, the Court has held that 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

<sup>161</sup> See, by analogy, judgment of 16 March 2023, *American Airlines v Commission* (C-127/21 P, EU:C:2023:209, points 79 and 87).

<sup>162</sup> See, by analogy, judgment of 16 March 2023, *American Airlines v Commission* (C-127/21 P, EU:C:2023:209, points 93 and 95).

<sup>163</sup> See judgment of 11 September 2025, *Austria v Commission (Centrale nucléaire Paks II)* (C-59/23 P, EU:C:2025:686, paragraph 101 and the case-law cited).

difficulties in assessing the compatibility of the aid at issue with the internal market, and that even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 296 TFEU if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties.<sup>164</sup> The balance between the obligation to state adequate reasons and the need for effectiveness, enshrined in this case-law, is crucial during crises such as COVID-19, when the Commission faces an exceptional volume of notifications.<sup>165</sup> Still, the context in which the notified aid measure is taken cannot allow the EU institutions to meet a lower standard of reasoning than is required under Article 296 TFEU, as interpreted in the case-law mentioned above.<sup>166</sup>

192. In the case at hand, the General Court upheld the sufficiency of the Commission’s statement of reasons on most aspects of the decision at issue, even when it appeared particularly succinct.<sup>167</sup> It found a failure to state reasons only in relation to the requirement that slot divestitures be carried out in return for remuneration.

193. Such a finding is, in my view, in line with the case-law recalled above and exempt from the errors alleged by DLH, the Commission, and the Federal Republic of Germany.

194. First, the General Court was correct to point out the lack of any indication in the decision at issue explaining why the Commission considered it appropriate that the slot divestiture be subject to remuneration.<sup>168</sup> Contrary to what DLH, the Commission, and the Federal Republic of Germany contend, recitals 71 and 74 of that decision – which appear in section 2, headed ‘Description of the measure’ – only outline the content of the proposed commitments as well as of the slot allocation procedure, but do not provide any reasoning whatsoever regarding the rationale for requiring remuneration.

<sup>164</sup> See judgment of 23 November 2023, *Ryanair v Commission* (C-210/21 P, EU:C:2023:908, paragraph 106 and the case-law cited).

<sup>165</sup> See, in particular, judgment of 23 January 2025, *Neos v Ryanair and Commission* (C-490/23 P, EU:C:2025:32, paragraphs 58 and 59), concerning the duty of the Commission to justify the absence of an explicit examination of the compatibility of an aid measure in the light of provisions or principles of EU law other than the State aid rules. On the specificity of that judgement, see Opinion of Advocate General Medina in *Austria v Commission (Centrale nucléaire Paks II)* (C-59/23 P, EU:C:2025:125, footnote 66).

<sup>166</sup> See Opinion of Advocate General Pitruzzella in *Ryanair v Commission* (C-320/21 P, EU:C:2023:54, paragraph 98).

<sup>167</sup> See paragraphs 207, 293, 431, and 459 of the judgment under appeal.

<sup>168</sup> See paragraph 498 of the judgement under appeal.

195. Second, the General Court did not disregard the fact that the proposed commitments did not only include the divestiture of slots but also of other assets required by a new entrant for the establishment of a base, which it explicitly mentioned in paragraph 497 of the judgement under appeal. However, it correctly separated the issue of the remuneration for the slot divestiture from that of the remuneration for the ancillary assets, focusing on the former, as it appears clearly in the last sentence of the above-mentioned paragraph 497 and in subsequent paragraphs 498-501.

196. Third, the General Court correctly substantiated why it was of decisive importance, in the case at hand, to justify the requirement of a remuneration for the slot divestiture. It pointed out that such a requirement was liable to reduce the effectiveness of the related commitments.<sup>169</sup> Contrary to what the Federal Republic of Germany alleges, commitments under point 72 of the TF must be designed to be as effective as possible. In order to fulfil the objective to preserve effective competition in the markets where the beneficiary enjoys SMP, pursued by that provision of the TF, they must be capable of being implemented effectively and within a short period of time.<sup>170</sup>

197. Fourth, DLH wrongly claims that the General Court adopted Condor's argument that the slot divestiture at issue fell within Article 8b of Regulation No 95/93,<sup>171</sup> while it was explicitly based on Article 8a(1)(b)(iii) of such Regulation.<sup>172</sup> In that respect, it must be noted, in the first place, that nowhere in the decision at issue, the Commission affirmed that the slot divestiture was based (let alone correctly based), on that latter provision. The mere fact that, in presenting the content of the divestiture commitments as proposed by the Federal Republic of Germany, paragraphs 71 and 74 of said decision reproduced partially the wording of aforementioned Article 8a(1)(b)(iii) cannot be regarded as implying the adoption of a position by the Commission on the (correct) legal basis under Regulation No 95/93 for the slot divestiture at issue. In the second place, it should be borne in mind that, contrary to what DLH alleges, the General Court did not address that question either, nor did it apply Article 8b of that Regulation to State aid cases. It merely highlighted that, since the slot divestiture was required by a public authority in the exercise of its powers, and Regulation No 95/93

<sup>169</sup> See paragraphs 498 and 500 of the judgement under appeal.

<sup>170</sup> See paragraph 9 of the Notice on remedies and case-law cited in footnotes 161 and 162.

<sup>171</sup> According to Article 8b of the Regulation No 95/93, second and third sentences, '[t]his Regulation shall not affect the powers of public authorities to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law or to Articles 81 or 82 of the Treaty or Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. These transfers can only take place without monetary compensation'.

<sup>172</sup> According to Article 8a(1)(b)(iii) of the Regulation No 95/93 'Slots may be (...) transferred (...) in the case of a total or partial take-over when the slots are directly related to the air carrier taken over'.

contains specific rules in this respect excluding monetary compensation, it was all the more important to address the question of the compatibility of the remuneration requirement with that Regulation. Therefore, it found that the decision at issue also lacked a statement of reasons on that point.

198. Lastly, as concerns the claim that the General Court erred in assessing the degree of reasoning required, it suffices to say that, in paragraphs 499-501 of the judgement under appeal, the General Court did not find that the statement of reason was insufficient to meet the requisite legal standard applicable to decisions under Article 108(3) TFEU or to complex economic assessments. It found that the decision at issue did not contain any reason whatsoever on issues of decisive importance.

199. In light of the above, I am of the view that the sixth ground of appeal must be rejected as unfounded.

#### **G. Conclusions on the appeal and costs**

200. In the light of all these unending considerations, I suggest the Court should dismiss the appeal in its entirety. Accordingly, I propose that the Court order DLH to pay the costs of Ryanair and Condor relating to the present appeal as well as the Federal Republic of Germany and the Commission to bear their own costs, pursuant to Articles 138(1) and 140(1) of the Rules of procedure, which apply to the procedure on appeal by virtue of Article 184(1) of those rules.

#### **IV. Conclusion**

201. I propose the Court to dismiss the appeal, order Deutsche Lufthansa AG to pay the costs incurred by Ryanair DAC and Condor Flugdienst GmbH and order the Federal Republic of Germany and the Commission to bear their own costs.