Reports of Cases

JUDGMENT OF THE COURT (Eighth chamber)

19 December 2012*

(Appeal — State aids — Concept of 'undertaking' — Economic activity — Airport infrastructure construction — Runway)

In Case C-288/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 June 2011,

Mitteldeutsche Flughafen AG, established in Leipzig (Germany),

Flughafen Leipzig-Halle GmbH, established in Leipzig,

represented by M. Núñez Müller and J. Dammann, Rechtsanwälte,

appellants,

the other parties to the procedure being:

European Commission, represented by B. Martenczuk and T. Maxian Rusche, acting as agents, with an address for service in Luxembourg,

defendant at first instance,

Federal Republic of Germany,

Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV), represented by L. Giesberts and G. Kleve, Rechtsanwälte,

interveners at first instance,

THE COURT (Eighth chamber),

composed of E. Jarašiūnas (Rapporteur), President of the Chamber, A. Ó Caoimh and C. Toader, judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 14 November 2012,

* Language of the case: German

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By their appeal, Mitteldeutsche Flughafen AG ('MF') and Flughafen Leipzig-Halle GmbH ('FLH') seek the partial setting aside of the judgment in Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others* v *Commission* [2011] ECR II-1311 ('the judgment under appeal'), by which the General Court, in Case T-455/08, first, annulled Article 1 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport (OJ 2008 L 346, p. 1) ('the contested decision') in so far as it fixes at EUR 350 million the amount of State aid which the Federal Republic of Germany was planning to grant to Leipzig Halle airport for the purposes of the construction of a new southern runway and related airport infrastructure and, second, dismissed the action as to the remainder.

Background to the dispute and the contested decision

2 It is apparent from paragraphs 1 to 12 of the judgment under appeal that Leipzig-Halle airport is operated by FLH which is a subsidiary of MF, whose shareholders are the Länder of Saxony and Saxony-Anhalt and the cities of Dresden (Germany), Halle (Germany) and Leipzig. On 4 November 2004, MF decided to construct a new runway ('the new southern runway') which was to be financed by capital contributions of EUR 350 million to MF or FLH by their public shareholders.

3 The DHL group ('DHL'), operating in the express parcel delivery sector, which is wholly-owned by Deutsche Post AG, decided, after carrying out negotiations with several airports, to move its European air freight hub from Brussels (Belgium) to Leipzig Halle from 2008. On 21 September 2005, FLH, MF and DHL Hub Leipzig GmbH ('DHL Hub Leipzig') signed a framework agreement, under which FLH was required to construct the new southern runway and to honour other commitments for the duration of that framework agreement, such as the guarantee that DHL be granted continuous access to that runway and the assurance that at least 90% of the flights made by or for DHL could be carried out at any time from that runway.

4 On 21 December 2005, the Land of Saxony issued a comfort letter in favour of Leipzig airport and DHL Hub Leipzig ('the comfort letter'). That letter seeks to guarantee the financial performance of FLH during the framework agreement and commits the Land of Saxony to pay compensation to DHL Hub Leipzig in the situation where it is no longer possible to use Leipzig-Halle airport as envisaged.

5 On 5 April 2006, the Federal Republic of Germany, in accordance with Article 2(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), notified the framework agreement and the comfort letter to the Commission of the European Communities.

6 By letter of 23 November 2006, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 88(2) EC. That procedure concerned the framework agreement, the comfort letter and the capital contributions.

7 On 23 July 2008, the Commission adopted the contested decision. It found, in that decision, that the capital contributions constituted State aid compatible with the common market, in accordance with Article 87(3)(c) EC. On the other hand, it considered that the comfort letter and the unlimited

warranties provided for in the framework agreement constituted State aid which were not compatible with the common market and requested the Federal Republic of Germany to recover the part of the aid already put at DHL's disposal pursuant to those warranties.

8 As is apparent from paragraphs 62 and 67 of the judgment under appeal, the capital contributions were granted prior to the contested decision. That was confirmed by the Commission at the hearing.

The proceedings before the General Court and the judgment under appeal

9 By applications lodged at the Registry of the General Court on 6 October 2008, the Freistaat Sachsen and the Land Sachsen-Anhalt, in Case T-443/08, and MF and FLH, in Case T-455/08, brought actions for annulment of Article 1 of the contested decision in so far as the Commission declares in it, first, that the capital contributions constitute State aid for the purpose of Article 87(1) EC and, secondly, that that State aid amounts to EUR 350 million.

10 By orders of 30 March 2009 and 24 June 2010, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene submitted by the Federal Republic of Germany and the Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV ('ADV') in the two cases and also decided to join those cases for the purposes of the oral procedure.

11 In support of their action, MF and FLH, supported by ADV, raised eight pleas alleging, essentially, as to the first, infringement of Article 87(1) EC, as to the second, that FLH could not be the recipient of State aid, as to the third, that it is impossible to treat FLH at the same time as both the donor and recipient of State aid, as to the fourth, infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, as to the fifth, infringement of primary law by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) ('the 2005 Guidelines'), as to the sixth, put forward in the alternative, a breach of procedure, as to the seventh, an infringement of the division of competences as it follows from the EC Treaty and, as to the eighth, that the decision on the amount of the alleged aid was inherently contradictory and insufficient reasons were stated for it.

12 By the judgment under appeal, the General Court joined Cases T-443/08 and T-445/08 for the purposes of the judgment, dismissed the action in the former case as inadmissible and annulled, in the latter case, Article 1 of the contested decision in so far as it fixes at EUR 350 million the amount of the State aid which the Federal Republic of Germany intended to grant to Leipzig-Halle airport for the purposes of the construction of the new southern runway and related airport infrastructure, dismissing the action as to the remainder.

13 In dismissing the first plea, in support of which the applicants in Case T-455/08 argued, inter alia, that the concept of 'undertaking', within the meaning of Article 87(1) EC, did not apply to regional airports so far as concerns the financing of airport infrastructure, the General Court first held, for the reasons set out at paragraphs 87 to 100 of the judgment under appeal, that, in so far as it was operating the new southern runway, FLH was engaged in an economic activity, from which that consisting in the construction of that runway could not be dissociated.

14 Next, at paragraphs 102 to 107 of the judgment under appeal, the General Court rejected the argument put forward by the applicants that the construction of the new southern runway constituted a measure falling within regional, economic and transport policy which the Commission could not review under the rules of the EC Treaty on State aid, in accordance with the Commission's Communication on the application of Articles [87 EC] and [88 EC] and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5) ('the 1994 Communication'). It observed, in this connection, that the airports sector had undergone developments, in particular so far as concerns its organisation and its economic and competitive situation, and that the case-law following from Case T-128/98 *Aéroports*

de Paris v *Commission* [2000] ECR II-3929, confirmed by Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, ('the *Aéroports de Paris* judgments') had acknowledged, since 2000, that the managers of airports carried out an economic activity for the purposes of Article 87(1) EC.

15 Likewise, the General Court rejected, at paragraphs 108 to 116 of the judgment under appeal, the applicants' arguments concerning the alleged dissociability of the activities of construction and operation of airport infrastructure. It observed, inter alia, first, that the construction of the new southern runway was a precondition for its operation, second, that the entities concerned were in the present case the same, third, that, by basing its findings on the fact that the infrastructure at issue was operated by FLH for commercial purposes and that it was therefore infrastructure which could be used for such a purpose, the Commission had adduced enough evidence to substantiate the link between the construction and the operation of the new southern runway and, fourth, that the construction of that new southern runway was an activity which could be directly linked with the management of airport infrastructure and the fact that an activity was not carried out by private operators or the fact that it was not profitable were not relevant criteria for the purposes of ruling out characterisation of it as an economic activity.

16 Lastly, the General Court discounted, at paragraphs 117 to 119 of the judgment under appeal, the applicants' arguments seeking to cast doubt on the relevance of the *Aéroports de Paris* judgments before concluding, at paragraph 120 of that judgment, that the Commission had been fully entitled to consider the capital contributions to be State aid for the purposes of Article 87(1) EC.

17 In dismissing the fourth plea raised by the applicants in Case T-455/08 and alleging the infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, the General Court observed, at paragraphs 157 to 164 of the judgment under appeal, that the Commission had not, contrary to what the applicants claimed, applied the 2005 Guidelines, but that it had implemented the principles stemming from the *Aéroports de Paris* judgments. Consequently, at paragraphs 166 to 172, 181 and 182 of the judgment under appeal, the General Court also dismissed the claims relating to infringement of the principles of protection of legitimate expectations, legal certainty and equal treatment, and the fifth plea put forward in that case, alleging an infringement of primary law by the 2005 Guidelines.

18 The General Court also rejected, at paragraphs 192 and 201 to 209 of the judgment under appeal, the applicants' sixth plea in that case, alleging a breach of procedure, in which the applicants argued, in the alternative, that the capital contributions should be treated as 'existing aid' within the meaning of Article 1(b)(v) of Regulation No 659/1999, and the seventh plea that they submitted in that case, alleging an infringement of the division of competences as it follows from the EC Treaty.

19 By contrast, the General Court upheld the eighth plea put forward by the applicants in support of their action in Case T-455/08, which alleged that the decision on the amount of the aid was inherently contradictory and that insufficient reasons were stated for it. The General Court held, in that connection, at paragraph 230 of the judgment under appeal, that the amount of EUR 350 million, set out in the operative part of the contested decision, was incorrect in the light of the recitals in the preamble to that decision in so far as it was apparent from those recitals that the sums covering public service duties did not constitute State aid and should therefore be deducted from the capital contributions.

Forms of order sought

20 MF, FLH and ADV claim that the Court should:

— set aside point 4 of the operative part of the judgment under appeal, by which the action brought in Case T-455/08 was dismissed as to the remainder, and the decision as to the costs;

— rule definitively on the dispute, allowing the action brought in Case T-455/08 in so far as that action seeks the annulment of the contested decision in so far as the Commission declares therein that the measure by which the Federal Republic of Germany provided capital contributions for the construction of the new southern runway and related airport infrastructure constitutes State aid for the purposes of Article 87(1) EC, and

— order the Commission to pay the costs relating to the appeal and to the proceedings at first instance.

21 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs of the appeal.

Appeal

22 In support of their appeal, the appellants raise five grounds alleging, first, infringement of Article 87(1) EC, second, infringement of the principles of non-retroactivity, the protection of legitimate expectations and legal certainty, third, infringement of Article 1(b)(v), Article 17 and Article 18 of Regulation No 659/1999, fourth, infringement of the division of competences as it follows from the EC Treaty and, fifth, infringement of the obligation to state sufficient reasons for judgments.

First ground of appeal, alleging infringement of Article 87(1) EC

Arguments of the parties

23 The appellants criticise the General Court for having characterised the financing of the construction of the new southern runway as State aid by holding that FLH should be regarded, in this respect, as an undertaking inasmuch as that construction was an economic activity for the purpose of the rules on State aid.

24 In their view, it is necessary to distinguish the activity of construction of airport infrastructure from that of its operation. Contrary to what is required under the consistent case-law of the EU judicature, the General Court failed to examine those activities separately and presumed that they were indissociable, merely stating, at paragraph 96 of the judgment under appeal, that runways are ‘essential’ for the purposes of the economic activities performed by the operator of an airport and that the construction of such runways allows that operator to carry out his main economic activity. Thus, the General Court did not check whether those activities could be differentiated from each other and disregarded the fact that they concerned different actors and sectors.

25 It is of little importance, in the assessment of whether an activity is economic in nature, whether that activity is a ‘pre-condition’ for another activity and there should be no distinction made between the main activities and the ancillary activities of the entity under consideration, the case-law requiring that that assessment be made in respect of each activity carried out by that entity.

26 Moreover, the distinction between the construction and the operation of infrastructure is a fundamental principle of the Commission’s practice and stems, so far as airports are concerned, from point 12 of the 1994 Communication, which was not annulled, but merely completed by the 2005 Guidelines. The General Court was therefore incorrect to hold that the Commission was not required to apply the 1994 Communication, where that communication is not contrary to primary law, since the EC Treaty does not confer any exclusive competence on the European Union in respect of infrastructure policy.

27 Furthermore, in the interpretation of primary law, the EU judicature does not in any way require the application of the rules on State aid to measures relating to airport infrastructure and take the view that those rules need only apply in the case of the operation of the airport. The appellants refer, in this connection, to the judgments in Case T-238/98 *Aéroports de Paris* v *Commission* and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, pointing out that the facts which gave rise to the first of those judgments concerned the activities of a big international airport whose economic situation was diametrically opposed to that of a regional airport such as Leipzig-Halle airport.

28 In addition, the General Court was incorrect to hold, at paragraph 115 of the judgment under appeal, that the fact that the activity of infrastructure construction was not performed by private operators was irrelevant, where the existence of a market presupposes that the activity concerned could theoretically be performed by such operators. The General Court merely assumed that the activity of the construction of the new southern runway was economic in nature without examining either the arguments put forward to dispute that there was a market in respect of that activity or the economic reality.

29 The activity of airport infrastructure construction could not be an economic activity by nature where there was no prospect of making a profit, it being impossible to pass on the construction costs to users of that infrastructure by means of airport charges, contrary to what the General Court observed at paragraph 94 of the judgment under appeal. Private investors could not freely pass on those costs to the users, since those charges must be authorised by the competent authorities of the Land in which the airport concerned is located, which base their authorisation on criteria with no connection to the airport infrastructure construction costs. The construction of such infrastructure therefore is included among activities which have always been and are necessarily exercised by public entities.

30 Like the appellants, ADV, which is an association of undertakings operating German airports, considers that characterising the activity of the financing or the construction of airport infrastructure as an economic activity is contrary to European Union law.

31 According to that party, it is necessary, both legally and in the light of the facts, to make a functional distinction between the construction and the operation of such infrastructure. It observes, inter alia, that the General Court's finding that the construction of the new southern runway is essential to the operation of the airport and cannot be considered separately from it is too general and leads to regarding as economic all the activities upon which the activity of an airport operator is contingent, including measures falling within the exercise of State authority.

32 In practice, there is no private financing of the construction of new airport infrastructure, at least in small and medium-sized airports, and the involvement of private undertakings is limited to the acquisition and operation of infrastructure which already exists or has been constructed by the State. It is still impossible, despite developments in the airports sector, to finance the construction of costly airport infrastructure by income from its operation. Since it is not profitable, the activity therefore cannot be considered an economic activity.

33 ADV also claims that the General Court erred and contradicted itself in referring, like the Commission, to the *Aéroports de Paris* judgments. The finding that the economic nature of the airport infrastructure's construction stems from the economic nature of its operation cannot be inferred from that case-law. Neither the Commission nor to the General Court have explained in an acceptable manner, in law, why, contrary to the 1994 Communication, the financing of the construction of an airport should be subject to examination by the Commission. In actual fact, airport infrastructure construction is an essential element of services of general interest, so that that task typically falls within the exercise of State authority.

34 The Commission submits, primarily, that the argument adopted by the appellants, that the airport infrastructure construction constitutes an activity which must be assessed independently of the airport's operation, is manifestly inaccurate. In its view it has been shown, since the *Aéroports de Paris* judgments, that making airport facilities available in return for consideration constitutes an economic activity falling within the European Union competition rules. The construction costs of the facilities used by the airport operator are therefore investment costs which a commercial undertaking must normally bear. Therefore, in the opinion of that institution, the General Court did not err in law in holding that FLH was an undertaking and that the construction of the new southern runway constituted a matter which was indissociable from its economic activity.

Findings of the Court

35 In support of their first ground of appeal, the appellants, supported by ADV, essentially repeat the arguments which they expounded before the General Court, according to which the construction or extension of airport infrastructure does not constitute an economic activity falling within the scope of European Union law on State aid, so that financing of it by means of public funds is not liable to constitute State aid.

36 In the appeal, it is necessary to consider whether, in the present case, the General Court infringed Article 87(1) EC in holding that the activity of FLH, operator of the Leipzig-Halle airport and recipient with MF of the capital contributions intended to finance the construction of the new southern runway, was, so far as concerns that construction, economic in nature and that therefore the Commission was fully entitled to find that those capital contributions constituted State aid for the purposes of that provision.

37 It must be pointed out at the outset, as the appellants and ADV argue, that the 1994 Communication states, in point 12 thereof, that '[t]he construction o[r] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids'.

38 In dismissing the appellants' arguments derived from that communication, the General Court, at paragraphs 104 to 106 of the judgment under appeal, observed as follows:

> '104 However, it must be recalled that the question whether aid is State aid within the meaning of the Treaty must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others*, ... paragraph 95), and, moreover, that, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 65 and the case-law cited).
>
> 105 There have been developments in the airports sector, referred to in recitals 169 to 171 of the [contested decision], concerning, in particular, the organisation of the sector, and its economic and competitive situation. Furthermore, the [*Aéroports de Paris* judgments] recognised, as of 2000, that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply and that was confirmed by the judgment in *Ryanair* v *Commission* ... (paragraph 88).

106 Consequently, having regard to the case-law referred to in paragraph 104, the Commission was required, when it adopted the [contested decision], to take account of those developments and that interpretation and their implications for the application of Article 87(1) EC to financing of infrastructure related to airport operations, unless it is not to apply point 12 of the 1994 Communication. Having regard to the foregoing, therefore, the Commission did not err in considering, in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000.'

39 Those assessments by the General Court are not vitiated by any error of law. The Commission was required, having regard to the factual and legal situation prevailing at the time of the adoption of its decision, to examine the capital contributions under the competences conferred upon it under Article 88 EC. The General Court was therefore fully entitled to reject the appellants' arguments relating to the 1994 Communication and also to examine the plea before it by establishing specifically, in the light of that situation and not of that communication, whether the construction of the new southern runway constituted an economic activity.

40 In this respect, having regard to the indissociable nature, in the present case, of the activities of operation and construction, which the appellants dispute, the General Court, after having recalled, in paragraph 89 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity (Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22), first observed, correctly, at paragraph 93 of the judgment under appeal, that FLH, in the context of the operation of Leipzig-Halle airport, is engaged in an economic activity where it offers airport services in return for remuneration gained from, inter alia, airport fees (see judgment in Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 78) on the regional airport services market. The General Court held, on this issue, in its definitive assessment of the facts, which has not been challenged by the appellants in this appeal, that the existence of such a market was, in the present case, proved by the fact that Leipzig-Halle airport was in competition with other regional airports to become DHL's European hub for air freight.

41 The General Court then held, at paragraph 94 of the judgment under appeal, that the operation of the new southern runway would form part of FLH's economic activity, the Commission having stated, at recital 177 in the preamble to the contested decision, that that infrastructure would be operated for commercial purposes by FLH which would demand fees for its use. It observed that, as the Commission stated at recital 15 in the preamble to the contested decision, those fees would constitute the main source of income for the purposes of financing that runway, which would allow FLH to increase its capacity and to extend its business of operating Leipzig-Halle airport.

42 Lastly, at paragraphs 95 to 100 of the judgment under appeal, the General Court held that it was not appropriate to dissociate the activity consisting in constructing the new southern runway from the subsequent use which would be made of that runway, observing, inter alia, at paragraph 99 of that judgment, that, having regard to its nature and its purpose, the construction of that runway did not, as such, fall within the exercise of State authority, which, moreover, the applicants were not expressly claiming. It must be observed, in this connection, that, in upholding the plea for annulment alleging that the reasons given for the amount of the aid were contradictory and inadequate, the General Court observed, at paragraphs 225 and 226 of the judgment under appeal, that the Commission had conceded, at recitals 182 and 183 in the preamble to the contested decision, that certain expenses covered by the capital contributions –namely the expenses relating to security and police functions, to fire-protection measures and public security measures, to operating security measures, to the German meteorological service and to the air-traffic control service – fell within the performance of public duties and could not therefore be treated as State aid.

43 It is apparent from those findings that the General Court did not err in law in holding, essentially, that the Commission had correctly considered the construction of the new southern runway by FLH to constitute an economic activity and, consequently, the capital contributions, subject to the amount to be deducted from them in respect of expenses linked to the performance of public duties, to constitute State aid for the purpose of Article 87(1) EC.

44 Contrary to what is asserted by the appellants, supported by ADV, it seems that, for the purposes of establishing whether the construction of the new southern runway could be characterised as an economic activity by the Commission, the General Court, in accordance with the case-law (see Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 19; Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 75, and *MOTOE*, paragraph 25), made an assessment of that activity and examined its nature. In doing so, it did not assume but established, taking account of the specific circumstances and without erring in law, that that activity could not be dissociated from the operation by FLH of the airport infrastructure, which constitutes an economic activity, the construction of the new southern runway moreover not being linked, as such, by its nature or purpose, to the exercise of State authority.

45 That finding cannot be called into question by the other arguments put forward by the appellants and ADV.

46 First, it is necessary to reject the argument that the construction of the airport infrastructure and the operation of the airport concern different actors and sectors since, on any view, as the General Court definitively held at paragraph 111 of the judgment under appeal, without that finding being called into question in the present appeal, the entities concerned were in actual fact the same.

47 Secondly, it is not important that the General Court observed, at paragraphs 96, 110 and 111 of the judgment under appeal respectively, that 'runways are essential for the purposes of the economic activities performed by an airport operator', that 'the objective of constructing a runway is linked to the main economic activity of an airport' and that the 'construction and extension of the runway [are] pre-conditions for its operation'. Those considerations are, admittedly, unsuitable, by reason of their general nature and because they might also apply to certain activities which fall within the exercise of State authority, for establishing the economic nature of a given activity of airport infrastructure construction. However, they do not affect the validity in law of the General Court's findings set out at paragraphs 40 to 42 above, from which it follows that, in the present case, the construction of the new southern runway constituted an economic activity.

48 Third, in response to ADV's assertion that airport infrastructure construction represents an essential element of services in the public interest and therefore typically constitutes a public duty, it is sufficient to observe that the General Court stated, at paragraph 99 of the judgment under appeal, that the appellants themselves did not expressly claim that the construction of the new runway fell, as such, within the exercise of State authority.

49 Lastly, as regards the argument that the activity of airport infrastructure construction could not be carried out by private operators on account of the fact that there was no market for that type of activity because it was not envisaged to be profitable, this was rejected by the General Court. It observed, at paragraph 114 of the judgment under appeal, that it was apparent from its preceding findings that the construction of the new southern runway was an activity which could be directly linked with the operation of the airport, which is an economic activity. That being established, the General Court accordingly did not have to examine whether there was a specific market for the activity of airport infrastructure construction.

50 In addition, at paragraph 115 of the judgment under appeal, the General Court correctly pointed out that, furthermore, the fact that an activity is not carried out by private operators or the fact that it is not profitable were not relevant criteria for the purposes of whether or not it was to be characterised

as an economic activity. As the General Court recalled at paragraphs 88 and 89 of that judgment, it is settled-case law that, first, in the field of competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed and, secondly, any activity consisting in offering goods or services on a given market is an economic activity (see, inter alia, Case C-82/01 P *Aéroports de Paris* v *Commission*, paragraph 75; *MOTOE*, paragraphs 21 and 22, and Case C-113/07 P *SELEX Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 69). It follows from this that whether or not an activity is economic in nature does not depend on the private or public status of the entity engaged in it or the profitability of that activity.

51 Moreover, in answer to the arguments put forward in this context by the appellants concerning the amount of the airport fees, it is appropriate to point out that, as observed at paragraph 41 above, the General Court held in the present case, at paragraph 94 of the judgment under appeal, that the airport fees would constitute the main source of income for the purpose of financing the new southern runway, as the Commission stated at recital 15 in the preamble to the contested decision. That finding of fact, from which it is apparent that, contrary to what the appellants claim, the construction costs of that runway are in part passed on to users, does not constitute, save where the clear sense of the facts or evidence has been distorted – which is not claimed in the present case – a point of law which is subject as such to review by the Court of Justice on appeal (see, inter alia, to that effect, Case C-487/06 P [2008] *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 97 and the case-law cited).

52 It follows that the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

Second ground of appeal, alleging infringement of the principles of non-retroactivity, the protection of legitimate expectations and legal certainty

Arguments of the parties

53 The appellants, supported by ADV, are of the opinion that the General Court erred in law in holding that the Commission had not applied the 2005 Guidelines. They submit that, the Commission having *de facto* applied those guidelines, the General Court, by refusing to acknowledge this, infringed the principles of non-retroactivity, protection of legitimate expectations and legal certainty.

54 Concerning, first of all, the first of those principles, they point out that the decision on the capital contributions in favour of FLH was adopted at a time when the 1994 Communication was exclusively applicable. It was only at the end of 2005 that the Commission's policy changed, and that institution did not annul that communication but completed it by the 2005 Guidelines. Those guidelines expressly exclude any retroactive application.

55 As regards, next, the alleged infringement of the principles of protection of legitimate expectations and legal certainty, the appellants submit that, contrary to the considerations set out by the General Court at paragraph 167 of the judgment under appeal, there was neither, before the adoption of the decision of 4 November 2004 on the construction and the financing of the new southern runway, any decision-making practice which differed from the 1994 Communication nor any case-law providing that the rules on State aid were applicable to the financing of airport infrastructure construction, so that the sudden change in the Commission's approach was not foreseeable.

56 An analysis of the decisions taken by the Commission concerning the measures for financing of airport infrastructure confirms that, before the publication of the 2005 Guidelines, that institution had not taken any decision to that effect. It previously expressly dealt with those measures as general measures of economic policy not falling within the scope of the rules on State aid, even after the

delivery of the *Aéroports de Paris* judgments. It was only in its decision of 19 January 2005 concerning State aid N 644i/2002 (Germany – Construction and development of regional airports) and its decision of 20 April 2005 concerning State aid N 355/2004 on Antwerp airport that the Commission envisaged for the first time the application of those rules to the construction and the development of airport infrastructure, while observing that those rules were in principle not applicable. However, assuming that those decisions were relevant, they could not have affected the legitimate expectations of the economic operators concerned, given that they were published in full not in the *Official Journal of the European Union* but, subsequently, on the Commission's internet site only in the language of procedure.

57 The General Court erroneously referred, in this connection, first, to the judgments in *Aéroports de Paris* and *Ryanair* v *Commission*, which concerned only the operation of such infrastructure, secondly, to the Commission's decision of 13 March 2001 on State aid N 58/2000 (Italy – Promotion of the Piedmont airport system) ('the Commission's decision of 13 March 2001'), which did not in any way call into question the fact that airport infrastructure financing measures constituted measures of general policy and, lastly, the notification made by the German government of State aid N 644i/2002, which concerned not an individual measure but an aid scheme. Member States often notify their national legislation, in the interest of legal certainty, even when they do not consider that legislation to contain any aid.

58 At the hearing, the appellants added that there was only a limited publication of the *Aéroports de Paris* judgments and the Commission's decision of 13 March 2001 in the *Official Journal*, that they were not available in German on the Commission's internet site and that the exchanges between the Commission and the Member States had not been published.

59 Lastly, the appellants claim that the General Court failed to examine the arguments which they put forward to argue that the 2005 Guidelines were not lawful. They submit that, apart from the fact that those guidelines are contrary to primary law in so far as they characterise the activity of airport infrastructure construction as economic activity, they are intrinsically contradictory inasmuch as they confirm the 1994 Communication while differing from it and thus infringe the principle of legal certainty.

60 The Commission disputes all of those arguments which, in its view, do not stand up against a straightforward reading of the contested decision, from which it is apparent that it relied, in order to prove that there was aid, not on the 2005 Guidelines but on Article 87(1) EC, as interpreted in the *Aéroports de Paris* judgments. It states that, in the light of the clarification in those judgments of the concept of State aid, which is an objective legal concept, it could not continue, without infringing that article, to apply point 12 of the 1994 Communication.

61 Furthermore, having regard to the *Aéroports de Paris* judgments and the decision-making practice which followed those judgments, there was no longer, in the Commission's view, any legitimate reason to believe, at the end of 2004, that the financing by the State of an airport runway could not under any circumstances constitute State aid. The principle of the protection of legitimate expectations was therefore not infringed. Moreover, since the 2005 Guidelines were not applied, the part of the ground of appeal relating to the infringement of the principle of legal certainty is manifestly redundant.

Findings of the Court

62 As regards, in the first place, the allegation relating to the infringement of the principle of non-retroactivity, the General Court, at paragraphs 157 to 160 of the judgment under appeal, observed as follows:

'157 ... it must be held that, as regards the classification of the capital contributions as State aid within the meaning of Article 87(1) EC, there is nothing in the [contested decision] which leads to the conclusion that the Commission applied the provisions of the 2005 Guidelines.

158 With regard, first, to the 'undertaking' and economic activity criterion, the Commission pointed out in recital 173 of the [contested decision] that it is clear from the [*Aéroports de Paris* judgments] that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply. Given the recent developments in the sector, the Commission considered, as indicated in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000, the year [of the judgment in Case T-128/98] *Aéroports de Paris* v *Commission* ... The Commission therefore concluded, in recital 176 of the [contested decision], that from the date of that judgment the State aid rules should apply in this sector, emphasising that that did not constitute retroactive application of the 2005 Guidelines inasmuch as the Court of Justice had simply clarified the concept of State aid.

159 That approach must be approved since the interpretation which the Court of Justice gives of a provision of European Union law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 159, and the case-law cited).

160 It follows that, with regard to the assessment of the economic activity criterion, the Commission was entitled to implement the principles flowing from the [*Aéroports de Paris* judgments] by applying them to the circumstances of the present case, in particular as regards the financing of airport infrastructures and that does not constitute retroactive application of the 2005 Guidelines.'

63 At paragraph 161 of the judgment under appeal, the General Court also observed that the statement, at recital 174 in the preamble to the contested decision, that, having regard to the developments in the airport sector, the Commission had, in its 2005 Guidelines, 'extended' the approach followed in the *Aéroports de Paris* judgments to all types of airports did not permit the inference that the Commission had applied those guidelines in the present case. Noting, at paragraphs 162 and 163 of the judgment under appeal, that the Commission had not applied the 2005 Guidelines either in its examination of the criteria of economic benefit and imputability to the State, the General Court concluded, at paragraph 164 of that judgment, that, as regards the characterisation of the capital contributions as 'State aid' for the purpose of Article 87(1) EC, the Commission had not applied the 2005 Guidelines. Consequently, it rejected the claim.

64 In doing so, the General Court did not err in law. First, as it follows from the examination of the first ground of appeal, it was fully entitled to hold, essentially, for the reasons referred to at paragraph 38 of this judgment, that the Commission had legitimately departed from the 1994 Communication. Secondly, it also correctly stated, essentially, that the Commission had not applied the 2005 Guidelines in order to characterise the capital contributions as State aid, but had assessed those contributions on the basis of conclusions which it had drawn from the *Aéroports de Paris* judgments as regards the application of Article 87(1) EC.

65 Accordingly, the General Court was likewise fully entitled not to examine the arguments put forward by the applicants as regards the lawfulness of the 2005 Guidelines, considering, at paragraph 182 of the judgment under appeal, the claims relating to those arguments to be ineffective.

66 Concerning, in the second place, the claims relating to the infringement of the principles of the protection of legitimate expectations and legal certainty, the General Court rejected them at paragraph 166 of the judgment under appeal on the grounds that they were based on the incorrect premise that the 2005 Guidelines had been applied retroactively. At paragraph 167 of that judgment, it also observed as follows:

'In any event, those complaints do not appear to be well founded. The [*Aéroports de Paris* judgments], from which it follows that the operation of an airport is an economic activity, date from 2000. In addition, the judgment in *Ryanair* v *Commission*, ... which concerns the situation before the adoption of the 2005 Guidelines, confirmed the [*Aéroports de Paris* judgments] in the context of the operation of a regional airport. Furthermore, it is clear from [the Commission's decision of 13 March 2001] that, at that date, the Commission did not exclude the possibility that a measure in favour of the development of regional airport infrastructure might constitute State aid. In that decision, which, contrary to what the applicants claim, also concerned the financing of airport infrastructure, the Commission considered, essentially, in particular in recital 17, that although the measure in question must be regarded as State aid, it was compatible with the common market under Article 87(3)(c) EC. Finally, it must be pointed out that if the German authorities notified State aid N 644i/2002 in 2002 for reasons of legal certainty, as the applicants state ..., it is because they envisage the possibility that the measures in question, which are intended to improve regional airport infrastructure, could constitute State aid. Furthermore, in the context of the procedure concerning that aid, the Commission, on the basis of the [*Aéroports de Paris* judgments], informed the German authorities on 30 June 2003, essentially, that it was not certain that "aid for the construction and development of regional airports could be … regarded as a general infrastructure measure which is irrelevant for the purposes of State aid".'

67 It must be observed in this connection, as the General Court correctly held at paragraph 166 of the judgment under appeal, that the appellants' arguments in respect of those claims is based on the incorrect premise that the Commission applied the 2005 Guidelines retroactively in the contested decision. The General Court was therefore fully entitled to reject those claims at paragraph 169 of the judgment under appeal.

68 As to the remainder, in so far as those arguments seek to call into question paragraph 167 of the judgment under appeal, they must be rejected as ineffective since they concern grounds included in that judgment purely for the sake of completeness (see, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 148 and the case-law cited).

69 The second ground of the appeal must therefore be dismissed as in part ineffective and in part unfounded.

Third ground of appeal, alleging infringement of Articles 1(b)(v), 17 and 18 of Regulation No 659/1999

Arguments of the parties

70 According to the appellants, supported by ADV, if the capital contributions are to be regarded as State aid, they should, in any event, be characterised as existing aid since, at the date of the adoption of the decision in 2004 to extend Leipzig-Halle airport, there was no market; regional airports were not engaged in economic activity and were not in competition with other airports. Therefore, the measure at issue only became aid because of the subsequent development of the airports market. The General Court therefore erred in law in rejecting the plea raised in the alternative on that point.

71 The Commission contends that that ground is manifestly unfounded. First, the market conditions had already undergone a significant alteration at the time of the grant of the capital contributions, so that those contributions should be regarded as new aid. Secondly, Articles 1(b)(v), 17 and 18 of Regulation No 659/1999 are applicable only to aid schemes.

Findings of the Court

72 At paragraphs 191 to 193 of the judgment under appeal, the General Court, after having set out the grounds on which it took the view that the capital contributions at issue had been granted at a time at which the Commission had already indicated that it considered that such financing was liable to constitute State aid, stated as follows:

'191 With regard to the applicants' argument that, as regards regional airports like Leipzig-Halle, there was no market at the time of the decision to develop the southern runway, since those airports did not engage in an economic activity and did not compete with each other, it is sufficient to recall that, in the context of the first plea in law, it was established that FLH is engaged in an economic activity and it competes with other airports ... and to note that nothing suggests that that was not the case when the capital contributions were granted. The development referred to by the Commission in the 2005 Guidelines took place prior to the decision to finance the southern runway in 2004. In point 5 of those Guidelines, the Commission refers to a development which took place "in recent years". Furthermore, the Commission already referred to that development in 2001 in [its decision of 13 March 2001], in particular in recital 11.

192 Under those circumstances, it cannot be considered that the capital contributions did not constitute aid at the time at which they were granted but became aid later as a result of the development of the common market.

193 It follows from the foregoing that the capital contributions were not existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.'

73 By the present ground of appeal, the appellants are not in any way arguing that that reasoning is vitiated by one or a number of errors of law or a clear distortion of the sense of the facts but are merely disputing, by essentially repeating the arguments already submitted at first instance, the findings of fact made by the General Court at paragraph 191 of the judgment under appeal, claiming that there was no market at the time of the adoption of the decision to extend Leipzig-Halle airport in 2004.

74 It follows that the appellants are in fact seeking, by those arguments, a re-examination of the application submitted to the General Court and of the assessment of the facts made by that court in the judgment under appeal, which the Court of Justice does not have jurisdiction to undertake in appeal proceedings (see the case-law cited at paragraph 51 above and Cases C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 34 and 35, and C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraphs 46 and 47).

75 The third ground of appeal must therefore be dismissed as inadmissible.

Fourth ground of appeal, alleging infringement of the division of competences resulting from the EC Treaty

Arguments of the parties

76 The appellants, supported by ADV, claim that by holding, at paragraph 203 of the judgment under appeal, that the Commission had not overstepped its competences in treating the capital contributions as State aid, the General Court erred in law. It failed to have regard to the fact that the decision on transport infrastructure construction constitutes a decision on land use, adopted on the basis of provisions of public law of the Member State. By making the financing of extensions to infrastructure subject to State aid law, the General Court is conferring on the Commission competences which restrict the Member States' prerogatives as regards land use. That is also contrary to the principle of subsidiarity.

77 According to the Commission, the General Court was fully entitled to hold that Article 88 EC authorises, and even obliges, it to examine and review State aid and that the examination of the aid's compatibility with the common market falls within its exclusive competence. The appellants' arguments are therefore, in its view, unfounded.

Findings of the Court

78 It is apparent from the examination of the first ground of appeal that the General Court did not err in law in holding that the Commission had legitimately considered the capital contributions to constitute State aid for the purpose of Article 87(1) EC. It was therefore also without vitiating its judgment by an error in law that the General Court, in dismissing the plea raised before it alleging an infringement of the division of competences stemming from the EC Treaty, stated, at paragraphs 203 to 205 of the judgment under appeal, as follows:

'203 In the present case, with regard ... to the complaint that the Commission infringed the powers of the Member States, it must be pointed out that, as is clear from consideration of the first plea in law, the Commission did not err when it considered that the capital contributions constituted State aid within the meaning of Article 87(1) EC. Consequently, it had power under Article 87(2) and (3) to assess the capital contributions ... It thus cannot have infringed the powers of the Member States in that regard.

204 With regard to the allegation that regional and economic policies, of which the development of the southern runway is part, are within the exclusive jurisdiction of the Member States, it must be stated that, even if that were true, the consequence of that fact would not be to deprive the Commission of its power to supervise State aid pursuant to Articles 87 and 88 EC where financing granted under such policies constitutes State aid within the meaning of Article 87(1) EC.

205 Finally, with regard to the fact that the Commission is unable to provide better supervision than that exercised at national level as is required by the second paragraph of Article 5 EC, it must be said that that argument is irrelevant since it is established that the Commission had the power under the EC Treaty to supervise the measure at issue in the present case since the measure in question was State aid.'

79 Having held that the Commission had correctly found that the measure at issue constituted State aid, the General Court could lawfully infer from this that the Commission had carried out the review of that measure which it was entrusted to perform under Article 88 EC and had therefore not overstepped its competences nor, consequently, those attributed to the European Union. Moreover, since the assessment of the compatibility of aid with the common market falls within its exclusive competence, subject to review by the EU judicature (see inter alia, to that effect, Case C-17/91 *Lornoy*

and Others [1992] ECR I-6523, paragraph 30, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 23), the General Court was fully entitled to hold that the Commission could not have infringed the principle of subsidiarity.

80 It follows that the fourth ground of appeal must be dismissed as unfounded.

Fifth ground of appeal, alleging infringement of the obligation to state sufficient reasons for judgments

Arguments of the parties

81 The appellants, supported by ADV, allege that the judgment under appeal lacks sufficient grounds, in so far as the General Court assumes that there is an economic activity by referring only to the contested decision, without examining the arguments to the contrary which they put forward or the economic reality.

82 The Commission observes that the General Court made a detailed examination of the arguments alleging infringement of Article 87(1) EC. In its view, that court therefore satisfied the obligation to state sufficient reasons for judgments.

Findings of the Court

83 It must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraphs 135 and 136).

84 The General Court satisfied that requirement by setting out clearly and unequivocally, at paragraphs 87 to 121 of the judgment under appeal, the grounds on which it rejected the appellants' arguments and held that the Commission had been fully entitled to find that the capital contributions constituted State aid for the purposes of Article 87(1) EC.

85 The fifth and last ground of appeal being, consequently, unfounded, it must be disregarded and, accordingly, the appeal must be dismissed.

Costs

86 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful, they must be ordered to pay the costs incurred by the Commission, in addition to their own costs, in accordance with the form of order sought by the Commission.

87 In accordance with Article 184(4) of those Rules of Procedure, ADV, as an intervener having participated in the proceedings before the Court of Justice, is to bear its own costs.

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

1) Dismisses the appeal;

2) Orders Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH to bear their own costs and to pay the costs incurred by the European Commission;

3) Orders Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV) to bear its own costs.

[Signatures]