Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 16 March 2023 [1]

**Case C-209/21 P**

**Ryanair DAC**
**v**

**European Commission**

(Appeal – State aid – Sweden – COVID-19 – Loan guarantees to support airlines – Decision of the European Commission not to raise objections)

1. The appeal in the present case is part of extensive litigation pending before the Court of Justice in which Ryanair is challenging the judgments by which the General Court dismissed its actions against the decisions by which the European Commission authorised support measures adopted by several Member States following the COVID-19 pandemic for airlines operating in their territory in the form of individual aid or aid schemes and based, as the case may be, on Article 107(2)(b) TFEU or Article 107(3)(b) TFEU. [2] In the present case, Ryanair DAC ('Ryanair' or 'the appellant') asks the Court to set aside the judgment of 17 February 2021, *Ryanair* v *Commission* [3] ('the judgment under appeal').

## I. Background to the dispute, procedure before the General Court, judgment under appeal, procedure before the Court of Justice and forms of order sought

2. The background to the action before the General Court is described as follows in paragraphs 1 to 3 of the judgment under appeal and can be summarised as follows.

3. On 3 April 2020, the Kingdom of Sweden notified the Commission of an aid measure in the form of a loan guarantee scheme for certain airlines ('the aid scheme at issue'), which aims to ensure that airlines which hold a licence issued by that Member State, which are important for the connectivity of that Member State, have sufficient liquidity to ensure that the disruptions caused by the COVID-19 pandemic do not undermine their viability and to preserve the continuity of economic activity during and after the current crisis. The aid scheme at issue was to benefit all airlines holding, on 1 January 2020, a Swedish licence to conduct commercial activities in aviation under Article 3 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the

1 Original language: Italian.

2 For the description of the context in which the appeal that is the subject matter of the present Opinion arose, I refer to paragraph 1 of my Opinion in Case C-320/21, *Ryanair DAC* v *Commission*.

3 T-238/20, EU:T:2021:91.

Community,[4] except for airlines which had non-scheduled passenger air transport services as their main activity. The maximum amount of loans guarantees under that scheme was to be 5 billion kronor (SEK) and the guarantee was to concern investment loans and working capital loans, it was to be granted until 31 December 2020 at the latest and the duration was to be limited to a maximum of six years. On 11 April 2020, the Commission adopted Decision C(2020) 2366 final on State aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines ('the decision at issue'), by which, after concluding that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU, it assessed its compatibility with the internal market in the light of its communication of 19 March 2020, entitled 'Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak',[5] amended on 3 April 2020,[6] ('the Temporary Framework'). The Commission concluded that the aid scheme at issue met all the relevant conditions set out in Section 3.2 of that Temporary Framework, entitled 'Aid in the form of guarantees on loans', and was compatible with the internal market pursuant to Article 107(3)(b) TFEU. It therefore did not raise objections to it.

4. By application lodged at the Registry of the General Court on 1 May 2020, Ryanair brought an action against the decision at issue. The French Republic and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by the Commission. Ryanair put forward four pleas in support of its action. The first plea alleges, in essence, infringement of the principles of non-discrimination on grounds of nationality and the free provision of services; the second plea alleges infringement of the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition; the third plea alleges, in essence, infringement of the procedural rights under Article 108(2) TFEU; and the fourth plea alleges infringement of the duty to state reasons. In the judgment under appeal, the General Court rejected all the pleas raised by Ryanair and the action in its entirety, ordered Ryanair to bear its own costs and to pay those of the Commission, and held that the French Republic and the Kingdom of Sweden were to bear their own costs.

5. By document lodged at the Registry of the Court of Justice on 1 April 2021, Ryanair brought the appeal which is the subject of the present Opinion. A hearing, jointly with Case C-210/21 P *Ryanair* v *Commission*, concerning an aid measure in the form of a moratorium on the payment of civil aviation tax and of solidarity tax on air tickets due on a monthly basis during the period from March to December 2020, granted by France to airlines holding an operating licence issued in that Member State, was held on 19 October 2022, at which Ryanair, the Commission, the Kingdom of Sweden and the French Republic presented their oral arguments.

6. Ryanair asks the Court, principally, to set aside the judgment under appeal, annul the decision at issue and order the Commission to pay the costs and, in the alternative, to set aside the judgment under appeal, refer the case back to the General Court for reconsideration, and reserve the costs of the proceedings at first instance and on appeal. The Commission asks the Court to dismiss the appeal and order the appellant to pay the costs. The Kingdom of Sweden and the French Republic ask the Court to dismiss the appeal.

4 OJ 2008 L 293, p. 3

5 OJ 2020 C 91 I, p. 1.

6 OJ 2020 C 112 I, p. 1.

## II. The appeal

7. In support of its appeal, Ryanair raises five grounds of appeal, alleging, first, an infringement of the principle of non-discrimination; secondly, an error of law and a distortion of the facts in relation to the appellant's argument concerning the infringement of the freedom to provide services; thirdly, an error of law committed by the General Court in denying the existence of an obligation on the Commission to weigh up the beneficial and adverse effects of the aid; fourthly, an error of law and a distortion of the facts regarding the assessment of the existence of a failure to state reasons for the decision at issue; and, fifthly, the General Court's failure to find that there was an obligation on the Commission to open the formal investigation procedure in relation to the scheme at issue.

8. In accordance with the Court's request, this Opinion will focus only on the first three grounds of appeal.

### *A. First ground of appeal*

9. By its first ground of appeal, directed against paragraphs 25 to 57 of the judgment under appeal, Ryanair argues that the General Court infringed EU law with regard to the determination of the existence, in the aid scheme at issue, of discrimination on grounds of nationality without an acceptable justification. That ground is divided into five complaints.

10. In the grounds of the judgment under appeal to which those complaints relate, the General Court found, first of all, that 'one of the eligibility criteria [for the aid scheme at issue], that of holding a Swedish licence, results in a difference in treatment for airlines whose principal place of business is in Sweden, so as to be able to benefit from a loan guaranteed by the State, and for those whose principal place of business is in another Member State and which operate in Sweden, to Sweden and from Sweden under the freedom to provide services and the freedom of establishment, which are not so entitled' (paragraph 30 of the judgment under appeal). It went on to state that even if that difference in treatment may amount to discrimination within the meaning of the first paragraph of Article 18 TFEU, it should be made clear that, under that provision, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaties 'without prejudice to any special provisions contained therein' and that, therefore, it was necessary to ascertain whether such a difference in treatment was permissible under Article 107(3)(b) TFEU, which is the legal basis for the decision at issue. Such an examination required, according to the General Court, first, that the objective of the aid scheme at issue satisfied the requirements of that provision and, secondly, that the conditions for granting the aid did not go beyond what was necessary to achieve that objective (paragraph 31 of the judgment under appeal). It therefore, first, defined the objective of the aid scheme at issue (paragraphs 32 and 33 of the judgment under appeal) and, then, examined whether the conditions for granting the aid did not go beyond what was necessary to achieve the objective of the aid scheme at issue and whether they satisfied the requirements of Article 107(3)(b) TFEU (paragraphs 34 to 56 of the judgment under appeal), responding in the negative to the first question and in the affirmative to the second (paragraph 57 of the judgment under appeal).

*1. The first complaint*

11. By its first complaint in its first ground of appeal, Ryanair argues that the General Court infringed the principle of non-discrimination on grounds of nationality because, although it found, first, that there was a difference in treatment between airlines whose principal place of business is in Sweden and those whose principal place of business is in another Member State, and, secondly, accepted that such a difference in treatment could constitute discrimination, it concluded that the latter should be examined in the light of Article 107(3)(b) TFEU alone. According to the appellant, that finding is vitiated by four separate errors of law.

12. First, Ryanair argues that restricting eligibility for the aid scheme at issue to airlines holding an operating licence issued in Sweden constitutes, in accordance with the judgment of 18 March 2014, *International Jet Management*,[7] which the General Court allegedly deliberately ignored, direct discrimination on grounds of nationality. Secondly, Ryanair argues that, contrary to the General Court's statement in paragraph 31 of the judgment under appeal, Article 107 TFEU does not constitute a 'special provision' within the meaning of the first paragraph of Article 18 TFEU since it does not lay down specific rules of non-discrimination. Thirdly, Ryanair argues that direct discrimination on grounds of nationality such as that introduced by the measure at issue is not justifiable except on the basis of the grounds for derogation expressly provided for in the Treaty and, therefore, since it is a measure affecting freedom to provide services, on the grounds of public policy, public security and public health exhaustively listed in Article 52 TFEU, to which Article 62 TFEU refers. The justifications put forward by the Commission in the decision at issue, relating to the need to preserve the connectivity of Sweden, allegedly do not fall within those derogations. Fourthly, Ryanair argues that, even if the freedom to provide services were inapplicable in the present case, the General Court in any event failed to assess whether, as required by the case-law of the Court of Justice, and, in particular the judgment in *International Jet Management*, the difference in treatment introduced by the aid scheme at issue is justified on the basis of 'objective considerations, independent of the nationality of the persons concerned'.

13. I would point out that the general principle of non-discrimination prohibits, on the one hand, treating comparable situations differently and, on the other hand, treating different situations in the same way, unless such treatment is objectively justified.[8]

14. The first paragraph of Article 18 TFEU provides that, 'within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. According to settled case-law, that provision applies independently only to situations governed by EU law in respect of which the Treaties lay down no specific rules prohibiting discrimination.[9] Such rules, according to the Court, include in particular the provisions of the Treaty on the freedom to move and reside within the territory of the Member States conferred by Article 20(2)(a) TFEU and Article 21 TFEU,[10] as well as the provisions on the free movement of goods (Articles 30, 34 and 110 TFEU),[11] the free movement of workers (Article 45 TFEU),[12] the freedom of establishment (Article 49 TFEU),[13] the freedom to

7 C-628/11, EU:C:2014:171, paragraph 68; 'the judgment in *International Jet Management*'.

8 See judgment of 27 October 2022, *ADPA and Gesamtverband Autoteile-Handel* (C-390/21, EU:C:2022:837, paragraph 41).

9 See judgment of 6 October 2022, *Contship Italia* (C-433/21 and C-434/21, EU:C:2022:760, paragraph 29 and the case-law cited).

10 See judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraph 65).

11 See judgment of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 40).

12 See judgment of 6 October 2020, *Jobcenter Krefeld* (C-181/19, EU:C:2020:794, paragraph 78).

13 See judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 55).

provide services (Articles 56 to 62 TFEU)[14] and the free movement of capital (Articles 63 and 65 TFEU).[15] The application of the first paragraph of Article 18 TFEU is thus subject to the condition that there must be no specific rule laid down by the Treaties prohibiting discrimination on grounds of nationality that is applicable to the situation that has given rise to the discrimination claimed.[16]

15. As I have already had the opportunity to set out in my Opinion in Case C-320/21 P, *Ryanair* v *Commission*,[17] although the prohibition of aid in Article 107(1) TFEU is intended to ensure that competition in the internal market is not distorted by intervention on the part of the Member States, which tendentially favours national undertakings, I have some difficulty in seeing in that provision a rule for implementing the prohibition of discrimination on grounds of nationality of the same kind as the provisions of the FEU Treaty concerning the four freedoms. Indeed, as I wrote there, while there is, between the principle of non-discrimination in the first paragraph of Article 18 TFEU and the rules on State aid, a potential similarity of purpose, namely the protection of competition and European freedoms, those rules nevertheless constitute a means for keeping discrimination in check; they themselves do not contain any rule of non-discrimination. Nonetheless, as the Commission points out, Article 107(2) and (3) TFEU, in so far as they provide for the compatibility of some aid with the internal market under certain conditions, allow certain differences in treatment where they are necessary and proportionate for the purpose of attaining the objectives contemplated by those provisions, and are therefore significant for the purposes of the application of the principle of non-discrimination, as 'special provisions' within the meaning of the first paragraph of Article 18 TFEU.

16. The second argument raised by Ryanair in the context of the complaint under consideration must therefore, in my view, be rejected.

17. By its first and fourth arguments, Ryanair, referring to the judgment in *International Jet Management*, argues that the criterion for selecting beneficiaries adopted by the aid scheme at issue is discriminatory in nature and is not justified by 'objective considerations independent of … nationality' within the meaning of that judgment.

18. In that regard, I would point out, first of all, that the Court has repeatedly held that decisions adopted by the Commission under the procedure laid down in Article 108 TFEU must never produce a result which is contrary to specific rules of the Treaty and that, therefore, State aid which, on account of some of its modalities, contravenes other provisions of the Treaty or infringes general principles of EU law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the internal market.[18] That limit follows, according to the Court, from the general scheme of the Treaty, within which therefore the aid rules do not constitute a 'closed system'.

[14] See judgment of 18 June 2019, *Austria* v *Germany* (C-591/17, EU:C:2019:504, paragraph 40 and the case-law cited).

[15] See judgment of 18 March 2021, *Autoridade Tributária e Aduaneira* (Tax on capital gains from immovable property) (C-388/19, EU:C:2021:212, paragraph 21).

[16] See judgment of 11 June 2020, *TÜV Rheinland LGA Products and Allianz IARD* (C-581/18, EU:C:2020:453, paragraphs 31 and 33 and the case-law cited).

[17] To the same effect, see my Opinion in Case C-320/21 P, *Ryanair* v *Commission*, points 63 to 66.

[18] See judgments of 31 January 2023, *Commission* v *Braesch and Others* (C-284/21 P, EU:C:2023:58, paragraph 96), and of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742, paragraph 44 and the case-law cited; 'the judgment in *Austria* v *Commission*').

19. Contrary to what the Commission maintains in its observations before the Court, that case-law does not exclude from the obligation to comply with the Treaty provisions on equal treatment and freedom of movement the rules by which a Member State defines the category of beneficiaries of an aid scheme. Such an exclusion does not follow, in my view, either from the general reference, in the case-law referred to above, to the 'modalities' of the aid, or from the judgment of 22 March 1977, *Iannelli & Volpi*,[19] on which the Commission relies in its observations on the second ground of appeal, the analysis of which I refer to.

20. The fact remains that the case-law referred to in point 18 of this Opinion must, in any event, be reconciled with the fact that, in the FEU Treaty system, the compatibility of aid with the internal market must be carried out through the prism of the provisions of Article 107(2) and (3) TFEU, which, as stated above, allow for differences in treatment where necessary and proportionate to the attainment of the objectives pursued by the Treaty and constitute, in the sense set out in point 15 of this Opinion, 'special provisions' in accordance with the first paragraph of Article 18 TFEU.

21. It is on the basis of those principles that the appellant's arguments based on the judgment in *International Jet Management* must be examined. I recall that, in that judgment, the Court held that Article 18 TFEU precluded legislation of a Member State which required an air carrier holding an operating licence issued by another Member State to obtain an authorisation to enter its airspace for flights from third countries, whereas no such authorisation was required for air carriers holding a licence issued by that first Member State. After stating that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, the seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result, the Court stated, in that judgment, that the national legislation in question, based on the State of issue of the operating licence, established a distinguishing criterion which, in fact, led to the same result as a criterion based on nationality, since, in accordance with Article 4(a) of Regulation No 1008/2008, the operating licence is issued by the competent authority of the Member State in which the air carrier has its principal place of business within the meaning of Article 2(26) of the same regulation.[20] In paragraph 68 of that judgment, on which Ryanair's argument is based, the Court stated that 'such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions'.

22. I note first of all that, since holding an operating licence issued in Sweden is one of the conditions for access to the aid scheme at issue, Ryanair is not wrong to consider, referring to the judgment in *International Jet Management*, that the category of beneficiaries of that scheme is defined, inter alia, on the basis of 'a distinguishing criterion which leads to the same result as a criterion based on nationality'.[21] However, the similarities between the present case and that which gave rise to that judgment and therefore the possibility of transposing to the present case the principles it sets out, is, in my view, limited to this finding alone.

23. The rules on State aid have specific features of their own, not only procedural, which must also be taken into account for the purposes of applying the principle of non-discrimination on grounds of nationality. In particular, depending on the nature of the measure at issue and the objective pursued by it, the requirement of a link with the national territory for the purposes of

[19] 74/76, EU:C:1977:51 ('the judgment in *Iannelli & Volpi*').

[20] See the judgment in *International Jet Management*, paragraphs 64 to 66.

[21] See the judgment in *International Jet Management*, paragraph 65.

eligibility for the aid may be both necessary and proportionate, so that even a distinguishing criterion, such as that used to define the category of beneficiaries of the aid scheme at issue, based, in essence, on the company's seat,[22] may, depending on the circumstances, be justified and non-discriminatory.[23]

24. The General Court therefore correctly held, in paragraph 31 of the judgment under appeal, that there could be discrimination only if and to the extent that the requirement of the licence issued in Sweden was not appropriate and proportionate to the objective pursued by the aid scheme at issue within the meaning of Article 107(3)(b) TFEU.[24]

25. In any event, even if the judgment in *International Jet Management* were considered relevant for the purposes of the application of the general principle of non-discrimination in the field of State aid, I am of the view that considerations relating to the need to preserve the connectivity of Sweden in general and that within the territory of Sweden in particular, including the continuation of essential air transport services, also in connection with the state of health emergency created by the COVID-19 pandemic – a need which, as will be seen more fully below, constitutes the fundamental objective pursued by the Swedish legislature in establishing the aid scheme at issue – are capable of constituting 'objective considerations, independent of the nationality of the persons concerned',[25] of a non-purely economic nature',[26] within the meaning of that judgment. In any event, even in that context, the assessment of proportionality remains the cornerstone of the assessment of the existence of discrimination prohibited by the first paragraph of Article 18 TFEU. Indeed, paragraph 68 of the judgment in *International Jet Management* states that the considerations relied on by the Member State concerned to justify a difference in treatment on grounds of nationality – which in the present case, it should be pointed out, unlike in the judgment in *International Jet Management*, does not favour all airlines licensed by Sweden, but only those that meet specific additional criteria – must be 'proportionate to the legitimate aim of the national provisions'.

26. It follows from the foregoing that also the first and fourth arguments raised by Ryanair in the context of the first complaint of its first ground of appeal are unfounded. As regards the third argument, since it overlaps, in essence, with those put forward in the context of its fourth ground of appeal, I refer to the examination of that ground.

27. On the basis of all of the foregoing considerations, the part of the first complaint of the first ground of appeal examined thus far should, in my view, be rejected as unfounded.

### *2. The second complaint*

28. By the second complaint of its first ground of appeal, Ryanair submits that paragraph 32 of the judgment under appeal, in which the General Court held that the aid scheme at issue is intended to 'remedy the serious disturbance in the Swedish economy caused by the COVID-19

22 See the judgment in *International Jet Management*, paragraph 66.

23 That is, in essence, apparent in particular from the judgment of 26 September 2002, *Spain* v *Commission* (C-351/98, EU:C:2002:530, paragraph 57).

24 In fact, the reasoning followed by the General Court in paragraph 31 of the judgment under appeal is in part different from that proposed. It considered, in essence, that, even if it were to be considered that the difference in treatment introduced by the aid scheme at issue constituted discrimination on grounds of nationality, it would still be necessary to establish whether that discrimination was not permitted under Article 107(3)(b) TFEU.

25 See the judgment in *International Jet Management*, paragraph 68.

26 See, to that effect, the judgment in *International Jet Management*, paragraph 70.

pandemic …, by securing Sweden's connectivity', is vitiated by an error of law and a distortion of the facts. Indeed, according to the appellant, it is clear from the decision at issue that the real objective of that scheme was to ensure sufficient liquidity for airlines holding an operating licence issued in Sweden, selected on the basis of a discriminatory criterion based on nationality.

29. That complaint must, in my view, be rejected. Indeed, I consider that the General Court correctly identified the main objective of the aid scheme at issue as the need to ensure the internal and external connectivity of Sweden and, without committing the errors alleged against it by the appellant, concluded, in paragraph 33 of the judgment under appeal, that such an objective was consistent with the objective pursued by Article 107(3)(b) TFEU of enabling Member States to remedy a serious disturbance in their economy. The objective of ensuring the link by air of the Swedish territory is clearly expressed both in recital 8 of the decision at issue, in which the aid scheme at issue is described, and in recital 43 of that decision, in which the Commission assesses the relevance of that objective and the arrangements for achieving it for the purposes of the application of Article 107(3)(b) TFEU. It is clear from those recitals, referred to by the General Court in paragraph 32 of the judgment under appeal, that the selection of the beneficiaries of the scheme on the basis of the criterion of holding an operating licence issued in Sweden is intended to pursue that objective and constitutes a means of achieving it, like the requirement to operate flights to and from or within Swedish territory and the exclusion of charter flights, and not, contrary to the appellant's assertion, an objective in itself.

30. That conclusion is not called into question by the particular treatment accorded by the Swedish authorities to SAS AB ('SAS'),[27] which is one of the airlines that contributes most to the connectivity of Sweden, nor by the fact that the airlines eligible for the aid scheme at issue had to hold an operating licence issued by Sweden before 1 January 2020, since that date, although prior to the date on which the World Health Organization (WHO) officially classified the COVID-19 outbreak as a pandemic (11 March 2020), is in a period, just before, in which the health emergency was already beginning to take shape[28] and cannot therefore, contrary to what Ryanair appears to assert, be regarded as totally separate from the event whose consequences the aid scheme at issue was intended to remedy.

### *3. The third complaint*

31. The appellant argues that, in concluding, in paragraphs 38 to 44 of the judgment under appeal, that the Commission had established, in the decision at issue, the need to restrict access to the aid scheme at issue to only those airlines which hold an operating licence issued by the Swedish authorities, the General Court committed several errors of law and manifestly distorted the facts.

32. First of all, the appellant maintains that the General Court erred in finding, in paragraphs 40 and 41 of the judgment under appeal 'with regard to the appropriateness of the aid scheme at issue', that, bearing in mind the fact that that scheme took the form of State guarantees for loans of a maximum period of six years, 'the criterion of holding a Swedish licence … [ensured] at least the administrative and financial stability of the presence of those airlines', enabling, first, the Swedish authorities to control the manner in which the aid was used so that the State guarantee was used as little as possible (paragraph 40) and giving them, secondly, the possibility to carry out, in accordance with their obligations under, in particular, Article 5 and Article 8(2) of

[27] As Ryanair points out, it is stated in footnote 10 of the decision at issue that a maximum amount of SEK 1.5 billion was reserved for SAS.

[28] On 30 January 2020, the WHO declared a 'public health emergency of international concern' (PHEIC).

Regulation No 1008/2008, financial checks of the recipients (paragraph 41). Moreover, the General Court erred in concluding, also in paragraphs 40 and 41 of the judgment under appeal, that the same control would not have been possible '[on] airlines operating on Swedish territory as mere service providers', since, first, 'service provision, by definition, could cease at very short notice, if not immediately' (paragraph 40) and, secondly, the Swedish authorities have no power, under Regulation No 1008/2008, 'to monitor the financial situation of airlines which do not have a Swedish licence' (paragraph 41). Finally, the General Court erred in concluding, in paragraph 42 of the judgment under appeal, that the provisions of Regulation No 1008/2008 'create reciprocal regulatory obligations between airlines holding a Swedish licence and the Swedish authorities, and thus a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(3)(b) TFEU, which require that the aid addresses a serious disturbance in the economy of the Member State concerned'.

33. The appellant raises three separate arguments.

34. First, the appellant argues that the statement of reasons for the decision at issue contains no reference to the possibility for the Swedish authorities to control the way in which the beneficiary companies use the aid. It argues that the General Court therefore supplemented the statement of reasons of that decision, which was from the outset deficient.

35. In that regard, I note that in paragraph 43 of the decision at issue the Commission expressly refers to the fact that airlines which hold an operating licence issued in Sweden have their principal place of business in that Member State and are subject there to regular monitoring of their financial situation. Therefore, contrary to what Ryanair in essence claims, the General Court did not substitute its own reasoning for that of the decision at issue, but at most made it more explicit. In that regard, I recall that, while, in reviewing the legality of acts under Article 263 TFEU, the General Court cannot under any circumstances, substitute its own reasoning for that of the author of the contested act,[29] it may nevertheless be led to interpret the reasoning of the contested act also in a manner which differs from that of its author and, in certain circumstances, even to reject the latter's formal statement of reasons, except where there is no material factor to justify that course of action.[30] In the present case, in paragraph 40 of the judgment under appeal, the General Court confined itself, in order to address the plea raised by the appellant, to carrying out an interpretation of the decision at issue in conformity with the indications contained in it and did not, therefore, substitute any reasoning of that decision.

36. Secondly, Ryanair argues that, contrary to what the General Court suggests, there is no link between the fact that the airline that is the beneficiary of aid holds an operating licence issued in the Member State granting the aid and the ability of that Member State to control the use of that aid. Indeed, according to Ryanair, the sole objective of the control carried out under Article 8 of Regulation No 1008/2008 by the competent licensing authority is to ensure that air carriers have at all times sufficient funds to guarantee the safety of their activities. That authority has no enforcement power in relation to those carriers with regard to the use of their financial resources. Ryanair also argues that the Kingdom of Sweden could have made the grant of the aid subject to objective commitments to monitor its use by the beneficiaries rather than imposing a discriminatory requirement based on nationality. It cites by way of example Decision

[29] See, to that effect, judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 70).

[30] See judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 71).

2010/13/EC,[31] in which the Commission declared incompatible with the internal market a German measure which limited the aid in question to only undertakings having their legal domicile and corporate management in the Member State concerned, stating that the need to supervise the financial situation of the beneficiaries could be satisfied by less discriminatory means.

37. In that regard, I note that, as maintained by the Commission in its written observations, under Articles 8 and 9 of Regulation No 1008/2008, the competent licensing authority of each Member State may at any time assess the financial performance of a Community air carrier to which it has granted an operating licence by requesting the relevant information (second paragraph of Article 8(4), and Article 9(1) of Regulation No 1008/2008). In addition, in order to assess the continuing financial fitness of existing licence holders, that authority has the power to request, in addition to the audited accounts for each financial year, a projected balance sheet, past and projected income and expenditure, cash-flow statements and liquidity plans (see Annex I to Regulation No 1008/2008, point 3), as well as, in specific circumstances – in particular in the case of operation of new air services or of substantial changes in the scale of the activity – a 'business plan' which includes, for a given period, 'a detailed description of the air carrier's intended commercial activities … in particular in relation to the expected market development and the investments to be carried out, including the financial and economic implications of these activities' (see Article 8(5) and (6) and the definition of the concept of business plan in Article 2(12) of that regulation).

38. Irrespective of the specific purpose of the control carried out by the competent authorities for the grant of the licences or of the absence of effective powers of enforcement over the use of the financial resources of the existing licence holders, it follows from the foregoing that continual and wide-ranging monitoring which enables the authorities of the Member State granting the aid, as correctly stated by the General Court in paragraph 40 of the judgment under appeal, to verify the use made of that aid and, in particular, given that the aid at issue is in the form of a public guarantee, to assess in practice the risk that it may be activated, is actually possible, and in fact mandatory. Moreover, I do not see why the fact that the supervisory powers conferred by Regulation No 1008/2008 on the competent licensing authority are also used for the purpose of verifying the use, by existing licence holders, of State resources granted in the context of the transport activity subject to supervision would constitute, as Ryanair claims, an infringement of that regulation, even assuming that the purpose of the powers conferred on those authorities is solely to ensure the safety of air transport.

39. As the General Court points out, airlines which hold a licence issued by a different Member State are not subject to monitoring such as that described above. Moreover, as both the Swedish Government and the French Government have rightly submitted, a similar control in terms of scope and intensity – reflecting the intensity of the link between each air carrier and the State of issue of the operating licence – could hardly be contractually imposed on those airlines as a condition for the grant of aid. The example given by Ryanair of the Estonian airline Nordica, with which Sweden allegedly concluded a public service contract, is irrelevant in the present case in which the measure at issue constitutes aid granted in the form of a State guarantee and it is therefore a question of verifying how the airline concerned honours the loans obtained and not

[31] Commission Decision 2010/13/EC of 30 September 2009 on aid scheme No C2/09 (ex N 221/08 and N 413/08) which Germany intends to grant to modernise the general conditions for capital investments (OJ 2010 L 6, p. 32, in particular recital 108).

to what extent it fulfils the public service obligations undertaken.[32] Likewise, it is not relevant even if Ryanair's reference to Decision 2010/13 were applicable,[33] since, in that decision, the aid was, as stated above, limited solely to companies which had at the same time their legal domicile and head office in the Member State concerned, a twofold requirement which excluded permanent business establishments, branches and subsidiaries of EU undertakings, held by the Commission not to be justified by the need, relied on by that Member State, to carry out the necessary supervision of the financial situation of investors. As the Commission rightly asserts, Article 4 of Regulation No 1008/2008, which refers to the concept of 'principal place of business',[34] read in conjunction with Article 2(26) of that regulation, does not require such a cumulative approach. Finally, the fact that the aid scheme at issue is granted and managed by an administrative authority other than that which exercises the control does not call into question either the effectiveness of the controls to which the airlines eligible for aid are subject in Sweden or the stability of the presence of those airlines in that Member State, factors which, as the General Court held, both allow the conditions for the use of the aid to be monitored more easily.

40. Thirdly, Ryanair asserts that Regulation No 1008/2008 does not impose on airlines any obligation to provide services to or from the Member State which issued them with an operating licence or in the territory of that Member State, nor does it make it more difficult, for those airlines, to interrupt such services compared with airlines operating under the provision of services regime.

41. In that regard, it must be pointed out that, contrary to what Ryanair appears to imply, in paragraphs 40 to 42 of the judgment under appeal, the General Court did not in any way state or even merely imply that there was an obligation on air carriers holding an operating licence issued in a given Member State to operate in the territory of that Member State. Instead, it merely observed that holding such a licence ensures 'at least the administrative and financial stability of the presence' of those carriers, a statement which cannot be challenged.

42. As regards the General Court's finding, in paragraph 40 of the judgment under appeal, which is challenged by the appellant, that service provision, by definition, could cease at very short notice, if not immediately, I note that Ryanair merely observes that no express provision of Regulation No 1008/2008 or of EU law 'makes it less difficult' for an airline which does not hold a licence issued in a Member State to cease activity in that Member State than for an airline which does hold such a licence. Such an argument, apart from the fact that it does not undermine the above finding of the General Court, does not take into account the fact that, as the Commission rightly observes, the stable and reciprocal links between an air carrier and the Member State which issued the licence are such that it is unlikely that the former would decide to cease all activity in the territory of the latter, just as it is unlikely that an air carrier would establish the principal place of business within the meaning of Article 4 of Regulation No 1008/2008, which includes, inter alia, operational control and continued airworthiness management, in a Member State in which it has no intention of carrying out any activity. Ryanair itself, despite its status as a pan-European airline and although, as it asserts, it carries more passengers to and from Germany,

[32] Ryanair refers to the Commission Decision of 11 August 2020 on State aid SA.57586 (2020/N) – Estonia COVID-19: Recapitalisation and subsidised interest loan for Nordica (OJ 2020 C 346, p. 3), which mentions, in recital 18 and footnote 10, a public service contract concluded between Sweden and Nordica, valid from 27 October 2019 until 27 October 2023.

[33] According to settled case-law, the legality of a previous decision-making practice (and a fortiori of an isolated decision), even if it were established, is not sufficient to call into question the legality of a decision of the Commission on State aid; see Order of 10 October 2017, *Greenpeace Energy* v *Commission* (C-640/16 P, not published, EU:C:2017:752, paragraph 27 and the case-law cited).

[34] I recall that, according to Article 2(26) of Regulation No 1008/2008, 'principal place of business' means the 'head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised'.

Spain or Italy than to and from Ireland, the country for which it holds the operating licence, nevertheless remains the largest Irish airline, which has, for over 35 years, made an 'unmatched contribution' to the connectivity and economy of that Member State.[35] In any event, the Swedish Government, without being challenged by Ryanair, states in its response that there are no airlines which hold an operating licence issued in Sweden which do not provide air services to, from or within the territory of that Member State.

43. The General Court therefore did not, in my view, commit the errors alleged against it by Ryanair in concluding, in paragraphs 43 and 44 of the judgment under appeal, that, by limiting eligibility for the aid to only those airlines which hold a Swedish licence, the Kingdom of Sweden had legitimately sought to ensure a permanent link between it and the airlines benefiting from its guarantee – although airlines holding licences issued in other Member States could also contribute to some extent to the connectivity and the Swedish economy – and that that limitation was appropriate for achieving the objective of remedying the serious disturbance in the economy of that Member State. I would add that the existence of such a permanent link was of particular importance in a context of crisis and uncertainty such as that created by the COVID-19 pandemic, which was likely to seriously affect the commercial choices of airlines operating on Swedish territory.

44. I therefore consider that the third complaint of the first ground of appeal should be rejected.

*4. The fourth complaint*

45. By the fourth complaint of its first ground of appeal, Ryanair argues that, by rejecting, in paragraphs 45 to 54 of the judgment under appeal, the arguments put forward by the appellant regarding the lack of proportionality of the aid scheme at issue, the General Court committed several errors of law and manifestly distorted the facts.

46. It puts forward five arguments to that effect.

47. First, the appellant challenges the General Court's finding, in paragraph 45 of the judgment under appeal, that 'the double requirement of a Swedish licence and air services in Swedish territory through regular flights is the most appropriate for guaranteeing that the presence of an airline on that territory is permanent'. According to the appellant, the justification provided by the General Court also in paragraph 45 of the judgment under appeal, namely, that 'the presence of the principal place of business of an airline in the territory of a given Member State', as it 'equate[s] to the place where administrative and financial decisions are taken', 'is particularly important in the present case in order to ensure that Sweden's connectivity is not interrupted from one day to the next', is based on hypothetical and erroneous allegations, since the essential criterion that leads an airline to interrupt or maintain its services is its commercial strategy, which does not depend on the place in which it has its principal establishment.

48. Since that argument overlaps, in essence, with the arguments raised in the context of the second complaint, I would simply refer to point 42 of this Opinion. The mere fact that, legally and in the abstract, an airline may cease all activity in the territory of the Member State in which it holds the operating licence with the same ease as an airline operating in that Member State under the provision of services regime, does not make it possible to call into question the circumstance, on which the General Court relied, that, in practice, such a cessation is highly

[35] See https://corporate.ryanair.com/news/pwc-report-confirms-ryanairs-unmatched-investment-in-irish-economy-over-past-35-years/

unlikely because of the reciprocal links between an air carrier and the Member State in which the licence was issued. As regards the assertion that airlines not licensed in the Member State in which they operate 'tend to offer faster connectivity', the appellant does not explain how it is relevant to the findings of the General Court which it challenges. Moreover, that assertion is based on data on the admissibility of which – called into question by the Commission – the General Court decided not to take a position, as is apparent from paragraph 55 of the judgment under appeal, which the appellant does not challenge in the present appeal.

49. Secondly, Ryanair challenges the statement in paragraph 45 of the judgment under appeal that 'the eligible airlines overall contribute most to Sweden's regular air service, both as regards freight and passenger transport'. According to the appellant, on the one hand, that statement is based on a manifest distortion of the facts, since the data provided by the General Court itself, in paragraph 46 of the judgment under appeal, show that airlines holding a Swedish licence constitute a minority in two of the three segments into which the air services covered by the decision at issue are divided, namely flights within the European Union (49%) and flights outside the European Union (35%). On the other hand, that statement is contrary to the principle of proportionality, since it implies that an undertaking or a category of undertakings which 'most' fulfils the objective of the measure is entitled to all of the aid provided for by that measure. Ryanair also argues that the General Court erred, in paragraph 46 of the judgment under appeal, in characterising as a 'key piece of information' the fact that, in 2019, the airlines which hold a Swedish licence were responsible for 98% of the domestic passenger traffic and 84% of the domestic freight transport. A proper assessment of that data in accordance with the principle of proportionality should have led the General Court to find that, since the domestic traffic constituted a very small proportion of Sweden's total traffic, it could not by itself justify the criterion for holding a national licence. Furthermore, the appellant observes that if the objective actually pursued by the Swedish authorities had been to ensure the domestic connectivity of Sweden, a measure which also supported the non-national activities of airlines with a licence issued by that Member State had to be regarded as disproportionate in itself.

50. I am not convinced by Ryanair's arguments.

51. It is apparent from a combined reading of paragraphs 45 and 46 of the judgment under appeal, indeed, that, when it stated that airlines with a Swedish licence overall contribute most to Sweden's regular air service, the General Court in fact intended to highlight the overall greater contribution of those airlines to the achievement of the general objective of ensuring the connectivity of that Member State in its various components, consisting of domestic and international transport of passengers and goods. Such a reading is confirmed by the end of paragraph 49 of the judgment under appeal, in which the General Court states that, by focusing on its share of the Swedish passenger air transport market to and from Sweden, the appellant 'fails to mention the fact that Sweden's connectivity is not only assured by passenger air transport, on the one hand, and by non-domestic transport to Sweden, on the other, but is also assured by the air transport of goods and by domestic passenger air transport'. When viewed in that light, the mere fact that, as Ryanair points out, airlines which hold a Swedish licence do not have a majority share in passenger transport within and outside the European Union does not have the decisive importance attributed to it by the appellant.

52. Moreover, I do not think that the General Court committed the errors of law alleged against it by the appellant, nor any distortion of the facts – which, moreover, Ryanair does not specifically invoke – by emphasising the particular importance for the Kingdom of Sweden of ensuring domestic air connectivity, given the geographical characteristics of that Member State.

53. In its response, the Swedish Government emphasised in particular the importance of air transport for the purposes of ensuring mobility in Sweden, especially where there are no fixed road connections, and, more specifically, the importance of domestic freight transport for the country's economy. It is therefore understandable that, in pursuing the objective of remedying the disruption to the economy caused by the pandemic by ensuring the connectivity of Sweden, the Swedish authorities accorded particular importance to domestic connectivity. The General Court therefore did not err in considering the data relating to the coverage of domestic freight and passenger traffic by airlines holding a Swedish licence to be essential. As has already been stated above, the Kingdom of Sweden states, without being challenged by Ryanair on that point, that all undertakings which have a Swedish authorisation and are eligible for the aid scheme at issue contribute, to a greater or lesser extent, to the domestic connectivity of Sweden. The criterion relating to the holding of that licence therefore reflects the reality of the Swedish air transport market.

54. Finally, contrary to what Ryanair asserts, the mere fact that, in the context of the strategy implemented by the authorities of a Member State in establishing an aid scheme with a view to achieving a given objective, certain specific aims within that more general objective take on, for those authorities, greater importance does not automatically mean that the scheme is disproportionate merely because the category of beneficiaries is not defined in such a way as to make eligible only the undertakings or activities which contribute to the achievement of those specific objectives.

55. Thirdly, Ryanair complains that the General Court did not assess, in its analysis of the proportionality of the aid scheme at issue, the effects of that scheme on competition. According to Ryanair, that assessment is essential in order to establish whether the conditions for granting the aid do not go beyond what is necessary to achieve the objective pursued. Since Ryanair's argument on that point overlaps with that developed in support of its third ground of appeal, I refer to the analysis of that ground.

56. Fourthly, Ryanair challenges the reasoning followed by the General Court in paragraphs 50 and 51 of the judgment under appeal in order to justify the eligibility for aid of airlines which contribute to a lesser extent than it to the connectivity of Sweden, disregarding the importance of its 5% market share.

57. In that regard I would point out that, in paragraph 50 of the judgment under appeal, the General Court, after noting that the grant of public funds in the context of Article 107(3)(b) TFEU implies that 'the aid provided by the Member State concerned, albeit in serious difficulty, may remedy the disturbance in its economy, which involves taking into account the overall situation of the airlines capable of enabling the restoration of that economy', pointed out that, 'bearing in mind that the resources which may be allocated by the Member State concerned are finite and must therefore address priorities, it [could not] be forgotten that that Member State had to take into consideration airlines which, although smaller than the applicant, … transport[ing] less passengers and [having] a smaller turnover, focused on domestic services in the Swedish territory, which was an even more vital issue given the specific features of the Swedish territory and the exceptional period characterised by the pandemic'. In paragraph 51 of the judgment under appeal, the General Court added that 'the Kingdom of Sweden had no guarantee that the contribution to that country's connectivity from an airline that focused on non-domestic passenger air transport, and whose principal place of business was not in its territory, would be maintained after the crisis, even if it was granted the benefit of the State guarantee'. It then referred to the appellant's situation at the time of the adoption of the decision

at issue, observing that its market share had fallen constantly, from 11.8% to 5%, and that it intended to reduce its physical presence on Swedish territory to a single base in Göteborg, which contained only one aircraft. According to the appellant, the reasoning of the General Court is open to criticism in two respects. First, that although Member States have limited resources, they are perfectly able to establish a scheme in which aid, while subject to a ceiling, is distributed in accordance with the principles of non-discrimination and proportionality and consistent with the objective pursued. Secondly, that neither a possible decline in market share nor the number of bases or aircraft are mentioned in the decision at issue as eligibility criteria for the aid.

58. The appellant's arguments must, in my view, be rejected. First of all, I note that, in paragraph 50 of the judgment under appeal, the General Court responded to the appellant's assertion that the fact that airlines with a smaller share of the market than its own were eligible for the aid constituted an element of inconsistency in the system, emphasising the need to take into account the contribution of the beneficiary airlines to the connectivity of Sweden from not only a 'quantitative' but also a 'qualitative' point of view. Such an approach, which entails the possibility for the Member States to define the priorities in the pursuit of the objective of aid granted under Article 107(3)(b) TFEU, is not, as already stated in point 54 of this Opinion, in itself contrary to the principle of proportionality, having regard also to the limited resources made available for the pursuit of that objective, in particular in a context of a generalised crisis such as that created by the COVID-19 pandemic.

59. In that respect, the General Court rightly referred to the importance, with regard to the objective of the aid scheme at issue, of smaller airlines or airlines active in specific sectors, such as, not only transport for medical or emergency purposes specifically mentioned by the General Court, but also, as the Swedish Government submits, services to peripheral areas of Sweden or even domestic freight transport, in particular given the characteristics of the exceptional event constituted by the COVID-19 pandemic, the consequences of which for the Swedish economy the aid scheme at issue was intended to remedy. In so far as the appellant asserts that that reasoning implied that it was for the General Court to verify that all airlines with a Swedish licence pursued a 'specific purpose', it overlooks the fact that, in paragraph 50 of the judgment under appeal, the General Court did not refer only to airlines which pursue 'specific purposes', but more generally to the situation of airlines which, irrespective of their size and market share, 'focused on domestic services in the Swedish territory'. Since, as stated above, it appears that, at the time of the adoption of the decision at issue, all the airlines benefiting from the aid scheme at issue were contributing to a greater or lesser extent to those services, Ryanair's argument is irrelevant.

60. Finally, it is necessary to reject Ryanair's argument that, in paragraph 51 of the judgment under appeal, the General Court added additional eligibility criteria to those mentioned in the decision at issue. Indeed, when, in that paragraph, the General Court referred to the appellant's situation at the time of the adoption of the decision at issue, it merely intended to illustrate the lower guarantee that an airline whose principal place of business was not in Swedish territory and whose activity focused on the non-domestic transport of passengers was able to provide to the Swedish authorities regarding the maintenance of its activities in that territory after the crisis.

61. Fifthly, the appellant submits that the General Court erred in stating, in paragraph 53 of the judgment under appeal, that the Commission is not required 'to make a decision in the abstract on every alternative measure conceivable'. The reference to the judgment of 6 May 2019 in *Scor* v

*Commission* [36] is based on an incorrect interpretation of that judgment, which refers only to the Commission's obligation to take a position on possible alternative measures in the statement of reasons for the decision. Relieving the Commission of the obligation to examine whether less restrictive measures exist allegedly negates the very essence of the principle of proportionality. In the present case, the reasoning of the General Court is, according to the appellant, all the more objectionable since the distribution of the aid at issue on the basis of market shares was an entirely feasible option.

62. I would say at the outset that the statement in paragraph 53 of the judgment under appeal, challenged by the appellant, is not, in my view, supportable and must, at the very least, be qualified by the Court.

63. It is certainly true that, as the French Government maintains, the Court stated in its judgment in *Denkavit italiana* [37] that the concept of aid envisaged in Article 107(1) TFEU refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought and that therefore 'the decision to grant aid and the detailed rules of such a measure constitute a political choice that is a matter for national legislative and administrative bodies, subject to review by the Commission and the Court'. [38]

64. However, this does not mean that Member States are not required, in laying down the detailed rules for granting an aid, and in particular the category of persons benefiting from it, to respect all aspects of the principle of proportionality. That principle requires it to be demonstrated that the measure in question does not go beyond what is necessary to achieve the objective pursued and that the latter could not be achieved by less restrictive measures. [39] The appellant is therefore right to challenge the correctness of the General Court's statement in paragraph 53 of the judgment under appeal. [40]

65. That said, for the purposes of verifying, in the context of the assessment of the compatibility of an aid with the internal market, the proportionality of its detailed rules – in particular as regards the definition of the category of its beneficiaries – possible 'less restrictive measures' which it is for the Commission to take into consideration must be capable of making an equally effective contribution to the objective pursued by the establishment of the aid, in the present case the objective of remedying the disturbances in the economy caused by the COVID-19 pandemic. That means that it is not sufficient to imagine, in the abstract, the existence of such alternative measures, but that they must also be of an effectiveness comparable to the measures planned by the Member State in question to achieve that objective.

36 T-135/17, not published, EU:T:2019:287 ('the judgment in *Scor*'; paragraph 94).

37 Judgment of 27 March 1980 (61/79, EU:C:1980:100, paragraph 31).

38 See Opinion of Advocate General Saugmandsgaard Øe in *A-Fonds* (C-598/17, EU:C:2018:1037, point 98).

39 See, with reference to the test to be applied when assessing the selectivity of an aid, judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 140 and the case-law cited).

40 I note, moreover, that paragraph 94 of the judgment in *Scor*, to which the General Court refers – which, moreover, contrary to what the appellant asserts, the General Court faithfully interpreted – cites paragraph 170 of the judgment of 3 December 2014, *Castelnou Energía* v *Commission* (T-57/11, EU:T:2014:1021), which, in turn, refers to paragraph 101 of the judgment of 23 October 1997, *Commission* v *France*, C-159/94, ECR, EU:C:1997:501. Both of these judgments relate to an interpretation of Article 106(2) TFEU, and not of Article 107(2) TFEU.

66. However, going beyond the statement challenged by the appellant, the General Court followed the approach set out above when, in paragraph 54 of the judgment under appeal, referring to the analysis in paragraphs 40 to 44 and 49 of that judgment, it concluded that 'the extension of the aid scheme at issue to airlines not established in Sweden would not have made it possible to achieve the objective of that scheme to the extent that … the requirement to take into account air transport in Sweden in its entirety, in its diversity and in its permanence would not have been as well satisfied by adopting the criteria proposed by the applicant, so that the Commission was correct not to approve them'. It is apparent, moreover, from all the grounds of the judgment under appeal relating to the assessment of proportionality that the General Court found, in particular, that the Commission had not erred in not considering a criterion for distributing the aid that was strictly proportional to market shares, since, first, that criterion would not have made it possible to take account of the priorities legitimately pursued by the Swedish Government and, secondly, those priorities could not be satisfied as effectively and with sufficient guarantees of duration by airlines which did not hold a licence issued by Sweden.

67. On the basis of all the foregoing observations, I consider that the arguments developed by Ryanair in the context of the third complaint of its first ground of appeal do not make it possible to conclude, having regard to the situation at the time when the decision at issue was adopted and to the characteristics of the event constituted by the COVID-19 pandemic at the origin of the disturbances in the economy which the aid scheme at issue is intended to remedy, as well as to the need to take into account the priorities pursued by the Kingdom of Sweden in establishing that scheme, that the General Court erred in law or manifestly distorted the facts by concluding that the twofold criterion used to identify the airlines benefiting from the aid – relating to holding a Swedish licence and to operating scheduled services to or from Sweden or within the territory of that Member State – did not go beyond what was necessary to achieve the objective of that scheme.

68. It follows that the fourth complaint of the first ground of appeal must, in my view, also be rejected.

*5. Conclusions on the first ground of appeal*

69. On the basis of all of the foregoing considerations, I propose that the Court reject the first ground of appeal.

## *B. Second ground of appeal*

70. The second ground of appeal is directed against paragraphs 61 to 64 of the judgment under appeal by which the General Court rejected the third part of Ryanair's first ground of appeal.

71. In paragraph 61 of that judgment, the General Court referred, as a preliminary point, in so far as the appellant had based its arguments on the existence of discrimination arising from the aid scheme at issue and the lack of proportionality of that scheme, to its examination of the first two parts of the first ground of appeal. It then pointed out, in paragraph 62 of the judgment under appeal, that Article 56 TFEU does not apply as such to the air transport sector since, 'pursuant to Article 58(1) TFEU, the free provision of services in the field of transport is governed by the provisions of the title relating to transport, namely Title VI of the TFEU' and that therefore 'the free provision of services in the field of transport is … governed, in primary law, by a special legal regime'. It then observed that, on the basis of Article 100(2) TFEU, the EU legislature adopted

Regulation No 1008/2008, and its very purpose is to define the conditions for applying in the air transport sector the principle of free provision of services and it pointed out that the appellant did not claim that there had been any infringement of that regulation. Finally, in paragraph 64 of the judgment under appeal, the General Court found that the appellant had not demonstrated how the exclusion from access to the aid at issue would discourage it from providing services from and to Sweden.

72. Ryanair makes, in essence, two complaints in the context of this ground of appeal.

73. By its first complaint, it argues that the finding, made by the General Court in paragraph 63 of the judgment under appeal, that no infringement of Regulation No 1008/2008 had been alleged by the appellant at first instance is lacking in reasoning and is based on a manifest distortion of the facts. Ryanair observes that several points in its application before the General Court referred to that regulation [41] and that it had also attached a report, provided by an expert in aviation law, highlighting aspects in which the decision at issue was incompatible with the regulatory framework of that regulation. Referring to the judgment of 6 February 2003, *Stylianakis*,[42] the appellant argues in any event that to claim that there has been an infringement of the freedom to provide services in the air transport sector amounts to claiming that there has been an infringement of Regulation No 1008/2008. Furthermore, in accordance with Article 15 of that regulation, it asserts that it is essential to refer to primary law when the infringement of its provisions relating to the freedom to provide services is at issue.

74. In that regard, without it being necessary to adopt a position on the substance of the present complaint, it is sufficient to note, as the Commission does, that, in paragraph 64 of the judgment under appeal, the General Court in any event responded on the substance of the arguments raised by the appellant concerning an alleged infringement of Article 56 TFEU. Therefore, even if it were well founded, that complaint would be ineffective since the General Court's rejection of the third part of the first ground of appeal would in any event be based on the grounds set out in that paragraph 64.

75. By its second complaint, in support of which two separate arguments are put forward, which should be examined together, the appellant challenges the findings in paragraph 64 of the judgment under appeal.

76. Ryanair challenges, first, the assertion, in paragraph 64 of the judgment under appeal, that it has not demonstrated how the fact that, as a result of the definition of the scope of the aid scheme at issue, it is deprived of access to loans which benefit from the State guarantee granted by the Kingdom of Sweden, 'discourages it from providing services from Sweden and to Sweden, especially when it is apparent from the documents in the file that, independently of the aid scheme at issue and for purely commercial reasons, the applicant progressively reduced its activity on the Swedish market, both in respect of the destinations served and the number of aircraft present'. According to Ryanair, that assertion is incorrect since the mere exclusion of an advantage reserved for 'Swedish airlines' discourages the freedom of other airlines to provide services, as is moreover apparent from the judgment in *International Jet management*.[43] That assertion is also based on a manifest distortion of the facts. Secondly, Ryanair challenges the assertion in paragraph 64 of the judgment under appeal that it '[failed] to identify the elements of fact or law which cause the aid scheme at issue to produce restrictive effects that go beyond those which

[41] It refers in particular to points 82, 92 and 93 of that application.

[42] C-92/01, EU:C:2003:72.

[43] The appellant refers to paragraphs 65 and 66 of that judgment.

trigger the prohibition in Article 107(1) TFEU, but which, as was found in the context of the first two limbs of the first plea, are nevertheless necessary and proportionate to remedy the serious disturbance in the Swedish economy caused by the COVID-19 pandemic, in accordance with the requirements of Article 107(3)(b) TFEU'. The appellant argues, above all, that the General Court erred when, in examining a restriction on the freedom to provide services, it referred only to Article 107 TFEU. Referring to what was set out in the context of the first complaint in its first ground of appeal (see point 12 of this Opinion), it submits that direct discrimination on grounds of nationality such as that introduced by the measure at issue which affects the freedom to provide services cannot be justified except on the basis of the grounds for derogation exhaustively listed in Article 52 TFEU, to which Article 62 TFEU refers. Lastly, by arguments similar to those analysed in the context of the examination of the fourth complaint of the first ground of appeal, it argues, in essence, that it has demonstrated that the restriction on the freedom to provide services arising from the aid scheme at issue is not justified.

77. In response to those arguments and referring to the judgment in *Iannelli & Volpi*, the Commission asserts, in essence, that the question of whether the effects of an aid on the freedom to provide services are prohibited by EU law must be resolved by applying only the provisions of the FEU Treaty on State aid, at least in the case of essential elements of aid, such as the definition of the category of its beneficiaries.

78. That position is not, in my view, convincing. Admittedly, in paragraph 10 of the judgment in *Iannelli & Volpi*, the Court, in a context which involved the relationship between the provisions on aid and those on the free movement of goods, stated that 'the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measure having an effect equivalent to a quantitative restriction within the meaning of Article [34 TFEU]' and that an interpretation of that provision 'which is so wide as to treat an aid as such within the meaning of [Article 107 TFEU] as being similar to a quantitative restriction referred to in Article [34 TFEU] would be to alter the scope of Articles [107 and 108 TFEU]'. However, it is apparent, in my view, from a reading of that judgment that the distinction drawn by the Court between the provisions of the Treaty on free movement and those on State aid is essentially based on the division of powers intended by the Treaty rather than on their mutually exclusive application.[44] On the other hand, the Court has, on several occasions, held that the same case may fall within the scope of both the provisions on free movement and those on State aid, and that the fact that a national measure might be regarded as aid within the meaning of Article 107 TFEU is not a sufficient reason to exempt it from the rules of the Treaty on free movement[45] and vice versa.[46] Moreover, as has already been pointed out in

[44] See paragraph 14 of the judgment in *Iannelli & Volpi*, in which the Court pointed out that 'those aspects of aid which contravene specific provisions of the Treaty other than Articles [107] and [108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article [108]', referring only to the procedural aspect. See, to the same effect, judgments of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 55); of 2 May 2019, *A-Fonds* (C-598/17, EU:C:2019:352, paragraphs 47 and 48); and, most recently, of 31 January 2023, *Commission* v *Braesch and Others* (C-284/21 P, EU:C:2023:58). I would point out, in any event, that, as rightly stated by the Commission, a condition for the grant of aid which determines the beneficiaries of that aid, such as, in the present case, the holding of a licence issued by Sweden, undoubtedly satisfies the criteria set out in the above paragraph 14 of the judgment in *Iannelli & Volpi*. Indeed, as rightly stated by Advocate General Saugmandsgaard Øe in his Opinion in the *A-Fonds* case (C-598/17, EU:C:2018:1037, point 81), an 'aspect of aid is necessary for the attainment of the object or for the functioning of aid where it is a constituent or essential element of the aid, so that its inapplicability leads to a change in the scope or the principal characteristics of the aid'.

[45] See, for example, judgment of 20 March 1990, *Du Pont de Nemours Italiana* (C-21/88, EU:C:1990:121, paragraph 20); see also judgment of 19 September 2002, *Spain* v *Commission* (C-114/00, EU:C:2002:508, paragraphs 101 to 104).

[46] See judgment of 28 February 2018, *ZPT* (C-518/16, EU:C:2018:126, paragraph 47).

point 19 of this Opinion, according to established case-law, State aid which, on account of some of its modalities, contravenes other provisions of the Treaty, cannot be declared by the Commission to be compatible with the internal market. That case-law was most recently confirmed by the Court in its judgment of 31 January 2023, *Commission* v *Braesch and Others*, in which, moreover, the Court, recalling both the judgment in *Iannelli & Volpi* and the judgments of 15 April 2008, *Nuova Agricast*,[47] and of 22 September 2020, *Austria* v *Commission*,[48] clarified that the modalities, which determine the conditions of eligibility for an aid scheme, are also inseparable from the aid as such and are therefore among the factors which the Commission is required to examine in the context of the procedure under Article 108 TFEU and, as the case may be, to approve, with the result that, if such modalities lead to an infringement of specific rules of EU law or of general principles of EU law, a decision adopted by the Commission which authorises such a scheme is, in turn, necessarily rendered unlawful.[49] Consequently, there is an obligation on the Commission to ensure consistency between Article 107 TFEU and, in particular, the provisions on freedom of movement.

79. That said, the appellant's arguments cannot, in my view, succeed, essentially on the basis of considerations similar, *mutatis mutandis*, to those set out in points 23 and 25 of this Opinion, to which I refer, and the finding, made, in point 67 of this Opinion, that the General Court did not commit the errors alleged against it by the appellant – including that discussed in points 65 and 66 of this Opinion – in concluding that the twofold criterion used to identify the airlines benefiting from the aid did not go beyond what was necessary to achieve the objective of that scheme.

80. In the light of the foregoing considerations, I suggest that the Court reject the second ground of appeal.

### *C. The third ground of appeal*

81. By its third ground of appeal Ryanair challenges paragraphs 67 to 69 of the judgment under appeal in which the General Court concluded that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. The appellant makes two complaints in that regard, which it is appropriate to examine together.

82. The first complaint is directed against paragraph 67 of the judgment under appeal. In that paragraph, the General Court stated, on the one hand, that 'it follows from the wording of [Article 107(3)(b) TFEU] that its authors considered that it was in the interests of the European Union as a whole that one or other of its Member States be able to overcome a major or possibly even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole' and, on the other hand, referring by analogy to the judgment in *Austria* v *Commission*,[50] specified that 'that textual interpretation of the wording of Article 107(3)(b) TFEU is confirmed by comparing it with Article 107(3)(c) TFEU concerning "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest", in so far as the wording of the latter

47 C-390/06, EU:C:2008:224, paragraphs 49 to 52.

48 C-594/18 P, EU:C:2020:742, paragraph 45.

49 See, most recently, judgment of 31 January 2023, *Commission* v *Braesch and Others* (C-284/21 P, EU:C:2023:58, paragraphs 96 to 100).

50 Paragraphs 20 and 39.

provision contains a condition relating to proof that there is no effect on trading conditions to an extent that is contrary to the common interest, which is not found in Article 107(3)(b) TFEU'. Ryanair argues, first, that Article 107(3)(c) TFEU refers only to the effect of the aid on trading conditions and not on undistorted competition, secondly, that the General Court erred in transposing to Article 107(3)(b) TFEU the reasoning of the Court in the judgment in *Austria* v *Commission* and, finally, that the obligation to weigh the adverse effects of the aid against beneficial effects applies across the board to all aid falling within the scope of Article 107(3) TFEU.

83. By its second complaint, Ryanair challenges the conclusion reached by the General Court in paragraph 68 of the judgment under appeal, in which it held that, 'in so far as the conditions laid down in Article 107(3)(b) TFEU are fulfilled, that is to say, in the present case, that the Member State concerned is indeed confronted with a serious disturbance in its economy and that the aid measures adopted to remedy that disturbance are, first, necessary for that purpose and, secondly, appropriate and proportionate, those measures are presumed to be adopted in the interests of the European Union, so that that provision does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, contrary to what is laid down in Article 107(3)(c) TFEU'. According to the General Court, 'such a balancing exercise would have no *raison d'être* in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive', since '… the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular'. Ryanair argues that the General Court endorsed a form of 'benign neglect' on the part of the Commission which allowed Member States to prioritise their national concerns to the detriment of the EU interest. For the appellant, in a context of crisis such as that created by the COVID-19 pandemic, which has affected the European Union as a whole, and in which the undertakings of all Member States are weakened, such protectionist policies are particularly damaging and their effects on trading conditions and undistorted competition may be irreversible. Rather, in Ryanair's view, that calls for increased monitoring by the Commission and not exemption from the obligation to balance the effects of State interventions for the purposes of Article 107(3)(b) TFEU.

84. I would point out that, in the judgment of 29 April 2004, *Italy* v *Commission*,[51] the Court specified, without distinguishing between the various derogations provided for in Article 107(3) TFEU, that 'economic assessments in connection with the application [of that provision] must be made in a Community context, [[52]] which means that the Commission must examine the impact of aid on competition and intra-Community trade'[53] and that the Commission must 'during that examination … weigh the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition'.[54] As the General Court rightly stated, in my view, in the judgment of 19 September 2018, *HH Ferries and Others* v *Commission*,[55] on which Ryanair bases a large part of its arguments, the requirement for such a balancing exercise is an expression of the principle of proportionality and the strict

[51] C-372/97, EU:C:2004:234.

[52] The Court has already ruled to that effect in several judgments; see, inter alia, judgments of 17 September 1980, *Philip Morris Holland* v *Commission* (730/79, EU:C:1980:209, paragraphs 24 and 26); of 14 September 1994, *Spain* v *Commission* (C-278/92 to C-280/92, EU:C:1994:325, paragraph 51); and of 14 January 1997, *Spain* v *Commission* (C-169/95, EU:C:1997:10, paragraph 18).

[53] Similarly, see, with regard to Article 107(3)(a) TFEU, judgments of 19 September 2002, *Spain* v *Commission* (C-113/00, EU:C:2002:507, paragraph 67), and *Spain* v *Commission* (C-114/00, EU:C:2002:508, paragraph 81).

[54] See judgment of 29 April 2004, *Italy* v *Commission* (C-372/97, EU:C:2004:234, paragraph 82 and the case-law cited).

[55] T-68/15, EU:T:2018:563, paragraph 211 ('the judgment in *HH Ferries and Others* v *Commission*'). In that judgment, the General Court rejected the Commission's argument, which it also put forward in the present proceedings, that that requirement is not applicable to the analyses carried out under Article 107(3)(b) TFEU.

interpretation of the derogations from the prohibition of State aid laid down in Article 107(1) TFEU. It therefore applies across the board to all the derogations provided for in paragraph 3 of that article.

85. I am not convinced by the reasoning to the contrary adopted by the General Court in the judgment under appeal. That reasoning is based essentially, if not exclusively, on an application of the same interpretative criterion as that adopted by the Court in the judgment in *Austria* v *Commission*, based on a comparison between the wording of paragraphs (b) and (c) of Article 107(3) TFEU. Indeed, it is on that judgment that the General Court relies, in paragraph 67 of the judgment under appeal, to support its literal interpretation of Article 107(3)(b) TFEU. It is based on the failure to take into account the textual difference between that provision and Article 107(3)(c) TFEU highlighted by the Court of Justice in the judgment in *Austria* v *Commission* that the General Court essentially reversed the judgment in *HH Ferries and Others* v *Commission*.

86. In paragraph 20 of the judgment in *Austria* v *Commission*, the Court, relying on the literal meaning of Article 107(3)(c), essentially confined itself to stating that that provision does not make the compatibility of aid dependent on its pursuing an objective of common interest, and that, if the authors of the Treaty had wanted to add such an additional requirement, they would have done so expressly, as was the case for Article 107(3)(b) TFEU. Such reasoning cannot, in my view, be used to exclude from the scope of Article 107(3)(b) one of the parameters for assessing the proportionality of aid. Indeed, on the one hand, even if, as the Commission maintains, the negative condition in Article 107(3)(c) TFEU, according to which aid must not adversely affect trading conditions to an extent contrary to the common interest, were to constitute an express reference to the requirement to weigh up the beneficial and adverse effects of the aid in the sense specified in point 84 of this Opinion, it must be observed, as the appellant submits, that that condition does not mention the taking into account of the effects of the aid on undistorted competition and that therefore, following the General Court's logic, that assessment would be precluded even in the context of Article 107(3)(c) TFEU, contrary to what is apparent from the judgment in *Austria* v *Commission*.[56] On the other hand, the absence of a similar negative condition in the wording of Article 107(3)(b) TFEU cannot lead to the outright exclusion, regardless of the context in which the aid is adopted, of the examination of its effects and their weighing up, by introducing, as the General Court does, a presumption of correspondence with the common interest.

87. I would also observe that, according to the logic on which the General Court relies, that presumption appears to be clearly irrefutable. The conclusion reached by the General Court in paragraphs 67 and 68 of the judgment under appeal is indeed based on an automatic mechanism according to which, once the conditions laid down in Article 107(3)(b) TFEU are met, an aid intended to remedy a serious disturbance in the economy of a Member State is necessarily adopted in the interest of the European Union. Such a position appears to be incompatible with the clarification which the Court should make in the present case at the request of the Commission, namely that although the Commission is not required, in the application of the derogation provided for in Article 107(3)(b) TFEU, to weigh up the effects of the aid, it is nevertheless free to do so.

[56] See judgment in *Austria* v *Commission*, paragraph 101, and judgment of 12 July 2018, *Austria* v *Commission* (T-356/15, EU:T:2018:439, paragraph 370).

88. I am therefore of the view that the General Court erred in law in concluding, in paragraph 68 of the judgment under appeal, that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition.

89. Having said that, I would point out that if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed.[57] For the reasons which I will set out, I consider that the third ground of appeal must, in any event, be rejected as unfounded and I suggest that the Court substitute the grounds on that point.

90. The assessment of the compatibility of aid measures with the internal market, under Article 107(3) TFEU, falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union.[58] In that regard, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments.[59] In the exercise of that discretion, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States. According to settled case-law, in adopting such guidelines, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations.[60] Although the Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3)(b) TFEU confers on it,[61] the Court has made clear, with regard to the Communication adopted by the Commission in 2013 on the application of State aid rules to the banking sector in the context of the financial crisis,[62] that the adoption of the guidelines contained in that Communication had had 'the effect of a limitation imposed by the Commission on itself in the exercise of [that] discretion, so that, if a Member State [had notified] … proposed … aid which [complied] with [the] guidelines [contained in that framework], the Commission [had], as a general rule, [to] authorise [it]'.[63] A similar self-limiting effect must be recognised for the Temporary Framework.

91. Adopted to address an unprecedented health emergency, which affected the economies of all Member States, necessitating significant intervention by those Member States in the sectors most affected by the restrictions imposed due to the pandemic, that framework enabled the Commission to examine and approve numerous projects notified by the Member States in an extremely short time frame, since the effectiveness of those interventions also depended on their timeliness. The decision at issue is in such an emergency context.

92. There is no doubt that, as the Commission itself argued at the hearing, it is precisely in times of crisis that care must be taken to ensure compliance with the general principles of the European Union and with the principles governing State aid policy. It is for that reason that I consider, as set out above, that the Court must reaffirm, even in emergency contexts such as those to which the

57 See, inter alia, judgment in *Austria* v *Commission*, paragraph 47.

58 See judgment of 15 December 2022, *Veejaam and Espo* (C-470/20, EU:C:2022:981, paragraph 29 and the case-law cited).

59 See judgment of 15 December 2022, *Veejaam and Espo* (C-470/20, EU:C:2022:981, paragraph 29 and the case-law cited).

60 See judgment of 15 December 2022, *Veejaam and Espo* (C-470/20, EU:C:2022:981, paragraph 30 and the case-law cited).

61 See judgment of 15 December 2022, *Veejaam and Espo* (C-470/20, EU:C:2022:981, paragraph 30 and the case-law cited).

62 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis; OJ 2013 C 216, p. 1.

63 See judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 43).

derogation provided for in Article 107(3)(b) TFEU applies,[64] the Commission's obligation to carry out, on a case-by-case basis, in the context of the decision by which it assesses the compatibility of the measure notified to it, a weighing up of the beneficial and adverse effects of the aid measures adopted on that basis by the Member States in order to ensure that those measures are in accordance with the common interest.

93. It is, however, equally beyond doubt that the exceptional nature of the situation created by the restrictions brought about by the COVID-19 pandemic, the impact on the economy of the European Union as a whole of those restrictions – which goes well beyond the territorially limited dimension of the disturbance to the economy of a Member State, to which Article 107(3)(b) TFEU refers – as well as the need for timely intervention to support the sectors most affected, are all factors which must be taken into account when defining the objective of common interest on the basis of which that balancing exercise must be carried out and to ensure the necessary coordination of national measures.

94. In such a context, I consider that the Commission should be empowered, within certain limits, to carry out such a general balancing exercise, in instruments which examine the impact of the crisis on the economy of the European Union as a whole and lay down rules and limits to be applied to all State interventions under Article 107(3)(b) TFEU adopted in order to address it, on the assumption that, where they comply with those rules and limits and are, moreover, proportionate to the objective pursued, such interventions are in the common interest, since the distortions which they introduce are, in principle, considered necessary.

95. In my view, the Temporary Framework, in accordance with which the compatibility of the aid scheme at issue with the internal market was assessed, meets the requirements set out above. In it, the Commission identifies both the channels through which the health crisis affects the economy of the European Union and the need for a coordinated economic response of Member States and EU institutions to mitigate these negative repercussions, and specifies that in the exceptional circumstances created by the COVID-19 outbreak, undertakings of all kinds may face a severe lack of liquidity, which makes it appropriate for Member States to 'incentivise credit institutions and other financial intermediaries to continue to play their role in continuing supporting economic activity in the EU', in particular by means of aid under Article 107(3)(b) TFEU, which, channelled through banks as financial intermediaries, benefits those undertakings directly (paragraphs 4 and 5).[65] The Commission also highlights the importance of EU State aid control in order to ensure 'that the EU Internal Market is not fragmented and that the level playing field stays intact' and to avoid 'harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union' (paragraph 10). Finally, the Commission sets out the aim of the Temporary Framework as being 'to lay down a framework that allows Member States to tackle the difficulties undertakings are currently encountering whilst maintaining the integrity of the EU Internal Market and ensuring a level playing field' (paragraph 16). It is having regard to those objectives that the Commission recognised, in Section 3.2 of the Temporary Framework, which concerns aid in the form of guarantees on loans, that this type of aid 'for a limited period and loan amount can be an appropriate, necessary and targeted solution during the current circumstances', in order to ensure access to liquidity to undertakings facing a sudden shortage.

[64] Even if one had to agree with the Commission on the 'existential' nature for the Member State concerned of the disturbance in its economy which allows it to avail itself of the derogation provided for in Article 107(3)(b) TFEU.

[65] That objective is reflected in recital 42 of the decision at issue.

96. I understand that even the proposed approach[66] is based, in essence, on a presumption. However, unlike the presumption established in paragraph 68 of the judgment under appeal, it allows the Commission greater flexibility and the Courts of the European Union to continue to review, albeit in a limited way, the Commission's exercise of its discretion.

97. Finally, it should be emphasised that, in order to prevent such an approach from actually weakening the Commission's control over interventions of States in support of their undertakings in times of crisis – in particular when they adversely affect one or more sectors of the economy in more than one Member State, are prolonged or follow one another – and therefore from altering the level playing field in which the European Union's undertakings operate on a lasting basis in favour, in particular, of undertakings belonging to Member States which have greater fiscal capacity, it is necessary that the balancing included in instruments such as the Temporary Framework, in particular where they are intended to apply for long periods of time, also takes into account the effect on trading conditions and on undistorted competition of interventions already authorised under previous instruments.

98. On the basis of the foregoing considerations, I consider that, after substituting the grounds set out in paragraphs 67 to 70 of the judgment under appeal, the third ground of appeal must be rejected.

## III. Conclusion

99. In the light of all of the foregoing considerations, I suggest that the Court reject the first, second and third grounds raised by Ryanair in support of its appeal.

[66] I would point out that that approach was supported by the Commission before the General Court and was rejected by the latter in paragraph 71 of the judgment under appeal.