Reports of Cases

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

14 July 2021 *

(State aid – Austrian air transport market – Aid granted by Austria to an airline amid the COVID-19 pandemic – Subordinated loan to Austrian Airlines AG – Decision not to raise any objections – Aid previously granted to the parent company of the recipient – Aid intended to make good the damage caused by an exceptional occurrence – Freedom of establishment – Free provision of services – Equal treatment – Duty to state reasons)

In Case T-677/20,

Ryanair DAC, established in Swords (Ireland),

Laudamotion GmbH, established in Schwechat (Austria),

represented by E. Vahida, F.-C. Laprévote, V. Blanc, S. Rating and I.-G. Metaxas-Maranghidis, lawyers,

applicants,

v

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

defendant,

supported by

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

by

Republic of Austria, represented by A. Posch, J. Schmoll, G. Eberhard and S. Weber, acting as Agents,

and by

Austrian Airlines AG, established in Vienna (Austria), represented by A. Zellhofer, lawyer,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2020) 4684 final of 6 July 2020 on State aid SA.57539 (2020/N) – Austria – COVID-19 – Aid to Austrian Airlines,

* Language of the case: English.

THE GENERAL COURT (Tenth Chamber, Extended Composition),

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

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 April 2021,

gives the following

Judgment

Background to the dispute

1 Austrian Airlines AG ('AUA') is a company which is part of the Lufthansa group. The parent company Deutsche Lufthansa AG ('DLH') is the head of the Lufthansa group. The Lufthansa group comprises, among others, the airlines Brussels Airlines SA/NV, AUA, Swiss International Air Lines Ltd and Edelweiss Air AG.

2 On 23 June 2020, the Republic of Austria notified the European Commission, in accordance with Article 108(3) TFEU, of an individual aid measure ('the measure at issue'), granted in the form of a subordinated loan convertible into a grant of EUR 150 million in favour of AUA. That measure is intended to compensate AUA for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions and other containment measures amid the COVID-19 pandemic.

3 On 6 July 2020, the Commission adopted Decision C(2020) 4684 final on State aid SA.57539 (2020/N) – Austria – COVID-19 – Aid to Austrian Airlines ('the contested decision'), by which it concluded that the measure at issue, first, constituted State aid within the meaning of Article 107(1) TFEU and, second, was compatible with the internal market by virtue of Article 107(2)(b) TFEU.

4 The measure at issue forms part of a series of aid measures in favour of AUA and the Lufthansa group, which may be summarised as follows.

5 By decision of 22 March 2020, SA.56714 (2020/N) – Germany – COVID-19 measures, the Commission authorised, on the basis of Article 107(3)(b) TFEU, an aid scheme established by the Federal Republic of Germany in order to support undertakings that require liquidity for their activities in Germany, without limitation as to the economic sector concerned. Under that scheme, DLH was eligible for a State guarantee of 80% on a loan of EUR 3 billion ('the German loan').

6 By decision of 17 April 2020, SA.56981 (2020/N) – Austria – Austrian guarantee scheme on bridge loans under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended by decision of 9 June 2020 SA.57520 (2020/N) – Austria – Austrian anti-crisis measures – COVID-19: Guarantees for large undertakings on the basis of the Guarantee Law of 1977 by Austria Wirtschaftsservice GmbH (aws) – Amendment to the scheme SA.56981 (2020/N), the Commission, on the basis of Article 107(3)(b) TFEU, authorised an aid scheme established by the Republic of Austria for undertakings affected by the COVID-19 pandemic, without limitation as to the sector concerned ('the Austrian aid scheme'). Under that scheme, the Republic of Austria granted AUA aid in the form of a State guarantee of 90% on a loan of EUR 300 million granted by a consortium of commercial banks.

7 By decision of 25 June 2020, SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa ('the Lufthansa decision'), the Commission, on the basis of Article 107(3)(b) TFEU, authorised the grant of individual aid of EUR 6 billion to DLH, composed of, first, EUR 306 044 326.40 for an equity participation, second, EUR 4 693 955 673.60 for 'silent participation', a hybrid capital instrument, treated as equity capital according to international accounting standards, and, third, EUR 1 billion for 'silent participation' with the characteristics of a convertible debt instrument. That aid could be used by DLH to support the other companies in the Lufthansa group that were not in financial difficulties on 31 December 2019, including AUA.

8 The Lufthansa decision states that the aid measure to which it relates is part of a larger set of support measures for the Lufthansa group, consisting of the following measures:

– the German loan to DLH referred to in paragraph 5 above;

– a 90% State guarantee on a EUR 300 million loan that the Republic of Austria planned to grant to AUA under the Austrian aid scheme referred to in paragraph 6 above;

– the measure at issue, referred to in paragraph 2 above;

– EUR 250 million liquidity support and a EUR 40 million loan provided by the Kingdom of Belgium to Brussels Airlines;

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

9 In the Lufthansa decision, the Commission observed, in essence, that the aid measures granted by other States to undertakings in the Lufthansa group, namely those listed in the second, third, fourth and fifth indents of paragraph 8 above, and therefore including the measure at issue, would be deducted from the individual aid to DLH which is the subject of that decision or from the German loan.

Procedure and forms of order sought

10 By application lodged at the Court Registry on 13 November 2020, the applicants, Ryanair DAC and Laudamotion GmbH, brought the present action.

11 By document lodged at the Court Registry on the same day, the applicants requested, in accordance with Articles 151 and 152 of the Rules of Procedure of the General Court, that the present action be adjudicated under an expedited procedure. By decision of 11 December 2020, the Court (Tenth Chamber) granted the request for an expedited procedure.

12 The Commission lodged its defence at the Court Registry on 23 December 2020.

13 Pursuant to Article 106(2) of the Rules of Procedure, on 28 December 2020, the applicants submitted a reasoned request for a hearing.

14 By documents lodged at the Court Registry on 9, 18 and 19 February 2021 respectively, the Federal Republic of Germany, AUA and the Republic of Austria sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

15 By decisions of 18 February and 2 March 2021 respectively, the President of the Tenth Chamber of the Court granted the Federal Republic of Germany and the Republic of Austria leave to intervene.

16 By order of 9 March 2021, the President of the Tenth Chamber of the Court granted AUA leave to intervene.

17 By measures of organisation of procedure notified on 24 February and 10 March 2021 respectively, the Federal Republic of Germany, AUA and the Republic of Austria were authorised, pursuant to Article 154(3) of the Rules of Procedure, to lodge a statement in intervention. On 10, 24 and 25 March 2021 respectively, the Federal Republic of Germany, AUA and the Republic of Austria lodged their statements in intervention at the Court Registry.

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

19 The parties presented oral argument and replied to the questions put by the Court at the hearing on 23 April 2021.

20 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

21 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

22 The Federal Republic of Germany and the Republic of Austria, like the Commission, contend that the action should be dismissed as unfounded and that the applicants should be ordered to pay the costs.

23 AUA contends that the Court should dismiss the action as inadmissible, reject it on substantive grounds as to the remainder and order the applicants to pay the costs.

Law

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

25 In support of the action, the applicants put forward five pleas in law, alleging, first, that the Commission failed to examine possible aid to or from 'Lufthansa', second, infringement of the principles of non-discrimination, free provision of services and freedom of establishment, third, that the Commission misapplied Article 107(2)(b) TFEU and made a manifest error of assessment, fourth, that the Commission should have initiated the formal investigation procedure, and, fifth, infringement of the duty to state reasons within the meaning of Article 296 TFEU.

First plea in law alleging that the Commission failed to review possible aid to or from 'Lufthansa'

26 First, the applicants claim that the Commission erred in law and made a manifest error of assessment by failing to verify whether the measure at issue also benefits 'Lufthansa'. If that were the case, the measure at issue would be incompatible within the meaning of Article 107(2)(b) TFEU, in that it would no longer cover the 'eligible costs' related to the damage suffered by AUA. The aid could thus be used for purposes other than its original objective.

27 Second, and conversely, the Commission failed to take account of all the aid granted to the Lufthansa group. The Commission failed to assess whether additional aid, over and above the recapitalisation of EUR 150 million awarded to AUA by DLH, mentioned in the contested decision, could benefit AUA, thereby overcompensating it for the damage which the measure at issue is intended to remedy.

28 The Commission, supported by the Federal Republic of Germany, the Republic of Austria and AUA, disputes the applicants' arguments.

29 In the first place, it should be noted that the Commission explained, in paragraphs 5, 48, 49 and 50 of the contested decision, that the measure at issue formed part of a financial package in favour of AUA totalling EUR 600 million which, in addition to the measure at issue, was made up of a contribution of EUR 150 million in equity from DLH ('the DLH equity injection') and of aid in the form of a State guarantee of 90% of a EUR 300 million loan from a consortium of commercial banks granted to AUA under the Austrian aid scheme (see paragraph 6 above). The Commission noted, in that regard, that, although the measure at issue sought to remedy the damage caused to AUA as a result of the cancellation and rescheduling of its flights due to the imposition of travel restrictions and other containment measures linked to the COVID-19 pandemic, the other parts of that financial package in favour of AUA, for their part, were intended to guarantee its solvency and its adequate capitalisation in order to enable it to deal with the effects of the COVID-19 pandemic not covered by the measure at issue and with technical issues unrelated to the pandemic.

30 In the second place, the Commission recalled, in paragraph 25 of the contested decision, that the aid which was the subject of the Lufthansa decision could be used by DLH to support the other airlines of the Lufthansa group which were not experiencing financial difficulties on 31 December 2019, including AUA. In addition, the Commission explained, in paragraph 85 of the contested decision, that, when it had examined the proportionality of the aid that was the subject of the Lufthansa decision, it had taken into account, in accordance with paragraph 54 of the Communication of 19 March 2020, entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (OJ 2020 C 91 I, p. 1), amended on 3 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and on 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework'), the additional aid measures granted or proposed, in the context of the COVID-19 pandemic, to companies in the Lufthansa group. In that regard, the Commission observed, in the same paragraph of the contested decision, that it had concluded in the Lufthansa decision that all the aid measures referred to in paragraph 8 above, including the measure at issue, as well as the Austrian aid scheme granted in favour of AUA, were limited to the minimum necessary to restore the capital structure of the Lufthansa group and to ensure its viability.

31 In the third place, it should also be noted that the Commission had already taken into account all the aid measures granted in favour of the airlines forming part of the Lufthansa group, including AUA, and the relationship between them in the Lufthansa decision, adopted two weeks before the contested decision, and to which the Commission refers several times in the contested decision. In those circumstances, the Lufthansa decision constitutes a factor which, in the context of the contested decision, must therefore be taken into consideration in the contested decision, without prejudice to the lawfulness of the Lufthansa decision, which is not the subject of the present dispute.

32 In paragraphs 77 and 114 to 121 of the Lufthansa decision, the Commission stated, in essence, that the support granted by other States to the airlines in the Lufthansa group would be deducted, as the case may be, either from the amount of aid which is the subject of that decision or from the German loan (see paragraph 5 above). In particular, in paragraph 115 of that decision, the Commission noted, first, that the loan which the Republic of Austria intended to grant to AUA under the Austrian aid scheme of up to EUR 300 million would be deducted from the German loan and, second, that the sum of EUR 150 million which the Republic of Austria planned to award to AUA under the measure at issue would be deducted either from the first silent participation, referred to in paragraph 7 above, or from the German loan.

33 In the fourth place, as regards the DLH equity injection, the Commission stated in paragraph 26 of the contested decision that, if the amount of that injection were to come from the aid which is the subject of the Lufthansa decision, it would, in any event, constitute aid already authorised under that decision.

34 Accordingly, it is apparent from all of the foregoing that, contrary to what the applicants claim, the Commission expressly examined all the aid measures granted to the airlines of the Lufthansa group and the relationship between them.

35 The applicants are therefore wrong to claim that the Commission failed to examine the abovementioned aid measures as a whole.

36 As regards the applicants' argument that there is a risk that the measure at issue, granted to AUA, also benefits 'Lufthansa', it should be observed that that argument does not take sufficient account of the relationship between the various aid measures, described in paragraph 8 above.

37 It is apparent from that relationship that, if the airlines of the Lufthansa group, such as AUA, were to receive aid granted by a State other than the Federal Republic of Germany, the amount of that aid would be deducted from the total amount granted to the Lufthansa group by that Member State. The aid measures mentioned above thus put in place a mechanism for deductions, under which the aid granted by the Federal Republic of Germany to the entire Lufthansa group is reduced by the aid granted by other States to a particular company in that group, so that the overall amount received by that group remains the same.

38 Accordingly, the risk that the measure at issue may 'spill over' to DLH or to the other airlines of the Lufthansa group, relied on by the applicants, is not consistent with the deduction mechanism mentioned above.

39 The same applies to the applicants' argument that there is a reverse risk, that is to say that AUA receives support from DLH going beyond the equity injection, which could, in their view, lead to overcompensation in favour of AUA.

40 In that regard, as a preliminary point, it should be noted that, in the contested decision, the Commission took into account the DLH equity injection. First, it found in paragraph 26 of the contested decision that, if that amount were to be drawn from the aid which is the subject of the Lufthansa decision, it would, in any event, constitute aid already authorised by the Commission. Second, it stated in paragraphs 82 to 89 of the contested decision that that equity injection would not cover the same costs as those included in the damage which the measure at issue sought to remedy.

41 Although the applicants insist that it cannot be ruled out that DLH will transfer additional liquidity to AUA beyond the equity injection, that assertion remains hypothetical, since the applicants have adduced no specific evidence to that effect. In any event, and even if DLH had such an intention, the considerations set out in paragraph 40 above would remain valid, given that, first, such a hypothetical transfer of additional liquidity would originate in the aid already authorised in the Lufthansa decision, the legality of which is not the subject matter of the present action, and that, second, the German loan

and the aid which is the subject of the Lufthansa decision, based on Article 107(3)(b) TFEU, on the one hand, and the measure at issue, based on Article 107(2)(b) TFEU, on the other hand, are not supposed to cover the same eligible costs, as was made clear by the Commission in paragraphs 82 and 83 of the contested decision. While the first measures are intended to ensure the solvency and adequate capitalisation of the beneficiary, the measure at issue is intended to remedy the damage caused by the cancellation and rescheduling of AUA flights due to the imposition of travel restrictions and other containment measures linked to the COVID-19 pandemic.

42 Moreover, the deduction mechanism referred to in paragraph 37 above, which is not disputed by the applicants, governs the relationship between those different aid measures, thereby reducing the risk of overcompensation in favour of AUA. As is apparent from paragraph 85 of the contested decision, the Commission had already concluded in the Lufthansa decision that all the aid measures referred to in paragraph 8 above, including the measure at issue and the Austrian aid scheme granted in favour of AUA, were limited to the minimum necessary to restore the capital structure of the Lufthansa group and to ensure the viability of that group. Thus, given that, as a result of the deduction mechanism, the overall amount from which that group could benefit remains the same, the risk of reverse 'spill-over', claimed by the applicants, does not affect the overall assessment of all the measures in question carried out by the Commission.

43 Lastly, the applicants claim that the measure at issue is similar context to the aid measure in favour of KLM, authorised by Decision C(2020) 4871 final on State aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM ('the KLM decision'), in so far as both the contested decision and the KLM decision concern beneficiaries which form part of a group of undertakings. However, contrary to what the applicants' claim, the KLM decision concerned a situation quite distinct from the one at issue in the present case, which was characterised by the fact that the Commission had examined separately two aid measures granted to two companies belonging to the same group, even though their parent company played a certain role in the grant and administration of that aid. It was in those circumstances that the Court found that the Commission had failed to provide reasons to the requisite legal standard for its conclusion that, first, the respective beneficiaries of that aid were exclusively subsidiaries and not the parent company or group as such and that, second, the aid granted to one of them could on no account benefit the other (judgment of 19 May 2021, *Ryanair* v *Commission (KLM; COVID-19)*, T-643/20, EU:T:2021:286). However, unlike the circumstances giving rise to that judgment, in the present case and as is apparent from paragraphs 31 to 42 above, the Commission took full account of the fact that the aid forming the subject matter of the Lufthansa decision could benefit all the companies of the Lufthansa group, expressly examined the relationship between that aid and the other aid which could be granted to those companies and assessed the proportionality of that aid, taken as a whole.

44 Consequently, the first plea must be rejected as unfounded.

Second plea in law alleging infringement of the principles of non-discrimination, free provision of services and freedom of establishment

45 The applicants submit that the Commission infringed the principle of non-discrimination and the principle of free provision of services and freedom of establishment, on the ground that the measure at issue benefits only AUA.

46 The Commission, the Federal Republic of Germany, the Republic of Austria and AUA contest the applicants' arguments.

47 It should be recalled that State aid which contravenes the provisions of the Treaty or the general principles of EU law cannot be declared compatible with the internal market (judgment of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 44; see also, to that effect, judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51).

Infringement of the principle of non-discrimination

48 The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 66; see also, to that effect, judgment of 5 June 2018, *Montero Mateos*, C-677/16, EU:C:2018:393, paragraph 49).

49 The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 26).

50 Furthermore, it should be borne in mind that the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question (judgment of 17 May 1984, *Denkavit Nederland*, 15/83, EU:C:1984:183, paragraph 25); where there is a choice between several appropriate measures, recourse must be had to the least onerous measure and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55).

51 The applicants argue that the contested decision allows discriminatory treatment which is not necessary for achieving the objective of the measure at issue, namely to make good the damage caused by the cancellation and rescheduling of flights as a result of the travel restrictions and containment measures imposed in the context of the COVID-19 pandemic. They state that the Ryanair group holds 8% of the Austrian market and therefore suffered 8% of the damage caused by the COVID-19 pandemic. The aim of the measure would be achieved without discrimination, if it were granted to all the airlines operating in Austria. In that regard, the contested decision does not explain why the measure at issue was granted only to AUA, even though other airlines operating in Austria also suffered damage as a result of the travel restrictions and containment measures imposed during the COVID-19 pandemic. According to the applicants, the measure at issue is a measure of 'naked economic nationalism'.

52 In that regard, in the first place, it should be borne in mind that the sole purpose of the measure at issue is to compensate AUA partially for the damage resulting from the cancellation or rescheduling of its flights following the introduction of travel restrictions or other containment measures amid the COVID-19 pandemic.

53 It is true, as the applicants correctly submit, that all airlines operating in Austria were affected by those restrictions and that as a consequence they, like AUA, have all suffered damage resulting from the cancellation or rescheduling of their flights following the introduction of the aforementioned restrictions.

54 However, the fact remains, as the Commission correctly submits in its defence, that there is no requirement for Member States to grant aid to make good the damage caused by an 'exceptional occurrence' within the meaning of Article 107(2)(b) TFEU.

55 Specifically, first, while Article 108(3) TFEU requires Member States to notify their plans as regards State aid to the Commission before they are put into effect, it does not, however, require them to grant any aid (order of 30 May 2018, *Yanchev*, C-481/17, not published, EU:C:2018:352, paragraph 22).

56 Second, an aid measure may be directed at making good the damage caused by an exceptional occurrence, in accordance with Article 107(2)(b) TFEU, irrespective of the fact that it does not make good the entirety of that damage.

57 Consequently, it does not follow from either Article 108(3) TFEU or from Article 107(2)(b) TFEU that Member States are obliged to make good the entirety of the damage caused by an exceptional occurrence, such that they similarly cannot be required to grant aid to all of the victims of that damage.

58 In the second place, it should be noted that individual aid, such as that at issue, by definition benefits only one company, to the exclusion of all other companies, including those in a situation comparable to that of the recipient of that aid. Consequently, such individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is nevertheless inherent in the individual character of that measure. To argue, as the applicants do, that the individual aid at issue is contrary to the principle of non-discrimination amounts, in essence, to calling into question systematically the compatibility of any individual aid with the internal market solely on account of its inherently exclusive and thus discriminatory nature, even though EU law allows Member States to grant individual aid, provided that all the conditions laid down in Article 107 TFEU are met.

59 In the third place and in any event, even if, as the applicants claim, the difference in treatment established by the measure at issue, in so far as it benefits only AUA, may amount to discrimination, it is necessary to ascertain whether it is justified by a legitimate objective and whether it is necessary, appropriate and proportionate in order to attain that objective. Similarly, since the applicants refer to 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 the application of the Treaties 'without prejudice to any special provisions contained therein'. Therefore, it is important to ascertain whether that difference in treatment is permitted under Article 107(2)(b) TFEU, which is the legal basis for the contested decision. That examination requires, first, that the objective of the measure at issue satisfies the requirements laid down in that provision and, second, that the conditions for granting the measure at issue, namely, in the present case, that it benefits only AUA, are such as to enable that objective to be achieved and do not go beyond what is necessary to achieve it.

60 As regards the objective of the measure at issue, the applicants do not dispute the fact that compensation for damage resulting from the cancellation or rescheduling of an airline's flights following the imposition of travel restrictions amid the COVID-19 pandemic makes it possible to make good the damage caused by that crisis. Nor do the applicants dispute that the COVID-19 pandemic constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

61 As regards the arrangements for granting the measure at issue, the Commission stated in paragraph 40 of the contested decision that, according to the Austrian authorities, AUA played an essential role in Austria's airline services and that it made a significant contribution to the Austrian economy, given that it was the only network carrier operating out of Austria offering long-haul connectivity from and to the Vienna airport hub. Furthermore, in view of Vienna's relatively small catchment area, no other airline would be able to offer a large number of long-haul flights from and to Vienna, given that feeder flights could also be routed to other airports, from which long-haul flights could be offered. In addition, AUA employs approximately 7 000 people, and approximately 17 500 jobs are directly or indirectly dependent on AUA. According to the Austrian authorities, the economic importance of a network carrier such as AUA comprises approximately EUR 2.7 billion per annum in economic added value for the Austrian economy and approximately EUR 1 billion per annum in taxes.

62 Furthermore, it should be noted that, according to the information provided by the applicants in Annex A.2.2 to the application, AUA is the largest airline in Austria, where it held 43% of the market share in 2019, that market share being significantly higher than that of the second airline and of the applicants whose respective market shares were only 14% and 8% in 2019.

63 The applicants nevertheless argue that those factors do not justify the difference in treatment resulting from the measure at issue. They submit that that difference in treatment is not proportionate, since the measure grants AUA all the aid intended to remedy the damage at issue, whereas it bore only 43% of that damage.

64 In that regard, it is apparent from the contested decision that AUA, because of its essential role in providing Austria's airline services, was more affected by the cancellation and rescheduling of flights in Austria following the imposition of travel restrictions in the context of the COVID-19 pandemic than the other airlines operating in that country. That is confirmed by all of the data summarised in paragraphs 61 and 62 above.

65 In addition, it is apparent from the aforementioned data that AUA is proportionately and, because of the scale of its activities in Austria, significantly more affected by those restrictions than Ryanair, which, as is apparent from Annex A.2.2 to the application, carried out only a minimal part of its activities to or from that country, unlike AUA, which carried out a much larger part of its activities there. As regards Laudamotion, the applicants do not provide sufficiently clear information allowing the Court to grasp the proportion of that airline's activities which are carried out to or from Austria in relation to the entirety of its activities. In any event, there is nothing in the documents before the Court to suggest that that airline plays an essential role in providing airline services in Austria.

66 Finally, as regards the question of whether the measure at issue goes beyond what is necessary to attain the objective pursued, it must be stated that the amount of that measure is lower than the amount of damage caused to AUA by the cancellation and rescheduling of its flights as a result of the imposition of travel restrictions during the COVID-19 pandemic, as is apparent in particular from paragraph 79 of the contested decision. Therefore, the measure at issue does not go beyond what is necessary to achieve the legitimate objective it pursues.

67 Consequently, it must be held that the difference in treatment in favour of AUA is appropriate for the purpose of making good the damage resulting from those restrictions and does not go beyond what is necessary to achieve that objective.

68 Moreover, the applicants have not established that the fact of dividing the amount of the aid at issue among all the airlines operating in Austria would not deprive that measure of its effectiveness.

69 In any event and in so far as the difference in treatment brought about by the measure at issue may amount to discrimination, it follows that granting the benefit of the measure at issue only to AUA was justified and that the measure at issue does not infringe the principle of non-discrimination.

Infringement of the freedom of establishment and of the free provision of services

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

71 Second, the free provision of services precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, irrespective of whether there is discrimination

on the grounds of nationality or residence (see, to that effect, judgment of 6 February 2003, *Stylianakis*, C-92/01, EU:C:2003:72, paragraph 25). However, it should be pointed out that, pursuant to Article 58(1) TFEU, the free provision of services in the field of transport is governed by the provisions of the title relating to transport, namely Title VI of the TFEU. The free provision of services in the field of transport is therefore governed, in primary law, by a special legal regime (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 36). Consequently, Article 56 TFEU, which enshrines the free provision of services, does not apply as such to the air transport sector (judgment of 25 January 2011, *Neukirchinger*, C-382/08, EU:C:2011:27, paragraph 22).

72 Therefore, measures liberalising air transport services may only be adopted under Article 100(2) TFEU (judgment of 18 March 2014, *International Jet Management*, C-628/11, EU:C:2014:171, paragraph 38). As the applicants rightly note, the EU legislature adopted 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 Community (OJ 2008 L 293, p. 3) on the basis of that provision, and its very purpose is to define the conditions for applying in the air transport sector the principle of free provision of services (see, by analogy, judgment of 6 February 2003, *Stylianakis*, C-92/01, EU:C:2003:72, paragraphs 23 and 24).

73 In the present case, it should be noted that the applicants submit, in essence, that the measure at issue constitutes a restriction on the freedom of establishment and the free provision of services on account of its discriminatory nature.

74 While it is true that the measure at issue relates to individual aid which benefits only AUA, the applicants do not demonstrate how that exclusivity is capable of discouraging them from establishing themselves in Austria or from providing services from and to that country. In particular, the applicants fail to identify the elements of fact or law which cause that measure to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU, but which, as was found in paragraphs 60 to 66 above, are nevertheless necessary and proportionate to make good the damage caused to AUA by the exceptional occurrence of the COVID-19 pandemic, in accordance with the requirements laid down in Article 107(2)(b) TFEU.

75 Consequently, the measure at issue cannot constitute a restriction on the freedom of establishment or the free provision of services. It follows that the applicants are not justified in complaining that the Commission failed to examine the compatibility of that measure with the freedom of establishment and the free provision of services.

76 In those circumstances, the applicants' second plea must be rejected.

Third plea in law alleging misapplication of Article 107(2)(b) TFEU and a manifest error of assessment relating to the proportionality of the aid

77 Essentially, the applicants' third plea is divided into two parts, alleging, first, that the Commission erred in its assessment of the amount of damage caused to AUA and, second, that it erred in its assessment of the amount of the aid at issue.

The first part of the third plea relating to the assessment of the damage caused to AUA

78 First, the applicants claim that the measure at issue, according to the contested decision, is intended to cover the damage caused to AUA during the period from 9 March to 14 June 2020, as a result of the cancellation and rescheduling of AUA flights following the imposition of travel restrictions and other containment measures linked to the COVID-19 pandemic. Some of the damage caused to AUA is not

the consequence of the imposition of travel restrictions and other containment measures, given that those restrictions were only partially in force during the period from 9 to 18 March 2020, whereas the measure at issue is intended to make good damage suffered during the period from 9 March to 14 June 2020. Consequently, the damage caused to AUA during that first period is the result of the reluctance of passengers to travel due to the uncertainties surrounding the pandemic. The method for calculating the damage approved by the Commission therefore reflects the impact of the COVID-19 crisis as a whole, rather than the specific impact of the travel restrictions imposed by the Austrian authorities or by other countries. Thus, the Commission manifestly overestimated the amount of damage directly caused by travel restrictions and other containment measures linked to the COVID-19 pandemic. The contested decision is therefore contradictory.

79 Second, the applicants claim that there is nothing in the contested decision to prove that the costs avoided during the period from 9 March to 14 June 2020, which should not be taken into account in order to determine the damage borne by AUA, reflected the 'avoidable' costs of AUA. Consequently, the avoided costs used in the assessment of the damage could indeed contain cost elements which were 'avoidable'.

80 Third, in the contested decision, the Commission failed to assess the damage caused to other airlines. According to the applicants, an exceptional occurrence within the meaning of Article 107(2)(b) TFEU by definition affects several, if not all, undertakings in the sector concerned. Thus, many other airlines have suffered damage in Austria as a result of the travel restrictions imposed amid the COVID-19 pandemic. That provision is therefore intended to make good the damage also borne by AUA's competitors, and not only by AUA.

81 The Commission, the Federal Republic of Germany, the Republic of Austria and AUA contest the applicants' arguments.

82 It should be noted, as a preliminary point, that, since this is an exception to the general principle set out in Article 107(1) TFEU that State aid is incompatible with the internal market, Article 107(2)(b) TFEU must be interpreted narrowly. Therefore, only economic damage caused by natural disasters or exceptional occurrences may be compensated for under that provision (judgment of 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, EU:C:2006:130, paragraph 79).

83 It follows that aid likely to exceed the losses incurred by the beneficiaries of that aid is not covered by Article 107(2)(b) TFEU (see, to that effect, judgment of 11 November 2004, *Spain* v *Commission*, C-73/03, not published, EU:C:2004:711, paragraphs 40 and 41).

84 In the present case, it should be noted in the first place that, as is apparent from paragraphs 41 and 69 of the contested decision, for the purposes of assessing the damage, the Austrian authorities took account of the period during which AUA's fleet was immobilised, from 19 March to 14 June 2020, in addition to the days immediately preceding that period, from 9 to 18 March 2020.

85 In that regard, in the contested decision, the Commission set out the reasons why it considered it appropriate to authorise aid covering not only the damage caused to AUA during the period when its fleet was immobilised, from 19 March to 14 June 2020, but also the damage suffered during the days immediately preceding it, from 9 to 18 March 2020.

86 As explained in paragraphs 6 to 14 of the contested decision, the Austrian Government had already introduced travel restrictions during the period from 9 to 18 March 2020. In particular, on 9 March 2020, the Republic of Austria had prohibited the landing in its territory of aircraft coming from China, Iran, Italy and South Korea. That prohibition was gradually extended to other countries, including France, Spain and Switzerland on 13 March 2020, and the Netherlands, Russia, Ukraine and the United Kingdom on 15 March 2020. In addition, on 10 March 2020, the Republic of Austria imposed, with immediate effect, general measures which included travel restrictions in response to the

COVID-19 pandemic. It also imposed medical checks at borders, first with Italy on 11 March 2020, then with Switzerland on 14 March 2020, and finally with Germany on 19 March 2020. In the meantime, on 12 March 2020, the United States of America announced that it would no longer allow European citizens, or travellers who had stayed in Schengen-area countries, to enter its territory. On 13 March 2020, the Austrian Government announced a package of restrictive legislative measures which entered into force on 16 March 2020. Those measures imposed far-reaching restrictions on the freedom of movement throughout Austria.

87 Therefore, in view of the progressive deterioration of the travel conditions resulting from the restrictions imposed on account of the COVID-19 pandemic, which led to the cancellation and rescheduling of AUA flights during the period from 9 March to 14 June 2020, the Commission could take into account, without committing any error, the damage caused to AUA by the aforementioned cancellations and rescheduling during that period.

88 Consequently, the Court rejects the applicants' argument that, by taking into account the damage which occurred during the period from 9 to 18 March 2020, the Commission overestimated that damage. For the same reason, the contested decision is not vitiated by any contradiction.

89 In the second place, as regards the applicants' argument that the Commission failed to ensure that AUA took the necessary steps to reduce its costs during the period from 9 March to 14 June 2020, so that not only avoided costs but also 'avoidable' costs, that is to say costs which it could have avoided but which it nevertheless incurred, are excluded from the compensation for damage, it should be noted that, in paragraph 74 of the contested decision, the Commission explained that the damage to be compensated corresponded to the loss of added value, calculated as the difference between, on the one hand, AUA's loss of profit, that is to say the difference between the turnover it could have expected to achieve during the period from 9 March to 14 June 2020, in the absence of the travel restrictions and other containment measures related to the COVID-19 pandemic, and the turnover actually achieved during that period, adjusted by AUA's profit margin, and, on the other hand, the avoided costs.

90 The Commission defined the avoided costs as being those which AUA would have incurred during the period from 9 March to 14 June 2020 if its activities had not been affected by the travel restrictions and containment measures linked to the COVID-19 outbreak, and which AUA did not have to bear as a result of the cancellation of its operations. The Commission also explained that the avoided costs had to be quantified for each type of relevant cost, on the basis of their correlation with the fall in traffic, by comparing AUA's costs during the same period of the previous year with the costs incurred by AUA during the period from 9 March to 14 June 2020.

91 The Commission also stated in footnote 19 of the contested decision that the avoided costs resulting from the containment measures connected with the COVID-19 pandemic concerned, for example, the reduction in fuel costs, fees and charges, and the reduction in personnel costs, in particular due to the use of short-term work.

92 Thus, the assessment of the damage, as is apparent from paragraph 42(b) of the contested decision, takes account of the additional costs and the costs avoided as a result of those restrictions. In that regard, on the basis of an examination of AUA's costs and of both the positive and negative impact of the containment measures taken by governments following the COVID-19 pandemic on variable costs, the Commission took into account, in that assessment, the deviation found in all variable costs, in particular fuel costs, fees and charges, maintenance costs, International Air Transport Association (IATA) commissions and catering costs, and the deviation found in fixed costs which varied as a result of the containment measures taken by governments following the COVID-19 pandemic, in particular the reduction in personnel and marketing costs, and the grounding of aircraft. Moreover, in its statement in intervention, the Republic of Austria referred to a list of measures taken by AUA in order to reduce its costs amid the COVID-19 pandemic, consisting in particular of a 54% reduction in total expenditure compared with 2019. Among those measures, the Republic of Austria indicated the

closure of a number of technical maintenance bases and passenger support installations in certain Länder. In addition, AUA reduced its fleet by removing most of the Dash aeroplanes and selling a number of aircraft. The applicants have not challenged the veracity or relevance of those factors.

93 In those circumstances, the Court can only find that the applicants' complaint relating to an alleged failure by the Commission to take account of 'avoidable' costs is too abstract and is not supported by any specific data. In particular, the applicants have failed to identify specifically which costs AUA could have avoided and should therefore have been excluded from the assessment of the damage which it suffered.

94 Therefore, that argument must be rejected.

95 In the third place, as regards the argument that the Commission failed to take account of the damage suffered by other airlines, suffice it to refer to paragraphs 53 to 57 above in order to conclude that the applicants are not justified in claiming that the Commission was required to assess, in the contested decision, the damage caused to airlines other than AUA.

96 Therefore, the first part of the third plea must be rejected.

The second part of the third plea relating to the assessment of the amount of aid

97 First, the applicants, referring to their arguments put forward in the first plea, claim that the Commission failed to take account of possible additional aid from 'Lufthansa' to AUA. The statement in the contested decision that the DLH equity injection should be invested in effective climate and noise efficient technologies, and therefore does not cover the damage suffered by AUA which the measure at issue seeks to make good, is not convincing because the beneficial effects of that injection are immediate, whereas the planned investments, which are not subject to any form of binding commitments, would not materialise until 2030. Moreover, the Commission merely mentioned a minimal amount of aid granted to the Lufthansa group, in the sum of EUR 150 million, leaving no mention of the possibility that the German measure might benefit AUA beyond that amount.

98 Second, the Commission underestimated the impact of the State aid granted to AUA under the Austrian aid scheme in its assessment of the proportionality of the measure at issue. The Commission states that that aid covered other AUA costs which were supposed to be borne during the second half of 2020, without, however, explaining the basis of that assessment. Furthermore, as regards the quantification of losses during the second half of 2020, the Commission simply reproduced AUA's estimates without carrying out an independent analysis of those losses. The Commission also underestimated the amount of aid granted to AUA under the Austrian aid scheme, by assessing it at EUR [70 to 80] million, without explaining how it had calculated that figure. According to the applicants, the amount of that aid is EUR 270 million. Thus, the amount of that aid, taken together with the DLH equity injection, comes to at least EUR 420 million, which exceeds the amount of AUA's losses that were supposed to have been incurred during the second half of 2020.

99 Third, contrary to its decision-making practice, the Commission did not take account of the competitive advantage resulting from the discriminatory nature of the measure at issue, which results in market shares for AUA that are larger than those which it could otherwise have claimed.

100 The Commission, supported by the Federal Republic of Germany, the Republic of Austria and AUA, disputes those arguments.

101 In the first place, as regards the applicants' argument that the Commission failed to take account of any additional aid from 'Lufthansa' in favour of AUA, first, it should be observed that that argument overlaps, in part, with the arguments put forward in the first plea. Reference should therefore be made to the analysis of the first plea.

102 Second, it should be pointed out that the FEU Treaty does not preclude a concurrent application of Article 107(2)(b) and Article 107(3)(b) TFEU, provided that the conditions of each of those two provisions are met. That applies in particular where the facts and circumstances giving rise to a serious disturbance in the economy are the result of an exceptional occurrence.

103 In the present case, as indicated in paragraphs 5 to 7 above, the German loan and the aid which is the subject of the Lufthansa decision, together with the aid measure under the Austrian aid scheme granted to AUA, were awarded on the basis of Article 107(3)(b) TFEU, whereas the measure at issue was accorded on the basis of Article 107(2)(b) TFEU.

104 In that regard, the Commission noted, in paragraph 29 of the contested decision, that those measures, granted on the basis of Article 107(3)(b) TFEU, were intended to restore AUA's solvency and viability, and therefore covered costs beyond mere compensation for the damage caused directly by the travel restrictions imposed amid the COVID-19 pandemic. In paragraphs 47 and 49 of the contested decision, the Commission also noted that the Austrian authorities had confirmed that the measure at issue could not be combined with other aid covering the same costs and that the other measures forming part of the support granted to AUA could not give rise to overcompensation because they were not intended to compensate AUA for the damage which it suffered as a result of the travel restrictions imposed on account of the COVID-19 pandemic, and that that measure could not be used for such compensation.

105 In particular, the Commission explained, in paragraph 50 of the contested decision, that those measures had no connection with any compensation for the damage caused to AUA, since, first, the loan granted to AUA under the Austrian aid scheme was secured by collateral consisting of the securitisation of AUA's shares and assets and, second, the DLH equity injection, as had been agreed between AUA, its shareholders and the Austrian Government, had to be invested in effective climate and noise efficient technologies by 2030.

106 In addition, in paragraphs 82 to 86 of the contested decision, the Commission ascertained whether the aid measures granted on the basis of Article 107(3)(b) TFEU, capable of benefiting AUA, did not cover the same damage which the measure at issue sought to remedy, and concluded that that was not the case.

107 It follows that, contrary to what the applicants submit, the Commission did not fail to take into account all the aid measures capable of benefiting the Lufthansa group when assessing the amount of the aid at issue and its proportionality.

108 The applicants have adduced no specific and substantiated evidence to show that all or some of the aid measures in question are intended to cover the same eligible costs as those included in the damage which the measure at issue seeks to remedy.

109 Third, the applicants criticise, in particular, paragraph 50(b) of the contested decision, according to which, as stated in paragraph 105 above, AUA was to invest, until 2030, the equity injected by DLH into effective anti-noise and environmentally friendly technologies, in so far as the corresponding amount had already been made available to AUA. However, that argument ignores the fact that such an investment could be staggered over time. Moreover, the commitment to use an amount equivalent to the equity injected to finance that investment clearly shows that the purpose of that equity injection was quite different from the one pursued by the measure at issue.

110 As regards the applicants' argument disputing the binding nature of that investment commitment, suffice it to note that it is apparent from paragraph 50(b) of the contested decision that, in the financial package agreed between AUA, its shareholders and the Austrian Government, AUA is 'required' to invest an amount equivalent to the DLH equity injection in effective anti-noise and environmentally friendly technologies.

111 In the second place, as regards the applicants' arguments concerning the aid granted to AUA under the Austrian aid scheme, it should be observed that the Commission noted, in paragraph 87 of the contested decision, that the financial results anticipated by AUA for 2020 should be more generally affected by the serious disturbance in the Austrian economy due to the COVID-19 pandemic. Those expected losses, for which no direct causal link with travel restrictions and containment measures could be established, could, according to the Commission, amount to [between EUR 300 and 400] million for the period from 1 to 9 March 2020 and from 15 June to 31 December 2020, that is to say outside the period covered by the measure in question. It was therefore in order to mitigate the effects of the serious disturbance in its economy that the Republic of Austria planned to grant AUA a State guarantee of 90% on a loan of EUR 300 million under the Austrian aid scheme, as is apparent from paragraph 88 of the contested decision.

112 First, the applicants claim that the Commission assumed that the aid granted to AUA under the Austrian aid scheme was intended to cover losses suffered by AUA during the second half of 2020, without, however, showing that that was in fact the case. By that argument, the applicants are in fact attempting to cast doubt on whether that aid could cover the same costs as those included in the damage caused to AUA during the period from 9 March to 14 June 2020 as a result of the travel restrictions imposed amid the COVID-19 pandemic, and which the measure at issue seeks to remedy.

113 However, it should be recalled that the Austrian aid scheme was introduced on the basis of Article 107(3)(b) TFEU and was thus intended to remedy the serious disturbance in the Austrian economy caused by the pandemic by providing support to a large number of undertakings requiring liquidity, without being limited to a specific economic sector. That scheme thus pursued an objective which was different from the purpose pursued by the measure at issue.

114 In that regard, the Commission's explanation, in paragraph 87 of the contested decision, that the aid granted to AUA under that Austrian aid scheme was intended to cover the losses suffered by AUA which were not directly caused by the cancellation and rescheduling of AUA flights during the period from 9 March to 14 June 2020 on account of travel restrictions, is perfectly consistent with the various objectives pursued by the aid in question. Thus, the mere fact that the Commission did not specify in the contested decision the basis on which it considered that the aid granted to AUA under the Austrian aid scheme was intended to cover the losses which it anticipated during the second half of 2020 cannot call into question the legality of the contested decision.

115 Second, as regards the amount of those losses, estimated at [between EUR 300 and 400] million, the applicants criticise the Commission for relying on the estimates provided by AUA, instead of carrying out an independent analysis. While it is indeed true that the source of that figure is not apparent from the contested decision, the fact remains that that estimate relates to losses which the measure at issue is not intended to cover. It is the aid granted to AUA under the Austrian aid scheme, the lawfulness and compatibility of which with the internal market are not the subject of the present dispute, which is intended to cover part of those losses. Therefore, the issue of the exact estimate of those losses has no bearing on the lawfulness of the contested decision.

116 Third, and for the same reason, the applicants cannot validly allege that the Commission failed to explain in the contested decision how it calculated the amount of aid granted to AUA under the Austrian aid scheme, estimated at [between EUR 70 and 80] million. Although the applicants may validly raise arguments challenging the estimate of the amount of the aid at issue in the present case,

they cannot, however, effectively criticise the estimate of the amount of other aid, the lawfulness and compatibility of which with the internal market are not subject to review by the Court in the present dispute.

117 In any event, it is apparent from paragraph 80 of the contested decision that the Austrian authorities undertook to submit to the Commission, by 30 June 2021 at the latest, the results of the *ex post* evaluation of the damage caused to AUA during the period from 9 March to 14 June 2020, which the measure at issue seeks to remedy, based on AUA's operational accounts for 2020, audited and duly certified by an independent body. If the *ex post* evaluation were to show that AUA was overcompensated, the Austrian authorities undertake to ensure that AUA would repay any overcompensation.

118 Fourth, and consequently, the applicants' argument that the combined amount of aid granted to AUA under the Austrian aid scheme and that of the DLH equity injection exceeded the amount of AUA's expected losses for the second half of 2020 must be rejected.

119 In the third place, as regards the applicants' argument that the Commission did not take account of the competitive advantage conferred on AUA as a result of the discriminatory nature of the measure at issue, it should be noted that, for the purposes of assessing the compatibility of aid with the internal market, the advantage procured by that aid for the recipient does not include any economic benefit the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid, and there may indeed be no such benefit, but that cannot justify a different assessment of the compatibility of the aid with the internal market (see, to that effect, judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 92).

120 Consequently, it must be held that the Commission was right to take account of the advantage conferred on AUA, as it results from the measure at issue. However, the Commission cannot be criticised for not having determined the existence of any possible economic benefit resulting from that advantage.

121 In those circumstances, the applicants are not justified in criticising the Commission for failing to take account of a possible competitive advantage resulting from the allegedly discriminatory nature of the measure at issue.

122 Therefore, the Court rejects the second part of the applicants' third plea and, consequently, that plea is dismissed in its entirety.

Fourth plea in law alleging infringement of the applicants' procedural rights

123 The applicants submit that the examination conducted by the Commission was inadequate, in particular as regards the proportionality of the measure at issue and its compatibility with the principle of non-discrimination and the principles of the free provision of services and of the freedom of establishment. The inadequate nature of that examination is evidence of the existence of serious difficulties, which should have led the Commission to open the formal investigation procedure and give the applicants the opportunity to submit their observations and, thus, to influence that investigation.

124 The Commission, the Federal Republic of Germany, the Republic of Austria and AUA contest the applicants' arguments.

125 It should be noted, as the Commission submits in essence, that the applicants' fourth plea is in fact subsidiary in nature, in case the Court did not examine the overall merits of the assessment of the measure at issue as such. According to settled case-law, the aim of such a plea is to enable interested parties to be held to have standing, in that capacity, to bring an action under Article 263 TFEU, which otherwise would be unavailable to them (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 48, and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 44). The Court has examined the first three pleas in this action, relating to the overall merits of the assessment of that measure, so that such a plea is deprived of its stated purpose.

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

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

Fifth plea in law alleging that the Commission infringed the second paragraph of Article 296 TFEU

128 The applicants submit that the Commission infringed the second paragraph of Article 296 TFEU in that, first, it did not state in the contested decision why it failed to verify whether the measure at issue granted to AUA would benefit the Lufthansa group or whether the aid granted to 'Lufthansa' might benefit AUA; second, it did not verify whether that measure complied with the principle of non-discrimination and the principles relating to the free provision of services and the freedom of establishment; third, it did not assess the competitive advantage conferred on AUA; and, fourth, it did not assess the damage caused by the travel restrictions, nor did it give reasons for its assessment of the proportionality of that measure and its cumulation with the German loan, the aid covered by the Lufthansa decision and the Austrian aid scheme.

129 The Commission, the Federal Republic of Germany, the Republic of Austria and AUA contest the applicants' arguments.

130 In that regard, it should be borne in mind that the statement of reasons required by Article 296 TFEU is an essential procedural requirement (judgment of 18 June 2015, *Ipatau* v *Council*, C-535/14 P, EU:C:2015:407, paragraph 37) and must be appropriate to the act at issue and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. Accordingly, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, on the nature of the reasons given and on the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and

points of law, since the question of whether the statement of reasons meets the requirements laid down in Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; of 22 June 2004, *Portugal* v *Commission*, C-42/01, EU:C:2004:379, paragraph 66; and of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79).

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

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

133 In that respect, first, as regards the statement of reasons for the contested decision concerning the relationship between the measure at issue and the other aid measures referred to in paragraph 8 above, suffice it to state that the applicants' criticism is based on a partial reading of the contested decision and of the background to that decision. It is apparent from all the considerations set out in paragraphs 31 to 43 above that the Commission provided reasons to the requisite legal standard for its assessment of the relationship between the measures in question.

134 Second, as regards the principle of non-discrimination and the principles of the free provision of services and freedom of establishment, it should, admittedly, be borne in mind that, where the beneficiaries of the measure, on the one hand, and the excluded operators, on the other hand, are in a comparable situation, the EU institution which is the author of the act is under a duty to explain in what way the difference in treatment thus introduced is objectively justified and to give specific reasons in that regard (judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 82). However, in the present case, it must be noted that the contested decision sets out the factors, referred to in paragraph 61 above, which make it possible to understand AUA's particular importance for air services in Austria and the Austrian economy, as well as the reasons why the Republic of Austria chose AUA to be the sole beneficiary of the measure at issue.

135 Moreover, in so far as the applicants refer to the competitive advantage resulting from the discriminatory nature of the measure at issue, it is sufficient to note, as is clear from paragraphs 119 to 121 above, that the Commission was not required to take such an advantage into consideration for the purpose of assessing the compatibility of that measure with the internal market; thus the Commission was not required to refer to it in the contested decision.

136 Third, as regards the estimate of the damage caused to AUA and the amount of aid, it should be noted that the Commission explained in the contested decision the reasons why it considered that, for the purposes of calculating the damage that could be compensated under Article 107(2)(b) TFEU, the damage incurred during the period from 9 March to 14 June 2020 was considered to be directly caused by the cancellation and rescheduling of flights on account of the travel restrictions imposed amid the COVID-19 pandemic (see paragraphs 84 to 88 above). In addition, it explained to the requisite legal standard the methodology for calculating the amount of damage, including the costs to be taken into consideration (see paragraphs 89 to 91 above).

137 Likewise, the Commission explained in a sufficiently clear and precise manner the way in which it calculated the amount of aid at issue and the reasons why it considered that the measure at issue could not be cumulated with other aid measures covering the same eligible costs.

138 It follows that the contested decision contains a sufficient statement of reasons and that, consequently, the applicants' fifth plea must be rejected.

139 It follows from all of the foregoing that the action must be dismissed in its entirety, without there being any need to rule on its admissibility.

Costs

140 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission in accordance with the form of order sought by the latter.

141 The Federal Republic of Germany and the Republic of Austria are to bear their own costs, in accordance with Article 138(1) of the Rules of Procedure.

142 AUA is to bear its own costs, in accordance with Article 138(3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Ryanair DAC and Laudamotion GmbH to bear their own costs and to pay those incurred by the European Commission;**

3. **Orders the Federal Republic of Germany, the Republic of Austria and Austrian Airlines AG to bear their own respective costs.**

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Petrlík

Delivered in open court in Luxembourg on 14 July 2021.

E. Coulon
Registrar

S. Papasavvas
President