Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 January 2022*

(Appeal – State aid – Aid for airports and airlines – Decision classifying the measures in favour of Frankfurt Hahn airport as State aid compatible with the internal market and finding no State aid in favour of airlines using that airport – Inadmissibility of an action for annulment – Fourth paragraph of Article 263 TFEU – Natural or legal person not directly and individually concerned by the decision at issue – Effective judicial protection)

In Case C-594/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 2 August 2019,

Deutsche Lufthansa AG, established in Cologne (Germany), represented by A. Martin-Ehlers, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

European Commission, represented by T. Maxian Rusche and S. Noë, acting as Agents,

defendant at first instance,

Land Rheinland-Pfalz, represented by Professor C. Koenig,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

* Language of the case: German.

gives the following

Judgment

1 By its appeal, Deutsche Lufthansa AG asks the Court of Justice to set aside the order of the General Court of the European Union of 17 May 2019, *Deutsche Lufthansa* v *Commission* (T-764/15, not published, EU:T:2019:349; 'the order under appeal'), by which the General Court dismissed as inadmissible its action for annulment of Commission Decision (EU) 2016/788 of 1 October 2014 on the State aid SA.32833 (11/C) (ex 11/NN) implemented by Germany concerning the financing arrangements for Frankfurt Hahn airport put into place in 2009 to 2011 (OJ 2016 L 134, p. 1; 'the decision at issue').

Background to the dispute and the decision at issue

2 The background to the dispute was set out as follows in the order under appeal:

'1 The appellant, [Deutsche Lufthansa], is an airline established in Germany, whose main activity is transporting passengers. Its main airport base is that of [Frankfurt am Main] (Germany).

2 Ryanair Ltd is a low-cost Irish airline which uses the facilities of Frankfurt Hahn airport (Germany).

3 Frankfurt Hahn airport is located in Land Rheinland-Pfalz (Federal State of Rhineland-Palatinate, Germany), approximately 120 kilometres from the city of Frankfurt am Main and 115 km from Frankfurt Main airport. Until 1992, there was a military airbase at the site on which Frankfurt Hahn airport is located. That base was later converted into a civil airport.

4 From 1 January 1998, the operation of Frankfurt Hahn airport was entrusted to Flughafen Frankfurt Hahn GmbH ("FFHG"), whose capital was held by Flughafen Frankfurt/Main GmbH, the operator of Frankfurt Main airport, as the majority shareholder, and by the Federal State of Rhineland-Palatinate … On 31 December 2008, Flughafen Frankfurt/Main sold all of its shares in FFHG to the Federal State of Rhineland-Palatinate which, until 2017, held a majority shareholding of 82.5%, the remaining 17.5% being held by Land Hessen (Federal State of Hesse, Germany), which entered the capital of FFHG in 2002.

5 Since 19 February 2009, FFHG has been included in the cash-pool of the Federal State of Rhineland-Palatinate. That pool is a system the purpose of which is to optimise the use of the surplus cash flow of the various holding companies, foundations and public undertakings of that federal state. By virtue of that shareholding, FFHG benefited from a credit line of EUR 45 million. This is the first measure examined in the decision [at issue].

6 FFHG also obtained, in 2009, five loans from the Investitions- und Strukturbank of the Federal State of Rhineland-Palatinate ("the ISB"). This is the second measure examined in the decision [at issue].

7 Finally, the loans agreed to by the ISB were guaranteed 100% by the Federal State of Rhineland-Palatinate. This is the third measure examined in the decision [at issue].

8 By letter of 17 June 2008, the Commission of the European Communities informed the Federal Republic of Germany of its decision to initiate an initial formal investigation procedure under Article 108(2) TFEU concerning the financing of FFHG and its financial relations with, in particular, Ryanair. That case was registered under case number SA.21121 and concerned 12 measures, 7 for FFHG and 5 which concerned Ryanair and other airlines for some of those measures ("the Hahn I procedure"). That procedure culminated in Commission Decision (EU) 2016/789 of 1 October 2014 on the State aid SA.21121 (C 29/08) (ex NN 54/07) implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair (OJ 2016 L 134, p. 46; "the Hahn I decision"). That decision is the subject of the action in *Deutsche Lufthansa* v *Commission*, registered at the Registry of the General Court as Case T-492/15.

9 In the meantime, by letter of 13 July 2011, the Commission notified the Federal Republic of Germany of a second decision to initiate a formal investigation procedure concerning alleged State aid in favour of Frankfurt Hahn airport consisting of the three measures referred to in paragraphs 5 to 7 above ("the measures [at issue]"). That decision was published in the *Official Journal of the European Union* on 21 July 2012 (OJ 2012 C 216, p. 1; "the Hahn II decision").

[The decision at issue]

10 In the decision [at issue], the Commission found, first of all, that the following constituted State aid within the meaning of Article 107(1) TFEU, compatible with the internal market on the basis of Article 107(3)(c) TFEU: first, the credit line made available to FFHG from the cash-pool of the Federal State of Rhineland-Palatinate; secondly, loans Nos 2 and 5 from the ISB; and, thirdly, the guarantee issued by the Federal State of Rhineland-Palatinate to cover 100% of the outstanding balance of the ISB loans. The Commission then considered that loans Nos 1, 3 and 4 of the ISB did not constitute State aid.

11 In addition to the Hahn I decision referred to in paragraph 8 above and the decision [at issue], the Commission adopted, on 31 July 2017, Decision C(2017) 5289 on State aid SA.47969, implemented by Germany concerning operating aid in favour of Frankfurt Hahn airport (OJ 2018 C 121, p. 9; "the Hahn III decision"). That decision is the subject of the action registered at the General Court Registry as Case T-218/18. Lastly, the Commission initiated a procedure based on the complaint of the appellant lodged in 2015 and registered under case SA.43260 and extended repeatedly to seek 14 other measures in favour of Frankfurt Hahn airport and Ryanair ("the Hahn IV procedure").'

The proceedings before the General Court and the order under appeal

3 By application lodged at the General Court Registry on 29 December 2015, the appellant brought an action for annulment of the decision at issue.

4 On 11 March 2016, the European Commission raised, by a separate document, an objection of inadmissibility, in respect of which, inter alia, the appellant submitted its observations the following 31 May.

5 Although the Court decided, by order of 5 September 2017, to join the Commission's objection of inadmissibility to the substance of the case, it subsequently considered itself sufficiently informed by the exchange of pleadings to rule by order on that objection.

6 By its objection of inadmissibility, the Commission, supported by the Federal State of Rhineland-Palatinate as an intervener at first instance, disputed the legal standing to bring proceedings of the appellant, in so far as it was neither directly nor individually concerned by the decision at issue within the meaning of the fourth paragraph of Article 263 TFEU.

7 In the order under appeal, the General Court, after having found that the appellant was not an addressee of the decision at issue, examined whether the appellant had legal standing to bring proceedings in so far as it was either directly and individually concerned by that decision, within the meaning of the second situation provided for in the fourth paragraph of Article 263 TFEU, or directly concerned by that decision and in so far as the latter constituted a regulatory act which did not entail implementing measures, within the meaning of the third situation provided for by that provision.

8 That examination was carried out successively, first, as regards legal standing to bring proceedings under the second situation in the fourth paragraph of Article 263 TFEU, in paragraphs 85 to 145 of the order under appeal and, secondly, as regards legal standing to bring proceedings under the third situation provided for by that provision, in paragraphs 146 to 150 of that order.

9 To that end, the General Court first examined whether the appellant was individually concerned by the decision at issue, within the meaning of the second limb of the fourth paragraph of Article 263 TFEU.

10 In that context, the General Court found, as a preliminary point, in paragraph 95 of the order under appeal, that, in the light of the appellant's arguments, it was necessary to examine whether the appellant was individually concerned by the decision at issue without drawing a distinction between the measures at issue.

11 In that regard, in paragraphs 96 to 109 of the order under appeal, the General Court examined whether the appellant's situation could, despite the fact that a formal investigation procedure had been initiated in the present case, be treated in the same way as that of an interested party seeking the annulment of a decision taken without a formal investigation procedure. In paragraph 110 of that order, it held that that was not the case and that it was not sufficient for it to rely on its status as an interested third party as a competitor of Ryanair to which the measures at issue had been transferred in order to justify the admissibility of its action for annulment.

12 Moreover, the General Court examined the appellant's argument that it was individually concerned by the decision at issue taken at the end of the formal investigation procedure and held, in particular in paragraph 142 of the order under appeal, that the appellant had not adduced pertinent reasons to show that the decision at issue was likely to harm its legitimate interests by substantially affecting its position on the market in question. Therefore, it held, in paragraph 144 of that order, that the appellant had not established, in particular with regard to its competitive relationship with the undertaking benefiting from the measures at issue, that it was individually concerned by the decision at issue, within the meaning of the second limb of the fourth paragraph of Article 263 TFEU.

13 Examining, therefore, secondly, whether the action was admissible under the third limb of the fourth paragraph of Article 263 TFEU, the General Court found, in paragraph 150 of the order under appeal, that the measures at issue had not been granted on the basis of an aid scheme and

were therefore individual in nature. It concluded that the decision at issue could not be classified as a 'regulatory act' within the meaning of that provision and that the appellant was not entitled to challenge it on that basis.

14 Consequently, the General Court dismissed the action as inadmissible.

Forms of order sought and procedure before the Court of Justice

15 The appellant claims that the Court should:

– set aside the order under appeal;

– grant the form of order sought at first instance and annul the decision at issue;

– in the alternative, refer the case back to the General Court; and

– order the Commission to pay the costs.

16 The Commission and the Federal State of Rhineland-Palatinate contend that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

The appeal

17 In support of its appeal, the appellant puts forward six grounds of appeal. The first ground of appeal alleges a procedural error, an infringement of the fourth paragraph of Article 263 TFEU and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') in so far as the General Court referred to the decision to initiate the Hahn IV procedure for the purposes of the statement of reasons for the order under appeal, without having first heard the appellant in that regard. The second ground of appeal alleges a manifest error of assessment and an infringement of the fourth paragraph of Article 263 TFEU and of the obligation to state reasons having regard to the aid schemes. The third ground of appeal alleges infringement of the fourth paragraph of Article 263 TFEU, Articles 47 and 41 of the Charter, procedural guarantees and a manifest error of assessment in so far as the General Court did not have recourse to the 'first alternative' of the case-law as a result of the judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609). The fourth ground of appeal alleges infringement of the fourth paragraph of Article 263 TFEU misapplying the substantive conditions of the 'second alternative' as a result of that case-law. The fifth ground of appeal alleges an infringement of the fourth paragraph of Article 263 TFEU, the principles of effective judicial protection and equality of arms and a manifest error of assessment in so far as the General Court applied too strict criteria as regards proof of a substantial adverse effect on the appellant's position on the market concerned. The sixth ground of appeal alleges a manifest error of assessment in so far as the General Court considered that the measures which were the subject of the decision at issue did not significantly affect its position on the market concerned.

The first and third grounds of appeal, alleging errors of law and an infringement of the appellant's procedural rights, in so far as the General Court did not examine the question whether the appellant was individually concerned by the decision at issue having regard to the criterion relating to the protection of the procedural rights of an interested party in the administrative procedure before the Commission

Arguments of the parties

18 By its first and third grounds of appeal, which relate to paragraphs 96 to 110 and 112 et seq. of the order under appeal and which it is appropriate to examine together, the appellant essentially complains that the General Court erred in law in so far as it did not examine whether it was 'individually concerned' by the decision at issue, within the meaning of the second situation referred to in the fourth paragraph of Article 263 TFEU, in the light of the criterion relating to the protection of the procedural rights of an interested party in the administrative procedure before the Commission.

19 By its first ground of appeal, the appellant essentially complains that the General Court erred in law by holding, in paragraphs 101 to 110 of the order under appeal, that the action was inadmissible on the ground that the Commission had in the meantime examined the measures at issue in the decision to initiate the Hahn IV procedure. First, that assessment is, from both a factual and legal point of view, incorrect and, secondly, by taking account of that decision, which is incomplete and was published only shortly before the adoption of the order under appeal, the General Court infringed, in addition to the fourth paragraph of Article 263 TFEU, Article 47 of the Charter and the appellant's right to be heard.

20 The Commission and the Federal State of Rhineland-Palatinate consider that that argument should be rejected as ineffective and, in any event, unfounded.

21 By its third ground of appeal, the appellant criticises, in particular, the General Court for having examined, in paragraph 112 et seq. of the order under appeal, whether it was 'individually concerned' by the decision at issue, for the purposes of the second situation set out in the fourth paragraph of Article 263 TFEU, in the light not of what it maintains is the 'first alternative' of the case-law resulting from the judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609), relating to the protection of the procedural rights of a concerned party in the administrative procedure before the Commission, but of the alleged 'second alternative' in that case-law, relating to a substantial adverse effect of the measure at issue on the position of that party on the market concerned. In that regard, in paragraphs 96 to 110 of that order, the General Court wrongly rejected its arguments criticising the Commission for not having carried out a proper formal investigation procedure in so far as it failed to take essential factual elements into account. The present case concerns a specific situation in which the Commission clearly refused to take account of facts which the appellant, as a party to the proceedings, provided as evidence and which are decisive in resolving the dispute. In so doing, the Commission infringed the appellant's procedural rights in an arbitrary manner.

22 More specifically, the appellant submits, by the first part of that ground of appeal, that the procedure underlying the present case was governed by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) and that it should have been classified as an 'interested party' within the meaning of Article 1(h) of that regulation, which would give it the right to be heard, in accordance with Article 108(2) TFEU, and the rights provided for in Article 20 of that regulation. Consequently,

in accordance with what the Court of Justice held in paragraphs 22 and 23 of the judgment of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42), read in conjunction with Article 47 of the Charter, the appellant had to have the ability to bring an action in order to protect its interests. The appellant's procedural rights consist, in particular, in the Commission taking into consideration and examining all the facts which it describes and which are decisive in resolving the dispute, in the context of which they form part.

23 By the second part of its third ground of appeal, the appellant submits that, as it has already maintained before the General Court, although the Commission had indeed initiated a formal investigation procedure in the present case, that procedure was not conducted properly and did not relate to the facts as a whole. The General Court neither examined nor, a fortiori, explained why the appellant's situation is not comparable to that of an interested party seeking an annulment of a decision taken without a formal investigation procedure.

24 By the third part of its third ground of appeal, the appellant submits that the General Court also misapplied the principle of sound administration, guaranteed by Article 41 of the Charter, and did not have regard to the infringement of that principle by the Commission. The General Court failed to take account of certain circumstances, such as the fact that the Hahn I decision and the decision at issue were adopted barely five months after the appellant's last comments and that the Commission discriminated against the appellant by failing to take into consideration the facts which adversely affected FFHG and Ryanair. In addition, the General Court did not take into account the fact that the Commission did not state the reasons why it did not take account of certain facts in the procedure that gave rise to the decision at issue nor the reasons why the measures relating to Frankfurt Hahn Airport were the subject of several decisions. In such a situation, however, the appellant should have a means of obtaining redress in order to assert its procedural rights.

25 By the fourth and fifth parts of its third ground of appeal, the appellant puts forward that, in paragraph 105 of the order under appeal, the General Court wrongly introduced a new requirement relating to an 'overall scenario'. That requirement has no basis either in EU law or in the case-law of the Courts of the European Union. By contrast, that case-law requires the Commission to examine a commercial transaction 'as a whole', which means that it should take account of all the relevant factors. The Commission did not carry out such an examination, even though the appellant had demonstrated and proved to the requisite legal standard the context in which the facts analysed by the Commission occurred. In addition, the Commission's obligation to carry out an examination includes at the very least, in the present case, the transfer of State aid by FFHG to Ryanair, a point which the General Court failed to verify.

26 By the sixth part of its third ground of appeal, the appellant submits that it may challenge the infringement of its procedural rights only by means of an action for annulment, since an action for failure to act is not appropriate or admissible in the present case.

27 It follows that, for the purpose of examining the admissibility of an action brought by a competitor, the appellant cannot be treated as if the Commission had conducted a proper formal investigation procedure.

28 The Commission takes the view, like the Federal State of Rhineland-Palatinate, that the third ground of appeal must be rejected in its entirety as being unfounded. According to the Commission, that ground of appeal is also inadmissible in part in so far as it concerns, first, findings of fact made by the General Court and, secondly, contains arguments which were not submitted at first instance.

Findings of the Court

29 It should be recalled, first of all, that the admissibility of an action brought by natural or legal persons against an act which is not addressed to them, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that they be accorded legal standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to those persons. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (see, to that effect, in particular, judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 59 and 91; of 13 March 2018, *Industrias Químicas del Vallés* v *Commission*, C-244/16 P, EU:C:2018:177, paragraph 39; and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 31).

30 In paragraphs 85 to 144 of the order under appeal, the General Court examined whether the appellant had legal standing to bring proceedings in the light of the first case referred to in the preceding paragraph, namely whether the decision at issue was of direct and individual concern to it.

31 In that regard, it is clear from the settled case-law of the Court of Justice that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (see, to that effect, inter alia, judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107; of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 22; of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 53; of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 93; and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 33).

32 By the first and third grounds of appeal, the appellant essentially complains that the General Court examined whether it was individually concerned by the decision at issue in the light not of the criterion relating to protection of the procedural rights of a concerned party in the administrative procedure before the Commission, but of the criterion of a substantial adverse effect on its position on the market concerned.

33 In that regard, it should be recalled that, in the context of the procedure for reviewing State aid provided for in Article 108 TFEU, 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 conformity of the aid in question, must be distinguished from the stage of the review under Article 108(2) TFEU. It is only at the latter stage, which is designed to enable the Commission to be fully informed of all the facts of the case, that the FEU Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their

comments (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 94, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 35).

34 It follows that, where, without initiating the formal investigation procedure under Article 108(2) TFEU, the Commission finds, by a decision taken on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the EU Courts. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 108(2) TFEU is to be declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to it under the latter provision. The Court has stated that such concerned parties are any persons, undertakings or associations whose interests might be affected by the granting of aid, that is to say, in particular, undertakings competing with the recipients of the aid and trade associations (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 95 and 96, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 36).

35 On the other hand, if the appellant calls into question the merits of a decision appraising the aid taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as 'concerned' within the meaning of Article 108(2) TFEU cannot suffice to render the action admissible. It must then demonstrate that it has a particular status, for the purposes of the case-law referred to in paragraph 31 of the present judgment. That applies in particular where the appellant's position on the market concerned is substantially affected by the aid to which the decision at issue relates (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 97, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 38).

36 In that regard, as the General Court correctly recalled, in paragraph 93 of the order under appeal, in addition to the undertaking in receipt of aid, competing undertakings have been recognised as being individually concerned by a Commission decision terminating the formal investigation procedure where they have played an active role in that procedure, provided that their position on the market is substantially affected by the aid measure which is the subject of the decision at issue (see, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 38 and the case-law cited).

37 In the present instance, the decision at issue was adopted, as the appellant indeed acknowledges, after a formal investigation procedure under Article 108(2) TFEU.

38 In those circumstances, contrary to the appellant's submissions, its action challenging that decision could not fall within the situation envisaged in paragraph 34 of the present judgment. In so far as the appellant bases its line of argument on paragraphs 22 and 23 of the judgment of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42), it need only be stated that those paragraphs must be read in conjunction with paragraph 25 of that judgment, which confirms that the mere fact that an undertaking has played an active role in the formal investigation procedure is not sufficient for it to be held individually concerned by the decision bringing that procedure to an end.

39 The appellant's argument that the formal investigation procedure carried out by the Commission was flawed since the decision at issue is based on facts that are incomplete or were assessed incorrectly, or that the argument based on the adoption and allegedly incomplete nature of the decision to initiate the Hahn IV procedure and the Hahn I and Hahn II decisions, cannot call into question such a conclusion.

40 The case-law relating to the admissibility of an action challenging a decision taken at the end of the formal investigation procedure applies irrespective of the various pleas that may be relied upon in support of such an action. Furthermore, it must be stated that the appellant, under the cloak of alleged procedural irregularities, in fact criticises the substance of the Commission's findings set out in the decision at issue, even though the argument before the General Court related to the admissibility of the action brought against that decision.

41 In those circumstances, whether the formal investigation procedure that gave rise to the decision at issue covered all the relevant aspects, or whether such aspects were examined in the context of another procedure, such as, in the present case, the Hahn IV procedure, is, as such, irrelevant to the applicability of the case-law referred to in paragraphs 36 and 38 of the present judgment. The General Court ruled on those aspects for the sake of completeness, in paragraphs 101 to 110 of the order under appeal, in response to the arguments put forward by the appellant seeking to demonstrate that its situation should be treated in the same way as that of an interested party seeking the annulment of a decision taken without a formal investigation procedure.

42 Consequently, the first and third grounds of appeal must be rejected as being ineffective in so far as they refer to those paragraphs of the order under appeal.

43 The General Court therefore did not err in law in holding, in paragraph 111 of the order under appeal and for the purposes of its examination in paragraph 112 et seq. of that order in the light of the second limb of the fourth paragraph of Article 263 TFEU, that the mere participation of the appellant in the administrative procedure was not sufficient to establish that it was individually concerned by the decision at issue, within the meaning of that provision.

44 In the light of the foregoing, the first and third grounds of appeal must be dismissed as being, in part, ineffective and, in part, unfounded.

The second ground of appeal, alleging a manifest error of assessment and infringement of the third limb of the fourth paragraph of Article 263 TFEU and of the obligation to state reasons, in so far as the General Court did not classify the decision at issue as a 'regulatory act' within the meaning of that provision

Arguments of the parties

45 By its second ground of appeal, the appellant criticises the General Court for, in essence, having infringed the third limb of the fourth paragraph of Article 263 TFEU by holding, in paragraphs 146 to 150 of the order under appeal, that the decision at issue did not constitute a 'regulatory act' within the meaning of that provision and that the appellant did not therefore have legal standing to bring proceedings under that provision.

46 It submits, in particular, that the EUR 45 million from the cash-pool of the Federal State of Rhineland-Palatinate in favour of FFHG constitutes an aid scheme. In that regard, the General Court did not take account of the facts enabling such a classification and, consequently, erred in law and infringed its obligation to state reasons by denying the existence of such an aid scheme. In the present case, FFHG used the aid obtained by such means for the benefit of Ryanair and, as a result, transferred it to Ryanair. In that regard, the General Court misapplied the extent of the duty of review incumbent on the Commission. Consequently, it also failed to verify whether the Commission complied with its duty of review, thereby erring in law. Furthermore, the General Court erred in law in denying that the Commission was under a duty to review the transfer of State aid to Ryanair. It is, in any event, established that the aid granted to FFHG was used by FFHG in favour of Ryanair in order to cover losses generated by the agreement concluded between those two parties in 2005 and to finance the infrastructure intended for Ryanair.

47 According to the appellant, the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), is applicable to financing from the cash-pool of the Federal State of Rhineland-Palatinate. It follows from that case-law that it is sufficient for an appellant to prove that it is directly concerned by the act at issue and that it is for it, in that regard, to establish that that act is actually capable of adversely affecting competition on the market concerned. As is apparent from evidence submitted by the appellant, those conditions are satisfied in the present case. The order under appeal is therefore wrong in law and the action at first instance should have been declared admissible.

48 The Commission and the Federal State of Rhineland-Palatinate contend that the second ground of appeal should be dismissed as being manifestly inadmissible, in so far as it relates to findings of a factual nature and constitutes, in any event, a new argument. Moreover, that ground of appeal is ineffective or, at the very least, unfounded.

Findings of the Court

49 It should be recalled, first, that the Treaty of Lisbon added a third limb to the fourth paragraph of Article 263 TFEU, relaxing the conditions of admissibility of actions for annulment brought by natural and legal persons. That limb does not subject the admissibility of actions for annulment brought by natural and legal persons to the condition of being individually concerned by the measure at issue and allows such actions to be brought against 'regulatory acts' which do not entail implementing measures and are of direct concern to the appellant (see, to that effect, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 22 and the case-law cited).

50 Secondly, it follows from settled case-law of the Court of Justice that a Commission decision authorising or prohibiting an 'aid scheme' is of general application and may, therefore, be classified as a 'regulatory act' within the meaning of the third limb of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 31 and 32 and the case-law cited).

51 In paragraph 150 of the order under appeal, the General Court found that the measures at issue were not granted on the basis of an aid scheme and that they were individual in character, which the appellant disputes on the ground that one of the three aid measures covered by the decision at issue, namely the cash-pool of the Federal State of Rhineland-Palatinate, constitutes an aid scheme.

52 However, it must be held that the argument of the appellant ultimately amounts to challenging the classification of that measure by the Commission in view of the criteria laid down in Article 1(d) of Regulation No 659/1999 and that that line of argument is therefore inadmissible at the appeal stage.

53 Consequently, the second ground of appeal must be dismissed as being inadmissible, without it being necessary to rule on all the arguments relied on by the appellant in support of that ground.

The fourth ground of appeal, alleging infringement of the fourth paragraph of Article 263 TFEU, in so far as the General Court misapplied the substantive conditions of the 'second alternative' of the case-law resulting from the judgment of 17 September 2015, Mory and Others v Commission (C-33/14 P, EU:C:2015:609)

Arguments of the parties

54 By its fourth ground of appeal, the appellant criticises the General Court, in the alternative, for having incorrectly applied, in paragraph 111 et seq. of the order under appeal, the substantive conditions of what it submits to be the 'second alternative' of the case-law stemming from the judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609), in so far as the question whether the measures at issue substantially undermined the appellant's position on the market concerned constitutes only one of the criteria for establishing that it was individually concerned by those measures. In paragraph 114 et seq. of the order under appeal, the General Court did not examine, however, whether, in the particular circumstances of the present case, there are other facts which differentiate it from all other persons.

55 The Commission and the Federal State of Rhineland-Palatinate consider that the fourth ground of appeal should be dismissed as being unfounded.

Findings of the Court

56 It suffices to note that, as is apparent, in particular, from paragraphs 32 to 43 of the present judgment, the General Court did not err in law in holding, in paragraph 111 et seq. of the order under appeal, that the appellant was not individually concerned by the decision at issue, within the meaning of the fourth paragraph of Article 263 TFEU, in so far as that decision was taken at the end of the formal investigation procedure, in the light of the criterion of substantial adverse effect on its position on the market concerned.

57 Therefore the fourth ground of appeal must be dismissed as being unfounded.

The fifth ground of appeal, alleging infringement of the fourth paragraph of Article 263 TFEU, the principles of effective judicial protection and equality of arms and a manifest

error of assessment, in so far as the General Court applied criteria that were too strict as regards proof of a substantial adverse effect on the position on the market concerned

Arguments of the parties

58 By its fifth ground of appeal, the appellant submits that, even if the criterion of substantial adverse effect on its position on the market concerned were to be applied, the General Court should have granted, on account of the particular features of the present case, a relaxation of the burden of proof that that criterion was met in the present case.

59 In that regard, the appellant submits that the Commission did not take account of all the facts and all the relevant measures. On account of the arbitrary presentation of the situation by the Commission and the information gaps which would result from it to the detriment of the appellant, the appellant cannot be required, having regard to the principle of equality of arms and the principle of effective judicial protection, to prove that the measures at issue substantially undermined its position on the market concerned.

60 The appellant submits that, from that point of view, it has produced evidence of a substantial adverse effect on its position on the market concerned, in so far as Ryanair received, from FFHG and the Federal State of Rhineland-Palatinate, several hundreds of millions of euros, and that those measures substantially affected the position of the appellant on the market, both in the European air transport sector and within its main operational base in Frankfurt am Main.

61 According to the Commission and the Federal State of Rhineland-Palatinate, the fifth ground of appeal must be dismissed as being unfounded.

Findings of the Court

62 It should be noted that the appellant's line of argument that the General Court should have allowed it to benefit from a relaxation in the burden of proof has no legal basis.

63 In the first place, in so far as the appellant invokes that the Commission's examination of the measures at issue was incomplete and incorrect, that fact, assuming it to be established, cannot affect either the relevance of the condition that the decision at issue must be such as to have a substantial effect on its position on the market concerned or the burden of proof required for the purpose of establishing legal standing to bring proceedings to challenge the decision relating to those measures.

64 In the second place, in so far as the appellant contends that, since it had to be granted a relaxation of the burden of proof for the purpose of demonstrating a substantial adverse effect on its market position, it did in fact provide that proof, and sets out for that purpose the advantages that Ryanair is said to have obtained from FFHG and the Federal State of Rhineland-Palatinate, it must be noted that that argument is founded on an incorrect premiss since, as is clear from the previous paragraph, the appellant cannot rely on such a relaxation of the burden of proof.

65 The fifth ground must therefore be dismissed as being unfounded.

The sixth ground of appeal, alleging a manifest error of assessment, in so far as the General Court held that the measures referred to in the decision at issue did not significantly affect the appellant's position on the market concerned

Arguments of the parties

66 By its sixth ground of appeal, raised in the alternative, the appellant criticises the General Court, first, for having based its decision on a misconception of the relevant market for the purpose of assessing the condition relating to the substantial adverse effect on its position on the market. In that regard, the General Court adopted the incorrect approach in order to carry out its analysis. Secondly, the General Court imposed excessive requirements concerning causality. Thirdly, its analysis did not take account of the fact that the relevant market was growing and was based on erroneous considerations, regarding, in particular, the opening of a base by the airline Ryanair at Frankfurt Main airport and the geographic proximity of that airport to Frankfurt Hahn airport.

67 As regards, first of all, the definition of the relevant market, it criticises, in particular, paragraphs 117 and 119 et seq. of the order under appeal in so far as the General Court, in that decision, wrongly rejected the definition given by the appellant on the ground that it was not relevant in the field of State aid for the purpose of assessing the admissibility of an action under the fourth paragraph of Article 263 TFEU.

68 Similarly, the appellant submits that, in that part of the order under appeal, the General Court relied on an incorrect definition of the relevant market when it rejected the definition put forward by the appellant in that regard. The relevant market in the present case is that of the European air transport sector and, consequently, of the European network of air routes comprising the competitors concerned, namely Ryanair and the appellant.

69 Next, the appellant complains that the General Court, in particular in paragraph 118 of the order under appeal, rejected in their entirety and on the basis of erroneous examination criteria the evidence and arguments which it had submitted in order to establish that its position on the market concerned had been substantially affected, even though those factors and arguments were summarised in paragraph 117 of that order. In so doing, the General Court also departed from the requirements for evidence of such an adverse effect, in particular as regards the causal link between the measures at issue and that adverse effect, as set out in the judgment of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42).

70 On that basis, the General Court also infringed Article 47 of the Charter.

71 The appellant submits, lastly, that, contrary to what the General Court decided in that regard, in particular in paragraph 121 et seq. of the order under appeal, it provided a number of items of evidence concerning, inter alia, European air traffic, the European networks of airlines, the exponential growth of Ryanair and its passenger numbers, the opening of a Ryanair base at Frankfurt Main airport and the geographical proximity of that airport with that of Frankfurt Hahn. The appellant therefore demonstrated that the measures at issue had had a substantial adverse effect on its position on the market concerned.

72 The appellant concludes that if the General Court had assessed those factors correctly, it would have had to confirm the admissibility of the action.

73 The Commission contends that the sixth ground of appeal criticises the unfettered assessment of the facts and evidence by the General Court and is therefore inadmissible. In any event, the Commission considers, like the Federal State of Rhineland-Palatinate, that that ground of appeal should be rejected in its entirety as being unfounded.

Findings of the Court

74 It should be noted, at the outset, that the Court has repeatedly held that demonstration by the appellant of a substantial adverse effect on its market position does not entail a definitive ruling on the competitive relationship between the appellant and the undertakings in receipt of aid, but requires only that the appellant adduce pertinent reasons to show that the Commission's decision may harm its legitimate interests by substantially affecting its position on the market in question (see, to that effect, judgments of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 28; of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 41; of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 60; and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 57).

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

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

77 In that regard, the Court of Justice held, in paragraphs 63 and 64 of the judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission* (C-453/19 P, EU:C:2021:608), and contrary to what was held by the General Court in paragraph 116 of the order under appeal, that the prima facie finding that the grant of the measure referred to in the Commission decision results in a substantial adverse effect on an appellant's competitive position does not require it to define the market or markets concerned by providing information regarding their size and structure and the competitors on those markets.

78 On the other hand, as the General Court rightly recalled in paragraph 112 of the order under appeal, the mere fact, in the first place, that the measure which the appellant seeks to have annulled may exercise an influence on the competitive relationships existing in the market concerned and that it is in a competitive relationship with the beneficiary of that measure cannot suffice for it to be regarded as being individually concerned by that measure. In other words, an undertaking cannot simply rely on its status as a competitor of the undertaking benefiting from the measure which it seeks to have annulled (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 47 and 48, and of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 99 and 100).

79 In the second place, as the General Court rightly held in paragraph 115 of the order under appeal, demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in the appellant's commercial or financial performance, such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can also have an adverse effect on the competitive situation of an operator in other ways, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 61 and the case-law cited).

80 In the present case, first of all, in so far as, by its sixth ground of appeal, the appellant criticises the General Court, in essence, for having, for the purposes of examining a substantial adverse effect on its position on the market concerned, incorrectly defined that market by not considering that it was the European air transport sector, consisting of the European network of air routes operated by the various airlines active in that sector, that is to say, in particular by Ryanair and by the appellant, it must be held that that argument is based on a reading in part of the order under appeal and cannot therefore succeed. It is apparent from paragraph 130 of that order that the General Court took that market into consideration, as defined by the appellant itself at first instance.

81 Next, the General Court held, in paragraph 131 of the order under appeal, that even if the relevant market in the present case could be defined in that way, it could not, however, be considered that the appellant's position on that market had been substantially adversely affected, neither in the light of the fact that Ryanair operated air routes from Frankfurt Main or the other evidence put forward by the appellant.

82 In its unfettered assessment of the facts – which is a matter for it alone and cannot be challenged on appeal except where distortion of those facts is pleaded, which the appellant has not done in the present instance – the General Court drew the conclusion, in paragraph 141 of the order under appeal, that the appellant had not established a significant decline in its turnover, appreciable financial losses or a significant reduction in its market share on the market or markets in question following the adoption of the measures in favour of Frankfurt-Hahn airport, even if the latter were transferred to Ryanair. It added that the appellant likewise had not established the loss of an opportunity to make a profit or a less favourable development than would have been the case without those measures.

83 Lastly, the appellant's argument alleging that, in paragraph 117 et seq. of the order under appeal, the General Court rejected in their entirety and on the basis of erroneous examination criteria the elements and the arguments which it had set out in order to establish a substantial adverse effect on its position on the market concerned, when those factors demonstrated such an adverse effect, must be rejected.

84 After recapitulating, in paragraph 117 of the order under appeal, the eight arguments and evidence put forward by the appellant, the General Court held, first, in paragraph 118 of that order, that most of the appellant's arguments were limited to a description of the general competitive pressure exerted by low-cost airlines on traditional airlines. As has been pointed out in paragraph 78 of the present judgment, it is settled case-law that such a finding is not capable of demonstrating that the appellant was substantially affected by the decision at issue. Secondly, it should be noted that the General Court examined those arguments within the context of its

unfettered assessment of the facts, which led it to the conclusion set out in paragraph 141 of the order under appeal, such that, for the same reasons as those set out in paragraph 82 of the present judgment, the appellant's arguments must be regarded as inadmissible.

85 It follows that the argument alleging infringement of Article 47 of the Charter must also be rejected.

86 Accordingly, the appellant has failed to demonstrate that the General Court erred in law in concluding, in particular in paragraph 144 of the order under appeal, that the appellant had not proved to the requisite legal standard that it was individually concerned by the measures covered by the decision at issue, in such a way that its action for annulment could not be considered admissible under the second limb of the fourth paragraph of Article 263 TFEU.

87 Consequently, the sixth ground of appeal must be dismissed as being, in part, inadmissible and, in part, unfounded.

88 Since none of the grounds of appeal put forward by the appellant in support of its appeal can succeed, the appeal must be dismissed in its entirety.

Costs

89 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

90 Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, 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 appellant is the unsuccessful party and the Commission and the Federal State of Rhineland-Palatinate have applied for costs to be awarded against it, the appellant must be ordered to pay all the costs relating to the present appeal.

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

1. **Dismisses the appeal;**

2. **Orders Deutsche Lufthansa AG to bear its own costs and to pay those incurred by the European Commission and by the Federal State of Rhineland-Palatinate.**

[Signatures]