Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 30 March 2023 [1]

Case C-758/21 P

Ryanair DAC,
Airport Marketing Services Ltd
v

European Commission

(Appeal – State aid – Aid implemented by Austria in favour of Klagenfurt airport, Ryanair and other airlines using that airport – Article 85(3) of the Rules of Procedure of the General Court – Article 17 of Regulation (EU) 2015/1589 – Data relevant for the calculation of the aid to be recovered)

1. By their appeal, Ryanair DAC and Airport Marketing Services Ltd ('AMS' and, jointly, the 'appellants') seek the judgment of the General Court of 29 September 2021, *Ryanair and Others* v *Commission* (T-448/18, not published, EU:T:2021:626) ('the judgment under appeal') to be set aside. That judgment dismissed their action seeking the partial annulment of Commission Decision (EU) 2018/628, [2] in so far as it concerned those appellants.

I. Background to the dispute

2. The background to the dispute is described in paragraphs 1 to 39 of the judgment under appeal. For the purposes of the present appeal, it can be summarised as follows.

3. Ryanair is an airline and AMS is its subsidiary providing marketing strategy solutions, with the bulk of its activity consisting in the sale of advertising space on the Ryanair website. Klagenfurt Airport (Austria; 'the airport') is located on the outskirts of that city, which is the capital of the province of Carinthia. The owner and operator of the airport is Kärntner Flughafen Betriebsgesellschaft mbH ('KFBG'). The ultimate owners of the shares in KFBG have always been public authorities or entities. KFBG has a wholly owned subsidiary, Destinations Management GmbH ('DMG'), which provides various services to the airport. In particular, DMG acted as a consultant to attract airlines to the airport and concluded several agreements under which the airlines received considerable sums of money in exchange for marketing services.

[1] Original language: English.

[2] Decision of 11 November 2016 on State aid SA.24221(2011/C) (ex 2011/NN) implemented by Austria for the Klagenfurt airport, Ryanair and other airlines using the airport (OJ 2018 L 107, p. 1; 'the contested decision').

4. On 22 January 2002, four agreements were concluded. First, KFBG and Ryanair concluded an airport services agreement ('the 2002 ASA'). That agreement entered into force on 27 June 2002 for a period of five years and provided for an automatic renewal for a further five years if Ryanair fully complied with its commitments under that agreement. Under that agreement, Ryanair undertook to offer a service on at least a daily basis between the airport and London Stansted airport from 27 June 2002 to 26 June 2007 for a fixed fee per rotation. In addition, Ryanair was to levy a fixed amount per departing passenger as a passenger services charge for the airport plus a fixed amount per departing passenger as a security charge, and pay those charges to the airport. The 2002 ASA detailed the various services which the airport was to provide to Ryanair and provided for certain other payments to the airport.

5. Secondly, DMG and Leading Verge.com Limited ('LV'), which became FR Financing (Malta) Ltd ('FR Financing'), a subsidiary of Ryanair which has since been wound up, concluded a marketing services agreement ('the 2002 MSA between DMG and LV'). That agreement entered into force on the same day and was to end on 26 June 2007, to be automatically renewed for a further five years provided that LV fully complied with its commitments under the agreement. According to that agreement, DMG commissioned LV to generate a promotional plan, arrange for the provision of links to DMG's homepage and undertake other promotional activities in return for a fixed annual payment.

6. Thirdly, DMG and AMS concluded another marketing agreement ('the 2002 MSA between DMG and AMS'). That agreement, which entered into force on the same day for a five-year term, provided for a possible extension for an additional five years. Under that agreement, DMG appointed AMS to establish and operate, by 1 May 2002 at the latest and in return for annual fees, two links on the website www.ryanair.com to websites chosen by DMG to highlight the attractions of the province of Carinthia. That agreement also stipulated that AMS could potentially provide additional services.

7. Fourthly, a side letter to the 2002 MSA between DMG and LV ('the 2002 side letter') was concluded and entered into force on the same day. It was agreed that, in relation to the 2002 MSA between DMG and LV, a further payment for additional and intensified marketing measures within the duration of the agreement between DMG and LV was payable by DMG to LV.

8. The 2002 ASA, the 2002 MSA between DMG and LV, as amended, and the 2002 MSA between DMG and AMS (together, 'the 2002 agreements') ended on 29 October 2005 when Ryanair discontinued its passenger air transport services between the airport and London Stansted airport.

9. On 23 August 2006, KFBG and Ryanair entered into a new airport services agreement ('the 2006 ASA'). That agreement concerned a service three times a week to London Stansted airport, to be operated from 19 December 2006 to 21 April 2007. Ryanair was obliged to pay the official Klagenfurt airport charges. Owing to an incentive scheme, Ryanair benefited from an incentive of EUR 7.62 per departing passenger on the new scheduled service.

10. On 21 December 2006, DMG and AMS concluded a new marketing services agreement ('the 2006 MSA'), which entered into force on 28 February 2007. The 2006 MSA was linked to Ryanair's commitment to operate the flights contemplated by the agreement mentioned in the point above. AMS was obliged to provide a package of marketing services each year seeking, in particular, to promote the Klagenfurt/Carinthia destination.

11. The 2006 ASA and the 2006 MSA (together 'the 2006 agreements') were applicable until 21 April 2007.

12. On 11 October 2007, following a complaint lodged by a competitor of Ryanair in the European air passenger transport sector alleging that Ryanair had been granted unlawful State aid by, inter alia, the province of Carinthia, the city of Klagenfurt, Kärnten Werbung Marketing & Innovations management GmbH and Klagenfurt airport, via KFBG, the Commission forwarded the complaint to the Republic of Austria and requested further information. By letters of 15 November 2010 and 24 March 2011, the Commission sought additional information from Austria. On 8 April 2011, the Commission requested further information from Ryanair, which was then forwarded to Austria, which subsequently provided its comments.

13. On 22 February 2012, the Commission informed Austria of its decision to initiate the investigation procedure laid down in Article 108(2) TFEU, in particular, in relation to the 2002 and 2006 agreements with Ryanair. [3]

14. By letters of 29 May and 20 July 2012, Ryanair's legal counsel sought, in particular, access to the administrative file, which the Commission rejected.

15. By letter of 24 February 2014, the Commission asked Austria for further information concerning a marketing agreement concluded between the airport and Ryanair on 22 January 2002, which Austria answered on 11 June 2014.

16. On 23 July 2014, the Commission decided to extend the investigation procedure.

17. In the contested decision, the Commission considered, in particular, that, by the 2002 and 2006 agreements, the Republic of Austria granted illegal aid to Ryanair which was incompatible with the internal market. It determined the recoverable aid amounts on the basis of the negative part of the projected annual incremental flow at the time the agreements at issue were concluded, for each year that those agreements were applicable. It found that the appellants were jointly and severally liable for full repayment of the aid received through the agreements at issue, with an indicative principal amount of EUR 1 827 267 and EUR 141 326 respectively and ordered the recovery of that aid.

II. Proceedings before the General Court and the judgment under appeal

18. At first instance, Ryanair, AMS and FR Financing raised six pleas in support of their action and, on 24 August 2018, they made an application for measures of inquiry, by which they requested that the Commission produce certain documents. On 25 September 2020, those parties lodged two documents as additional evidence (that is, following the closure of the written part of the procedure). These two documents were the airport's table of estimates of non-aeronautical revenue per departing passenger for the airport services agreements and marketing services agreements (Annex E.1) and an unredacted version of cost data in a report by Ryanair's economic consultant, Oxera, of 3 November 2014 (Annex E.2).

[3] Published in the *Official Journal of the European Union* on 3 August 2012 (OJ 2012 C 233, p. 28).

19. By the judgment under appeal, the General Court considered that that evidence was inadmissible, given that the applicants at first instance failed to justify the late submission of the additional evidence under Article 85(3) of the Rules of Procedure of the General Court ('the Rules of Procedure'). That court also dismissed all the pleas raised as unfounded and therefore dismissed the action in its entirety.

III. Assessment

20. The appellants put forward four grounds of appeal.

A. First ground of appeal, concerning the admissibility of additional evidence produced by the appellants before the General Court

21. The appellants claim, in essence, that the General Court erred in law by rejecting as inadmissible, and therefore refusing to take into account for its judicial review, key pieces of evidence that were submitted by them prior to the closure of the oral part of the procedure. In particular, they submit that the General Court erred (i) in disregarding, or failing duly to consider, the legal principles underpinning the rules in Article 85(1) to (3) of the Rules of Procedure and (ii) in disregarding the case-law applying those provisions.

22. Article 85 of the Rules of Procedure provides for different stages at which evidence may be produced or offered. Article 85(1) provides: 'Evidence produced or offered shall be submitted in the first exchange of pleadings' (*the general rule*). Article 85(2) provides: 'In reply or rejoinder a main party may produce or offer further evidence in support of his arguments, provided that the delay in the submission of such evidence is justified' (*the derogation*). Article 85(3) provides: 'The main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified' (*the exception*).

23. The Court has already held that those rules take into account the principles of adversarial proceedings and equality of arms as well as the right to a fair trial in the interests of the sound administration of justice.[4] The Court has also ruled that 'the [EU] Courts … have jurisdiction to review the merits of the reasons for the delay in submitting or offering that evidence and, depending on the case, the content of that evidence and also, if its belated production is not justified to the requisite legal standard or substantiated, jurisdiction to reject it'.[5]

24. That passage concerned Article 85(2) of the Rules of Procedure and the case-law, that the Court cites therein, related to the equivalent provision in the former Rules of Procedure.[6]

[4] Judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice* (C-243/04 P, not published, EU:C:2005:238, paragraph 30 (concerning the equivalent provisions in the former Rules of Procedure of the General Court).

[5] Judgment of 16 September 2020, *BP* v *FRA* (C-669/19 P, not published, EU:C:2020:713, paragraph 41). The Court cites here the judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice* (C-243/04 P, not published, EU:C:2005:238, paragraphs 32 and 33).

[6] That is, Article 48(1) of the former Rules of Procedure of the General Court.

25. It follows from the judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice*,[7] as well as from the judgment of 16 September 2020, *BP* v *FRA*,[8] that the above reasoning is also applicable for Article 85(3) of those rules of procedure, whereas – given that Article 85(2) is a derogation and Article 85(3) an exception – the latter standard is stricter and is applicable in exceptional circumstances only (see point 31 of the present Opinion).

26. First of all, the appellants' primary argument is that the General Court erred in law by rejecting the two pieces of evidence as inadmissible, whereas such evidence must always be accepted by the General Court for the purpose of its judicial review 'unless there are compelling reasons to the contrary'.

27. That argument must be rejected as unfounded. Indeed, it amounts to a reversal of the logic governing the rules on the taking of evidence before the General Court.

28. It follows from the *Gaki-Kakouri* case-law that accepting evidence submitted belatedly constitutes an exception. Moreover, it follows from the wording of Article 85(3) of the Rules of Procedure itself that it is for the parties seeking to produce such evidence to justify sufficiently the delay in the submission.

29. Hence, contrary to the appellants' argument, the General Court is not obliged always to accept evidence submitted belatedly unless it establishes that rejecting that evidence is necessary for 'compelling reasons' (that is, due to the adversarial principle or the notion of fair procedure before the General Court).

30. Rather, the onus is on the parties themselves to justify that delay.

31. As the General Court rightly held in *TestBioTech and Others* v *Commission*,[9] 'the submission of evidence before the oral part of the procedure is closed is subject to the two-fold requirement that [(i)] the delay in the submission of the evidence is justified and [(ii)] that the late submission of the evidence is justified by exceptional circumstances. As to the second condition of admissibility [(ii)] … it should be noted that, in any event, the exceptional nature of such a submission implies that it was impossible for the applicant to produce the documents in question before the Court prior to the hearing or that earlier submission could not reasonably be required of the applicant. *It is for the party wishing to submit the documents before the Court to prove that that condition is met at the time when the new evidence is submitted*' (emphasis added).

32. I consider that the above approach of the General Court (where, in certain situations, it requires evidentiary proof to support the justification for late submission of evidence) can find support in the Court's judgment in *BP* v *FRA*,[10] where the Court makes a reference to the duty to adduce such evidence to back up the justification.

33. In paragraph 47 of the same judgment, the Court also points out that Article 85(3) of the Rules of Procedure must be interpreted rather strictly ('it is only *exceptionally* that the parties may produce or offer further evidence. It is clear from that provision that any delay in the submission of such evidence *must be justified*') (emphasis added).

7 C-243/04 P, not published, EU:C:2005:238, paragraphs 32 and 33.

8 C-669/19 P, not published, EU:C:2020:713, paragraph 47.

9 Judgment of 15 December 2016, (T-177/13, not published, EU:T:2016:736, paragraph 251).

10 Judgment of 16 September 2020 (C-669/19 P, not published, EU:C:2020:713, paragraph 44).

34. In the proceedings at first instance, the appellants argued, in essence, with respect to the table of non-aeronautical revenues obtained from the airport, that the Commission referred to that table in its rejoinder. Referring to their request for a measure of organisation, they explain that it was difficult and took significant time to obtain information from the airport, because the information was old, staff had changed at the airport, and the COVID-19 crisis affected both the airport staff and the applicants and their advisers. According to the appellants, they only received the information 'in the last few days'.

35. To my mind, it is clear – as may be inferred from the abovementioned case-law – that the appellants should have been able to provide some evidence that proves that they tried to obtain the table from the airport early on and that they kept on sending reminders to the airport in this regard; not least upon receiving the Commission's observations on the new evidence (of 14 October 2020), where the Commission argued, inter alia, that the delay was not justified because the explanations were unverifiable. Given that such a significant period had elapsed between the Commission's rejoinder (25 February 2019) and the oral hearing (29 September 2020), the appellants should have come forward with some evidence of the kind I mention above, in order to show that they could substantiate their justification, under Article 85(3) of the Rules of Procedure.

36. It should be pointed out that the appellants brought forward no such evidence at the appeal stage either.

37. Exceptions must be interpreted strictly and so the General Court, in cases such as this one, where it has doubts as to the justification provided by the party for the late submission, must be able to carry out at least a rudimentary verification and may, as a result, require that party to back up its claim with evidentiary proof.

38. Indeed, the Court has already ruled in a similar situation, where the party was arguing that the delay in submitting evidence at first instance was due to his or her bad health, that the General Court was right when it rejected that argument, given that the party was incapable of providing any medical certificate to that effect. [11]

39. Next, at the hearing, the appellants sought to rely on the General Court's judgment of 15 June 2022, *Qualcomm* v *Commission* (*Qualcomm – Exclusivity payments*) (T-235/18, EU:T:2022:358), where evidence submitted late by Qualcomm was accepted as admissible by that court.

40. Suffice it to point out that the present case is objectively not comparable, in material respects, to that case in at least four aspects: indeed, (i) the justification for the late submission is different; (ii) the nature of the documents at issue is different; (iii) the procedures are different; and (iv) the status of the applicant is different. As regards (i), Qualcomm relied not only on Article 85(3) of the Rules of Procedure, but also argued that, in that case, Article 85(3) should be interpreted 'in the light of Article 92(7) of those rules' (evidence may be submitted in rebuttal and previous evidence may be amplified). While I find the General Court's approach in Qualcomm convincing, suffice it to state that, in the present case, the appellants made no such argument (either at first instance or at the appeal stage) nor have they raised such argumentation expressly or implicitly – despite the fact that the Commission itself did explicitly address Article 92(7) and argued that that provision was not applicable. In relation to (ii), it appears from that judgment that Qualcomm had objective

[11] Judgment of 11 September 2019, *HX* v *Council* (C-540/18 P, not published, EU:C:2019:707, paragraphs 65 to 68).

reasons why it could not obtain the documents at issue and the General Court explains in detail in that judgment (paragraphs 134 to 153) that the production, as a whole, of the further evidence after the end of the written procedure was 'justified by exceptional circumstances' and was therefore admissible. As far as (iii) is concerned, the Qualcomm case relates to competition law whereas the present case concerns State aid (see point 94 of the present Opinion). As regards (iv), the beneficiary in a State aid case is not the defendant before the General Court.

41. Finally, the appellants also seek to rely, in particular, on the judgments in *Crocs* v *EUIPO – Gifi Diffusion (Footwear)*[12] and *Schmid* v *EUIPO – Landeskammer für Land- und Forstwirtschaft in Steiermark (Steirisches Kürbiskernöl)*.[13] They argue that the General Court misapplied that case-law, alleging that it follows from that case-law that a late submission of evidence may be justified where the party could not have that evidence before and where, when assessing whether the late submission is justified, it is necessary to verify whether the evidence at issue was already contained in the administrative file upon which the contested decision was founded. If so, it would not be justified to reject that evidence, given that the defendant had already taken the evidence into account before adopting its decision.

42. It is worth noting that that case-law does not have the scope that the appellants attribute to it. Indeed, the Court has not ruled exactly as above in a situation such as that at issue here. It is important to point out that that case-law originates in EU trade mark litigation and can be explained by certain specificities of litigation in that particular field of EU law.

43. That conclusion follows from the Court's order of 13 September 2011, *Wilfer* v *OHIM*.[14]

44. In essence, in that case, the Court stated that the General Court was right to point out that, in accordance with Article 63 of Council Regulation (EC) No 40/94,[15] it cannot re-evaluate the factual circumstances in the light of evidence adduced for the first time before it. The purpose of actions before the General Court is to review the legality of decisions of the Boards of Appeal of EUIPO for the purposes of that provision, and that legality must be assessed in the light of the information available to them when those decisions were adopted (paragraphs 40 and 41 of the order in *Wilfer* v *OHIM*).

45. Furthermore, the Court pointed out that it was common ground that the expert opinion and the representations of EU and national trade marks relied on by the applicant as evidence were submitted for the first time before the General Court and had not been submitted to the Board of Appeal of EUIPO. The General Court was therefore right to reject them as inadmissible. That rejection did not therefore infringe the applicant's right to be heard (paragraph 42 of the order in *Wilfer* v *OHIM*).

46. Finally, the Court noted that it was not apparent either from the application initiating proceedings before the General Court or from the judgment under appeal that the appellant had claimed, before that court, that the Board of Appeal infringed the principle that it should examine the facts of its own motion, in order to establish the admissibility of that evidence (paragraph 43 of the order in *Wilfer* v *OHIM*).

[12] Judgment of 14 March 2018 (T-651/16, not published, EU:T:2018:137).

[13] Judgment of 7 June 2018 (T-72/17, EU:T:2018:335).

[14] C-546/10 P, not published, EU:C:2011:574, paragraphs 40 to 43 ('the order in *Wilfer* v *OHIM*').

[15] Council Regulation of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

47. As a consequence, the case-law raised by the appellants in point 41 of the present Opinion is inapplicable in the present case and their arguments should be rejected as unfounded.

48. It follows from all the foregoing considerations that the first ground must be rejected as unfounded.

B. Second ground of appeal, alleging misinterpretation of Article 17 of Regulation 2015/1589 and misapplication of Article 296 TFEU

1. First limb of the second ground of appeal

49. The appellants argue that, according to Article 17(2) of Regulation (EU) 2015/1589,[16] the Commission's measure, that is, the request for information ('RFI'), must relate to a specific subject matter of the investigation. The General Court misapplied settled case-law, according to which an RFI must address a specific measure in order for the limitation period to be interrupted under that provision. The appellants claim that the General Court also breached the principles of legitimate expectations and of legal certainty.

50. The contested decision identifies four agreements from 2002 as regards the aid granted to Ryanair. Furthermore, it is apparent from the judgment under appeal that it was common ground between the parties that, as regards all the 2002 agreements, the limitation period laid down in Article 17 of Regulation 2015/1589 began to run on 9 August 2002. In that context, the appellants had argued during the administrative procedure, and then before the General Court, that the 10-year period had expired by the time the Commission requested information from the Austrian authorities and Ryanair about the 2002 agreements (those requests having been made only in 2015 whereas the limitation period expired on 8 August 2012) (paragraph 66 of the judgment under appeal). According to the appellants, the Commission became aware of the existence of the 2002 agreements only on 31 August 2012 at the earliest, by means of a document sent to it by Ryanair, as evidenced by its decision to extend the formal investigation procedure. They argue that the Commission did not take any action between 9 August 2002 and 8 August 2012 capable of interrupting the limitation period. They submit that, before 31 August 2012, the Commission had been unable to take any action interrupting the limitation period with regard to the 2002 agreements. The reason for that is that such an interruptive effect required the 'action taken', within the meaning of that article, to refer relatively precisely to the aid at issue. By considering that a 'catch-all' phrase produces such an interruptive effect, the General Court misinterpreted Article 17 of Regulation 2015/1589.

51. In its decision of 22 February 2012 to initiate the procedure, the Commission stated that, based on the information available to it, it had decided to examine, as regards the companies at issue, 'the 2002 agreements with Ryanair' and 'the 2006 agreements with Ryanair'. As regards the 2002 agreements, it is apparent that there was a cooperation agreement between KFBG and Ryanair of 22 January 2002 and a marketing agreement between DMG and LV, also of 22 January 2002. As regards its decision of 23 July 2014, by which the Commission extended the formal investigation procedure, it is apparent from that decision that that extension related also to the marketing agreement concluded between DMG and AMS of 22 January 2002, and to 'the covering letter attached to the marketing agreement between DMG and LV', also of the same date.

[16] Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

52. Then, in the judgment under appeal (paragraphs 73 to 77), the General Court analysed the various elements and requests for information that had been sent to the Austrian authorities and to Ryanair before the initiation of the formal investigation procedure and inferred from this that all the requests that it analysed also covered the 2002 MSA between DMG and AMS and the 2002 side letter between DMG and LV, with the result that they were measures capable of interrupting the limitation period laid down in Regulation 2015/1589.

53. Next, in paragraphs 77 to 79 of that judgment, the General Court found that various elements in the decision at issue establish that the 2002 ASA and 'the marketing agreements concluded in 2002' were inextricably linked and so the limitation period had indeed been interrupted by the RFI analysed by the General Court.

54. Finally, in paragraphs 80 to 84 of that judgment, the General Court held, in essence, that as the Austrian authorities and Ryanair were aware, in their capacity as addressees, of the content of the letters requesting additional information from them, the indication of the dates on which the Commission had taken the measures capable of interrupting the limitation period was sufficient for it to fulfil its obligation to state reasons.

55. I would point out that the Court has already ruled that the limitation period laid down in Article 17 may be interrupted by a measure that has not been notified to the beneficiary of the aid. [17]

56. It has also ruled that the expiry of that period merely places a time limit on the Commission's power to recover State aid, and the expiry of that period cannot therefore have the effect of retroactively regularising unlawful State aid solely because it becomes existing aid. [18]

57. However, it seems that the Court has not yet provided any express clarification as to the degree of precision of information that a measure, taken by the Commission within the meaning of Article 17 (such as an RFI), must contain in order to interrupt that period.

58. In that connection, so far the General Court has only held that 'the simplicity of the [RFI] does not have the consequence of depriving it of legal effect as a measure capable of interrupting the limitation period provided for in [what is now Article 17 of Regulation 2015/1589]'. [19]

59. This raises the question whether – as the appellants claim – the General Court adopted an overly broad interpretation of the concept of 'measure' capable of constituting an act interrupting the limitation period provided for in Article 17 of Regulation 2015/1589.

60. First, the wording of Article 17(2) of Regulation 2015/1589 provides that 'any measure … with regard to the unlawful aid shall interrupt the limitation period.'

61. The wording makes it clear that the measure must be 'with regard to the unlawful aid'.

62. That means that the EU legislature did not intend to give the Commission carte blanche in this respect.

[17] See, in relation to Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 17 of Regulation 2015/1589), judgment of 6 October 2005, *Scott* v *Commission* (C-276/03 P, EU:C:2005:590, paragraph 36).

[18] See, by analogy, judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo* (C-387/17, EU:C:2019:51, paragraphs 61 and 62).

[19] Judgment of 10 April 2003, *Département du Loiret* v *Commission* (T-369/00, EU:T:2003:114, paragraph 82).

63. Secondly, the purpose of the limitation period is to ensure legal certainty (see recital 26 of Regulation 2015/1589), not least in those cases where the grant of unlawful aid has remained undetected for a long period of time. This may happen for instance in cases where a Member State has not realised that a certain measure qualifies as State aid.[20] Moreover, legal literature mentions as a further purpose of the limitation period the protection of competition.[21]

64. On the one hand, the measure must be sufficiently specific so as to avoid giving the Commission that carte blanche, in order to avoid a situation where it is possible to regularly send standardised RFIs to Member States and beneficiaries, thus easily circumventing the ten-year limitation period. Such an interpretation would – as the appellants rightly point out – breach the protection of legitimate expectations and legal certainty of the beneficiary of the aid (and of the Member State).[22] In my opinion, it must also be taken into account that ten years is already a significant period of time, for any company (or Member State), during which possible claims for aid recovery may be expected. This uncertainty also represents an economic burden for any company.

65. On the other hand, the Commission needs a sufficient period of time in order to be able to conduct its investigations. A complete specification of the measure to be examined under State aid law cannot be required. That would be an excessively high hurdle for the Commission. Any investigation is initially characterised by an information gap between the Member State or the beneficiary and the Commission.

66. Thirdly, as regards the content and level of precision of an RFI that is capable of interrupting the limitation period, it clearly follows from Regulation 2015/1589 that, when the Commission has information about an alleged unlawful aid or misuse of aid, it is entitled to request information, in particular, from the Member State concerned. The Member State is obliged to provide *all necessary information to enable the Commission to take a decision under the preliminary examination or formal investigation procedure*.[23]

67. Indeed, the fact that the RFI is a tool that allows the Commission to seek *necessary* information follows from recitals 9, 10, 24 and 36, as well as Articles 2(2), 5(1), 7(1), 12(2), 21(1) and 25(1) of Regulation 2015/1589.

68. Given that the EU Courts have already ruled on a number of key elements of RFIs under Regulation (EC) No 1/2003[24] and, in particular the 'necessity' element, that case-law is applicable *mutatis mutandis* to the interpretation of RFIs under Regulation 2015/1589. Indeed, Article 18 of Regulation No 1/2003, entitled 'Requests for information', provides for exactly the same investigative tool available to the Commission as the one it uses in State aid investigations.

[20] See, for instance, Säcker, F.J., and Montag, F. (eds.), *European State Aid Law*, Beck, 2016, p. 1613.

[21] Ibid. See also Lübbig, T. and Martin-Ehlers, A., *Beihilfenrecht der EU: das Recht der Wettbewerbsaufsicht über staatliche Beihilfen in der Europäischen Union*, Beck, 2009, p. 228.

[22] See judgment of 6 October 2005, *Scott* v *Commission* (C-276/03 P, EU:C:2005:590, paragraph 30).

[23] See Articles 2(2), 5(1) and (2), which, by virtue of Article 12(2), apply to information requested pursuant to that provision.

[24] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p 1).

69. Given the 'necessity' requirement stated in Article 18(1) of Regulation No 1/2003, the EU Courts have clarified that the Commission is only entitled to require the disclosure of information that may enable it to investigate presumed infringements, that justify the conduct of the investigation and are set out in the RFI. [25]

70. There must be a correlation between the information requested by the Commission and the infringement under investigation. The Commission must reasonably suppose that the information will help it determine whether the alleged infringement has taken place. [26]

71. The 'necessity' of an RFI must appear in the reasoning of the request. In relation to the purpose of the RFI, the Commission must identify, in clear, precise and unambiguous terms, the suspected infringement of the competition rules that the Commission intends to investigate. [27]

72. It follows that the statement of reasons of an RFI may be neither vague nor generic, especially if the investigation is no longer at the very early stage and where the suspicions of infringements involved should be presented with sufficient precision. [28]

73. Indeed, the obligation on the Commission to state specific reasons is a fundamental requirement, showing not only that the RFI is justified, *but also to enable the undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence, and ensuring that the EU Courts can exercise judicial review*. [29]

74. It follows that the information sought by the Commission should be identified as precisely as circumstances permit.

75. Importantly, to my mind, since the interruption of the limitation period laid down in Article 17(2) of Regulation 2015/1589 constitutes an exception to the ten-year limitation period laid down by Article 17(1) of that regulation, it must be interpreted narrowly.

76. Next, as we have seen above, Article 17(2) requires that, in order to interrupt the limitation period in accordance with that regulation, a written RFI by the Commission must be 'with regard to the unlawful aid' and Article 18 of Regulation 1/2003, which may be applied by analogy, requires that RFIs must be 'necessary'.

77. As we have seen in the overview of the case-law above, an RFI is 'necessary' within the meaning of Article 11(1) of Regulation No 17, [30] the predecessor provision of Article 18 of Regulation No 1/2003, if it 'may legitimately be regarded as having a connection with the putative infringement'. [31]

[25] Judgments of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149, paragraph 23), and of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraph 68). This section draws, inter alia, on the cases discussed in the legal literature. See Geulette, A., and Scholz, M., *Article 18 Requests for Information*, in Prete, L., Laitenberger, J., Gauer, C., and Dekeyser, K. (eds.), *Regulation 1/2003 and EU Antitrust Enforcement*, Wolters Kluwer, 2022, p. 433 et seq., where more case-law is cited.

[26] See judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraph 70 and the case-law cited).

[27] Judgment of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149, paragraphs 20, 24 and 25).

[28] Judgment of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149, paragraph 39).

[29] Judgment of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149, paragraph 19).

[30] Council Regulation of 6 February 1962 – First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), which was the predecessor regulation to Regulation 1/2003.

[31] Judgment of 12 December 1991, *SEP* v *Commission* (T-39/90, EU:T:1991:71, paragraph 29) (appeal dismissed by the Court).

78. To my mind, it is clear that the same approach must apply to RFIs in the context of the State aid procedure. Therefore, the RFI is 'necessary' if it may legitimately be regarded as having a connection with the putative unlawful State aid.

79. It follows that, in order validly to interrupt the ten-year limitation period laid down by Article 17(1) of Regulation 2015/1589, an RFI must be necessary for the preliminary investigation or proceedings and, ultimately, must be necessary for the adoption of the unlawful State aid-recovery decision. Therefore, the Commission cannot, for instance, make an RFI the sole purpose of which is to prolong the limitation period artificially so as to preserve the power to recover unlawful State aid.[32] RFIs solely for that purpose cannot be 'necessary' for the purposes of 'the infringement proceedings'.

80. Furthermore, if the Commission were able to interrupt the limitation period by sending 'catch-all' RFIs that are not necessary for the proceedings, it would be able to prolong systematically the limitation period beyond the already quite significant 10-year maximum laid down by Article 17(1) of Regulation 2015/1589, thereby subverting it.

81. It should be pointed out that my above approach has already been followed in the case-law of the EU Courts, which has analysed whether the Commission's RFIs under Regulation No 17 were capable of interrupting the limitation period provided under Regulation (EEC) No 2988/74.[33]

82. In the present case, the General Court examined the wording of all four RFIs, of the questions asked by the Commission as well as the answers provided by Ryanair. The General Court then reviewed the criteria that constitute a sufficient specification of the individual contracts 'with regard to' which an assessment can be made as to their legality. I consider that, in the present case, the RFIs fulfil the conditions for the interruption of the limitation period. They were not vague and had a purpose of obtaining necessary information in relation to the suspected aid.

83. Directly related to this is the question of the conditions under which the contracts can be considered to be inseparably linked. That is relevant for the purposes of establishing whether the fact that two agreements were specifically mentioned, whilst the other two were not, should be considered as lacking sufficient precision and thus not related to the agreements not mentioned.

84. According to the General Court, there is an inseparable link between the contracts resulting from the degree of economic connection between the contracting parties, the same point in time at which the contracts were concluded, as well as the connection of the contracts in terms of subject matter and terms and condition (judgment under appeal, paragraph 77 et seq.).

85. Taking into account this close connection, a splitting of the contracts with regard to the interruption of the limitation period would, in my opinion, be arbitrary. The four contracts form an economic construct, which was only split into four contracts, in particular, because the company itself is split into subsidiaries. A severance of this connection would therefore disregard the factual context of the case.

[32] See, to that effect, judgment of 15 February 2001, *Austria* v *Commission* (C-99/98, EU:C:2001:94, paragraphs 45 to 67).

[33] Regulation of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1). See judgment of 19 March 2003, *CMA CGM and Others* v *Commission* (T-213/00, EU:T:2003:76, paragraphs 484 to 511) (appeal dismissed by the Court).

86. Even though the General Court did not examine whether the RFIs in question meet the criterion of 'necessity' (which I explained above), it is clear from the documents before the Court that, in the present case, those RFIs were indeed necessary in so far as they manifestly had a connection with the putative unlawful State aid and were necessary for the preliminary investigation and, ultimately, for the adoption of the unlawful State aid recovery decision.

87. I consider that my above-proposed solution follows from the interpretation of Regulation 2015/1589 and does not imply that the Commission has carte blanche, nor does it set unattainable standards for that institution's investigations. It thus forms a balance between the protection of legal certainty and the restoration of effective competition as two rival principles enshrined in that regulation (recitals 25 and 26).

88. It follows that the first limb of the second ground of appeal must be rejected as unfounded.

2. Second limb of the second ground of appeal

89. The appellants submit, in essence, that the General Court misapplied Article 296 TFEU when it found the reasoning of the contested decision to be sufficient, despite the fact that the decision did not explicitly explain why the Commission had rejected the arguments that the appellants had made during the administrative procedure, namely that the limitation period in Article 17 of Regulation 2015/1589 had lapsed.

90. The judgment under appeal states that it is sufficient to set out the facts and the legal considerations of fundamental importance in the context of the decision.[34] Furthermore, 'given that the Austrian authorities and Ryanair were aware … of the content of the letters requesting additional information that had been sent to them by the Commission, the latter, for the purposes of Article 296 TFEU, was supposed to state only the facts of fundamental importance in the context of the contested decision'.[35]

91. To my mind, what is decisive is whether the assumption that the correspondence between the Commission and the addressee is to be considered as a whole is compatible with the principles established by the case-law on Article 296 TFEU.

92. As paragraph 80 of the judgment under appeal rightly points out, the Court has already clearly stated that 'it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of 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'.[36]

93. Since the 'context' manifestly also includes all correspondence, the appellants' argument based on a misapplication of the case-law regarding Article 296 TFEU is unfounded in the present case.

[34] Judgment under appeal, paragraph 81 (and the case-law cited).

[35] Judgement under appeal, paragraph 83.

[36] Judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 63 and the case-law cited).

94. It is necessary to bear in mind that the procedure for reviewing State aid is a procedure initiated in respect of the Member State responsible for granting the aid and interested parties (including the recipient) cannot seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State. [37]

95. Therefore, the Commission was not obliged to respond specifically to the observations of the appellants in this regard.

96. It follows that the second limb of the second ground of appeal must be rejected as unfounded and, as a result, the second ground of appeal must be dismissed in its entirety.

C. Third ground of appeal, alleging distortion of evidence when assessing if the Commission lawfully applied the market economy operator test

97. The appellants submit, in essence, that the General Court distorted the clear sense of the evidence produced before it when assessing if the Commission lawfully applied the so-called 'market economy operator test' ('MEO test') when determining if the appellants received an advantage within the meaning of Article 107(1) TFEU. In particular, they argue that the General Court distorted evidence related to: (i) the security fee stipulated in an airport services agreement between the airport and Ryanair; (ii) the estimation of incremental operating costs that the airport could have expected (the security margin); and (iii) the load factor relied on by the Commission when carrying out its *ex ante* profitability assessment.

98. It is necessary to assess whether or not the elements raised by the appellants were distorted by the General Court in the sense of the Court's case-law [38] and, if so, whether that distortion is such that it vitiated the General Court's conclusion that, in essence, the Commission based its finding of the existence of an advantage on information and data that were sufficient and credible.

99. However, it is not sufficient that the appellants 'specified all relevant locations in the case file that allow the Court to conclude that unlawful distortions were made', as the distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence. [39]

1. Security fee

100. The appellants refer to the arguments they made at first instance (that the security fee was invoiced to and paid by Ryanair) and claim that the evidence on file shows that Ryanair was both contractually obliged to pay the security fee and did, in fact, pay it in accordance with that obligation. They argue that the General Court failed to consider duly the evidence laid before it.

101. First of all, in the paragraphs at issue in the appeal (paragraphs 331 and 332), the General Court did not indicate that that fee was not passed to Ryanair by the airport. Instead, it merely stated that that fee was repaid to Ryanair.

[37] Judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192, paragraphs 73 to 75).

[38] Judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraphs 43 and 44).

[39] Judgments of 8 March 2016, *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraph 32), and of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154, paragraph 52).

102. However, even if it turned out that it manifestly follows from the evidence invoked by Ryanair that it did pay that security fee to the airport (*quod non*) – which, in any event, the General Court did not call into question in those paragraphs – that would not necessarily establish that the General Court committed the distortions of evidence claimed by the appellants in this respect and that it erroneously came to the conclusion that the Commission could consider – without committing a manifest error of assessment – that that fee constituted an incremental cost for the airport for the purposes of analysing the profitability of the 2006 agreements.

103. Indeed, the General Court based its conclusion on the explanation of the Commission, according to which the Austrian authorities confirmed on two occasions that the security fee was ultimately repaid to Ryanair.

104. In paragraph 332 of the judgment under appeal, the General Court does no more than point out in this regard that the Commission sought in a diligent manner, from the Member State concerned, relevant information, which allowed the General Court to determine whether the security fee was, in fact, repaid to Ryanair.

105. I consider that the General Court was entitled to conclude that the Commission had fulfilled its obligation to conduct a diligent and impartial examination and that it had to rely on the information provided by Austria and consider that the security fee was an incremental cost for the airport for the purposes of the profitability analysis of the 2006 agreements.

106. Furthermore, even if one were to argue that, in the absence of concrete evidence produced by the Commission, the General Court could not attribute such weight to the assertions of the Commission (*quod non*), that would in any event not amount to a distortion of evidence within the meaning of the Court's case-law. [40]

107. Suffice it to say that it was not impossible for the appellants to establish that the security fee was not repaid to Ryanair, given that it is conceivable that an analysis of Ryanair's accounting would have been capable of showing that.

2. Security margin

108. As regards the security margin added by the Austrian authorities to the values that were used as a basis of calculating the incremental operating costs relevant for the purposes of the profitability analysis of the 2002 agreements, the appellants claim that the 2018 report from Oxera, their economic adviser, shows that the Commission's estimates of the incremental costs were inexplicably high, and that the General Court distorted evidence by disregarding or failing to consider that report duly (in paragraphs 301 and 302 of the judgment under appeal).

109. It is true that paragraphs 301 and 302 attacked by the appellants, do not mention the 2018 Oxera Report.

[40] Which is recalled in point 99 of the present Opinion.

110. However, it does not follow *ipso facto* that the General Court distorted that document. Rather, I consider that, by their argumentation, the appellants are in fact seeking to contest the weight that that court attributed to the arguments of the Commission as opposed to their own arguments. That, however, amounts to the appellants seeking a new assessment of facts and evidence, which is inadmissible on appeal.

111. Moreover, their submission is based on a partial reading of the judgment under appeal. The General Court's assessment of the appellants' wider claim at first instance alleging an overestimation of the incremental costs related to the 2002 agreements (the security margin is part of those incremental operating costs) appears in paragraph 288 et seq. of the judgment under appeal. In particular, in paragraphs 289 and 296, the General Court refers to the 2018 Oxera Report. Therefore, the appellants' argument that no reference to that report was made in the judgment under appeal is simply wrong and their claim that the General Court disregarded that report is unfounded.

112. Suffice it to point out that the General Court considered the Commission's explanations sufficient in order to dismiss the alleged overstatement of incremental operating costs (including the security margin), without it being necessary for it to explicitly mention the 2018 Oxera Report in relation to every single claim made by the appellants in that context. Hence, there was no distortion of evidence by the General Court.

3. Load factor

113. The load factor was relevant to the *ex ante* profitability analysis regarding the 2002 agreements. The contested decision used a 70% load factor, which the appellants consider too low. They claim that: (i) the 2002 ASA set a target load factor of 76%; (ii) the Commission used a higher load factor of 85% in its analysis of the 2006 agreements; (iii) the contested decision showed that the airport had civilian aircraft operations soon after its founding in 1915 and thus had gathered 'many decades of civilian aviation experience'; and (iv) the 2018 Oxera Report showed that the target load factor of 76% was close to, although slightly below, the load factor of approximately 80% achieved by Ryanair across its network. The appellants complain that the General Court disregarded, or failed to consider the evidence duly, and took the Commission's pleadings at face value.

114. To my mind, the appellants' arguments should be rejected for reasons analogous to those I raise in relation to the security margin above.

115. The General Court states that the 2002 ASA had a target load factor of 76% – just as the appellants argue in the present ground of appeal – and that the Commission used 70% in the contested decision, without having committed a manifest error of assessment, given that the airport had, at that stage, no experience with low-cost airlines and that those airlines were at that point less well established than they are now.

116. The fact that the airport had been in operation since 1915 and thus gathered 'civil aviation experience' cannot call into question the fact it had no experience with Ryanair or other low-cost airlines at the time it entered into the 2002 agreements. Indeed, the appellants do not dispute that.

117. Therefore, the appellants' argument that the General Court disregarded, or did not duly consider, the evidence laid before it must be rejected as unfounded. The appellants may disagree with the General Court's assessment of evidence, but that does not mean that that court distorted that evidence.

4. Conclusion on the third ground of appeal

118. The appellants have failed to show that the General Court distorted evidence, let alone that such distortions are obvious. Therefore, the third ground of appeal must be rejected as unfounded.

D. Fourth ground of appeal, alleging errors in law in relation to the amount of aid to be recovered

119. The appellants claim, in essence, that the General Court wrongfully concluded that both the existence and amount of aid fall to be assessed solely on the basis of *ex ante* evidence. Moreover, the General Court failed to address their arguments that corrections to the *ex ante* data should be made regarding 'factors directly under the control of the grantor' but instead only referred to 'totally fortuitous' developments. The appellants submit that the General Court misread the case-law (which does not prevent the Commission from making such corrections). They claim that the General Court's error stems from a confusion between the 'grant' and the 'payment' of aid.

120. It appears that the appellants are de facto questioning the foundation of the MEO test, that is, the question as to what a prudent private investor in a market economy would have done at the time the agreements were concluded.

121. The appellants' argument appears ineffective. Indeed, the Court has clearly held that for the purpose of applying the MEO test, 'the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to proceed with the measure at issue was taken'. [41]

122. Accordingly, 'factors arising after the measure at issue has been adopted cannot be taken into account for the purpose of applying the [MEO test]'. [42]

123. Moreover, the Court has already ruled that, in view of the above case-law, a line of argument by which the appellant is disputing the merits of the General Court's appraisal relating to the assessment of the aid to be recovered is *ineffective*, in so far as it is based on taking into account events subsequent to the grant of measures at issue. [43]

124. In that connection, I also consider that, contrary to the appellants' arguments, the wording of the above paragraph of the judgment in *Larko* v *Commission* clearly shows that it concerns *both* the existence of aid and the amount of aid to be recovered.

[41] Judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 31. See also paragraphs 28 to 30) ('the judgment in *Larko* v *Commission*').

[42] Judgment in *Larko* v *Commission*, paragraph 32.

[43] Judgment in *Larko* v *Commission*, paragraph 113.

125. As the Commission pointed out, the appellants' arguments amount to a blurring of the two types of situations mentioned above and create a certain degree of confusion in their appeal. In any case, in the judgment under appeal, the General Court addressed correctly both situations they are referring to ('marketing fees actually paid to Ryanair or LV and AMS during the relevant period' and 'adjustments based on other *ex post* revenue and cost data which showed clear overestimation of costs').

126. First, the General Court observes the principles of the MEO test, and explains, inter alia in paragraph 419 of the judgment under appeal, that both the existence and the amount of aid fall to be assessed in light of the situation prevailing at the time it was granted. Referring to that principle, the General Court rejected the appellants' claim that the Commission should have 'corrected' the airport's operating costs with *ex post* evidence when calculating the quantum of aid, as is explained in paragraphs 427 to 429 of the judgment under appeal.

127. In that regard, the General Court has correctly applied the judgment in *Larko* v *Commission*.

128. The appellants' reference to 'errors' is misleading as they refer to information that was not available at the time the aid was granted (seeking to correct the operating costs of 2002 on the basis of data from the 2005 cost accounting system, that system not even being available to the airport earlier). From an *ex ante* perspective, it is entirely incorrect to speak of 'errors' when referring to *ex post* information. It further follows that the appellants' claim that such a 'correction' should be made if the 'error' is in the data of the grantor of aid is irrelevant and in any case ineffective.

129. I agree with the Commission that, if one were to follow the appellants' argumentation, the amount of aid could be 'corrected' based on *ex post* data also to the beneficiary's detriment. To that effect, in paragraph 421 of the judgment under appeal, the General Court simply provided certain examples of fortuitous developments that could result in a variation of the quantum of aid, but it did not introduce a requirement that such developments must be beyond the control of the grantor of the aid.

130. Secondly, contrary to the appellants' arguments, the General Court correctly addressed the situation where Austria could amend the aid to be recovered regarding payments to the beneficiary that had not actually been made. As observed by the General Court in paragraph 422 of the judgment under appeal, Austria had argued during the Commission's investigation procedure that a certain agreement providing aid had in fact not entered into force as it had been replaced by another agreement. However, Austria produced no evidence to support that claim. Consequently, the Commission included the disputed agreement in the calculation of the quantum of aid but allowed Austria to adjust the amount of aid to be recovered at a later stage, subject to evidence to be provided by Austria. This is explained in paragraphs 422 and 426 of the judgment under appeal. It is important to note that any such adjustment must be based on evidence that existed at the time the agreements in question were concluded.

131. Importantly, the Court has held that 'no provision of [EU] law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount'. [44]

[44] See judgment of 20 March 2014, *Rousse Industry* v *Commission* (C-271/13 P, not published, EU:C:2014:175, paragraph 77). See also, judgment of 18 October 2007, *Commission* v *France* (C-441/06, EU:C:2007:616, paragraph 29 and the case-law cited).

132. This is the principle the General Court recalled in paragraph 415 of the judgment under appeal and applied to the present case in paragraphs 422 to 426 thereof.

133. The appellants argue that both the case in *Larko* and the case in *Freistaat Thüringen*,[45] which were relied upon by the General Court (and by the Commission in the contested decision), concerned guarantees and those judgments do not include the principle that not only the existence of aid, but also the amount of that aid, fall to be assessed in the light of the situation prevailing at the time it was granted. This is allegedly convenient for the Commission since guarantees are probably the only type of aid measure where the distinction between grant and payment is less clear. This is due to the fact that no active provision of funds or services is required from the guarantor after the grant of a guarantee and during the validity of the guarantee.

134. First, the appellants' contentions are incorrect. It is clear from paragraph 113 of the judgment in *Larko* v *Commission* that it concerns both the existence of aid and the amount of aid to be recovered.

135. Secondly, I do not consider that the circumstance in point 133 of the present Opinion alone suffices in order to disapply that case-law in the present case.[46]

136. Indeed, the aid in the present case did not constitute simple 'pure' transfers of sums of money, without recompense, whose amounts could directly be determined. Instead, they constituted various complex contractual arrangements by which the airport (and so the public authorities) accepted *in fine* to incur costs – which a market economy operator would not have accepted to incur – in so far as they 'overpaid' for the services received or waived certain charges (or fees) due.

137. Therefore, I consider that the Commission was entitled to consider that those amounts had to be calculated, as it indicated in recital 563 of the contested decision, 'using the negative part of the projected incremental flow (revenues less costs) at the time when the transaction was concluded'.

138. Indeed, it is precisely at that moment that the commitment of State resources in the present case crystallised and which must, therefore, be used for the purposes of determining the advantage from which the appellants benefited and *in fine* the amount of aid to be recovered.

139. It follows from the foregoing considerations that the fourth ground of appeal must be rejected as ineffective.

140. Finally, even if the Court decided not to follow the analysis in my Opinion that this ground of appeal is ineffective, I consider that that ground would in any event have to be rejected as unfounded.

141. Indeed, although the vocabulary used in the contested paragraphs of the judgment under appeal could be seen to sometimes fluctuate, it is, to my mind, apparent from an overall reading of that judgment that the General Court did not call into question the fact that the obligation to

[45] Judgment under appeal, paragraph 419 referring to the judgment of 19 October 2005, *Freistaat Thüringen* v *Commission* (T-318/00, EU:T:2005:363, paragraph 125), and the judgment in *Larko* v *Commission*, paragraph 113.

[46] See the case-law cited in the judgment in *Larko* v *Commission*, paragraphs 28 to 32.

recover unlawfully paid aid is intended to restore the situation prior to its payment, in order to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid. [47]

142. Furthermore, the distinction that the appellants seek to draw between the grant of the aid and its payment seems to be at least tenuous when what is at issue is not an aid scheme but individual aid.

143. It follows from the foregoing considerations that the fourth ground of appeal must be rejected as ineffective and, in any event, unfounded.

144. Given that all the grounds of appeal are unfounded, it is necessary to dismiss the appeal in its entirety.

IV. Conclusion

145. In the light of the foregoing, I propose that the Court of Justice should dismiss the appeal and order the appellants to pay the costs.

[47] See, inter alia, judgments of 15 September 2022, *Fossil (Gibraltar)* (C-705/20, EU:C:2022:680, paragraph 39 and the case-law cited), and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 131 and the case-law cited).