Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 September 2016[1]

Case C-524/14 P

European Commission
v

Hansestadt Lübeck

(Appeal — State aid — Airport charges — Article 108(2) TFEU — Fourth paragraph of Article 263 TFEU — Decision to initiate the formal investigation procedure — Admissibility of an action for annulment — Person individually concerned — Legal interest in bringing proceedings — Article 107(1) TFEU — Selectivity criterion)

1. By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 9 September 2014, *Hansestadt Lübeck* v *Commission*,[2] by which the General Court partially annulled Commission Decision C(2012) 1012 final[3] in so far as that decision concerns the schedule of airport charges of Lübeck Airport (Germany) adopted in 2006 ('the 2006 schedule') and dismissed the action as to the remainder.

2. Among the questions raised by this appeal, two deserve particular attention. The first concerns examination of the admissibility of an action brought by a public entity which operates an airport against a decision to initiate the formal investigation procedure in respect, inter alia, of a schedule fixing, for that airport, the amount of the airport charges payable by airlines. The second relates to assessment of the selectivity of a measure consisting of such a schedule.

3. The case therefore offers, in the very specific context of a decision initiating the formal investigation procedure, the opportunity to specify the scope of the condition that, to be classified as 'State aid', the disputed measures at issue must, in particular, as Article 107(1) TFEU expressly requires, '[favour] certain undertakings or the production of certain goods'. That condition, commonly known as the 'selectivity criterion', is — as Advocate General Wathelet noted in his recent Opinion in *Commission* v *Banco Santander and Santusa*,[4] which admittedly concerned tax measures very different from the measures to which this case relates — one of the most controversial issues in the field of State aid. The explanations which the Court will therefore be prompted to give in this case will help to provide the clarification awaited in the specific context of measures which fix charging rates — such as schedules of airport charges — and are used to finance infrastructure.

1 — Original language: French.

2 — T-461/12, 'the judgment under appeal', EU:T:2014:758.

3 — Decision of 22 February 2012 on State aid No SA.27585 and SA.31149 (2012/C) (ex NN/2012, ex CP 31/2009 and CP 162/2010) — Germany ('the decision at issue').

4 — Joined Cases C-20/15 P and C-21/15 P, EU:C:2016:624, point 5.

I – **Background to the proceedings**

A – *Lübeck Airport*

4. Lübeck Airport is in Germany, in the *Land* of Schleswig-Holstein.

5. Until 31 December 2012, it was operated by Flughafen Lübeck GmbH ('FL'). Up to 30 November 2005, FL was wholly owned by the applicant at first instance, Hansestadt Lübeck (the City of Lübeck). From 1 December 2005 to the end of October 2009, FL was 90% owned by the private New Zealand company Infratil and 10% owned by the City of Lübeck. From November 2009, FL was again wholly owned by the City of Lübeck. On 1 January 2013, Lübeck Airport was sold to Yasmina Flughafenmanagement GmbH, FL being incorporated into the assets of the City of Lübeck and removed from the commercial register on 2 January 2013.

B – *The 2006 schedule*

6. Under Paragraph 43a(1) of the Luftverkehrs-Zulassungs-Ordnung (Air Traffic Licensing Rules, 'the LuftVZO') of 19 June 1964,[5] as in force in 2006, before the commencement of the airport's operation an airport operator had to submit to the supervisory authority for its approval rules governing use and, in respect of the airports, a schedule of charges for the take-off, landing and parking of aircraft as well as for the use of facilities for air passengers.

7. Pursuant to that provision, FL adopted the 2006 schedule fixing the amount of the airport charges, which was approved by the supervisory authority, namely the aviation authority of the *Land* of Schleswig-Holstein, and which has applied since 15 June 2006 to all airlines using Lübeck Airport unless an agreement has been concluded between the airport operator and an airline. That schedule lays down a landing charge, a 'passenger' charge, a charge for terminal and apron services, a security charge, a charge for exceptional use and a parking charge.

8. In 2007, the Commission adopted a decision to initiate the formal investigation procedure in relation to a contract concluded between FL and the airline Ryanair which fixed for that airline charges lower than those provided for by the schedule of charges that was in force.

9. Taking the view, inter alia, that the 2006 schedule could also contain State aid within the meaning of Article 107(1) TFEU, the Commission, by the decision at issue, initiated the formal investigation procedure provided for in Article 108(2) TFEU in respect of various measures concerning Lübeck Airport, including that schedule.

II – **Procedure before the General Court and the judgment under appeal**

10. By application lodged at the Registry of the General Court on 19 October 2012, FL brought an action for the annulment of the decision at issue in so far as it initiates the formal investigation procedure in relation to the 2006 schedule (first head of claim) and requires the Federal Republic of Germany to reply to an information injunction in relation to that schedule (second head of claim).

11. In its reply lodged at the Court Registry on 20 February 2013, the City of Lübeck stated that it was taking the place of FL in order to pursue the action brought by FL.

5 — BGB1. I, p. 370.

12. In support of its first head of claim, the City of Lübeck raised five pleas in law alleging: (i) infringement of the rights of defence of the Federal Republic of Germany, (ii) infringement of the obligation to carry out a diligent and impartial examination, (iii) infringement of Article 108(2) and (3) TFEU and Article 4, Article 6 and Article 13(1) of Regulation (EC) No 659/1999,[6] (iv) infringement of Article 107(1) TFEU and (v) infringement of the duty to state reasons.

13. By the judgment under appeal, the General Court held that the first head of claim was admissible on the ground, first, that when the action was brought FL was directly and individually concerned by the decision at issue and therefore had *locus standi* and, secondly, that FL had retained a legal interest in bringing proceedings after the sale of Lübeck Airport. On the merits of the case, it upheld the fourth plea, in respect of the part alleging infringement of Article 107(1) TFEU with regard just to the selectivity criterion, and, consequently, annulled the decision at issue in so far as it initiates the formal investigation procedure in respect of the 2006 schedule. As regards the second head of claim, since the single plea, alleging infringement of Article 10(3) of Regulation No 659/1999 was rejected as manifestly unfounded, the action was dismissed as to the remainder.

III – **Forms of order sought and procedure before the Court**

14. The Commission claims that the Court should:

— set aside the judgment under appeal;

— declare the action at first instance inadmissible;

— in the alternative, declare the action devoid of purpose;

— also in the alternative, declare that the part of the fourth plea in the action by which the City of Lübeck alleges infringement of Article 107(1) TFEU so far as concerns the selectivity criterion is unfounded, and refer the case back to the General Court as regards the other parts of that plea and the first, second, third and fifth pleas in the action;

— order the City of Lübeck to pay the costs at first instance and on appeal or, in the alternative, if the case is referred back to the General Court, reserve the decision as to the costs at first instance and on appeal.

15. The City of Lübeck contends that the Court should:

— dismiss the appeal in its entirety and uphold the claims that it put forward at first instance in their entirety;

— order the Commission to pay the costs.

16. By decisions of the President of the Court of 26 March and 14 April 2015, the Federal Republic of Germany and the Kingdom of Spain were granted leave to intervene in support of the City of Lübeck.

17. The parties set out their positions in writing and orally at the hearing held on 31 May 2016.

6 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1990 L 83, p. 1).

IV – **Analysis of the appeal**

18. In support of its appeal, the Commission advances five grounds of appeal. The first two concern the examination of the admissibility of the action at first instance. The third ground of appeal concerns the assessment of the selectivity of the measures at issue. The fourth alleges defects in the reasoning of the judgment under appeal. The fifth alleges that the General Court failed to have regard to the limited nature of judicial review of decisions to initiate the formal investigation procedure in relation to State aid.

A – *The first ground of appeal, alleging that FL was not individually concerned by the decision at issue*

1. Arguments of the parties

19. By its first ground of appeal, the Commission criticises the General Court for having held that FL was individually concerned by the decision at issue on the ground that, in granting State aid, it had exercised powers conferred on it alone. By so doing, the General Court erred in law because, under the applicable national law, a schedule of charges must be approved by the supervisory authority of the *Land*, which is itself bound by the federal legislation on airport charges. Therefore, the fact that the public undertaking which operates the airport is responsible for proposing that schedule does not mean that it, and not the State, has the power itself to decide its management and formulate the policies which it applies by means of that schedule. The General Court's interpretation of the criterion of individual concern is, in that regard, inconsistent with that contained in the judgment of 10 July 1986, *DEFI* v *Commission*.[7]

20. The City of Lübeck maintains that the General Court did not commit an error of assessment by holding that FL was individually concerned by the decision at issue. It states that, at the time when the action was brought, FL, which was then 90% owned by a private investor, had a power of its own to adopt and implement the 2006 schedule. It notes in particular that the airport operator would be able to apply such a schedule even if it were refused the authorisation provided for in Paragraph 43a(1) of the LuftVZO. The General Court's conclusion is in accordance with national law and, in any event, cannot be called into question in an appeal.

21. The Federal Republic of Germany states that in Germany airport charges are fixed, in the exercise of their discretion, by undertakings operating airports, by means of schedules which are implemented by private law contracts concluded with the airlines. The supervisory authority's approval provided for in Paragraph 43a(1) of the LuftVZO has no 'constitutive effect' with regard to the validity of the schedule of airport charges. That provision merely establishes a preventive control — designed to prevent abuse — of the relationship between airport operators and users, in the interests of the proper functioning of air traffic and competition. The Federal Republic of Germany maintains, moreover, that the interests of private-law airport undertakings, such as FL, are separate from the interests of the State and that, unlike the body at issue in the case giving rise to the judgment of 10 July 1986, *DEFI* v *Commission*,[8] those undertakings cannot be regarded as an emanation of the State.

7 — 282/85, EU:C:1986:316.

8 — 282/85, EU:C:1986:316.

2. Assessment

22. It is apparent from paragraphs 29 to 34 of the judgment under appeal that the General Court concluded, in essence, that FL was individually concerned by the decision at issue in so far as it relates to the 2006 schedule since it affected a measure of which FL was one of the authors and prevented FL from exercising its own powers as it saw fit. The Court considered that, although, under the applicable national law, in this instance Paragraph 43a(1) of the LuftVZO, the schedule of charges drawn up and proposed by the airport operator had to be approved by the supervisory authority, that authority had no power of its own to determine the airport charges itself.

23. In that regard, it is well established that the condition of individual concern resulting from the fourth paragraph of Article 263 TFEU is satisfied if the contested measure affects the applicant by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is differentiated from all other persons and by virtue of these factors distinguishes him individually just as in the case of the person addressed. [9]

24. Natural or legal persons must be regarded as individually concerned by a measure which directly prevents them from exercising their own powers, consisting inter alia in the grant of alleged aid to undertakings, as they see fit [10] and which brings about a change in contractual relations with the undertaking or undertakings alleged to be the beneficiaries of the measures at issue. [11]

25. In the present case, it is necessary to determine whether the General Court correctly concluded that, under the relevant national law (Paragraph 43a(1) of the LuftVZO), FL had a power of its own in the adoption and implementation of the 2006 schedule.

26. In paragraph 29 of the judgment under appeal, the General Court analysed Paragraph 43a(1) of the LuftVZO, which lays down the rules for implementing the 2006 schedule. It deduced in particular that, since the supervisory authority, unlike FL, had no power of its own to fix airport charges, the power to adopt the 2006 schedule lay with FL and not with the State authorities (see paragraph 32 of the judgment under appeal).

27. Where what is at issue is an interpretation of national law by the General Court, review by the Court of Justice must be limited to establishing that the General Court has not distorted that law. [12]

28. It is settled case-law that that distortion must be apparent in findings which the documents in the file show to be substantially incorrect, without there being any need for the Court to carry out a new assessment of the facts and the evidence. [13] In other words, such a distortion must be obvious. [14] As regards, more specifically, a matter of interpretation of national law, the Court has jurisdiction to examine, first, whether the General Court, on the basis of documentary and other evidence before it, distorted the wording of the national provisions at issue, the tenor of national case-law relating to

9 — See judgments of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, 107); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 72); and of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 46).

10 — See, by analogy, judgments of 30 April 1998, *Vlaamse Gewest* v *Commission* (T-214/95, EU:T:1998:77, paragraphs 29 and 30), and of 15 June 1999, *Regione Autonoma Friuli-Venezia Giulia* v *Commission* (T-288/97, EU:T:1999:125, paragraphs 31 and 34). See, *a contrario*, judgment of 10 July 1986, *DEFI* v *Commission* (282/85, EU:C:1986:316, paragraph 18), in which it was held, on the other hand, that the French Government undeniably had the power to determine DEFI's management and policies and hence also to define the interests which that organisation was required to defend.

11 — It is apparent that rules fixing airport charges are included, like general conditions, in the contracts concluded between the company operating the airport and the airlines.

12 — See judgments of 24 October 2002, *Aéroports de Paris* v *Commission* (C-82/01 P, EU:C:2002:617, paragraph 63), and of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited).

13 — See judgment of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 80 and the case-law cited).

14 — Judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 98), and of 10 February 2011, *Activision Blizzard Germany* v *Commission* (C-260/09 P, EU:C:2011:62, paragraph 53).

them or the academic writings concerning them; secondly, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case-file. [15]

29. However, in the present case, in spite of the doubts which may be entertained as to whether the airport operator is really autonomous and, accordingly, whether it has an interest of its own, separate from that of the supervisory authority, in maintaining the 2006 schedule, the matters put forward by the Commission to call into question the interpretation of the relevant national law are not sufficient to establish any distortion of the evidence presented before the General Court.

30. Nor can this conclusion be invalidated by the Commission's arguments that the assessment made by the General Court in this case is inconsistent with the approach taken in the judgment of 10 July 1986, *DEFI* v *Commission*. [16] Although the facts in *DEFI* v *Commission* seem, on the face of it, to have certain similarities with those in the present case, such as the possibility that the supervisory authority may not approve the rules for implementing the measure in question, I think that the present case is set apart by the more limited control exercised by the *Land* over the fixing of the charging rates proposed by the entity managing the airport, inasmuch as it cannot prevent the application of the 2006 schedule, and by the divergent interests of the supervisory authority, FL and the airport users. In *DEFI* v *Commission*, the Court had held that the French Government undeniably had the power to determine DEFI's management and policies and hence also to define the interests which that organisation was to protect (paragraph 18).

31. In the light of these considerations, I take the view that the first ground of appeal cannot succeed.

B – *The second ground of appeal, alleging that the City of Lübeck had no current legal interest in bringing proceedings*

1. Arguments of the parties

32. By its second ground of appeal, the Commission maintains that the General Court erred in law by holding, first, that FL had an interest in bringing proceedings even after the sale of Lübeck Airport to a private investor (Yasmina Flughafenmanagement GmbH) since the formal investigation procedure had not been closed and the decision at issue therefore continued to produce effects and, secondly, that FL had in any event retained an interest in bringing proceedings in respect of the period prior to the sale. The Commission argues that, even in the absence of a final decision closing the formal investigation procedure, the decision at issue had ceased to produce its sole legal effect, namely the obligation to suspend the aid measure during the investigation, [17] since no suspension was ordered up until 31 December 2012 and from 1 January 2013, the date on which Lübeck Airport was privatised, the 2006 schedule could no longer be regarded as an aid scheme in the course of implementation because the airport was no longer financed by public funds. The assessment of the General Court is contrary to the case-law according to which the interest must be vested and present and continues to exist only if the action is liable, if successful, to procure an advantage for the party bringing it. The City of Lübeck has indeed not shown that it had any interest in maintaining its action after the privatisation of Lübeck Airport.

15 — Opinion of Advocate General Jääskinen in *France* v *Commission* (C-559/12 P, EU:C:2013:766, point 42 and the case-law cited).

16 — 282/85, EU:C:1986:316.

17 — In support of that argument, the Commission refers to the judgments of 16 October 2014, *Alro* v *Commission* (T-517/12, EU:T:2014:890, paragraphs 19 to 67), and of 16 October 2014, *Alpiq RomIndustries and Alpiq RomEnergie* v *Commission* (T-129/13, not published, EU:T:2014:895, paragraphs 18 to 31).

33. The City of Lübeck, supported by the Federal Republic of Germany, submits that FL did in fact have an interest in bringing proceedings at the time when the action was brought, which is the relevant time for assessing the admissibility of the action. It maintains that, on the date on which the action was brought, the adverse effects of the decision at issue consisted in particular in the obligation of suspension owed by FL pursuant to the last sentence of Article 108(3) TFEU. Moreover, the City of Lübeck still has an interest in bringing proceedings since, without the declaration of annulment by the General Court, the decision at issue would continue to produce legal effects adversely affecting it now, after the sale of the airport. It states in particular that national courts would be required, following an application, to order recovery of the alleged advantages. It also considers that, in the absence of a decision concluding that there is no State aid, it is exposed to the risk of repetition of the illegality. Finally, it submits that the annulment of the decision at issue may enable it to prepare an action for damages given that, if a decision had not been taken to initiate the formal investigation procedure, it would have been able to persuade other airlines to use Lübeck Airport, and to obtain, at the time it was sold, a higher price.

2. Assessment

34. In the present case, it is not disputed by the parties that FL, which the City of Lübeck has replaced, had a vested and current interest at the time when the action against the decision at issue was brought. In this regard, the General Court found, in paragraph 36 of the judgment under appeal, that when the action was brought FL had an interest in bringing proceedings against the decision at issue since it produced binding legal effects such as to affect its own interests.

35. The Commission does not agree, however, that that interest continued to exist after the sale of Lübeck Airport to a private company. It takes the view that the obligation to suspend implementation of the alleged aid scheme is the only effect of a decision to initiate the formal investigation procedure. Since no such suspension materialised before the sale of Lübeck Airport to a private company, the City of Lübeck's interest in bringing proceedings disappeared during the proceedings.

36. In that regard, it should be pointed out that in paragraph 37 of the judgment under appeal the General Court rejected the Commission's argument that the sale of Lübeck Airport to a private company on 1 January 2013, after the decision at issue had been adopted and the action had been brought before the General Court, put an end to the aid scheme at issue, so that the obligation to suspend that scheme no longer adversely affected the City of Lübeck and the City of Lübeck no longer had an interest in seeking the annulment of the decision at issue. The Court considered that, since the formal investigation procedure was not closed, that decision still produced effects and that the City of Lübeck did at the very least retain an interest in bringing proceedings in respect of the period prior to the sale of the airport.

37. In order to determine whether the assessment of the General Court is correct, a brief reminder of the case-law concerning the requirement of a vested and present interest in bringing proceedings is needed.

38. First of all, it is well established that the interest in bringing proceedings, which is an essential and fundamental prerequisite for any legal proceedings distinct from an applicant's *locus standi*,[18] must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. That purpose must, like the interest in bringing proceedings, continue to exist until the final decision, failing which there will be no need to adjudicate; this presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it. The question

18 — See, inter alia, judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraphs 58 and 62 and the case-law cited).

whether an applicant retains his interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained.[19] The Court of Justice endeavours not to define that interest too restrictively.

39. With regard to a decision to initiate the formal investigation procedure, such as the decision at issue, the Court has acknowledged that such a decision is liable to entail several autonomous legal effects. Accordingly, as well as the obligation to suspend the alleged aid measure during the proceedings brought against that decision, account must be taken of the possibility that an action will be brought before the national courts in order, in particular, for all the appropriate conclusions to be drawn from infringement of the last sentence of Article 108(3) TFEU.[20] The Court has therefore concluded that, although the assessments carried out in the decision to initiate the formal investigation procedure are preliminary in nature, the decision does not lack legal effects.[21] The Court has acknowledged, in particular, that the decision to initiate the formal investigation procedure necessarily alters the legal situation of the undertakings which are the beneficiaries of the measure.[22]

40. Contrary to what the Commission maintains, the Court's case-law does not find suspension of the measure to be the sole legal effect of the decision to initiate the formal investigation procedure.[23] The Court has already noted other legal effects stemming from a decision to initiate the procedure. It has held that the national courts 'are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure'.[24] Among those conclusions, the Court has indicated, inter alia, the possibility of combining suspension of the measure with the obligation to recover payments already made. The national court may also order interim measures in order to safeguard the interests of the parties and the effectiveness of the Commission's decision.[25]

41. In the light of all those considerations, I consider that the legal effects of the decision to initiate the formal investigation procedure may continue to exist even after the sale of Lübeck Airport to a private operator. The decision to initiate the formal investigation procedure continues, until the procedure is closed by the Commission, to expose FL to the risk that a national court may order recovery of the aid granted when FL, which has been replaced by the applicant, owned Lübeck Airport.

42. The General Court therefore did not err in law when it concluded, in paragraph 27 of the judgment under appeal, that the decision to initiate the formal investigation procedure continued to produce autonomous legal effects altering FL's legal position, so as to confer on it an interest in bringing proceedings.

43. In that regard, it is to be noted that this case is characterised by the fact that the measure at issue was still in the course of implementation at the time when the action was brought before the General Court and that, according to information provided by the Federal Republic of Germany, that measure is, to this day, still in force. Against that background, it is apparent that FL remains exposed to the risk of an order for recovery of the aid granted when it owned the airport by virtue of the obligation of the national court to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.

19 — See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraphs 61 to 65 and the case-law cited).

20 — See judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695, paragraphs 52 and 53).

21 — Judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 37).

22 — Judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695, paragraph 52).

23 — Judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695, paragraph 53 and the case-law cited).

24 — Judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 42).

25 — See judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraphs 42 and 43), and order of the President of the Court of Justice of 4 April 2014, *Flughafen Lübeck* (C-27/13, not published, EU:C:2014:240, paragraphs 25 and 26).

44. The Commission's argument that, on the date on which the reply was lodged, no action against approval of the 2006 schedule was pending and that any action subsequent to that date would be time barred cannot be upheld. Even if this latter assertion is correct, it cannot be automatically precluded that, on the date on which the General Court gave its ruling, FL retained an interest in the decision at issue being annulled.

45. In the light of all those considerations, I consider that the applicant at first instance remained at the very least exposed to the risk that a national court might order recovery of the aid granted prior to the sale of Lübeck Airport. It therefore retained an interest in seeking the annulment of the decision at issue.

46. The second ground of appeal must, therefore, be rejected.

C – *The third ground of appeal, alleging an incorrect assessment of the selectivity of the 2006 schedule*

1. Arguments of the parties

47. By its third ground of appeal, the Commission submits that the General Court misinterpreted the term 'selectivity' in the light of Article 107(1) TFEU by holding that, in order to assess whether the 2006 schedule might be selective, it was necessary to ascertain whether it applied in a non-discriminatory manner to all the undertakings using, or able to use, the specific goods or services. The fact that that schedule applies only to airlines using Lübeck Airport is not a relevant criterion.

48. The Commission takes the view that the assessment of the General Court conflicts with the case-law of the Court of Justice,[26] according to which a measure is not a general measure of fiscal or economic policy and is thus selective if it applies only to certain economic sectors or certain undertakings in a given sector. It considers that the conditions on which a public undertaking offers its own goods and services always constitute selective measures, and the question of inequality or discrimination is, in that context, not relevant for concluding whether or not there is aid. The General Court was therefore wrong to refer to the criterion adopted in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*,[27] a criterion which applies only to fiscal measures and not to the conditions on which a public undertaking offers its own goods and services.[28] The deciding factor is, in the latter case, the criterion of a private investor in a market economy.

26 — The Commission refers inter alia to the judgments of 20 November 2003, *GEMO* (C-126/01, EU:C:2003:622, paragraphs 35 to 39), and of 15 December 2005, *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraphs 95 to 101).

27 — C-143/99, EU:C:2001:598, paragraph 41.

28 — The Commission relies on the Opinion of Advocate General Mengozzi in *Deutsche Lufthansa* (C-284/12, EU:C:2013:442). It also mentions the judgments of 2 February 1998, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38, paragraphs 28 and 29); of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraph 10); of 20 November 2003, *GEMO* (C-126/01, EU:C:2003:622, paragraphs 35 to 39); of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraphs 63 to 67); and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

49. In the alternative, the Commission maintains that the General Court failed to comply with the case-law of the Court of Justice which states that it is the effects of the measure which are crucial in assessing whether or not it is selective [29] and that measures which benefit only one economic sector are selective. [30] It points out that, even though Lübeck Airport is in direct competition with that of Hamburg (Germany), the advantage conferred by the 2006 schedule benefits only airlines using the former airport, which is sufficient to show that the schedule is selective. The approach taken by the General Court amounts to exempting schedules of airport charges from the State aid rules.

50. In the further alternative, the Commission maintains that the General Court misinterpreted the criterion relating to undertakings in a factual and legal situation that is comparable in the light of the objective pursued by the measure concerned. In order to determine which undertakings are in such a situation, it is necessary to take as a criterion not the scope of the measure at issue but the costs structure of the undertakings concerned. In the present case, the 2006 schedule is selective because it does not observe the principle — enshrined in Paragraph 43a(1) of the LuftVZO — which applies to all German airports, and therefore to all airlines, that airport charges must cover costs.

51. Finally, the Commission argues that the General Court also erred in law by omitting to examine whether the discounts granted in the 2006 schedule are selective on the ground that only airlines which satisfy certain conditions benefit from them.

52. The City of Lübeck maintains, in essence, that the General Court correctly found that the 2006 schedule does not favour certain undertakings or the production of certain goods. According to the City of Lübeck, the different treatment of comparable undertakings or of the production of comparable goods is a condition for selectivity. [31] Therefore, the 2006 schedule is not selective because it does not treat comparable undertakings or the production of comparable goods differently.

53. The Federal Republic of Germany contests the Commission's argument that the conditions on which a public undertaking offers its goods and services must always be regarded as selective. A measure is selective in nature only if it grants special conditions to a certain group of undertakings and draws an internal distinction between users with regard to access to and use of the public facilities at issue. Moreover, the users of other airports are not in a comparable factual and legal situation.

54. The Kingdom of Spain agrees with the interpretation of Article 107(1) TFEU given by the General Court as regards the selectivity criterion and supports the City of Lübeck's arguments. It adds that the Commission's premiss that the laying down of conditions on which a public entity offers its goods and services constitutes a selective measure does not result from the case-law. The Kingdom of Spain draws attention to the factors taken into account in the judgment of 14 January 2015, *Eventech*, [32] for determining whether undertakings are in comparable situations.

29 — The Commission cites the judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 85 to 89); of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 51); and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87 to 109).

30 — The Commission refers to the judgments of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 33); of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 45); and of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraphs 31 and 32).

31 — The City of Lübeck refers to the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 41 and 42).

32 — C-518/13, EU:C:2015:9, paragraph 61.

2. Assessment

55. It should be recalled that, according to Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

56. According to the settled case-law of the Court of Justice, classification as 'State aid' for the purposes of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. [33]

57. It is thus well established that, for a national measure to be classified as 'State aid' for the purposes of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, that intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and fourth, it must distort or threaten to distort competition. [34]

58. In the present case, it is solely the interpretation and application of the third criterion, more specifically of the requirement of 'selectivity', which have been put in issue.

59. According to case-law that is also well established, a measure is considered to be selective if it is such as to favour certain undertakings or the production of certain goods over other undertakings which are in a factual and legal situation that is comparable in the light of the objective pursued by the measure in question. [35]

60. In the present instance, the General Court, in essence, held that the selectivity of a measure by which a public entity offers its goods and services is assessed having regard to all the undertakings using or able to use those goods or services. It held that the charges fixed under the 2006 schedule were applied in a non-discriminatory manner and thus concluded that the schedule was not selective in nature.

61. In that regard, paragraph 53 of the judgment under appeal seems to beg the question in the following words:

'In order to assess the potentially selective nature of a fee scale drawn up by a public entity for the use of a product or service in a given sector in relation to certain undertakings, it is necessary, in particular, to refer to all of the undertakings using or able to use that specific product or service and to examine whether only some of them obtain or are able to obtain a potential advantage. The situation of undertakings which do not want to or cannot use the product or service in question is therefore not directly relevant when assessing the existence of an advantage. In other words, the selective nature of a measure consisting of a fee scale drawn up by a public entity for the use of a product or service made available by that entity may be assessed only in relation to current or potential customers of that entity and of the specific product or service in question, and not, in particular, in relation to customers of other undertakings from that sector providing similar products and services. Furthermore, … if it were to be considered that every non-discriminatory fee scale implemented by a public entity in consideration of a given product or service has a selective character, that would, essentially, have the effect of excessively extending the notion of aid "favouring certain undertakings or the production of certain goods" referred to in Article 107(1) TFEU. In

33 — See, inter alia, judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 38 and the case-law cited).

34 — Judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 39 and the case-law cited).

35 — Judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41).

addition, in order for a potential advantage, conferred by a public entity in the context of the provision of specific products or services, to favour certain undertakings, it is necessary that … undertakings using or wishing to use that product or that service do not or cannot obtain that advantage from that entity in that particular context.'

62. In the Commission's view, that assessment is wrong. There are four parts to its argument. First, it maintains that the conditions on which a public undertaking offers its goods and services always constitute selective measures. Second, it considers that the General Court failed to have regard to the settled case-law of the Court of Justice according to which (i) only the effects of a measure are decisive for assessing its selectivity and (ii) measures which benefit one economic sector are necessarily selective. Third, it submits that the General Court misinterpreted the criterion relating to 'undertakings in a factual and legal situation that is comparable in the light of the objective pursued by the measure concerned'. Fourth, it maintains that the General Court erred in law by failing to examine whether the discounts granted by the 2006 schedule, which benefit only airlines satisfying certain conditions, are selective.

63. Before addressing the various parts of the Commission's line of argument in turn, I would like to set out a number of general considerations which I consider necessary for understanding the meaning and scope of the selectivity condition and which will guide my examination of this ground of appeal.

a) General considerations on the meaning of the selectivity requirement under Article 107(1) TFEU and on its scope in a situation such as that at issue in the present case

64. As the Commission has pointed out, it is apparent from the scheme and origin of the Treaties [36] that a distinction must be drawn between *general* measures of fiscal or economic policy (which now fall within the scope of Articles 113 and 115 to 117 TFEU) and *specific* measures which lead to the acquisition of *advantages* by means of State resources (which are, for their part, now covered by Articles 107 to 109 TFEU).

65. The requirement of 'selectivity', according to which measures covered by the prohibition laid down in Article 107(1) TFEU must be directed at 'certain undertakings or the production of certain goods', has the principal function, for the purpose of respecting the division of powers between the Member States and the European Union, of distinguishing State aid from general measures of fiscal or economic policy.

66. Seen as decisive for distinguishing the measures which fall within the scope of State aid discipline from the others, that requirement, although it enables, in principle, [37] a State measure which benefits without distinction all the undertakings situated in national territory to avoid the prohibition laid down in Article 107(1) TFEU, [38] does not mean, however, that a measure laid down at regional or local level must necessarily be regarded as selective. Whilst in many cases the reference framework is at national level, it is conceivable that a lower level must be applicable in certain situations. To that effect, the Court specifically stated, in the 'Azores' case, [39] that it is possible that an infra-State body

36 — See in particular the 'Spaak Report' (Report of the intergovernmental committee created by the Messina Conference to the Ministers of Foreign Affairs, Brussels, 21 April 1956, p. 59), according to which 'it should be noted that certain intervention schemes which formally constitute aid or subsidies are not directed specifically at undertakings or sectors, but affect the general economy. In that case, the Commission does not have the power on its own to determine incompatibility'.

37 — The case-law has stated that interventions which are prima facie applicable to all undertakings may have a certain degree of selectivity — particularly where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided — and may therefore be regarded as intended to favour certain undertakings or the production of certain goods (see, inter alia, judgment of 29 June 1999, *DM Transport*, C-256/97, EU:C:1999:332, paragraph 27 and the case-law cited).

38 — See, to this effect, judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 35 and 36).

39 — Judgment of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511).

enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings over others in a comparable factual and legal situation, having regard to the objective pursued by the measure or the legal system concerned. [40]

67. As an extension of that reasoning, it is now accepted that that criterion requires verification as to whether, *under a particular legal regime*, a measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. [41]

68. The Court has repeatedly held that, in order to determine whether a measure is 'selective' and may therefore be classified as 'State aid', it is necessary to focus on the effects it produces. By contrast, the causes and objectives of State interventions and the techniques used to implement those interventions cannot be decisive factors. [42]

69. Also, the Court has stated that it is not relevant, for the purpose of concluding that a specific measure is selective, only whether or not a large number of undertakings benefit from it, that the circle of beneficiaries of the measure is more, or less, open [43] or that all the undertakings in a specific economic sector may benefit from the measure. [44]

70. Moreover, as I have already had occasion to point out, [45] the requirement as to selectivity or 'specificity' of the measure must be clearly distinguished from the detection of an economic advantage. In other words, once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it then remains for the Commission to establish that that advantage is specifically directed at one or more undertakings. It falls to the Commission, in particular, to show that the measure creates differences between undertakings which, in the light of the objective pursued, are in a comparable situation. [46] What is prohibited is not the grant of an advantage as such, but the fact that, if carried out in a discriminatory and therefore selective manner, its grant is liable to place certain undertakings in a more favourable situation than others.

71. That said, the selectivity requirement cannot, in my view, be completely disconnected from the concomitant, albeit separate, identification of an economic advantage.

72. In this regard, several considerations, some of which I have already set out, [47] should be addressed.

40 — Judgment of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 58).

41 — Judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 82), and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraphs 54 and 55).

42 — See, inter alia, judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 85 and 89), and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87).

43 — See, inter alia, judgment of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 50 and the case-law cited).

44 — Judgment of 15 June 2006, *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraphs 31 and 32 and the case-law cited).

45 — See my Opinion in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, point 47).

46 — See judgment of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 62).

47 — See my Opinion in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, points 50 to 55).

73. In the context of the examination of a scheme of a general nature [48] (subsidy schemes, a system of charges, tax relief, a scheme derogating from the rules of ordinary law in matters of insolvency, facilities for the payment of fees or miscellaneous charges, and so forth), selectivity provides a means of identifying whether the supposed advantage, although directed at economic operators in general, is, in fact and in the light of the objective criteria which it selects, of benefit only to certain types of undertakings or groups of undertakings.

74. This involves identifying whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so 'to the exclusive benefit of certain undertakings or certain sectors of activity'. This approach seeks, by another route, to ensure that State measures do not give rise to a differentiation between undertakings — or, more precisely, between economic operators which, in the light of the objective assigned to the national scheme in question, are in a comparable factual and legal situation — which is not justified by the nature and rationale of the scheme in question.

75. In that regard, it should be pointed out that the concept of selectivity is linked to that of discrimination. [49] Although it is true that the Commission cannot be required accurately to identify a category of undertakings with specific characteristics which are the only ones favoured by the measure at issue [50] in order to conclude that the measure is selective, the fact remains that it must be established that, because it *derogates from the common regime* — which, as I have already said, may be, but is not always, a national general scheme — it is such as to favour certain undertakings.

76. Therefore, in order to conclude that an alleged aid measure is selective, it seems to me essential to establish that it gives rise to a derogation from a 'common' or 'normal' regime, and that applies, in my view, whatever the nature of the regime at issue. I believe that it is now well established [51] that, in order to assess the selectivity of a measure, a criterion which, in my view, is the expression of the principle of non-discrimination, it is necessary, in every case, to ascertain whether, within the context of a specific regime, that measure constitutes an advantage for certain undertakings in comparison with certain others.

77. That prior determination of the reference framework, recognised as being essential in tax matters, is, in my view, just as essential in an examination of non-fiscal measures, and in particular of charging schemes designed inter alia to finance infrastructure, like the 2006 schedule at issue in the present case. Just as it could be held that the determination of the reference framework 'has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation', [52] it must be held that, before assessing the selectivity of a measure fixing charging rates, it is necessary to determine the 'normally applicable' regime from which the measure purports to derogate. [53]

48 — In the case of a measure of an individual nature, identification of the economic advantage in principle enables its 'specificity' to be presumed and, therefore, the conclusion to be drawn that is also selective.

49 — See, to this effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 101), and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 53). See point 54 of my Opinion in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32) and point 29 of the Opinion delivered by Advocate General Bobek in *Belgium* v *Commission* (C-270/15 P, EU:C:2016:289).

50 — See, in that regard, Opinion of Advocate General Wathelet in *Commission* v *Banco Santander and Santusa* (C-20/15 P and C-21/15 P, EU:C:2016:624, particularly points 7, 10 and 80 to 87).

51 — See judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 82 and 83 and the case-law cited).

52 — See, in that regard, judgment of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 56).

53 — I would point out that the Commission, in its recent Notice 2016/C 262/01 on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1), stated that 'the reference system constitutes the benchmark against which the selectivity of a measure is assessed'.

78. Finally, as in the case of the analytical framework which prevails in the examination of tax measures, it seems to me that, once the reference framework has been defined, it is then necessary to determine whether the measure at issue procures an advantage for certain undertakings in relation to others in a comparable factual and legal situation [54] and, as the case may be, finally, to assess whether the grant of that advantage is justified by the nature and general scheme of the system of which the measure at issue forms part.

79. It should be pointed out — a matter to which I shall return in the reasoning below — that, although identification of an economic advantage and, as the case may be, an assessment of the justification for it are relatively easy where a measure laying down a tax exemption derogates from the normally applicable tax regime (the 'normal' regime which is usually defined at national level), a degree of caution is required in the case of measures which fix charging rates and are designed to finance infrastructure.

b) The first part of the ground of appeal, alleging that the General Court disregarded the fact that the conditions on which a public undertaking offers its goods and services *always* constitute selective measures.

80. The Commission maintains, as its principal argument, that the conditions on which a public undertaking offers its own goods and services always constitute selective measures. It relies on the Opinion delivered in the case giving rise to the judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755), [55] and on the case-law. [56] The criterion laid down in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), which served to determine whether or not a tax regime was selective, therefore cannot be transposed to the present case. The Commission considers that paragraph 53 of the judgment under appeal shows that the General Court was guided by considerations of legislative policy designed to remove non-discriminatory rules relating to the charges of public institutions from State aid control.

81. I am hardly convinced by this line of argument.

82. First, contrary to what the Commission seems to suggest, it certainly does not follow from the Court's case-law to which it has referred that a measure fixing charging rates for the use of a public undertaking's goods and services is, by its very nature, selective.

83. Thus, in two cases cited by the Commission, namely those giving rise to the judgments of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission*, [57] and of 29 February 1996, *Belgium* v *Commission*, [58] it is apparent that advantageous charging rates granted by a public undertaking to a group of clients were at issue. As for the cases giving rise to the judgments of 11 July 1996, *SFEI and Others*, [59] and of 20 November 2003, *GEMO*, [60] they concerned situations in

54 — In the case giving rise to the judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 61), the Court held, concerning a measure fixing mining fees in connection with the extraction of hydrocarbons, that 'the appropriate comparator for establishing the selectivity of the measure at issue in the present case was to ascertain whether [it] draws a distinction between operators that are, in the light of the objective of the measure, in a comparable factual and legal situation, a distinction not justified by the nature and general scheme of the system at issue'.

55 — Opinion of Advocate General Mengozzi in *Deutsche Lufthansa* (C-284/12, EU:C:2013:442).

56 — The case-law concerned comprises the judgments of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38, paragraphs 28 and 29); of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraph 10); of 20 November 2003, *GEMO* (C-126/01, EU:C:2003:622, paragraphs 35 to 39); of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraphs 63 to 67); and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

57 — 67/85, 68/85 and 70/85, EU:C:1988:38.

58 — C-56/93, EU:C:1996:64.

59 — C-39/94, EU:C:1996:285.

60 — C-126/01, EU:C:2003:622, paragraphs 35 to 39.

which the advantages, although available to economic operators in general, had, in fact, been of benefit only to a small group of them. To summarise, it is not the supply of goods or services by a public body or a public undertaking which was held, as such, to be selective, but the fact that it had occurred under preferential conditions.

84. More generally, there is no basis for maintaining that the conditions on which a public undertaking offers its goods and services, in any event where that offer takes the form of a regime applicable to economic operators in general wishing to use those goods or services, *always* satisfy the selectivity condition.

85. As I pointed out in the introduction to this ground of appeal, in order to assess the selectivity of a measure, it is necessary to examine whether, *under a particular legal regime*, that measure constitutes an advantage for certain undertakings over others which are in a comparable factual and legal situation (see point 67 of this Opinion).

86. In that context, identification of the reference framework — and, based on that, of the advantage possibly created by the derogation at issue — constitutes an essential prerequisite for any consideration of selectivity. Contrary to what the Commission maintains, it is not appropriate to restrict such verification to the case of fiscal or tax regimes. Although it cannot be denied that the method of examining the selectivity of a specific measure has particular features depending on the nature of the measure, I do not think that it is expedient to identify different examination criteria according to whether the measure is a tax measure or a measure establishing charging rates for the services provided to users.

87. The Court's case-law confirms that the comparative exercise prescribed in the case of tax regimes is equally valid in the case of other measures. I would point out in particular that the criterion laid down in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), was not established only for a tax measure, but for a 'State measure' in general. [61]

88. It should be noted that the Court has, moreover, conducted that comparative exercise in the case of measures relating to the payment of costs and to the use of infrastructure.

89. Indeed, in the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9), [62] the Court took care to consider, in relation to the authorisation given to London taxis to drive in bus lanes, whether London taxis and minicabs were in a comparable factual and legal situation. The examination of whether the measure is discriminatory is, in essence, coextensive with the examination of whether the measure confers a selective economic advantage on the beneficiary undertakings.

90. It is apparent from all those considerations that the General Court did not err in law by holding that measures relating to the conditions on which a public entity offers goods and services are not necessarily selective (see paragraphs 53, 54 and 57 of the judgment under appeal).

91. Contrary to the view taken by the Commission, that conclusion does not necessarily amount to denying any possibility of classifying as 'State aid' the conditions under which a public undertaking offers its goods and services where those conditions apply without distinction to all contracting parties. It is still permitted, in such a situation, to show that those conditions, although applicable without distinction, ultimately benefit only one or more quite specific undertakings, particularly those which match a well-defined commercial model.

61 — See, in particular, paragraph 41.

62 — See, in particular, paragraphs 54 to 61.

92. Whilst it cannot be ruled out at the outset that a scale of charges is selective, it is still necessary to demonstrate — which, as the General Court pointed out, the Commission failed to do — that it has the effect of discriminating against certain economic operators which are in a comparable situation.

93. Also, although the general nature of the wording used at the beginning of paragraph 53 of the judgment under appeal may suggest that the General Court sought to exclude all the conditions on which a public undertaking offers its goods and services from the application of Article 107 TFEU where those conditions apply without distinction to all contracting parties, I consider that the General Court took care to state, at the end of that paragraph, that, 'in order for a potential advantage, conferred by a public entity in the context of the provision of specific products or services, to favour certain undertakings, it is necessary that … undertakings using or wishing to use that product or that service do not or cannot obtain that advantage from that entity in that particular context'.

c) The second part of the ground of appeal, alleging that the General Court failed to have regard to the settled case-law of the Court of Justice according to which, first, only the effects of a measure are decisive for assessing its selectivity and, secondly, measures which benefit one economic sector are necessarily selective

94. The Commission observes that Lübeck Airport is in direct competition with Hamburg Airport and that the 'advantage' conferred by the 2006 schedule is available only to airlines using Lübeck Airport. That simple fact is, in its submission, sufficient to establish that the 2006 schedule is selective by virtue of its effects.

95. At first sight, the reasoning adopted by the General Court and in particular paragraph 53 of the judgment under appeal may be surprising.

96. In order to conclude that the 2006 schedule was not selective, the General Court merely found that the provisions fixing charging rates in the 2006 schedule applied in a non-discriminatory manner to all the airlines using or wishing to use Lübeck Airport.

97. In the light of the case-law according to which Article 107(1) TFEU defines State interventions in relation to their effects,[63] it might be pleaded that a mere finding that the 2006 schedule is *formally* non-discriminatory is not sufficient to conclude that it is not selective. It would have been necessary to analyse whether the 2006 schedule, by its effects, benefits certain undertakings or the production of certain goods. Thus, in the judgment of 13 February 2003, *Spain* v *Commission*,[64] the Court stated that the argument that a measure is governed by objective criteria of horizontal application shows only that the measure falls within an aid scheme and is not individual aid, but does not show that the measure is not selective.

98. However, I do not consider that, in the present instance, the General Court failed to have regard to that case-law in the judgment under appeal. By holding that equal treatment of the actual or potential users of Lübeck Airport was the only determining factor, the Court implicitly, but necessarily, took into account the effects of the measure. It did not merely refer to the horizontal criteria for application of the 2006 schedule.

63 — See, inter alia, judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 85 and 89), and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87, 88 and 92).

64 — C-409/00, EU:C:2003:92, paragraph 49.

99. Nor can it validly be maintained that a measure which benefits a 'single sector', in the present case the group of undertakings using Lübeck Airport, is necessarily selective. As has been pointed out in the introduction to this ground of appeal, that could be a valid conclusion only if it were concluded that the reference framework is that of a 'normal' regime applicable at national level or, at the very least, that it applies beyond the confines of that airport. Use of the concept of 'sectorial selectivity' makes sense only if there are measures adopted by the public authorities of a State, whether central, regional or local, which are competent to adopt decisions that may benefit all undertakings. In the case of measures adopted by an airport operator, which is competent only to adopt measures concerning that airport, the sectorial selectivity criterion should not be applicable. Also, where that operator itself determines the level of the airport charges applicable to airlines operating from and into that airport, it is not derogating from the national charging system but putting in place a scale of charges applicable to all the airlines wishing to use that airport.

100. This shows that a measure adopted by an airport operator in respect of the airlines operating there is not selective if it is granted without discrimination to all those airlines.

101. On that basis, it is necessary to assess whether the measure at issue introduces differentiation between economic operators which, in the light of the objective pursued, are in a comparable factual and legal situation. [65]

102. This leads us to study the third part of the Commission's line of argument.

d) The third part of the ground of appeal, alleging an incorrect examination of the criterion relating to 'undertakings in a comparable factual and legal situation'

103. The Commission maintains, first, that even if the comparison required by the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), were applicable to examination of the selectivity of measures fixing the charges of certain public entities, the General Court committed the same error as that which was criticised by the Court of Justice in the cases giving rise to the judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 87 and 89), and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraphs 61 to 67). The Commission takes the view that, if circular reasoning is not to be adopted, the comparability of the factual and legal situation does not depend on the criteria which define the scope of the measure at issue, but must be based on the cost structure of the undertakings concerned.

104. The Commission submits, secondly, that the General Court failed to take account of the objective pursued by Paragraph 43a(1) of the LuftVZO, a provision applicable to all airports in Germany which prescribes the levying of airport charges that cover costs, for the purpose of protecting the public interest in the proper operation of aviation, and which constitutes the legal basis for the 2006 schedule.

105. In the present case, the question arises as to whether the fact that the 2006 schedule actually applies only to airlines serving Lübeck Airport creates a difference in treatment between undertakings in a comparable situation.

106. In that regard, it should be pointed out that, according to the applicable national law, each airport operator is authorised to adopt a scale of airport charges applicable to its own airport.

65 — Judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 55).

107. This means that the 2006 schedule was intended to apply only to Lübeck Airport, which constitutes the relevant reference framework. In that context, the only decisive factor is whether that schedule differentiates between the undertakings using that single airport.

108. The Commission's argument that the assessment of the selectivity of the 2006 schedule cannot depend on the scope of the schedule, but should be based only on a comparison of the costs which are the subject of Paragraph 43a(1) of the LuftVZO, is unconvincing.

109. As the City of Lübeck has pointed out, all airlines are able to use Lübeck Airport and thus to benefit from the advantages supposed to stem from application of the 2006 schedule. The choice made by airlines to use certain airport infrastructure generally depends on their own commercial strategy, according to the advantages and restrictions to which the infrastructure gives rise.

110. I think that it is also inopportune to require a comparison of the situation of airlines allegedly favoured by the 2006 schedule with that of competing undertakings having the same budgetary expenditure items. Airlines which do not operate from and into Lübeck Airport specifically do not incur expenditure in relation to the charges levied by that airport. The Commission's argument amounts to taking a different and incorrect approach to the question of the selectivity of the measure, namely ascertaining with what other transport infrastructure — airport, railway or other — Lübeck Airport may possibly compete, irrespective of the status of the operating undertakings and of the nature of the services which they provide. [66]

111. Nor, in my view, can the argument be accepted in the present case that it was appropriate to take into account the objectives to be attained by a schedule fixing airport charges under Paragraph 43a(1) of the LuftVZO. It is apparent from the General Court's assessment of the facts that that provision does not involve the general fixing of airport charges applicable to all airports. That provision only authorises each airport operator to adopt its own scale of charges in accordance with priorities which it is for that operator alone to define.

112. In the end, it must be stated that, in the circumstances of this case, there are no basic general rules or basic reference rules from which the 2006 schedule is designed to derogate in favour of airlines using Lübeck Airport. The relevant reference framework is that of the regime which is applicable only to that airport.

e) The fourth part of the ground of appeal, alleging that the General Court erred in law by failing to examine whether the discounts granted by the 2006 schedule are selective on the ground that they benefit only certain airlines

113. The Commission submits, in essence, that, even if the criterion laid down in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), were to be relevant for examining the selectivity of measures fixing charging rates such as those at issue in the present case, the General Court should have examined whether the 2006 schedule, owing to the various discounts for which it provides, is selective in that it favours certain airlines using Lübeck Airport to the detriment of other airlines using that airport.

66 — See judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraphs 59 to 61).

114. In that respect, the Commission maintains that the General Court was wrong to confine itself to examining the reasoning of the decision at issue contained in paragraph 279 thereof. It submits that paragraphs 55 to 66 of that decision described in detail the system of discounts laid down by the 2006 schedule. The Commission also submits that, contrary to what the General Court seems to suggest in paragraphs 53 and 55 of the judgment under appeal, the fact that the circle of beneficiaries of the discounts in question is open, since those discounts are granted according to objective criteria of horizontal application, does not prevent it from being selective. [67]

115. In the present instance, I consider that the General Court did not err in law in concluding that the relevant reference framework was that of the charges applicable only to airlines using Lübeck Airport.

116. The question now arises as to whether the General Court erred in law by not examining whether the system of discounts granted under the 2006 schedule created differentiation between those airlines.

117. In that regard, it is possible for a scale of charges to be selective owing to the criteria and systems of discounts for which it provides.

118. That said, it must be emphasised that the Commission did not take that factor as the basis for concluding, in paragraph 279 of the decision at issue, that the 2006 schedule was selective, but only the fact that 'the advantages at issue benefit only airlines using Lübeck Airport'. Although the issue of the 'rebates and discounts' provided for by the 2006 schedule was indeed referred to in the decision at issue, in particular in paragraphs 268 to 277, it was not mentioned in connection with examination of the selectivity of that schedule, but only in the assessment of the existence of an 'advantage' for the purpose of Article 107(1) TFEU.

119. In those circumstances, I consider that the Commission's objection must be dismissed as inadmissible. In an appeal, the Court's jurisdiction is confined to examining the assessment by the General Court of the pleas argued before it. [68]

120. In any event, it should be pointed out that the Commission has not established that the system of discounts and rebates provided for by the 2006 schedule and granted to airlines with a large number of passengers — a system which seems therefore to be based on a common quantitative criterion — could not be justified.

121. In conclusion, I consider that the third ground of appeal must be rejected.

D – *The fourth ground of appeal, alleging insufficient and contradictory reasoning*

1. Arguments of the parties

122. The Commission submits, first, that the judgment of the General Court is vitiated by insufficient reasoning in three respects. First of all, the General Court neglected an essential element of the examination of selectivity, namely determination of the objective pursued by the 2006 schedule. It is in the light of that objective that it should be determined which undertakings are in a comparable

67 — The Commission refers to the judgments of 13 February 2003, *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraph 48); of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraphs 118 to 128); and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 50).

68 — See, inter alia, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 99 and the case-law cited).

factual and legal situation. Next, the General Court failed to state why selectivity of the aid is not at least the consequence of the system of discounts provided for by the 2006 schedule. Finally, the judgment under appeal fails to state why the 2006 schedule was so manifestly not selective that the Commission was not entitled to initiate the formal investigation procedure.

123. The Commission considers, secondly, that the General Court's reasoning is contradictory, since it first applies the case-law on the selectivity of fiscal measures (paragraphs 51 and 53 of the judgment under appeal) and then finds that that case-law is not relevant (paragraph 57 of the judgment under appeal).

124. The City of Lübeck, supported by the Federal Republic of Germany and the Kingdom of Spain, contends that the judgment under appeal is properly reasoned and that the ground of appeal should be rejected.

2. Assessment

125. I do not think that this ground of appeal can succeed.

126. In the first place, as to whether the General Court stated sufficient reasons in the judgment under appeal with regard to the assessment of the selectivity of the 2006 schedule, it is apparent, first of all, that the General Court implicitly identified the objective of the 2006 schedule and the context in which it was drawn up. Next, it is to be noted that the General Court did not have to state the reasons why the system of discounts did not render the 2006 schedule selective, since, as I have already mentioned, that question was specifically not discussed before the General Court. Finally, I consider that the General Court likewise did not have to explain why the error committed by the Commission in the assessment of the selectivity of the measure at issue was so manifest that it had to lead to the annulment of the decision at issue.

127. As regards, in the second place, the complaint alleging contradictory reasoning so far as concerns the relevance of the case-law on tax measures, I see no inconsistency between the considerations contained in paragraphs 51 and 53 of the judgment under appeal and the statement contained in paragraph 57 of that judgment.

E – *The fifth ground of appeal, alleging disregard of the limited nature of review of a decision to initiate the formal procedure to investigate aid measures*

1. Arguments of the parties

128. The Commission submits that, although the General Court rightly points out, in paragraph 42 of the judgment under appeal, that judicial review of a decision to initiate the formal investigation procedure is limited, it exceeded the limits of that review.

129. The Commission maintains in particular that FL, which was then operating Lübeck Airport, had proposed the 2006 schedule with the aim of avoiding State aid controls as regards its price-setting policy in respect of low-cost airlines. The Commission was faced with a situation in which a preliminary examination of the facts had not enabled it to dispel all the doubts as to whether or not that schedule was selective. Consequently, the Commission was required to initiate the formal investigation procedure. The judgment under appeal contains no explanation as to the reasons why the 2006 schedule was so manifestly not selective that the Commission was not entitled to initiate the formal investigation procedure.

130. The City of Lübeck, supported in this regard by the Federal Republic of Germany and the Kingdom of Spain, contends that this ground of appeal should be rejected. It considers that, since it is manifest that the measure at issue, namely the 2006 schedule, is not selective, the General Court was right to hold that the decision at issue was vitiated by a manifest error of assessment.

2. Assessment

131. I am also not convinced that the General Court exceeded the limits of judicial review concerning the initiation of the formal investigation procedure.

132. Admittedly, it cannot be denied that the decision to initiate the formal investigation procedure is based on an analysis, which is necessarily provisional, of the information brought to the notice of the Commission during the preliminary investigation stage. Since that information is by definition 'fragmentary', the Commission, at the end of that preliminary stage, can only make suppositions regarding whether there is aid and, consequently, regarding whether the cumulative conditions laid down in Article 107(1) TFEU are fulfilled.

133. As the Court has repeatedly held, it is necessary to distinguish between the preliminary procedure for reviewing aid established by Article 108(3) TFEU, which is intended only to allow the Commission to form a prima facie opinion as to whether the aid is compatible in part or in whole, and the formal investigation procedure referred to in Article 108(2) TFEU, which permits — and, in my view, requires — an in-depth examination of the State measures and has a dual purpose.[69]

134. In view of the necessary distinction between those two stages in examining measures, it is not possible to subject the preliminary stage to the same legal requirements as those imposed in connection with the formal procedure.

135. Consequently, the Commission is authorised to initiate the formal investigation procedure provided for in Article 108(2) TFEU where it has sufficient information to consider that a measure fulfils all the conditions for classification as 'State aid' prohibited by Article 107(1) TFEU.

136. However, it cannot be concluded from this that the Commission may confine itself, in support of its decision to initiate the procedure provided for in Article 108(2) TFEU, to making general statements regarding the fulfilment of the conditions required by Article 107(1) TFEU. As is apparent from Article 6 of Regulation No 659/1999, the decision to initiate the formal investigation procedure is to include a preliminary assessment by the Commission as to the aid character of the proposed measure and is to set out the doubts as to its compatibility with the common market.

137. Also, although limited to ascertaining whether or not the Commission made a manifest error of assessment in considering that it could not overcome all the difficulties regarding classification of the measure at issue as 'State aid' during a first examination of that measure,[70] the review carried out by the General Court of the decision to initiate the formal investigation procedure and, in particular, of the question of whether the conditions laid down in Article 107(1) TFEU were prima facie satisfied must nevertheless be effective. It should be pointed out, in line with the reasoning stated in connection with the second ground of appeal, that decisions to initiate a preliminary investigation may have specific and significant legal effects for the parties concerned.

69 — See, inter alia, judgments of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224, paragraph 57), and of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 57). With regard to the difference between the preliminary examination stage and the formal stage, see, most recently, my Opinion in *Club Hotel Loutraki and Others* v *Commission* (C-131/15 P, EU:C:2016:617, points 25 to 27).

70 — See, inter alia, judgment of 21 July 2011, *Alcoa Trasformazioni* v *Commission* (C-194/09 P, EU:C:2011:497, paragraph 61).

138. By confining itself, in paragraph 279 of the decision at issue, to stating that 'the advantages [under the 2006 schedule] benefit only airlines using Lübeck Airport [and are therefore] selective for the purpose of Article 107(1) TFEU', the Commission omitted to state from which general rules the 2006 schedule was intended to derogate. By so doing, it failed to define the relevant reference framework and thus committed a manifest error in its assessment of the measure at issue, an error which, in my view, is unrelated to the existence of complex economic assessments.

139. In this connection, it cannot reasonably be maintained that the General Court should not have restricted its examination to the assessment contained in paragraph 279 of the decision at issue, but should have taken into account the description of the system of discounts in paragraphs 268 to 274 of that decision, since these latter paragraphs concern the identification of a supposed advantage under the 2006 schedule and not its selectivity.

140. I therefore consider that the General Court could conclude without committing a manifest error of assessment that the Commission had not adequately explained why it was unable to indicate, at the stage of its preliminary investigation, the reasons why the 2006 schedule was selective, so that it was required to initiate the formal investigation procedure or, at the very least, it was entitled to do so.

V – **Conclusion**

141. In the light of all the foregoing considerations, I propose that the Court dismiss the appeal and order the European Commission to pay its own costs and those incurred by Hansestadt Lübeck. The Federal Republic of Germany and the Kingdom of Spain are to bear their own costs.