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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1225

of 19 December 2012

regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10) (ex CP 175/06))*(notified under document C(2012) 9448)***(Only the Italian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and particularly Article 62(1)(a) thereof ⁽¹⁾,

Having called on interested parties to submit their comments under to the provisions cited above ⁽²⁾ and having regard to the comments submitted,

Whereas:

1. PROCEDURE

- (1) In a letter dated 13 July 2006, the Commission received a complaint concerning the alleged aid paid to the company SEA Handling SpA ('SEA Handling'), which provides ground handling services at Milan Malpensa and Milan Linate airports. The complaint was initially filed under the number CP 175/06.
- (2) By letter dated 6 October 2006, the Commission asked the Italian authorities for clarification regarding the complaint. By letter dated 21 December 2006, the Italian authorities asked for an extension of the time allowed for an answer.
- (3) By letter dated 11 January 2007 the Commission allowed that extension. By letter dated 9 February 2007, the Italian authorities provided the requested clarification.
- (4) By letter dated 30 May 2007, the Commission informed the complainant that there was insufficient information to show that the state resources criterion in Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU') was met in the case. Consequently, in accordance with Article 20(2) of Council Regulation (EC) No 659/1999 ⁽³⁾, there were insufficient grounds for taking a view of the case. By letter dated 2 July 2007, the complainant provided additional information. In the light of that information the Commission decided to review the complaint.
- (5) By letter dated 3 March 2008, the Commission asked the Italian authorities to provide a copy of the trade union agreement concluded on 26 March 2002. By letter dated 10 April 2008, the Italian authorities provided the requested document.
- (6) By letter dated 20 November 2008, the Italian authorities sent the Commission the union agreement concluded on 13 June 2008.

⁽¹⁾ OJ L 1, 3.1.1994, p. 3.

⁽²⁾ OJ C 184, 22.7.2008, p. 34.

⁽³⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

- (7) By letter dated 23 June 2010, the Commission notified the Italian authorities that it had decided to initiate the procedure provided for in Article 108(2) of the TFEU, and asked the Italian authorities to provide within one month all data and information necessary to evaluate the compatibility of the measures in question.
- (8) By letter dated 19 July 2010, the Italian authorities requested an extension of the time-limit for an answer until 20 September 2010; the Commission replied, allowing the extension, on 23 July 2010.
- (9) On 20 September 2010, the Italian authorities submitted the comments of the Municipality of Milan regarding the Commission's decision to initiate the formal investigation procedure.
- (10) The Commission's decision to initiate the formal investigation procedure ('the opening decision') was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission called on interested parties to submit their comments concerning the measures in question within one month of the date of publication.
- (11) By letter dated 11 February 2011, SEA Handling requested that the deadline for submission of its comments on the opening decision be extended until 21 March 2011. By letter dated 23 February 2011 the Commission allowed that extension.
- (12) By letter dated 25 February 2011, [...] ^(*) requested that the deadline for submission of its comments on the opening decision be extended until 25 March 2011.
- (13) By letter dated 21 March 2011, SEA Handling and SEA SpA ('SEA') sent the Commission joint comments on the opening decision.
- (14) By letter likewise dated 21 March 2011, [...] sent the Commission its comments on the opening decision.
- (15) By letter dated 7 April 2011, the Commission forwarded the comments of the interested parties to the Italian authorities, and asked the Italian authorities to submit their observations by 16 May 2011.
- (16) By letter dated 18 April 2011, the Italian authorities asked the Commission to extend the deadline for their observations on the interested parties' comments until 2 June 2011. By letter dated 28 April 2011, the Commission allowed the Italian authorities that extension.
- (17) By letter dated 1 June 2011, the Italian authorities submitted their observations. They also submitted new arguments based on a study carried out by a consultant.
- (18) By letter dated 11 July 2011, the Commission urged the Italian authorities to submit the information requested in paragraph 5 of the opening decision, which had not yet been provided either by the Italian authorities or by SEA.
- (19) By letter dated 28 July 2011, the Italian authorities asked the Commission to extend the deadline for submission of the requested information until 15 October 2011. By letter dated 8 August 2011, the Commission allowed an extension of the deadline until 15 September 2011.
- (20) By letter dated 26 August 2011, the Italian authorities informed the Commission that they considered that the extension of the deadline allowed in response to their initial request was insufficient.
- (21) By letter dated 15 September 2011, the Italian authorities submitted their reply to the Commission's request for information. By letter dated 18 October 2011, the Italian authorities submitted a translation into English of the document contained in Annex 5 to the previous submission.
- (22) By letter dated 21 October 2011, the Italian authorities supplemented Annex 12 to the previous submission by supplying information provided by the Municipality of Milan. By letter dated 7 November 2011, the Italian authorities submitted a translation of those observations into English.
- (23) On 19 June 2012 a meeting was held between Commission staff and the Italian authorities. After the meeting, in letters dated 2 July 2012 and 10 July 2012, the Italian authorities submitted fresh arguments in support of their view of the measures under examination. At the request of the Italian authorities, a further meeting with Commission staff took place on 23 November 2012. The Italian authorities there submitted substantially the same arguments as at the previous meeting.

⁽⁴⁾ OJ C 29, 29.1.2011, p. 10.

^(*) Confidential information.

2. SUMMARY OF THE MEASURES

- (24) This decision concerns injections of capital by SEA into its subsidiary SEA Handling, from 2001 to 2010, which were intended essentially to cover operating losses suffered by SEA Handling.

2.1. ALLEGED RECIPIENT OF THE AID

- (25) The beneficiary of the measures in question is SEA Holding, which is wholly owned by SEA. SEA is a company that manages the Milan airport system, which comprises Linate and Malpensa airports. It is a limited company (SpA) established under private law, which during the relevant period was owned almost entirely by two public bodies, the Municipality of Milan (84,56 %) and the Province of Milan (14,56 %), along with some other small public and private shareholders (0,88 %). In December 2011, 29,75 % of SEA's capital was sold to the private fund F2i (Fondi italiani per le infrastrutture).
- (26) The activities of SEA are divided as follows:
- (a) general airport management: implementation and management of air transport infrastructures;
 - (b) ground handling: ground handling services for passengers, aircraft, baggage and freight;
 - (c) related activities: commercial activities in airports, including sale to the public of various services, duty-free goods, management of newspaper kiosks, restaurants, advertising, parking, vehicle rental, and management and maintenance of infrastructures intended for non-air activities, such as tourist accommodation and logistics services. These activities are carried out directly by SEA or by other parties under specific contracts with SEA.
- (27) SEA Handling was established following the entry into force of Legislative Decree No 18/99 of 13 January 1999 ⁽⁵⁾, which transposed into Italian law Council Directive 96/67/EC ⁽⁶⁾: that Directive imposed the requirement to keep separate accounts for activities related to the provision of the services referred to above ⁽⁷⁾. With the formation of SEA Handling, SEA proceeded to separate this set of activities in accounting and legal terms ⁽⁸⁾. In addition to managing Malpensa and Linate airports, SEA provides various services which are secondary and complementary to air transport.
- (28) SEA Handling went into operation on 1 June 2002. Until 1 June 2002 ground handling services at Linate and Malpensa airports were provided directly by SEA ⁽⁹⁾.

2.2. THE MEASURES UNDER EXAMINATION

- (29) According to the information supplied to the Commission, SEA Handling received subsidies from SEA from 2002 onward, in the form of capital injections intended essentially to cover its operating losses.
- (30) The amounts of SEA Handling's losses were as follows ⁽¹⁰⁾:
- in 2002, SEA Handling recorded a total loss of EUR 43 639 040,39 (1 June 2002-31 December 2002),
 - in 2003, SEA Handling recorded a total loss of EUR 49 489 577,23 (1 January 2003-31 December 2003),

⁽⁵⁾ *Gazzetta Ufficiale* 28, 4.2.1999.

⁽⁶⁾ Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36).

⁽⁷⁾ Article 4 of Directive 96/67/EC states that 'Where the managing body of an airport, the airport user or the supplier of groundhandling services provide groundhandling services, they must rigorously separate the accounts of their groundhandling activities from the accounts of their other activities, in accordance with current commercial practice ... An independent examiner appointed by the Member State must check that this separation of accounts is carried out. The examiner shall also check the absence of financial flows between the activity of the managing body as airport authority and its groundhandling activity.'

⁽⁸⁾ On 1 December 2011, the Commission adopted the 'Better Airports' package. This package includes a proposal to review the rules on ground handling, especially in order to improve the quality and efficiency of ground handling services at airports. It also provides for the legal separation of ground handling activities from airport management. It would increase from two to three the minimum number of ground handling service providers available to airlines at large airports for key ground handling services that are still restricted, namely baggage management, ramp handling, refuelling and oil, freight and mail services.

⁽⁹⁾ SEA Handling Srl, which existed prior to the founding of SEA Handling, was formed in 1998, but was never operational.

⁽¹⁰⁾ Accounts at 31 December each year.

- in 2004, SEA Handling recorded a total loss of EUR 47 962 810 (1 January 2004-31 December 2004),
 - in 2005, SEA Handling recorded a total loss of EUR 42 430 169,31 (1 January 2005-31 December 2005),
 - in 2006, SEA Handling recorded a total loss of EUR 44 150 435 (1 January 2006-31 December 2006),
 - in 2007, SEA Handling recorded a total loss of EUR 59 724 727 (1 January 2007-31 December 2007),
 - in 2008, SEA Handling recorded a total loss of EUR 52 387 811 (1 January 2008-31 December 2008),
 - in 2009, SEA Handling recorded a total loss of EUR 29,7 million (1 January 2009-31 December 2009),
 - in 2010, SEA Handling recorded a total loss of EUR 13,4 million (1 January 2010-31 December 2010).
- (31) Between 2002 and 2010 SEA Handling's total losses amounted to EUR 339,784 million; in response, SEA transferred a total of EUR 359,644 million to SEA Handling in the form of capital increases made in various instalments each year. The distribution and the amounts shown in the table are taken from information submitted by the Italian authorities.

(EUR thousand)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	
Amounts injected ⁽¹⁾	18 765	24 879	25 236	6 111	30 000	11 559	25 271	13 481	0	
	21 200	24 252	30 000	30 000	439	2 663		34 328		
				4 118	30 000	3 527				
						23 808				
Annual total	39 965	49 132	55 236	40 229	60 439	41 559	25 271	47 810	0	
Grand total										359 664

- ⁽¹⁾ The capital increases intended to offset the operating losses were not necessarily all made over the course of a given year. For example, the first capital increase, of EUR 24,879 million, which occurred in 2003, resulted from the partial coverage of the losses suffered in 2002. The second capital increase, of EUR 24,252 million, resulted from the partial coverage of losses suffered in 2003.

2.3. ROLE OF THE PUBLIC AUTHORITIES IN THE MANAGEMENT OF SEA AND SEA HANDLING

- (32) According to the information provided to the Commission, the administration of the Municipality of Milan, SEA and trade union organisations reached an agreement on 26 March 2002 which states:

The administration of the Municipality of Milan ... confirms that ...

- SEA will retain the majority share in the handling company for at least five years,
- SEA undertakes to report the choice of any partners to the union organisations and to present together with them the business plan and corporate structure ... the agreement to be reached between SEA and the union organisations will come into effect after the business plan has been presented to and examined by the unions,
- the agreed mobility plan must resolve potential job losses, excluding collective redundancy procedures and obliging SEA to provide supplementary training, retraining, voluntary redundancy incentives and assistance pending pensionability to all identified personnel,
- the transfer of workers to the new company will take place with the protection of all rights acquired and with a guarantee of employment for the subsequent five years,

- the balancing of costs/turnover and the general economic framework will be supported by SEA and any partners, maintaining its managerial capacities unchanged while making substantial further improvements in its ability to compete properly on domestic and international markets,
- the competent Ministries and airport authorities will be approached with the aim of introducing directives which ensure guaranteed employment in the event of the transfer of ground handling activities to a competitor, with a view among other things to responding to the obligations of safety and reliability imposed on airport managers, obligations which must also extend to the staff who operate in ground handling activities.

Finally, the municipal administration and union organisations will monitor the content of this agreement, ensuring its continued implementation at regular meetings.

- (33) The abovementioned commitments were confirmed by subsequent agreements which specifically reaffirmed the content of the agreement. The Commission makes particular reference to the records of the union agreements between SEA and the union organisations dated 4 April 2002, 15 May 2002 and 9 June 2003, copies of which were sent to the Commission.
- (34) The Municipal Council minutes also list among the commitments entered into by the Municipality 'protection of rights' and 'guaranteed employment for the next five years' ⁽¹¹⁾. Those commitments were reaffirmed at the Municipal Council meeting held on 16 June 2003, a copy of the minutes of which was sent to the Commission.
- (35) Moreover, on 7 November 2006, the municipal councillors expressed concern regarding the crisis situation, emphasising the need to guarantee the economic survival of SEA Handling at all costs:

The difficulties faced by SEA Handling SpA ... cannot fall entirely on the backs of the workers ... In light of this situation, the airport company chairman and mayor Moratti must appear before the Committee on Transport [of the Municipality of Milan] as soon as possible to explain how they intend to relaunch the role of SEA Handling SpA on the air support services market ⁽¹²⁾.

2.4. ECONOMIC PERFORMANCE OF SEA HANDLING ⁽¹³⁾

- (36) The following graph shows the progression of operating costs and gross operating margin for the period 2002-2010. The same data are shown in table 1 below, with the progression of the turnover of SEA Handling, along with the progression of gross operating margin/turnover and labour cost/turnover ratios.

Graph 1

Economic progression of the company

[...].

Table 1

Progression of turnover and operating costs

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Turnover (EUR million)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Turnover progression (YoY)		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Labour costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Cost of labour progression (YoY)		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹¹⁾ Agreement was reached on 26 March 2002 between the unions, SEA and the Municipality of Milan.

⁽¹²⁾ Press release from Milan municipal councillor Marco Cormio, dated 7 November 2006, a copy of which was sent to the Commission.

⁽¹³⁾ The data shown in the tables and graphs in this section are taken from documentation provided by SEA.

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Other costs	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].
Other costs progression (YoY)		[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].
Gross operating margin (EBITDA)	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].
EBITDA progression (YoY)		[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].
EBITDA/turnover ratio	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].
Labour costs/turnover ratio	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].	[...].

- (37) The table shows that labour costs remained stable between 2002 and 2007, with slight variations, at around EUR 160 million, but then dropped sharply to just under EUR 100 million in 2010, a fall of nearly 38 % in three years. The progression of other costs follows a similar trend, with a 37 % fall in the same period.
- (38) Turnover rose 10 % between 2002 and 2006. The marked decline in activity of Alitalia at Malpensa had a significant impact as of 2008, since the number of trips booked through Alitalia fell 87 % between 2007 and 2010, and the revenues generated by the presence of Alitalia consequently fell 72 %. Total turnover fell 27 % in the same period, a reduction which was offset with a rise in revenues earned from other airlines.
- (39) The efforts made to reduce operating costs and limit losses after Alitalia's de-hubbing in 2008 led to a gradual improvement in the (negative) gross operating margin, which climbed from – EUR 42,5 million in 2007 to – EUR 8,5 million in 2010.
- (40) The following table shows the progression of worker numbers expressed in full time equivalents (FTE).

Table 2

Progression of worker numbers

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Total FTEs	3 842	3 976	3 820	3 562	3 476	3 310	2 969	2 460	2 221
of which: permanent	3 692	3 804	3 457	3 223	3 011	2 795	2 760	2 419	2 181
of which: temporary	150	172	363	338	465	515	208	40	40
operative FTEs (total FTEs + hours of overtime — layoff fund)	3 964	4 125	3 979	3 706	3 642	3 461	2 852	2 227	2 050

- (41) The table shows a constant decline in the number of full-time equivalents from 2003 onward (– 44 % between 2003 and 2010), particularly among permanent FTEs.
- (42) Temporary staff numbers rose considerably between 2002 and 2007, from 150 to 515 FTEs. The number of temporary staff then fell, alongside a dip in turnover resulting from the loss of Alitalia traffic and greater efforts by SEA Handling to reduce its wage bill. This effort also led, in the period in question, to a reduction of overtime hours and an increase in the layoff fund (*cassa integrazione*), causing an even sharper fall in the number of operative FTEs.

- (43) The table below shows improvements in staff productivity in terms of movements handled by the work unit and the progression of labour costs.

Table 3

Progression of staff productivity

[...]

Table 4

Labour costs

[...]

3. REASONS FOR THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

- (44) In the opening decision the Commission judged, on the basis of information provided by the complainant and by the Italian authorities, that the measures for the period 2002-2005 might have constituted State aid, and expressed doubts regarding the compatibility of such aid with the internal market. In the opening decision the Commission therefore asked Italy to provide the necessary documents, information and data up to the most recent period to enable it to evaluate the compatibility of the measures. It also indicated the need to examine the period after 2005, in which the scale of the losses had not initially been communicated to the Commission, and the period 2002-2010 as a whole, in order to determine whether SEA Handling had received unlawful State aid during that period in the form of compensation for losses ⁽¹⁴⁾.
- (45) The Commission reached the conclusion that there was indeed State aid, as it considered that the conditions in Article 107(1) of the TFEU were satisfied.
- (46) The Commission took the preliminary view that, in consideration of the majority share of the Municipality and of the Province of Milan in SEA's capital, the funds used to cover the losses were of public origin. The Commission also observed that there was considerable evidence of the kind referred to in the *Stardust Marine* judgment ⁽¹⁵⁾ indicating an involvement of the public authorities in measures adopted by SEA with regard to its subsidiary SEA Handling.
- (47) The Commission considered that the measures were selective, since they concerned only SEA Handling, giving the company an economic advantage which it would not have had under normal market conditions.
- (48) To determine whether, in covering SEA Handling's losses, SEA had acted as a prudent investor operating in normal market conditions, the Commission took various factors into consideration.
- (49) In a preliminary phase, the Commission found that the business plan approved in 2001 envisaged that SEA Handling would see its profits grow by 2005 ⁽¹⁶⁾. It had been said that the decision to continue operating in the ground handling sector after 2002, and not to sell SEA Handling immediately after the break-up of the two companies, was justified by the predicted upturn in profits within a three-year period. However, the 2001 business plan did not contain a detailed strategy that would allow SEA to guarantee that SEA Handling would be profitable, and that plan covered all of SEA's activities. No other detailed business plan relating specifically to SEA Handling was submitted to the Commission.
- (50) The Commission also found that between 2003 and 2005, SEA Handling saw limited progress or even negative results, with annual losses exceeding EUR 40 million, while labour costs remained stable, total costs fell by around 3 %, turnover dropped 4,5 % and costs per unit of labour rose 7,6 %.
- (51) The Italian authorities had argued that the coverage of SEA Handling's losses had to be looked at from a group perspective; the Commission took the view that this did not explain why, at the group level, it should have been regarded as more advantageous to cover the losses of SEA Handling rather than to sell or restructure it. The Commission considered that the deficit situation of SEA Handling was too protracted to fall within the meaning of the term 'a limited period' in the judgment of the Court of Justice in Case C-303/88 *Italy v Commission* ⁽¹⁷⁾ and that the recurrent nature of the coverage of losses since 2002 confirmed that SEA was not operating as a prudent investor.

⁽¹⁴⁾ Opening decision, paragraphs 42 and 102 and Section 5.

⁽¹⁵⁾ Case C-482/99 *France v Commission* [2002] ECR I-4397.

⁽¹⁶⁾ 'Piano aziendale consolidato del Gruppo SEA 2002-2006' (SEA Group consolidated business plan 2002-2006), provided by the Italian authorities.

⁽¹⁷⁾ Case C-303/88 *Italy v Commission* [1991] ECR I-1433.

- (52) The Commission found that [...] or other operators would have been able to enter the market; that the loss of image that the Italian authorities had invoked to justify SEA's withdrawal from ground handling was not quantified, and was presented in terms that were too vague; and that the obligation to provide ground handling services did not require SEA to provide such services direct, given that the presence of other providers constituted a practical and valid alternative.
- (53) Finally, the Commission judged that the measures undoubtedly had an impact on trade between Member States and on competition. The effect on trade was clear, given the objectives of Directive 96/67/EC, which regulated access to the ground handling market at Community airports that reached the levels of traffic that the Directive specified. There was also a presumed impact on competition, since the measures significantly strengthened the position of SEA Handling to the detriment of its competitors.
- (54) The Commission considered for the time being that the coverage of losses constituted State aid, and expressed doubts regarding the compatibility of the aid in question with the internal market. The Commission communication 'Community guidelines on financing of airports and start-up aid to airlines departing from regional airports' (the Aviation Sector Guidelines)⁽¹⁸⁾, referring to Directive 96/67/EC, states that Above the threshold of two million passengers, ground-handling services must be self-financing and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest⁽¹⁹⁾. The Commission found that the subsidising of such activities by public authorities was contrary to the objectives established by Directive 96/67/EC and could therefore have a negative effect on the liberalisation of the market.
- (55) Consequently, the Commission decided to initiate the formal investigation procedure to remove all doubts as to the classification of the measures as State aid up to the most recent period, and as to their compatibility with the internal market.

4. OBSERVATIONS OF THE ITALIAN AUTHORITIES

The period under investigation

- (56) The Italian authorities were puzzled by the decision primarily because of the chronology of the claims made by the Commission. The Italian authorities argued that the observations of the Commission referred to the period 2006-2008, which was later than the period that formed the basis of the preliminary investigation and, therefore, of the requests for clarification that they had received regarding the period 2002-2005. The Municipality therefore asked the Commission to amend the timeframe covered by the proceedings, and to send the Italian authorities a regular request for information for the later period (from 2006 onwards)⁽²⁰⁾.

The imputability to the public authorities of the measures for the coverage of losses

- (57) The first indication of imputability identified by the Commission consisted of excerpts from the agreement of 26 March 2002 signed by the Municipality of Milan, SEA and union representatives, excerpts from the record of the union agreement of 4 April 2002, subsequently confirmed on 15 May 2002, between SEA and the industrial and confederated union organisations, and excerpts from the minutes of the union agreement concluded by SEA, SEA Handling and the industrial and confederated union organisations of 9 June 2003; the Italian authorities asked the Commission to reconsider the probative value of these documents.
- (58) In this regard, the Italian authorities argued that the measures could be imputed to the State only on the basis of objective findings showing that the Member State had intervened in SEA's decision in such a way as to determine or influence it, in the sense that SEA would have adopted different behaviour had it been able to make an independent decision⁽²¹⁾; they contended that this was not the case for the Municipality of Milan.
- (59) The Municipality argued that it had had no involvement whatsoever in the signing of the union agreements, and had had nothing to do with the commitments given by SEA to union representatives in the agreements in question. The Municipality had participated only in the meeting of 26 March 2002, and had protected the interests of workers as the majority shareholder and particularly as the responsible authority in the local community. As such it had not entered into any commitment, but had given the unions 'confirmation' at political level of SEA's business decisions,

⁽¹⁸⁾ OJ C 312, 9.12.2005, p. 1.

⁽¹⁹⁾ Aviation Sector Guidelines, point 70.

⁽²⁰⁾ Following this observation, the Commission, in its letter of 11 July 2011, drew attention to paragraph 42 of the opening decision, which stated that the Commission judged it necessary to examine the period 2002-2010 to determine whether SEA Handling had received unlawful State aid in the form of compensation for losses during that period. The Commission went on to confirm that the time being considered ran from 2002 to the most recent period, and that the requests for information remained valid.

⁽²¹⁾ Judgment of the General Court in Case T-442/03 SIC v Commission, paragraph 126.

and in particular its strategy of saving jobs, with the intention of supporting the unions in overseeing the implementation of those decisions. The agreement, which was clearly of a socio-political nature, had no value in law, and served only to reassure the unions as to the trustworthiness of SEA's commitments. From the documents taken into consideration by the Commission, it could not be inferred that the Municipality of Milan had played a determining role in the decision to cover SEA Handling's losses, or that it had assumed any obligation in that respect. SEA therefore took its own business decisions in complete freedom and independence.

- (60) In general, the correspondence from 2002 to 2005 between company management and certain members of the Municipal Council, who were denied access to certain SEA internal documents which they had requested, in particular the business plan, provided proof of a lack of interference by the administration in the activities of SEA. According to the Italian authorities, there was additional proof in the fact that SEA had specifically asserted its independence from the administration, for example in response to a question submitted by a municipal councillor.
- (61) The Italian authorities also stated that the Municipality could not legitimately enter into valid and effective commitments without formal acts adopted by its competent bodies giving specific indications of financial coverage.
- (62) The second indication of imputability identified by the Commission was the particular dependency of the directors and managers of SEA on the Municipality of Milan: here the Italian authorities disputed the Commission's elevation of claims made in newspaper articles to the level of evidence. They also put forward the following observations.
- (63) First, regarding the SEA directors' signing of 'blank resignations' that were submitted to the mayor of Milan before the end of their term of office, the Italian authorities maintained that such resignations did not show the existence of a situation of particular dependency of SEA directors on the Municipality. As acknowledged by the chairman of the board of directors at the ordinary meeting held on 24 February 2006, this was a common practice 'used specifically to take timely steps to remove directors alleged to have acted improperly'. The chairman ruled out the use of such letters in cases where the shareholder disagreed with managerial decisions made by the board of directors: the board had exclusive responsibility for such decisions. He stressed that 'in any case, nobody has ever applied any pressure with reference to this letter or to other documents', and that such letters had 'moral value, but no legal value'. According to the representative of the Municipality at the same SEA ordinary meeting, such letters 'would be entirely unlikely to influence the conduct of board members. The members of the board are subject only to the general meeting of shareholders: only by that body can they be appointed and dismissed, and only to that body are they responsible for company management'. According to the Italian authorities, the only effect of the abovementioned letters was that a director dismissed by the shareholders' meeting would lose entitlement to compensation for unfair dismissal.
- (64) Second, still with regard to the relationship of particular dependency of SEA on the Municipality of Milan, the Italian authorities observed, contrary to the claims of the Commission, that in its supervisory role the Municipality of Milan did not appoint representatives to the board of directors, but merely designated them: board members were appointed only by the general meeting, in accordance with the ordinary rules of private law governing limited companies under the Italian Civil Code. They also argued that in line with the ordinary legal rules, as was often the case, the constitution of SEA gave the board of directors the power to select the names of directors to be submitted for the meeting's approval.
- (65) The Italian authorities affirmed that other indicators that might tend to demonstrate the imputability of a State measure, and in particular the classes of evidence identified by the Court of Justice in the *Stardust Marine* case, likewise led to the conclusion that the measure under examination in this case was not imputable to the State. SEA was not integrated into the structures of the public administration in any way, either locally or at the national level. Turning to the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the Italian authorities stated that SEA always acted as an ordinary private firm. The legal status of the undertaking could not demonstrate that the measures were imputable to the State either, because SEA was in every respect a private company. Finally, in reference to the last kind of evidence identified by the court, namely the intensity of the supervision exercised by the public authorities over the management of the undertaking, they contended that the Municipality exercised no influence whatsoever and that the company had itself proclaimed its independence from the administration, which demonstrated that the administration was not involved in the adoption of any corporate decisions.

Application of the private investor test

- (66) With regard to the application of the private investor test, the Italian authorities argued that the factual evidence (economic and other data) which the Commission had assembled during the course of its preliminary investigations, but which related to a time after the disputed acts were decided, could be used where necessary to evaluate the compatibility of the measures with the rules of the Treaty, if they were classified as aid; but such evidence was of no help in determining whether the financial measures in question were compatible with the private investor test. The Commission's entire reasoning was vitiated by an erroneous application of the private investor test, which derived from an inaccurate assessment of the background to the case.
- (67) With regard to the context that had to be taken into consideration, the Italian authorities observed, first, that the Commission had taken no account of the fact that, as part of the liberalisation of the European ground handling services market following the adoption of Directive 96/67/EC, transposed into Italian legislation by Legislative Decree No 18/99, SEA had decided not simply to separate its accounts, but to spin off the activities in question and transfer them to a new legal entity. This break-up was instrumental in the group's strategic aims of finding an industrial partner to provide ground handling services and identifying measures to improve the efficiency of ground handling services at Linate and Malpensa airports.
- (68) According to the Italian authorities, as part of the liberalisation process, airport management companies had generally reorganised ground handling services after having considered the two viable commercial models: ground handling services might be provided not directly by the airport manager but instead by outside companies operating on an international scale ('outsourcing', e.g. airports in London, Copenhagen, Spain or Dublin), or they might be provided directly by the airport manager with only the accounts being separated (e.g. Frankfurt or Vienna) or through the formation of a separate company (SEA or Paris) ('direct management'). Each of the two models had its advantages and disadvantages, which the airport management companies had looked at carefully, particularly given the different regulatory circumstances in each country. Outsourcing allowed resources to be focused on core business, and benefited the profit and loss account immediately, because in most cases ground handling services operated at a loss, unless they were provided on a large scale and not only at the airport managed by the company. But keeping ground handling activities allowed airport managers to exercise greater control over the quality of the service, which, leaving the regulatory aspects aside, had knock-on benefits on group profits, particularly in the medium to long term.
- (69) This second model, which had been chosen by SEA, enabled the airport manager to protect the role of the airport centre and the transfer processes, to retain control over the level of quality of the service provided, to provide select ground handling services at airports in which no other operators were able to supply them and, finally, to maintain a strong influence over airport security. This option necessitated high operating costs which were inherent in the direct provision of ground handling services. Productivity in this area could not be measured in exclusively financial terms.
- (70) The Italian authorities argued that this strategy of the SEA group was perfectly rational, because it enabled SEA to retain ground handling services, counting on a gradual increase in productivity and on the quality of services and medium- to long-term benefits to the group. At the same time, by spinning off the activities and transferring the provision of services to a separate company (SEA Handling), SEA would be able to capitalise on any opportunities for partnership with other operators in the sector, with the aim of recovering profitability thanks to the synergies achieved through integration into an international network and the acquisition of further operational know-how.
- (71) SEA, therefore, intended to bear the losses initially recorded by its subsidiary with a view to the benefits that would ensue for the group, along with a gradual improvement in SEA Handling's revenue and profitability (which was initially forecast to happen after three years of activity, i.e. by 2005), to be achieved through measures set out in a restructuring plan which also provided, if possible, for the entry of a strategic partner which would acquire a significant minority share in SEA Handling.
- (72) In May 2001, SEA launched a competitive bidding procedure aimed at identifying a minority strategic partner in SEA Handling, at the end of which the offer submitted by [...] was found to be the most advantageous. The negotiations undertaken with [...] came very close to signature, particularly thanks to a relaunch plan. But thereafter the negotiations ran aground, owing mainly to disagreement over the valuation of the company.

- (73) The measures set forth in the SEA group's consolidated business plan for 2002-2006 ('the 2002-2006 consolidated business plan') focused on a recovery of labour productivity of 20 % in that period. These measures were judged appropriate and sufficient to validate the choice of business model that had been made. While the objective for the recovery of profitability was not met, the financial results were encouraging, and confirmed SEA's view of the suitability of the business model chosen, in the economic interests of the group and its shareholders.
- (74) The Italian authorities argued that the fact that SEA Handling saw no recovery in profitability within the term initially proposed was due to a market scenario that differed greatly from what had been forecast, as a result of two international factors which significantly affected the development of air traffic in that period, namely SARS and the Iraq war, and the consequent economic challenges faced by international airlines, which suffered a sharp rise in oil prices and consequently had to accept a drop in prices in a competitive environment that was far more aggressive than expected.
- (75) The Italian authorities asked the Commission to reconsider its objection to SEA's decision to continue to cover the losses of its subsidiary even when, in its view, economic developments in its first two full years of activity (2003 and 2004) showed that an upturn in profitability within three years would be impossible. The Italian authorities argued that this objection was based on a simplistic application of the private investor test, essentially in terms of mere short-term profit. The Commission had overlooked the fact that, in the case in point, there were other factors to be taken into account, in addition to the financial flows generated directly by the investment, especially because the parent company was vertically connected to its subsidiary, and that an appreciable part of its business depended on the quality of the services the subsidiary provided. The Commission had confined itself to looking at the lack of profitability of the measure in first two years of operation, and had completely ignored the specific nature of the sector, in which an airport manager might have an interest in carrying on a ground handling business, or supporting it financially, irrespective of its immediate profitability.
- (76) The Italian authorities also provided a counterfactual analysis conducted by an external consultant with the aim of proving that the hypotheses behind the document supplied by SEA, 'Presentazione del piano aziendale 2003-2007 di SEA Handling' (Presentation of the SEA Handling 2003-2007 business plan, hereinafter 'the 2003-2007 business plan') were realistic and reasonable, and that a number of unforeseen circumstances had had serious negative effects on SEA Handling, resulting in losses greater than those reasonably foreseeable when the decision to cover the losses was made. The primary finding of this analysis was that the main reason that the results recorded fell short of those forecast in the business plan was the fall in traffic handled and in prices. In other words, while SEA Handling had managed to achieve its objectives in terms of reducing unit costs, it had not reached the financial targets set in the business plan owing to the significant loss of revenue due to the drop in traffic and in prices by comparison with the levels forecast.
- (77) The Commission had also failed to give proper consideration to the specific character of the sector in Italy in light of the applicable Italian regulations. First, pursuant to Article 3.3 of Legislative Decree No 18/99 and Article 705.2(d) of the Sea and Air Navigation Code, the airport manager was required to ensure that the airport had all the necessary ground handling services, either providing them directly or coordinating the activities of operators who provided such services themselves or through outside parties. Additionally, with specific reference to Linate and Malpensa airports, Article 4 of the agreement signed between ENAC (the Italian Civil Aviation Authority) and SEA on 4 September 2001 specifically required SEA to guarantee ground handling services and to ensure the availability and efficiency of all vehicles, equipment and systems and anything else necessary for the continued, regular and effective provision of such services.
- (78) The Italian authorities argued that this legislation did not allow SEA simply to transfer or outsource ground handling activities. Even if it were to decide to move in that direction, it would still have to conclude the appropriate contracts and bear the necessary costs in order to satisfy itself that the services met the demands and requirements imposed by the legislation or deriving from provisions laid down in the measure entrusting it with the management of the airport. The airport manager continued to be responsible to the public authority for the regular and effective provision of ground handling services.
- (79) For the correct application of the private investor test to the case, lastly, the Italian authorities observed that according to established case-law, the private operator with which the conduct of the public enterprise was to be compared must be of a comparable size and nature⁽²²⁾, and that the investment consisting of the coverage of the losses of SEA Handling was decided and carried out by the SEA Group, shareholder in SEA Handling and holder of the concession for the management of Malpensa and Linate airports. First, this meant, as the Commission had indeed pointed out in its decision, that the conduct of SEA could not be compared to that of an ordinary investor laying out

(22) Judgment of the General Court in Case T-296/97 *Alitalia*, paragraph 81.

capital with a view to realising a profit in the relatively short term, but instead had to be compared to the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term ⁽²³⁾. Second, consideration must also be given to the specific features of the regulated sector in question, and to the normal dynamics, in that context, of the economic relations between the parent and the subsidiary ⁽²⁴⁾.

- (80) Consequently, the Italian authorities considered that the Commission should have evaluated the measures in question from a group perspective, that is, examining SEA's consolidated balance sheet; if it had done so, it would have found that the group had received substantial gross revenue, and had been well able to absorb the losses of its ground handling division internally while creating value for its shareholders.
- (81) Besides the probability of deriving indirect material profit from the coverage of SEA Handling's losses, there were other considerations to be taken into account, including: (a) the possibility of obtaining indirect economic advantages from commercial relations with the subsidiary; (b) the difficulties of outsourcing in the national context of reference, given the economic obligations undertaken and the commitments made to the public authorities; (c) the protection of the image of the group; and (d) the fulfilment of obligations towards the state deriving from the agreement and from the law.
- (82) In the three-year period of 2003-2005, the SEA group had achieved significant results with regard to the quality of the service provided to users. Waiting times for arriving baggage had improved and calls managed by SEA had seen their punctuality improve.
- (83) In conclusion, the Italian authorities considered that SEA's conduct in the case was perfectly compatible with that of a private business group which was pursuing a structural policy and which preferred to compensate the losses of one of its business divisions for the present, with a view to improving long-term profitability and in consideration of other factors of a financial or non-financial nature that were inherent to the group's economic interests. Contrary to the Commission's arguments, therefore, the existence of solid prospects for a return to profitability within a reasonable time was demonstrated by the constant economic improvement seen by SEA Handling in the period 2003-2005, despite its inability to find a strategic minority partner and despite the difficult market situation.

Compatibility

- (84) Regarding the admissibility of the measures, the Italian authorities essentially made the following claims: (i) considering the constant losses recorded by its ground handling divisions, even prior to the formation of SEA Handling, it was clear that the company had been in difficulty since the date it went into operation; (ii) the restructuring of SEA Handling was based on a restructuring plan consisting of various documents regarding the period 2003-2010, aimed at restoring the profitability of its ground handling business; (iii) those documents set out in detail SEA's strategy and the schedule of measures to be taken.
- (85) More specifically, the 2002-2006 consolidated business plan laid down the following measures for recovering ground handling productivity and increasing revenue:
- incentives for reducing the employee absentee rate;
 - computerisation and rationalisation of operating branch activities;
 - allowing overtime;
 - integration of Malpensa airport sectors A and B as of January 2002;
 - introduction of new employment contracts with flexible hours; and
 - measures aimed at reducing staff transfer times.
- (86) Additionally, the Italian authorities argued that one of the most important restructuring measures was the selection of a minority shareholder.

⁽²³⁾ Judgment of the Court of Justice in Case C-305/89 *ALFA Romeo*, paragraph 20.

⁽²⁴⁾ Judgment of the Court of Justice in Joined Cases C-83/01, C-93/01 and C-94/01 *Chronopost*, paragraphs 33-38.

- (87) Second, according to the Italian authorities, the 2003-2007 business plan, which was centred on SEA Handling, identified the main factors having negative effects on the functioning of the company: it cited in particular the cost of labour, organisational imbalances, and insufficient technological innovation. The document indicated the principal measures needed to restore company productivity: (i) increase of the company's market share; (ii) measures to increase technological innovation; (iii) measures to improve adaptability to customer needs; (iv) review of non-core activities with high costs; (v) reduction of labour costs; (vi) recovery of revenue from activities other than ground handling services.
- (88) Third, the Italian authorities observed that the document 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA — 11 maggio 2007' (Executive Summary: Guidelines for the SEA group's 2007-2012 strategic plan, 11 May 2007, hereinafter 'the 2007-2012 strategic plan') included a three-phase plan aimed at returning SEA Handling to viability by 2011. The aim of returning its ground handling business to profitability was also apparent in the SEA group strategic plan for 2009-2016 ('the 2009-2016 strategic plan') and in the SEA group business plan for 2011-2013 ('the 2011-2013 business plan').
- (89) Fourth, the Italian authorities argued that there was no distortion of competition, since the measures in question were necessary for liberalising the market. In any event measures had been taken to ensure that competition was not unduly distorted, most notably the gradual reduction in employment levels (with 1 755 jobs cut in 2003-2010) and reduced market presence (a complete withdrawal from all non-core business; the ending of de-icing activity; and the failed attempts to sell a minority share in SEA Handling).
- (90) Finally, Italy contended that the aid was clearly limited to the minimum necessary, given the operating losses sustained by the company and the amount needed to ensure continuity of ground handling operations. The aid did not result in an increase in the company's market share to the detriment of its competitors, since no investment measures were taken that were not included in the restructuring plans.

5. OBSERVATIONS OF THE INTERESTED PARTIES

5.1. SEA

- (91) In its observations, SEA supported the arguments presented by the Italian authorities, and elaborated on certain aspects.

The imputability to the Italian State of the measures for the coverage of losses

- (92) The Commission had asserted that the Municipality had played an active role in the union agreement of 4 April 2002; SEA began by looking more closely at the *Stardust Marine* judgment, arguing that the burden of proof with regard to imputability lay with the Commission, and asserting that the evidence provided in the case was limited in volume and was flimsy in content and consistency. There was far more solid and meaningful counterevidence to show that SEA had made its choices with regard to the restructuring of SEA Handling independently.
- (93) The agreements reached with the union organisations were aimed at reassuring employees that their rights would be safeguarded and that the employment protection measures based on the strategy adopted by SEA would be implemented. SEA's board of directors had decided to reorganise the group, but had not given any commitment that in the course of the reorganisation staff numbers would not be cut in the light of market demands. All decisions to cut or restructure the business up to the present day were based entirely on economic considerations, and the Municipality and the political forces that were represented there had played no significant role.
- (94) Social concerns were clearly reflected both in Legislative Decree 18/99, Article 14 of which was concerned with 'social protection', and in Directive 96/67/EC, which acknowledged that Member States 'must retain the power to ensure an adequate level of social protection for the staff of undertakings providing ground handling services' (recital 24), and went on to authorise Member States to take the necessary measures to ensure protection of the rights of workers, without prejudice to the application of the Directive and 'subject to the other provisions of Community law'. SEA had taken its business decisions freely, and social concerns had played a role only within the limits imposed by the legislation.
- (95) Moreover, the Commission had ignored certain counterevidence suggested by the Municipality of Milan, namely the fact that the commitments allegedly given in the union agreement of 26 March 2002 had never been applied, and the limited duration of those commitments.

- (96) The Commission alleged that the Municipality exercised supervision; SEA stated that it had full decision-making and managerial independence, and that it exercised that independence freely, without any influence being brought to bear by the Municipality or the Province of Milan. Corporate management was the exclusive responsibility of the directors, and outside entities (e.g. controlling shareholders) could not exercise the powers and functions of directors. Even if it were to be supposed, purely for the sake of argument, that the majority public shareholder could ordinarily exercise effective influence over the decisions of the SEA's governing bodies, the crucial consideration in order to show that there was imputability for purposes of the *Stardust Marine* judgment was not the organisational structure but actual interference in the disputed decisions.
- (97) According to SEA, the Commission had to take greater account of the contrasting positions which emerged at the meeting of the Milan Municipal Council on 16 June 2003, the minutes of which unequivocally demonstrated the company's decision-making and managerial autonomy, on the one hand when the municipal councillors acknowledged SEA's refusal to provide classified information that was being discussed in negotiations with union organisations, and on the other in light of the rejection of a motion calling on the Municipal Executive to ask SEA to present a business plan: not only would this motion have been approved, but there would never have been any need to put it forward, had the Municipality of Milan actually exercised or had it been aware that it could exercise the influence which the Commission seemed to want to attribute to it.
- (98) Concerning the 'blank resignations', SEA added to the statements made by the Municipality of Milan that at the SEA general meeting on 24 February 2006, the chairman of the SEA board of auditors had confirmed that none of the members of the board had been asked to sign such letters. All the answers given at that meeting with regard to blank resignations were clear evidence against the theory that there was a relationship of particular dependency on the Municipality of Milan. Moreover, as affirmed by SEA's chairman at the same meeting, the board of directors did not comply with the shareholder's request that a dividend of between EUR 250 million and EUR 280 million should be distributed, and instead set the amount available at EUR 200 million, thus taking a decision against the wishes of the Municipality and showing that the company had not been influenced by the existence of these letters.
- (99) Finally, the accusations that SEA's board of directors was dependent on the Municipality of Milan, which had been reported in the media, dated from 2006, and proved nothing with regard to influence exercised by the Municipality over SEA before that year. There were in fact no grounds to suppose that any such influence existed, if the Commission could not produce solid evidence to that effect that took account of the sequence of events.

Application of the private investor test

- (100) SEA recalled that in *ALFA Romeo* ⁽²⁵⁾ and *ENI-Lanerossi* ⁽²⁶⁾ the Court of Justice had held that just as a private shareholder might reasonably subscribe the capital necessary to secure the survival of a company which was experiencing temporary difficulties but was capable of becoming profitable again, possibly after a reorganisation, so might a parent company decide to bear the losses of one of its subsidiaries for reasons other than the pursuit of a short-term return on investment. In *ENI-Lanerossi*, the Court indicated that in the eyes of a private investor pursuing an objective of long-term profitability (not merely financial), a transfer of capital to a loss-making subsidiary might be justified by considerations such as the likelihood of an indirect material profit from the investment, the prospect of disposing of the subsidiary on better terms, or the desire to protect the group's image or to redirect its activities.
- (101) In the case in point, SEA considered that in the eyes of a private investor the compensation of SEA Handling's losses might be validly justified not only by the presence of a strategic plan and restructuring programme with good long-term profit prospects, but also by considerations other than a mere financial return on investment, considerations that derived from the special responsibility incumbent upon SEA as airport manager and from its image, bearing in mind that at no time did the internal compensation impose any specific debt or financial burden on the group, which was in fact generating a significant net profit.
- (102) Additionally, SEA stated that its investment decisions were based not necessarily on considerations of immediate profit, such as might guide the decisions, possibly speculative, of a minority shareholder without powers of control, or of a controlling shareholder driven exclusively by a desire to secure maximum profit from ground handling support services seen in isolation, but rather on far broader considerations directed towards the objective of maximising the overall long-term profits of the SEA group.

⁽²⁵⁾ Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 20.

⁽²⁶⁾ Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 21.

The context of the measures

- (103) SEA submitted that the Commission could not neglect to consider the regulatory context in which the compensation of losses took place. The regulatory framework generated the competitive pressure under which SEA operated and the obligations by which it was bound, and had an impact on its industrial decisions and on the results obtained as a result of such decisions. However, since the contested measures were implemented in the period immediately after the adoption of Directive 96/67/EC, which sought to liberalise the sector, and its transposal at domestic level, SEA pointed out that from 1996 it had allowed an outside provider of ground handling services (ATA Handling) in its airports.
- (104) It also pointed out that Italy had opted for a complete liberalisation of the ground handling services market, the only proviso being that the supervisory authority ENAC was entitled to impose temporary restrictions on the number of service providers provided it had proper grounds. ENAC had certified 246 providers, 84 of which were authorised to operate at Linate and Malpensa, and SEA considered that ENAC had thereby congested the ground handling services market at certain Italian airports. The option chosen by Italy favoured the entry of numerous operators, but the market trend was towards a reduction in the number of ground handling service providers operating at each airport. This was confirmed by the rules recently approved by ENAC, which introduced requirements stricter than those previously applying to the certification of providers of such services, in order to ensure more careful selection of operators, who would then be expected to guarantee services with higher levels of quality and security. SEA argued that the choices made in other European countries went in the opposite direction, in order to avoid excessive competitive pressure and thus an imbalance in the economic conditions of providers due to pressure exerted on their prices.
- (105) In a developing competitive context, SEA stated that the decision to split the company was taken in the light of its strategic commercial model, which at that time was based on the use of Malpensa airport as a hub, with a need for control, monitoring and management of ground handling services (following a model similar to those at Frankfurt and Vienna airports).
- (106) SEA insisted that in analysing the economic logic of its decisions, consideration had to be given to the nature of the ground handling services market. First, the ground handling business had a very low profit margin, a factor amplified by the liberalisation of the market: profitability was poor when the service was not actually provided at a loss. The operators that found it easiest to make a profit, if only a modest one, were usually those that had a network, oftentimes international, through which they were able to distribute business risk across various sites of operation. For example, a presence at multiple airports enabled the operator to offset costs incurred in countries that had stricter regulatory or contractual requirements concerning workforce management against lower costs incurred in countries where the rules were more flexible. The operators that managed to obtain positive margins overall were those that had an international network and achieved substantial synergies through exclusive global contracts, a single, centralised administration, economies of scale in their investments, market shares that were small but often linked to one reference carrier or specific working hours, and economies of scale achieved by serving a particular carrier in multiple airports.
- (107) The market was heterogeneous from a supply perspective as ground handling services could be provided by entities of different types, capacities, responsibilities and areas of activity: airport managers with separate accounts, airport managers with separate business structures, outside service providers (which in turn could be divided into domestic or international networks and SMEs), or airlines which provided their own ground handling services.
- (108) The Commission consequently must not fail to consider the functioning and general development of the ground handling market and to compare the progression of SEA Handling with that of comparable operators. From the point of view of the general development of the market, given that profit margins were very low, SEA considered that coming from a situation of severe deficit in terms of productivity of the business division, and a wide imbalance in terms of its cost structure, with a particularly difficult market situation and general economic climate, a gain in profitability could not be miraculous or sudden, and an extension of the timeframe initially established would be anything but surprising.
- (109) SEA therefore contested the argument that given the impossibility of absorbing SEA Handling's losses within the forecast three-year period, SEA should have revised its strategy and detached itself from its ground handling division. SEA stresses that it could not reopen discussion of its decisions every year: ground handling, like all airport-related economic sectors, reckoned in periods of years, and the validity of decisions could be properly evaluated only over the long term.

- (110) Regarding the comparison of the economic performance of SEA Handling with those of other operators, SEA suggested that a truly comparable operator had to be an airport manager providing ground handling services through a separate company, and the only such operator was [...]. In the period 2004-2006, [...] had reported losses in its ground handling business, and the negative results had continued in subsequent years and seemed destined to continue in the near future.
- (111) Given its commercial model as a hub, SEA had to have an operator which was capable of providing all the necessary ground handling services at high quality standards. Only SEA Handling was able to meet those requirements, since none of the others on the market had the material resources, economic resources and above all staff resources needed to guarantee provision of all the services called for under this model.
- (112) Leaving aside its own interests, SEA had a legal obligation, in that the national regulations held the airport manager responsible in the event of any failure in the provision of ground handling services.
- (113) Moreover, the complete liberalisation of the market in Italy imposed heavier burdens on the airport manager than it would have had to bear in a market that was only partially open. The airport manager had an obligation and a responsibility towards the supervisory authority to maintain special task forces capable of ensuring continued service in case of emergencies or unforeseen events. It had no way of imposing continued service obligations on new operators, whereas such obligations could be envisaged in tender specifications used in a selection procedure as part of a partial liberalisation.

The economic rationality of SEA's conduct

- (114) SEA argues that the separation and subsequent transfer of ground handling activity to a subsidiary, SEA Handling, were conducted in compliance with European Union law and with a view to engaging with liberalisation on the best possible terms, making the most of the long-term development openings it offered. The separation was intended to enable SEA to better implement the policies needed to improve the efficiency and productivity of both companies, while at the same time seizing any opportunities to secure alliances with external partners.
- (115) SEA states that the spin-off of ground handling activities led to an increase in its costs, due to the obligation on it with regard to the management of emergencies and unforeseen events. By way of illustration, the savings it obtained from economies of scale deriving from its ability to use the marginal cost of SEA Handling personnel for continued service, rather than incurring the cost of setting up and maintaining a specialised group, amounted to EUR 10,7 million in 2003 and EUR 8,7 million in 2010.
- (116) SEA contended that from the outset SEA Handling had a very heavy cost structure, with extraordinary burdens and the specific task of gradually bringing ground handling services first to sustainability and then to profitability. From the beginning, therefore, SEA had implemented an intense restructuring and recovery programme with the aim, if possible, of identifying a strategic partner that could contribute to the pursuit of those objectives.
- (117) In May 2001 SEA launched a competitive bidding procedure with a view to selecting one or more operators looking to purchase a minority share in SEA Handling — a procedure in which a large number of leading operators in the industry participated. Following an analysis of the credentials and bids of interested companies, in the same year, SEA entered into negotiations with [...], which had submitted the most advantageous partnership proposal. Although the negotiations reached an advanced stage, and a plan was drawn up to re-launch SEA Handling, the SEA board of directors, at its meeting on 10 September 2002, decided not to accept the operator's bid, considering it [...]. SEA acknowledged that the failure of those negotiations compromised the viability of its target to return SEA Handling to profitability within the term initially proposed, a target for which the identification of a strategic minority partner was considered an important tool.
- (118) In April 2008 SEA launched a new procedure for the partial sale of SEA Handling, which has yet to reach a conclusion, despite initial interest from a leading international operator.
- (119) SEA emphasised that the SEA Handling recovery program was based primarily on the hub airport commercial model chosen by the group, and had a medium/long term timeframe that would allow an adequate economic return on the financial commitments required to undertake such activity. SEA pointed out that Directive 96/67/EC stated that where the number of ground handling service providers was limited providers were to be selected, by an appropriate procedure, for seven years, implicitly acknowledging that shorter periods of time would be insufficient to achieve adequate organisational scheduling and the consequent economic return.

- (120) Specifically, the program consisted of measures to improve labour productivity and gradually to reduce staff costs. These objectives were to be achieved by taking both qualitative measures, addressing the way ground handling activities were carried out, and quantitative measures, looking at staff numbers. In the first place the restructuring plan interlocked with the SEA group's 2002-2006 consolidated business plan, which outlined the group's strategy and objectives and the measures to be adopted to return its ground handling services to profitability. Thereafter, SEA Handling's 2003-2007 business plan, adopted on 29 July 2003, provided for a restructuring program aimed at improving the efficiency of all services, structures and human resources pertaining to ground handling. SEA hoped it could return its ground handling business to profitability within three years, that is, by 2005, or at the latest by 2007.
- (121) SEA therefore disputed the Commission's claims that the group's consolidated business plan did not give a detailed description of the measures that SEA intended to adopt to reorganise SEA Handling, and that there was no detailed business plan specifically for SEA Handling that set out the strategy for saving the company and the steps by which the strategy was to be implemented.
- (122) SEA considered that the improvement in the key economic indicators between 2003 and 2004 was encouraging and showed the validity of SEA's actions. The return to profitability by 2005 envisaged in the 2003-2007 business plan was stifled by a series of factors that had a negative impact on SEA Handling's economic situation of SEA Handling. Among these, SEA cites the spread of SARS in 2002-2003; the outbreak of the Iraq war in 2003 and the growing threat of international terrorism; intensified pressure to cut ground handling prices in 2006, following the arrival of new operators at Malpensa airport, particularly Aviapartner, which resulted in a downward revision of several contracts, including that with Alitalia (– 6 % of the unit price); the 'de-hubbing' of Milan Malpensa airport decided by Alitalia in 2007, the full effects of which were felt as of April 2008; and the ash cloud produced by the Icelandic volcano Eyjafjallajökull in 2010.
- (123) In light of the worsening in SEA Handling's position in 2006-2007, and following the de-hubbing by Alitalia, SEA had to decide whether to maintain its commercial model, in which case it would have to adapt and update the programme for the relaunch of SEA Handling. SEA finally decided in 2007 to focus on creating an innovative 'self-hub' or 'virtual hub' model, and confirmed the strategic decision to continue with the recovery and restructuring of SEA Handling, reiterating the importance of ground handling services to its own industrial plans, as in the previous model. Its decision was based on the results already achieved in terms of labour productivity and staff cuts, on the fact that its past experience showed that a return to profitability was possible, and on the consideration that any other solution, including outsourcing, continued to raise the same counterindications that had been evaluated in 2003.
- (124) The coverage of losses was still justified, because the use of outside operators to provide certain continued service activities was neither economically advisable (given the higher cost of outsourced services compared to the synergies that could be achieved internally) nor practicable (given the absence of outside operators able to provide a comprehensive set of ground handling services, and the poor reliability and quality of services provided on numerous occasions by the operators working at the Milan airports).
- (125) As regards the practicality of the services offered by outside operators, SEA contends, first, that while the certification necessary to provide all ground handling services at Milan airports was obtained by some outside providers, such as Aviapartner, in 2006 and thereafter, the real situation was quite different. The standardised certification procedure followed by ENAC was inadequate, because it was often based on whether the ground handling provider met certain requirements stated in terms of the group as a whole, rather than the actual capacity that the company was able to guarantee at a given airport. As airport manager, SEA ought to have been involved in the ground handling service provider certification procedure, so that it did not have to suffer directly the consequences of service failures or inefficiencies on the part of outside operators, without having the power to penalise them. Under the new ENAC regulations of 19 January 2011, the airport manager was to give a reasoned opinion on the regularity of the procedure and on the standards for providers.
- (126) Second, no outside operators were actually able to offer the complete set of services, since their commercial strategy consisted of focusing on the most profitable services.
- (127) Third, the operators working at the airports owed a considerable amount of money to SEA Handling, which often had to intervene in emergencies to make up their shortcomings, and had finally decided to go through legal channels to recover its claims.

- (128) Fourth, contrary to the statements made by the Commission, the main competitors currently operating at the Milan airports, ATA Handling and Aviapartner, had not made profits. ATA Handling had recorded losses between 2003 and 2005 which, according to SEA, were heavier at the Milan airports. Aviapartner had made profits across the network of airports in which it operated, but SEA considered it likely that the company had recorded losses on the services it provided at the Milan airports.
- (129) As regards the assessment of SEA Handling's financial performance, which it had been argued might have led to a different decision, SEA stressed that in the ground handling sector the effects of business decisions could be evaluated only in the long term and that, consequently, SEA's decision could not reasonably have been changed after just a few years, particularly in light of the encouraging results obtained in the initial three years, which had had positive effects that were compromised only by events that took place thereafter outside the SEA group.
- (130) As regards the accounting arrangements, SEA stated that SEA Handling's results did not receive the subsidy to ground handling services that could be given by assigning business to the subsidiary that was paid in accordance with a more profitable scale of rates, rather than at market prices, as was the case with other European operators. SEA Handling was also the only ground handling service provider in the Milan airports that regularly paid the airport manager the fee for the use of common facilities; if, like other operators working at the Milan airports, it were not to pay this fee, SEA Handling's accounts would already be in the black (in 2011). Finally, the accounts for ground handling services did not include revenues deriving from the management of centralised infrastructure, as was the case with comparable operators. The inclusion of these activities at set rates in SEA Handling's accounts would generate additional annual revenues of around EUR 70 million. SEA cited the example of [...], which included in its ground handling services accounts revenues deriving from 'centralised infrastructure management', an item which did not appear on the exhaustive list of ground handling services contained in Annex A to Directive 96/67/EC, nor in the IATA Standard Ground Handling Agreement. If it had acted in the same way in the period 2005-2009 SEA would have achieved a total gross operating margin of between – EUR 9 million and + EUR 8 million (compared to an actual total of between – EUR 42,5 million and – EUR 23,2 million), which would have reduced the operating loss by an average of 100 %.
- (131) SEA stated that by 2012 it would have finally returned its ground handling services to profitability, thanks to its perseverance in implementing its restructuring plan, which had proved to be prudent and consistent with the conduct that could be expected of a private investor operating in a market economy. SEA would be able to resume its search for a strategic ground handling partner, for example, in order to develop its own business in the sector, at the Milan airports and elsewhere, and potentially also in order to expand its business to specialist services that it did not yet provide.
- (132) Many airport managers of a comparable business type, including larger undertakings such as [...], had expressly ruled out any intention of withdrawing from ground handling services, even though they had sometimes been encouraged to do so by financial analysts, thus confirming the validity of this commercial model.

5.2. [...]

- (133) [...] pointed out that the ground handling industry generally generated profits despite the reduced margins. Staff costs made up a significant part of each operator's outgoings, probably somewhere between 60 and 70 % of revenue, and it was therefore vital to keep close control of operations using specific planning systems.
- (134) There were economies of scale in the sector: the cost per passenger fell as the number of passengers rose. The optimum level of cost per passenger was reached when 8-9 million passengers were being managed in a year, and SEA Handling comfortably surpassed this level, handling around 22 million passengers at the two airports with a market share that was constantly above 70 %.
- (135) [...] cited SAGAT Handling as an example of an undertaking that was profitable on the market, managing around 2,5 million passengers in 2009 with a staff cost equivalent to around 55 % of its turnover. It also cited Fraport Ground Services Austria, Swissport, and Menzies.
- (136) The primary cause of SEA Handling's poor profitability was its high staff costs, which consistently exceeded 85 % of its turnover between 2002 and 2008, a burden which [...] saw as unsustainable. [...] found this particularly surprising in that SEA Handling seemed to have access to the *cassa integrazione* layoff fund.

- (137) The possibility could not be ruled out that SEA Handling might have received aid in other forms. [...] suggested that SEA Handling's push-back, tow-in, de-icing and bussing services were provided by SEA, while SEA Handling sold such services to its clients. [...] expressed doubts regarding the regularity of operations given the lack of transparency with regard to the billing of these services to SEA Handling.
- (138) Likewise, SEA might be giving further support to SEA Handling by providing its own staff. Without proper billing SEA Handling might have been receiving unlawful aid.
- (139) SEA might also be giving aid to SEA Handling by making combined offers to airlines proposing a discount based on the provision of SEA Handling services. From newspaper reports [...] had observed that whenever SEA attracted a new airline the ground handling services were almost always provided by SEA Handling.
- (140) Finally, [...] collective agreement between ground handling service providers and the trade unions. This agreement applied to all personnel of ground handling service providers. Only SEA continued to apply its own collective agreement, which was less favourable to SEA both economically and legally and in both the short term and the long term: this was a choice that was not consistent with policy that was stated to be focused on cutting costs.

6. OBSERVATIONS MADE BY THE ITALIAN AUTHORITIES IN RESPONSE TO THE COMMENTS SUBMITTED BY INTERESTED PARTIES

- (141) The Italian authorities submitted their own observations in response those put forward by [...].
- (142) The Italian authorities contended that the first argument, based on the idea that the profitability of a ground handling company depended on the volume of traffic it managed and thus on the number of passengers it served, was a simplistic argument deriving from an abstract assessment that took no account of the fact that SEA's decisions were guided by long-term economic considerations. This economy of scale was not a decisive factor in a ground handling company's economic performance. More specifically, the revenue of such a company was entirely unrelated to the number of passengers managed, but depended on the number of flights served and their tonnage.
- (143) For purposes of the private investor test the main question was not whether the company might have been able to make profits which, for whatever reason, it had proved unable to achieve, but whether the shareholder had a sound economic interest in investing in the company in the hope of gaining a return on its investment, even in the long term, or even in strategic terms rather than purely financial terms. Accordingly, the fact that the firm was potentially in a position to generate profits suggested that it did satisfy this test.
- (144) The Italian authorities also argued that in order to make a profit it was not sufficient to handle a large volume of traffic. They stressed the importance of operating over a broad network of airports, to which they had already drawn attention in the past.
- (145) A ground handling services provider which was not linked to an airport manager, and which did not hold a dominant market position at a given airport, could follow a commercial strategy that focused solely on the services it considered profitable. SEA Handling could not follow such a strategy: as a subsidiary of the airport manager, given the airport manager's obligations towards the regulatory authority (ENAC) to ensure continued and effective provision of the entire range of ground handling services exhaustively listed in Directive 96/67/EC at Linate and Malpensa airports, it could not choose to provide only the services that were the most economically advantageous, or to provide services only at certain times of the day.
- (146) The Italian authorities disputed the statement that a large number of European ground handling undertakings had substantial profit margins. In 2009, the seven biggest operators on the Italian market recorded losses (in addition to SEA Handling these were Aviohandling, Flightcare, ATA Handling, Aviapartner, Marconi Handling and SAGA). Only SAGAT Handling, whose share of the Italian ground handling market was very small, made a profit, and that profit was modest.

- (147) In any event, SEA handling's economic performance could not be compared with those of operators in the sector in Italy or in Europe such as SAGAT Handling, Fraport Ground Services Austria, Swissport or Menzies. Nor did these arguments help with the analysis for purposes of the private investor test; it had to be asked, rather, whether there were other operators comparable to SEA Handling whose shareholders, even if private, had taken decisions similar to those of SEA. The activities of SAGAT Handling and of SEA Handling presented different levels of complexity. Menzies Aviation and Swissport were independent ground handling undertakings operating in the form of an international network, and their economic indicators could not be reliably compared to those of SEA Handling for reasons already explained by the Italian authorities.
- (148) It had been argued that staff costs had an excessive impact on SEA Handling's turnover compared to the industry average, and that this was evidence of a failure to comply with the private investor test; the Italian authorities contended that this argument took no account of the diversity between different operators. More specifically, operators that had been created following the separation of ground handling and airport management services, like SEA Handling, were inevitably going to experience a higher labour cost compared to new players, at least during their first years of operation.
- (149) For subsidiaries of an airport manager which offered the full range of ground handling services, this average impact of staff costs on turnover had to be set at 70-75 %. The higher cost was due to the fact that such undertakings used highly qualified personnel with extensive knowledge of the industry and of the rules and procedures by which it was governed, and were able to provide the entire range of ground handling services. As such, the shareholder/airport manager, despite wanting to gradually reduce the impact of labour costs, would attach greater importance to the preservation of accumulated expertise and integration with ground handling services, both of which were of significant strategic value to the group. The Italian authorities also pointed out that new market players were not affected by historic costs resulting from pre-existing contracts.
- (150) The Italian authorities said the shifts in the impact of labour costs on turnover were very different from what had been described by [...]: over the period 2002-2011 the movement had been positive, reaching just under 80 % in 2010, with a trend towards the average for independent ground handling operators, which was just under 70 %.
- (151) Regarding the suspected forms of aid indicated by [...], the Italian authorities rejected what they considered mere suppositions put forward without any foundation or supporting evidence.
- (152) The services for which SEA Handling uses SEA (push-back, tow-in, bussing) were governed by paid subcontracting agreements, concluded on market terms, as shown both in the customer airline agreements and on the certificate issued by ENAC. Access to those services was provided in a way that did not discriminate against any other operator requesting them, and the outsourcing of certain services was common practice in the Italian ground handling industry.
- (153) The affirmation that SEA Handling used SEA staff free for the provision of ground handling services was unfounded, and when ground handling services were hived off all the skills required for the provision of such services had been allocated to SEA Handling's cost centres.
- (154) With regard to the alleged concession by SEA of more favourable terms to new airlines for access to the Milan airports (i.e. discounts) on the condition that they favour SEA Handling over its competitors, the Italian authorities considered this claim to be completely unfounded, devoid of any proof and indeed contradicted by the facts, since leading carriers such as Gulf Air at Malpensa and Air Malta, Air Baltic and Carpatair at Linate had chosen providers that were competitors of SEA Handling.
- (155) Finally, concerning the application to SEA Handling employees of SEA's collective bargaining agreement rather than the new collective bargaining agreement specifically for workers in the ground handling industry, [...], even if this were to prove more advantageous than its predecessor from an economic and regulatory perspective, the Italian authorities emphasised above all that, irrespective of the content and application of the agreement in question, the objection raised was irrelevant in these proceedings, given that it concerned an event that had occurred outside the relevant period.

- (156) In any case, having regard to the collective bargaining agreement, which consisted of a general, all-inclusive part and three specific sections, negotiated separately by each of the representative associations affected (Assoaeroporti, Assohandlers and Assocatering), SEA Handling applied the general part of the agreement to its employees, along with the specific rules negotiated by Assoaeroporti, because SEA Handling could not exempt itself from compliance with the agreements concluded previously with union organisations, as described in the union agreement of 4 February 2002 ⁽²⁷⁾, according to which 'SEA Handling will apply the collective bargaining agreement signed by Assoaeroporti and union organisations'.

7. ADDITIONAL INFORMATION SUBMITTED ON 28 JUNE 2012

- (157) Following the meeting of 19 June 2012, the Municipality of Milan submitted additional observations setting out its assessment of the measures in question, particularly regarding its view that the reorganisation of SEA Handling was an internal matter for the SEA group, the business model chosen by SEA for the development of the airports under its management, and the need to distinguish between the different periods under investigation.

The reorganisation of SEA Handling is an internal matter for the SEA group

- (158) The Milan authorities reaffirmed that at no time had SEA sought financial support for its recovery from its shareholders, the Municipality and Province of Milan. On the contrary, the public authorities in question had received substantial dividends from the SEA group, totalling EUR 550 million over the period 2002-2012.
- (159) It could not be assumed — and it had yet to be shown — that if SEA had decided not to cover the debts of the handling company, and instead to use the services of an independent operator, the public authorities would have received an even higher financial benefit. This was due essentially to the difficulty of obtaining from outsiders, at competitive prices, all the ground handling services which SEA, as airport manager, was required to provide to all airlines and passengers on a continuous, accessible and comprehensive basis, in accordance with the regulations in force; to the difficulty of maintaining supervision over service quality, a requirement which was vital to airport competitiveness and to the recovery of traffic (which SEA had in fact achieved thanks to its chosen business model); and to the intrinsic link between the company's business model and the airport's hub model (particularly after Alitalia's de-hubbing from the Milan Malpensa airport and the need to develop a self-hub or virtual hub concept). The Municipality of Milan was unaware of any assessments made by the Commission, or by independent experts on its behalf, which might serve to dispute these affirmations.
- (160) Finally, given the lack of any financial flows originating with SEA's public shareholders, and the fact that the decision to reorganise SEA Handling was in line with SEA's strategic objectives, any finding that the measures at issue constituted State aid should be accompanied by proof of the imputability to the State of every single decision to cover losses made during the entire period in question, and especially in the second phase (post-2007), to which the considerations in the opening decision did not apply, although the Municipality in any event disputed them.

The SEA group business model

- (161) The Milan authorities reiterated that the chosen model, based on the option not to outsource ground handling services, would benefit long-term airport development. This course was preferable from a group perspective when the airport system in question acted as a hub. The management of an airport system based on the presence of a hub carrier, or on the provision of hub activity, given the high degree of complexity of the system, required that the manager should provide some airport services direct, including handling, in order to ensure the efficient operation of the airport. The Milan authorities cited the examples of Frankfurt, Vienna and Paris airports. The choice was justified by the following considerations:
- (a) It was consistent with SEA's goal of developing its hub activity at the Milan Malpensa airport, which required continuous supervision, monitoring and management of ground handling services provided to the hub carrier, and was even more important when pursuing a self-hub or virtual hub model. Under the 'self-hub' or 'virtual hub' model the airport would be developed as a hub without the presence of one or more hub carriers. Under this model the airport manager itself would offer users the opportunity to use the airport as a hub, and would connect arriving and departing flights operated by all carriers at the airport irrespective of whether any interconnection agreements between carriers were in place.

⁽²⁷⁾ The Commission assumes that the Italian authorities are actually referring to the union agreement of 4 April 2002 mentioned above.

- (b) It was supported by the fact that the biggest and best-performing airport hubs in continental Europe had opted for the same solution.
- (c) It was necessary for developing freight traffic at the Milan airports, a sector in which competition between European airports was seeing strong growth, and the potential for attracting new carriers was also related to the level of specialisation of handling services. The commercial model selected by SEA had allowed constant growth in freight activity in Milan, which was in first position in Italy and sixth in Europe, with the highest concentration of all-cargo carriers originating in the Middle and Far East, which were the areas experiencing the fastest economic growth in the world.
- d) It was consistent with the business model chosen for increasing the capital of the airport management company with a view to its subsequent privatisation.

Distinction between the periods under investigation for the purpose of assessment of the measures

- (162) The Milan authorities cited the 2003-2007 business plan, which had been submitted to the Commission after the formal investigation procedure was initiated. In their opinion, the plan showed that SEA's actions in covering the losses were decided in compliance with the private investor test.
- (163) However, the analysis of the SEA Handling 2003-2007 business plan must in any event demonstrate that the reorganisation of SEA Handling complied with the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Restructuring Guidelines')⁽²⁸⁾, given that the reorganisation was carried out with a significant contribution from the subsidiary, the financial intervention was limited to the minimum needed in order to prevent a situation of insolvency arising under the applicable corporate law regulations, and SEA Handling had put all of its own efforts into the recovery, losing market share to its competitors and giving up certain peripheral activities outside its core business.
- (164) While the shareholder's hopes of a recovery within the planned five-year period had been frustrated by a series of external events, combined with the difficult initial situation of the company (which was not formed as a start-up, but as a spin-off of an existing company division in difficulty) and the complete liberalisation of the ground handling market in Italy, nevertheless the efforts made in the first, challenging period showed that the recovery of SEA Handling was certainly possible. At the end of that first period, the company found itself in an economic situation and with a productivity level that were significantly better than in 2002.
- (165) Regarding the second phase of the recovery, the Milan authorities referred to the SEA group's strategic plans for 2007-2012 and 2009-2016. According to the SEA group, break-even point was expected to be reached in the course of 2012. If despite the evidence submitted the Commission were to take a contrary view, the Milan authorities considered that it should analyse each of the interventions in the capital of SEA Handling individually, to establish the presence of aid and in particular the imputability of the aid to the Municipality of Milan, which was firmly denied.

8. ASSESSMENT OF THE MEASURES UNDER ARTICLE 107(1) OF THE TFEU

- (166) Following the formal investigation initiated in compliance with Article 108(2) of the TFEU, and taking into account the arguments put forward by the Italian authorities and by the interested parties, the Commission considers that the measures in question constitute State aid which is incompatible with the internal market under Article 107(1) of the TFEU and inadmissible under Article 108(3) of the TFEU.
- (167) Regarding the period to which this decision relates, the Commission asked Italy to provide any information it judged necessary to determine the compatibility of the measures in question, specifying the period indicated in Section 2.1 and Section 5 of the opening decision. In Section 5, the Commission asked it to provide the 2002 business plan for SEA Handling, with any subsequent amendments, or any document concerning the strategy and return to profitability of SEA Handling; SEA Handling's economic results for the entire 2002-2009 period; the exact amounts and form of compensation of losses and, in particular, all relevant data for the period from 2005 to date.

⁽²⁸⁾ OJ C 244, 1.10.2004, p. 2.

- (168) In any case, the Italian authorities were asked to submit their observations on the entire duration of the period examined in the opening decision. In paragraph 42 of the decision the Commission particularly stipulated that the Commission therefore deems it necessary to examine the period 2002-2010 to determine whether SEA Handling received illegal State aid in the form of compensation for losses during that period.
- (169) Moreover, since the Italian authorities had not provided the above information for the whole of the period expressly referred to in the opening decision, the Commission specified the documents to be provided and the period under examination for a second time in its letter of 11 July 2011.
- (170) Following this letter from the Commission, the Italian authorities submitted observation and provided details up to 2010, mainly in their letter of 15 September 2011.
- (171) Additionally, the Commission observes that the measures investigated for the period 2006-2010 were of the same kind as those examined for the previous period, namely capital injections to cover operating losses, and were adopted by the same body for the benefit of the same company. The Commission therefore had a duty to examine the entire period in question within the context of these proceedings.
- (172) For these reasons the Commission considers that the period under investigation runs from the date on which SEA Handling was set up in 2002 until the Commission's decision to initiate the formal investigation on 23 June 2010.
- (173) This Decision first addresses the question whether SEA Handling was a firm in difficulty within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty of 1999 ('the 1999 Restructuring Guidelines')⁽²⁹⁾ and the 2004 Restructuring Guidelines (Section 8.1). The Commission then assesses whether the measures in question constitute State aid to SEA Handling within the meaning of Article 107(1) of the TFEU (Section 8.2), and, finally, whether such aid can be declared compatible with the internal market (Section 8.3).

8.1. SEA HANDLING'S DIFFICULTIES

The 1999 Restructuring Guidelines

- (174) Point 5 of the 1999 Restructuring Guidelines states that a firm is regarded as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or ... where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- (175) Point 6 of the 1999 Restructuring Guidelines states that the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (176) The General Court has confirmed that the fact that point 6 of the 1999 Restructuring Guidelines refers to 'increasing' losses cannot prevent the Commission from taking into account the continuous presence of losses over several consecutive years as a sign of financial difficulties, even though those losses were not increasing⁽³⁰⁾. The Commission considers that in 2002, at the time when the decision to carry out an initial injection of capital was taken, SEA's financial difficulties were evident. The company's situation improved significantly in the period 2003-2004 period. It was working against substantial losses which generated a cumulative operating loss of more than EUR 140 million in three years.
- (177) The General Court has also accepted that a substantial reduction in a company's capital is a relevant factor in determining whether the firm is in difficulty⁽³¹⁾. The Commission considers that the continuing losses recorded by the company, the consequent reduction of its capital, and the decision by SEA to carry out the injections of capital to which this investigation relates in order to address that reduction, clearly show that the company was facing serious financial difficulties throughout the period under investigation. In its annual reports and accounts at 31 December 2002, 2003 and 2004, the company itself declared losses at SEA Handling which exceeded one third of its capital.

⁽²⁹⁾ OJ C 288, 9.10.1999, p. 2.

⁽³⁰⁾ Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen, MB Immobilien Verwaltungs GmbH and MB System GmbH & Co. KG v Commission* [2010] ECR-II-585.

⁽³¹⁾ Case T-565/08 *Corsica Ferries France v Commission* [2005] ECR II-2197, paragraph 105.

- (178) The General Court has also held that the list of economic factors that may indicate that a firm is in difficulty set out in the 1999 Restructuring Guidelines is not exhaustive ⁽³²⁾. SEA Handling's debts rose from EUR 250,3 million in 2002 to EUR 310,6 million in 2003, and fell only slightly in 2004, down to EUR 259,3 million. The net asset value of SEA Handling also fell, from EUR 35,1 million in 2002 to EUR 34,8 million in 2003. These indicators too highlight the financial difficulties faced by the firm in 2002 and 2003.
- (179) The annual report and accounts at 31 December 2003 refer to the negative results of SEA Handling, whose costs remained too high in relation to its market share irrespective of the partial benefit deriving from the labour force agreements. The prospect of a further decline in volume of handling activities in future years means the company will be unable to achieve economic balance within the proposed time-frames. Similarly, the annual report and accounts at 31 December 2004 state that returning SEA Handling to viability in the next few years remains difficult, particularly in light of the growing competition in the market following the arrival of new operators. Similar statements are contained in the report and accounts at 31 December 2005.
- (180) Finally, the fact that the company was in difficulty at the time of the first injection of capital has also been repeatedly reiterated by the Italian authorities and by SEA ⁽³³⁾, and has been confirmed in the many business plans submitted to the Commission. It will be enough to point out that the 2002-2006 consolidated business plan envisaged that ground handling activities would return to profitability gradually by 2003 (p. 31). SEA Handling itself confirmed, in its comments on the opening decision, that it would not have been able to absorb its losses for the period 2003-2005. If those losses had not been covered by SEA, SEA Handling would have been insolvent.

The 2004 Restructuring Guidelines

- (181) The definition of a firm 'in difficulty' remains substantially unchanged in the 2004 Restructuring Guidelines. The provisions in points 5 and 6 of the 1999 Restructuring Guidelines reappear as points 10 and 11 of the 2004 Restructuring Guidelines.
- (182) In addition, point 11 of the 2004 Restructuring Guidelines states that Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.
- (183) Neither the company's debt nor its net asset value improved significantly over the period 2004-2010. SEA Handling experienced losses for the entire period. The situation was exacerbated in 2007 when it recorded an operating loss of more than EUR 59 million, followed in 2008 by an operating loss of EUR 52,4 million. Over the 2004-2010 period total turnover fell from EUR 177,4 million in 2004 to EUR 125,9 million in 2010. In the same period, SEA Handling received injections of capital totalling more than EUR 270 million.
- (184) Several documents submitted by the Italian authorities confirm that SEA Handling was in financial difficulty even after 2004. For example, the minutes of the SEA Handling board of directors meeting held 31 May 2007 explain that SEA Handling requires an in-depth reorganisation, suggesting that the measures previously adopted were not sufficient to resolve the firm's difficulties. Similarly, the minutes of the SEA Handling board of directors meeting held 21 December 2006 report that one of its members reiterated that the situation of SEA Handling was still 'seriously alarming'.
- (185) All this shows that SEA Handling must be considered a firm in difficulty within the meaning of point 11 of the 2004 Restructuring Guidelines, according to which a firm may be considered to be in difficulty in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value

⁽³²⁾ See note 32.

⁽³³⁾ For example, Annex 12 to the observations of the Italian authorities of 14 November 2011.

- (186) The Commission has no doubt that SEA Handling was a firm in difficulty when the measures were decided. This conclusion is further supported by the fact that even before the ground handling business was transferred to SEA Handling in 2002 it was making a loss. The substantial and recurring gap between SEA Handling's revenues and costs, and its repeated losses, mean that SEA Handling was a firm in difficulty throughout the entire period under investigation ⁽³⁴⁾.

8.2. EXISTENCE OF STATE AID

- (187) According to Article 107(1) of the TFEU, 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (188) For a national measure to constitute State aid, all of the following criteria must be satisfied: 1) the measure must be granted using State resources; 2) the advantage must be selective and must confer an economic benefit; and 3) the measure must distort or threaten to distort competition and must affect trade between Member States ⁽³⁵⁾.
- (189) The reasons that lead the Commission to consider that the measures in question satisfy all those conditions are set out below.

8.2.1. STATE RESOURCES AND THE IMPUTABILITY OF THE MEASURES TO THE STATE

- (190) First, it should be recalled that the concept of State resources includes aid granted directly by the State, but also by public or private entities established or appointed by the State to manage the aid. The concept covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to a State aid measure are financial resources of public undertakings and are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources ⁽³⁶⁾.
- (191) The resources used to cover the losses of SEA Handling were of public origin, because they came from SEA, 99,12 % of whose capital was owned during the period under investigation by the Municipality and the Province of Milan ⁽³⁷⁾. The fact that the transfers were made by SEA rather than by the abovementioned local authorities does not mean they were not of public origin. It thus needs to be determined whether the actions of the organisation in question are to be considered the result of conduct imputable to public authorities.
- (192) The Commission confirms its initial assessment that the measures are indeed imputable to the Italian authorities, and more specifically to the Municipality of Milan. First, in their observations of 15 September 2010 the Italian authorities acknowledged that the Municipality exercised control over SEA, appointing the members of its board of directors and audit board. Second, the Commission reaffirms the value of the evidence of imputability referred to in the opening decision. That evidence is valid for the entire period under investigation, and for all the injections of capital considered in this Decision.
- (193) As a preliminary remark the Commission would point out that the Court of Justice held in the *Stardust Marine* judgment that It is ... necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty ⁽³⁸⁾.

⁽³⁴⁾ The improvement of the firm's economic situation, which may have been the result of repeated grants of illegal State aid, cannot be invoked to show that the firm had overcome its financial difficulties. The aid should have been granted only if it was compatible with the Treaty and in accordance with the procedure laid down in Article 108(3) of the TFEU.

⁽³⁵⁾ See, for example, the judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraph 129.

⁽³⁶⁾ Judgment in *Stardust Marine*.

⁽³⁷⁾ In December 2011 29,75 % of SEA's capital was sold to the private fund F2i (Fondi italiani per le infrastrutture).

⁽³⁸⁾ *Stardust Marine*, paragraphs 52 and 53.

- (194) The Court also found that to demonstrate imputability the Commission could base its reasoning on any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved ⁽³⁹⁾.
- (195) The first category of evidence, consisting of numerous documents ⁽⁴⁰⁾, indicates that the coverage of losses of SEA Handling by SEA was carried out at the request of the Municipality, or at least with its active involvement. The Commission confirms its assessment of the documents in question, which clearly show that the Municipality of Milan was involved in the management of SEA Handling, through SEA, especially with a view to maintaining employment levels.
- (196) This is particularly evident from the record of the union agreement between SEA and the unions dated 4 April 2002, which states that SEA ... undertakes ... to bear the coverage of losses in order to balance the finances and assets of SEA Handling SpA and that those commitments are guaranteed by the agreement signed by the Municipality of Milan, among other things in its capacity as the absolute majority shareholder (in SEA SpA), by the contributions made, by the financial resources not subject to legal limitations transferable by SEA SpA to SEA Handling SpA, and by the solidity of the assets of the assets and finance of SEA ⁽⁴¹⁾.
- (197) In the same way, all the documents mentioned in the opening decision (Sections 2.4.2 and 3.1.1.2) ⁽⁴²⁾ demonstrate that the Municipality of Milan was intervening in the running of SEA Handling through SEA, especially with a view to maintaining employment levels.
- (198) The Commission considers that the steps taken by the Italian authorities, particularly at the meeting of 26 March 2002, guided the decisions taken by SEA with regard to its subsidiary SEA Handling. In the agreement reached on that date, the Municipality of Milan gave specific commitments with a direct impact on the running of SEA Handling and on SEA's role in the management of its subsidiary; moreover, the Municipality undertook to monitor the application of the agreement, evaluating its implementation at regular intervals. The involvement of the Municipality of Milan is therefore not a harmless factor of no importance, as the Italian authorities and SEA suggest. SEA could not ignore the commitments and requirements that the public authority and controlling shareholder had accepted in that agreement, but had to bear them in mind when it took the measures regarding the management of SEA Handling. The Commission also considers that the measures to cover losses were more than 'guided' by the commitment given by the Municipality of Milan in the agreement of 26 March 2002, and that they were in fact the result of that commitment.
- (199) The Commission rejects the statement that the Municipality of Milan did not take on any role when it gave the abovementioned commitment, and simply confirmed the employment protection strategy adopted by SEA to the unions.
- (200) The fact that the Municipality did not take part in the signing of the union agreements which followed the agreement of 26 March 2002 is no justification for ignoring the significant influence it had on those subsequent union agreements. More specifically, the references in the union agreements of 4 April 2002 and 9 June 2003 to the commitment given by the Municipality are sufficient proof of the meaning of the agreement of 26 March 2002 and its influence on the subsequent union agreements. SEA stated that the union agreement of 4 April 2002 was still applicable and that it had to continue to adhere to its provisions. Further, the Italian authorities have also argued that SEA Handling could not exempt itself from compliance with the agreements concluded previously with union organisations, so that it could not dismiss personnel, which in the Commission's view demonstrates the scope of those agreements and thus the involvement of the public authorities.
- (201) Finally, the Commission has identified other evidence that shows that the Municipality of Milan was involved at all times when SEA took important decisions with regard to SEA Handling. In the minutes of the meeting of the SEA board of directors report dated 31 May 2007, with regard to the submission to the board of the SEA business plan (which, according to the Italian authorities, was also to serve as the business plan of SEA Handling), it is stated that the plan had already been submitted to SEA's majority shareholder, which had expressed its opinion. Subsequently, as recorded in the minutes of the meeting of SEA Handling's board of directors dated 13 June 2008 with regard to the implementation of SEA Handling's 2009-2016 strategic plan, the chairman of the board stated that the strategic plan had been agreed with the Municipality/shareholder. The Commission considers that both documents make it clear that the Municipality's role went beyond that of a normal shareholder, who would have been informed of the operating decisions of the board of directors and would have evaluated them primarily through the company's

⁽³⁹⁾ *Stardust Marine* judgment, paragraph 56.

⁽⁴⁰⁾ In particular the union agreement signed on 26 March 2002 between the Administration of the Municipality of Milan, SEA and the unions; the record of an agreement between SEA and the unions dated 4 April 2002; and the record of an agreement between SEA, SEA Handling and the unions dated 9 June 2003.

⁽⁴¹⁾ See the final recital to the record of the union agreement between SEA and the unions dated 4 April 2002. The idea that the commitments made by SEA to SEA Handling are backed by the majority shareholder is also expressed in the fourth recital and at the end of Section 2 of the same document.

⁽⁴²⁾ These sections of the opening decision are to be considered an integral part of this Decision.

internal bodies and its official communications. The insistence on the fact that the business plan had been previously agreed with the shareholder confirms the shareholder's predominant role in SEA's strategic choices. This role is also reflected in the facts set out in paragraph 51 of the opening decision, in paragraph 35 of this Decision (a member of the municipal executive had asked the chairman of SEA and the mayor of Milan to appear before the municipal Committee on Transport to explain how they intended to relaunch SEA Handling), and in paragraphs 69 and 70 of the opening decision (with reference to the strict links between the top management of SEA and SEA Handling, whose appointment is controlled by the Municipality).

- (202) The Commission also confirms the validity of the second piece of evidence of imputability found, namely the particular dependency of SEA's directors and managers on the Municipality of Milan.
- (203) Contrary to the Italian authorities' contentions, the Commission considers statements made in press reports as valid evidence only when they report verified facts⁽⁴³⁾. Neither the Italian authorities nor SEA have disputed the facts in question, nor have they commented on the fact that in 2006 the mayor of Milan, Letizia Moratti, called for and secured the resignation of the then chairman and managing director, Mr Bencini, two years prior to the natural conclusion of his term⁽⁴⁴⁾.
- (204) In any event, the Commission points out that in *Stardust Marine* the Advocate General said that 'Because of the difficulties of proof and the obvious danger of circumvention' evidence of State aid might be inferred even from 'press reports'⁽⁴⁵⁾.
- (205) According to SEA, the press reports and the facts reported therein date from 2006 and cannot prove anything regarding the Municipality's influence on SEA; the Commission considers that the evidence of the dependency of the directors indicate the general context of the working of SEA, and thus the context in which the annual decisions to cover SEA Handling's losses were taken. In any event, the Commission's investigation also covers the period after 2006.
- (206) Third, with regard to the blank resignations submitted by SEA directors to the mayor of Milan, the Commission does not share the view of SEA and the Italian authorities that those letters, which allegedly had only a moral value and no legal validity, were not likely to influence the actions of members of the board of directors. The Commission considers that this practice can have had no other purpose than to tighten the Municipality of Milan's control over SEA's directors, unequivocally reinforcing its power to hold the directors to account, a power which the Municipality ought to have exercised only within the limits of its rights as a shareholder in SEA. Even if the letters had only a moral value, which does not seem to be the case, they would still confirm the public authorities' interference in the running of SEA. In any event, the Commission points out that on p. 37 of their observations of 15 September 2010 the Italian authorities reiterated that, rather than having a purely moral value, the letters legally prevented the director in question from seeking compensation for unfair dismissal under the Italian civil code. The Municipality, which controls the shareholders' meeting, also holds tight control over the directors, since even if they have acted in the best interests of the company they can be removed by the general meeting without any entitlement to compensation for unfair dismissal. SEA Handling contends that the board of directors cannot have been influenced by the blank resignations because it did not accept a request made by the public shareholder that it distribute EUR 250-280 million in extraordinary dividends; the Commission observes that the minutes of the SEA general meeting of 24 February 2006 made it clear that a distribution of no more EUR 200 million in extraordinary dividends would allow the company to maintain a rate of debt compliant with the average rate for comparable firms and would ensure sufficient financial flexibility. Second, the same document specifies that SEA had set the level of dividends at EUR 200 million on objective grounds and that it represented the maximum that the company could pay out in the light of the financial indicators at the time. The management report for 2006 confirms that indebtedness had been increasing (it had doubled in 2006 as compared to 2005) owing partly to the fall in liquidity caused by the distribution of extraordinary dividends to shareholders. Had SEA paid out higher dividends, it would have been more difficult to cover SEA Handling's losses that year. Moreover, the fact that a shareholder may request a certain amount in dividends on certain occasions whereas the management then pays out a lower figure seems to be a normal occurrence in the life of a company, and is not in contradiction with the strict control of the management by the same shareholder.

⁽⁴³⁾ The Commission refers to the press reports mentioned in paragraph 67 of the opening decision. See also 'Sea, nuovo attacco della Provincia' (SEA, renewed assault from the Province), *la Repubblica*, 25 February 2006; 'Sea, Penati chiede le dimissioni del consiglio' (SEA, Penati asks for the board to resign), *l'Unità*, 25 February 2006.

⁽⁴⁴⁾ See http://archiviostorico.corriere.it/2006/novembre/17/articoli_del_17_novembre_2006.html

⁽⁴⁵⁾ Opinion in *Stardust Marine*, paragraph 68.

- (207) The Commission considers that this practice constitutes an objective reflection of a situation of dependency. Without being able to judge the precise influence of this practice *a posteriori*, the Commission considers that merely by their existence (*a priori*) the letters of resignation were certainly capable of influencing the actions of the members of the board of the directors appointed by the Municipality of Milan. The public authorities did not even have to refer to the letters in order to exercise such influence, it being evident that their existence alone placed the directors in a position of subordination to the mayor of Milan.
- (208) With regard to the statements made by the Italian authorities concerning the designation of directors, the Commission repeats that the Municipality, *de facto*, 'appoints the members of the board of directors'. This is clear from the fact that, as the Italian authorities have stated, the Municipality designates the directors, who are then appointed by the general meeting, of which the Municipality forms a part as majority shareholder. This formal control exercised by the Municipality over SEA is not in itself sufficient to prove that the Municipality does in fact exercise control over SEA in the particular case, but it does help to prove it.
- (209) The Italian authorities have put forward counterevidence to show that the measures were not imputable to the State, namely the fact that members of the Municipal Executive had been denied access to SEA internal documents on several occasions; the Commission considers this evidence to be inconclusive, since mere compliance with the formal requirement in the Italian civil code not to disclose internal company information, such as the minutes of the board of directors, does not prevent the exercise of influence by the Municipality over SEA in fact, both in general and in the case in point. Furthermore, the Commission observes that the members of the municipal council who were denied access to certain documents belonged to the opposition, and did not form part of the Municipality's executive body. When the Commission affirms that the Municipality of Milan keep SEA in a state of dependency on it, it is referring more especially to the authorities who exercise the power to take decisions on behalf of the Municipality, and who are consequently in a position to influence the management of the company.
- (210) Fourth, on a general level, given the importance of the operation of Malpensa and Linate airports in the local socioeconomic context and their vital role in policy, in terms of both transport and regional development, the local public authorities will not as a rule be 'absent' when the airport operator makes important decisions concerning the functioning and long-term development of such infrastructures, especially when such an authority is also the airport manager's controlling shareholder. In their observations the Italian authorities have confirmed the political importance of the measures in question. In the case in point, furthermore, the measures to cover SEA Handling's losses were at least an integral part of the SEA group's strategy, as the Italian authorities explain in their observations.
- (211) Fifth, the measures to cover losses, implemented through increases in SEA Handling's capital, were not ordinary management measures but exceptional measures. The extraordinary character of the measures is reflected both in economic terms, given the scale of the amounts in question (each absorption of losses was offset by means of a capital increase of several million euros), and in political terms, given the anticipated impact of the measures on the maintenance of employment.
- (212) In view of their exceptional nature, the measures were not adopted by SEA's board of directors, exercising its own powers: in accordance with SEA's constitution and the principles laid down in the civil code they had to be expressly approved by the general meeting, at which the Municipality is the majority shareholder. There is therefore no doubt that the Municipality was fully informed of the measures and approved them, as shown in the minutes of the general meeting. Not only did the measures originate with it, as a result of its participation in the agreement of 26 March 2002, but it was also informed of every measure to cover SEA Handling's losses, which it systematically approved. Such exceptional measures are therefore necessarily imputable to the State.
- (213) The Commission observes that in the *Stardust Marine* judgment, the Court of Justice found that imputability could be inferred from any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains ⁽⁴⁶⁾.
- (214) Finally, as shown in Section 8.2.3, the fact that SEA was not acting in conformity with the private investor test confirms that the public authorities were involved in the measures under discussion ⁽⁴⁷⁾.

⁽⁴⁶⁾ *Stardust Marine* judgment, paragraph 56.

⁽⁴⁷⁾ Opinion of Advocate General Jacobs in *Stardust Marine*, paragraph 67.

- (215) In the particular case, given the scale of the measures and of the other factors identified in this Decision and in the opening decision, the Commission considers that it has sufficient evidence to demonstrate the imputability of the measures in question to the Italian State, given the involvement of the Municipality of Milan in the measures to cover SEA handling's losses, or the improbability of the public authorities not being involved.
- (216) Consequently, the Commission must reject the Italian authorities' suggestion that the Commission should analyse each of the measures taken with regard to the capital of SEA Handling individually, in order to verify the existence of aid and, in particular, the imputability of any such aid to the Municipality of Milan. The factors described in paragraphs 174-186, and the analysis of the measures from the perspective of a private investor, provide sufficient evidence that the coverage of losses through injections of capital can only be the result of a strategy and an involvement on the part of the public authorities during the entire period under investigation. The Italian authorities have themselves stated that while the decisions to cover the losses were formally adopted on an annual basis, there was a multiannual strategy to cover losses over the period needed for restructuring (see paragraphs 225-232).
- (217) The Commission therefore concludes that the measures must be considered imputable to the State.

8.2.2. THE SELECTIVE NATURE OF THE MEASURES

- (218) The measure at issue is selective, because it relates only to SEA Handling.

8.2.3. THE APPLICATION OF THE MARKET-ECONOMY PRIVATE INVESTOR TEST AND THE PRESENCE OF AN ECONOMIC ADVANTAGE

- (219) Regarding the existence of an economic advantage, it is necessary to determine whether, in similar circumstances, a private investor would have covered losses of the kind that were covered here. The Court of Justice has held that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term⁽⁴⁸⁾.
- (220) The Court has also ruled that a private shareholder may reasonably provide the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 107 of the TFEU⁽⁴⁹⁾.
- (221) It must also be pointed out that in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation⁽⁵⁰⁾. Thus, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen. Consequently, the Commission may refuse to examine the evidence produced [which] has been established after the adoption of the decision to make the investment in question⁽⁵¹⁾.

Multiannual loss coverage strategy

- (222) The Italian authorities and SEA maintain in their observations that, while the decisions to cover the losses were formally taken on an annual basis, the multiannual strategy to absorb the losses over the period needed for restructuring could not have been discussed afresh every year, and the results could be evaluated only over a multiannual period. The Commission observes that five business plans were submitted to it, some of them relating to overlapping periods, with a duration of no more than five years. Considering that the drafting of a new business plan generally involves an assessment of the company's business strategy, in order to determine whether to pursue it

⁽⁴⁸⁾ See in particular Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraphs 20-22.

⁽⁴⁹⁾ See for example Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraphs 21 and 22.

⁽⁵⁰⁾ *Stardust Marine* judgment, paragraph 71.

⁽⁵¹⁾ Judgment of the Court of Justice in Case C-124/10 P *Commission v EDF*, paragraphs 85 and 104.

further or to change it, the Commission considers that the strategy adopted with regard to SEA Handling could indeed have been reviewed at any time before a new plan was adopted, in order to take market developments into account.

- (223) The Italian authorities and SEA have stated that the decision to cover future losses was initially made in 2002 and then a second time in 2007, when, in view of the failure to reach the expected targets, the decision was taken to review the initial strategy calling for the coverage of losses, after which it was decided to proceed as originally planned. Essentially, they seem to present the measures in question as two injections of capital which were to be made in annual payments but which were decided in 2002 and 2007.
- (224) In their letter of 14 September, the Italian authorities stated that the de-hubbing of Alitalia in 2007 had grave repercussions on the activity of SEA Handling. Those repercussions on the firm's financial performance were exacerbated by the economic downturn and led SEA to reassess the viability of the hub model and evaluate the possibility of selecting a different business model. According to the Italian authorities, rather than choosing to outsource ground handling services, SEA in the last analysis decided to create a new business model, namely its 'self-hub' or 'virtual hub' model, which was merely a straightforward development of the previous model. The new model required tight control of ground handling activities. This demonstrated the rationality of SEA's decision to continue covering the operating losses of its subsidiary SEA Handling in order to return its ground handling business to profitability. The Italian authorities therefore contended that the review of SEA's strategy with regard to its subsidiary was fully justified by the unforeseen external circumstances, and in no way compromised SEA's objective of returning its ground handling business to long-term profitability.
- (225) The Commission acknowledges the existence of a multiannual strategy for the coverage of losses by the Italian authorities (in accordance with the commitment given by the Municipality of Milan to guarantee the financial stability of SEA Handling, and line with the evidence set out above for the imputability of those decisions to the Municipality), but it considers that such a strategy does not correspond to the conduct of a prudent private investor.
- (226) While it may take several years for any restructuring process to bear fruit, a prudent private investor would not enter blindly into a multiannual commitment, but would instead try to decide each year whether to inject fresh funds into the company in the light of the results of the restructuring process and the prospects for future viability. In the present case a private investor would certainly have reassessed the strategy in 2003 or 2004, when it was evident that the objective of a return to profitability in 2005 was not going to be achieved, or in any event in 2005, when it proved that that objective had not been achieved. Even if a private investor had embarked on a long-term loss coverage strategy, that investor, always supposing there were no binding legal restrictions, would have reviewed the strategy whenever asked to provide funds to eliminate SEA Handling's losses ⁽⁵²⁾.
- (227) More specifically, as SEA made clear in its observations, the failed negotiations with [...] in 2002 significantly compromised the possibility of achieving the objective of returning SEA Handling to profitability by 2005. But after SEA's board of directors rejected the offer on 10 September 2002, just a few months after SEA Handling was set up, no changes to the loss coverage strategy were ever considered.
- (228) Second, a decision as important as an injection of capital, which is subject to the approval of the general meeting, cannot be regarded as merely a step in the implementation of a general decision to cover future losses.
- (229) Third, the decisions to cover future losses over several years were not mentioned in the strategic business plans of SEA Handling or SEA. SEA's governing bodies did not enter into any formal, binding commitment based on a business plan providing for stated capital injections by SEA over a stated number of years ⁽⁵³⁾. The decisions taken in 2002 and 2007 were concerned at most with the aspect of SEA Handling's restructuring, rather than with the coverage of losses over multiple years. A private investor would in any event not have given a commitment to cover losses over several years without having at least a preliminary estimate of the total cost.

⁽⁵²⁾ Judgment of the General Court in Case T-358/94 *Air France v Commission* [1996] ECR II-02109, paragraph 79.

⁽⁵³⁾ The only commitment that might be so interpreted is that given to the Municipality in the agreement of 26 March 2002, whereby the Municipality confirmed that SEA would ensure that costs/revenues and the general economic framework remained balanced. That commitment does not refer to precise amounts indicated in a specific business plan, and the Italian authorities maintain that it is not legally binding.

- (230) It follows that aid was granted in each of the years under investigation, and in particular on the dates when SEA decided to increase the capital of SEA Handling, primarily in order to cover its losses, and undertook binding legal obligations in that respect ⁽⁵⁴⁾.
- (231) However, in analysing the injections of capital, the Commission cannot ignore the preceding injections. The measures were closely interlinked. According to the Italian authorities, they formed part of a single strategy. They pursued the same objective, namely to offset the losses of SEA Handling in order to ensure the firm's survival and restore its profitability. From a chronological perspective, too, they formed a continuous process, in that they were adopted each year, in succession, to respond to the ongoing difficulties of the recipient ⁽⁵⁵⁾.
- (232) Given the situation of difficulty in which SEA Handling found itself since it was set up, the Commission considers that a prudent private investor would have evaluated the risk that, from the first injection of capital, the measures might constitute illegal and incompatible State aid, and would therefore have studied the impact which the possible recovery of such aid would have on the profitability of its investment. The Italian authorities have never provided any evidence to show that such an assessment was performed.

Capital injections in 2002

- (233) It is not contested that when the first capital injection took place SEA Handling was a firm in difficulty within the meaning of the 1999 Restructuring Guidelines.
- (234) Points 16 and 17 of those Guidelines state that where capital is provided by public authorities to an enterprise that is in financial difficulties, it is likely that the funding will constitute State aid (it being extremely difficult for such an investment to generate a profit that would be acceptable to a prudent private investor operating in a market economy, considering the risks involved). Such capital injections must therefore be reported to the Commission in advance in order to be authorised as State aid.
- (235) In 2002 the Italian authorities ignored the indications in the 1999 Restructuring Guidelines, as they did in the case of the later capital injections too, and chose to carry out the injections even though they do not seem to have based their decision on a detailed business plan showing that SEA Handling was capable of reversing its fortunes and returning to profitability within a reasonable time ⁽⁵⁶⁾.
- (236) The Commission considers that a market investor would not have carried out the 2002 capital injections without a sufficiently detailed business plan based on sound, reliable hypotheses, which precisely described the measures needed to restore the profitability of the company, analysed the various possible scenarios, and demonstrated that the investment would generate a return that satisfied the investor (taking account of the intrinsic risk) in terms of dividends, increased share value, or other advantages.
- (237) Accordingly, the first capital injections, in 2002, do not seem to satisfy the market-economy private investor test, and conferred an advantage on SEA Handling that it would not have received in normal market conditions.

Context at the time the decisions were taken

- (238) Regarding the context in which the aid was granted, which the Commission must take into account when it applies the private investor test, the Commission will now set out its own approach, in response to the points raised by the Italian authorities and by SEA.
- (239) First, with regard to the impact on SEA's decisions of Italy's specific regulatory framework and the particularly high competitive pressure it generated, the Commission is responsible for ensuring that the objective of Directive 96/67/EC, namely to create a single market for ground handling services in the European Union by liberalising the sector, which entails greater competition between operators, is not compromised by the granting of State aid that might distort competition. It follows that measures adopted by a Member State to implement the Directive are no evidence that financial support granted to a given operator in order to offset the effects of a more competitive economic environment complies with the prudent private investor test. But in this Decision, and more especially in its analysis

⁽⁵⁴⁾ Judgments of the General Court in Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-127, paragraph 74; Joined Cases T-362/05 and T-363/05 *Nuova Agricast v Commission* [2008] ECR II-297, paragraph 80; and Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* [2009] ECR II-4315, paragraph 321.

⁽⁵⁵⁾ Judgment of the General Court in Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraph 171. In light of the previous indications in this Decision, the Commission will assess the compatibility of the measure investigated with the private investor test from an overall perspective, but will focus on specific times when it judges it necessary in order to analyse the arguments submitted or for other reasons.

⁽⁵⁶⁾ For an analysis of the 2002-2006 consolidated business plan see paragraphs 269-271.

of the course of conduct that a private investor would have adopted in a situation such as that of SEA, the Commission will take into account of the fact that Italy had opted for full liberalisation of the ground handling market, and that ENAC had authorised 84 providers to operate at Malpensa and Linate.

- (240) Many other Member States have opted for a similar form of liberalisation (Denmark (Copenhagen), Spain, Ireland (Dublin), UK (London), France (Paris)).
- (241) The applicable regulatory framework is in any case the same for all providers in the sector in Italy, the number of which is high, in SEA's opinion, with 84 providers authorised to operate.
- (242) The Italian authorities have not argued that the services are services of general economic interest which the market would not be able to guarantee.
- (243) Irrespective of the fact that SEA opted for a legal separation of activities (and, therefore, of accounts), Article 4 of Directive 96/67/EC still applies: it states that operators 'must rigorously separate the accounts of their ground handling activities from the accounts of their other activities, in accordance with current commercial practice', and prohibits 'financial flows between the activity of the managing body as airport authority and its ground handling activity'. This separation of accounts and prohibition of financial flows between the managing body and the ground handling entity are aimed at guaranteeing suitable conditions for developing effective competition in ground handling markets, by ensuring that the ground handling activity of vertically integrated operators does not receive any specific advantage over other operators.
- (244) Coverage of losses by the airport manager involving financial flows between the activity of the manager and the ground handling business runs counter to Directive 96/67/EC and its objectives. Consequently, the fact that SEA has opted not just for an accounting separation but for a legal separation of its areas of activity does not change the Commission's finding that there is an unfair advantage conferred on SEA Handling.
- (245) Regarding the affirmation that SEA is obliged to guarantee the provision of all ground handling services, the Commission observes that this 'legal obligation' means only, as the Italian authorities themselves indicate, that the responsibility may be exercised by the airport itself, or that the airport may coordinate the operations of outside providers. As the Commission said in paragraph 95 of the opening decision, SEA is in no way obliged to guarantee such provision either directly or through its subsidiary SEA Handling. The general responsibility of the airport manager in the event of a malfunction cannot, therefore, be invoked to show the absence of alternatives to covering the losses of SEA Handling. In the second place, even accepting SEA's claim that the ground handling business generally offers low profit margins and low levels of profitability, the Commission cannot accept that the market context proper justified the capital injections for purposes of the market-economy private investor test, especially given the scale of the losses incurred by SEA Handling throughout the period in question. On the contrary, on p. 5 of the 2007-2012 strategic plan it is confirmed that the most efficient airport operators in Europe have subcontracted ground handling activities. This same point is reiterated on p. 7 of the 2009-2016 strategic plan. It is confirmed on p. 28 of that document that the market tendency in 2001 was towards the subcontracting of ground handling services. This evidence contradicts the idea that vertical integration between the airport operator and the ground handling service provider is essential in order to guarantee quality, and that in view of the meagre profit margins in ground handling it was reasonable not to subcontract.
- (246) In particular, in a market that offers such low profit margins, rather than covering SEA Handling's losses SEA should have taken far more radical measures to increase SEA Handling's efficiency, significantly reducing staff costs, which according to the Italian authorities themselves make up a considerable part of the cost structure of a company in this sector, a sector subject to intense competitive pressure.

Alternatives to coverage of SEA Handling's losses

- (247) The Commission considers that SEA's view that there were no alternatives to the restructuring of SEA Handling and the coverage of its losses does not correspond to the conduct of a private investor in a market economy. Possible alternatives included a full or partial outsourcing of services, or the establishment of a strategic alliance through the transfer of part of SEA Handling to a strategic partner. Moreover, as pointed out in the previous paragraph, there was nothing to prevent SEA from adopting more radical restructuring measures aimed at increasing the efficiency of SEA Handling within a timeframe acceptable to a private investor.

- (248) Regarding the possibility of a transfer, the Commission cannot pass judgment on the efforts made by SEA to establish such an alliance, which might have allowed it to benefit from synergies deriving from its integration into an international network. The Commission notes, however, that in its comments SEA mentioned only two attempts at partial sale: the one that led to the failed negotiations with [...] in 2002, and the one that was initiated but not concluded in 2007-2008. Since then the possibility of a sale seems to have been made dependent upon a recovery of SEA Handling's profitability by other means. The Commission considers the evident lack of interest among private companies in investing in SEA Handling as an indicator of the company's lack of solid prospects of profitability.
- (249) With regard to the possible outsourcing of all or part of the ground handling activities, the Italian authorities have argued in the first place that no operator wanted to take over the business. The Commission observes that the State aid was reported by [...], and that [...] also expressed its opposition to the measures.
- (250) Additionally, neither that statement nor the more specific claim that potential outside operators are interested only in certain more profitable services ('cherry picking') is based on a firm observation of a manifest disinterest, for example following a tender procedure initiated by SEA for the provision of the services in question. In other words, this claim is not supported by any specific evidence, while a number of operators are authorised to offer their services in Italy and in particular at Malpensa and Linate airports.
- (251) Regarding the capacity of outside operators, the Italian authorities have insisted that there were no operators capable of guaranteeing the level of quality required by SEA's commercial model, namely that of a 'hub' or 'self-hub' airport. SEA considered that it needed a provider that was able to provide all of its ground handling services, and that this was impossible because the other operators on the market did not have the material resources, the economic resources or especially the human resources required to ensure the entire range of services.
- (252) First, the Commission points out that SEA is wrong to suppose that the available supply of ground handling services is limited to that of outside parties present at any given moment in Malpensa and Linate airports, and does not include potential supply by any other providers also authorised to work there. SEA's somewhat vague statements concerning the allegedly negative economic situation of other providers active at the Milan airports or the level of the resources they actually use at those airports are in no way relevant. The marginal presence of providers actually working at the Milan airports is only one example of the supply potentially available and able to enter the market. In addition, the fact that the outside providers currently operating at the Milan airports do not cover all ground handling services does not mean judgments can be made as regards their capacity to do so.
- (253) Second, the Italian authorities and SEA have not clarified why SEA needed to transfer all of its ground handling services to one operator. While it may be accepted that some activities may be less profitable, these activities could reasonably have been transferred to an operator that could take advantage of international economies of scale.
- (254) Third, regarding the actual capacity of outside operators to provide all ground handling services, the Commission rejects the claim that no operator had the necessary resources. According to SEA, 84 providers are authorised to operate at Linate and Malpensa. And, as already mentioned, it was certainly feasible to outsource part of the activities, rather than all of them.
- (255) Fourth, SEA has not specifically shown that an outside operator would not be able to satisfy the quality requirements judged essential for SEA's commercial model to function correctly. The Commission does not share the opinion that the quality of service requirement cited in Directive 96/67/EC and in the Italian legislation would apply in this context.
- (256) Concerning SEA's economic justification, which seeks to demonstrate the inadequacy of outsourcing certain ground handling services, because the airport manager has ultimate responsibility for guaranteeing continued services in cases of emergency or unforeseen events, the Commission has reservations on various points.
- (257) First of all, SEA has submitted dubious calculations to support its theory. These put the number of full time equivalent (FTE) staff units at SEA Handling assigned to emergency management at a very high level. In 2003, SEA estimates that the figure was no less than 336 FTE, at a total cost of EUR 9,9 million and equivalent to 1,8 % of SEA Handling's total FTEs. Clearly the actual cost incurred by SEA Handling was far less, since those staff were also — if not primarily — assigned to other tasks. However, to calculate the total cost which SEA would have to bear as airport manager in 2003 to cover this activity, SEA suggested multiplying that number of FTEs assigned to continued service and emergency management by a factor of 1,7, thus reaching the conclusion that SEA required 569 full-time workers costing a total of EUR 20,6 million. SEA concluded that the difference between these two amounts (EUR 20,6 million–EUR 9,9 million) represented the effective gain from the non-transfer of SEA's activities. The

Commission considers the factor of 1,7 to be arbitrary, since no justification has been provided, whereas it was up to SEA to show that this hypothetical cost had been calculated correctly. The Commission also estimates that the number of FTEs used to calculate the total cost incurred by SEA is completely unrealistic.

- (258) The Commission considers, rather, that the estimate of the cost incurred by SEA Handling should take into account the actual cost usually billed by SEA Handling to SEA, and a more realistic estimate of the number of SEA Handling FTEs assigned to such duties based on the average number of emergency situations, unforeseen events and cases of continued service that took place over the course of a year.
- (259) Second, the calculation takes no account of the substantial costs incurred by SEA as a result of the coverage of losses, which could have been avoided by outsourcing some or all of the ground handling activities to a more competitive operator. The outsourcing of some of the continued service activities might have entailed potentially higher costs to SEA, on account of the synergies that may be achieved as a result of the combination of those services with other in-house activities, but the overall gain from such outsourcing was potentially positive, so that this argument does not by itself show that there was no solution available other than covering SEA Handling's losses, as SEA contends in its comments.
- (260) [...] envisaged disinvestment from SEA Handling in 2010 following the de-hubbing of Alitalia. According to [...], SEA's primary objective was to develop Malpensa as a main hub (p. [...]) and to identify a new airline within five years (p. [...]). Disinvestment from SEA Handling was crucial to the attainment of this objective, and represented a milestone in the reorganisation of SEA in order to place it among the most profitable air transport operators (p. [...]). SEA itself therefore saw no need to keep SEA Handling in the group, either for managing Malpensa airport as a hub or for improving the overall financial standing of SEA.
- (261) In light of the above, the Commission concludes that while SEA seems to have made efforts to establish an alliance with a strategic partner capable of having a significant impact on restoring SEA Handling's profitability, the outsourcing of all or part of its activities to outside operators was an economically advantageous option which a private investor would necessarily have considered, and, if appropriate, pursued, rather than continuing to pay heavy operating losses over many years. Yet none of the documents submitted shows that there was any reflection on the future of SEA Handling over the course of the entire period in question.

The selection of the SEA group's commercial model

- (262) The Italian authorities have made the general statement that SEA's decision to maintain a hub airport system requires that these services be provided directly by the airport manager, but this argument does not seem to be supported by an analysis aimed at determining why, when set against the potential earnings from the existence of the hub, it was economically advantageous to SEA to compensate some EUR 360 million in losses. Apart from general claims, the Italian authorities have not submitted a single document showing how that choice was arrived at.
- (263) More specifically, regarding the argument that covering SEA Handling's losses provided the most efficient possible basis for SEA's chosen hub model, because of the complementary nature of ground handling and airport management activities, the Commission observes that, without judging the wisdom of the decisions taken by the SEA group, this constraint on SEA Handling's strategy (besides being contradicted by the observation that Europe's best-performing large airports/hubs have transferred their ground handling services, and by the business plans mentioned in paragraphs 281-282 and 283-286⁽⁵⁷⁾) is essentially based only on a presumption that no outside operator would be able to provide sufficient quality. SEA has not clarified the level of quality it required, or the impact that an insufficient level of quality might have had on the functioning of the airport and its revenues. This is even more surprising considering SEA's claim that inadequate provision of ground handling services by outside parties would have damaged SEA's reputation as an airport operator, a fact which could easily have been confirmed by a market study (paragraph 106 of SEA Handling's letter of 21 March 2011). Given the lack of a clear assessment of the damage that might have been caused to SEA's image or reputation if all or part of its ground handling services had been subcontracted, the Commission cannot accept the argument that SEA's conduct — in systematically covering SEA Handling's losses — was economically rational and necessary in order to avoid such damage. Moreover, in application of Article 15 of Directive 96/67/EC, a Member State may impose rules of conduct on suppliers of ground handling services in order to ensure the proper functioning of the airport (where appropriate on a proposal from the airport), even if those suppliers are from outside the airport. In any case, neither SEA nor Italy has provided any concrete proof that the hub model could not have been implemented by outsourcing all or part of the ground handling services.

⁽⁵⁷⁾ 2007-2012 strategic plan, p. 5, and 2009-2016 strategic plan, p. 9.

- (264) Rather, [...] confirms SEA's intention to make no further investment in SEA Handling, since its investment is considered a non-strategic holding for the purpose of ensuring that Malpensa will return to its hub status following the de-hubbing of Alitalia.

The restructuring of SEA Handling and SEA's objectives

- (265) The Italian authorities cite the *ENI-Lanerossi* judgment, which states that a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 92 of the Treaty, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision⁽⁵⁸⁾.
- (266) The Italian authorities submit in particular that the Commission should assess decisions to cover a subsidiary's losses on the basis not only of the likelihood of an immediate profit, but on other considerations that may justify covering the losses of a subsidiary which is capable of becoming profitable again after a process of restructuring.
- (267) SEA contends that offsetting the losses of SEA Handling is justified, first, by the presence of a strategic plan and restructuring programme with good prospects of long-term profitability, and, second, by considerations other than mere financial profitability.
- (268) Concerning the first argument, the Commission considers that the business plans for SEA Handling that were supplied to it are not sufficiently detailed to justify such a decision by a private investor in a market economy. More specifically, the plans are not the 'turnaround' plans that a prudent private investor would require before undertaking such substantial injections into the capital of a company that had been in economic difficulties since it was set up. The plans are not based on an in-depth audit of the causes of the difficulties and of the measures needed to resolve them. They are not based on realistic forecasts regarding the development of SEA Handling's activity or of the sector, nor do they contain an analysis of alternative scenarios, which a diligent private investor would have expected in a similar situation.

The 2002-2006 consolidated business plan

- (269) Specifically, the 2002-2006 consolidated business plan approved in 2001 envisaged that SEA Handling would return to profitability by 2005. But that plan covered the entirety of SEA activities, and did not include a detailed description of the measures that SEA should take in order to guarantee the profitability of SEA Handling.
- (270) The plan lists the measures to be implemented to improve workforce productivity by 20 % by 2006 (p. 17), but does not evaluate the effect of such a rise in productivity on the company's overall financial performance. The Commission considers that the plan cannot be seen as based on credible hypotheses, since it does not include any specific measures for addressing the structural causes of chronic losses in ground handling, namely excess labour costs (p. 23). On the contrary, the document provides for a rise in the cost of labour in ground handling in that period (Annex 3, p. 13). It also forecasts a 37 % increase in revenue from ground handling services (p. 30) without giving any realistic justification, particularly considering the presence of other ground handling operators at the Milan airports and the growing competition in the sector. The Commission observes that in its report and accounts at 31 December 2003 SEA acknowledged that SEA Handling's market share had fallen as a result of competition.
- (271) As the Commission observed in paragraphs 82-85 of the opening decision, the economic performance of SEA Handling on the basis of its 2002-2006 consolidated business plan and 2003-2007 business plan was not satisfying.

The 2003-2007 business plan

- (272) The opening decision clearly asked the Italian authorities to submit 'the 2002 business plan for SEA Handling, with any subsequent amendments, or any document concerning the strategy and return to profitability of SEA Handling'. In their observations the Italian authorities did not initially react. SEA, as an interested party, ultimately submitted a document entitled 'Piano d'impresa 2003-2007 di SEA Handling' (2003-2007 business plan for SEA Handling). From its title and its form, however, this document is more a presentation of the business plan already referred to which outlines the main general hypotheses for the return to profitability envisaged in the company's forecasts for

⁽⁵⁸⁾ Judgment of the Court of Justice in C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraphs 21 and 22.

2005. The Commission considers that in substance this presentation reproduces the policy for SEA Handling established at the SEA group level in the SEA 2002-2006 consolidated business plan, but does not explain with sufficient precision the measures to ensure profitability which a private investor would logically have expected.

- (273) The 2003-2007 business plan describes a situation that is highly critical for SEA Handling (excessive labour costs, substantial organisational imbalances, insufficient technological innovation and a failure to take advantage of certain potential revenue items, p. 1), which could result in a loss of market share and of which SEA Handling was well aware (p. 15); but the measures for the reduction of labour costs are essentially limited to brief mentions of a voluntary redundancy incentive policy, an increase in temporary staff and a reduction in overtime. SEA estimated that this would reduce staff costs by 3,1 % between 2003 and 2007.
- (274) According to the information provided by the Italian authorities, labour costs amounted to 103,7 % of SEA Handling's turnover in 2002, and 94,9 % in 2003, whereas the corresponding figure for independent operators was less than 70 % on average; but SEA Handling set itself the target only of reaching around 75 % by 2005 and maintaining that level thereafter.
- (275) In addition, SEA Handling envisaged that this improvement would be brought about primarily by a 25 % rise in turnover between 2003 and 2007 (pp. 5 and 6 of the business plan), and not by a reduction in staff costs, which was estimated at only around - 3,1 % between 2003 and 2007 (with a slight increase in labour costs in the period 2004-2007).
- (276) The Commission considers that, given the scale of the restructuring required, a private investor would have focused its efforts to return the company to profitability on internal measures over which it would have the most control, essentially related to cutting labour costs, which at the time were higher than turnover, rather than anticipating an increase in prices and demand, factors over which SEA Handling had far less control.
- (277) The Commission also considers that that the contract signed with Alitalia for the 2001-2005 period envisaged a 7 % increase in prices in 2004 and in 2005, a rise which later proved excessive and was followed by reductions in 2006 and 2007 against a background of falling prices due to a more competitive environment. Given that the liberalisation of the sector could be expected ultimately to result in a reduction in prices, the Commission considers that SEA cannot reasonably claim that such a reduction was an 'unforeseeable negative event'. The 2003-2007 business plan was therefore not based on realistic prospects. Moreover, the Commission takes the view that a private investor would have anticipated the change in the competitive environment brought about by the liberalisation of the sector, and would not have embarked on a strategy that made a return to profitability depend primarily on an increase in turnover.
- (278) The Commission thus considers that the achievement of the objective of returning to viability by 2005 was unrealistic if the only measures taken were those judged necessary by SEA according to the indications in its 2003-2007 business plan and 2002-2006 consolidated business plan.
- (279) In response to the Commission's request of 11 July 2011, the Italian authorities were not able to provide the minutes of the meeting of the board of directors of SEA Handling that had approved the measures described in the SEA Handling business plan. Instead, the Italian authorities sent the Commission minutes of the meeting of the board of directors of SEA held on 23 July 2003, at which a consolidated business plan was approved for the SEA group. On that occasion, according to the extract from the minutes provided, the 2003-2007 business plan for SEA Handling was only presented, and consequently was not approved.
- (280) Regarding a possible amendment to the initial business plan, or the drafting of a subsequent business plan, the Commission concludes, on the basis of the information provided by the Italian authorities in response to its request of 11 July 2011, that thereafter the need for a fresh recovery programme was discussed only at the board of directors meeting on 21 December 2006, when it was decided that the chairman would draw up a detailed restructuring plan. On that occasion there was no mention whatever of any restructuring plan currently being implemented.

The 2007-2012 strategic plan

- (281) The strategy planned by SEA was subsequently set out in a document drafted by an external consultant which was produced at the meeting of SEA Handling's board of directors on 31 May 2007. This document, entitled 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA — 11 maggio 2007' (Executive Summary: Guidelines for the SEA group's 2007-2012 strategic plan, 11 May 2007), is an external consultant's presentation of possible development scenarios for the SEA group, and gives only a brief account of the situation of SEA Handling, on just two pages (pp. 8 and 12), merely indicating the absolute need to return it to profitability by 2012. No specific

measures for returning the company to profitability are provided for. The Commission therefore disputes the Italian authorities' statement that this document sets out the strategy of the SEA Group for the 2007-2012 period in three phases. The only strategic measure discussed at the meeting was the reorganisation of the production model with a brief indication of certain recovery measures.

- (282) Moreover, as already pointed out, the plan confirms that non-vertically integrated operators provide services that are better in economic terms than those of airport operators that have kept control over ground handling operators.

The 2009-2016 strategic plan

- (283) According to the Italian authorities, when Alitalia de-hubbed Malpensa airport in 2007, SEA considered abandoning its hub model in view of the departure of the hub carrier on which the model was based. Consequently, a new strategic plan drawn up by an external consultant ('Piano strategico 2009-2016') was presented to the SEA board of directors, which approved it on 15 July 2008. This document displays the same characteristics as its predecessor, giving no details of measures related to the planned recovery of SEA Handling except for a brief description of aspects relating to a contractual review and managerial improvements and also emergency procedures such as the extraordinary layoff fund (*cassa integrazione*).
- (284) Contrary to the claims of the Italian authorities, SEA's primary objective according to this plan is to develop Malpensa as a main hub by identifying a new hub carrier 'within five years' (p. 5). According to the SEA Handling disinvestment plan, it is essential to achieve this objective by 2010 (pp. 12, 35 and 37). The Commission observes that the plan does not contain any reference to the virtual hub model, nor does it say that the development strategy is based on a new business model and necessarily involves the vertical integration of SEA Handling. The minutes of the meeting of the board of directors of SEA Handling on 13 June 2008 likewise confirm that SEA's objective at the time was not to become a virtual hub, but to attract a new hub carrier. The minutes of the SEA board of directors meeting of 15 July 2008 also describes disinvestment from SEA Handling by 2010 as a key factor in the plan's sustainability.
- (285) The Commission also observes that the document 'VIA Milano', submitted by the Italian authorities on 28 June 2012, includes a description of the virtual hub model. The document suggests that SEA has been pursuing this strategy since 2011. But there is no suggestion here either that the virtual hub model requires the vertical integration of the airport and ground handling operators.
- (286) The plan confirms that from 2001 onward Europe's leading airport operators have gradually left the ground handling market, with the result that new, independent operators have entered it (p. 28).

The 2011-2013 business plan

- (287) Finally, SEA states that on 27 June 2011 its board of directors approved a document entitled 'Piano d'impresa di SEA 2011-2013' (SEA business plan 2011-2013), which among other things highlighted 'the need to continue with the strategy of improving the efficiency of ground handling'. The Commission observes, however, that this document contains only financial projections, and makes no specific mention of any measure in reference to SEA Handling.
- (288) The Commission also points out that the business plan indicates that the charges related to labour costs borne by SEA Handling had remained virtually unchanged since 2009 (see table on labour costs).
- (289) The Commission finds, therefore, that the Italian authorities have been unable to provide it with sufficiently detailed business plans for SEA Handling, or any other documents that might describe the restructuring strategy and its implementation over the period in question, much less any documents that might show that this strategy had from the outset envisaged the necessity or possibility of covering SEA Handling's operating losses for a stated period and for stated amounts. The Commission therefore considers that the Italian authorities have not been able to produce concrete evidence of a restructuring strategy for SEA Handling that in the eyes of a prudent private investor would justify the temporary coverage of its losses with a view to returning it to profitability. This is surprising in the present case because a private operator, looking at a company that had been accumulating losses since it was set up some years ago, would have asked for an in-depth audit and for precise measures to be taken before investing resources in the company.

- (290) The Commission cannot accept SEA Handling's argument that the fact that SEA Handling had almost reached break-even point in 2011/2012 demonstrates the rationality of SEA's strategy of covering SEA Handling's losses over the whole time, and thus shows that the capital injections satisfied the market-economy private investor test. Given that that SEA Handling's losses had been covered continuously for nearly 10 years, it is not surprising that SEA Handling should finally have returned to profitability. Any undertaking that received the same financial support would be able to return to profitability if it took just modest restructuring measures. But this prospect would not be enough to satisfy a private investor, who would require at least a projection showing that the expected return from the strategy of medium- and long-term loss coverage — in terms of dividends, increased share value, avoidance of damage to image, etc. — would exceed the capital injected to offset such losses. The Commission observes that none of the business plans submitted by Italy provides forecasts which try to show that the strategy of covering losses over such a long period of time would be more economically advantageous to SEA than disinvestment from SEA Handling, or which try to reduce the restructuring period in order to return to profitability in a reasonable time and to minimise losses.
- (291) Given the repeated losses of SEA Handling each year over the period of reference, the Commission considers that SEA Handling was loss-making for a time that was too long to be considered 'a limited period' within the meaning of the judgment in *ENI-Lanerossi* ⁽⁵⁹⁾. SEA Handling has been making losses since it was set up in 2002, and at best may become profitable only in 2012, according to SEA's forecasts in 2011. The decisions to cover the losses were taken year by year, and the repeated annual losses did not lead to a change in SEA's strategy or to more radical restructuring measures.
- (292) On the second argument, regarding considerations other than mere financial profitability, the Commission, for the reasons already stated above, disputes the concerns cited by SEA regarding the allegedly insufficient level of quality that an outside provider would have been able to provide, which it is argued would have had a negative impact on SEA's development and general performance and might have rendered SEA liable for any malfunction.
- (293) As already observed, the Commission considers that the Italian authorities and SEA have not provided details of the potential damage to SEA's image or of the damage that passengers might have suffered. They did not quantify any such loss even after the opening decision. And yet SEA acknowledged that such a loss could easily have been confirmed by a market study. The Commission takes the view, therefore, that the absence of any evaluation of the damage to SEA's image, or of its potential liability, or of the prospects of an indirect long-term return, is especially detrimental to any attempt to show that the measures are compatible with the prudent private investor test given the scale of the capital injections involved. A prudent shareholder would have carried out an economic evaluation of these risks and prospects before paying out a total of EUR 359,644 million ⁽⁶⁰⁾.
- (294) It has been argued that the goal of maximising the long-term profits of the SEA group has to prevail over the financial profitability of SEA Handling, but this ignores the fact that if SEA had not systematically covered its subsidiary's losses its profits would have been much greater. Moreover, the Italian authorities have submitted no evidence that might show that in the long term SEA would have achieved greater profitability by pursuing its strategy of covering the losses rather than by taking more drastic restructuring measures or outsourcing all or part of its ground handling services.
- (295) In the terms used in the *ENI-Lanerossi* judgment, the Commission considers that SEA Handling was not 'experiencing temporary difficulties' but had a serious structural problem, and that its losses were not covered by SEA for 'a limited period'. Moreover, if the losses were borne 'in order to enable [the subsidiary] to close down its operations under the best possible conditions', it has to be observed that since 2001 SEA has initiated only two competitive bidding procedures, or at least that the optimal conditions have not been achieved within a reasonable time. In any event, that objective cannot by itself demonstrate that the measures comply with the prudent private investor test.
- (296) In conclusion, the Commission finds that the business plans submitted to it are not based on realistic forecasts of the development of SEA Handling's business or of the sector, and do not provide the analysis of alternative scenarios that a diligent private investor would have demanded in a similar situation.

⁽⁵⁹⁾ Judgment of the Court of Justice in Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 21.

⁽⁶⁰⁾ See the judgment of the General Court in Case T-565/08 *Corsica Ferries v Commission*, paragraphs 101-108.

The economic performance of SEA Handling

- (297) While the economic performance of SEA Handling after the decision to cover its losses for a given year do not allow a judgment to be made with regard to compliance with the private investor test, its results prior to such a decision, and particularly the direction in which they were moving, do clarify the factual context in which the decision was taken. The correlation between the restructuring measures applied to SEA Handling and the results they produced during the period in question would necessarily have at least influenced a private investor's decision whether or not to continue covering the company's losses. They therefore need to be analysed in this light.
- (298) The Italian authorities and SEA implicitly acknowledge this principle when they say that the positive progression of the main economic results of SEA Handling during the period 2003-2004 was, in their opinion, encouraging, and showed that a return to profitability was possible. In the opening decision, however, the Commission pointed out that between 2003 and 2005, the company's losses remained at over EUR 40 million; its gross operating margin remained negative; its unit labour costs rose 7,6 %; total costs fell only by around 3 %; and income increased by around 4,5 %.
- (299) Leaving aside the Commission's negative assessment of the level of precision of the restructuring plans submitted by the Italian authorities, it should be noted that the indicators of sound economic development recorded over the course of the period, particularly those related essentially to the internal measures adopted and not based on external factors over which the company had no influence, allow a direct evaluation to be made of the scale of the restructuring measures actually implemented. This is the case, for example, of a reduction observed in staff costs resulting from a rise in productivity, a reduction in unit labour costs and a reduction in employee numbers.
- (300) On the other hand, the Commission considers that indicators of quality, such as shifts in waiting times for arriving baggage and the punctuality of calls managed by SEA, while useful for evaluating the competitiveness of the services offered, cannot be used to judge the scale of the restructuring measures.
- (301) Regarding the actual economic results achieved, the Commission refers to the analysis of the graphs and tables in Section 2.4.
- (302) The Commission points out that according to the data shown in table 3 a 22 % rise in productivity was observed between 2004 and 2010. SEA has stated that this improvement was the result of better and more flexible use of human resources, outsourcing of low-productivity services (e.g. cabin cleaning), and better staff supervision (particularly through a reduction of absentee rates).
- (303) SEA claims that SEA Handling failed to achieve its goal of profitability by 2005 or at the latest by 2007 mainly because of a loss of income, deriving in particular from the reduction in prices, including those paid by Alitalia from 2006 onward, and from the rise in unit labour costs. Finally, SEA states that the lower-than-expected level of traffic had repercussions on income generated between 2002 and 2007.
- (304) Regarding labour costs, the Commission observes that the unit cost of labour rose nearly 10 % between 2003 and 2010. SEA claims that its limited capacity to achieve significant reductions in its operating costs was limited. It says that the power of the unions in collective bargaining negotiations and their political role in Italy restricted its room to manoeuvre in the short term. Staff cuts were substantial, but they were not sufficient to offset the rise in unit labour costs before 2008, nor to significantly reduce labour-related costs (- 38 % between 2008 and 2010). The Commission takes note here of the minutes of the board of directors meeting of 21 December 2006, at which one of the members pointed out that the situation of SEA Handling was still 'very alarming'. The fact that from 2008 onward SEA Handling managed to reduce its labour costs appreciably shows that considerable efforts were made in this area. But in the context of the case that fact does not show that the capital injections complied with the private investor test. In particular, the Commission has already observed that the capital injections carried out from 2007 onward cannot be examined without considering the preceding injections. Similarly, the Commission also pointed out that they were not based on financial analyses and business plans comparable to those that a private investor would have requested.
- (305) Regarding the price reduction imposed by Alitalia, the Commission observes that the contract signed with Alitalia for the period 2001-2005 envisaged a 7 % increase in prices in 2004 and in 2005, a rise which later proved excessive and was followed by reductions in 2006 and 2007 against a background of falling prices due to a more competitive environment. Given that the liberalisation of the sector could be expected ultimately to result in a reduction in prices, the Commission considers that SEA cannot reasonably claim that the reduction, which was largely an adjustment following an increase that had proved excessive and a reaction to the entry of a competitor, Aviapartner, in 2006, was an 'unforeseeable negative event'. The Commission takes the view that a private investor would have anticipated the change in the competitive environment brought about by the liberalisation of the sector.

For example, such an investor would not have counted on a 9 % price increase between 2003 and 2007 ⁽⁶¹⁾, and would have expected that SEA Handling's market share, while essentially reflecting a monopoly status, would have fallen.

- (306) According to SEA, another 'unforeseeable event' which had serious negative repercussions on SEA Handling's return to viability was the loss of income after 2008 resulting from Alitalia's decision to reduce its services at Malpensa. The Commission recognises the significance of this withdrawal for SEA Handling's revenue, but it takes the view that SEA's efforts to improve SEA Handling's situation were intensified when the withdrawal was announced in 2007. The number of operative FTEs dropped almost 41 % between 2007 and 2010. As a result, the cost of labour fell between 2007 and 2009, while the growth in productivity accelerated. Other operating costs also fell 40 % between 2007 and 2010. Overall, thanks to these cost cuts following Alitalia's reduction in services, the company's gross operating margin improved, despite its drop in turnover. Nevertheless, these results did not put SEA Handling in a position to return to economic equilibrium within a short time, despite the aid granted previously. In addition, in a counterfactual scenario in which Alitalia had continued its services at Malpensa and SEA Handling's market share had remained at the 2005 level indicated by the Italian authorities, the calculations suggest that SEA Handling might have hoped to return to profitability in 2009, but the Commission takes the view that the efforts to cut costs in the period in question would not have been as far-reaching without Alitalia's withdrawal ⁽⁶²⁾. In any event, the Court of Justice has reiterated that for an assessment of compliance with the private investor principle, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen ... where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question ⁽⁶³⁾.
- (307) The Italian authorities have confirmed that the potential gravity of the situation after Alitalia's withdrawal encouraged SEA to make efforts to improve costs.
- (308) Finally, SEA Handling has also stated that unforeseen events had a negative impact on its results, and has referred in particular to the effects on its turnover of SARS, terrorist threats following the outbreak of war in Iraq in 2003, and the eruption of the Eyjafjallajökull volcano in 2010. The Commission observes that the only quantification of the impact of these events on SEA Handling's turnover was in the RBB Economics study of 1 June 2011. But here the study merely repeats statements made by SEA Handling, namely that SARS and the terrorist threats following the outbreak of war in Iraq in 2003 had led to a 3 % fall in turnover, and that the Eyjafjallajökull volcano eruption had caused a drop of EUR 1,5 million in turnover. The counterfactual analysis is based on these presuppositions, and does not provide any means of evaluating the effects of the events in question. In addition, the Commission considers that even if SEA's estimates could be regarded as reliable without any supporting evidence, the effects of the unforeseeable events indicated in the RBB Economics study would still not realistically justify SEA's continued injections of capital, which totalled nearly EUR 360 million in the period 2002-2010 period. Furthermore, the Commission considers that an investor operating under market conditions would probably have carried out a study immediately after such events took place, rather than several years later, in order to evaluate their impact and to decide whether to change its strategy, to continue with the strategy in place, or to amend its business plan. But as the RBB Economics study was drawn up several years after the opening decision, the Commission considers that it does not correspond to the conduct of a prudent private investor, but was carried out for the purposes of the present proceedings, in order to demonstrate *ex post* the supposed economic rationality of SEA's behaviour. The study consequently cannot be taken into account for the application of the prudent private investor test. Finally, the Commission observes that precisely in order to ensure the profitability of their investment even following negative events, private investors look for financial analyses that indicate the return on their investment in poor scenarios, particularly in industries such as air transport, which by its nature is exposed to risk factors that are outside the operators' competence and control. Neither Italy nor SEA has ever shown that such an analysis was carried out at the time of the measures in question.
- (309) The Commission consequently takes the view that the efforts to cut costs, although they were substantial in several respects following the setting up of the company, and particularly after 2007, were not sufficient to envisage a return to profitability, or then only in the long term, that is to say in more than 10 years, and without considering the risk

⁽⁶¹⁾ As described in the SEA Handling's 'Piano aziendale 2003-2007'.

⁽⁶²⁾ That the company's market share should continue until 2010 at the 2005 level, i.e. 76,65 %, is merely hypothetical.

⁽⁶³⁾ Judgment in Case C-124/10 P *Commission v EDF*, paragraphs 85 and 104.

of having to return any illegal aid granted in the past. It is not surprising that after receiving public support for so many years SEA should have improved its results, but the Commission considers that given SEA Handling's extremely heavy cost structure and the context of market liberalisation, a private investor would have sought a much more far-reaching restructuring operation in 2002 before agreeing to cover the losses for the time needed to complete the restructuring process and to obtain a reasonable return on its investment within a reasonable time.

The comparison with the profits of other operators

- (310) The Commission rejects the argument that no comparison can be made with the economic performance of other ground handling service providers of a different 'nature' (the Italian authorities cite airport managers operating with separate accounts, airport managers operating separate companies, airlines providing their own ground handling services, and outside providers, which may in turn be divided into providers with domestic or international networks and SMEs) or with a different area of activity (some providers offer all ground handling services while others offer only some).
- (311) The very purpose of liberalising the sector is to stimulate competition so that the suppliers with the most competitive business models can establish themselves on the market, to the benefit of users, airlines and, ultimately, users. The Commission considers that the operators with which the Italian authorities do not wish to compare SEA Handling are nevertheless in actual or potential competition with it. The Italian authorities' argument *de facto* reduces the number of competitors comparable to SEA Handling to zero, since no operator provides exactly the range of services currently offered by SEA Handling, even where that operator is of the same 'nature', namely an undertaking linked to an airport manager but operating as a separate company. This is leaving aside the fact that SEA considers that the Commission ought also to take account of the methods by which Directive 96/67/EC has been implemented in order to compare the services provided by providers operating on a market other than Italy.
- (312) Numerous ground handling service providers are structurally profitable. In any case, the fact that other ground handling operators may have incurred losses in the same period does not demonstrate the rationality of SEA's conduct, but rather seems to suggest the opposite, because any company faced with economic difficulties will seek to focus on its core business and stop any investments in to activities that generate structural losses or are less profitable. As already pointed out several times, in two of the business plans submitted SEA Handling emphasised that the market trend in the period in question was towards an end to investment by airport managers in ground handling services, and that operators that had subcontracted ground handling services were generally more profitable than vertically integrated operators.
- (313) For similar reasons, the Commission must reject SEA's argument that the only comparable operator was [...] ⁽⁶⁴⁾, which is presumed to have suffered losses in the period 2004-2006 period ⁽⁶⁵⁾ and did not subcontract its ground handling services. First, [...] is still controlled by the State, so that its conduct cannot be considered typical of private operators ⁽⁶⁶⁾. Second, the Commission does not have the information needed to determine whether [...] had received financial aid towards its ground handling services that was comparable in terms of amount or duration to that received by SEA Handling.
- (314) Finally, the Commission does not consider the comparison made by SEA Handling with [...] and [...] to be significant. SEA Handling claims that those operators had incurred losses from services provided at those airports without giving sufficient proof ⁽⁶⁷⁾. Moreover, it would seem that the negative results of those operators were partly a consequence of the aid received by SEA Handling. Had SEA Handling not received repeated injections of capital from SEA, it would have become insolvent, and would have undergone a more rapid and in-depth restructuring process than it actually did. The structure of the market would have changed, and competitors would have had the opportunity to increase their market share and improve their profits.

⁽⁶⁴⁾ [...].

⁽⁶⁵⁾ Observations of SEA Handling of 21 March 2011, paragraphs 99 and 100.

⁽⁶⁶⁾ See: [...].

⁽⁶⁷⁾ Observations of SEA Handling of 21 March 2011, paragraph 105.

- (315) In conclusion, the Commission considers that the capital injections in question do not pass the private investor test and consequently that they conferred on SEA Handling an advantage that it would not have obtained in normal market conditions.

8.2.4. EFFECT ON TRADE BETWEEN MEMBER STATES AND DISTORTION OF COMPETITION

- (316) The measures affect trade between Member States and distort or threaten to distort competition in the internal market in that they favour a single undertaking, which is in competition with other ground handling service providers at Malpensa and Linate airports, and with all other providers authorised to operate there, many of which operate in more than one Member State, more especially since the liberalisation of the sector took effect in 2002.

8.2.5. CONCLUSION

- (317) The Commission therefore concludes that measures taken by SEA to cover SEA Handling's losses constitute State aid within the meaning of Article 107(1) of the TFEU.

8.3. COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET

- (318) Since it considers that the measures in question constitute State aid within the meaning of Article 107(1) of the TFEU, the Commission has examined their compatibility in light of the exemptions provided for Article 107(2) and (3).
- (319) Article 107(2) is clearly not applicable, given the nature of the measures in question, and it has not been invoked by Italy or SEA.
- (320) Regarding Article 107(3), in the opening decision the Commission expressed its concern regarding the compatibility of the measures with the Aviation Sector Guidelines. Those guidelines set out the way in which the Commission will evaluate the public funding of airport services under the rules and procedures governing State aid.
- (321) With regard to the subsidising of airport services, the Aviation Sector Guidelines refer to Directive 96/67/EC, according to which above the threshold of two million passengers ground handling services must be self-financing, and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest.
- (322) It must be pointed out, therefore, that subsidisation of such activities by public authorities runs counter to the objectives laid down in Directive 96/67/EC and may have a negative effect on the liberalisation of the market.
- (323) The Commission accordingly considers that the aid cannot be declared compatible with the internal market on the basis of the Aviation Sector Guidelines.
- (324) In the alternative, the Italian authorities have asked the Commission to evaluate the compatibility of the aid under Article 107(3)(c) of the TFEU and the 2004 Restructuring Guidelines. The Italian authorities have not sought to rely on any other legal basis that might demonstrate the compatibility of the aid in question with the internal market in the light of Article 107(3), nor have they submitted any evidence to demonstrate such compatibility to the Commission. The Italian authorities have in fact stated that the Aviation Sector Guidelines are not applicable to an assessment of the compatibility of the measures in question. Consequently, the Commission must analyse the arguments put forward by the Italian authorities to demonstrate the compatibility of the aid as aid towards restructuring.
- (325) According to point 104 of the 2004 Restructuring Guidelines:

The Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation ...on the basis of these Guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union*. In all other cases it will conduct the examination on the basis of the Guidelines which apply at the time the aid is granted.

- (326) The 2004 Restructuring Guidelines were published on 1 October 2004.

- (327) Since the Commission considers that the measure in question must be understood as a series of decisions for injections of capital into SEA Handling to cover its operating losses as they arose, rather than as one or two instalments of aid for restructuring (as the Italian authorities seem to argue, see paragraph 84), the compatibility of the measures must be examined in light of the Restructuring Guidelines of 1999 and 2004, depending on whether they were the subject of binding commitments given before or after 1 October 2004⁽⁶⁸⁾.

Eligibility of the firm

Measures taken before 1 October 2004

- (328) On the grounds outlined in paragraphs 174-180, the Commission considers that SEA Handling can be considered a firm in difficulty within the meaning of the 1999 Restructuring Guidelines.
- (329) Under point 7 of those Guidelines, a newly created firm is not eligible for rescue or restructuring aid. However, the Guidelines state that the creation by a company of a subsidiary merely as a vehicle for receiving its assets and possibly its liabilities is not regarded as the creation of a new firm. Since SEA Handling was created as the result of a separation by SEA to provide ground handling services, the Commission considers that SEA Handling is not to be regarded as a newly created firm within the meaning of the Guidelines.
- (330) In addition, SEA Handling's financial difficulties do not derive from an arbitrary distribution of costs within the group. They were not imputable to the holding company SEA, but were due at most to the excessive cost of labour, as a result of which the company was unable to balance its accounts.

Measures taken after 1 October 2004

- (331) The Commission observes that there was no improvement in the company's financial situation in 2004 compared to 2002. As explained in paragraphs 181-184, the company continued to face financial difficulties in 2004, and had to be considered a firm in difficulty under the 2004 Restructuring Guidelines.
- (332) Point 13 of those Guidelines states that a newly created firm is not eligible for rescue or restructuring aid. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. A firm will in principle be considered as newly created for the first three years following the start of operations in the relevant field of activity.
- (333) For the reasons given in paragraph 330, the Commission considers that SEA Handling cannot be considered a newly created firm. The Commission observes that, in their last letter, the Italian authorities affirmed that SEA Handling was to be regarded as a newly created firm under the 2004 Restructuring Guidelines, as it was set up as the result of a spin-off of SEA's existing ground handling division, and therefore took over the assets and liabilities of the parent company relating to the provision of ground handling services.
- (334) The considerations set out in paragraph 331 apply here again.
- (335) The Commission concludes that SEA Handling was eligible for restructuring aid under the 1999 and 2004 Restructuring Guidelines.

Return to long-term viability

- (336) According to the 2004 Restructuring Guidelines, The grant of the aid must be conditional on implementation of the restructuring plan which must be endorsed by the Commission in all cases of individual aid (point 34 of the 2004 Restructuring Guidelines and point 31 of the 1999 Restructuring Guidelines). Moreover, Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission (point 35 of the 2004 Restructuring guidelines and point 32 of the 1999 Restructuring Guidelines).

⁽⁶⁸⁾ It should be noted that if the if the argument of the Italian authorities were correct only the 2004 Restructuring Guidelines would apply, but the assessment of compatibility would remain unchanged.

- (337) First, the 'restructuring plans' cited by the Italian authorities are the 2002-2006 consolidated business plan ('Piano aziendale consolidato 2002-2006'), the SEA 2003-2007 business plan ('Piano aziendale 2003-2007 SEA'), the 2007-2012 strategic plan ('Piano strategico 2007-2012'), the 2009-2016 strategic plan ('Piano strategico 2009-2016'), and the 2011-2013 business plan ('Piano aziendale 2011-2013'). The Commission, on the basis of the evaluation of the documents set out in paragraphs 269-296 of this Decision, takes the view that none of these satisfies the criteria imposed by the Guidelines.
- (338) More specifically, point 35 of the 2004 Restructuring Guidelines states: The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan ... submitted in all relevant detail to the Commission [which must] include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Point 32 of the 1999 Restructuring Guidelines contains a similar provision.
- (339) The Commission observes that both the 2002-2006 consolidated business plan and the plans for the period after 2007 ⁽⁶⁹⁾, with the exception of the 2003-2007 business plan, concern SEA as a whole, and make only isolated reference to SEA Handling. Accordingly, they cannot be regarded as plans for the restructuring of SEA Handling within the meaning of the Guidelines. Nor do they contain all the necessary information required by the Guidelines, namely a detailed description of the circumstances behind the firm's difficulties and a market study. Furthermore, they do not give a detailed description of the measures needed to restore the long-term viability of the firm within a reasonable timescale, and they envisage an improvement in profitability primarily thanks to external measures securing an increase in revenue (this is particularly true of the 2003-2007 business plan), without in any way showing that the hypotheses put forward for market trends are generally accepted.
- (340) The brief passages in these documents referring specifically to SEA Handling do not contain schedules indicating the timescales reasonably needed in order to restore the long-term viability of SEA Handling, nor the duration of a potential restructuring process. The restructuring measures therefore offer too little detail to satisfy the requirements in the Guidelines.
- (341) As a result, the payments of aid in question were granted before being notified and in the absence of a restructuring plan that satisfied the conditions of the restructuring guidelines. Consequently, they were not conditional on implementation of a restructuring plan of the kind indicated in points 34 and 35 of the 2004 Restructuring Guidelines or points 31 and 32 of the 1999 Restructuring Guidelines. This alone is sufficient to exclude compatibility with the internal market ⁽⁷⁰⁾.
- (342) Second, it should be noted that given the lack of notification of the aid and of a viable restructuring plan, the Commission did not have the opportunity to lay down the conditions and obligations it deemed necessary for the aid to be authorised ⁽⁷¹⁾, nor was it able to monitor the correct implementation of the restructuring plan on the basis of regular and detailed reports ⁽⁷²⁾.

Prevention of undue distortion of competition

- (343) According to point 38 of the 2004 Restructuring Guidelines, In order to ensure that the adverse effects on trading conditions are minimised as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as 'contrary to the common interest' and therefore incompatible with the common market. Point 35 of the 1999 Restructuring Guidelines contains a similar provision.
- (344) The Italian authorities and SEA Handling state that the aid measures did not distort competition in the ground handling services market, because they were necessary in order to satisfy the conditions for the liberalisation of the market in accordance with Legislative Decree No 18/99, implementing Directive 96/67/EC.
- (345) They add that proper measures were taken alongside the aid in order to avoid any distortion of competition.

⁽⁶⁹⁾ See 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA-11 maggio 2007', 'Piano strategico 2009-2016', and 'Piano aziendale SEA 2011-2013'.

⁽⁷⁰⁾ See, for example, the judgment of the EFTA Court of 8 October 2012 in *Hurtigruten v EFTA Surveillance Authority*, paragraphs 228 and 234-240.

⁽⁷¹⁾ Guidelines, points 46-48.

⁽⁷²⁾ Guidelines, points 49-51.

- (346) According to the Italian authorities, the first such measure was a reduction in the capacity of SEA Handling, particularly in terms of workforce, through gradual staff cuts between 2003 and 2010.
- (347) The second such measure reduced the presence of SEA Handling on the market by scaling down its range of activities. Specifically, SEA Handling ended its aircraft maintenance and ticketing services, and some secondary services such as cabin cleaning and assisting underage passengers, which it entrusted to outside parties from 2004 onward. SEA Handling also transferred its de-icing services to SEA in 2004.
- (348) The third measure consisted of attempts to sell a minority share in SEA Handling which, had they been successful, would have resulted in the entry of a new competitor to the market.
- (349) Finally, the Italian authorities consider that the high degree of liberalisation of the ground handling market in Italy necessitated the measures to cover losses in order to ensure the continuity and quality of all ground handling services and to adapt gradually to the new situation. Overall, therefore, the aid payments allowed an orderly transition to a competitive market, while avoiding any negative consequences for passengers.
- (350) The Commission points out that Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures⁽⁷³⁾. The Commission takes the view, therefore, that the second measure does not constitute a 'compensatory' measure but is rather an integral, and even essential, part of the restructuring operation itself. As suggested by the Italian authorities, these activities do not form part of SEA Handling's core business; their withdrawal cannot therefore be considered a compensatory measure aimed at bringing about a significant reduction in the company's presence in the market⁽⁷⁴⁾.
- (351) Similarly, a reduction of capacity, particularly in terms of the workforce, is an essential step in restoring the company's viability, given SEA Handling's extremely high staff costs, especially compared with its turnover, and cannot be seen as a measure to offset the aid granted.
- (352) Regarding the intention to sell a minority share, the Commission observes that only two competitive bidding procedures have been initiated to date⁽⁷⁵⁾. Moreover, the sale is currently conditional on the restoration of viability, and therefore does not constitute a measure to compensate for the restructuring operation. In any case, in around 10 years there have been no transfers of SEA Handling capital, and the intention to transfer cannot be considered a measure to offset the aid.
- (353) Finally, regarding the argument that the aid ensured the transition to a competitive market, the Commission takes the view that the transposal of Directive 96/67/EC into Italian law does not mean that State aid may be granted in order to compensate particular operators, in this case SEA Handling, so as to smooth their adjustment over a given period, the exact duration of which has in any event not been mentioned by the Italian authorities.
- (354) These circumstances are sufficient to rule out the compatibility of the aid with the internal market.

Aid limited to the minimum

- (355) In accordance with point 43 of the 2004 Restructuring Guidelines and point 40 of the 1999 Restructuring Guidelines, in order to limit the amount of aid towards restructuring costs to the strict minimum, beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. In the case of large firms the Commission usually considers a contribution to the restructuring of at least 50 % to be appropriate.
- (356) The Italian authorities have not submitted any information regarding any significant contributions to the restructuring process made by SEA Handling. The fact that no private investor contributed financially to the restructuring of SEA Handling is an additional sign that the market did not believe in the feasibility of the firm's return to viability (point 43 of the 2004 Guidelines).

⁽⁷³⁾ Guidelines, point 40.

⁽⁷⁴⁾ Judgment of the General Court in Joined Cases T-115/09 and T-116/09 *Electrolux v Commission*, paragraphs 51-58.

⁽⁷⁵⁾ As indicated by the Italian authorities, one was initiated in 2001 and the other in 2007.

The ‘one time last time’ rule

- (357) Finally, in order to be deemed compatible, restructuring aid must comply with the ‘one time last time’ rule. Point 43 of the 1999 Restructuring Guidelines and point 72 in point 43 of the 2004 Guidelines state that where a firm has received restructuring aid in the last 10 years it may not receive additional restructuring aid. On this basis, the Commission concludes that the restructuring aid granted to SEA Handling after the first injection of capital in 2002 was incompatible with the internal market, given that it did not comply with the ‘one time last time’ rule. The same applies to the aid received in 2007, if it is considered that SEA took two decisions for the provision of aid in instalments over successive years, as the Italian authorities seem to argue (see paragraph 223).

Conclusions

- (358) The arguments set out above show that the aid measures do not satisfy the tests of the Aviation Sector Guidelines or those in the 1999 and 2004 Restructuring Guidelines so as to be considered compatible under Article 107(3)(c) of the TFEU.
- (359) Consequently, the aid is not compatible with the internal market.

8.4. RECOVERY

- (360) Article 14(1) of Regulation (EC) No 659/1999 states that all unlawful aid that is incompatible with the internal market must be recovered from the beneficiary.
- (361) This aid was granted to SEA Handling unlawfully and is incompatible with the internal market, and must therefore be recovered from the company.
- (362) Given the severely compromised financial situation of SEA Handling, and the lack of any prospect of profit from the capital injections, a private investor would not have carried out the capital injections, and consequently SEA Handling would not have been able to secure such funds on the market. As the return on capital investments is a factor in the viability of the firm’s business model, a private investor would not make the investment without being certain that it would be adequately indemnified by the company for the risks involved. Accordingly, the Commission considers that the firm would not have been able to increase its share capital on the capital market, since the expected yield would not have enabled it to offer such a large return to any potential investor. The counterfactual situation, that is to say the situation that would obtain in the absence of the aid that recovery is intended to restore or to bring about, is therefore that no capital would have been invested at all⁽⁷⁶⁾. According to established case-law, ‘Where an equity injection is involved, the Commission can take the view that abolition of the advantage granted must require the repayment of the capital contributed’⁽⁷⁷⁾. The amount of aid to be recovered is therefore the total amount by which the firm’s capital was increased.
- (363) For purposes of such recovery account must also be taken of the interest accruing from the date on which each instalment of aid was at the disposal of the company, namely the effective date of each increase in capital, to the date of its recovery⁽⁷⁸⁾.

8.5. CONCLUSION

- (364) The Commission finds that Italy has unlawfully granted aid consisting of a number of injections of capital made by SEA into its subsidiary SEA Handling with the aim of covering the subsidiary’s losses, contrary to Article 107(1) of the TFEU.
- (365) Italy must therefore take all the necessary measures to recover the State aid deemed incompatible with the internal market from the recipient, SEA Handling,

HAS ADOPTED THIS DECISION:

⁽⁷⁶⁾ Commission Decision 2012/252/EU of 13 July 2011 on State aid No C 6/08 (ex NN 69/07) implemented by Finland in favour of Ålands Industrihus Ab (OJ L 125, 12.5.2012, p. 33).

⁽⁷⁷⁾ Judgment of the General Court in Case T-16/96 Cityflyer v Commission [1998] ECR II-757, paragraph 56.

⁽⁷⁸⁾ Article 14(2) of Regulation (EC) No 659/99, cited above.

Article 1

The injections of capital made by SEA into its subsidiary SEA Handling for each of the financial years in the period 2002-2010, amounting to an estimated total of around EUR 359,644 million, not including recovery interest, constitute State aid within the meaning of Article 107 of the TFEU.

Article 2

That State aid was granted contrary to Article 108(3) of the TFEU and is incompatible with the internal market.

Article 3

1. Italy shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽⁷⁹⁾.

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within four months of its notification.

Article 5

1. Within two months of the notification of this decision, Italy shall submit the following information to the Commission:
 - (a) the total amount (capital and interest) to be recovered from the recipient;
 - (b) a detailed description of the measures taken or planned in order to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Italy shall inform the Commission of the progress of national measures adopted in implementation of this Decision until the entirety of the aid referred to in Article 1 is recovered. Moreover, at the request of the Commission, Italy shall immediately submit any information relevant to measures taken or planned in order to comply with this Decision. It shall also provide detailed information regarding the amount of aid and interest recovered from the recipient.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 19 December 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

⁽⁷⁹⁾ OJ L 140, 30.4.2004, p. 1.

COMMISSION DECISION (EU) 2015/1226**of 23 July 2014****on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Services***(notified under document C(2014) 5080)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof⁽¹⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those articles⁽²⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 26 January 2010, the airline Air France lodged a complaint about advantages which the airline Ryanair was allegedly enjoying at a number of regional and local French airports. In the case of Angoulême Brie Champniers airport ('Angoulême airport'), the complaint also referred to financial support allegedly received by the managing body of the airport, Angoulême Chamber of Commerce and Industry ('Angoulême CCI').
- (2) By letter dated 16 March 2010, the Commission sent the French authorities a non-confidential version of the complaint and asked them for explanations concerning the measures at issue. The French authorities sent answers by letters dated 31 May and 7 June 2010.
- (3) By letter dated 2 November 2011, Air France sent additional information in support of its complaint. The Commission forwarded this information to France and asked it for additional information by letter dated 5 December 2011. On 22 December 2011 the French authorities requested an extension of the deadline for replying, to which the Commission agreed by letter dated 4 January 2012. The French authorities sent their comments and their replies by letter dated 20 January 2012.
- (4) By letter dated 21 March 2012, the Commission notified France of its decision to initiate the formal investigation procedure laid down in Article 108(2) TFEU concerning the potential aid to Angoulême airport and to the airline Ryanair. The Commission decision (the 'opening decision') was published in the *Official Journal of the European Union*⁽³⁾ on 25 May 2012.
- (5) The French authorities sent their comments and their replies to the questions set out in the opening decision and to the Commission's subsequent questions by letters dated 22 May and 21 September 2012.
- (6) Air France, Ryanair and Airport Marketing Services ('AMS') submitted their comments within the deadlines provided for in the opening decision. By letters dated 20 August 2012 and 3 May 2013, the Commission forwarded these comments to the French authorities. France, by letters dated 12 September 2012 and 7 June 2013, informed the Commission that it did not have any additional observations to make in this respect.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU will be used throughout this Decision.

⁽²⁾ OJ C 301, 5.10.2012, p. 1.

⁽³⁾ OJ C 149, 25.5.2012, p. 29.

- (7) The Commission received additional comments from Ryanair dated 13 April 2012, 10 April 2013, 20 December 2013, and 17 and 31 January 2014. These additional comments were sent to France by letters dated 13 July 2012, 3 May 2013, 9 and 23 January 2014 and 4 February 2014. France, by letters dated 17 July 2012, 4 June 2013, 29 January 2014, 3 February 2014 and 21 May 2014, informed the Commission that it did not have any additional observations to make in this respect.
- (8) On 24 February, 13 and 19 March 2014, following the adoption of the Guidelines on State aid to airports and airlines (the 'new guidelines') ⁽⁴⁾, the Commission invited France and the interested parties to submit their comments on the application of the new guidelines, in particular to the present case. On 19 March 2014, the French authorities submitted observations in this regard.
- (9) Furthermore, on 15 April 2014, a notice was published in the *Official Journal of the European Union* ⁽⁵⁾, inviting the Member States and interested parties to submit their comments, including in this case, in the light of the entry into force of the new guidelines. Air France and Transport & Environment submitted their comments within the stipulated deadlines. By letters dated 28 May 2014, the Commission forwarded these comments to the French authorities. France, by letter dated 21 May 2014, informed the Commission that it did not have any observations to make.

2. THE FACTS

2.1. Operators and owners of the airport infrastructure

- (10) Angoulême airport was managed by Angoulême CCI until 2011. By ministerial decree of 20 September 2002, the State, which owned the airport at that time, granted a concession over the airport to Angoulême CCI for five years. The agreement ⁽⁶⁾ concluded by Angoulême CCI with the state provided that Angoulême CCI was responsible for the construction, maintenance and operation of the airport. To that end, Angoulême CCI, acting as the operator and manager of Angoulême airport ('CCI-airport'), had separate accounting from Angoulême CCI's general department ⁽⁷⁾. By an order of the Prefect of 22 December 2006, the ownership of Angoulême airport was then transferred to the *Syndicat mixte des aéroports de Charente* ('SMAC'). SMAC therefore replaced the state as the conceding authority on 1 January 2007. From that date, all the investments and financing of the airport were the responsibility of SMAC.
- (11) SMAC is responsible for fitting out, equipping, maintaining, managing and operating Angoulême airport, and includes the *département* of Charente ('CG16'), the *Communauté d'agglomération du grand Angoulême* ('Comaga'), the *Communauté des communes de Braconne Charente* ('CCBC'), Angoulême CCI, the *Communauté des communes de Cognac* ('CCC') and the Cognac Chamber of Commerce and Industry. As stated in the opening decision ⁽⁸⁾, SMAC's statutes provide for the allocation between its members of the expenditure incurred in relation to Angoulême airport.
- (12) After extending the concession to Angoulême CCI until 31 December 2008, SMAC concluded a management subcontracting agreement with Angoulême CCI on 22 January 2009 ('2009 subcontracting agreement'). With effect from 1 January 2009, for a period of three years, the investments undertaken for airport operations were the responsibility of SMAC rather than CCI-airport.
- (13) Lastly, following a competitive tendering procedure, since 1 January 2012 the management and operation of the airport have been the responsibility of the private company SNC-Lavalin ⁽⁹⁾.

2.2. Airport characteristics and traffic

- (14) As was pointed out in the opening decision, Angoulême airport is located in the *département* of Charente and is open to national and international commercial traffic. It is located 75 km from Périgueux and Limoges airports, 80 km from Niort airport, and approximately 120 km from La Rochelle and Bordeaux airports.

⁽⁴⁾ OJ C 99, 4.4.2014, p. 3.

⁽⁵⁾ OJ C 113, 15.4.2014, p. 30.

⁽⁶⁾ Concession agreement of 22 April 2002 ('concession agreement').

⁽⁷⁾ Article 37 of the specifications in the concession agreement.

⁽⁸⁾ See recital 13 of the opening decision, Table 2.

⁽⁹⁾ As stated in recital 23 of the opening decision, SMAC decided to use a public procurement procedure.

Table 1

Airports neighbouring Angoulême airport ⁽¹⁾

	Niort	Périgueux	Limoges	La Rochelle	Bordeaux
Duration in mins	93	106	79	119	102
Distance in km	108	110	97	156	127

⁽¹⁾ The journey times and distances given in this table are taken from the Michelin route planner and use the criterion of the quickest journey time

- (15) A scheduled air service subject to a public service obligation (PSO) between Angoulême and Lyon, operated by Twin Jet, was discontinued in April 2007. In 2008 and 2009, Ryanair operated a service to London Stansted from April to October, with a frequency of three weekly rotations. From 2004 to 2011, the other commercial movements at Angoulême airport were mainly flights by flying clubs, helicopter clubs and business flights.
- (16) Passenger traffic at Angoulême airport, as summarised in Table 2 below, places it in category D of paragraph 15 of the 2005 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports ⁽¹⁰⁾ (the '2005 Guidelines').

Table 2

Traffic and movements at Angoulême airport ⁽¹⁾

	Passengers	of which, Ryanair	% scheduled service	Movements
2004	5 496	0	85,53 %	26 731
2005	6 789	0	89,45 %	28 328
2006	6 553	0	94,26 %	24 381
2007	2 362	0	66,30 %	22 868
2008	25 596	24 494	95,69 %	22 650
2009	28 216	27 490	97,43 %	31 358
2010	345	0	0,00 %	24 632
2011 ⁽²⁾	394	0	0,00 %	26 060

⁽¹⁾ Traffic and movements according to the letter from the French authorities dated 20 January 2012.

⁽²⁾ Figures for January to November 2011

- (17) Analysis of Angoulême airport's financial situation shows that the management of the platform made substantial losses in the periods in question. The total contributions paid to the airport managing body for operating the airport during the period 2004-2011 were EUR 10 232 310 ⁽¹¹⁾. Non-state investments made by the airport managing body during the period 2004-2011 amounted to EUR 1 277 000. They were financed by the interested regional and local authorities, then by SMAC and CCI-airport ⁽¹²⁾.

⁽¹⁰⁾ OJ C 312, 9.12.2005, p. 1.

⁽¹¹⁾ See recital 28 of this Decision.

⁽¹²⁾ See recital 21 of this Decision.

3. DETAILED DESCRIPTION OF THE MEASURES

3.1. Financial support for the airport

3.1.1. Contractual framework for subsidies to the airport

- (18) Part of Angoulême airport's investments and operating deficit were paid for by CG16, Comaga and CCBC under a partnership agreement ⁽¹³⁾ ('2002 Agreement') with Angoulême CCI. This agreement followed the award by the state of a local public equipment concession. As a result, until 31 December 2006, CG16, Comaga and CCBC provided financial support to Angoulême CCI for operating the airport ⁽¹⁴⁾. SMAC took over the commitments referred to in the 2002 Agreement with effect from 1 January 2007.
- (19) Under the 2009 subcontracting agreement, SMAC covered the operating deficit of CCI-airport for the period 2009-2011. The breakdown of the contributions between the member organisations of SMAC in respect of the expenditure attributable to Angoulême airport remain, for this period, identical to that provided for by the 2002 Agreement.
- (20) Lastly, as noted above, SNC-Lavalin has been operating Angoulême airport since 1 January 2012 under a six-year public operating contract awarded by SMAC ⁽¹⁵⁾. Every participant in the call for tenders ⁽¹⁶⁾ had to propose a strategic development plan for a 'baseline scenario' ⁽¹⁷⁾ and a 'proactive scenario' ⁽¹⁸⁾. The delegating authority chose the second scenario.

3.1.2. Investments in infrastructure

- (21) Details of the contributions actually paid to CCI-airport by the different public authorities to finance investments in airport infrastructure are set out in the opening decision ⁽¹⁹⁾. The Commission points out that the non-state investments made by CCI-airport during the period 2004-2011 amounted to EUR 1 277 000. They were financed by the interested regional and local authorities (CG16, Comaga, CCBC), then by SMAC and CCI-airport.
- (22) These investments were intended to extend the runway by 50 metres so that Angoulême airport had the technical characteristics required to host airlines that could contribute to the growth of air traffic. The French authorities also argue that the work to fit out the airport and the modular installations were intended to comply with the regulations applicable to establishments serving the public.
- (23) With the exception of state prerogatives, SMAC has been responsible for the cost and supervision of investments for fitting out and equipment since 1 January 2012. Although no definitive programme has been drawn up, these investments were estimated at EUR 1 200 000 during the period 2012-2017 ⁽²⁰⁾.

⁽¹³⁾ Agreement of 23 May 2002 on the financing conditions for the operation and development of Angoulême Brie Champniers airport.

⁽¹⁴⁾ The breakdown of these contributions is set out in Table 2 of the opening decision.

⁽¹⁵⁾ Tender document by SNC-Lavalin dated 19 July 2011, accepted by SMAC on 8 August 2011 following talks on 23 June 2011.

⁽¹⁶⁾ Contract notice published on 9 March 2011 in the French Official Bulletin of Public Procurement Notices (*Bulletin Officiel des Annonces des Marchés Publics* — BOAMP) No 48-B, announcement No 222.

⁽¹⁷⁾ The baseline scenario corresponds to the objectives and results that the operator regards as realistic to verify and assume over the duration, and under the performance conditions, of the contract that is awarded to it, having regard to the economic circumstances, the specific features of the contract and the outlook for air transport, and of the situation and specific environment of the platform.

⁽¹⁸⁾ The proactive scenario is intended to ensure the development of scheduled commercial services. It evaluates the impact on the airport's accounts and, where appropriate, the operator's remuneration and the financial impact of the additional financial contributions to be provided by the *syndicat*, outside the contract.

⁽¹⁹⁾ See recital 30 of the opening decision (cited above), Table 3.

⁽²⁰⁾ Discussion by SMAC, 23 June 2011.

3.1.3. *Financing of the costs associated with state tasks*

- (24) The 2002 Agreement explicitly excludes from its scope investments directly linked to state tasks. According to the French authorities, these costs ⁽²¹⁾ cover operational expenditure, safety equipment ⁽²²⁾ and security equipment ⁽²³⁾. This expenditure can be broken down as follows:

Table 3

Security and safety expenditure

(EUR)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Safety	244 858	234 727	243 989	255 209	292 450	255 555	536 194	517 307	463 595	315 065
Security	59 490	108 626	120 002	130 078	111 919	59 943	276 869	254 428	57 206	45 269
Overheads	0	0	0	0	0	0	0	77 174	52 080	36 033
Total	304 348	343 353	363 991	385 287	404 369	315 498	813 063	848 909	572 881	396 367

- (25) This expenditure was covered, pro rata the depreciation charges, by the airport tax and additional subsidies from the Intervention Fund for Airports and Air Transport (*Fonds d'intervention pour les aéroports et le transport aérien* — FIATA), which were replaced from 2008 by an increase in the airport tax. The airport tax, which is established by Article 1609 *quater* of the General Tax Code, is collected by airport operators whose enplaned and deplaned traffic exceeds 5 000 passengers during the previous calendar year. A ministerial order lays down the list of airports concerned and the amount of the tax for each airport ⁽²⁴⁾.

- (26) According to the French authorities, the resources collected may be broken down as follows:

Table 4

Income from resources allocated to financing state activities

(EUR)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Revenue from the tax	45 560	48 704	26 087	30 657	32 673	11 995	130 734	82	1 359	1 644
Increase	0	0	0	0	0	0	786 190	838 362	582 712	133 340
FIATA	389 000	131 802	296 639	336 184	307 806	590 775	0	0	0	0
Total	434 560	180 506	322 726	366 841	340 479	602 770	916 924	838 444	584 071	134 984

3.1.4. *Operating subsidies*

- (27) Until 2008, CG16, Comaga and CCBC covered the operating deficit and paid the loan instalments in accordance with the 2002 Agreement; Angoulême CCI paid the balance of any deficit by a contribution from its general department ⁽²⁵⁾. The ceiling on the annual deficit covered by the parties to the 2002 Agreement, which was initially set at EUR 350 000, was increased from 2004. Lastly, SMAC offset the entire operating deficit of CCI-airport from 2008 and after 1 January 2009, the date on which SMAC made a commitment under the 2009 subcontract.

⁽²¹⁾ In addition to the financial flows associated with the state investments referred to in recital 24 of this Decision, the financial flows associated with operations are set out in recital 43, Table 4, of the opening decision.

⁽²²⁾ Fire engines, wildlife and bird hazard vehicles, fences.

⁽²³⁾ Equipment for checking passengers and their hold baggage.

⁽²⁴⁾ See Section 8.1.1.2 of this Decision.

⁽²⁵⁾ See recital 36 of the opening decision.

- (28) In total, the contributions paid to CCI-airport for the operation of Angoulême airport during the period 2004-2011 are as follows:

Table 5

Amount of operating subsidies received by CCI-airport

(thousand EUR)

Year	2004	2005	2006	2007	2008	2009	2010	2011
Grants	801,38	999,23	1 295,37	1 222,77	1 896,21	1 679,63	1 313,90	1 023,82

- (29) Since 2012, SNC-Lavalin has been operating the airport under a procurement contract. The baseline scenario and the proactive scenario described above (see footnotes 17 and 18) set out, on the basis of the forecast operating result, the maximum amount of the balancing contribution financed by SMAC and the level of the flat-rate remuneration awarded to the delegatee. The offers submitted by SNC-Lavalin were as follows:

Table 6

Ceiling on operating subsidies and remuneration granted to SNC-Lavalin (including taxes) — Baseline scenario

(EUR)

Year	2012	2013	2014	2015	2016	2017
Balancing contribution	401 000	364 000	374 000	357 000	350 000	342 000
Remuneration	179 400	179 400	179 400	179 400	179 400	179 400
Total	580 400	543 400	553 400	536 400	529 400	521 400

Table 7

Ceiling on operating subsidies and remuneration granted to SNC-Lavalin (including taxes) — Proactive scenario

(EUR)

Year	2012	2013	2014	2015	2016	2017
Balancing contribution	464 722	425 471	448 416	384 230	341 228	296 389
Remuneration	179 400	179 400	179 400	179 400	179 400	179 400
Total	644 122	604 871	627 816	563 630	520 628	475 789

3.2. Fee framework for Angoulême airport

- (30) Angoulême CCI took four successive fee decisions, of which the latter two were approved by SMAC:

Table 8

Aeronautical charges at Angoulême airport

(EUR)

	Charges as at 15.6.2003	Charges as at 1.12.2005	Charges as at 1.1.2009	Charges as at 1.6.2010
Landing	Several categories	Several categories	Several categories	Several categories

(EUR)

	Charges as at 15.6.2003	Charges as at 1.12.2005	Charges as at 1.1.2009	Charges as at 1.6.2010
B737-800 landing	284,56	296,77	296,81	305,94
Runway lighting	26,25	27,35	27,35	35,00
Parking (per hour and per tonne beyond 2 h)	0,25	0,26	0,26	0,27
EU passengers	3,61	3,76	2,76	2,85
Fee for disabled passengers/pas- sengers with reduced mobility ⁽¹⁾	—	—	—	0,42

⁽¹⁾ Fee for disabled passengers and passengers with reduced mobility (*passagers handicapés et à mobilité réduite* — PHMER).

- (31) Companies planning scheduled flights could be the subject of a specific agreement, depending on the services required. In that context, rebates could be granted ⁽²⁶⁾.

3.3. Relations with Ryanair

3.3.1. Contracts concluded with Ryanair and Airport Marketing Services

- (32) Following the publication of a European call for projects ⁽²⁷⁾, two contracts were concluded on 8 February 2008 between SMAC and, first, Ryanair and, second, Airport Marketing Services, a wholly owned Ryanair subsidiary ('AMS'). The purpose of these two contracts ('the 2008 Agreements') was to establish a scheduled air service between Angoulême and London Stansted.
- (33) The contract concluded with Ryanair concerns airport services (the 'Airport Services Agreement'). The contract concluded with AMS (the 'Marketing Services Agreement') relates to promotion and marketing of the route.
- (34) The 2008 Agreements were concluded for a duration of five years from the launch of the route ⁽²⁸⁾. Although no comparable agreement was concluded with another airline, the charges decision of 1 March 2009 sets out all of the charges measures. That decision refers to a 'contribution to the development of the route' of EUR 15, EUR 12 and EUR 9 per passenger respectively for the first three years after the launch of the route, limited to EUR 400 000, EUR 300 000 and EUR 225 000. The last measure does not feature in the 2010 charges decision.

3.3.2. Airport Services Agreement

- (35) Under the Airport Services Agreement, Ryanair undertook to operate three flights a week during the summer period ⁽²⁹⁾. Moreover, as stated in the opening decision ⁽³⁰⁾, SMAC granted Ryanair certain reductions in relation to the general schedule of charges in force:

Table 9

Airport charges applicable to Ryanair

(EUR)

Year	2008	2009	2010	2011	2012
Charge per passenger	1,18	1,44	2,1	2,76	2,76

⁽²⁶⁾ See recital 35, Table 9, of this Decision in relation to Ryanair.

⁽²⁷⁾ OJ S 144-179348, 28.7.2007.

⁽²⁸⁾ Article 2.1 in each of the two agreements.

⁽²⁹⁾ Article 4.1 of the Airport Services Agreement.

⁽³⁰⁾ See recitals 55 et seq. of the opening decision.

(EUR)

Year	2008	2009	2010	2011	2012
Landing charges per rotation	252,29	252,29	252,29	252,29	252,29
Ground handling charges per rotation	195	245	245	245	245

- (36) SMAC undertook to maintain the level of these charges for the duration of the contract and not to impose other charges, directly or indirectly ⁽³¹⁾. Lastly, the Airport Services Agreement provided that Ryanair would pay a penalty if it terminated the agreement ⁽³²⁾. If Ryanair terminated the agreement before the end of the third year of application, the clause provided that Ryanair would pay EUR 17 000 for the fourth year and EUR 8 500 for the fifth year.

3.3.3. Marketing Services Agreement

- (37) The Marketing Services Agreement is based explicitly on Ryanair's undertaking to operate the Angoulême-London Stansted route described in the Airport Services Agreement ⁽³³⁾. Under that agreement, AMS undertook to provide marketing services on Ryanair's website during the first three years of the agreement, in return for a payment by SMAC ⁽³⁴⁾.
- (38) Moreover, although the Marketing Services Agreement was signed by AMS, it ⁽³⁵⁾ provided that, if Ryanair terminated the agreement before the end of the third year of application, Ryanair would pay SMAC a penalty of EUR 50 000 for the fourth year and EUR 25 000 for the fifth year.

3.3.4. Implementation of the agreement by SMAC, Angoulême CCI and Ryanair/AMS

- (39) In 2008 and 2009, Ryanair's commercial activity accounted for between 95 % and 97 % of traffic at Angoulême airport. This activity used between 25 % and 28 % of the airport's overall theoretical capacity, estimated by the French authorities at 100 000 passengers per year.
- (40) The financial flows between the airport manager, SMAC, Ryanair and AMS from 2008 to 2010 are broken down as follows:

Table 10

Financial flows between 2008 and 2010

(EUR)

	2008	2009	2010	Total
Fees	54 086	70 294	0	124 380
Marketing support ⁽¹⁾	400 000	300 000	0	700 000
Net transfer ⁽²⁾	454 086	370 294	0	824 380

⁽¹⁾ The payments under the Marketing Services Agreement were made directly by SMAC to AMS.

⁽²⁾ The net transfer does not take account of other income or expenditure associated with Ryanair's activity.

- (41) The 2008 Agreements were not implemented after 2009. After having initially made the continuation of the service in 2010 conditional on the cessation of the payments provided for by the Marketing Services Agreement of EUR 225 000 for the third year and EUR 400 000 for the fourth year, then on the maintenance of the volume of services provided for in the Marketing Services Agreement but with a limit on the service to two months in summer instead of the eight months stipulated in the agreement, Ryanair gave notice that it would terminate the route.

⁽³¹⁾ Article 6 of the Airport Services Agreement.

⁽³²⁾ Article 10(3) of the Airport Services Agreement.

⁽³³⁾ Article 1 of the Marketing Services Agreement.

⁽³⁴⁾ See recital 60 of the opening decision.

⁽³⁵⁾ Article 7 of the Marketing Services Agreement.

- (42) On 28 June 2010, SMAC submitted a claim for damages to the Poitiers Administrative Court for the loss suffered because of cessation of operations. Ryanair referred the matter to the London Court of International Arbitration, whose jurisdiction SMAC has since challenged before the Council of State. The latter proceedings are currently pending.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (43) In its decision to initiate the formal investigation procedure, the Commission expressed doubts about the financial support to the airport's operators ⁽³⁶⁾.
- (44) The Commission first expressed doubts about the scope of the non-economic activities likely to be paid for by the public authority. The Commission stressed that the inclusion of all of Angoulême airport's activities within the scope of a service of general economic interest (SGEI) was likely to be vitiated by a manifest error of assessment in the light of the first condition laid down by the *Altmark* ⁽³⁷⁾ judgment.
- (45) Second, the Commission had doubts about compliance with the second condition in the *Altmark* judgment, according to which the parameters used to determine the amount of compensation in respect of the activities carried on must be established in advance.
- (46) Third, the Commission had doubts about the level of compensation granted to SNC-Lavalin for the costs incurred in discharging the public service obligations (third condition laid down by *Altmark*). Fourth, the Commission had serious misgivings about the procedure for selecting the service providers (fourth condition in *Altmark*), including in relation to the period of operation guaranteed by SNC-Lavalin in the absence of any information on the competing bid.
- (47) Furthermore, the Commission expressed doubts about the measures granted to Ryanair. After establishing the existence of a potential link between the Airport Services Agreement and the Marketing Services Agreement, the Commission took the view that Ryanair had not paid a market price for the use of the airport services ⁽³⁸⁾.

5. COMMENTS BY FRANCE

5.1. Financial support for the airport

5.1.1. On the classification as aid

5.1.1.1. On the concept of economic activity

(a) Entities operating the airport

- (48) The French authorities point out first that SMAC has retained responsibility for investments and commercial policy. It is the sole signatory of the agreements with Ryanair. The French authorities take the view that this intervention in the operation of the airport is justified by the public interest tasks which are the responsibility of the public authorities.

(b) Legal basis for assessing the public financing of infrastructure

- (49) The French authorities consider that the assessment of the financing of the airport infrastructure should be carried out on the basis of the 1994 Guidelines ⁽³⁹⁾. They thus take the view that point 12 thereof excludes any scrutiny of this financing under the State aid rules. They add that the classification of airport activities and infrastructure was subject to legal uncertainty before the entry into force of the 2005 Guidelines. The position of the General Court of the European Union has not been sufficient to establish clearly the economic nature of the activities of managing and operating an airport.

⁽³⁶⁾ See recital 175 of the opening decision (cited above).

⁽³⁷⁾ Case C-280/00 Trans GmbH and Regierungspräsidium v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747.

⁽³⁸⁾ See recital 240 of the opening decision (cited above).

⁽³⁹⁾ Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

(c) Prerogatives of a public authority

- (50) The French authorities emphasise that the Commission, in its decision on Leipzig airport ⁽⁴⁰⁾, took the view that certain airport infrastructure associated with the exercise of prerogatives linked to public safety, firefighting and operating safety, could not be classified as economic activities. According to the French authorities, these security and safety measures ⁽⁴¹⁾ are financed by the revenue from the airport tax ⁽⁴²⁾. The tax is set every year in the light of the costs to be covered and collected for the benefit of the public or private bodies operating airports where activity exceeds 5 000 traffic units ⁽⁴³⁾. This mechanism is justified by the specific security and safety constraints that go beyond simple operating requirements.
- (51) The French authorities indicate that some of the expenditure is covered only partially ⁽⁴⁴⁾. Furthermore, the data declared by the airport operators may be checked in relation to the current year and the previous two years.
- (52) The French authorities state that this mechanism does not result in any overcompensation. First, the airport tax is not used to reimburse expenditure until the declared data have been checked. Second, the investments are compensated for pro rata the investment allocations. Next, any positive balance is carried over to the following years and carries charges payable by the operator. In this connection, the French authorities refer to a frequent financing deficit from the airport tax because of the increase in security and safety costs ⁽⁴⁵⁾.
- (53) Moreover, the French authorities point out that Angoulême CCI bears other costs related to the exercise of public powers, in accordance with the agreement and the concession specifications. In this regard, the operator provided the Air Flight Information Service (AFIS) ⁽⁴⁶⁾ when the state was not providing air traffic control. Furthermore, when the state was responsible for this activity, the operator paid the state a contribution towards the costs of the service ⁽⁴⁷⁾. In application of the subcontracting agreement signed by CCI and SMAC, it was Angoulême CCI that pursued the introduction of an AFIS service outside the hours of operation of air traffic control by the State. The French authorities consider that the costs resulting from these tasks, which were borne by Angoulême CCI, are as follows:

(thousand EUR)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
AFIS	113	114	115	117	125	122	82	63	44	37
Air traffic control	0	0	0	0	0	0	240	0	0	0
Total	113	114	115	117	125	122	322	63	44	37

- (54) Lastly, the French authorities refer to the financing by Angoulême CCI, the regional and local authorities and SMAC of renovation work on the control tower in 2004 and 2005 costing EUR 84 800 and work on runway lighting and an uninterruptible power supply for the aprons in 2008 costing EUR 89 300.

5.1.1.2. Existence of a selective advantage

- (55) With regard to the financing of infrastructure and operations outside the scope of state activities, the French authorities stress first that the public authorities which participated in the financing of Angoulême airport did not solely pursue profit. They also took account of the economic and social benefits to the region. As a result, the market economy investor test is not sufficient to justify this financing. However, the French authorities refer to SMAC's

⁽⁴⁰⁾ Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1).

⁽⁴¹⁾ The French authorities take the view that these activities include action against wildlife hazard.

⁽⁴²⁾ The arrangements for the airport tax are laid down in Article 1609 *quater* of the General Tax Code and by ministerial order of 30 December 2009 on returns to be made by airport operators to establish the passenger rate of the airport tax.

⁽⁴³⁾ One unit of traffic corresponds to one passenger or to 100 kg of mail or freight.

⁽⁴⁴⁾ For example, only 50 % of the cost of fencing is covered.

⁽⁴⁵⁾ Security and safety expenditure increased 6,4 times between 1999 and 2010.

⁽⁴⁶⁾ Air Flight Information Service (AFIS).

⁽⁴⁷⁾ The French authorities state that such a contribution was paid for the 2008 financial year.

desire to optimise the operation of the airport in order to limit the contribution that it paid. In support of their position, the French authorities refer to the contractual ceiling on the guaranteed deficit that was introduced following the call for tenders and the rationalisation of the forecast rate of investments for the duration of the agreement.

5.1.1.3. Effect on competition and trade

- (56) The French authorities maintain that the public financial support granted to Angoulême airport does not affect competition. Bearing in mind that Périgueux, Limoges, Niort, La Rochelle and Bordeaux airports are more than one hour's drive ⁽⁴⁸⁾ from Angoulême airport, they take the view that those airports should not be included in the latter's catchment area.
- (57) What is more, Niort airport is not suitable for commercial flights. Such traffic is virtually non-existent there. Périgueux airport can accommodate only twin turbo-prop aircraft having a seating capacity under 60, which do not correspond to the characteristics of the European medium-haul aircraft operated by most low-cost carriers. A review of the passenger traffic with London from Bordeaux, Limoges and La Rochelle does not reveal any significant variation in traffic linked to the opening and closing of the Angoulême-London Stansted route:

Pax London	Angoulême	Limoges	La Rochelle	Bordeaux
2007	0	0	112 257	83 171
2008	24 494	0	100 312	88 826
2009	27 490	94 133	60 432	80 073
2010	0	81 817	54 773	143 171 ⁽¹⁾

⁽¹⁾ This substantial increase in traffic is linked to the bringing into service of the Billi terminal, designed for low-cost airlines, in June 2010

- (58) Furthermore, the French authorities take the view that the rail connections to Angoulême do not compete with the air route to London. These markets are distinct because of the price and time differential with the TGV and Eurostar high-speed trains. In addition, the intermodality between the TGV and Bordeaux airport is practically nil because there is no high-speed link between Tours, Angoulême and Bordeaux.
- (59) More generally, the French authorities refer to the 2005 Airline Guidelines, which state that 'funding granted to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest'. Notwithstanding the above considerations, the French authorities take the view that only Bordeaux, Limoges and La Rochelle airports are potentially located in the catchment area of Angoulême airport, having regard to their traffic and characteristics.
- (60) However, the fact that Ryanair has opened routes to London Stansted from La Rochelle and Limoges airports means that airlines regard them as separate markets. In the same way, the journey time from the city of Angoulême to Bordeaux, Limoges and La Rochelle airports, which is similar to the flight time between Angoulême and London Stansted, is a dissuasive factor for the inhabitants of Angoulême.
- (61) Consequently, the French authorities consider that the criterion of effect on competition is not met and that the Commission's objections to the public financing in favour of Angoulême airport cannot be justified because one of the essential conditions for the application of Article 107(1) TFEU is not satisfied in this case.

⁽⁴⁸⁾ The French authorities base this threshold on the Commission decision of 16 May 2006, NN 21/06 United Kingdom — City of Derry Airport (OJ C 272, 9.11.2006, p. 13). Furthermore, they calculate the journey time using the Michelin route planner, taking as a reference the quickest journey time.

5.1.2. Compatibility with the internal market

5.1.2.1. Compatibility under Article 106(2) TFEU

- (62) The French authorities consider that the financing granted to the managers of Angoulême airport could be found compatible with the internal market and exempted from notification even in the event that not all the conditions established by the *Altmark* judgment were fulfilled. They take the view that this airport should be regarded overall as an SGEI intended to participate in regional economic development. According to the French authorities, such compatibility is directly based on Article 106(2) TFEU and on the Commission Decision 2005/842/EC (the ‘2005 SGEI Decision’) ⁽⁴⁹⁾ for the period before 30 January 2012. It is further based on Commission Decision 2012/21/EU (the ‘2011 SGEI Decision’) ⁽⁵⁰⁾
- (a) Period under the management of Angoulême CCI and Angoulême CCI associated with SMAC
- (i) Existence of entrustment
- (63) The French authorities consider that the entrustment of the public-service task to Angoulême CCI flows from Article 170-1 of the Code of Commerce. Under that provision, the establishment contributes ‘to economic development, to the attractiveness and land planning of the territory and to the support of undertakings and of their associations by fulfilling ... any public-service task and any task of general interest necessary to the accomplishment of those tasks’. To that end, ‘every establishment ... may carry out ... a task of creating and managing installations, in particular ... airports ...’.
- (64) The French authorities add that this legal framework supplements the acts conferring on Angoulême CCI the responsibility for managing and operating the airport. This has resulted in the entrustment to Angoulême CCI of the construction and management of airport infrastructure. The same applies to the decisions by which Angoulême CCI and the regional and local authorities involved determined their participation in the financing of the airport.
- (ii) Amount of compensation
- (65) The French authorities take the view that the budgetary and accounting framework applicable to Angoulême CCI ⁽⁵¹⁾ was such as to avoid any overcompensation.
- (66) In general, a specific budget item was allocated to airport activities. Moreover, the monitoring was the outcome of the vote on the airport budget, after validation by the Bureau ⁽⁵²⁾ of Angoulême CCI, by the elected members of Angoulême CCI. In this regard, the French authorities point out that the preparation of the budget is supported by documents concerning the state of operating transactions, self-financing capacity, capital transactions, the schedule of services provided and interdepartmental contributions and the schedule of employees and wage bill.
- (67) In the same way, the French authorities argue that the statutes of SMAC refer to its object, which consists entirely in providing a public airport service. The airport activities are the subject of a specific budget. The French authorities add that the budget is voted by the SMAC committee. Furthermore, any new measure and any exceeding of the previous budget by 5 % must be approved by qualified majority.
- (68) Lastly, the French authorities consider that reporting at regular intervals verifies that the budget voted is implemented, which precludes any overcompensation. The general meeting votes again in n+1 to accept the implemented budgets. A final level of monitoring is assured by sending the accounts of Angoulême CCI to the Prefecture, which checks that the accounts have been properly prepared. Until 31 December 2006, the Civil Aviation Authority issued an opinion on compliance. SMAC approves the initial, amended and implemented budgets in its capacity as concession-granting authority.

⁽⁴⁹⁾ Commission Decision 2005/842/EC of 28 November 2005 concerning the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽⁵⁰⁾ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

⁽⁵¹⁾ Circular No 111 of 30 March 1992 setting the budgetary and accounting rules applicable to Angoulême CCI.

⁽⁵²⁾ The Bureau of Angoulême CCI is composed of elected members who take a decision on a draft budget, after any amendments have been made.

- (b) Period under the management of SNC-Lavalin and SMAC
- (i) Existence of entrustment
- (69) The French authorities take the view that the definition of the general economic interest tasks entrusted to SNC-Lavalin are included in the specifications of the call for tenders and the technical clauses⁽⁵³⁾. They say that the development of the airport platform is an integral part thereof.
- (ii) Amount of compensation
- (70) The French authorities state that the income statements of CCI-airport show that there is no overcompensation.
- (71) In addition to the separation of accounts guaranteed by the creation of a subsidiary of SNC-Lavalin⁽⁵⁴⁾, the absence of overcompensation is ensured by the monitoring carried out by SMAC⁽⁵⁵⁾, which is intended to avoid the overcompensation of its contribution to the cost of the tasks of general economic interest.
- (72) The French authorities also take the view that the remuneration of SNC-Lavalin was not unreasonable. First, the tenderer had to set the maximum guarantee requested by SMAC in order to balance its operation, under the baseline scenario (operation without commercial traffic) and the proactive scenario (operation with commercial traffic). If the proactive scenario had been accepted, the French authorities stress that the bid by SNC-Lavalin was the lowest in financial terms. Second, they maintain that the expenditure borne by SMAC during the 2012 financial year, without commercial traffic, was EUR 644 000 compared with EUR 810 000 in 2010.
- (73) Lastly, the French authorities point out that the burden of the property tax weighed on SMAC, which, as the property owner, had chosen not to pass it on to the operator.
- (74) The French authorities therefore consider that the financing granted to the operators of Angoulême airport may be declared compatible with the internal market on the basis of Article 106(2) TFEU and of the 2005 SGEI Decision for the period before 30 January 2012 and on the basis of the 2011 SGEI Decision after that.

5.1.2.2. Compatibility under Article 107(3)(c) TFEU

- (a) Infrastructure investments
- (75) If the Commission were to decide that the public subsidy for infrastructure investments constituted State aid within the meaning of Article 107(1) TFEU, the French authorities take the view that the subsidy should be regarded as compatible with the internal market in accordance with the 2005 Guidelines.
- (i) Clearly defined objective of general interest (criterion 1)
- (76) The French authorities take the view that economic and tourism development in the *département* of Charente is a clearly defined objective of general interest. They consider that Commission practice⁽⁵⁶⁾ authorises the public administration to regard the development of a regional airport as such an objective.
- (ii) The investments are necessary and proportional to the objective which has been set (criterion 2)
- (77) These investments satisfied the criteria of necessity and proportionality. In this context, the French authorities refer to a study⁽⁵⁷⁾ justifying the creation of a structure bringing together all of the regional and local authorities and the public and professional tourism bodies with the express interest of developing Angoulême airport rather than another infrastructure and carrying out an assessment of the minimum investments required.

⁽⁵³⁾ Under Article 8 of the specifications and the technical clauses, SNC-Lavalin must carry out of the state tasks, implement an AFIS service, perform tasks ensuring the safe use of the airport, the maintenance of the airport site and networks and ensure that the airport is able to accommodate scheduled commercial traffic.

⁽⁵⁴⁾ Société d'exploitation de l'aéroport d'Angoulême Cognac.

⁽⁵⁵⁾ The French authorities believe that this monitoring is provided for by the specifications in the call for tender.

⁽⁵⁶⁾ Commission Decision of 27 January 2007, N 491/06, Italy — Tortoli-Arbatax (OJ C 133, 15.6.2007, p. 3).

⁽⁵⁷⁾ The study was carried out by the *Alliance de conseils pour l'économie locale des services aéroportuaires*. It was delivered on 14 June 2006.

(iii) Satisfactory medium-term prospects for use (criterion 3)

- (78) The French authorities state that the same study forecast traffic in the medium term of more than 100 000 passengers per year, which would correspond to a satisfactory medium-term prospect for use. According to the French authorities, the forecasts were based on the assumption of an increase in the frequency of the first route to London and the opening of a second route.

(iv) Equal and non-discriminatory access to infrastructure (criterion 4)

- (79) The French authorities emphasise that access to the infrastructure was non-discriminatory. The only constraint on using the infrastructure at Angoulême airport was linked to the limit imposed by the capacity of the apron and the terminal. The incentives had been opened to any airline launching a new route, although only Ryanair had actually benefited.

(v) Absence of effect on trade contrary to the common interest (criterion 5)

- (80) The French authorities state that the mere fact that Angoulême airport is classified under category D of the 2005 Airline Guidelines is sufficient to demonstrate that competition is not affected to an extent contrary to the common interest.

(vi) Necessity and proportionality of the aid (criterion 6)

- (81) The French authorities consider that the 100 % public financing of the investments was necessary to maintain the airport's potential and development. They take the view that this requirement justified an allocation of the investment financing between SMAC and the operator by the subcontract dated 22 January 2009. This situation is to be distinguished from that which, from 2012, led SMAC to pay annual remuneration of EUR 179 400 for the provision of services following a call for tenders. The French authorities point out that this legal framework did not provide for SMAC to carry out investments, but that it should act as project manager for the investments proposed by the service provider or decided by SMAC.

(b) Operational financing

- (82) The French authorities state first that Angoulême CCI granted advances to the airport from 1984 to 2001. They consider that this period should remain outside the scope of the Commission's investigation. After this period, the other aid was paid by way of operating aid.
- (83) Then, leaving aside the financing of investments, the French authorities state that the deficit covered by the regional and local authorities was limited to EUR 350 000 in the 2002 and 2003 financial years⁽⁵⁸⁾. They add that, with regard to the 2004-2006 financial years, the decisions by the airport board were not minuted. The general department of Angoulême CCI provided the amount needed to balance the budget as implemented.
- (84) Lastly, the French authorities consider that the operational financing does not affect competition for the reasons cited in recitals 56 to 61 of this Decision. Accordingly, they believe that the criterion relating to an effect on competition is not fulfilled and that the public operational financing of Angoulême airport cannot constitute aid within the meaning of Article 107(1) TFEU.
- (85) The French authorities also argue that, if the financing in question were aid, it should be found compatible with the internal market and exempted from notification. In this regard, they rely on the 2005 Guidelines and the 2005 SGEI Decision.

5.2. Relations with Ryanair

5.2.1. On the classification as aid

- (86) The French authorities take the view, first, that the Airport Services Agreement and the Marketing Services Agreement must be assessed together. Second, they believe that SMAC did not reason as a prudent market-economy investor, for the reasons set out in recital 55 of this Decision. According to the French authorities, it is the absence of a response to the call for projects launched for the opening of international air routes that prompted Angoulême CCI, following a mandate approved by SMAC, to negotiate with Ryanair the opening of a route between London Stansted and Angoulême.

⁽⁵⁸⁾ This threshold was set by the partnership agreement of 23 May 2002.

- (87) They also stress the fact that the objective of the improvement works ⁽⁵⁹⁾ begun in 2006 was not to satisfy a specific company but to enable airlines to be accommodated. However, they point out that the absence of other airlines regularly using the airport resulted in virtually all of these investments being allocated to Ryanair.
- (88) With regard to the costs of commercial relations with Ryanair, the French authorities point out that the airport operator had to incur additional staff costs. They refer to a difference between forecast and actual costs:

Safety	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Number of staff	5	+ 6	+ 6	+ 6	+ 6	+ 6
Full-time equivalent	4,6	+ 1,46	+ 1,35	+ 3	+ 1,35	+ 3
Wage costs (thousand EUR)	219,1	+ 137,4	+ 116,8	+ 109,3	+ 52,17	+ 133,1

Security	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Number of staff	10	—	—	—	—	—
Full-time equivalent	0,7	+ 1,4	1,6	+ 2	+ 1,6	+ 2
Wage costs (thousand EUR)	42,5	+ 102,2	+ 86,2	+ 119,7	+ 115,6	+ 122,8

Assistance and reception	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Number of staff	1	—	—	—	—	—
Full-time equivalent	0,3	+ 0,3	+ 0,3	+ 0,5	+ 0,5	+ 0,5
Wage costs (thousand EUR)	11	+ 20	+ 14	+ 30	+ 20	+ 30

- (89) The same applies to the additional costs other than staff costs associated with Ryanair's commercial activity:

Safety	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
(thousand EUR)	0	—	—	—	—	—

⁽⁵⁹⁾ Extension of the runway by 50 metres and extension, refitting and equipping of the terminal to enable handling of a 200-seat passenger aircraft. The amount of these investments was assessed at EUR 977 000.

Safety	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Other costs	36,5	+ 269,1	+ 163,2	+ 316,9	+ 248,5	+ 326
including vehicle leases	0	+ 157,9	+ 138,4	+ 210,5	+ 223,5	+ 210,5
(thousand EUR)						
Security	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Services provided	0	+ 118,6	+ 112,6	+ 253,2	+ 113,5	+ 263,2
(thousand EUR)						
Other costs (thousand EUR)	12,5	+ 16,8	+ 14	+ 14,8	- 4,5	+ 15,2
Assistance and reception	Benchmark 2007	Change 2008/2007		Change 2009/2007		Change 2010/ 2007
		Forecast	Actual	Forecast	Actual	Forecast
Services provided	5	+ 140	+ 96	+ 180	+ 90	+ 180
(thousand EUR)						
Other costs (thousand EUR)	5	+ 20	+ 10	+ 25	+ 12	+ 25

5.2.2. Compatibility with the internal market

- (90) The French authorities consider that some of the criteria in the 2005 Guidelines have not been complied with.
- (91) First of all, they state that Ryanair did not submit a business plan. They had felt that the degressive aid resulting in the signing of the 2008 Agreements was such as to allow the airline to make a satisfactory commercial margin.
- (92) Consequently, in the absence of a business plan, they emphasise that it is impossible to verify whether the aid intensity criterion is met. However, Angoulême CCI and SMAC, based on the information available on the creation of routes with public service obligations, did consider that this criterion was fulfilled.
- (93) The French authorities further believe that the upward annual trend of [...] (*) % in the number of passengers without an increase in rotations observed in 2008 and 2009 would likely have continued in 2010.
- (94) Lastly, as set out in recitals 56 to 60 of this Decision, the French authorities are of the opinion that the measures adopted do not affect trade to an extent contrary to the common interest.

5.3. The new guidelines

- (95) France formulated comments on the interpretation of the new guidelines, on the form and the substance, and expressed its agreement with their application to cases concerning measures implemented before they were published.

(*) Business secret

- (96) They note that the new guidelines are more flexible than the old guidelines as regards operating aid. France maintains that their retroactive application to all aid would therefore allow previous situations for certain airports to be treated less disadvantageously.

6. COMMENTS BY THIRD PARTIES

6.1. Comments by Air France

- (97) Air France considers that the measures granted in favour of Ryanair and its subsidiary AMS are particularly representative of Ryanair's commercial practices.
- (98) Air France has also submitted comments to the Commission on the application of the new guidelines to this case. It challenges the application of the new guidelines to cases relating to operating aid to airports, even where the aid was paid before the guidelines were published.
- (99) First, Air France takes the view that this is a retroactive application of the new guidelines which benefits unscrupulous operators by legitimising behaviour which did not comply with the rules applicable to the period during which the behaviour occurred. Conversely, that approach penalises operators which complied with the previous guidelines by refraining from receiving public funds.
- (100) Second, Air France emphasises that the retroactive application of the new guidelines to operating aid granted to airports is contrary to the general principles of law and to European case law.

6.2. Comments by Ryanair

- (101) The airline Ryanair ('Ryanair') disputes the assertion that the Airport Services Agreement that it concluded with Angoulême airport constitutes State aid.
- (102) It argues that its decision to launch a route from London Stansted to Angoulême reflected the wish to secure a low-cost base whose environment matched the characteristics of Angoulême airport. Moreover, the specific features of Angoulême airport were such as to incite it to offer a competitive schedule of airport charges. Despite the uncertainties linked to the opening of a new route⁽⁶⁰⁾, and as a result of the risk undertaken, Ryanair believes that the airport could reasonably expect to make a profit from the agreement concluded because of its success on other routes.
- (103) Ryanair also points out that the decision to terminate the London Stansted-Angoulême route was taken for commercial reasons. It claims that the revenue shortfall had reached [...] % in 2009 in relation to 2008⁽⁶¹⁾. It emphasises that it had negotiated in good faith, in application of Article 9 of the Airport Services Agreement, with a view to reaching a viable economic agreement with Angoulême airport. It states that it requested a reduction in airport charges in September 2009. After SMAC had refused the request on 3 February 2010, Ryanair states that it proposed to continue operating the route during July and August only, a proposal which SMAC rejected outright, resulting in the agreement being broken off.

6.2.1. State resources and imputability

6.2.1.1. Presence of state resources

- (104) Ryanair points out that not all CCI resources are generated by taxes. It takes the view that Article R. 224-6 of the Civil Aviation Code requires airports managed by a CCI to finance their expenditure from revenue generated by airport operations. Ryanair considers that Angoulême CCI provided the bulk of airport financing. By contrast, SMAC did not have any experience in running an airport⁽⁶²⁾.

⁽⁶⁰⁾ Ryanair points out that no scheduled commercial service had been undertaken to Angoulême by aircraft such as the ones it uses and that there was no benchmark to rely on to assess the route's profitability.

⁽⁶¹⁾ Ryanair attributes the fall in revenue to the increase in passenger charges in the United Kingdom, the increase in oil prices and the economic crisis as a whole.

⁽⁶²⁾ Ryanair emphasises that Angoulême CCI had led the negotiations.

6.2.1.2. Imputability of the measures to the state

- (105) Ryanair believes that the sole fact that Angoulême CCI is under the control of the state and that its resources are taxes is not sufficient to fulfil the criterion of imputability to the state.
- (106) It states that the organisational criterion, i.e. the public nature of a body, is not enough in itself to establish the imputability of the measure to the state⁽⁶³⁾. In this case, a distinction should be made between the CCIs and other public bodies⁽⁶⁴⁾. In this regard, Ryanair notes that Article L. 711-1 of the Commercial Code in force in June 2005 classifies CCIs as public economic entities (*établissements publics économiques*) and that a parliamentary report identifies their 'dual institutional nature' and raises doubts about how to classify them⁽⁶⁵⁾. Ryanair also points out that the state is not involved in their decision-making processes, its role being limited to administrative supervision⁽⁶⁶⁾.

6.2.2. Selective advantage

6.2.2.1. Joint assessment of an economic benefit granted to Ryanair and AMS

- (107) Ryanair considers that it and AMS should not be regarded as a single beneficiary of the measures in question.
- (108) First, the beneficiary of the Marketing Services Agreement was the airport; the objective was not to increase the load factor or the yield on Ryanair's route. Second, neither AMS's shareholding structure nor its objects are grounds for disputing the fact that the agreements in question had separate objectives. Ryanair also stresses that the two agreements were signed by different people⁽⁶⁷⁾, despite the sole management highlighted by the Commission.
- (109) Ryanair also notes that the conclusion of a marketing services agreement is not a precondition for opening a route. However, this practice is more frequent in the case of regional airports⁽⁶⁸⁾.

6.2.2.2. Joint assessment of the Airport Services Agreement and the Marketing Services Agreement

- (110) Ryanair challenges the joint assessment of the Marketing Services Agreement and the Airport Services Agreement. It stresses that marketing services agreements are a matter for AMS, a Ryanair subsidiary. They are negotiated and concluded separately from Ryanair's agreements with airports.
- (111) However, Ryanair points out that the company itself carries out the advertising campaigns for its destinations. It also notes that it placed advertising on its website for the benefit of third parties without the involvement of AMS. Lastly, Ryanair believes that the Commission, in its Decision on Bratislava airport⁽⁶⁹⁾, acknowledged that there is value to the advertising campaigns carried out on the company's website.

6.2.2.3. Principle of a prudent investor in a market economy

(a) Business plan

- (112) Ryanair states that investment decisions are not systematically preceded by a business plan. The fact that Ryanair, other companies and certain competition authorities⁽⁷⁰⁾ do not regard business plans as systematically useful is sufficient to establish that it is not realistic to make them a factor characterising the behaviour of a market economy investor.

⁽⁶³⁾ Ryanair cites the judgment of the Court of Justice in Case C-482/99 France v Commission [2002] ECR I-4397.

⁽⁶⁴⁾ Ryanair refers to Opinion No 351 654 handed down on 16 June 1992 by the Council of State.

⁽⁶⁵⁾ Report by Ms Catherine Vautrin, on behalf of the Economic Affairs Committee, No 2388, on the Draft Law on consular networks.

⁽⁶⁶⁾ Ryanair states that the exercise of this supervision does not mean that the state gives an opinion on the agreements at issue in this case.

⁽⁶⁷⁾ The Airport Service Agreement was signed by Michael Cawley, Vice-President of Ryanair, whereas the Marketing Services Agreement was signed by Eddie Wilson, a director of AMS.

⁽⁶⁸⁾ Ryanair refers to the airport's need to develop a brand image and to increase the share of incoming passengers in the total number of passengers passing through the airport.

⁽⁶⁹⁾ Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

⁽⁷⁰⁾ Ryanair refers to the position of the UK's Competition Appeal Tribunal of 21 May 2010 in Case 1145/4/8/09 Stagecoach group plc v Competition Commission, point 75.

(b) Remarks on the conditions for applying the market economy investor principle (MEIP)

- (113) Ryanair considers that the Commission cannot apply the market economy investor principle selectively. Referring to the position of the General Court ⁽⁷¹⁾, it stresses that the Commission must envisage the commercial transaction as a whole and examine all the relevant features of the measures and their context ⁽⁷²⁾.
- (114) Furthermore, Ryanair takes the view that the Commission must compare the agreements concluded between Ryanair and the public airports with those concluded with the airports partially or wholly owned by private investors. Ryanair refers to a study ⁽⁷³⁾ for the purpose of this analysis. Recalling the case law of the Court of Justice ⁽⁷⁴⁾, it states that it is only where no reference to a private investor is available that the Commission should adopt an approach based on costs.
- (115) Ryanair considers that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed ⁽⁷⁵⁾.
- (116) Ryanair argues that market benchmark prices obtained from comparator airports are not polluted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEIP tests.
- (117) In fact:
- comparator analyses are widely used for MEIP tests outside the field of State aid,
 - companies affect each other's pricing decisions only to the extent that their products are substitutes or complements,
 - airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face limited competition from state-owned airports within their catchment area. Less than one third of commercial airports within the catchment area of comparator airports are fully state-owned, and none of the airports within the same catchment area as comparator airports was subject to ongoing State aid concerns (as of April 2013),
 - even where comparator airports face competition from state-owned airports within the same catchment area, there are reasons to believe their behaviour is in line with the MEIP (for example, where there is a large private ownership stake or where the airport is privately managed),
 - market economy investor airports will not set prices below incremental cost.
- (118) Ryanair states that the market economy investor principle must take account of the low economic value of regional airports ahead of the rapid development of their activity. With regard to the costs associated with their closure or maintenance in operation, Ryanair takes the view, recalling the case law of the General Court ⁽⁷⁶⁾, that any less costly alternative should be considered to be consistent with the market economy investor principle.
- (119) Ryanair therefore takes the view that the costs taken into account by the Commission should be the incremental costs rather than the average costs. Angoulême airport had an economically rational interest in pricing at marginal (or even lower) cost.

⁽⁷¹⁾ Case T-196/04 *Ryanair v Commission* [2008] ECR II-03643.

⁽⁷²⁾ In this regard, Ryanair refers to the non-aeronautical revenues and the network externalities.

⁽⁷³⁾ Study dated 25 June 2012 carried out by Oxera.

⁽⁷⁴⁾ Ryanair cites the judgment of the Court of Justice in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA* [2008] ECR I-6993. It also refers to the European Union framework for State aid in the form of public service compensation (2011).

⁽⁷⁵⁾ Identifying the market benchmark in comparator analysis for MEIP tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013.

⁽⁷⁶⁾ Case T-98/00 *Linde v Commission* [2002] ECR II-3961, paragraphs 43-54.

- (120) First, the greater the competition faced by an airport, the greater its incentive to reduce its prices to marginal cost.
- (121) Likewise, according to Ryanair, the Commission should take into account the specific nature of every airport ⁽⁷⁷⁾. In this regard, it is of the opinion that the highly competitive environment between regional airports leads them to compete with a view to concluding agreements with it. In doing so, these airports are acting in the same way as private investors.
- (122) The airport's desire to improve its image leads it to carry out advertising campaigns. This effect is all the stronger where the market power of regional airports is limited and they have an interest in attracting airlines that are able to develop their traffic.
- (123) Ryanair further states that the business plan applicable to those airports should imply that only a part of the fixed and infrastructure costs are deemed sunk costs. The time horizon of the business plan should be at least 15 years rather than a standard duration of 5 years.
- (124) In this context, Ryanair argues that the approach adopted should be the 'single-till' approach. Relying on the Commission's position in its decision on Bratislava airport ⁽⁷⁸⁾, Ryanair considers that non-aeronautical revenues, which account for approximately 50 % of the revenue of an airport, are of particular importance to under-used regional airports. It is the wish to develop these revenues to cover as many fixed costs as possible that explains the penalties provided for in the agreements concluded with Ryanair if the latter did not fulfil its commitments. Ryanair's activity increases the economic value of the airport, which is free to take advantage by attracting other airlines.
- (125) According to Ryanair, the interest of regional airports in concluding an agreement with an airline such as itself is increased by the network effects associated with the opening of a route ⁽⁷⁹⁾. Ryanair's view is that the interest of Angoulême airport in concluding an agreement with it was all the greater because the only alternative would have been to open routes with public service obligations operated by airlines using small aircraft such as Twin Jet. However, Ryanair emphasises that this second option would have involved an opportunity cost for the airport, since large airlines generate a lower cost per passenger.
- (126) Ryanair also takes the view that the Commission should take into account the network externalities generated by its activity. An agreement concluded with Ryanair acts as a 'magnet' for other airlines seeking increased visibility and better infrastructure. These network effects have a positive impact on aeronautical and non-aeronautical revenues ⁽⁸⁰⁾. Ryanair believes that the Commission took this approach in the decision on Bratislava airport ⁽⁸¹⁾. Airports therefore have an interest in concluding an agreement with an airline giving traffic commitments.
- (127) Ryanair points out that the agreements it concludes are not exclusive. Any other airline offering the same service as Ryanair could be granted identical operating conditions.
- (128) With regard to the profitability analysis, Ryanair argues that the following principles would be adopted by a rational private sector investor ⁽⁸²⁾:
- the assessment is undertaken on an incremental basis,
 - an *ex ante* business plan is not necessarily required,
 - for an uncongested airport, the 'single till' approach is the appropriate pricing methodology,
 - only those revenues associated with the economic activity of the operating airport should be considered,

⁽⁷⁷⁾ Ryanair refers to the position of the Commission in its Decision of 27 January 2010, cited in footnote 69, recital 111.

⁽⁷⁸⁾ See the decision cited in footnote 69.

⁽⁷⁹⁾ According to Ryanair, these externalities include: 1. The fact that the opening of a route to a regional airport sends a positive signal to other airlines about profitability prospects; to be specific, Ryanair states that Cityline was about to conclude an agreement with Angoulême airport to establish a scheduled service several weeks before Ryanair closed the route. 2. The presence of a large airline allows non-aeronautical services to be developed, which in return contributes to generating more traffic.

⁽⁸⁰⁾ Non-aeronautical revenues are stimulated in particular by the longer time spent in the airport by passengers not making a stopover. This feature is such as to attract commercial chains operating in airports.

⁽⁸¹⁾ See the decision cited in footnote 69.

⁽⁸²⁾ Principles underlying profitability analysis for MEIP tests. Ryanair State aid cases, prepared for Ryanair by Oxera, 9 April 2013

- the entire duration of the agreement, including any extensions, should be considered,
- future financial flows should be discounted in assessing the profitability of the agreements.

(129) Incremental profitability of Ryanair agreements to the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

(c) Application of the market economy investor principle

- (130) In general, Ryanair considers that Angoulême CCI had acted as a genuine private investor because its status, independent of the State, in itself constitutes evidence of compliance with the market economy investor principle. The fact that the funding of the airport investments had been provided by the member of SMAC provided further evidence, since the owners of the airport had an interest in increasing its value.
- (131) Ryanair emphasises that the assessment of the airport charges that it pays should be carried out against its reduced needs. Compared with other airlines, Ryanair argues that its business model requires fewer check-in desks, facilities and services, and the fact that it does not use stopovers reduces the duration and intensity of ground handling for its aircraft and increases the productivity of the crew in order to reduce reliance on airport services.
- (132) It also considers that, for the purposes of applying the market economy investor principle, certain European airports are substitutable for Angoulême airport because of their similarities⁽⁸³⁾. In this regard, Ryanair submits a comparative study which concludes that the airport charges levied by [...], [...], [...] and [...] airports, which are comparable to Angoulême airport, are on average lower than the charges at Angoulême airport⁽⁸⁴⁾.

Table 11

Airports comparable to Angoulême airport

Airport characteristics compared	Angoulême	[...]	[...]	[...]	[...]
Population of the airport town	45 000	168 000	157 000	31 400	121 000
Distance to the town (kilometres)	14	12	45	46	11,5
Largest city within 150 km (population)	Bordeaux (241 000)	[...] (441 000)	[...] (481 000)	[...] (76 000)	[...] (1 119 000)
Closest large airport (passengers in 2009)	Bordeaux (3 300 000)	[...] (1 800 000)	[...] (7 700 000)	[...] (2 800 000)	[...] (19 000 000)

- (133) Ryanair also states that the choices made by Angoulême airport after it had closed the route to London Stansted were such as to establish that the airport considered that a scheduled commercial service to the United Kingdom operated by a low-cost carrier was a credible solution. In this connection, it refers to the agreement concluded with SNC-Lavalin, which had a mandate to introduce an aggressive development scenario.
- (134) Moreover, Ryanair argues that a guaranteed level of passengers, such as the one it committed itself to, would limit the economic risk taken by an airport. As a result, the guarantee justifies a lower level of profitability than would be required by a private investor without the benefit of that clause.

⁽⁸³⁾ These similarities are due to the characteristics of the airports (located less than 150 kilometres from large cities and competing with other airports) and to the income levels in the regions surrounding them.

⁽⁸⁴⁾ On average over the period studied, airport charges at Angoulême airport were [...] % higher per rotation and [...] % higher per passenger. However, Oxera emphasises that Ryanair was not liable for the airport tax in 2009.

- (135) Ryanair also notes that the 'single till' approach⁽⁸⁵⁾ explains why an airport seeks to maximise its revenues by reducing the level of its airport charges. Ryanair therefore challenges the assessment that a negative price cannot be a market price. It believes that a negative airport charge may be consistent with the market economy investor principle if the expected level of non-aeronautical revenues is sufficiently high. In this case, Ryanair takes the view that a private investor could reasonably assume that the non-aeronautical revenues, which were zero, would develop as a result of the traffic that it could generate⁽⁸⁶⁾.
- (136) It argues that this approach is bolstered by the specificity of the situation of Angoulême airport. It judges that a market economy investor should regard infrastructure costs and fixed operating costs as sunk costs. That is all the more so in this case since Angoulême airport was likely to suffer from competition with the TGV high-speed train⁽⁸⁷⁾. Moreover, Ryanair maintains that if the closure of the airport had been another option, the market value of the assets net of closure costs would not have been significant. These sunk costs should therefore be ignored.
- (137) Furthermore, bearing in mind that Ryanair undertook to guarantee a minimum level of traffic, failing which it could face penalties, it considers that any commercial offer represents an improvement on the situation of an airport with the characteristics of Angoulême airport. The only condition is that its marginal revenues should be higher than its marginal costs, which would differentiate the situation of Angoulême airport from that analysed by the Court of Justice in the *Chronopost* judgment⁽⁸⁸⁾. Consequently, Ryanair states that, in this case, a private investor in a market economy would not necessarily seek a return on investment in the case of existing infrastructure. According to Ryanair, nor would such an investor require the contracting airline to participate in covering the operating costs incurred before the agreement was concluded.
- (138) Lastly, Ryanair states that the decisions taken by Angoulême airport were not specifically addressed to it.
- (139) Such is the case, first of all, with the decisions to adapt Angoulême airport. Most of these investments were carried out before it arrived. In the same way, it stresses that in many cases the recruitment contracts for members of staff were concluded or extended after it had left. Those decisions therefore formed part of the wider plan to position Angoulême airport in the low-cost carrier market⁽⁸⁹⁾. The decisions taken subsequently by SMAC once Ryanair had left, such as the choice of the scenario pursued by SNC-Lavalin, are evidence of this.
- (140) Lastly, Ryanair emphasises that Article 3 of the Airport Services Agreement stipulated that the operating conditions granted to it could be granted to any other airline. It states that the level of airport charges was in any event published by Angoulême airport.

(d) Comments relating to the payments to AMS

- (141) Ryanair disagrees with the Commission's preliminary assessment of the payments to AMS as costs to the airport since this approach disregards the value of AMS's services to the airport. Ryanair further believes that, for the purposes of the market economy operator analysis, the purchase of valuable marketing services at market rates should be considered separately from a related airport-airline contractual arrangement.
- (142) In support, Ryanair submits an analysis of benchmarking prices charged by AMS against prices for comparable services offered by other travel websites⁽⁹⁰⁾. The analysis concludes that prices charged by AMS were either lower than the average or within the mid-range of prices charged by comparator websites.
- (143) According to Ryanair, this shows that AMS's prices are in line with market prices and the decision by a public airport to purchase AMS's services is consistent with the market economy operator test. Ryanair further provides evidence of the services that are provided to the airports under AMS contracts, with the aim of showing the value of these services to the airports.

⁽⁸⁵⁾ See recital 124 of this Decision.

⁽⁸⁶⁾ Ryanair raises the possibility for the said investor to take the example of La Rochelle airport, which it believes to be similar.

⁽⁸⁷⁾ The decision to build the Angoulême-Bordeaux line was taken in July 2006, and the decision to build the Tours-Angoulême line was taken in June 2009.

⁽⁸⁸⁾ Judgment of the Court of Justice in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA* [2008] ECR I-6993. However, Ryanair acknowledges that this approach should be refined if the fixed costs increase markedly once a certain activity threshold is reached. In that case, it takes the view that it would be more appropriate to take into account the net present value over a longer period.

⁽⁸⁹⁾ Ryanair believes that those investments would also have been carried out in its absence because the infrastructure investments went ahead despite the very low volume of passengers.

⁽⁹⁰⁾ Oxera, 'Are prices set by AMS in line with the market rate?', prepared for Ryanair, 20 December 2013.

- (144) According to Ryanair, should the Commission, despite its opposition to such an approach, insist on including AMS agreements and Ryanair's airport services agreements in a single market economy operator test, the value of AMS services to the airport should not be disregarded.
- (145) In addition, Ryanair refers to the conclusions of various reports confirming that it has a strong pan-European brand capable of attracting a premium for its advertising services.
- (146) Ryanair also submitted a report prepared by Oxera, its economic adviser, concerning the principles that it believes should apply to a market-economy operator profitability test encompassing both the air services agreements concluded between Ryanair and airports and the marketing agreements concluded between AMS and the same airports⁽⁹¹⁾. Ryanair emphasises that this does not prejudice its position that AMS agreements and air services agreements should be subject to separate market-economy operator tests.
- (147) The report states that AMS-associated income should be included on the revenue side for the purposes of a joint profitability analysis, whereas AMS expenditure should be included on the cost side. In order to do so, the report proposes a cash-flow-based method by which expenditure on AMS would be treated as incremental operating expenditure.
- (148) The report submits that marketing activities contribute to creating and enhancing brand value, which is likely to generate business and profits over the duration, but also beyond the expiry, of the marketing agreement. This would be the case where, because of an agreement with Ryanair, other airlines are attracted to the airport, in turn attracting commercial operators and increasing the airport's non-aeronautical revenues. According to Ryanair, were the Commission to undertake a joint profitability analysis, these benefits should be taken into account by treating expenditure on AMS as incremental operating expenditure, with incremental profits calculated net of AMS payments.
- (149) Ryanair considers in addition that a terminal value could be included in projected incremental profits at the end of the term of the air services agreement in order to capture the value accruing beyond the expiry of its term. The terminal value could be adjusted by a conservative assumption about the probability of whether the agreement will be renewed with Ryanair or whether similar conditions will be agreed with other airlines. Ryanair considers that this would allow an estimate of a lower bound for the benefits arising from the AMS and air services agreements jointly, taking into account the uncertainty of incremental profits beyond the expiry of the air services agreement.
- (150) In support of this approach, the above report submits a summary of the results of studies on the effect of advertising on brand value. These studies recognise that advertising can build brand value and improve customer loyalty. In particular, according to the report, advertising on ryanair.com increases brand exposure for an airport. The report adds that smaller regional airports aiming to increase their traffic base can build their brand value by entering into advertising agreements with AMS.
- (151) The report suggests that the cash-flow approach is to be preferred over a capitalisation approach under which AMS expenditure would be treated as capital expenditure on an intangible asset (i.e. the brand value of the airport). Marketing expenditure would be capitalised as an intangible asset and then amortised over its useful life, with a residual value at the end of the scheduled expiry of the air services agreement. This approach would, however, not capture additional benefits to the airport as a result of signing the air services agreement with Ryanair, and estimating intangible asset value due to brand expenditure and the length of the asset's useful life is difficult.

6.3. Comments by AMS

- (152) AMS disputes the assertion that the Marketing Services Agreement that it concluded with Angoulême airport constitutes State aid. The contract does not confer any selective advantage on it.

6.3.1. *Joint assessment of an economic benefit granted to Ryanair and AMS*

- (153) AMS emphasises that it has genuine company objects, which consist in the provision of marketing services on the internet. It states that most of its activity is intended to increase the value of the advertising space on Ryanair's website.

⁽⁹¹⁾ Oxera, 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?' Prepared for Ryanair, 17 January 2014.

- (154) Furthermore, it points out that Ryanair has chosen to work with other intermediate structures to market other advertising space.
- (155) It follows that there are no grounds for taking the view that it is necessary to carry out a joint assessment of any economic benefit granted to Ryanair and AMS.

6.3.2. *Joint assessment of the Airport Services Agreement and the Marketing Services Agreement*

- (156) AMS considers that the increase in the number of passengers using Ryanair services is not the only benefit accruing to Angoulême airport from the Marketing Services Agreement. First, it notes that the contract concluded by the airport with AMS is different from the one concluded with Ryanair. Second, it emphasises that Ryanair promotes its services using its own resources. Accordingly, Angoulême airport does not help to promote Ryanair services by concluding a marketing services contract with AMS.
- (157) By way of illustration, AMS notes that Ryanair's load factor is invariably [...] % on average, regardless of whether or not a marketing services contract is concluded with it. Furthermore, AMS argues that the revenues accruing to Ryanair are identical for all passengers, either at arrival or departure from a particular airport.
- (158) In general, AMS notes that advertising campaigns benefit the providers of the advertising space themselves⁽⁹²⁾. In this case, that externality is reflected in the increasing popularity of Ryanair's website, regardless of whether the entity behind the advertising campaign is public or private. Since a private investor would not refrain from making an investment on the ground that third parties would benefit, AMS considers that Angoulême airport did not have to take into account the fact that Ryanair also benefited from its investment in advertising.
- (159) AMS takes the view that in this case Ryanair played a pioneering role since most airlines now commercialise the space available on their website. However, it believes that Ryanair's website was unusual in that it had an exceptional value⁽⁹³⁾. Accordingly, it was not comparable with the websites of other airlines.

6.3.3. *Criterion of a prudent investor in a market economy*

6.3.3.1. *Existence of an advantage in favour of AMS*

- (160) AMS considers that it did not benefit from any economic advantage within the meaning of Article 107(1) TFEU. It states that its services are directed to both private and public entities. It could therefore have benefited from the same measure by a private company. It adds that it does not force airports to buy its marketing services⁽⁹⁴⁾ and that the advertising space which it markets is a scarce resource for which there is high demand.

6.3.3.2. *The relationship between AMS services and the needs of its customers*

- (161) AMS considers that carrying out advertising campaigns is a necessity for regional airports. Their objective is to raise the profile of the services they offer. It adds that the major airport hubs themselves now feel that it is desirable to conduct advertising campaigns. The resulting image enhancement benefits the airports in question⁽⁹⁵⁾. In this connection, AMS states that this expenditure is a strategic investment comparable to those made by companies such as Coca-Cola, McDonald's and Nike.
- (162) This investment is all the more decisive because airports tend to generate almost half of their revenues from non-aeronautical activities. In this case, Angoulême airport had an even greater interest in generating traffic comprising international customers because regular passenger traffic was almost non-existent. On the contrary, AMS takes the view that Ryanair had no interest in contributing to these investments in advertising because it does not generate any additional revenue from inbound or outbound passengers.

⁽⁹²⁾ AMS takes the example of an advertising campaign published in a newspaper, which confirms its support role in carrying out such marketing operations, thereby enabling it to increase its fees or sell more advertising space, or a brand of soda whose advertising campaigns increase the sales of a distributor.

⁽⁹³⁾ AMS bases its assessment on a report published by Zénobie Conseil in May 2011. It also points out that Ryanair's website accounts for 4,5 billion page views per year, 80 % of direct visitors, a bounce rate of 17 %, an average visit duration of 9 minutes and 36 seconds per visitor and a high capacity of targeting potential customers.

⁽⁹⁴⁾ AMS points out that many airports choose not to advertise on Ryanair's website.

⁽⁹⁵⁾ Increase in inbound traffic via the airline on whose website the advertising campaign is located or any other airline; increase in non-aeronautical revenues by the installation of commercial operators.

- (163) AMS states that the promotion of the 'brand' of airports, and in particular regional airports, has become common practice. In this connection, it refers to the desire to increase the value and profile of the airport so that it becomes a destination chosen by travellers, to the fact that these investments are economically rational for both public and private investors, to the fact that these investments are also carried out by hubs, to the fact that airports have an interest in increasing the number of outbound passengers, and to the fact that what differentiates regional airports from hubs is that the former do not enjoy the same international profile. This strategy is independent of the airline chosen by travellers, since airports define their marketing investments in relation to the ability of the advertising space to target their potential customers.

6.3.3.3. The price of services provided by AMS

- (164) AMS states that its prices in relation to Angoulême airport are market prices. Comparing the contracts concluded with [...] and [...] airports, it maintains that it does not discriminate between airport and non-airport clients. Furthermore, it takes the view that making commercial use of the space available on Ryanair's website⁽⁹⁶⁾ is also likely to establish that the price of the service provided to Angoulême airport is a market price.
- (165) AMS argues that the Commission, in its decision on Bratislava airport cited in recital 111 of this Decision, took the view that it could not be excluded that a certain value could be attached to the mere presence of the name of an airport on Ryanair's website, provided that the airport is mentioned as a destination.
- (166) Furthermore, AMS notes that its rate card is objective and available on its website⁽⁹⁷⁾. The prices applied to the contract concluded with Angoulême airport are consistent with this framework. The prices have been set according to the type of page in question⁽⁹⁸⁾, the type of placement⁽⁹⁹⁾, the number of daily visitors and the number of routes to and from the airport.
- (167) Lastly, AMS states that the services it provides are more effective — because they are more targeted — than those provided through other traditional advertising platforms, such as newspapers. This is all the more so since the advertising it provides on Ryanair's website are 'fixed', whereas other websites rotate, and the prices laid down in the Marketing Services Agreement concluded with Angoulême airport were set using a 2007 price base, while traffic on Ryanair's UK website rose by 55 % between 2008 and 2012.

6.4. Comments by Transport & Environment

- (168) The comments by this non-governmental organisation under this procedure are limited to questioning the merits of the new aviation guidelines and of the decisions adopted by the Commission in the aviation sector, because of their environmental impact.

7. COMMENTS BY FRANCE ON THE COMMENTS BY INTERESTED PARTIES

- (169) The French authorities have indicated that they have no additional comments to make in response to the comments by interested parties.

8. ASSESSMENT OF THE AID MEASURES IN FAVOUR OF THE SUCCESSIVE AIRPORT MANAGERS

8.1. Existence of aid within the meaning of Article 107(1) TFEU

- (170) Under Article 107(1) TFEU, 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, in so far as it affects trade between Member States, is incompatible with the internal market.

⁽⁹⁶⁾ AMS is relying on a report carried out by Mindshare Ireland in June 2004.

⁽⁹⁷⁾ www.airportmarketingservices.com

⁽⁹⁸⁾ Homepage or page mentioning destinations.

⁽⁹⁹⁾ Link, banner, paragraph of text, format.

- (171) For a national measure to be classed as State aid the following cumulative criteria therefore have to be met: 1) the beneficiary or beneficiaries must be undertakings within the meaning of Article 107(1) TFEU; 2) the measure must be granted through state resources and be imputable to the state; 3) the measure must confer a selective advantage on its recipient(s); and 4) the measure must distort or threaten to distort competition and must be likely to affect trade between Member States.

8.1.1. Concepts of undertaking and economic activity

- (172) In order to determine whether the subsidies described above constitute State aid, it must be ascertained whether the beneficiaries are undertakings within the meaning of Article 107(1) TFEU.
- (173) The Commission would point out here that it is settled case-law that the concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed⁽¹⁰⁰⁾. Moreover, the concept of economic activity covers any activity consisting in offering goods and services in a given market⁽¹⁰¹⁾.
- (174) In its *Leipzig-Halle airport* judgment, the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of airport infrastructure constitute economic activities⁽¹⁰²⁾. An airport operator engaged in economic activities, irrespective of its legal status and the way in which it is financed, necessarily constitutes an undertaking within the meaning of Article 107(1) TFEU and therefore the Treaty rules on State aid apply⁽¹⁰³⁾.
- (175) In the case at hand, the Commission would point out that the infrastructure in which investments financed by public subsidies were made, in particular the extension of the runway and work on the terminal, has been operated on a commercial basis by the successive airport operators. These operators have accordingly charged for the use of the infrastructure concerned.
- (176) The financing of this airport infrastructure and the potential operating aid involved have therefore served primarily to finance the economic activity of the commercial operation of the airport engaged in by its successive operators. It follows that the entities operating the infrastructure constitute undertakings within the meaning of Article 107(1) TFEU.

8.1.1.1. Entities engaged in the economic activity of operating the airport

- (177) The Commission would point out that CCI-airport performed the management and thus the commercial operation of Angoulême airport alone from 2002 to 2006.
- (178) As regards the periods after 2006, the Commission would point out that two distinct legal entities may be considered to be engaged jointly in an economic activity for the purposes of applying the State aid rules where they in fact provide goods or services jointly on a given market. On the other hand, an entity that is not itself engaged in providing goods or services on a market cannot be regarded as an undertaking solely on the grounds of its holding a share, even a controlling share, where that share gives rise only to the exercise of the rights attached to the status of shareholder or member⁽¹⁰⁴⁾. The Commission takes the view that during the period 2007-2011 SMAC and CCI-airport were jointly engaged in the commercial operation of Angoulême airport. The commercial revenues from the supply of airport services were set and collected by CCI-airport, which was also responsible for the operational management of the airport. At the same time, SMAC had the authority to enter into commercial commitments with third parties on behalf of the airport. It also had operational and financial responsibility for investments of a

⁽¹⁰⁰⁾ Judgments of the Court of Justice in Cases C-35/96 *Commission v Italy* [1995] ECR I-3851, paragraph 36; C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; and C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21.

⁽¹⁰¹⁾ Judgments of the Court of Justice in Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1995] ECR I-3851, paragraph 36; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

⁽¹⁰²⁾ Judgments in Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others v Commission* ('Leipzig-Halle airport case') [2011] ECR II-1311, confirmed by the Court of Justice in its judgment of 19 December 2012 in Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* (not yet reported), paragraphs 42 and 43; see also judgment of the Court of First Instance in Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by the Court of Justice in Case C-82/01P *Aéroports de Paris v Commission* [2002] ECR I-9297; and judgment of the Court of First Instance in Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, paragraph 88.

⁽¹⁰³⁾ See judgments of the Court of Justice in Joined Cases C-159/91 and C-160/91 *Poucet v AGV and Pistre v Cancava* [1993] ECR I-637.

⁽¹⁰⁴⁾ Judgment of the Court of Justice in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, paragraphs 107 to 118 and 125.

commercial nature at the airport site. SMAC was directly involved in the supply of airport services, in particular through its involvement in the commercial management of the airport during this period, for example by concluding the 2008 agreements.

- (179) Likewise, the Commission would point out that the transfer of the management of Angoulême airport to SNC-Lavalin as of 1 January 2012 did not release SMAC from its responsibilities. Under the contractual framework established by the public procurement procedure of 6 July 2011, certain obligations have remained the responsibility of SMAC during the period of the contract.
- (180) First, SMAC is solely responsible for investment decisions. It finances the related expenditure ⁽¹⁰⁵⁾ even though this expenditure is indissociable from the activity of operating the airport ⁽¹⁰⁶⁾. Next, SMAC carries a significant share of the operating risk in so far as it guarantees, up to an annual ceiling, the equilibrium of the airport's accounts ⁽¹⁰⁷⁾. Lastly, SMAC has expressed the intention of directly financing support to airlines designed to implement the airport's commercial policy of re-opening a route between Angoulême airport and the British Isles.
- (181) The Commission therefore takes the view that, in the period starting on 1 January 2012, SMAC remains the joint operator of the airport.
- (182) The Commission accordingly finds that the economic activity of the commercial operation of Angoulême airport has been successively carried on by the following three groups of entities:
- CCI-airport for the period 2002-2006,
 - jointly by SMAC and CCI-airport for the period 2007-2011, and
 - jointly by SMAC and SNC-Lavalin as of 1 January 2012.

8.1.1.2. Exercise of public powers

- (183) The Commission would point out that not all activities engaged in by an airport manager are necessarily economic in nature. Activities relating to the exercise of public powers are in principle not economic in nature.
- (a) National system for financing state tasks in French airports
- (184) Various tasks performed by the successive managers of Angoulême airport relating to air traffic safety, security or environmental protection were financed by the public authorities between 2002 and 2012. This funding falls within the scope of the present formal investigation procedure.
- (185) In this connection, France has referred to the general system for financing state tasks in French airports laid down in national law and described below.
- (186) This system is based on a tax, the airport tax, and an additional financing instrument. The background to and rules governing these instruments, and the tasks financed by them, are described below.
- (187) In 1998 the Council of State ruled in its judgment in SCARA ⁽¹⁰⁸⁾ that safety and security tasks in airports were sovereign responsibilities incumbent on the state and that they therefore could not be charged to airport users. Following this ruling, Law No 98-1171 of 18 December 1998 on the organisation of certain air transport services and Article 136 of Law No 98-1266 of 30 December 1998 (1999 Budget Law) ⁽¹⁰⁹⁾ introduced the airport tax as of 1 July 1999. It is an earmarked tax in so far as the revenue from it can be used to finance certain expenditure only, namely the cost of tasks which France regards as sovereign responsibilities in airports. The above legal provisions also introduced an additional instrument to finance such tasks. The type of task financed by the airport tax and the additional financing instrument, and the rules governing the airport tax and the additional instrument, are set out below.

⁽¹⁰⁵⁾ Article 11 of the specification and technical specifications.

⁽¹⁰⁶⁾ Leipzig-Halle airport judgment, paragraph 107, see footnote 102.

⁽¹⁰⁷⁾ Article 15 of the specification and technical specifications.

⁽¹⁰⁸⁾ Judgment of the Council of State of 20 May 1998 in *Syndicat des Compagnies aériennes autonomes* ('SCARA').

⁽¹⁰⁹⁾ Now codified in Article 1609 *quater* of the General Tax Code.

- (188) French legislation, together with the more detailed regulatory provisions, sets out precisely which tasks can be financed by the airport tax. They are aircraft rescue and firefighting, wildlife hazard prevention⁽¹¹⁰⁾, the screening of hold baggage, passengers and cabin baggage, control of public access points to the restricted area⁽¹¹¹⁾, environmental protection measures⁽¹¹²⁾ and automatic border control using biometric identification. The reference to automatic border control using biometric identification was introduced into the legislation in 2008. Otherwise, the set of tasks eligible for financing by the airport tax has remained unchanged since it was introduced and corresponds to the tasks covered by the SCARA judgment. A number of national and European regulatory instruments set out the obligations incumbent on airport operators in relation to the performance of these tasks. For example, for aircraft rescue and firefighting, the regulations set out precisely the human and material resources to be put in place depending on the characteristics of the airport.
- (189) For any given airport, the airport tax is payable by all airlines using the airport. It is based on the number of passengers and the mass of freight and mail carried by the airline. The rate of airport tax per passenger or tonne of freight or mail is set annually for each airport, depending on the estimated cost of performing the tasks financed by the tax.
- (190) Each year airport operators draw up an annual statement of costs and traffic. These statements set out, for the previous year, the actual observed levels of traffic and the costs of performing the safety and security tasks⁽¹¹³⁾, and the amounts collected by way of the airport tax and the additional instrument for financing these tasks. They also contain estimates of traffic, costs and revenue related to safety and security tasks for the current year and the next two years. The statements are checked by the administrative authorities, who can also carry out on-site inspections. The rate of the tax is then set on this basis by an interministerial order.
- (191) As the tax rates are calculated on the basis of estimates of costs and traffic, an *ex post* adjustment mechanism has been put in place in order to ensure that the airport tax revenue, supplemented where appropriate by the revenue from the additional financing instrument described below, does not exceed the costs actually borne in the performance of the relevant tasks. The costs concerned include the operating and staff costs incurred in the performance of these tasks, depreciation for investments made in connection with these tasks, and the share of overheads related to these tasks⁽¹¹⁴⁾. Operators must keep multiannual accounts of the revenue from the airport tax and the additional financing instrument, and of the costs incurred in the performance of the relevant tasks. As soon as a positive balance is observed, it is carried over into the cumulative accounts for the preceding years, which may result in a positive or a negative balance. This balance is taken into account for setting the tax rate for the following year. In addition, any positive balance carries financial charges payable by the operator.
- (192) From the outset, the financing by way of the airport tax had to be supplemented by an additional financing instrument. This was because the costs of safety and security are not proportional to the volume of air traffic, unlike the airport tax revenue. It became clear that in airports with low traffic volumes, the airport tax rate would have had to be set at a high level judged to be difficult for users to accept if the safety and security costs were to be met. For these airports, provision was therefore made for setting the airport tax at a lower level than that required to cover costs and for using an additional financing instrument to finance the eligible tasks where required.
- (193) A number of different additional instruments succeeded one another in this regard. To start with, the French authorities used a specific fund, the Intervention Fund for Airports and Air Transport ('FIATA'), set up alongside the airport tax, also by Law No 98-1266 of 30 December 1998 as referred to above. It was the successor to the Air Transport Equalisation Fund ('FPTA'), initially reserved for financing air connections designed to promote regional development and territorial planning. A portion of the civil aviation tax was paid into it. FIATA was used to finance the same tasks as those financed by FPTA, extended to include those covered by the airport tax in order to supplement the latter for small airports. In practice, FIATA's functions were essentially divided into two separate

⁽¹¹⁰⁾ The concept of wildlife hazard includes bird strike hazard, covering collisions between aircraft and birds that are such as to endanger passengers and goods on board the aircraft.

⁽¹¹¹⁾ Performance of this task may include, for example, installing and maintaining barriers delimiting the public and restricted areas or installing a video surveillance system around the restricted area.

⁽¹¹²⁾ This task includes noise measures, in correlation with flight paths if appropriate, and air and water quality control in the areas surrounding airports.

⁽¹¹³⁾ Understood as tasks eligible for financing by the airport tax as described above.

⁽¹¹⁴⁾ Overheads are primarily linked to support functions such as human resource management, financial affairs, financial supervision of investments, purchases, non-specialised IT systems, legal department, general services, general management, accounting and management supervision.

'sections': an airport section for the supplementary coverage of safety and security tasks in small airports and an air transport section for subsidising air connections to promote regional development and territorial planning. Decisions on paying out FIATA grants for the supplementary financing of safety and security tasks were taken after consulting a management committee of FIATA's airport section.

- (194) In 2005 FIATA was closed, and the corresponding financing was taken over directly by the state budget for two years on the same terms, in particular as regards the opinion of a management committee. As of 2008, the state replaced this instrument by an increase in the airport tax, involving setting a tax that is higher than necessary to cover safety and security tasks in certain airports. The resulting surplus is redistributed to smaller airports in order to supplement the airport tax revenue collected by them.
- (195) As explained above, the annual statements by the airport operators, which are checked by the administrative authorities, indicate estimated and actual costs and revenue from both the airport tax and the additional instrument. Likewise, the annual accounts kept by the operators and used for calculating the balance of actual costs and revenue leading to a downwards adjustment of the tax and the imposition of financial charges on the operators if the balance is positive, show the revenue from both the airport tax and the supplementary instrument. The mechanism for declaring, checking and adjusting the financing designed to avoid the payment of public funds over and above the costs actually borne thus applies both to the airport tax and to the additional instrument.

(b) Evaluation of the general system for financing state tasks entrusted to French airports

- (196) As pointed out by the Commission in the new guidelines, the Court of Justice has held that activities that normally fall under the responsibility of the state in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid⁽¹¹⁵⁾. Under the new guidelines⁽¹¹⁶⁾, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature.
- (197) In addition, the new guidelines stipulate that, for public funding of non-economic activities not to constitute State aid, it must be strictly limited to compensating for the costs to which they give rise and must not lead to undue discrimination between airports. With respect to the second condition, the guidelines state that, when it is normal under a given legal order that civil airports have to bear certain costs inherent in their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature⁽¹¹⁷⁾.
- (198) The activities financed by the general system for financing state tasks in French airports as described in Section 8.1.1.2 relate to safeguarding civil aviation against acts of unlawful interference⁽¹¹⁸⁾, police tasks⁽¹¹⁹⁾, aircraft rescue and firefighting⁽¹²⁰⁾, air traffic safety⁽¹²¹⁾ and the protection of the natural and human environment⁽¹²²⁾. These activities can legitimately be regarded as falling under the responsibility of the state in the exercise of its official powers as a public authority. The Commission therefore takes the view that France rightly regards these tasks as incumbent on the state and therefore as non-economic for the purposes of the State aid rules.
- (199) It follows that France may also provide for public funding to compensate for the costs borne by airport managers in the performance of these tasks, in so far as such performance is imposed by national law on all airports indiscriminately and provided that the funding does not give rise to overcompensation or to discrimination between airports.

⁽¹¹⁵⁾ Judgments of the Court of Justice in Cases C-118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8, and C-30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR 2479, paragraph 18.

⁽¹¹⁶⁾ Point 35.

⁽¹¹⁷⁾ Points 36 and 37.

⁽¹¹⁸⁾ The screening of hold baggage, passengers and cabin baggage and the control of public access points to the restricted area belong to this category.

⁽¹¹⁹⁾ Automatic border control using biometric identification belongs to this category.

⁽¹²⁰⁾ As indicated above, these three categories are explicitly mentioned in the new guidelines as examples of non-economic activities.

⁽¹²¹⁾ Wildlife hazard prevention belongs to this category.

⁽¹²²⁾ Environmental protection measures belong to this category.

- (200) First, it must be noted that the system described above applies to all civil airports in France, both as regards the scope of the tasks giving rise to compensation and as regards the financing instruments. The non-discrimination requirement is therefore met. While French legislation entrusts the performance of state tasks to airport managers, it lays the responsibility for financing these tasks on the State, not the airport managers. Thus the compensation from public funds for the costs of performing these tasks does not result in mitigating costs that should normally be borne by airport managers under the French legal system.
- (201) Second, it is clear from the description in Section 8.1.1.2 that the system laid down in the French legislation is based on strict mechanisms for checking costs on a before and after basis, thus ensuring that airport managers receive by way of the airport tax and the additional instrument only the amounts strictly necessary to cover the costs.
- (202) It follows that the financing received by French airport managers under this system, including at Angoulême airport, does not constitute State aid.

8.1.2. State resources and imputability to the state

8.1.2.1. Presence of state resources

- (203) Under the legal framework established by the 2002 agreement and the 2009 subcontracting agreement, a number of local authorities and other public authorities awarded grants to the successive operators of the airport. These authorities were CG16, Comaga, CCBC, SMAC and Angoulême CCI.
- (204) In order to ascertain whether the resources of Angoulême CCI constitute state resources, the Commission takes note of the fact that a public administrative body (*établissement public à caractère administratif*) constitutes an independent administrative entity subject to close supervision by the central administration of the French state⁽¹²³⁾. Moreover, Angoulême CCI's general budget includes tax revenue collected from companies entered in the trade and companies register. The Commission therefore takes the view that Angoulême CCI's resources are state resources.
- (205) In addition, local authority resources constitute state resources for the purposes of applying Article 107(1) TFEU⁽¹²⁴⁾. The members of SMAC who gave a contractual undertaking to pay into SMAC's accounts from their own resources are Chambers of Commerce and Industry, local authorities⁽¹²⁵⁾ or public bodies themselves made up of local authorities. The Commission therefore takes the view that SMAC's resources constitute state resources.

8.1.2.2. Imputability of the measures to the state

- (206) The Commission takes the view that the decisions by the public-law entities awarding the subsidies at issue are imputable to the state⁽¹²⁶⁾.
- (207) Moreover, the Commission notes that SMAC is a public body which has no employees and is administratively part of the local authorities which it groups together directly or indirectly. In addition, its budgetary decisions, which are binding on its members, are taken by a joint committee made up of representatives of its members. Taking account of these factors, the Commission finds that the decisions taken by SMAC relating to the activity of the airport are imputable to the State.

⁽¹²³⁾ In France, Chambers of Commerce and Industry are public administrative bodies. Generally speaking, they represent the general interests of trade, industry and services within their catchment area. Their tasks and prerogatives are laid down by law and they are subject to administrative and financial supervision by the State, through the agency of the Ministries for Finance and Infrastructure and Territorial Planning and Administration, each within its own sphere of responsibility. Regional and local chambers of commerce and industry are subject to the authority of the prefect of the region, assisted by the regional public finance officer (Article R 712-2 of the Commercial Code). The authority with supervisory power has a right of information. This means that it is the addressee of certain types of act. Acts are enforceable only if they have been addressed to the authority with supervisory power. Chambers of Commerce and Industry are governed by an assembly elected from among industry representatives in their catchment area.

⁽¹²⁴⁾ Judgment of the General Court in Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais v Commission* [2011] ECR II-1999, paragraph 108.

⁽¹²⁵⁾ In the case of CG16.

⁽¹²⁶⁾ See, for example, judgment of the Court of Justice in Case C-482/99 *France v Commission* [2002] I-4397, paragraphs 52 to 56.

- (208) As regards the measures taken by Angoulême CCI, the Commission would start by pointing out that Chambers of Commerce and Industry are public administrative bodies and as such are subject to public law. The Commission would also stress that French law classes Chambers of Commerce and Industry as '*corps intermédiaires de l'État*' (intermediary bodies of the State) and confers on them the task of contributing to economic development, the attractiveness and land planning of the territory and support for businesses and business associations ⁽¹²⁷⁾. The task of airport operation entrusted to the Chambers of Commerce and Industry also derives from their role of supporting local and regional development, even though the activity of operating an airport is in itself an economic activity ⁽¹²⁸⁾.
- (209) The Commission would also point out that Articles R712-2 et seq. of the Commercial Code place the Chambers of Commerce and Industry under the supervision of the representatives of the State. In this capacity, the authority exercising supervision has access to all CCI General Assemblies and can have items added to the agenda. In particular, decisions relating to initial, amending or implemented budgets are binding only once they have been approved, even tacitly, by the authority exercising supervision. In the case at hand, these budgets included financial transfers to the airport operators, including CCI-airport ⁽¹²⁹⁾, as set out in recitals 28 and 29 of this Decision ⁽¹³⁰⁾.
- (210) The Commission accordingly takes the view that Angoulême CCI, including CCI-airport, forms part of the public administration ⁽¹³¹⁾ and that the measures adopted by it in favour of the operators of Angoulême airport are necessarily imputable to the State.

8.1.3. *Selective advantage for the airport operators*

- (211) To determine whether a state measure constitutes aid to an undertaking, it must be determined whether the company in question enjoys an economic advantage enabling it to avoid costs that would otherwise have been borne by its own financial resources or whether it enjoys an advantage which it would not have received under normal market conditions ⁽¹³²⁾.
- (212) In the case at hand, the French authorities take the view that Angoulême airport in its entirety can be classed as an SGEI on account of its role in territorial planning and the economic and social development of the region. The financing granted to it does not therefore constitute State aid within the meaning of the *Altmark* ruling, because it does not confer on it a real advantage.
- (213) As the French authorities argue that the financial contributions made to the managers of Angoulême airport do not entail a selective advantage under the terms of the *Altmark* ruling, the Commission must examine whether the conditions laid down in that ruling are satisfied in this case. In this regard, it should be recalled that the Court ruled in that case that the compensation granted in discharging public service obligations does not constitute aid within the meaning of Article 107(1) TFEU when the following four criteria are all met:
- the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (first condition),
 - the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (second condition),

⁽¹²⁷⁾ Article L 710-1 of the Commercial Code provides: 'Departmental chambers or establishments belonging to the network of Chambers of Commerce and Industry each have the function, in their capacity as intermediary bodies of the State, of representing the interests of industry, trade and services to the public authorities or to foreign authorities. ... The network, and each establishment within it contributes to economic development, to the attractiveness and land planning of the territory and to the support of undertakings and of their associations by fulfilling within the terms set by decree any public-service task and any task of general interest necessary to the accomplishment of those tasks'.

⁽¹²⁸⁾ Article L 710-1 cited above: 'To this end, each departmental chamber or establishment in the network may carry out, in compliance with any sectoral plans applicable: ... 5. a task of creating and managing installations, in particular ports and airports'.

⁽¹²⁹⁾ The Commission would point out that no distinction need be made between Angoulême CCI and the specific airport management department known as CCI-airport for the purposes of applying the State aid rules, given that the airport management department does not have a separate legal personality that is distinct from that of Angoulême CCI, and simply forms part of the latter's internal organisational structure without any autonomy to take decisions, except where the day-to-day management of the airport is concerned. Moreover, neither France nor the third parties have argued that the measures subject to the formal investigation procedure should be attributed to this department alone.

⁽¹³⁰⁾ See, for example, judgment of the Court of Justice in Joined Cases 67, 68 and 70/85 *van der Kooy v Commission* [1988] ECR 219, paragraph 37.

⁽¹³¹⁾ See Commission Decision in State aid case N563/05 Aid granted by France to Ryanair (Toulon-London service) (OJ C 204, 26.8.2006, p. 4).

⁽¹³²⁾ See, for example, judgment of the Court of Justice in Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (third condition), and
 - where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (fourth condition).
- (214) In its communication on the application of State aid rules to compensation granted for the provision of an SGEI ⁽¹³³⁾ (the SGEI Communication), the Commission provided guidance to clarify the requirements for compensation for services of general economic interest. The communication addresses the various conditions set out in the *Altmark* judgment, i.e. the concept of service of general economic interest within the meaning of Article 106 TFEU, the need for an entrustment act, the obligation to define the parameters of the compensation, the principles relating to the need to avoid overcompensation and the principles for selecting the service provider.
- (215) As the conditions laid down in the *Altmark* ruling are cumulative, the failure to satisfy any one of these conditions will result in the measure being classed as State aid within the meaning of EU law. Consequently, and in the light of the measures under scrutiny, the Commission considers it appropriate and adequate to examine the first and fourth *Altmark* conditions for all the periods under consideration.

8.1.3.1. Definition of the service of general economic interest (first condition)

(a) Framework for analysis

- (216) The first *Altmark* condition pertains to the definition of an SGEI task. This requirement coincides with that of Article 106(2) TFEU ⁽¹³⁴⁾, from which it transpires that undertakings entrusted with the operation of SGEIs are undertakings entrusted with a 'particular task' ⁽¹³⁵⁾. Generally speaking, the entrustment of a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions ⁽¹³⁶⁾. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.
- (217) However, the Commission considers that it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question whether a service can be provided by the market, it must be borne in mind that the Commission's powers with regard to the definition of an SGEI are confined to verifying whether the Member State has made a manifest error in defining a service as an SGEI ⁽¹³⁷⁾.
- (218) Where specific Union rules exist, the Member States' discretion is further bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purposes of State aid control ⁽¹³⁸⁾.
- (219) Generally speaking, the Commission does not rule out the possibility of defining the overall management of an airport as an SGEI. In this connection the new Aviation Guidelines indicate that such a definition is possible in well-justified cases ⁽¹³⁹⁾, such as where a region would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development. An assessment of whether there is a real public service requirement should take due account of other modes of transport, such as high-speed rail services or

⁽¹³³⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

⁽¹³⁴⁾ Judgment of the Court of First Instance in Case T-289/03 BUPA v Commission [2008] ECR II-81, paragraphs 171 and 224.

⁽¹³⁵⁾ See, in particular, judgment of the Court of Justice in Case 127/73 BRT v SABAM [1974] ECR 313.

⁽¹³⁶⁾ See SGEI Communication cited above, points 46 to 47.

⁽¹³⁷⁾ See SGEI Communication cited above, point 47.

⁽¹³⁸⁾ See SGEI Communication cited above, point 46.

⁽¹³⁹⁾ See points 69 to 73 of the new guidelines.

maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic.

- (220) The Commission would also point out in this connection that, for an activity to be considered an SGEI, the general interest objective pursued by the public authorities must go beyond that of the development of certain economic activities or economic areas provided for in Article 107(3)(c) TFEU. The Court of Justice has held that SGEIs are services that exhibit special characteristics as compared with the general economic interest of other economic activities⁽¹⁴⁰⁾ and that undertakings entrusted with SGEI tasks are undertakings entrusted with a 'particular task'⁽¹⁴¹⁾. As a general principle, the Commission takes the view that defining the tasks carried out by an airport manager as an SGEI is justifiable only if all or part of the region served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development.
- (221) In the opening decision, the Commission took the view that, while airport management tasks involving specific public service obligations, such as those related to keeping the airport operational or to infrastructure accessibility, could be regarded as an SGEI, developing the airport for commercial flights, independently of the existence of routes covered by a public service obligation, could not be defined as a service of general interest.
- (222) In this connection, the Commission would point out first that the airports with scheduled services closest to Angoulême airport are accessible only by a drive of more than one hour and thirty minutes⁽¹⁴²⁾. Second, although it is in a central location in the west of mainland France, Angoulême is not connected to the motorway network or the high-speed rail lines that serve the east of the country. In this connection, it must be noted that public service obligations were imposed for part of the period under review for the route between Angoulême and Lyon airports in accordance with the applicable EU legislation⁽¹⁴³⁾. The public service obligations concerned served to guarantee sufficient scheduled transport services to and from Angoulême⁽¹⁴⁴⁾.
- (223) Furthermore, the Commission would point out that average traffic at Angoulême airport during the periods under review fell and remained significantly below 200 000 passengers per year⁽¹⁴⁵⁾, and that the airport's operating account was structurally in deficit, as is clear from recital 17 above.
- (224) Given these inherent characteristics of Angoulême airport, it may be supposed that an economic entity considering its own commercial interest would not assume the management of this airport, or at least not under normal commercial conditions.
- (225) Accordingly, given Angoulême's geographic location in the light of its transport network, the absence of an airport nearby that could constitute a suitable alternative for passengers, the very low traffic volumes and the airport's loss-making situation, the Commission finds that France has not made a manifest error in defining the tasks of Angoulême airport's managers related solely to keeping the airport operational and to infrastructure accessibility as an SGEI. By contrast, the commercial development of an airport by introducing new air routes or expanding non-aeronautical activities does not in principle as such satisfy the general interest criterion for definition as an SGEI. In particular, the Commission takes the view that the compensation by the public authorities of the net costs incurred in the provision of an SGEI should not affect the economic incentive for an airport manager to enter into commercial relations with airlines.
- (226) Accordingly the Commission must determine, for each of the management periods at issue, which activities of the managers of Angoulême airport fall within the scope of an SGEI and which do not.

⁽¹⁴⁰⁾ Judgments of the Court of Justice in Cases C-179/90 *Mercati Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 27, C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 53, and C-266/96 *Corsica Ferries* [1998] ECR I-3949, paragraph 45.

⁽¹⁴¹⁾ See, for example, judgment of the Court of Justice in *BRT v SABAM*, cited above.

⁽¹⁴²⁾ See recital 14 of this Decision, Table 1.

⁽¹⁴³⁾ Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), since replaced by Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3)).

⁽¹⁴⁴⁾ Article 4(1)(a) of Regulation (EC) No 2408/92, cited above.

⁽¹⁴⁵⁾ See Table 2 above.

(b) Scope of the SGEI

- (227) For the period 2002-06 when CCI-airport was operating the airport, the 2002 agreement was drawn up to ensure that public service tasks linked to land use planning restrictions around the airport and the continuity of the public service ⁽¹⁴⁶⁾ could be carried out. The purpose of the agreement was also to allow development of the airport. The preamble to this agreement states in this respect that the signatories 'have decided to combine their efforts to define and finance the development, planning and operating policy' for Angoulême airport.
- (228) Bearing in mind the arguments set out in recitals 221 to 226, the Commission finds that the management tasks described in the concession agreement and the related specification that are linked to keeping the airport operational and to infrastructure accessibility may be regarded as general interest tasks and that the definition of these tasks as an SGEI is not marred by any manifest errors of assessment.
- (229) By contrast, the objective of the commercial development of the airport by introducing new air routes or expanding non-aeronautical activities does not as such satisfy the general interest criterion for definition as an SGEI. It cannot be justified by the regional development objective cited by the French authorities.
- (230) In point of fact, however, the only compensation that was actually paid did not arise from the costs of opening new routes, the conclusion of contracts with new airlines or the expansion of non-aeronautical activities at Angoulême airport, but related solely to the activities that can be classed as an SGEI.
- (231) For the period 2007-2011 when SMAC and CCI-airport were jointly operating the airport, it must first be noted that SMAC's statutes of 21 December 2006 entrust it with the tasks of fitting out, equipping, maintaining, managing and operating Angoulême airport. Second, the management subcontracting agreement of 22 January 2009 between SMAC and Angoulême CCI transfers the responsibility for investments relating to the operation of the airport from CCI-airport to SMAC. Under the terms of the management subcontracting agreement, the other tasks related to the operation of the airport were assigned to CCI-airport.
- (232) In addition, according to SMAC's statutes, its object is to 'ensure the development of commercial passenger or freight air services, business, leisure or tourist flights, training and all related activities in support of this objective' at Angoulême and Cognac airports.
- (233) As set out in recital 225, management tasks linked solely to keeping the airport operational and to infrastructure accessibility may be regarded as general interest tasks; only these tasks can be defined as an SGEI without manifest error.
- (234) By contrast, as explained in recital 225, the development of commercial flights cannot be defined as an SGEI, even if it has the objective of promoting regional development. However it was only the commercial relationship with Ryanair that gave rise to costs borne by SMAC and CCI-airport that were specifically related to the development of new transport services. As SMAC and CCI-airport must be regarded as being jointly engaged in the economic activity of managing the airport vis-à-vis Ryanair, the compensation by SMAC for the additional costs incurred in connection with the 2008 agreements must be analysed as part of the assessment of any aid elements contained in those agreements.
- (235) The decision of 23 June 2001 by SMAC provided that the extra-contractual payments for the commercial development of the airport were to be paid directly by SMAC to the airlines. As a result, the financial measures corresponding to the development of new transport services cannot be regarded as an SGEI and will be analysed as part of the assessment of aid paid to Ryanair ⁽¹⁴⁷⁾.

⁽¹⁴⁶⁾ These obligations are mentioned in Articles 20 and 21 of the specification for the 2002 concession.

⁽¹⁴⁷⁾ See Section 9 of this Decision.

- (236) Lastly, the specification and technical specifications for the period of joint operation of the airport by SMAC and SNC-Lavalin that started on 1 January 2012 refer not only to tasks relating to keeping the airport operational and to infrastructure accessibility but also to the task of promoting the airport and developing its activity. Article 9 of the specification and technical specifications accordingly states, 'the operator is required to seek in the interests of the local economy and local tourism all means of developing airport activity and tourism'. It goes on to say that the operator must 'to this end promote the airport to current and potential users and to entities active in the fields of commercial and business aviation, tourism, air freight, training, aeronautical maintenance, or any entities carrying on activities that are complementary or related to the activity of the airport'.
- (237) In this connection, SMAC's report to the tender committee indicates that the development plan presented by SNC-Lavalin as part of a proactive scenario was key to the selection of its bid. Moreover, it is clear from the awarding decision and from the remuneration set out in the bid that the operator's intention at the time was to re-establish a passenger transport route from Great Britain and Ireland by a low-cost airline. According to the planned schedule, three routes would be successively opened over a period of six years at a rate of one new route every two years.
- (238) As set out in recital 225, management tasks linked solely to keeping the airport operational and to infrastructure accessibility may be regarded as general interest tasks and defining them as an SGEI is without manifest error.
- (239) By contrast, as explained in recital 225, the development of commercial flights cannot be defined as an SGEI, even if it has the objective of promoting regional development. The financial measures corresponding to these activities cannot therefore be regarded as being for the purpose of financing an SGEI.
- (240) However, the only compensation actually paid to the airport manager after January 2012 was not related to costs incurred in the development of commercial flights. The French authorities have undertaken to notify the Commission of any support granted in future by SMAC or its constituent entities to airlines for the purpose of operating routes out of Angoulême airport.

(c) Existence of entrustment

- (241) Only for the tasks that can justifiably be defined as an SGEI by the French authorities, the Commission must establish whether the manager or managers of Angoulême airport for each of the periods under review was or were actually entrusted with the performance of public service obligations by an entrustment act. In this connection, it must be borne in mind that the public service task must be assigned by way of an act or series of acts that, depending on the legislation in Member States, may take the form of a legislative or regulatory instrument or a contract. The Commission's approach, codified in the SGEI Communication, is to require that the act or series of acts must specify at least ⁽¹⁴⁸⁾:

- the content and duration of the public service obligations,
- the undertaking and, where applicable, the territory concerned,
- the nature of any exclusive or special rights assigned to the undertaking by the authority in question,
- the parameters for calculating, controlling and reviewing the compensation, and
- the arrangements for avoiding and recovering any overcompensation.

(i) The period 2002-06

- (242) For the period 2002-06, the concession for the construction, maintenance and operation of the airport was awarded to Angoulême CCI by ministerial order. The terms governing the concession were set out in the concession agreement between the minister responsible for civil aviation and CCI-airport signed for a period of five years. In

⁽¹⁴⁸⁾ See SGEI Communication cited above, point 52.

addition, some of the subsidies paid by the CCI and the contributions paid by the local municipalities to CCI-airport⁽¹⁴⁹⁾ were awarded on the basis of the 2002 agreement. Lastly, the procedure for adopting the budget for the airport, laid down in Circular No 111 of 30 March 1992 setting the budgetary, accounting and financial rules applicable to Angoulême CCI, ensured that the amounts at issue constituted real compensation and that overcompensation was avoided. It should also be noted that the procedure also included control mechanisms to ensure that there was no overcompensation⁽¹⁵⁰⁾. Moreover, up to 31 December 2006, the airport's accounts and budgets were also submitted to the Civil Aviation Authority, which had to deliver an opinion to the authority exercising supervision over Angoulême CCI before the accounts and budgets could be approved, the state being the conceding authority for the airport.

- (243) The Commission accordingly finds that the task of managing the airport was entrusted to Angoulême CCI by way of an entrustment act that satisfies the *Altmark* conditions.

(ii) The period 2007-2011

- (244) For this period, the public service tasks were entrusted to the managers by a series of acts. First, SMAC's statutes of 21 December 2006 entrust it with the tasks of fitting out, equipping, maintaining, managing and operating Angoulême airport. They also provide for SMAC's costs to be automatically entered in the budgets of its members⁽¹⁵¹⁾. Second, the management subcontracting agreement concluded on 22 January 2009 between SMAC and Angoulême CCI for a period of three years transfers the responsibility for investments relating to the operation of the airport from CCI-airport to SMAC. Under the terms of the management subcontracting agreement, the other tasks related to the operation of the airport were assigned to CCI-airport.

- (245) Lastly, the procedure for adopting the budget for the airport, laid down in Circular No 111 of 30 March 1992 setting the budgetary, accounting and financial rules applicable to Angoulême CCI, ensured that the amounts at issue constituted real compensation and that overcompensation was avoided. Control mechanisms were also built in to the procedure⁽¹⁵²⁾. In addition, CCI, as concession-holder until 31 December 2008 and then as sub-contractor until 31 December 2011, sent its initial, amending or implemented budgets (profit and loss, supply and use, self-financing capacity) to SMAC for approval by the latter in its capacity as conceding authority, in accordance with its statutes.

- (246) The Commission accordingly finds that the task of managing the airport was entrusted to SMAC and Angoulême CCI by way of an entrustment act that satisfies the *Altmark* conditions.

(iii) Period starting on 1 January 2012

- (247) The management and operation of Angoulême airport were entrusted to SNC-Lavalin by the acceptance of the bid on 8 August 2011 and by the specification and technical specifications for a period of six years⁽¹⁵³⁾. Although a number of obligations remained the responsibility of SMAC⁽¹⁵⁴⁾, these acts set out the obligations of the parties as part of the task of operating the airport.

- (248) The responsibilities incumbent on SNC-Lavalin as part of the task of operating the airport are listed and detailed in the specification and technical specifications. Under Article 8 of the specification, SNC-Lavalin is entrusted with the following tasks: performance of state tasks, implementation of an AFIS service, performance of tasks ensuring the safe use of the airport, maintenance of the airport site and networks and ensuring that the airport is able to accommodate scheduled commercial traffic. The relevant acts also define the method for calculating the remuneration to be paid to SNC-Lavalin by SMAC. The maximum compensation paid by SMAC derives from SNC-Lavalin's bid. Lastly, as concerns the regular checks to avoid overcompensation, the provisions of Title III of the tender specification set out the arrangements for monitoring by SMAC to ensure that there is no overcompensation

⁽¹⁴⁹⁾ See recital 18 of this Decision.

⁽¹⁵⁰⁾ The procedure is as follows: Each year Angoulême CCI defines the budgetary guidelines and each department draws up its budget accordingly. Each year, in the autumn, the general airport department submits a draft budget for years n, n+1 and n+2. The elected members of Angoulême CCI's Bureau examine the draft budgets and make any necessary changes. Once it has been endorsed by the Bureau, the budget for the airport, together with those of the other departments, is presented at a general meeting to the elected members of Angoulême CCI, who then vote on it. Implementation is subject to their voting in favour. Moreover, reporting is carried out at regular intervals in order to verify that the budget adopted is being implemented properly. During year n+1, the budget for year n is submitted to the general meeting with comments on any discrepancies. The general meeting votes again to accept the implemented budgets.

⁽¹⁵¹⁾ Article 17 of the statutes of SMAC.

⁽¹⁵²⁾ See footnote 150.

⁽¹⁵³⁾ Tender document by SNC-Lavalin dated 19 July 2011, accepted by SMAC on 8 August 2011 following a decision of 23 June 2011.

⁽¹⁵⁴⁾ See recital 23 of this Decision.

involved in the contribution from SMAC as against the costs of performing the general economic interest tasks entrusted to SNC-Lavalin.

- (249) The task of managing the airport must therefore also be considered to have been entrusted to SNC-Lavalin by way of an entrustment act that satisfies the *Altmark* conditions.
- (250) The Commission accordingly finds that, for each period of operation of Angoulême airport under review, an entrustment act did in fact entrust to the manager or managers the public service obligations consisting in keeping the airport operational and the infrastructure accessible. The first *Altmark* condition has therefore been satisfied in respect of the tasks referred to above.

8.1.3.2. Selection of the service provider (fourth condition)

- (251) The Commission also deems it appropriate to examine the fourth *Altmark* condition in respect of all the periods concerned.
- (252) In accordance with this condition, the compensation offered must either be the result of a public procurement procedure which allows for selection of the tenderer capable of providing those services at the least cost to the community (first sub-criterion), or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means (second sub-criterion).

(a) First sub-criterion

(i) Periods 2002-06 and 2007-2011

- (253) For the period 2002-06, the concession to operate the airport was awarded to Angoulême CCI by ministerial order⁽¹⁵⁵⁾ of 20 September 2002 published in the Official Journal of the French Republic on 5 October 2002. For the period 2007-2011, it was the order of the Prefect of 21 December 2006 setting up SMAC and the subcontracting agreement of 2009 which entrusted SMAC with the task of fitting out, equipping, maintaining, managing and operating, directly or indirectly, Angoulême airport.
- (254) These unilateral and contractual administrative acts were quite clearly not adopted as the result of an open, transparent and non-discriminatory public procurement procedure whereby a number of potential bids could be compared and the compensation set in such a way as to rule out the presence of State aid.
- (255) Accordingly, for the periods mentioned above, the Commission finds that the terms of the procedure followed were not such as to ensure effective competition for the task of managing Angoulême airport. The procedure for selecting the managers of Angoulême airport therefore does not satisfy the first part of the fourth *Altmark* criterion in so far as it did not allow for selection of a tenderer capable of providing the services concerned at the least cost to the community.

(ii) Period starting on 1 January 2012

- (256) The management and operation of the airport were entrusted to the undertaking SNC-Lavalin following a public procurement procedure in accordance with Article 21 of Directive 2004/18/EC of the European Parliament and of the Council⁽¹⁵⁶⁾. Furthermore, prior to this procedure, the French authorities published a notice of a competitive public tender in the *Official Journal of the European Union*.
- (257) However, as the French authorities were not obliged to use a standard public procurement procedure, they had a wide margin of discretion in selecting a contractor⁽¹⁵⁷⁾. A procedure conferring such wide discretion on the adjudicating authority may restrict the participation of interested operators.

⁽¹⁵⁵⁾ Order granting the concession for Angoulême-Brie-Champniers airport to the Angoulême Chamber of Commerce and Industry (*Arrêté portant concession de l'aéroport d'Angoulême-Brie-Champniers à la Chambre de commerce et d'industrie d'Angoulême*).

⁽¹⁵⁶⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽¹⁵⁷⁾ The award criteria included the following: 'most economically advantageous tender assessed in the light of the criteria listed in the specification, the invitation to tender or negotiate, or the descriptive document'.

- (258) The Commission accordingly finds that the procedure employed in this instance is not in itself sufficient to satisfy the fourth *Altmark* condition⁽¹⁵⁸⁾.
- (259) The Commission must therefore assess whether the public procurement procedure employed in this instance allowed for selection of a tenderer capable of providing the services concerned at the least cost to the community.
- (260) The key contractual features are: (i) a six-year duration; (ii) a contractual commitment by the service provider to the ceiling on the contribution by SMAC to the balancing of the airport's accounts; (iii) a flat-rate remuneration for the service provided; and (iv) a performance incentive clause. Potential tenderers were invited to make a baseline offer (without commercial traffic) and an offer for a proactive scenario (with commercial traffic). The procurement report submitted to the tender committee points out that two competing bids were submitted. Besides SNC-Lavalin, the company APCO⁽¹⁵⁹⁾ also submitted a baseline scenario and a proactive scenario. For a technical value equivalent to that of SNC-Lavalin's bid for the proactive scenario, which was the one selected, the prices offered by the two competing bids for the whole of the period were:

(thousand EUR)

	Balancing contribution	Remuneration	SMAC's total expense
SNC-Lavalin	2 359	1 074	3 433
APCO	5 463	480	5 943

- (261) Moreover, SMAC's procurement report to the tender committee shows that each of the two tenderers submitted a baseline and a proactive scenario⁽¹⁶⁰⁾. The latter, which was the scenario chosen by the delegating authority, corresponds to the strategic plan for the commercial development of Angoulême airport. The report to the tender committee states that the remuneration of SNC-Lavalin, which won the bid, is the same for both scenarios. However, the ceiling on the balancing contribution borne by SMAC as proposed by the company in its bid does show a variation in the guaranteed balancing contribution ceiling. As the report indicates, the average additional annual amount borne is EUR 30 000 in the proactive scenario, although the additional amount is not distributed evenly across the period of performance of the contract. The difference between the baseline and the proactive scenarios is as follows:

(thousand EUR)

	2012	2013	2014	2015	2016	2017
Baseline scenario	405	364	374	357	350	342
Proactive scenario	465	425	448	384	341	296
Difference	+ 60	+ 61	+ 74	+ 27	- 9	- 46

- (262) The Commission accordingly finds that the delegating authority did not select the bid capable of providing the service concerned at the least cost to the community. The baseline scenario offered by SNC-Lavalin was more advantageous than the baseline scenario proposed by APCO, and was such as to ensure accessibility and the maintenance of operational conditions at Angoulême airport. On the other hand, the proactive scenario was designed to ensure the commercial development of the airport. This service was not essential to ensuring the first and in any event could not be regarded as a service of general economic interest. Therefore, the selection of the service provider was not based on the most economically advantageous tender capable of ensuring the provision of a public service at the least cost to the community.

⁽¹⁵⁸⁾ See point 66 of the SGEI Communication cited above.

⁽¹⁵⁹⁾ Set up in January 2011, APCO is a wholly owned subsidiary of Limoges and Haute-Vienne CCI. Its object is airport management consultancy, training of airport staff, the management and development of airports, ground handling and airport security.

⁽¹⁶⁰⁾ See recital 20 of this Decision.

- (263) As regards the extra-contractual payments for the commercial development of the airport, which the Commission does not regard as falling legitimately under the scope of the SGEI ⁽¹⁶¹⁾, the doubts expressed by the Commission in the opening decision have been lifted. The SMAC decision of 23 June 2001 provides for these measures to be paid directly by SMAC to the airlines. They will therefore be assessed in the light of the State aid rules as part of the assessment of the measures granted to Ryanair/AMS ⁽¹⁶²⁾.
- (264) The Commission accordingly finds that the terms of the procedure employed to award the contract to SNC-Lavalin were not such as to allow for selection of a tenderer capable of providing the services concerned at the least cost to the community and therefore that the first sub-criterion of the fourth *Altmark* condition has not been satisfied.
- (b) Second sub-criterion
- (265) For the periods 2002-2006 and 2007-2011, the French authorities had to demonstrate that the compensation had been established by reference to a medium-sized, well-run undertaking adequately equipped with the necessary resources.
- (266) The Commission notes in this respect that France has not provided information of this nature. The Commission also finds that the compensation was not determined with reference to a cost base established in advance or by comparison with the cost structure of other comparable airport managers. For the relevant periods, the Commission therefore does not have the necessary comparative data to assess whether the criterion has been satisfied in respect of the selection of the service provider.
- (267) The Commission therefore finds that the fourth *Altmark* condition is not satisfied for the periods 2002-06 and 2007-2011.
- (268) The same applies to the period starting on 1 July 2012, as the Commission does not have the necessary comparative data to assess whether the criterion has been satisfied in respect of the selection of the service provider. It must therefore find that the fourth *Altmark* criterion is not satisfied for this period either.
- (269) Given that the fourth *Altmark* criterion has not been satisfied, the Commission takes the view that the measures at issue did confer an advantage on the successive operators of Angoulême airport which they would not have received under normal market conditions.

8.1.4. *Effect on intra-EU trade and competition*

- (270) When financial aid from a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. In accordance with the settled case-law of the Court of Justice ⁽¹⁶³⁾, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings in markets open to competition.
- (271) More generally, as Ryanair confirmed in its comments, airport managers in the EU compete with one another to attract airlines. Airlines decide which routes to operate and with what frequency based on a number of criteria. These criteria include not only the potential customers they can expect on the routes concerned but also the characteristics of the airports at either end of the route.
- (272) Airlines take into account such criteria as the type of airport services provided, population or economic activity around the airport, congestion, whether there is access by land, and the level of charges and overall commercial conditions for use of airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition ⁽¹⁶⁴⁾.

⁽¹⁶¹⁾ See recital 225 of this Decision.

⁽¹⁶²⁾ See Section 9 of this Decision.

⁽¹⁶³⁾ Judgment of the Court of First Instance in Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

⁽¹⁶⁴⁾ See point 43 of the new guidelines.

- (273) Airlines therefore allocate their resources, in particular in terms of aircraft and crew, to the various routes taking account in particular of the services offered by the airport managers and the prices charged by them for their services.
- (274) As the market for airport services is a market open to competition within the EU, the advantages granted to the successive operators of Angoulême airport are therefore likely to affect trade between Member States by artificially increasing the range of airport services provided there compared with normal market conditions. The Commission accordingly finds that the measures at issue are likely to distort competition and affect trade within the EU.

8.1.5. *Conclusion on the existence of aid*

- (275) In the light of all the considerations set out above, the Commission concludes as follows:
- given the specific characteristics of Angoulême airport, France made no manifest error of assessment in defining the management tasks linked solely to keeping the airport operational and ensuring the accessibility of its infrastructure as an SGEI for all the periods under review in this Decision,
 - by contrast, the economic development of the airport for commercial purposes cannot be defined as an SGEI for any of the periods concerned,
 - the public compensation awarded to finance the public service tasks that fall within the scope of the SGEI does not satisfy the fourth condition of the *Altmark* ruling for any of the periods covered by this Decision. These measures therefore constitute State aid within the meaning of Article 107(1) TFEU.

8.2. **Compatibility with the internal market of the measures in favour of the airport operators**

- (276) By way of a preliminary remark, it should be pointed out that only the public compensation paid to the successive managers of Angoulême airport for performing SGEI tasks must be assessed for compatibility with the internal market. As stated in recital 225, activities linked to developing the airport's commercial activity, including for the purposes of promoting regional development, cannot be defined as an SGEI. In this case, these activities did not give rise to the payment of compensation to the successive managers of Angoulême airport during the periods covered by this Decision.

8.2.1. *Compatibility of the aid granted to the airport operators*

- (277) In the Commission's view, the SGEI Decision of 2011 applies to the aid granted during all the periods covered by this Decision. Under Article 10(b) of the 2011 SGEI Decision, 'any aid put into effect before [31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempt from the requirement of prior notification'.
- (278) However, Article 4(f) of the 2011 SGEI Decision, which provides that the entrustment act must make explicit reference to that Decision, cannot be applied in this instance. As the aid at issue was granted before the entry into force of the 2011 SGEI Decision, it is impossible to require the entrustment acts concerned to refer to that Decision, without rendering Article 10(b) devoid of any useful effect. Furthermore, in the interests of procedural efficiency, the Commission considers that it can examine the application of the 2011 SGEI Decision to the aid granted before 31 January 2012 without first examining whether this aid was incompatible with Decision 2005/842/EC. The purpose of Article 10(b) of the 2011 SGEI Decision is to extend the scope of the Decision to incompatible aid granted before its entry into force, without excluding aid that might have been found compatible under Decision 2005/842/EC.

8.2.1.1. *Condition of scope*

- (279) Under the 2011 SGEI Decision, compensation for the provision of public services granted to undertakings entrusted with an SGEI may be regarded as compatible with the internal market if granted to an airport with an average annual traffic of no more than 200 000 passengers during the two financial years preceding that in which the service of general economic interest was assigned. The annual traffic at Angoulême airport did not exceed 200 000 passengers at any point between 2000 and 2012.

- (280) The measures at issue therefore fall within the scope of the 2011 SGEI Decision and must be assessed in the light of the conditions laid down therein.

8.2.1.2. Condition of entrustment (Article 4 of the 2011 SGEI Decision)

- (281) It follows from the Commission's assessment of compliance with the first and second *Altmark* criteria that a genuine SGEI was entrusted to the managers of Angoulême airport and that the conditions relating to the existence of an entrustment act were satisfied. Only airport management tasks related solely to keeping the airport operational and to infrastructure accessibility can be defined as an SGEI.

8.2.1.3. Condition of compensation (Articles 5 and 6 of the 2011 SGEI Decision)

(a) Periods 2002-2006 and 2007-2011

- (282) Under Article 5(1) of the 2011 SGEI Decision, the amount of compensation may not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit. In the case at hand, the compensation is limited to the necessary costs of discharging the public service by the procedure for defining the budget allocated to the airport. Point 2.6 of the circular describing this procedure requires Angoulême CCI, for the purposes of preparing the budget, to determine: (i) the state of operating transactions; (ii) the state of self-financing capacity; and (iii) the state of capital transactions. In addition, a number of documents have to be annexed to the budget proposal for approval (schedule of services provided and interdepartmental contributions and the schedule of employees and wage bill, etc.). The set of controls in place prior to the preparation of the budget is such as to ensure in advance that it is limited to what is necessary and justified in the light of Angoulême CCI's tasks. The information submitted by the French authorities shows that the aid granted served only to compensate for the operating deficit associated with the management of Angoulême airport. In addition the arrangements established by SMAC's statutes for monitoring the implemented budget *ex post* were such as to prevent any overcompensation. As a result, the amount of compensation did not exceed what was necessary to cover the costs incurred in discharging the public service obligations.
- (283) Furthermore, the existence of separate accounts meant that the activity of managing Angoulême airport could be kept separate from an accounting point of view. The CCI-airport accounts had a separate item for the activities of the airport. This was sufficient to ensure that there was no cross-subsidising to the benefit of other activities. The airport's accounts and budgets were also submitted to the Civil Aviation Authority, which had to deliver an opinion to the authority exercising supervision over Angoulême CCI before the accounts and budgets could be approved, the state being the conceding authority for the airport. The compensation was therefore actually used for the provision of the service concerned and the public authorities had put a procedure in place to ensure that there was no overcompensation. The Commission would none the less point out that this assessment does not apply to the costs incurred in relation to the activity of Ryanair, which was part of the commercial development task ⁽¹⁶⁵⁾.
- (284) Lastly, the Commission would point out that the information submitted by the French authorities demonstrates that the aid at issue served only to compensate for the airport's operating deficit during the relevant period and that the airport manager did not make any profit from it.

(b) Period starting on 1 January 2012

- (285) The invitation to tender stated quite clearly that the tenderer should set the remuneration for service provision for non-commercial operation (baseline scenario) and commercial operation (proactive scenario). The tenderer also had to set the maximum guarantee sought from SMAC for balancing the operating account in the two scenarios. SMAC also included in the invitation to tender a performance incentive clause (50%/50 %) in the event that SMAC's contribution was lower than the ceiling set in the bid; this clause is included in the specification. Moreover, as pointed out in recital 262 above, the baseline scenario offered by SNC-Lavalin, which was more advantageous than the baseline scenario proposed by APCO, was such as to ensure accessibility and the maintenance of operational conditions at Angoulême airport.
- (286) In addition, the compensation is calculated primarily with reference to the deficit actually incurred within a separate account for the airport ⁽¹⁶⁶⁾. The operator is required to have this separate account certified by an auditor and to submit its annual accounts to SMAC.

⁽¹⁶⁵⁾ See recital 225 of this Decision.

⁽¹⁶⁶⁾ Article 14-1 of the specification and technical specifications.

- (287) There is also provision for the public balancing contribution paid to SNC-Lavalin to be reduced if the amount required to balance the airport's accounts proves to be lower than the ceiling set in the accepted bid. This clawback arrangement reduces the risk of overcompensation *ex post*.
- (288) As regards the regular checks to avoid overcompensation, the provisions of Title III of the tender specification set out the arrangements for monitoring by SMAC to ensure that there is no overcompensation involved in the contribution from SMAC as against the costs of performing the general economic interest tasks entrusted to SNC-Lavalin.
- (289) As regards the compensation amount, the Commission would none the less point out that the contractual balance of the contract concluded between SMAC and SNC-Lavalin is based, not on the prior determination of a reasonable profit, but on a flat-rate remuneration. The Commission also takes note of the airport's very limited traffic to date, the mechanisms in place to calculate and monitor the compensation, the inclusion of the performance incentive clause referred to above and the fact that SNC-Lavalin's bid was the lowest in financial terms. In view of these factors, the Commission finds that the compensation granted under the contract between SMAC and SNC-Lavalin can be declared compatible with the internal market on condition that the French authorities ensure that the total amount of compensation paid to SNC-Lavalin over the duration of the contract does not exceed what is necessary to cover the net costs incurred in discharging the public service obligations only, excluding the costs of the airport's commercial development but including a reasonable rate of return on the capital invested.
- (290) In this connection, the French authorities are required to submit to the Commission within four months of the expiry of the contract between SMAC and SNC-Lavalin a report demonstrating that the amount of compensation granted to the latter, including a reasonable rate of return on the capital invested, has complied with Article 5 of the 2011 SGEI over the entire duration of the contract.

8.2.2. *Conclusion on the compatibility of the aid between 2002 and 2017*

- (291) In the light of the above, the Commission concludes that the aid already granted for the management of Angoulême airport since 2002, irrespective of who the managers were, is compatible with the internal market pursuant to Article 106(2) TFEU and the 2011 SGEI Decision⁽¹⁶⁷⁾.
- (292) However, as far as SNC-Lavalin is concerned, the Commission finds that the compensation granted under the contract between SMAC and SNC-Lavalin can be declared compatible with the internal market on condition that the French authorities demonstrate to the Commission that the total amount of compensation paid to SNC-Lavalin over the entire duration of the contract does not exceed what is necessary to cover the net costs incurred in discharging the public service obligations only, excluding the costs of the airport's commercial development but including a reasonable rate of return on the capital invested.
- (293) In this connection, the French authorities are required to submit to the Commission within four months of the expiry of the contract between SMAC and SNC-Lavalin a report demonstrating that the amount of compensation granted to the latter, including a reasonable rate of return on the capital invested, has complied with Article 5 of the 2011 SGEI over the entire duration of the contract.

9. ASSESSMENT OF THE AID MEASURES IN FAVOUR OF RYANAIR AND AMS

9.1. Existence of aid within the meaning of Article 107(1) TFEU

- (294) Although the 2008 agreements were formally concluded between SMAC and Ryanair/AMS, the Commission considers that, in order to assess the aid measures granted to Ryanair and AMS, the behaviour of SMAC and CCI-airport should be evaluated jointly. Indeed, as it has shown previously in recital 178, the Commission considers that SMAC and CCI-airport jointly operated Angoulême airport between 2007 and 2011.

⁽¹⁶⁷⁾ The Commission deems it expedient to point out that the aid measures that fall within the scope of the 2005 SGEI Decision would also be compatible with the internal market under that Decision and on the same grounds. For the purposes of the assessment in this case, the conditions for compatibility under the 2005 SGEI Decision are not substantially different from those of the 2011 Decision.

9.1.1. *Concepts of undertaking and economic activity*

- (295) For the purposes of determining whether the measures of the 2008 agreements constitute State aid, it is necessary to determine whether the beneficiaries, Ryanair and AMS, are undertakings within the meaning of Article 107(1) TFEU. It cannot be disputed that these two companies are entities engaged in the provision of air transport and advertising services. As such, they are engaged in economic activities.

9.1.2. *State resources and imputability to the state*

9.1.2.1. *Presence of state resources*

- (296) The 2008 agreements were concluded directly by SMAC. In the light of the evidence set out above in recitals 203 to 205 of this Decision, the Commission considers that the resources of SMAC constitute state resources.

9.1.2.2. *Imputability of the measures to the state*

- (297) SMAC's decision authorising signature of the 2008 agreements was approved unanimously by the public bodies that are members of SMAC, which is itself directly or indirectly composed of local authorities and chambers of commerce and industry. The Commission considers that it follows from the characteristics of those bodies that decisions of SMAC concerning airport activities are imputable to the state ⁽¹⁶⁸⁾.
- (298) Consequently, the Commission considers that the conclusion of the agreements entails the use of state resources within the meaning of Article 107(1) TFEU and that the decisions to conclude them are imputable to the state.

9.1.3. *Selective advantage*

- (299) In determining whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives a selective economic advantage which it would not have obtained under normal market conditions ⁽¹⁶⁹⁾.
- (300) In this regard, the Commission notes first of all that the measures at issue are selective in that they relate exclusively to Ryanair. The 2008 agreements were concluded prior to the publication of the public tariff decisions mentioning a similar measure, which were applicable from 1 March 2009, to all companies wishing to operate out of Angoulême airport. Moreover, the award of the London Court of International Arbitration (LCIA) of 18 June 2012 concerning Ryanair's termination of the 2008 agreements shows that bilateral negotiations took place between representatives of Ryanair and Angoulême CCI on the conditions for Ryanair's activities at Angoulême airport. The negotiations took place in September 2009, when Ryanair's representatives informed the representatives of CCI-airport of the financial difficulties encountered by the airline on the London Stansted-Angoulême route. The discussions show that the airport manager and Ryanair viewed their relations as being exclusive, since the former ruled out contacting another airline.
- (301) Secondly, in order to determine whether the agreements concluded conferred an economic advantage on Ryanair, the Commission must assess whether a hypothetical market economy operator (MEO) acting in the stead of SMAC and CCI-airport and guided by prospects of profitability would have concluded similar agreements.
- (302) In order to apply this principle, taking into account the facts of this case, the Commission considers that the following questions must first be answered:
- Should the marketing services agreement and the airport services agreement, which were signed at the same time, be analysed separately or together?
 - What benefits could a hypothetical MEO acting in the stead of CCI-airport have expected to gain from the marketing service agreements?

⁽¹⁶⁸⁾ See Section 8.1.2.2 of this Decision.

⁽¹⁶⁹⁾ See, in particular, judgment of the Court of Justice in Case C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41.

— For the purposes of applying the MEO principle, what is the relevance of comparing the terms of the airport services agreements referred to in the formal investigation procedure with the airport charges billed in other airports?

- (303) After answering these questions, the next step for the Commission is to apply the MEO principle to the various measures at issue.

9.1.3.1. Joint analysis of the Marketing Services Agreement and the Airport Services Agreement

- (304) In its decision to open the procedure, the Commission considered as a preliminary point that the airport services agreement and the marketing services agreement concluded between SMAC and Ryanair and AMS should be analysed jointly for the purposes of the application of the market economy operator principle. It is worth recalling in this connection that, according to the Court of First Instance⁽¹⁷⁰⁾, it is necessary to envisage the commercial transaction as a whole in order to determine whether a public entity has acted as a rational operator in a market economy. The Commission must therefore, when assessing the measures at issue, examine all the relevant features of the measures and their context.
- (305) In its comments, France supported the approach adopted by the Commission in its opening decision, which consisted in joint analysis of the airport services agreement and the marketing services agreement, which were concluded at the same time. However, some interested parties, such as Ryanair, have challenged this approach, arguing that the marketing services agreements must be analysed separately.
- (306) However, the Commission considers that analysis of all the elements of the case confirms the correctness of the approach adopted in the opening decision (see recitals 215 to 220 of the opening decision). It should be noted in this connection that none of the information submitted during the formal investigation procedure has cast doubt on the Commission's preliminary analysis.
- (307) Firstly, the marketing services agreement was concluded on the same date as the airport services agreement, and the two agreements were concluded between the same parties. AMS is a wholly-owned subsidiary of Ryanair and its directors are senior Ryanair executives. Thus, Ryanair and AMS constitute a single economic entity in the sense that AMS acts in accordance with the interests of Ryanair and under its control, and the profits it generates are destined for Ryanair, in the form of dividends or an increase in the value of the company. Moreover, as will be explained in detail below, the marketing services agreement is linked to Ryanair's operation of the route out of Angoulême airport. The marketing services agreement states that it stems from Ryanair's commitment to operate this route and it was also concluded at the same time as the airport services agreement between SMAC and Ryanair relating to the route. Consequently, the mere fact that SMAC concluded the marketing services agreements with AMS and not with Ryanair cannot prevent a marketing services agreement and an airport services agreement concluded at the same time from being considered as forming a single transaction.
- (308) Moreover, the Commission recalls that the marketing services agreement is linked to Ryanair's operation of air services to Angoulême airport. The Commission considers that the commercial relationship between SMAC and Ryanair, on the one hand, and SMAC and AMS, on the other, could be envisaged only in the unique context of Ryanair's launch of the Angoulême-London Stansted route. In this respect, it is important to note that an audit carried out on behalf of the Charente local authorities⁽¹⁷¹⁾ presents Ryanair as the direct recipient of the 'marketing aid' that the airline demands for the launch of a possible low-cost service. Thus, the French authorities point out that the 2008 agreements constitute a coherent and comprehensive contractual arrangement that is indivisible. It thus appears that, from the point of view of SMAC, there is an inseparable link between the marketing services agreement and the air services operated by Ryanair to Angoulême airport.
- (309) That assessment is reinforced by the provisions of the marketing services agreement, from which it is apparent that the agreement is based on Ryanair's commitment to operate the service that is, at the same time, the subject-matter of the airport services agreement. Article 1 of the marketing services agreement, relating to its object, stipulates that 'this agreement is based on Ryanair's commitment to operate an air service between Angoulême airport and London. The initial schedule of flights will be three flights a week during the spring/summer period, unless it is impossible due to force majeure'. The Commission also notes that certain clauses of the marketing services agreement make direct reference to Ryanair, to the point of considering it as a party to the agreement, even though the consensus was reached between SMAC and AMS. For example, Article 7 of the marketing services agreement provides that 'if the agreement is terminated by Ryanair at any time before the end of the third year of the agreement, Ryanair shall pay a

⁽¹⁷⁰⁾ Judgment of the Court of First Instance in Case T-196/04 Ryanair v Commission [2008] ECR II-3643.

⁽¹⁷¹⁾ Study carried out by Alliance ELSA dated 14 June 2006 on the outlook for Angoulême Brie-Champnier and Cognac-Chanteaubernard airports after 1 January 2007.

penalty of EUR 50 000 for the fourth year and EUR 25 000 for the fifth year, in proportion to each year and to the flight schedule'. Furthermore, the presentation report sent to the tenders committee states that SNC-Lavalin proposed to launch a new route to the British Isles in 2013 operated by a low-cost airline if SMAC granted the marketing aid requested, which it put at EUR 30-35/passenger departure. Therefore these arrangements establish a link between the choices made in the management of Angoulême airport and the marketing services agreement.

- (310) Ryanair's assertion made in the course of the present procedure that the marketing services agreement concluded between the airport and AMS was not intended to increase the occupancy rate of flights operated by Ryanair on the Angoulême-London route cannot call that conclusion into question. The purpose of the marketing agreement was to provide advertising space on the Ryanair website in order to promote Angoulême as a travel destination among visitors to the Ryanair site and hence among the customers of the airline. Assuming Ryanair's claim to be true and that the marketing agreement was unlikely to increase the number of passengers carried by Ryanair to/from Angoulême, it is difficult to understand what the advantage for the airport could be in concluding a marketing agreement of this kind.
- (311) Accordingly, the costs associated with the marketing services agreement were, for SMAC, attributable to the opening of the route between Angoulême and London Stansted. From SMAC's point of view, the benefits of the agreement could derive only from additional revenues linked to the passenger traffic on the Angoulême-London Stansted route, which was the only route operated by Ryanair to Angoulême airport.
- (312) The marketing services agreement is therefore inseparable from the airport services agreement concluded in parallel and the air transport services that constitute its subject-matter. The facts presented above show, moreover, that, in the absence of the routes in question (and hence of the airport services agreement relating to them), the marketing services agreement would not have made sound economic sense for Angoulême airport and consequently would not have been concluded. At that time, Ryanair was the only large airline that was flying to the airport and that could have increased traffic. If the airport wanted to promote traffic on other routes served by Ryanair's competitor airlines, it is reasonable to assume that it would not have advertised on Ryanair's website. As mentioned above, the marketing services agreement explicitly states that it stems from Ryanair's commitment to operate an air service between Angoulême airport and London Stansted and it provides, moreover, for marketing services that are essentially intended to promote that route.
- (313) In conclusion, in view of the foregoing, the Commission considers that the marketing services and airport services agreements ('the 2008 agreements'), which form a single transaction, should be analysed jointly in order to determine whether they constitute State aid.

9.1.3.2. The benefits that an MEO could have expected to gain from the marketing services agreements and the price that it would have been willing to pay for these services

- (314) In order to be able to apply the MEO principle to the case in point, the behaviour of CCI Angoulême and SMAC as signatories of the 2008 agreements must be compared with that of a hypothetical MEO in charge of operating Angoulême airport.
- (315) In analysing the transaction in question, an assessment should be made of the benefits that this hypothetical MEO, motivated by the prospect of profits, could gain from the marketing services. This analysis should not take into account the general impact of such services on tourism and the region's economic activity. Only the impact of these services on the airport's profitability counts, as this would be the only concern for a hypothetical MEO.
- (316) Thus, the marketing services are likely to stimulate passenger traffic on the air routes covered by the marketing services agreements and the corresponding airport services agreements since they are designed to promote these air routes. Although this impact will mainly benefit the airline concerned, it may also be of benefit to the airport manager. An increase in passenger traffic may lead to an increase in revenues generated by certain airport charges for the airport manager, as well as an increase in revenues from non-flight services, in particular from car parks, restaurants and other businesses.

- (317) There can therefore be no doubt that an MEO operating Angoulême airport in the stead of CCI-airport and SMAC would have taken this positive effect into account when considering entering into the marketing services agreement and the corresponding airport services agreement. The MEO would have taken into account the impact of the air route in question on future revenues and costs by, in this case, estimating the number of passengers using these routes, which would have reflected the positive effect of the marketing services. Moreover, this effect would have been evaluated for the entire term of operation of the air routes in question, as set out in the airport services agreement and the marketing services agreement.
- (318) When airport managers conclude an agreement for the promotion of certain air routes, it is possible for them to forecast the load ratio (or the load factor)⁽¹⁷²⁾ for the air routes in question and to take this into account when assessing future revenues. On this point, the Commission notes Ryanair's opinion that marketing services agreements do not just generate costs for an airport manager; they also bring possible benefits with them.
- (319) It is also necessary to determine whether other benefits could reasonably be expected and quantified for a hypothetical MEO operating Angoulême airport in the stead of CCI-airport and SMAC, i.e. other than the benefits from the positive effect on passenger traffic on the air routes covered by the marketing services agreement during the term of operation of these routes, as set out in the marketing services agreement or the airport services agreement.
- (320) Some interested parties support this argument, including Ryanair in its study of 17 January 2014. This study of 17 January 2014 is based on the premise that marketing services acquired by an airport manager, such as CCI-airport and SMAC, will help to improve the airport's brand image and, as a result, to sustainably increase the number of passengers using this airport and not just the numbers on the air routes covered by the marketing services agreement and the airport services agreement for the term of operation set out in these agreements. In particular, Ryanair found in its study that these marketing services will have a lasting positive impact on passenger traffic in the airport even after the marketing services agreement has expired.
- (321) It should first be noted that there is nothing to suggest that, when the marketing services agreement covered by the formal investigation procedure was entered into, the airport manager ever considered, still less quantified, the marketing services agreement's possible beneficial effects on air routes additional to those covered by the agreement, or the possibility of such effects continuing after the agreement had expired. Moreover, France did not suggest any method for estimating the possible value that a hypothetical MEO operating Angoulême airport in the stead of CCI-airport and SMAC could have placed on such effects when assessing whether or not to enter into the 2008 agreements. Accordingly, these effects, even if they were proved, were in any case not taken into account by the airport managers when signing the agreements with AMS and Ryanair.
- (322) In addition, from the information available, the sustainable nature of these effects also appears to be highly uncertain. It is possible that advertising Angoulême and the region on Ryanair's internet site may have encouraged people visiting this site to buy Ryanair tickets to Angoulême when the advertising was first posted or shortly thereafter. However, it is unlikely that the effect of this advertising on visitors lasted or had an influence on plane ticket purchases for more than a few weeks after its being posted on the Ryanair internet site. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more advertising media to which consumers are regularly exposed over a given period. For example, an advertising campaign involving mainstream TV and radio stations, popular internet sites and/or various advertising posters displayed outside or inside public places could have a sustainable effect if consumers are regularly exposed to these media. However, promotional activities limited to just Ryanair's internet site are unlikely to have an effect that lasts much past the end of the promotional campaign. Furthermore, even the holders of well-known trade marks continue to promote their trade marks through marketing campaigns, which would have no rational economic justification if Ryanair's line of argument were to be followed.
- (323) It is very likely that most people do not visit Ryanair's internet site frequently enough for the advertising there alone to leave them with an indelible memory of the promotion of a region on that site. This observation is well supported by two factors. First, under the marketing services agreement, the promotion of the Angoulême region on the homepage of the Ryanair site amounted to five paragraphs totalling 150 words in the 'Top Five Things To Do' section for the destination of Angoulême-Cognac and the presence of a simple link on the home page of www.ryanair.com to a site designated by SMAC during limited or even very short periods (24, 17 and 12 days a year over the first three years). Both the nature of these promotional activities (the presence of a simple link of limited

⁽¹⁷²⁾ The load ratio or load factor is defined as the proportion of places filled in the aircraft in operation on the air route in question.

promotional value) and their short lifespan would have severely limited the impact of these activities after the end of the promotion, all the more so since these activities were limited to just the Ryanair internet site and were not relayed by any other media. Secondly, the other marketing activities provided for in the agreement entered into with AMS were only in relation to the internet page for the destination of Angoulême. It is very likely that most people do not visit this page often, and if they do so, it is only because they are already potentially interested in this destination.

- (324) Thus, even if the marketing services did stimulate passenger traffic on the air routes covered by the marketing services agreement for their period of implementation, it is very likely that this effect was zero or negligible after this period and that the effect on other air routes was similarly insignificant.
- (325) Moreover, in the Ryanair studies of 17 and 31 January 2014, it was established that the likelihood of these benefits going beyond the air routes covered by these agreements or lasting after the term of operation for these routes, as set out in the marketing services and airport services agreements, was extremely small and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.
- (326) For example, according to the study of 17 January 2014 ‘... future incremental profits beyond the scheduled expiry of the airport services agreement are by nature uncertain’. Furthermore, this study proposes two methods of assessing *ex ante* the positive effects of marketing services agreements: an approach based on cash flow and an approach based on capitalisation.
- (327) The cash flow approach consists in evaluating the benefits of marketing services and airport services agreements by estimating the future revenues which may be generated by the airport manager through the marketing services and by the airport services agreements, less corresponding costs. The capitalisation approach consists in treating the improvement in the brand image of the airport through the marketing services as an intangible asset, acquired for the price laid down in the marketing services agreement.
- (328) However, the study emphasises the extent of the difficulties raised by the capitalisation approach, thereby demonstrating the lack of reliability of the results that such a method can produce, and the study itself prefers the cash-flow approach. In particular, the study shows: ‘The capitalisation approach should take into account only the proportion of marketing expenditure attributable to the intangible assets of an airport. However, it may be difficult to identify the proportion of marketing spending intended to generate future income for the airport (i.e. an investment in the airport’s intangible asset base), as opposed to those that generate current income for the airport’. It also stresses that, ‘to implement the capitalisation approach, it is necessary to estimate the average period during which an airport is able to retain a customer because of the AMS marketing campaign. In practice it would be very difficult to estimate the average length of customer retention following an AMS campaign owing to lack of adequate data’.
- (329) The study of 31 January 2014 proposed a practical application of the cash-flow approach. Under this approach, the benefits of the marketing services and airport services agreements that last even after the marketing services agreement has expired are expressed as a ‘final value’, calculated on the expiry date of the agreement. This final value is based on the incremental profits expected from the airport services and marketing services agreements in the final year of application of the airport services agreement. These profits are projected into the following period, the term of which is equal to the term of the airport services agreement, adjusted by the growth rate of the air transport market in Europe and a probability factor designed to reflect the capacity of the airport services agreement and the marketing services agreement to contribute to the airport’s profits after they have expired. According to the study of 31 January 2014, the capacity for producing lasting benefits depends on a number of factors ‘including greater prominence and a stronger brand, alongside network externalities and repeat passengers’, although no further details of these are given. Moreover, this method takes into account a discount rate which reflects capital costs.
- (330) The study suggests a probability factor of 30 %, which it considers prudent. However, this very theoretical study does not provide any serious evidence for this factor, neither quantitatively nor qualitatively. It does not base itself on any facts relating to Ryanair’s activities, air transport markets or airport services to substantiate this rate of 30 %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are supposed to extend the benefits of the airport services agreement and the market services agreement beyond their expiry dates. Finally, it does not in any way base itself on the specific content of the marketing services provided for in the various agreements with AMS when analysing to what extent these services could influence the factors mentioned above.

- (331) Moreover, it does not prove that there is any likelihood that, on expiry of an airport services agreement and a marketing services agreement, the profits generated by the agreements for the airport manager in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport services agreement and a marketing services agreement for a given airport.
- (332) A 'final value' calculated using the method suggested by Ryanair would therefore be highly unlikely to be taken into account by a prudent MEO when deciding whether or not to enter into an agreement.
- (333) The study of 31 January 2014 therefore shows that a cash flow method would lead to only very imprecise and unreliable results, as would the capitalisation method.
- (334) Moreover, neither France nor any interested party has provided any evidence that the method put forward by Ryanair in this study, or any other method aimed at quantifying the benefits outliving the airport services agreements and marketing services agreements, has been successfully implemented by the managers of regional airports comparable to Angoulême airport. France has not commented on the studies of 17 and 31 January 2014 and has therefore not approved their conclusions in the course of the present procedure.
- (335) Moreover, as stated above, the marketing services considered by the formal investigation procedure clearly target persons likely to use the route covered by the marketing services agreement. If this route is not renewed on expiry of the airport services agreement, it is extremely unlikely that marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport manager to assess the likelihood of an airline continuing to operate a route on expiry of the term to which it has committed itself in the airport services agreement. Low-cost airlines in particular have demonstrated very dynamic management of the opening and closure of routes. Therefore, when entering into a transaction such as the one being examined in this formal investigation procedure, a prudent MEO would not count on an airline extending operation of the relevant route on expiry of the agreement.
- (336) Furthermore, and for the sake of completeness, it should be observed that a terminal value calculated in accordance with the methodology proposed by Ryanair in the study of 31 January 2014 is positive (and therefore has a positive effect on the expected profitability of the airport services agreement and the marketing services agreement) only when the incremental profits expected from such agreements during the last year of application of the airport services agreement are positive. The methodology consists in starting with the expected incremental profit for the last year of application of the airport services agreement and projecting it into the future by applying two factors. The first factor is the overall growth of the European aviation market and reflects the expected traffic growth. The second is a factor of 30 % representing approximately the probability that the execution of the recently expired agreements promotes the future conclusion of similar agreements likely to generate similar financial flows. Thus, if the expected future incremental profit for the last year of application of the airport services agreement is negative, the terminal value will also be negative, reflecting the fact that agreements similar to those which have recently expired would, like them, harm the profitability of the airport each year.
- (337) The study of 31 January 2014 envisages this case very briefly, confining itself to indicating in a footnote, without comments or explanations: '... no terminal value can be calculated if the incremental profits net of AMS payments are negative in the final year of the period in question' ⁽¹⁷³⁾. However, as will be shown below, all the agreements concerned in this case lead to forecast incremental cash-flows that are negative each year — and not only globally — in terms of net discounted value. Thus, for these agreements, a 'terminal value' calculated according to the methodology proposed by Ryanair would be zero or even negative. Taking account of such a terminal value would not therefore call into question the finding that the various agreements involve an economic advantage.
- (338) To conclude, it is clear from the above that the only benefit that a prudent MEO would expect from a marketing services agreement and would quantify when deciding on whether or not to enter into such an agreement, together with an airport services agreement, would be that the marketing services would have a positive effect on the number of passengers using the routes covered by the agreements in question for the term of operation of these routes, as set out in the agreements. The Commission considers that the other benefits would be deemed too uncertain to be regarded as quantified, and indeed such theoretical benefits were not taken into account by the managers of Angoulême airport at the time of conclusion of the agreements in question.

⁽¹⁷³⁾ Study of 31 January 2014, footnote 17.

9.1.3.3. The comparability of Angoulême airport to other European airports

- (339) Under the new guidelines for applying the MEO principle, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price, or it can be demonstrated through an *ex ante* analysis, that is to say one founded on information available when the aid is granted and on developments foreseeable at the time, that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport ⁽¹⁷⁴⁾.
- (340) Furthermore, according to the new guidelines, 'when assessing airport/airline arrangements, the Commission will also take into account the extent to which those agreements may be regarded as forming part of an overall strategy of the airport expected to lead to profitability at least in the long term' ⁽¹⁷⁵⁾. However, under the first approach (a comparison with a 'market price'), the Commission doubts that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports and considers an *ex ante* supplementary profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines ⁽¹⁷⁶⁾.
- (341) It should be noted here that, in general, the application of the MEO principle based on an average price for other similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method cannot have the same relevance in the case of airport services. The reason for this is that the cost and revenues structure tends to vary greatly from one airport to another. This is because costs and revenues depend on how highly developed an airport is, the number of airlines using the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another, and any debts or obligations entered into by the airport in the past ⁽¹⁷⁷⁾.
- (342) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in the case in point, commercial practices between airports and airlines are not based on a list of public prices for individual services. Rather, these commercial relations are very varied. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.
- (343) Ryanair considers that it is possible to apply the informed investor in a market economy principle by using certain European airports as a benchmark. In this connection, it considers that some European airports are substitutable for Angoulême airport because of their similarities ⁽¹⁷⁸⁾. The study provided to the Commission in this regard compares the charges paid by Ryanair to Angoulême airport with the charges that the airline pays at these airports considered to be comparable. Ryanair claims that the charges applied by the other airports are lower than those of Angoulême airport.
- (344) However, the Commission considers that the methodology adopted for the above study is inoperative in so far as it limits itself to the benefits and payments resulting from the airport services agreement without taking into account the marketing services agreement. However, as indicated above, the Commission considers that the market economy operator principle must be applied after a joint analysis of the two linked contractual instruments. Accordingly, the findings of the comparative analysis provided by Ryanair cannot be accepted.
- (345) Thus, the charges paid by Ryanair for airport services at other airports cannot serve as benchmark for the application of the market economy operator principle.

⁽¹⁷⁴⁾ Point 53 of the new guidelines.

⁽¹⁷⁵⁾ Point 66 of the new guidelines.

⁽¹⁷⁶⁾ See points 59 and 61 of the new guidelines.

⁽¹⁷⁷⁾ See the Commission decision cited in footnote 69, recitals 88 and 89.

⁽¹⁷⁸⁾ Ryanair bases its analysis on a study produced by Oxera dated 25 June 2012.

- (346) Furthermore, the Commission notes that the price actually paid by Ryanair for use of the airport services of Angoulême airport was negative during the years 2008 and 2009. Admittedly, a negative price granted by an airport manager to an airline as a level of airport charges which does not cover the costs of the services involved may be consistent with the rational calculation of a market economy operator. This is, however, subject to the condition that that negative price is offset, over a period of time, by an expected increase in the revenues from the operation of an airline, whether these revenues have an aeronautical or a non-aeronautical origin. In the present case, the non-aeronautical revenues could not be sufficient and were unlikely to be developed to the extent necessary and sufficient during the five-year term of the airport services agreement.
- (347) Finally, airports for which a negative price might be justified are few in number and do not feature in the sample selected. In this regard, the Commission considers that the characteristics of the airports that make up the sample are too disparate to provide a satisfactory basis for analysis ⁽¹⁷⁹⁾.
- (348) Moreover, Ryanair has not shown how the airports mentioned in the study are sufficiently comparable in terms of traffic volume and type of traffic, type and level of airport services, the presence of a large city in the vicinity of the airport, the number of inhabitants in the catchment area, prosperity in the surrounding area, and the existence of different geographical areas likely to attract passengers ⁽¹⁸⁰⁾. Neither France nor any interested party has cited the existence of airports that are sufficiently comparable to Angoulême airport in terms of those various criteria.
- (349) In such conditions, the Commission considers that, in this context and taking into account all the information available to it, there are no grounds for departing from the approach recommended in the new aviation guidelines for applying the MEO principle to relations between airports and airlines, i.e. an *ex ante* analysis of supplementary (or incremental) profitability. This approach is justified by the fact that an airport manager has an objective interest in concluding a transaction with an airline if it can be reasonably expected that this transaction improves its profits (or reduces its losses) compared with a counterfactual situation in which the transaction was not concluded, irrespective of any comparison.

9.1.3.4. Conclusion on the method used for the application of the market economy investor principle

- (350) It follows from all of the foregoing that, to apply the market economy operator principle to the 2008 agreements, the Commission must jointly analyse the marketing services agreement and the airport services agreement concluded simultaneously and must determine whether a hypothetical market economy operator guided by prospects of profitability and managing Angoulême airport in the stead of CCI-airport and SMAC would have concluded such agreements. To this end, it is necessary to assess the incremental profitability of the 2008 agreements throughout their period of application, as the market economy operator would have assessed them when concluding the agreements, by estimating:
- the future incremental traffic expected from the implementation of the 2008 agreements, taking into account the effects of the marketing services on the load factor of the routes covered by the agreement,
 - the future incremental revenues expected from the implementation of the 2008 agreements, including revenues from aeronautical charges and ground handling services generated by the routes covered by these agreements and the non-aeronautical revenues from the additional traffic generated by the implementation of these agreements,
 - the expected future incremental costs of implementing the 2008 agreements, including operating costs and any incremental investment costs generated by the routes covered by these agreements, as well as the costs of marketing services.
- (351) These calculations should provide the future annual flows corresponding to the difference between incremental revenues and costs, to be discounted if necessary with a discount rate reflecting the cost of capital for the airport manager. A positive net discounted value indicates in principle that the relevant agreements do not confer an economic advantage while a negative net discounted value indicates the presence of such an advantage.

⁽¹⁷⁹⁾ One of the comparators chosen is based on classification in the category of airports with a traffic volume of less than 1 000 000 passengers per year. Since the airport charges applied by Angoulême airport are compared to those applied by airports whose annual traffic is several hundred thousand passengers per year, the resulting comparative analysis is made on a basis that is not precise enough to be acceptable.

⁽¹⁸⁰⁾ See point 60 of the new guidelines.

- (352) It should be noted that, in the context of such an assessment, Ryanair's arguments that the price of the marketing services acquired by SMAC is equivalent to or lower than what can be considered a 'market price' for such services is irrelevant. Indeed, a market economy operator guided by prospects of profitability would not be ready to acquire such services, even at a price lower than or equal to the 'market price', if it foresaw that, despite the positive impact of those services on the routes concerned, the incremental costs incurred by the agreements exceeded the incremental revenues in discounted value terms. In such a case, the 'market price' would be beyond its willingness to pay and it would therefore logically be led to waive the benefits in question.
- (353) For the same reasons, the fact that the prices provided for in the airport services agreement may be better than or in line with the prices charged by managers of slightly comparable airports is irrelevant in the context of this analysis, since they cannot be expected to lead to incremental revenues sufficient to cover the incremental costs.

9.1.3.5. Application of the market economy operator principle

- (354) For the purposes of assessing the 2008 agreements and in the light of the foregoing considerations, it should be recalled that both the existence and the amount of aid must be assessed in the light of the situation prevailing at the time of their conclusion ⁽¹⁸¹⁾, and more precisely, taking account of the information available and the developments foreseeable at that time.
- (355) The information provided by the French authorities emphasises that SMAC launched a forward study submitted on 14 June 2006 ⁽¹⁸²⁾. This study focuses on the prospects of Angoulême airport after 1 January 2007. Without going into detail, this document shows the major aggregates associated with the opening of a route operated by Ryanair between Angoulême and London. For an estimated potential traffic of 100 000 passengers per year, the findings of the study are as follows:

	Year 1	Year 2	Year 3
Negative balance of profit-and-loss account	56 000	56 000	56 000
Marketing aid	560 000	560 000	560 000
Annual expenditure charged to SMAC	616 000	616 000	616 000

- (356) This document does not correspond to a business plan in the light of which the Commission could undertake an assessment of compliance with the market economy operator criterion. The reference data used in these forecasts are not specified and the assumptions made are not sufficiently detailed. Moreover, this estimate is made over a three-year period whereas it was established, prior to the conclusion of the 2008 agreements, that they should be implemented over a period of five years. Finally, this study was conducted well ahead of the 2008 agreements. It was not intended to establish whether these agreements with Ryanair/AMS, as envisaged before their conclusion, were sufficiently profitable for the airport manager.
- (357) In any event, the Commission notes that these estimates tend to show that SMAC, as manager of Angoulême airport, did not act in line with the behaviour of a prudent market economy operator. It is clear from that 2006 forward study that SMAC could not already be unaware at that time that the opening of a route between Angoulême and London operated by a low-cost airline would translate into significant operating losses and consequently high financing needs.
- (358) Despite this information that SMAC had at the time of the conclusion of the 2008 agreements, SMAC did not consider it necessary to commission a business plan or any other equivalent prior economic analysis of agreements to be concluded with Ryanair and AMS, in order to support, from an economic point of view, its decision to undertake those commitments.

⁽¹⁸¹⁾ See, for example, judgment of the Court of First Instance in Case T-318/00 Freistaat Thüringen v Commission [2005] ECR II-4179, paragraph 125.

⁽¹⁸²⁾ This study was conducted by Alliance ELSA.

- (359) According to Ryanair, the absence of a business plan at the time of the conclusion of agreements such as those covered by the formal investigation procedure cannot be used as proof of failure to comply with the market economy operator principle.
- (360) The absence of a business plan, or more generally any quantitative cost-benefit analysis carried out prior to the conclusion of an agreement, is a serious indication that the MEO principle was not complied with. This is all the more true in this case since the manager of Angoulême airport possessed, prior to the conclusion of the 2008 agreements, information such as to cast doubt on its economic viability in the event of the conclusion of an agreement to develop a low-cost service to London.
- (361) The Commission considers it necessary to point out in this context that France has not provided any evidence to show that the airport manager carried out an analysis of the risk taken in relation to the profits that could be expected from the 2008 agreements at the time of their conclusion. France argues, instead, that SMAC's decision was based on the wish to ensure the continued existence of Angoulême airport and was guided by a regional development objective. However, this claim is further indication that the conclusion of the 2008 agreements with Ryanair and AMS was not guided principally by prospects of profitability.
- (362) The Commission considers that this conclusion is borne out by its evaluation of what would have been the cost-benefit analysis conducted by a prudent market economy operator in relation to the 2008 agreements.
- (363) To this end, the Commission conducted its own analysis by relying solely on the incremental costs and revenues of the 2008 agreements, as a market economy operator would have evaluated them *a priori*, in accordance with the new guidelines. The assumptions made and the results of the analysis are presented below.
- (364) The Commission considers it worth recalling in the context of this analysis that, following the adoption of the new guidelines, both France and the interested parties were invited to comment on the application to the present case of the provisions of these guidelines (see recitals 8 and 9). In the present case, neither France nor the interested parties contested the substance of the Commission's approach according to which, since it is impossible to define an appropriate benchmark to establish a true market price for the services provided by airports to airlines, the most relevant criterion for the assessment of the arrangements concluded between the two parties is an *ex ante* analysis of their supplementary profitability.
- (a) Time-frame
- (365) When deciding whether or not to conclude an airport services agreement and/or a marketing services agreement, an MEO would have chosen as a time frame for its assessment either the term of the agreements in question or the term stipulated in each agreement taken separately. In other words, it would have assessed the incremental costs and revenues during the term of application of the agreements.
- (366) There does not seem to be any justification for choosing a longer period. On the dates on which the agreements were concluded, a prudent MEO would not have counted on the agreements being renewed once they expired, whether under the same or new terms. This is all the more true since a normally prudent manager could not possibly fail to be aware that low-cost airlines such as Ryanair were and are known for being very responsive to market developments in their business dealings, both when starting up or shutting down routes and when increasing or decreasing the number of flights.
- (367) It should also be noted that, in applying the market economy operator principle, the fact that Ryanair did not operate certain routes throughout the entire period provided for in the 2008 agreements was not taken into account since that factor was neither known nor foreseeable at the time those agreements were concluded.
- (368) In what follows, the Commission will examine the assumptions used to analyse the 2008 agreements concluded with Ryanair/AMS as regards incremental revenues and costs and traffic, before proceeding to present the results of its analysis of these agreements.
- (b) Incremental traffic and forecast number of turnarounds
- (369) The analysis conducted by the Commission is based on the incremental traffic (i.e. the number of additional passengers) that a market economy operator managing Angoulême airport in the stead of SMAC could have estimated when concluding the 2008 agreements. In other words, the aim is to estimate the number of passengers that the manager of Angoulême airport could have expected, in 2008, to use the Angoulême-London service operated by Ryanair during the term of the agreement.

- (370) The incremental traffic forecast was calculated on the basis of the frequencies for the Angoulême-London route as provided for in the airport services and marketing services agreements and the resulting number of annual turnarounds.
- (371) Moreover, the Commission took into account the capacity of the aircraft used by Ryanair, namely Boeing 737-800s configured with 189 seats.
- (372) The Commission thus assumes a load factor of 85 % per flight. It is a hypothesis which is favourable to Ryanair, since an 85 % rate is high. Moreover, this rate is slightly above the average for the flights operated by Ryanair on its network⁽¹⁸³⁾ and equal to or above the load factor proposed by France for the various agreements in its reconstruction of the cost-benefit analyses. However, the Commission considers that this high load factor can be used, even if it constitutes a favourable assumption, to reflect a possible beneficial effect of the marketing services on the routes covered by the different agreements and in the absence of other elements quantifying the foreseeable impact of these services on the load factor.

Where the period of application of an agreement did not coincide with full calendar years, the Commission took it into account by calculating the forecast traffic, for each year of the agreement, on the basis of the number of days of the year the agreement should apply.

(c) Incremental revenues

- (373) As regards the 2008 agreements under analysis, the Commission sought to establish the incremental revenues, i.e. the revenues generated by the transaction, like a market economy operator would have foreseen it.
- (374) In application of the 'single till' principle, the Commission takes the view that aeronautical and non-aeronautical revenues should be taken into account.
- (375) The aeronautical revenues consists of the income from the various fees payable by the airline to the manager of the airport, namely:
- the 'landing charge', i.e. an amount per turnaround,
 - the 'passenger charge', i.e. an amount per passenger, and
 - the charge paid for the ground handling services, which takes the form of a fixed amount per turnaround in the airport services agreement.
- (376) The 2008 agreements set the amount of the passenger and landing charges directly. According to Article 7.1 of the airport services agreement, the amount of the charge per passenger was calculated on the basis of the adopted rates of Angoulême airport. However, Article 7.3 of the airport services agreement provides for promotional discounts applicable during the first three years. These discounts are 57,25 % in the first year, equivalent to EUR 1,18, 48 % in the second year, equivalent to EUR 1,44, and 24 % in the third year, equivalent to EUR 2,10. Furthermore, Article 7.2 of the same agreement fixed the landing charge at EUR 252,29 per landing. The amounts laid down in the agreement have thus been included in the analysis.
- (377) Moreover, according to Article 7.4 of the airport services agreement, the ground handling fee was EUR 195 in the first year. It also provided that the fee was increased to EUR 245 from the second year. This amount was therefore used by the Commission in its analysis.
- (378) In order to calculate the income from the three abovementioned aeronautical charges that a market economy operator would have expected, the Commission used the forecasts for the number of turnarounds (for the landing charge and the ground handling fee) and for additional traffic (for the passenger charge), as determined by the agreement and multiplied by the unit amounts of the fees, as determined above.
- (379) The non-aeronautical revenues are in principle roughly proportional to the number of passengers. The activity of the car parks, restaurants and other shops in the airport fluctuates in line with the number of passengers. The same applies to the revenues collected by the airport manager in connection with those activities. However, in the present case a large share of the non-aeronautical revenues comes from spending by the employees of the manager and of other undertakings when passenger traffic at Angoulême airport is not significant.

⁽¹⁸³⁾ See <http://corporate.ryanair.com/investors/traffic-figures/>

(380) As regards this amount of incremental non-aeronautical revenues, the Commission considers it likely that a reasonable market economy operator would have calculated it, when concluding the agreements, on the basis of the total non-aeronautical revenues of the airport immediately prior to the conclusion of the agreement in question. In the present case, the non-aeronautical revenues is largely generated by the spending of the employees of the manager and of the undertakings based at the airport when the passenger traffic is not significant. Finally, according to the information submitted by France, the sum of the incremental non-aeronautical income coming only from commercial traffic could be estimated at EUR [...] per year. The Commission considers that this estimate is reasonable.

(d) Incremental costs

(381) The incremental costs that could normally be expected from each transaction (including, where relevant, an airport services agreement and a marketing services agreement) by a market economy operator managing the airport instead of the managers of Angoulême airport fall into the three following categories:

- the cost of purchasing the marketing services,
- the incremental investment costs due to the investment made because of the transaction,
- the incremental operating costs, i.e. the operating costs (staff, miscellaneous purchases) likely to be generated by the execution of the transaction.

(382) As regards the costs of the marketing agreements, the Commission took into account the amounts provided for in the marketing services agreement. Article 3.1 of the marketing services agreement concluded with Ryanair provided for marketing services valued at EUR 400 000 in the first year, EUR 300 000 in the second year and EUR 225 000 in the third year. It is therefore those amounts that have been identified by the Commission as the cost of the marketing services.

(383) As with the traffic forecasts, the projected marketing payments do not necessarily represent the amounts actually paid, because certain events occurring after the agreements were concluded could lead to amounts different from those originally planned. This is the case, for example, where the agreement has been terminated early. However, these events should not be taken into account in applying the market economy operator principle since they are subsequent to the conclusion of the agreements. For the purpose of estimating the profitability of the 2008 agreements any market economy operator would refer to the amounts provided for when the agreement was signed.

(384) As regards the incremental investment costs, none have been accepted, since there is nothing in the case file to show that a market economy operator would have expected to carry out certain investments mainly because of the agreements which are the subject of the formal investigation procedure.

(385) In order to estimate the incremental operating costs foreseeable when the 2008 agreements were concluded, the Commission must rely on the analysis of the airport manager, since it was not able to estimate itself how a given agreement may affect the different cost items of the airport.

(386) The Commission notes that the estimate was carried out by CCI-airport and SMAC prior to the signing of the 2008 agreements and was therefore available at the time the agreements in question were concluded.

(e) Presentation of the results regarding the agreements concluded with Ryanair and AMS

(387) Having thus established for the agreement all the incremental revenues and incremental costs that a market economy operator would have foreseen, the Commission is able to determine, for the 2008 agreements and year-by-year throughout their term, the expected incremental flows (revenues minus costs). These results are set out below.

Table 12

The expected incremental flows from the 2008 agreements

	2008	2009	2010	2011	2012
Load factor	0,85	0,85	0,85	0,85	0,85
Passengers per flight	160,65	160,65	160,65	160,65	160,65

	2008	2009	2010	2011	2012
Passengers per turnaround	322	322	322	322	322
Turnarounds from April to October	93	93	93	93	93
Total passengers	29 946	29 946	29 946	29 946	29 946

Fees	2008	2009	2010	2011	2012
Fee per passenger	1,18	1,44	2,1	2,76	2,76
Landing charges per turnaround	252,29	252,29	252,29	252,29	252,29
Handling fee per turnaround	195	245	245	245	245

Incremental revenues	2008	2009	2010	2011	2012
Income from the passenger fee	35 336,28	43 122,24	62 886,6	82 650,96	82 650,96
Income from the landing charge	23 462,97	23 462,97	23 462,97	23 462,97	23 462,97
Income from the handling fee	18 135	22 785	22 785	22 785	22 785
Non-aeronautical revenues	[...]	[...]	[...]	[...]	[...]
Total	[...]	[...]	[...]	[...]	[...]

Incremental costs	2008	2009	2010	2011	2012
Handling and reception	[...]	[...]	[...]	[...]	[...]
<i>Of which: Staff</i>	[...]	[...]	[...]	[...]	[...]
<i>Of which: Other</i>	[...]	[...]	[...]	[...]	[...]
Marketing	400 000	300 000	225 000	0	0
Total	[...]	[...]	[...]	[...]	[...]

	2008	2009	2010	2011	2012
Revenues	[...]	[...]	[...]	[...]	[...]
Expenditures	[...]	[...]	[...]	[...]	[...]
Result	[...]	[...]	[...]	[...]	[...]

- (388) The Commission notes that in the 2008 agreements, all the annual incremental flows are negative, as shown in Table 12, despite the assumptions favourable to Ryanair that the Commission made, particularly as regards the incremental traffic and incremental costs. The Commission also notes that this conclusion would remain valid even if the incremental operating costs are totally excluded and if the only incremental costs used are the purchase costs of the marketing services.
- (389) Consequently, the Commission considers that the 2008 agreements concluded by SMAC with Ryanair and AMS confer an economic advantage on these two companies. As this advantage stems from specific contractual provisions with the airline concerned, it is selective.

9.1.4. *Effect on trade and competition*

- (390) When financial aid granted by a Member State strengthens the position of undertakings compared with other undertakings competing in intra-Community trade, that trade must be regarded as affected by that aid. In accordance with settled case-law⁽¹⁸⁴⁾, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings in markets open to competition.
- (391) Since the entry into force of the third air transport liberalisation package on 1 January 1993⁽¹⁸⁵⁾, air carriers are free to operate flights on intra-Community routes and benefit from unlimited cabotage authorisation. According to the Court of Justice, 'where an undertaking operates in a sector in which there is effective competition from producers from different Member States, any aid granted by the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing on the market prevents competitors from increasing their market share and reduces their chances of increasing their exports'⁽¹⁸⁶⁾.
- (392) In the present case, it must be considered that the measures at issue were likely to reduce the operating costs of an airline and encourage operators to transfer a route from one airport to another airport. Consequently, the Commission considers that the measures in question distort competition and affect trade within the European Union.

9.1.5. *Conclusion on the existence of aid*

- (393) In the light of the foregoing, the Commission considers that Ryanair and AMS benefited from State aid by virtue of the 2008 agreements.

9.2. **Compatibility with the internal market**

- (394) The aid in question constitutes operating aid. Such aid may be declared compatible only in exceptional and duly justified circumstances.
- (395) It is also apparent from the case-law of the Court of Justice⁽¹⁸⁷⁾ that it fell to France to indicate the legal basis on which the aid at issue could be considered compatible with the internal market and to demonstrate that the conditions for such compatibility were met. In the decision opening the procedure, the Commission therefore requested France to indicate potential legal bases for compatibility and to demonstrate that the applicable conditions for compatibility were met, in particular in the event that the aid in question should be considered as start-up aid for the opening of new routes. France, however, has never argued that the measures under assessment constitute start-up aid compatible with the internal market and did not put forward other grounds of compatibility or reasoning on the basis of which a declaration of compatibility could be based. Furthermore, no interested party has adduced sufficient evidence to demonstrate the compatibility of these measures with the internal market.
- (396) The Commission nevertheless considers it useful to examine whether such aid could be declared compatible on the basis of their contribution to the opening of new routes.

⁽¹⁸⁴⁾ Judgment of the Court of First Instance in Case T-214/95 Vlaams Gewest v Commission [1998] ECR II-717.

⁽¹⁸⁵⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

⁽¹⁸⁶⁾ See, in particular, judgment of the Court of Justice in Case C-305/89 Italy v Commission [1991] ECR I-1603.

⁽¹⁸⁷⁾ Judgment of the Court of Justice in Case C-364/90 Italy v Commission [1993] ECR I-2097, paragraph 20.

- (397) In this connection, the new guidelines state: 'As regards start-up aid to airlines, the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014' ⁽¹⁸⁸⁾.
- (398) The 2005 Guidelines provide that 'the Commission will assess the compatibility of all aid to finance airport infrastructure, or start-up aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty, on the basis of these guidelines if payment of the aid started after their publication in the *Official Journal of the European Union*. In other cases, the Commission will carry out an assessment based on the rules applicable when the aid started to be paid' ⁽¹⁸⁹⁾.
- (399) Since the 2008 agreements were concluded after the entry into force of the 2005 Guidelines, these guidelines constitute the applicable legal basis.
- (400) In this regard, point 27 of the 2005 Guidelines states that operating aid granted to airlines (such as start-up aid) can only be declared compatible with the internal market under exceptional circumstances and under strict conditions in underprivileged regions, i.e. regions covered by the derogation set out in Article 107(3)(a) TFEU, the most remote regions and sparsely populated areas.
- (401) Since Angoulême airport is not located in a region of this type, this derogation does not apply to it.
- (402) The Commission notes that neither France nor any interested party has demonstrated the compatibility of these measures with the internal market, on the basis of the 2005 Guidelines or on any other basis.
- (403) Since the criteria laid down in point 79 of the 2005 Guidelines for start-up aid are cumulative, the Commission considers it appropriate to examine the criteria laid down in point 5.2(i) and (k) of the guidelines.
- (404) As regards criterion (i) (business plan demonstrating the viability and an analysis of the impact of the new route on competing routes), the Commission asked France to explain whether such business plans had been prepared, and if so to provide copies. Neither France nor any interested party has reported the existence of such business plans. Furthermore, it is clear from the statements of Ryanair/AMS that no business plan has been prepared showing, over a substantial period, the viability of the route after the aid has been granted. There was no *ex ante* analysis, based on the information available to the airline at the time of the conclusion of the 2008 agreements, establishing the viability of the air service between Angoulême and London-Stansted. Consequently, the criterion referred to in point (i) is not fulfilled.
- (405) Criterion (k) (Appeals) provides that appeal procedures must be provided for at Member State level to ensure that there is no discrimination in the granting of aid. The Commission notes that no appeal procedure was provided for at the time the 2008 agreements were concluded to remedy discrimination in the granting of start-up aid. The criterion in point (k) is therefore not fulfilled either.

9.3. Conclusion

- (406) The 2008 agreements concluded by SMAC with Ryanair and AMS, which are the subject-matter of this procedure, therefore constitute State aid incompatible with the internal market.

10. GENERAL CONCLUSION

- (407) Under Article 108(3) TFEU, Member States must notify any plans to grant or alter aid. The Member State concerned may not put its proposed measures into effect until the procedure has resulted in a final decision. In the present case, the French authorities have not notified the compensation received by the managers of Angoulême airport nor the 2008 agreements. In addition, the aid has been paid before the Commission has taken a final decision on it.

⁽¹⁸⁸⁾ Point 174 of the new guidelines.

⁽¹⁸⁹⁾ Point 85 of the 2005 Guidelines.

- (408) In the light of the above, the Commission considers that the compensation received by Angoulême airport constitutes illegal State aid, which is none the less compatible with the internal market under Article 106(2) TFEU.
- (409) However, the amounts paid under the 2008 agreements in respect of the activity of Ryanair and AMS constitute State aid that is illegal and incompatible with the internal market.

11. RECOVERY

- (410) According to settled case-law, when the Commission finds that aid is incompatible with the internal market, the Commission is competent to decide that the Member State concerned must abolish or alter the aid ⁽¹⁹⁰⁾. According to Article 14 of Council Regulation (EC) No 659/1999 ⁽¹⁹¹⁾, '[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.
- (411) The Commission's objective in requiring the Member State concerned to recover the aid incompatible with the internal market is to restore the previously existing situation ⁽¹⁹²⁾. In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage it enjoyed over its competitors. In this way, the situation prior to payment of the aid is restored ⁽¹⁹³⁾.
- (412) In the present case, it appears that no general principle of EU law would run counter to the recovery of the unlawful aid found to exist. In particular, neither France nor the interested parties presented any arguments to that effect.
- (413) Consequently, France must take all necessary measures to recover from Ryanair and AMS the aid granted illegally through the 2008 agreements.
- (414) The amounts of aid to be recovered must be calculated as follows. The 2008 agreements must be regarded as giving rise to an annual amount of aid for each year during which the agreements were applied. Each of these amounts must be calculated from the negative part of the estimated incremental flows (revenues minus costs) at the time of the conclusion of the 2008 agreements, appearing in Table 12. Those amounts correspond to the sums that would have had to be deducted each year from the amount of marketing services (or that would have had to be added to the airport charges and ground handling charges invoiced to airlines) to ensure that the net discounted value of the agreement is positive, in other words that it is in line with the market economy operator principle.
- (415) In order to take account of the actual advantage received by Ryanair and AMS under the 2008 agreements, the amounts mentioned in the previous recital may be adjusted, in accordance with the supporting evidence provided by France, depending on (i) the difference between the actual payments as established *ex post* which were made by Ryanair in respect of the landing charge, the passenger charge and ground handling services under the airport services agreement, and the forecast flows (*ex ante*) corresponding to these items of revenues and listed in Table 12, and (ii) the difference between the actual marketing payments as established *ex post* which were made to Ryanair and AMS under the marketing services agreement and the corresponding forecast marketing costs (*ex ante*), as indicated in Table 12.
- (416) The Commission also considers that the actual advantage received by Ryanair and AMS is limited to the actual duration of the implementation of the 2008 agreements. After the termination of these agreements, Ryanair and AMS did not receive any payments in the form of marketing payments. Consequently, the amounts of aid calculated as indicated below and relating to the 2008 agreements are reduced to zero for the years when the agreement ceased to apply (in particular due to early termination by mutual agreement between the parties).

⁽¹⁹⁰⁾ See judgment of the Court of Justice in Case C-70/72 Commission v Germany [1973] ECR 813, paragraph 13.

⁽¹⁹¹⁾ Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽¹⁹²⁾ See judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103, paragraph 75.

⁽¹⁹³⁾ Judgment of the Court of Justice in Case C-75/97 Belgium v Commission [1999] ECR I-671, paragraphs 64 and 65.

- (417) Table 13 presents the relevant information concerning the amounts from which the amounts to be recovered are calculated. These amounts are composed of the incremental cash-flow (revenues minus costs) forecasts resulting from the application of the market economy operator principle, but with reductions for the years when the expiry date was not reached.

Table 13

Information on the amounts to be recovered from the 2008 agreements

Indicative amount of aid received under the scheme (EUR) ⁽¹⁾					Indicative amount of aid to be recovered (EUR) (Principal)
2008	2009	2010	2011	2012	
463 066	405 630	0	0	0	868 695

⁽¹⁾ As regards the calculation of interest, the grant of aid is deemed to have taken place on 31 December of the year in question

- (418) As explained above, the Commission considers that, for the purposes of applying the rules on State aid, Ryanair and AMS constitute a single economic entity and that the marketing services agreements and the airport services agreements concluded simultaneously on 8 February 2008 must be regarded as forming a single transaction. Consequently, the Commission considers that Ryanair and AMS are jointly liable for full repayment of the aid received under the 2008 agreements.
- (419) The amount of aid actually paid from 2008 to 2009 under the 2008 agreements comes to a total of approximately EUR 868 695.
- (420) The French authorities must recover the above amount within four months from the date of notification of this Decision.
- (421) In this regard, the French authorities must also add recovery interest to the amount of aid, to be calculated from the date on which the aid concerned was made available to the undertakings, in other words the actual date of each payment of aid, until it has been actually recovered ⁽¹⁹⁴⁾, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁹⁵⁾. Given that, in the present case, the flows that make up the aid are complex and occur on a number of dates during the year, even continuously for certain categories of revenues, the Commission considers that it is acceptable for the calculation of recovery interest to consider that the time of payment of the aid concerned is at the end of the year, i.e. 31 December of each year.
- (422) A Member State encountering unforeseeable difficulties or circumstances overlooked by the Commission may submit those problems for consideration by the Commission together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions ⁽¹⁹⁶⁾ of the TFEU.
- (423) The Commission therefore invites France to submit to it without delay any problems encountered in the implementation of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The payments made by the *département* of Charente, the *Communauté d'agglomération du grand Angoulême* and the *Communauté des communes de Braconnne Charente* under the agreement of 23 May 2002 on the financing conditions for the operation and development of Angoulême Brie Champniers airport and by the *Syndicat mixte des aéroports de Charente* under

⁽¹⁹⁴⁾ See Article 14(2) of Regulation (EC) No 659/99 (cited above).

⁽¹⁹⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁹⁶⁾ See judgments of the Court of Justice in Cases C-94/87 *Commission v Germany* [1989] ECR 175, paragraph 9, and C-348/93 *Commission v Italy* [1995] ECR 673, paragraph 17.

the management subcontracting agreement of 22 January 2009 and the tender document of 8 August 2011 in favour of the Chamber of Commerce and Industry of Angoulême and SNC-Lavalin respectively constitute State aid within the meaning of Article 107(1) TFEU granted unlawfully by France, in breach of Article 108(3) TFEU.

2. The payments made to Ryanair and Airport Marketing Services by the *Syndicat mixte des aéroports de Charente* pursuant to the airport services agreement and the marketing services agreement concluded on 8 February 2008 constitute State aid within the meaning of Article 107(1) TFEU granted unlawfully by France, in breach of Article 108(3) TFEU.

Article 2

1. The payments made by the *département* of Charente, the *Communauté d'agglomération du grand Angoulême* and the *Communauté des communes de Braconne Charente* under the agreement of 23 May 2002 on the financing conditions for the operation and development of Angoulême Brie Champniers airport and by the *Syndicat mixte des aéroports de Charente* under the management subcontracting agreement of 22 January 2009 in favour of the Chamber of Commerce and Industry of Angoulême constitute State aid compatible with the internal market on the basis of Article 106(2) TFEU.

2. The payments made by the *Syndicat mixte des aéroports de Charente* in favour of SNC-Lavalin under the tender document of 8 August 2011 are compatible with the internal market on the basis of Article 106(2) TFEU, provided that France demonstrates to the Commission that the total amount paid over the duration of the agreement does not exceed what is necessary to cover the net costs incurred through discharging the public service obligations alone, excluding any costs relating to the commercial development of the airport, including a reasonable rate of return on the capital invested.

3. France shall communicate to the Commission, within four months of the expiry of the agreement concluded in 2011 between the *Syndicat mixte des aéroports de Charente* and SNC-Lavalin, a report showing that the amount of compensation granted to SNC-Lavalin, including a reasonable rate of return on the capital invested, complies with Article 5 of Decision 2012/21/EU throughout the duration of the agreement.

4. The aid granted in favour of Ryanair and Airport Marketing Services by the *Syndicat mixte des aéroports de Charente* under the airport services agreement and the marketing services agreement concluded on 8 February 2008 with Ryanair and Airport Marketing Services is incompatible with the internal market.

Article 3

1. France shall recover the aid referred to in Article 2(4) from the beneficiaries. Ryanair and Airport Marketing Services are jointly liable for repayment of the aid.

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until the date of their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽¹⁹⁷⁾ amending Regulation (EC) No 794/2004.

4. France shall cancel all outstanding payments of the aid referred to in Article 2(4) with effect from the date of adoption of this Decision.

Article 4

1. The recovery of the aid specified in Article 2(4) shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months following the date of its notification.

⁽¹⁹⁷⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Article 5

1. Within two months following notification of this Decision, France shall submit the following information to the Commission:

- (a) the amounts of aid to be recovered under Article 3;
- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiaries have been given formal notice to repay the aid.

2. France shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the aid referred to in Article 2(4) has been fully recovered. At the Commission's request, it shall immediately submit all information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 23 July 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

COMMISSION DECISION (EU) 2015/1227

of 23 July 2014

on State aid SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia

*(notified under document C(2014) 5085)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof⁽¹⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those Articles⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 25 January 2007, the French authorities notified the Commission, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), of a measure benefiting the company Airport Marketing Services Limited ('AMS') — a wholly-owned subsidiary of the airline Ryanair Limited (hereinafter 'Ryanair') — in the form of a marketing services agreement signed with the latter. This measure was notified as State aid by the French authorities. As the measure had already been implemented by the French authorities, it was recorded by the Commission in the register of unlawful aid under number NN 12/07.
- (2) At the request of the French authorities, meetings were organised with the Commission on 20 February and 16 July 2007.
- (3) By letter of 26 February 2007, the Commission asked the French authorities to provide further information. As no response was received within the set time limit, a reminder was sent to the French authorities on 15 June 2007. By letter of 12 July 2007, the French authorities provided the information requested.
- (4) By letter of 28 November 2007, the Commission notified the French authorities of its decision to open the formal investigation procedure laid down in Article 108(2) TFEU.
- (5) The Commission decision to open the procedure was published in the *Official Journal of the European Union* on 15 February 2008⁽³⁾. The Commission called on interested parties to submit their comments on the measure in question.
- (6) On 18 December 2007 and 29 January 2008, the French authorities asked for an extension to the time limit set for submitting their comments on the opening decision. By letters of 4 January and 1 February 2008, the Commission agreed to extend the time limit to 28 February 2008.
- (7) The French authorities' comments were submitted to the Commission on 2 June 2008.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU is used throughout this Decision.

⁽²⁾ OJ C 41, 15.2.2008, p. 11, and OJ C 96, 31.3.2012, p. 22.

⁽³⁾ OJ C 41, 15.2.2008, p. 11.

- (8) The Commission received comments from the Chamber of Commerce and Industry of Pau-Béarn (hereinafter 'the CCIPB') on 25 February 2008 ⁽⁴⁾, from AMS ⁽⁵⁾, Ryanair and the Association of European Airlines (hereinafter 'the AEA') by letters of 14 March 2008, and from the airline Air France on 19 March 2008 ⁽⁶⁾. The Commission forwarded these comments to France by letter of 11 June 2008 and gave it the opportunity to respond to them.
- (9) By letter of 7 July 2008, the French authorities informed the Commission that they had no response to make to the comments by third parties.
- (10) At the request of the French authorities, a meeting was held on 4 November 2008 between the Commission and representatives of the CCIPB. During the meeting, the Commission informed the French authorities that it had engaged an independent consultant to help it analyse the agreements in question (hereinafter 'the consultant'). The consultant delivered his report on 30 March 2011.
- (11) By letter of 17 March 2011, the Commission asked the French authorities to provide further information. By letter of 13 April 2011, the French authorities asked for the time limit to be extended to 1 June 2011. The Commission agreed to this extension by letter of 6 May 2011. The French authorities gave their response by letter of 30 May 2011.
- (12) By letter of 11 April 2011, the Commission asked Ryanair for supplementary information, which it provided by letter of 31 August 2011. By letter of 11 October 2011, the Commission forwarded these comments to France for its response. By letter of 21 November 2011, the French authorities informed the Commission that they had no response to make to these comments.
- (13) By letter of 25 January 2012, the Commission notified France of its decision to extend the formal investigation procedure opened in 2007 to various measures granted to airlines using Pau airport and to the airport operator. The Commission decision was published in the *Official Journal of the European Union* on 31 March 2012 ⁽⁷⁾. The Commission called on interested parties to submit their comments on the measures in question.
- (14) By letter of 22 February 2012, the Commission asked the French authorities to provide further information. On 28 February 2012 the French authorities asked for an extension to the time limit set for submitting their comments on the decision of 25 January 2012 and to the time limit set in the Commission's letter of 22 February 2012. The Commission agreed to extend these time limits to 27 March 2012. By letter of 29 March 2012, the French authorities gave their response to the Commission's letter of 22 February 2012 and submitted their comments on the decision to extend the procedure.
- (15) In relation to the extension of the procedure, the Commission received comments from the CCIPB on 30 April 2012 ⁽⁸⁾, from AMS on 30 April 2012 ⁽⁹⁾, and from Ryanair on 30 April 2012 ⁽¹⁰⁾. By letter of 31 May 2012, the Commission forwarded these comments to France for its response. By letter of 13 June 2012, France indicated that it had no response to make.
- (16) By letter of 26 April 2012, the Commission asked the French authorities to provide further information. The French authorities gave their response by letter of 10 May 2012.
- (17) By letter of 10 April 2013, Ryanair forwarded to the Commission two notes prepared by the company Oxera and an analysis prepared by Professor Damien P. McLoughlin. By letter of 3 May 2013, the Commission forwarded these documents to the French authorities for their response. By letter of 7 June 2013, France indicated that it had no response to make.

⁽⁴⁾ On 14 April 2008 the Commission asked the CCIPB to provide a non-confidential version of its comments. On 16 April 2008 the CCIPB confirmed that its comments did not contain any confidential information that could not be forwarded to the French authorities.

⁽⁵⁾ On 10 April 2008 the Commission asked AMS to provide a non-confidential version of its comments. On 19 May 2008 AMS provided the Commission with the non-confidential version of its comments.

⁽⁶⁾ By letter of 13 March 2008, Air France asked for an extension to the time-limit for submitting its comments on the decision of 28 November 2007. The Commission agreed to this extension on 17 March 2008.

⁽⁷⁾ OJ C 96, 31.3.2012, p. 22.

⁽⁸⁾ On 14 May 2012 the CCIPB confirmed that its comments did not contain any confidential information that could not be forwarded to the French authorities.

⁽⁹⁾ On 1 May 2012 AMS provided the Commission with the non-confidential version of its comments.

⁽¹⁰⁾ Ryanair confirmed that its comments did not contain any confidential information.

- (18) By letter of 14 November 2013, the Commission asked France to provide further information.
- (19) By letter of 16 December 2013, the Commission forwarded the consultant's report to the French authorities for their response. France did not respond within the set time limit.
- (20) On 19 December 2013 France asked for an extension to the time limit set for responding to the information request of 14 November 2013. The Commission agreed to extend the time limit to 23 January 2014. As no response was received within this time limit, the Commission sent a reminder to France by letter of 24 January 2014 and allowed it a further period of 10 working days. France gave its response by letter of 6 February 2014.
- (21) The Commission received comments from Ryanair on 20 December 2013, 17 January 2014 and 31 January 2014. These additional comments were forwarded by letter to France on, respectively, 9 January 2014, 23 January 2014 and 4 February 2014. In its letters of 29 January 2014, 3 February 2014 and 21 May 2014, France informed the Commission that it had no response to make.
- (22) On 24 February, 13 March and 19 March 2014, following the adoption of the Guidelines on State aid to airports and airlines ⁽¹¹⁾ (hereinafter 'the new Guidelines'), the Commission called on France and the interested parties to submit their comments on the application of the new Guidelines to this case. France submitted comments on 19 March 2014.
- (23) In addition, on 15 April 2014 a notice was published in the *Official Journal of the European Union* ⁽¹²⁾ inviting Member States and interested parties to submit their comments, including in this case, in the light of the entry into force of the new Guidelines. Air France, the non-governmental organisation Transport & Environment and the CCIPB submitted comments within the set time limit. By letter of 28 May 2014, the Commission forwarded these comments to the French authorities. In its letter of 6 June 2014, France informed the Commission that it had no response to make.
- (24) By letter of 27 February 2014, the Commission asked France to provide further information. On 17 March 2014 France asked for an extension to the time limit set for responding to the information request of 27 February 2014. The Commission agreed to extend the time limit to 27 April 2014. France gave its response by letter of 25 April 2014 ⁽¹³⁾.
- (25) By letter of 16 May 2014, the Commission asked France for further information, which it provided by letter of 6 June 2014.

2. GENERAL INFORMATION ON THE AIRPORT

- (26) As indicated in the decision opening the formal investigation procedure, Pau-Pyrénées airport (hereinafter 'Pau airport') is situated in the department of Pyrénées-Atlantiques, within the Aquitaine region.
- (27) The airport was initially owned by the State, which entrusted its operation to the CCIPB through a public equipment concession granted until 31 December 2015 by an Interministerial Order of 12 March 1965 (hereinafter 'the 1965 Order'), to which terms and conditions defining, in particular, the respective obligations of the State and the CCIPB are annexed. The interministerial order and the terms and conditions of the concession have been amended on four subsequent occasions.
- (28) The CCIPB is a member of the network of chambers of commerce and industry. In France, the chambers of commerce and industry are public administrative bodies. In essence, a chamber of commerce and industry represents the general interests of commerce, industry and services within its area. The tasks and powers of the chambers of commerce and industry are laid down by law. These chambers are subject to the administrative and financial scrutiny of the State, through the Minister for Finance and Infrastructure and the Minister for Planning and Local Administration, each acting within his area of responsibility. According to Article R.712-2 of the Commercial Code, 'regional chambers of commerce and industry and local chambers of commerce and industry shall be supervised by the regional prefect, assisted by the regional public finance officer.' The supervisory authority must therefore be informed of certain important decisions specified in the regulations (regarding, for example, budget, recourse to borrowing, granting of guarantees to third parties, transfers, acquisitions or extensions of financial holdings in civil or commercial companies, etc.). Such acts may be implemented only after having been notified to the supervisory authority, which may object to them. The chambers of commerce and industry are managed by an elected assembly of representatives from undertakings within their area.

⁽¹¹⁾ OJ C 99, 4.4.2014, p. 3.

⁽¹²⁾ OJ C 113, 15.4.2014, p. 30.

⁽¹³⁾ With this letter, France also submitted a note from the CCIPB, but indicated that the French authorities did not agree with the assessment contained in the note. In any event, this note essentially reiterates the comments previously submitted directly to the Commission by the CCIPB.

- (29) Specific accounts are kept for Pau airport, which are separate from the general accounts of the CCIPB.
- (30) On 1 January 2007, pursuant to Article 28 of Act No 2004-809 of 13 August 2004 on local freedoms and responsibilities, the State transferred ownership of the airport to a group of local authorities known as the *syndicat mixte de l'aéroport Pau-Pyrénées* (hereinafter the '*syndicat mixte*'). The Regional Council of Aquitaine, the Departmental Council of Pyrénées-Atlantiques, the Urban Community of Pau Porte des Pyrénées, and 14 municipal groups are members of this *syndicat mixte*. An agreement was signed to this end between the State and the *syndicat mixte*, which entered into force on 1 March 2007. This agreement was amended on 12 August 2009.
- (31) On becoming the owner of the airport, the *syndicat mixte* replaced the State as concession authority. Pursuant to Article 28-VI-2^o of the aforementioned Act of 13 August 2004, it took over the previous agreements, and in particular the concession agreement signed with the CCIPB. The CCIPB was therefore the airport operator before ownership was transferred to the *syndicat mixte*, and has remained so since.
- (32) The airport handles both civil and military aircraft. The following table shows the total number of inbound and outbound passengers having used the airport over the 2000-2013 period.

Table 1

Traffic at Pau airport (number of passengers) over the 2000-2013 period

Year	Total
2000	613 333
2001	600 084
2002	585 410
2003	682 428
2004	720 588
2005	729 409
2006	763 942
2007	763 018
2008	817 511
2009	691 037
2010	673 697
2011	641 496
2012	609 535
2013	645 577

Source: Information provided by France and the CCIPB website.

- (33) Ryanair began operating at Pau airport in April 2003. During the period under review (2003 to 2011), Ryanair operated routes to London, Charleroi, Bristol and Beauvais.
- (34) In 2010 Ryanair's flights accounted for approximately 16 % of the airport's passengers. Ryanair stopped flying to Pau when its contractual commitments to the airport expired on 1 April 2011.

- (35) Aside from Ryanair, the main commercial airline using Pau airport is Air France. It operates most of the flights from Pau and accounts for the bulk of the traffic at this airport (approximately 80 % of passengers).
- (36) Other airlines have used the airport during the period under review, in particular Transavia CV (hereinafter 'Transavia'), which is a subsidiary of the Air France KLM group.

3. MEASURES COVERED BY THE DECISION OPENING THE FORMAL INVESTIGATION PROCEDURE AND THE CONSULTANT'S REPORT

- (37) The measures covered by the decision opening the formal investigation procedure particularly related to the operation of the route between Pau airport and London Stansted airport. The first measure was the marketing services agreement signed by the CCIPB with AMS in 2005, and the second measure was the airport services agreement signed by the CCIPB with Ryanair on the same date. These two agreements (hereinafter 'the 2005 agreements') were signed on 30 June 2005 for a term of 5 years, with the possibility of extension for a further 5 years.

3.1. 2005 AGREEMENTS SIGNED WITH AMS AND RYANAIR

3.1.1. MARKETING SERVICES AGREEMENT SIGNED WITH AMS FOR THE PAU-LONDON STANSTED ROUTE

- (38) AMS is a Ryanair subsidiary that has an exclusive licence to offer marketing services on the Ryanair website www.ryanair.com. The web marketing services agreement signed with AMS (hereinafter 'the 2005 marketing services agreement'), notified by France, states that 'This Agreement is rooted in Ryanair's commitment to operate on a daily basis a route between Pau and London Stansted' (Article 1). The purpose of the marketing services agreement is to 'determine the conditions under which Airport Marketing Services will provide CCIPB with specific marketing services intended to promote the various tourist and business attractions in the Pau/Bearn region'. The agreement stipulates that 'The primary tool for the provision of marketing services under this Agreement is the website www.ryanair.com which allows for direct targeting of the potential passengers of the low fares airline Ryanair' (Article 1.1).
- (39) The 2005 marketing services agreement defines how AMS is to provide certain advertising services on Ryanair's website⁽¹⁴⁾. This package of services involves:
- 'suitable space on the Pau destination page of www.ryanair.com for 5 (five) 150 word paragraphs within the Airport Marketing Services Top Five Things To Do section (cost of one paragraph per year as per the rate card: EUR 20 000)',
 - 'suitable space in the right hand bar on the Pau destination page of www.ryanair.com for the presence of 1 (one) link to the website designated by CCIPB (cost of one link per year as per the rate card: EUR 15 000)',
 - 'suitable space below the Top Five Things To Do section on the Pau destination page of www.ryanair.com for 7 (seven) links to the websites designated by CCIPB (cost of one link per year as per the rate card: EUR 10 000)',
 - '45 (forty five) days per year of the presence of a link to the website designated by CCIPB on the English homepage of www.ryanair.com (cost per day as per the rate card: EUR 6 000)' (Article 3).
- (40) On the basis of this agreement, the CCIPB undertook to pay EUR 437 000 per year to AMS throughout the term of the agreement.

3.1.2. AIRPORT SERVICES AGREEMENT SIGNED WITH RYANAIR FOR THE PAU-LONDON STANSTED ROUTE

- (41) The airport services agreement (hereinafter 'the 2005 airport services agreement') signed with Ryanair sets out how the infrastructure of Pau airport is to be made available to the carrier, particularly with regard to groundhandling services and the provision of private premises. This agreement concerns the London Stansted-Pau route launched in April 2003. It replaces the initial agreement signed on 28 January 2003, which was declared void by Pau Administrative Court on 3 May 2005.
- (42) The purpose of this agreement is to 'determine both the operational and financial conditions under which Ryanair will establish and operate international commercial flights to and from the Airport. Moreover, this Agreement sets forth conditions of landing, groundhandling and other services offered by the Airport to Ryanair' (Articles 1.1 and 1.2).

⁽¹⁴⁾ <http://www.ryanair.com>

- (43) According to Article 4 of the 2005 airport services agreement, Ryanair will operate daily scheduled air services on the London-Pau route and will pay the airport the charges as detailed in Articles 7.1 (regulated aeronautical charges) and 7.2 (non-regulated aeronautical charges).

3.2. CONSULTANT'S REPORT

- (44) In his report, the consultant particularly examined the nature of marketing services and the details of airport services covered by agreements signed by the CCIPB with airlines, and in particular the 2005 agreements that it signed with Ryanair and AMS ⁽¹⁵⁾.

3.2.1. MARKETING SERVICES AGREEMENTS SIGNED WITH RYANAIR AND AMS

- (45) The consultant summarised all the marketing services agreements for Pau airport that were signed by the CCIPB with Ryanair and AMS between 2003 and 2008. Among these, only the 2005 agreements were covered by the opening decision.
- (46) In particular, the consultant carried out the following tasks.
- He checked to what degree the rates laid down in the marketing services agreements were consistent with the online rates published on the AMS website (<http://airportmarketingservices.com/pdfs/ratecard.pdf>). According to the consultant, the rates listed on the AMS website are consistent with the rates set in the 2005 marketing services agreement.
 - He analysed the correlation between the amounts invoiced by AMS and Ryanair's level of activity at Pau. According to the consultant, the charges for marketing services seem to develop in line with the number of flights operated.
 - He compared the services provided by AMS to the CCIPB with other web marketing services commonly offered in similar ways.
- (47) The consultant questioned whether it was in the interests of the CCIPB to sign an agreement for the purchase of such marketing services for the following reasons. Firstly, the Ryanair website is essentially a ticket sale website, and not a general travel sale website. According to the consultant, the Ryanair website therefore primarily seems to be comparable to the websites of other airlines that generally host only a limited amount of paid advertising, with airports not featuring among the advertisers. Secondly, the consultant notes that airports are not comparable to other potential advertisers on the websites of airlines such as Ryanair, given that the services provided by the airport to Ryanair passengers are by nature indissociable from the services of Ryanair itself, unlike ancillary services such as accommodation or car rental. Lastly, the consultant generally questions whether it is rational behaviour for airports to spend their own money with airlines in order to attract customers on flights to and from the airport, when these extra passengers will directly benefit the said airlines.
- (48) For these reasons, the consultant concludes that, for an airport, there is only limited commercial interest in advertising on the Ryanair website.
- (49) Furthermore, according to the consultant, assuming that such interest does exist, this cannot be measured by the airport or by Ryanair. The consultant also notes that the marketing information on the Ryanair website is fairly brief and unsophisticated, and that if the advertising had been deemed effective (either by the airport or by Ryanair), investment to improve its quality and appearance would have been made. The consultant therefore concludes that the commercial value of the marketing services is not crucially important to the parties to the agreements.
- (50) Conversely, in the consultant's opinion, the destination region could have effectively benefited from advertising services encouraging Ryanair's customers to spend more time or consume more in the region. However, as the agreement was signed between the CCIPB and Ryanair or its subsidiary, the consultant takes the view that any benefits to the region must be excluded from the analysis of the agreement.
- (51) According to the consultant, the incongruity between the highly volatile nature of the online marketing market and the AMS fixed rate card also calls into question this undertaking's true purpose. According to Ryanair, the agreement with AMS is optional and airport operators would not sign it if it had no commercial value. However, the consultant wonders about the pressure exerted by Ryanair during negotiations with the airport concerning the operation of routes, particularly when several nearby airports (for example Tarbes and Biarritz for Pau) are in competition to attract Ryanair.

⁽¹⁵⁾ In his report, the consultant examined the various marketing services agreements signed by the CCIPB with Ryanair and AMS and the agreement signed with Transavia for the period between 2002 and 2008, the airport services agreements signed between 2002 and 2005, the airport's financial results between 2002 and 2007, and the impact of the Pau-London Stansted route operated by Ryanair on the airport's accounts between 2003 and 2008. This report therefore has a wider scope than the opening decision.

- (52) According to the consultant, all these factors indicate that Ryanair's strategy underlying the signature of marketing services agreements is to obtain a subsidy from the airport to keep its prices low.

3.2.2. MARKETING SERVICES AGREEMENTS SIGNED WITH TRANSAVIA

- (53) The consultant also examined a marketing services agreement signed between the CCIPB and the airline Transavia in 2006. This agreement is not covered by the opening decision.

3.2.3. AIRPORT SERVICES AGREEMENTS

- (54) The consultant analysed a number of airport services agreements signed between the CCIPB and various airlines (namely Ryanair, Air France and Transavia) during the period between 2003 and 2005.
- (55) According to the consultant, the prices of airport services are determined as follows: regulated charges (lighting charge, landing charge, parking charge and passenger charge) are set out in a price list applicable to all the airlines. The applicable charge is updated every year using a rate that depends on negotiations within the airport's economic advisory committee. According to the consultant, the regulated charges cannot therefore differ between the airlines.
- (56) According to the consultant, non-regulated charges (for groundhandling services) vary by airline and depend on bilateral commercial negotiations.
- (57) The consultant compared the non-regulated services invoiced to Ryanair with the same services invoiced to other airlines (Air France and Transavia). This comparison is based on both the nature of the services and the price applied.
- (58) The consultant found that the groundhandling services covered by the agreements of these two airlines seem to be duly provided and that there is a real difference in the nature of the services provided to the various airlines. Air France receives a more comprehensive package of services. Ryanair benefits from a lower flat-rate charge (but for more services) than Transavia.
- (59) However, according to the consultant, who compared the flat-rate charges applied to Ryanair and Transavia and the charge applied to Air France for comparable services with a comparable joint service, Ryanair benefits from a lower charge (EUR [...] (*)) than that applied to Air France (EUR [...]) or Transavia (EUR [...]). The price paid is seemingly around [...] % of that paid by other airlines.
- (60) According to France, the comparison of airport services (non-regulated services) made by the consultant does not correctly summarise the results of the various negotiations conducted by the CCIPB. France cites a number of examples justifying this charging, in particular where Ryanair does not benefit from certain services offered to Air France.

4. MEASURES COVERED BY THE EXTENSION DECISION

- (61) The Commission took the view that the formal investigation procedure needed to be extended and that all the agreements signed by the CCIPB with AMS and Ryanair should be examined for the entire period during which Ryanair operated from Pau airport (2003 to 2011) in order to determine whether the agreements that the CCIPB signed with AMS and Ryanair constituted State aid.
- (62) The Commission also decided to extend the formal investigation procedure to the agreement that the CCIPB signed with the airline Transavia on 23 January 2006 and to various financial contributions made by public entities to the airport during the period under review, a list of which was sent to the Commission by France by letter of 30 May 2011.
- (63) These measures are detailed below in Sections 4.1 to 4.3.

(*) Business secret.

4.1. AGREEMENTS SIGNED BY THE CCIPB WITH AMS AND RYANAIR

- (64) The extension decision covers various agreements signed by the CCIPB with AMS and Ryanair between 2003 and 2011.

4.1.1. AGREEMENT OF 28 JANUARY 2003

- (65) The agreement signed on 28 January 2003 was entered into between the CCIPB and Ryanair directly (and not with AMS). This agreement contains provisions on airport services and marketing services.
- (66) Article 2 of this agreement sets out Ryanair's obligations towards the CCIPB as well as the amount of the airport charges. Article 3 of the agreement stipulates the CCIPB's obligations and indicates, in particular, that the latter must carry out the following at its own expense:
- (a) 'provide or procure the provision of airport terminal/infrastructure services for the Services as more particularly set out in Annex A attached hereto;
 - (b) perform such public relations and marketing functions as more particularly set out in Annex B attached hereto;
 - (c) pay Ryanair the sum of eighty thousand euros (EUR 80 000,00) on a "one-off" basis to launch this new route after the signature of the contract.
 - (d) In consideration of the marketing of Pau through internet links provided to CCIPB on Ryanair's website, through the advertising of low fares to and from Pau in the print media, and through other means such as radio, outdoor and television advertising as selected by Ryanair, CCIPB shall pay Ryanair the sum of eleven euros (EUR 11,00) per passenger departing from Pau Airport on the Services monthly in arrears and/or credited against payments due from Ryanair to CCIPB under the provisions of Clause 2(b) above but limited to four hundred thousand euros (EUR 400 000,00) per annum per daily rotation of the Services.
 - (e) This Agreement holds only for the Pau-London route on the minimum basis of one flight per day, and 364 days per annum. If the Pau-London route develops to the extent that there are several frequencies per day, CCIPB shall not pay any supplement. If, of a common accord, other routes develop to Germany, Belgium, Ireland or Italy, this Agreement would be replicated with the same launch payment of eighty thousand euros (EUR 80 000,00), and a maximum of four hundred thousand euros (EUR 400 000,00) per annum, calculated on the basis of eleven euros (EUR 11,00) per departing passenger. Each new route shall form the subject of a new Agreement or of an amendment to this Agreement'.
- (67) Annex A to the Agreement provides a list of the groundhandling and related services applicable to flights operated by Ryanair. Annex B contains provisions on the public relations, sales and marketing functions of the airport. The part on sales and marketing states in particular:

'Airport to provide sales support and assistance to assist Ryanair during periodic sales missions in the catchment area of the Airport, including free use of an office, phone and fax lines for the Ryanair team. Airport to monitor all opportunities for budget advertising (outdoor, newspapers, TV, radio and other) that the Airport sees in their region as a good opportunity for Ryanair'.

- (68) This agreement was declared void by Pau Administrative Court on 3 May 2005 ⁽¹⁶⁾ for the following reasons:

The imbalance ... identified between the reciprocal undertakings of the parties to the agreement, having regard to the vagueness of Ryanair Limited's obligations in terms of promoting abroad the town of Pau as a tourism destination and to the fact that there is no provision for a refund, even in part, of the sums paid if the objectives set out are not achieved, means that the decision in dispute is regarded as constituting financial aid to the benefit of Ryanair Limited.

The decision in dispute, which approves the agreement granting financial aid to the benefit of Ryanair Limited, is, in the absence of prior notification of the said decision to the Commission of the European Communities, unlawful and must be declared void.

⁽¹⁶⁾ Pau Administrative Court, 3 May 2005, *Air Méditerranée*. The judgment delivered by Pau Administrative Court stemmed from an action brought in September 2003 by Air Méditerranée, a charter airline operating from Tarbes airport, which is near to Pau airport. Air Méditerranée considered itself injured by what it regarded as unfair competition with its own routes between London and south-west France.

(69) Pau Administrative Court found in its judgment of 3 May 2005 that the CCIPB, which operates Pau airport, had undertaken to pay Ryanair, without any consideration, EUR 80 000 to launch its London Stansted-Pau route in 2003. The CCIPB had also undertaken to pay EUR 11 per passenger to Ryanair, up to an annual limit of EUR 400 000, as consideration for activities intended to promote the town of Pau. The court therefore concluded that the agreement constituted financial aid to the benefit of Ryanair.

(70) This 2003 agreement was therefore replaced by the two 2005 agreements covered by the decision opening the formal investigation procedure.

4.1.2. 2005 AGREEMENTS ⁽¹⁷⁾

(71) The 2005 agreements were examined by the Aquitaine Regional Audit Chamber (hereinafter 'the CRC').

(72) The CRC's final comments report on the CCIPB was discussed on 19 October 2006 and concerned the financial years from 2001 onwards. Part of this report concerns the aid granted to a low-fare airline (Chapter 3 of the report). Prior to this report, the CRC examined the marketing services agreement. In its final comments report, the CRC made the following comments in particular:

'In order to sidestep the effects of the Administrative Court's decision [concluding that the 2003 agreement with Ryanair resulted in unlawful State aid], the Chamber of Commerce and Industry has resorted to a new legal framework.'

'AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives.'

'Using the reasoning given by the administrative courts (Strasbourg Administrative Court, 24 July 2003, *Brit Air v Strasbourg and Bas-Rhin Chamber of Commerce and Industry*; Strasbourg Administrative Appeal Court, 18 December 2003, *Strasbourg and Bas-Rhin Chamber of Commerce and Industry v Brit Air*), the imbalance between the undertakings of the parties to the agreement is clear. Advertising on its website also benefits Ryanair and cannot constitute direct consideration for the financial undertakings made by the Chamber [the CCIPB].'

(73) According to the comments report, an imbalance ... has been identified between the reciprocal undertakings of the parties to the agreement.

(74) The report states that, despite the arguments put forward by AMS and Ryanair, the CRC maintains its position. It concludes as follows:

'Subject to the appraisal of the competent court, it considers that this services agreement actually constitutes financial aid to Ryanair and that it is unlawful, given that this aid has not been previously notified to the Commission.'

(75) The report also considers the effectiveness of the aid (Chapter 3.2) and its efficiency (Chapter 3.3). It states that the economic impact of the Pau-London Stansted route on the Béarn region is indisputable:

'The target of 50 000 passengers flying from London that was set in 2003 has almost been achieved in the second year of operation. According to a study conducted by the Chamber of Commerce and Industry in 2005, the economic impact of the route is apparently close to EUR 8 million per year. A panel representing the economic activities linked to tourism has been formed to measure this impact. Around 700 professionals from Béarn have been questioned about the contribution made by British customers to their turnover. The route's contribution to the total number of British tourists visiting Béarn has been assessed through a passenger survey and data from the departmental tourism committee.'

(76) With regard to the efficiency of the aid, the report states that the total cost of the route to the Chamber of Commerce and Industry in 2004, taking into account the revenue generated through this activity, is estimated at close to EUR 360 000.

(77) The CRC questions whether the CCIPB could achieve the same result in terms of the economic development of Béarn by granting less financial aid to Ryanair. In this context, the report refers to the compatibility rules set out in the 2005 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ⁽¹⁸⁾ (hereinafter the '2005 Guidelines'). The report concludes in this respect that these rules have not been observed.

⁽¹⁷⁾ These agreements were already covered by the opening decision, see Section 3.1.

⁽¹⁸⁾ OJ C 312, 9.12.2005, p. 1.

4.1.3. AGREEMENTS SIGNED BY THE AIRPORT WITH AMS AND RYANAIR AFTER 2005

(78) According to the French authorities, the various agreements or amendments to the 2005 agreements signed by the CCIPB with AMS and Ryanair after 2005 are as follows:

- A marketing services agreement signed on 25 September 2007 for an initial term of 5 years from its date of signature, with the two parties agreeing to 'meet to discuss the possibility of the continuation of the cooperation between CCIPB and AMS' 'at least 6 months prior to the expiry of the initial term'. This promotion is linked to the operation of a Pau-Charleroi route with three flights per week per full year of operation. In return for a link to the website designated by the CCIPB on the Belgian and Dutch homepage of the Ryanair website (www.ryanair.com), the CCIPB pays AMS the sum of EUR [...] per year. The route was launched on 30 October 2007. This agreement was amended by an exchange of correspondence on 16 June 2009 increasing the promotion effort to EUR [...] from 1 January 2009 without any change to the services.
- An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 25 September 2007 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Charleroi route for a term of 5 years.
- An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 17 March 2008 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Bristol route for a term of 1 year.
- A marketing services agreement signed on 31 March 2008 for a period between 16 May 2008 and 13 September 2008, with the two parties agreeing to 'meet to discuss the possibility of the continuation of the cooperation between CCIPB and AMS' 'at least 3 months prior to the expiry of the initial term'. The promotional activities covered by this agreement are linked to Ryanair's commitment to operate a Pau-Bristol route with three flights per week over the same period. In return for a link to the website designated by the CCIPB on the English homepage of www.ryanair.com for 8 days, the CCIPB pays AMS the sum of EUR [...].
- Following discussions on 15 June 2009, the CCIPB authorised its chairman to amend the amount of the 2005 marketing services agreement by limiting it to EUR [...] for 2009, which was linked to a reduction in the number of flights planned by Ryanair for its Pau-London route to 211.
- An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 16 June 2009 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Bristol route for the 2009 summer season.
- A marketing services agreement signed on 16 June 2009 for a period between 1 April 2009 and 24 October 2009, which could be renewed subject to agreement 3 months before its expiry. The promotional activities covered by this agreement are linked to the operation of a Pau-Bristol route with two flights per week, which is 60 projected flights over the same period. In return for a link to the website designated by the CCIPB on the English homepage of www.ryanair.com for 9 days, the CCIPB pays AMS the sum of EUR [...]. The route was withdrawn in October 2009.
- A marketing services agreement signed on 28 January 2010 'for an initial term starting on the date of its signature and ending one year after the date of the launch of the first service', which could be 'extended for an additional period of one year'. The promotional activities covered by this agreement are linked to a Pau-London Stansted route from 30 March 2010 with three flights per week and a minimum of 220 flights, to a Pau-Charleroi route from the same date with three flights per week and a minimum of 100 flights, and a Pau-Beauvais route from April 2010 with three flights per week and a minimum of 100 flights. In return for a link to the website designated by the CCIPB on the English, Belgian, Dutch and French homepages of www.ryanair.com for periods of 25 or 45 days, the CCIPB pays AMS the sum of EUR [...].

(79) The services offered by AMS and their financial conditions are indicated in Article 3 of the various marketing services agreements. According to the French authorities, the amounts paid to AMS vary due to the signature of new agreements linked to new routes (Charleroi, Bristol) and changes made to the projected flight schedules, particularly for the Pau-London Stansted route. When the renewed agreements of 30 June 2005 and 25 September 2007 expired, a new agreement was signed that took into account all the routes operated from 30 March 2010.

- (80) According to the French authorities, no new airport services agreement was signed after the 2005 airport services agreement expired in April 2010. The charges invoiced to Ryanair between April 2010 and April 2011 were therefore those adopted by the economic advisory committee for the regulated charges and those stipulated by the 2005 agreement for groundhandling services, as negotiations on a new agreement had failed. The French authorities have indicated that only the marketing services were the subject of a new agreement.
- (81) According to France, the Pau-London, Pau-Charleroi and Pau-Beauvais routes covered by the airport services agreement were launched on 30 March 2010 for the first two routes and in April 2010 for the third route. The initial term therefore corresponded to the 2010/2011 winter schedule. By letter of 14 February 2011, the CCIPB noted that the agreement had not been extended for an additional period of 1 year, within the set time limits, and asked AMS to take into account the automatic expiry of the agreement on 1 April 2011.
- (82) In its letters of 30 May 2011 and 10 May 2012, France provided a summary of the sums paid to AMS (or to Ryanair for the agreement of 28 January 2003) by the CCIPB and other public entities during the period between 2003 and 2011. The total amount of these payments between 2003 and 2011 was EUR [4 000 000-6 000 000] under the agreements referred to in recitals 64 to 81. The exact sums paid by the CCIPB and other public entities to AMS (or to Ryanair) are set out in Table 2 below.

Table 2
Subsidies to AMS or Ryanair for each route operated

(thousand EUR)

Subsidy paid to AMS or Ryanair for each route operated	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Pau-London	[...]	[...]	[...]	437	[...]	[...]	[...]	[...]	[...]	[...]
Pau-Charleroi					[...]	[...]	[...]	[...]	[...]	[...]
Pau-Bristol						[...]	[...]			[...]
Pau-Beauvais								[...]	[...]	[...]
Total of the payments made to AMS or Ryanair	[...]	[...]	[...]	437	[...]	[...]	[...]	[...]	[...]	[4 000-6 000]

Source: Letters from France of 30 May 2011 and 10 May 2012 ⁽¹⁾.

⁽¹⁾ For 2011, in the absence of a precise breakdown by route, the Commission has distributed the total amount between the various routes in the same proportions as observed in 2010.

4.2. AGREEMENT SIGNED BY THE CCIPB WITH TRANSAVIA

- (83) The CCIPB signed an agreement with the airline Transavia on 23 January 2006. This agreement had a term of 3 years from 26 April 2006, which was the start date of the Pau-Amsterdam route, and could be renewed for an additional period of 2 years. It was tacitly renewed in April 2009, but was terminated in October 2009 following Transavia's decision to withdraw its services.
- (84) This agreement provides for payments for marketing services of EUR 250 000 for the first 2 years, with 156 outbound flights per year. If the number of flights is less than 156 per year, the payment must be proportionally adjusted. For the third year, the payment is EUR [...] per outbound passenger (with an annual limit of EUR [...]).
- (85) The agreement also provides for a renewal option for two additional years, with a payment of EUR [...] per outbound passenger for the fourth year, and EUR [...] per outbound passenger for the fifth year.
- (86) The agreement resulted in payments totalling EUR [700 000-900 000] by the CCIPB to Transavia for the marketing services provided by the latter between 26 April 2006 and 29 October 2009.

4.3. FINANCIAL CONTRIBUTIONS FROM VARIOUS PUBLIC ENTITIES TO PAU AIRPORT

- (87) In its letter of 30 May 2011, France provided the Commission with a summary of all the subsidies granted to the airport through public resources. The measures covered by the extension of the procedure are described in recitals 88 to 107. According to France, the airport does not receive any state funding or public aid intended to balance the airport's operating accounts.
- (88) In order to assess these with regard to the applicable provisions on State aid, the 'equipment' subsidies paid by the various public entities must be distinguished from the subsidies granted by the State to cover the costs arising, according to the French authorities, from sovereign tasks.

Table 3

Pau-Pyrénées Airport: Financial contributions received by the airport from various public entities during the 2000-2010 period

Nature of Subsidy	(thousand EUR)											
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
FIATA State Subsidy (Sovereign Tasks)			396		11		400	300				1 107
State Equipment Subsidy (Sovereign Investment Grant)	166 (SSLIA premises ⁽¹⁾)		1 782 (2 CT Scanners + Vehicle) SSLIA	466 (SSLIA Vehicle)								2 414
Total Equipment Subsidy for Sovereign Tasks	166		2 178	466	11		400	300				3 521
Pyrénées-Atlantiques Departmental Council (Equipment grant)	1 326 (freight terminal)		91 (runway equipment)			478 (taxiway work)						1 895
Aquitaine Regional Council	1 413 (freight terminal)	2 164 (passenger terminal)	232 (terminals)			479 (taxiway work)						4 288
Group of Municipalities and Pau Urban Community	1 479 (freight and passenger terminals)	1 683 (passenger terminal)	643 (passenger terminal)	5 (terminals)								3 810
ERDF		1 559 (passenger terminal)	1 184 (terminals)	291 (passenger terminal)		653 (taxiway work)						3 687

Nature of Subsidy	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
Gaz de France				38 (cogeneration plant)								38
Syndicat Mixte de l'Aéroport de Pau-Pyrénées										4 030 (run-way and lighting re-lighting re-pair)	100 (run-way and lighting re-lighting re-pair)	4 130
Total Equipment Subsidy (Excluding Sovereign Tasks)	4 218	5 406	2 150	334		1 610				4 030	100	17 848
Pyrénées-Atlantiques Departmental Council (Repayment of loan capital)	97	272	113	122	98	77						779
Investments made	3 470	8 656	5 781	1 352	272	2 744	260	315	416	5 419	167	28 852

(¹) Service de Sécurité et de Lutte contre l'Incendie des Aéronefs (Aircraft Fire and Safety Service).

4.3.1. 'EQUIPMENT' SUBSIDIES

- (89) During the 2000-2010 period, the airport received payments (hereinafter 'equipment subsidies') from the *syndicat mixte*, the State, various local authorities, the European Regional Development Fund ('ERDF') and Gaz de France to finance a range of investments (passenger terminal, runway repair, lighting repair, freight terminal, cogeneration plant, etc.) totalling approximately EUR 17 800 000 (see Table 3 above).
- (90) The Departmental Council of Pyrénées-Atlantiques gave the airport an 'equipment grant' of EUR 1 895 000 to finance the freight terminal, runway equipment and taxiway work. France has also indicated that, between 2000 and 2005, the Departmental Council of Pyrénées-Atlantiques paid EUR 779 000 to repay the capital of a loan. France states that this measure stemmed from an agreement on the Pau airport financing plan, signed on 5 November 1990 between the local authorities and the CCIPB. This plan, totalling a maximum of EUR 5 680 000, covered work to upgrade certain areas and lighting and also a terminal extension. According to the agreement, the local authorities' financing could take the form of either an equipment grant or repayment of loans taken out by the operator to finance investments, or a combination of both. The sum of EUR 779 000 mentioned above was used to repay the capital of a loan that the Departmental Council of Pyrénées-Atlantiques had undertaken to cover under the 1990 agreement, and which expired in 2005.
- (91) The airport received four subsidies totalling EUR 4 288 000 from Aquitaine Regional Council to finance the freight and passenger terminals and taxiway work.
- (92) The Group of Municipalities and Pau Urban Community granted EUR 3 810 000 to the airport to finance the freight and passenger terminals.
- (93) The ERDF subsidised the development of the passenger terminal and taxiway work to the tune of EUR 3 687 000.
- (94) Gaz de France also granted Pau airport EUR 38 000 to finance cogeneration equipment in 2003. When this financing was granted, Gaz de France was a public industrial and commercial body.
- (95) Lastly, the *syndicat mixte* financed a programme of investments including repairs to the runway and lighting and an extension to the car park, in the amount of EUR 4 130 000.
- (96) Table 4 below gives an overview of the various measures or, in other words, the various legal acts having resulted in the equipment subsidies described above. For these various measures, it gives the dates of granting of the equipment subsidy, nature of the investments financed and total costs of these investments, total amounts of the equipment subsidies received under these various measures, and the periods during which these amounts were paid.

Table 4

Overview of the measures having resulted in the equipment subsidies

Date of granting of the subsidy	Public entities having granted the subsidy	Nature of the investments	Total cost of the investments (million EUR)	Total amounts of the subsidy (million EUR)	Payment period
1999-2000	Departmental Council Regional Council Group of Municipalities and Pau Urban Community Gaz de France	Freight and passenger terminals, runway equipment, cogeneration plant	15,3	11,9	2000-2003

Date of granting of the subsidy	Public entities having granted the subsidy	Nature of the investments	Total cost of the investments (million EUR)	Total amounts of the subsidy (million EUR)	Payment period
2004	Departmental Council Regional Council European Union (ERDF)	Taxiway work	2,6	1,6	2005
2009	<i>Syndicat Mixte</i>	Renovation of runway and lighting, car park extension	5,1 ⁽¹⁾	4,1	2009-2010

Source: Documents produced by France.

⁽¹⁾ EUR 450 000 of this figure was for the car park extension.

4.3.2. STATE SUBSIDIES INTENDED, ACCORDING TO FRANCE, TO FINANCE SOVEREIGN TASKS — SYSTEM OF FINANCING SOVEREIGN TASKS IN FRENCH AIRPORTS

(97) Table 3 also shows the state subsidies intended, according to France, to finance sovereign tasks. These involve (see rows 1 and 2 of the table, period from 2000 to 2010):

— subsidies from the assistance fund for airports and air transport ('FIATA') totalling EUR 1 107 000;

— equipment subsidies to the tune of EUR 2 414 000.

(98) In total, between 2000 and 2010, Pau airport received subsidies of EUR 3 521 000 under this heading.

(99) According to France, these subsidies cover the cost of sovereign tasks that must be carried out by airport operators and funded by the State under French law. The tasks in question are funded from the proceeds of the airport tax and a supplementary scheme. The history and arrangements of these schemes and the types of task funded are described in recitals 100 to 108.

(100) In 1998 the Council of State ruled, in the SCARA judgment ⁽¹⁹⁾, that safety and security tasks within airports were sovereign tasks for which the State was responsible and that could not therefore be funded by airport users through fees. Following this judgment, Act No 98-1171 of 18 December 1998 on the organisation of certain air transport services and Article 136 of Act No 98-1266 of 30 December 1998 (1999 Finance Act) ⁽²⁰⁾ introduced the airport tax as from 1 July 1999. This is a specific tax in the sense that its proceeds can be used only to finance certain expenditure, in this case the costs of tasks that France regards as sovereign within airports. The aforementioned provisions also introduced a supplementary scheme to finance these tasks, described in recitals 105 to 107.

(101) This legislation, developed by regulations, precisely defines the tasks eligible for financing through the airport tax. These tasks are aircraft firefighting and rescue, wildlife hazard prevention ⁽²¹⁾, screening of hold baggage, screening of passengers and cabin baggage, access control to the restricted area ⁽²²⁾, environmental control measures ⁽²³⁾ and automated border controls through biometric identification. The reference to automated border controls through

⁽¹⁹⁾ Judgment of the Council of State of 20 May 1998 *Syndicat des Compagnies aériennes autonomes* ('SCARA').

⁽²⁰⁾ Now codified in Article 1609 *quater* of the General Tax Code.

⁽²¹⁾ Wildlife hazards particularly include bird hazards, which involve collisions between aircraft and birds that may threaten the safety of persons and goods on board aircraft.

⁽²²⁾ This task may include, for example, installing and maintaining fencing around the public and restricted areas or installing video surveillance systems around the edge of the restricted area.

⁽²³⁾ This task particularly involves noise measures combined, where applicable, with aircraft flight paths, and air and water quality controls in the surroundings of airports.

biometric identification was introduced into the legislation in 2008. Otherwise, the tasks eligible for financing through the airport tax have remained the same since this scheme was introduced and correspond to the tasks identified by the SCARA judgment. Various national and European regulations clarify the obligations of airport operators in terms of carrying out these tasks. For example, with regard to aircraft firefighting and rescue, the regulations precisely define the human and physical resources to be provided depending on the characteristics of the airport.

- (102) For a given airport, airport tax is payable by any airline using the airport. It is based on the number of passengers and weight of freight and mail loaded by the airline. The rate of airport tax per passenger or tonne of freight or mail is set annually, airport by airport, according to the predicted costs of carrying out the tasks financed by the scheme.
- (103) Every year airport operators prepare an annual costs and traffic declaration. This declaration presents, for the previous year, the recorded traffic levels and costs of the safety and security tasks, and also the amounts received through the airport tax and supplementary scheme to finance these tasks. They also contain traffic, cost and income forecasts in relation to the safety and security tasks for the current year and the next 2 years. These declarations are checked by the administrative authorities, which can in particular carry out on-the-spot checks. The airport tax rate is then set on this basis through an interministerial order.
- (104) As the airport tax rate calculations are based on predicted cost and traffic data, an *ex-post* adjustment mechanism has been introduced to ensure that the proceeds from the airport tax, plus the financing provided under the supplementary scheme described in recitals 105 to 107, where applicable, do not exceed the costs actually incurred in carrying out the tasks concerned. The costs in question include the operating and staff costs incurred in carrying out these tasks, depreciation on investments made in relation to these tasks, and part of the general costs associated with these tasks⁽²⁴⁾. Operators must keep multiannual accounts showing the income from the airport tax and supplementary scheme and also the costs incurred in the tasks concerned. When a positive balance is reported, this is added to the cumulative accounts from previous years. This may result in a positive or negative balance, which is then taken into account when setting the airport tax rate for the following year. In addition, any positive balance is allocated to the financial costs payable by the operator.
- (105) Since its creation, the financing mechanism based on airport tax has had to be complemented by a supplementary scheme. Safety and security costs are not proportional to air traffic, unlike the income from airport tax. In this context, it became apparent that, at low-traffic airports, the airport tax rate would have needed to be set at a high level, deemed to be barely affordable for users, in order to balance the safety and security costs. For these airports, it was therefore stipulated that the airport tax could be set at a level below that required to cover the costs and that a supplementary financing scheme could be used to finance, as necessary, those tasks eligible for financing through airport tax.
- (106) A succession of supplementary schemes then followed. Initially the French authorities used a trust fund, known as the 'fonds d'intervention pour les aéroports et le transport aérien' ('FIATA') or assistance fund for airports and air transport, which was set up at the same time as the airport tax through the same Act No 98-1266 of 30 December 1998 mentioned above. This fund, financed by a share of civil aviation tax, succeeded the 'fonds de péréquation des transports aériens' ('FPTA') or air transport adjustment fund, which had initially been reserved for financing routes supporting regional development and land planning. The FIATA financing covered the same tasks as were financed by the FPTA and was extended to the tasks covered by airport tax in order to supplement the latter for small airports. In essence, the FIATA tasks were split into two distinct 'parts': an 'airport' part providing supplementary cover for safety and security tasks at small airports, and an 'air transport' part providing subsidies for routes supporting regional development and land planning. Decisions to pay the FIATA subsidies providing supplementary financing for the safety and security tasks were taken following an opinion from the FIATA committee managing the 'airport' part.
- (107) In 2005 the FIATA was abolished and, for 2 years, the corresponding financing was provided directly through the state budget according to the same operating principles, particularly an opinion from a management committee. From 2008 the State replaced this arrangement with an increase in airport tax, which means that this tax is set at a

⁽²⁴⁾ The general costs mainly stem from support functions such as human resources management, financial affairs, financial audit, purchases, non-exclusive IT systems, legal office, general services, general management, accounting functions and management control.

rate higher than what is necessary to cover the safety and security costs at certain airports. The surplus thus created is redistributed among the smallest airports in order to supplement their income from airport tax.

- (108) As indicated above, the annual declarations of airport operators, which are checked by the administrative authorities, give the predicted and recorded costs and the predicted and recorded income from both airport tax and the supplementary scheme. Likewise, the annual accounts kept by operators, based on which the balance of actual costs and income is calculated, which, if positive, results in a reduction in airport tax and an allocation to the financial costs payable by operators, include both the proceeds from airport tax and the financing received through the supplementary scheme. The declaration, checking and *ex-post* adjustment mechanism intended to prevent the payment of public resources in excess of the costs actually incurred therefore applies to both airport tax and the supplementary scheme.

5. REASONS FOR THE OPENING AND EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

5.1. DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

- (109) In the decision to open the formal investigation procedure, the Commission noted, in accordance with France's notification, that the payment based on the 2005 marketing services agreement constituted a subsidy paid to AMS by the CCIPB. Given the public nature of the CCIPB, the Commission considered that the agreement involved the use of state resources.
- (110) In terms of the existence of an economic advantage pursuant to Article 107(1) TFEU, the Commission expressed doubts as to whether the CCIPB, by signing these agreements with AMS and Ryanair, behaved as a prudent market economy operator (MEO) pursuing a global or sectoral structural policy, guided by prospects of profitability in the more or less long term.
- (111) In this context, the Commission in particular took the preliminary view, based on the available information, that the 2005 marketing services agreement, notwithstanding the services effectively provided, was signed to subsidise the Pau-London Stansted route and that it conferred an economic advantage on Ryanair, through its subsidiary AMS, that it would not have received under normal market conditions. The Commission considered that the measure in question was likely to constitute State aid, paid to AMS by the CCIPB, that was prohibited in principle under Article 107(1) TFEU. This view was based on an analysis of the information submitted by France and the circumstances under which this agreement was signed.
- (112) With regard to the 2005 airport services agreement, the Commission wondered whether an economic advantage had been conferred on Ryanair through the reduced airport charges.
- (113) Lastly, the Commission expressed doubts about the compatibility of these measures with the internal market under the 2005 Guidelines.

5.2. DECISION TO EXTEND THE FORMAL INVESTIGATION PROCEDURE

- (114) As regards the agreements signed by the CCIPB with Ryanair and AMS (the airport services and marketing services agreements), the Commission considered, in the extension decision, that the two types of services agreements signed at the same time had to be assessed together, as Ryanair and AMS formed a single beneficiary of the measures concerned. As a result, the Commission considered that, in order to determine whether these various agreements constituted State aid, the private operator in a market economy test needed to be applied on the various dates on which the agreements were signed⁽²⁵⁾, namely:

— 28 January 2003 (Pau-London Stansted route),

— 30 June 2005 (Pau-London Stansted route) and 16 June 2009 for the amendment to this agreement,

— 25 September 2007 (Pau-Charleroi route) and 16 June 2009 for the amendment to this agreement,

— March 2008 (airport services agreement dated 17 March 2008, marketing services agreement signed on 31 March 2008) (Pau-Bristol route),

⁽²⁵⁾ Except for certain agreements, the effective start date of the activities covered by the agreement was not the date of signature of the agreement. See recital 395.

- 16 June 2009 (Pau-Bristol route),
 - 28 January 2010 (Pau-London, Pau-Charleroi and Pau-Beauvais routes).
- (115) The Commission concluded, on the basis of the available information, that it could not rule out the possibility that Ryanair and AMS had benefited from State aid under the agreements examined. However, it considered that it did not have sufficient information to enable it to come to a final decision on the matter. In order to assess this issue, the Commission considered that, on the basis of the available information, the conduct of the CCIPB service managing the airport, the CCIPB and other public entities in their relations with Ryanair and AMS had to be assessed jointly.
- (116) Likewise, the Commission expressed doubts as to whether the agreement signed with Transavia satisfied the private operator in a market economy test.
- (117) As regards the compatibility of this potential aid to the airlines ⁽²⁶⁾, the Commission made a distinction between the measures pre-dating the entry into force of the 2005 Guidelines and subsequent measures.
- (118) With regard to the first category, the Commission took the view that the criteria to be applied in order to assess the compatibility of the potential aid in question with the internal market were as follows.
- The measure contributes to the achievement of an objective of common interest, namely the launch of new routes, with long-term viability, to another airport in the European Union.
 - The amount of the aid is necessary and proportional to the additional costs incurred in launching new routes, and the measure has an incentive effect.
 - The measure is granted in a transparent and non-discriminatory way.
 - It provides for penalties if the airline fails to comply with its obligations.
 - It does not affect competition in a manner contrary to the common interest.
- (119) The Commission expressed doubts as to whether these criteria were met and also whether this potential operating aid was compatible with the internal market.
- (120) In terms of the compatibility of the measures post-dating the entry into force of the 2005 Guidelines, the Commission mainly referred to the criteria set out in these guidelines for start-up aid to airlines. The Commission expressed doubts as to whether these criteria were met.
- (121) With regard to the equipment subsidies to the CCIPB, the Commission wondered whether the public authorities had acted as a prudent investor in granting these subsidies. The Commission indicated that it could not therefore rule out the possibility of these subsidies constituting State aid.
- (122) As regards the compatibility of this potential aid with the internal market, the Commission referred to the criteria set out in the 2005 Guidelines on investment aid to airports. The Commission expressed doubts as to whether this potential aid was compatible with the internal market.

6. COMMENTS FROM INTERESTED PARTIES

6.1. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (123) The Commission received comments from five interested third parties:
- 6.1.1. CHAMBER OF COMMERCE AND INDUSTRY OF PAU-BÉARN (CCIPB)
 - 6.1.1.1. ***Airport services agreement signed with Ryanair***
- (124) According to the CCIPB, given the objective and non-discriminatory conditions under which the airport charges are applied to Ryanair and all the other airlines using Pau airport, the airport services agreement does not contain any element of State aid.

⁽²⁶⁾ Hereinafter the term 'airlines' means the airlines and their subsidiaries, which therefore specifically includes AMS.

- (125) The CCIPB notes that Pau airport self-finances its operation through its income and takes the view that it does not receive any State aid or financing to balance its operating accounts.
- (126) As regards the airport charges applied to Ryanair, the CCIPB confirms that these stem from the application of rates applicable as much to Ryanair as to any other airline.
- (127) The CCIPB notes that there are three categories of airport charges:
- regulated airport charges,
 - non-regulated groundhandling charges,
 - state taxes.
- (128) Firstly, the CCIPB confirms that it applies the regulated airport charges (of which there are four: landing charge, parking charge, runway lighting charge and passenger charge) to airlines in an objective and non-discriminatory way. Their amount is determined by a joint committee comprising the operators and the airlines, as well as the supervisory authority.
- (129) The CCIPB indicates that it does not exempt Ryanair from parking and runway lighting charges, but that the agreement simply states that 'Ryanair will not normally have to pay' these charges. The CCIPB notes that, with regard to the parking charge, this becomes payable only after the aircraft has been parked for more than two hours at the airport, whereas Ryanair's turnaround time is normally limited to 25 minutes. The CCIPB notes that, with regard to the runway lighting charge, Ryanair's flights operate only in the daytime, which reduces the likelihood of Ryanair having to pay a lighting charge.
- (130) Secondly, with regard to the non-regulated groundhandling charges (for example, groundhandling services or aircraft docking), the CCIPB notes that the rates are commercially negotiated with each airline according to its specific situation. In practice, any purely arithmetic comparison between airlines is not necessarily relevant given that, despite the identical size of aircraft, many other criteria need to be taken into account, such as the annual volume and frequency of the airline's flights, the daytime period (off-peak or peak) during which flights are operated, additional charges for night flights, delays, de-icing operations, aircraft cleaning operations, and so on.
- (131) Thirdly, the CCIPB stresses that, with regard to state taxes (of which there are two: airport tax and civil aviation tax), these are applied in a strictly identical manner to all airlines. The CCIPB is not involved in determining their amount, which is set by the regulatory authority.

6.1.1.2. Marketing services agreement signed with AMS

- (132) According to the CCIPB, the sums paid by the CCIPB to AMS do not constitute State aid. The CCIPB notes that, as the concession-holder for Pau airport, it decided in line with the 2005 Guidelines to publish, in the Air & Cosmos magazine for December 2007, a call for proposals in order to find one or more airlines ready to offer new destinations in Europe from Pau in return for financial aid (eight lots were envisaged). However, by 31 January 2008, which was the deadline for receiving proposals, no offers had been made by any airlines.
- (133) Furthermore, the CCIPB considers that its decision to sign the marketing services agreement with Ryanair is not attributable to the State. According to the CCIPB, no public or administrative authorities were involved at any stage in the negotiations with Ryanair or in the conclusion of the commercial partnership with this company.
- (134) The CCIPB takes the view that chambers of commerce and industry ('CCIs') operate airport facilities 'under the rules of private law'.
- (135) According to the CCIPB, CCIs constitute 'a very specific category of public body ... whose object is to freely represent the commercial and industrial interests of their area before public authorities'. The CCIPB adds that 'the fact that they are linked to the State ... does not in itself imply any subordination'. When operating the airport and, as a result, when concluding a partnership with Ryanair, the CCIPB is therefore operating entirely independently of its supervisory authority and without any direct or indirect state intervention.

6.1.1.3. *Criterion of a private investor in a market economy*

- (136) The CCIPB indicates that it received an offer from Ryanair to operate the Pau-London Stansted route after the agreement of 28 January 2003 was declared void by Pau Administrative Court on 3 May 2005.
- (137) As regards the operational aspect of the route, the CCIPB signed with Ryanair an airport services agreement that, according to the CCIPB, did not result in any substantial difference in treatment between Ryanair and other airlines operating from Pau airport. The CCIPB adds that, in order to commercially develop the airport, it signed a web marketing services agreement with a wholly-owned subsidiary of Ryanair, namely AMS. With regard to this agreement, the CCIPB takes the view that it acted as a private investor in a market economy for five reasons, which are set out in recitals 138 to 142.
- (138) Firstly, in return for the price paid by the CCIPB, AMS would provide genuine commercial services, including numerous weblinks on the ryanair.com website, enabling internet users to be directed straight to the websites of the CCIPB, the airport, the region's infrastructure (buses, trains, taxis), the Béarn Tourism Office, and so on.
- (139) Secondly, the ryanair.com website is currently and indisputably the leading travel reservation website in Europe, and by far one of the websites most Googled by internet users. Using the ryanair.com website to advertise Pau airport represents a real opportunity for the airport and the local communities that it serves. Airports and other third parties (car rental companies, hotels, regions, etc.) are ready to pay the prices indicated in the rate card published on the AMS website. Some wholly private airports have also agreed to pay these amounts. The CCIPB stresses the added value of advertising on the ryanair.com website, citing a study by the company Planet-Work that indicated that advertising purchased on the ryanair.com website offered greater visibility, for Pau airport and its region, in terms of the number of clicks by internet users, than advertising on the voyages-sncf.com website. The CCIPB therefore concludes that, for the services provided, the prices applied by AMS and paid by the CCIPB are 'market prices'.
- (140) Thirdly, in the CCIPB's opinion, it does not seem that the one-off nature of the price paid for the services provided is a criterion for determining the existence of State aid.
- (141) Fourthly, the sums paid under the Pau-Charleroi agreement resulted in different services from those that the CCIPB received under the Pau-London agreement. Accordingly, the CCIPB has not paid twice for the same service, which helps to prove that the sums paid are not subsidies for the launch of a route. The CCIPB also asserts that, if the sum had been intended to support the route's structural operating deficit, it would have clearly been insufficient.
- (142) Fifthly, the CCIPB considers that it is very difficult for a non-profit-making public body to prove that the sum of EUR [...] paid to AMS has enabled the CCIPB to 'make a profit' of EUR [...]. However, the CCIPB is certain that, in terms of image and/or attractiveness, the link on the ryanair.com website (and the absence of short-haul destinations on this website) made this investment worthwhile.

6.1.1.4. *Distortion of competition*

- (143) The CCIPB takes the view that the sums that it paid in return for the marketing services provided by AMS do not affect competition.
- (144) The Pau destination did not spontaneously interest any airline other than Air France and, despite the airport's efforts, only Ryanair for London and Transavia for Amsterdam submitted proposals.
- (145) The CCIPB notes that the arrival of low-fare routes did not affect the Air France routes, which saw their traffic from Pau increase from 2003.

6.1.2. ASSOCIATION OF EUROPEAN AIRLINES ('AEA')

- (146) The AEA considers itself to be an interested party in this case. Firstly, it has one member airline operating at Pau airport (Air France). More generally, however, the AEA, which represents the interests of European 'network' carriers, considers that it has a natural interest in monitoring the implementation of the 2005 Guidelines. According to the AEA, carriers that unlawfully benefit from certain reductions in their charges contribute to creating distortions of competition within the common market, to the detriment of other carriers that have to bear the costs of their operations.

- (147) The AEA considers that the two agreements that the CCIPB signed with Ryanair and its wholly-owned subsidiary AMS, namely (1) the airport services agreement for the London Stansted-Pau route and (2) the web marketing services agreement under which AMS receives a one-off sum of EUR 437 000 per year, raise serious concerns.
- (148) In its opinion, the fact that Ryanair is the only airport user to benefit from a special airport services agreement is a more than questionable practice. Furthermore, it considers that Ryanair should not be exempt from parking and lighting charges and that, when Ryanair's turnarounds exceed two hours, it should be subject to the same charges as other airlines.
- (149) The AEA claims that it has been broadly acknowledged by various French courts that the marketing services agreement signed with AMS created conditions that were excessively favourable to Ryanair⁽²⁷⁾. It notes that expressions such as 'imbalance' were also used by Pau Administrative Court in a May 2005 judgment, which could only conclude that this type of agreement constituted financial aid to Ryanair. The AEA does not question the practice of marketing services per se, but doubts that normal market conditions have been respected in these particular contractual arrangements.

6.1.3. RYANAIR

- (150) Ryanair argues that the terms and conditions of the 2005 airport services agreement correspond to market conditions and that the agreement does not confer any selective advantage on Ryanair and does not therefore distort competition or affect trade between Member States.
- (151) Ryanair points out that it is paying the standard airport charges and taxes applicable at Pau airport, in addition to commission on ticket sales and excess baggage. It notes that these charges are similar to those applied at other comparable airports, as well as to other airlines operating at Pau airport. To its knowledge, the CCIPB is not treating Ryanair more favourably than other airlines.
- (152) According to Ryanair, the conditional reductions in the parking and lighting charges and in the handling charges provided for in Articles 7.1.3 and 7.2 of the 2005 airport services agreement are based on objective criteria set out in the agreement, namely the absence of daytime lighting and parking or heavy handling given Ryanair's 25-minute turnaround time and 'no frills' service offered to its passengers. Ryanair notes that these exemptions also apply to other similar airlines, and that Article 3 of the 2005 airport services agreement expressly notes the CCIPB's obligation to apply the conditions granted to Ryanair to other comparable airlines⁽²⁸⁾.
- (153) Ryanair stresses that the terms and conditions offered to it are not secret and that, contrary to standard industry practice, the 2005 airport services agreement expressly authorises the CCIPB to reveal its contents to other airlines.
- (154) Ryanair maintains that it did not receive any unlawful advantage from the CCIPB under the 2005 airport services agreement and that the transparent relationship covered by the agreement lacks the selectivity that is an essential condition (although not sufficient by itself) for classifying a measure as State aid. It also asserts that the other conditions necessary for State aid to exist (effect on trade between Member States and distortions of competition, for example) are not met by the measures in question.

6.1.4. AIRPORT MARKETING SERVICES (AMS)

- (155) AMS indicates that it offers advertising space on the Ryanair website under standard market conditions at prices based on a rate card published on its own website.
- (156) AMS considers that the web marketing services (WMS) agreement with the CCIPB falls outside the scope of EU transport rules, since it is a standard commercial advertising agreement, similar to those routinely entered into with newspapers, television and radio broadcasters, outdoor media providers, and so on.

⁽²⁷⁾ The AEA refers in particular to the Council of State judgment of 27 February 2006 *Compagnie Ryanair Limited* (No 264406).

⁽²⁸⁾ Article 3 of the 2005 airport services agreement states: 'Non-exclusive agreement. This Agreement is entered into on a non-exclusive basis. The conditions granted to Ryanair according to this Agreement will also be applied to any airline with which Pau-Pyrénées Airport would decide to open a new low-fare international route. These conditions will be modulated according to the characteristics of the newly created international routes, in particular: frequency of flights, number of passengers carried, flight tariff rates'.

- (157) According to AMS, the conditions for the purchase of advertising space on the Ryanair website by the CCIPB reflect and correspond to market conditions. With regard to the value of advertising space on the Ryanair website, AMS stresses that its pricing of this space reflects the increasing commercial success of this website and its unique ability to address advertising to a highly targeted audience.
- (158) AMS argues that the Ryanair website is much more desirable as an advertising space than any other travel site of any general portal used as a benchmark by the Commission. It stresses that the Ryanair website records in excess of 300 million page views per month.
- (159) AMS claims that the CCIPB purchased advertising space under the same conditions as private customers. According to AMS, the prices set out in the web marketing services agreement were the standard prices in the AMS rate card at the time of the agreement and were the same for all customers, whether public or private. It indicates that private airport operators ([...] and [...], for example) signed agreements with AMS that were similar to the agreement entered into with the CCIPB.
- (160) AMS argues that it is irrelevant whether or not the agreement in question was needed, as raised by the Commission in the opening decision: '... the Commission wonders whether the CCIPB needs the marketing services in question and whether the marketing services agreement was not concluded solely in order to subsidise the Pau-London Stansted route' ⁽²⁹⁾.
- (161) According to AMS, this type of transaction carried out under market conditions precludes the existence of aid and there is no legal precedent for the assessment of this 'need'. However, if the Commission insists on questioning this need, AMS points out that the CCIPB is responsible for both promoting the Pau-Béarn region and operating Pau airport. It considers that advertising on the Ryanair website makes commercial sense in terms of both these objectives.
- (162) With regard to purchasing advertising space to promote the region, AMS stresses that French CCIs are in competition with each other and have to use 'territorial marketing' so that their region comes out ahead of competing regions.
- (163) AMS considers that advertising space purchased on the Ryanair website increases the visibility of Pau airport. In its opinion, the CCIPB has a direct commercial interest in taking this approach because the resulting increase in passengers attracts ancillary businesses to the airport and increases airport revenue.
- (164) AMS claims that the CCIPB is not advertising on the Ryanair website in order to subsidise the Pau-London route, rather that the space on the Ryanair website that AMS is making available to the CCIPB constitutes a valuable resource for which there is proven alternative demand, including from the private sector. It would therefore be inaccurate to describe the sale of such space as a mere pretext for the payment of subsidies.
- (165) According to AMS, the web marketing services agreement does not constitute aid because its conditions correspond to those of a standard commercial agreement and do not confer any advantage on AMS (or Ryanair). It considers that this agreement does not therefore distort competition or affect trade between Member States.

6.1.5. AIR FRANCE

- (166) From Pau airport, Air France offers around five daily flights to Paris Orly airport, three daily flights to Paris Roissy Charles de Gaulle airport, and four daily flights to Lyon airport (through a subsidiary).
- (167) Air France states that the advantages granted to Ryanair and its subsidiary AMS, from which Air France does not benefit, have the effect of significantly reducing Ryanair's operating costs. According to Air France, this not only affects the direct competition between Ryanair and Air France for flights offered to and from Pau airport, but also the competition for all intra-Community routes. Trade between Member States is therefore directly affected.

⁽²⁹⁾ Opening decision, paragraph 43.

6.1.5.1. Airport charges

- (168) Air France notes that, according to the 2007 price brochure published by the CCIPB, the public rate for the parking charge is set at EUR 0,16 tonne/hour. This charge applies when an aircraft is parked for at least two hours on the tarmac. Air France does not find it odd that Ryanair does not pay this charge for a 25-minute turnaround, but, when a turnaround exceeds two hours, Ryanair should be required to pay this charge.
- (169) Air France notes that, according to the 2007 price brochure published by the CCIPB, the public rate for the lighting charge is set at EUR 35,18 per aircraft movement. This charge is payable when lighting equipment is used for an 'aircraft movement', namely a landing or takeoff, both during the day and at night. Not applying this charge to Ryanair on the pretext that it operates only daytime flights does not therefore comply with the general conditions for the application of this charge.
- (170) Air France stresses that these public charges are usually reviewed over time and it considers that Ryanair — like other carriers flying to and from Pau airport — should be subject to any variations in these charges.

6.1.5.2. Groundhandling services

- (171) Air France indicates that the groundhandling service provided to it at Pau airport is the subject of a formal contract. Air France notes that, according to the 2005 Guidelines, 'An airport operator acting as a provider of groundhandling services may charge different rates for the groundhandling charges invoiced to airlines if these different rates reflect cost differences linked to the nature or scale of the services provided'. Air France stresses that Pau Administrative Court, in its judgment of 3 May 2005, found that an unjustified discount granted to Ryanair on the groundhandling charges constituted State aid that, due to not having been notified, should be regarded as unlawful.
- (172) Air France notes that it offers significantly more services to and from Pau airport than Ryanair. Under these circumstances, Air France believes that the charges applied by the CCIPB to Ryanair for groundhandling services should not be more advantageous than those offered to Air France.

6.1.5.3. Marketing services agreement signed with AMS

- (173) Air France notes that this type of agreement between the airport operator and the Ryanair subsidiary AMS seems to be a common practice for Ryanair at airports from which it decides to launch routes. Air France indicates that the French administrative courts have already rejected this type of measure where the alleged promotional services have not been provided or have been provided under conditions that are excessively favourable to Ryanair.
- (174) Air France cites the 'imbalance' highlighted by Pau Administrative Court in its judgment of 3 May 2005 between the reciprocal undertakings of the parties to the agreement signed between the CCIPB and Ryanair in 2003. Air France considers that it is questionable whether a balance exists between the obligations of the parties to the 2005 agreement with AMS. According to Air France, there is nothing to indicate that all or part of this sum may be refunded by Ryanair if either the route in question is withdrawn or the promotional objectives that may be set are not achieved.
- (175) Air France does not dispute the fact that certain 'marketing' aid may be acceptable under the Community rules. However, Air France considers it unlikely that the 'marketing services' agreement meets the conditions required to be compatible with the internal market under Article 107(3)(c) TFEU.

6.1.5.4. Conclusion

- (176) Air France asks for an end to the payments that, in its opinion, are undue and that Ryanair has received from Pau airport since 2005, and that the recovery of the unlawful aid received by Ryanair be ordered.

6.2. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE**6.2.1. CHAMBER OF COMMERCE AND INDUSTRY OF PAU-BÉARN (CCIPB)**

- (177) The CCIPB believes that the marketing services agreements and airport services agreements that it has signed with the airlines and/or their subsidiaries do not contain any element of State aid.

- (178) The CCIPB notes that the nature and purpose of these agreements are radically different and must be analysed separately. It is irrelevant that these agreements may have been signed on the same date as they each have a different purpose. The airport services agreement is intended to determine the conditions under which Pau airport makes its airport facilities available to airlines and provides them with various airport services in return for remuneration. On the other hand, the marketing services agreement is intended to define the conditions under which, in return for remuneration, an airline must promote Pau airport and the tourist and business attractions of the Pau-Béarn region on its website. The two types of agreement are not therefore intrinsically linked. In the same way, even though the terms and conditions for airport services provided by the airport and marketing services provided by an airline or one of its subsidiaries may appear in one and the same agreement, this does not mean, however, that the legal analysis of the existence of State aid must cover both these types of service where they do not 'balance out each other'.
- (179) As regards the conduct of the CCIPB and that of other public entities, the CCIPB takes the view that they should not be assessed together, at the very least in terms of the marketing services agreements (which further justifies the separate assessment of the agreements), as these agreements are negotiated and concluded by the CCIPB in a strictly independent manner, without the intervention of other public entities.

6.2.1.1. *Marketing services agreements signed by the CCIPB*

Imputability

- (180) According to the CCIPB, the payments made under the marketing services agreements are not imputable to the State because the CCIPB is fully independent of its supervisory authorities with regard to the airport's operation. The decisions to pay the sums to Ryanair and AMS, on the one hand, and to Transavia, on the other hand, for marketing services were taken by the CCIPB individually and independently, without any direct or indirect intervention by the State.

Economic advantage granted to airlines

- (181) The CCIPB considers that it has clearly acted like a prudent private investor in a market economy. In particular, AMS and Transavia have provided genuine commercial services, including links on their websites allowing internet users to be directed straight to the CCIPB's website, for which the remuneration corresponds to the market price. The CCIPB stresses in this respect the large number of visitors to the Ryanair and Transavia websites.
- (182) The CCIPB also notes that the prices applied by AMS are as set in a public rate card available on its website. These prices are therefore applied to all airport customers of AMS without distinction, including certain fully privatised British airports. For its part, Transavia provides marketing services to a private airport in Italy.
- (183) In addition, according to the CCIPB, certain French airports operated by private companies (as public service licensees) appear to have signed a marketing services agreement with AMS, including Tarbes-Lourdes-Pyrénées airport managed by the Canadian company SNC-Lavalin. The CCIPB regards this as evidence that its conduct corresponds to that of a private operator.
- (184) The CCIPB also notes that the one-off nature of the price paid for the services provided does not appear to be a criterion for determining the existence of State aid, and that the sums paid under the Pau-Charleroi agreement resulted in different services from those that the CCIPB received under the Pau-London agreement, as a result of which the CCIPB has not paid twice for the same service. The CCIPB also considers that the sums paid are insufficient to launch a route.
- (185) The CCIPB considers that, by purchasing these marketing services at the prices stated in the agreements, it has benefited from indisputable economic consideration in two respects. Firstly, the marketing services have had a favourable impact on the airport's operating revenue, in particular by encouraging an increased flow of passengers within the airport. Secondly, and furthermore, this consideration has also benefited the entire town of Pau and its region.
- (186) The CCIPB does not agree with the consultant's view that Ryanair's strategy underlying the signature of marketing services agreements is to obtain a subsidy from the airport to keep its prices low. Unlike the consultant, the CCIPB takes the view that there is significant commercial interest in purchasing such services as Pau airport is a regional airport without a natural flow of passengers in a sufficient volume to balance its operating accounts. The CCIPB indicates that, since Ryanair's arrival at the airport and the promotional efforts made on its website, Pau airport has substantially increased its traffic.

- (187) Lastly, the CCIPB indicates that it refused to renew the marketing services agreement with AMS because the new prices being negotiated were too high. This decision confirms that it was not ready to accommodate Ryanair at any cost.

Distortion of competition

- (188) According to the CCIPB, the sums paid in return for marketing services have in no way affected competition between either airlines or airports. The CCIPB stresses that it must make promotional efforts as it has extreme difficulty in attracting airlines because they prefer to operate from local airports that are more attractive in terms of leisure tourism. The CCIPB cites Biarritz-Anglet-Bayonne airport, which serves a region renowned for its beaches, and Tarbes-Lourdes airport, which benefits from the religious site at Lourdes.
- (189) The CCIPB notes that, at Pau airport, the competition from low-fare airlines has in no way affected Air France's operations, which continued to grow until 2008 when the financial crisis broke. Furthermore, the CCIPB stresses that, prior to Ryanair's arrival in 2003, no airline operated any international routes from Pau airport, and that this arrival therefore did not affect competition for existing routes.

6.2.1.2. Airport services agreements

- (190) The CCIPB points out that all the airport charges are strictly applied in identical fashion to all users and all airlines at Pau airport. The CCIPB refutes in this respect that any discriminatory practices exist.
- (191) Furthermore, the CCIPB does not agree with the consultant's view that the non-regulated charges vary from one airline to another without just cause. According to the CCIPB, the charges for non-regulated services are negotiated with each airline according to its specific situation. The CCIPB concludes from these arguments that none of the airport services agreements examined by the Commission contains any element of State aid.

6.2.1.3. Subsidies to the airport

- (192) The CCIPB takes the view that none of the 'subsidies' received by Pau airport over the 2000-2010 period and examined in the formal investigation procedure contains any element of State aid.

Sovereign task subsidies

- (193) According to the CCIPB, the subsidies of EUR 3 521 000 mentioned in Section 4.3.1 were intended to finance tasks entrusted by law to airport operators, but that normally fall under State responsibility in the exercise of its official powers as a public authority. Accordingly, these tasks are not economic in nature and the subsidies in question therefore do not fall within the scope of State aid rules.

Equipment subsidies

- (194) The CCIPB takes the view that the equipment subsidies granted by the *syndicat mixte* and local authorities do not contain any element of State aid. These sums have been used to finance investments made by the owners of the airport infrastructure in maintaining and improving that infrastructure, or, in other words, developing their own assets. These investments have therefore been made solely for the benefit of their owners. These sums have not, however, conferred any economic advantage on the CCIPB because they have not reduced the operating costs that it must normally bear as airport operator. These sums have simply 'passed through' the CCIPB given that, in its capacity as operator of the public equipment, it is responsible for carrying out this maintenance, upgrading and improvement work.
- (195) As a result, according to the CCIPB, in paying equipment subsidies, the concession authority and local authorities have acted quite naturally, in their capacity as owners of the airport infrastructure and under the public equipment concession, to ensure that work to maintain, upgrade and improve the airport public service is carried out with a view to developing their assets. These are therefore investments that are naturally the responsibility of the public equipment owner and not its operator.
- (196) The CCIPB further notes that, at the end of the concession (end of 2015), it must return this airport infrastructure to its owners, together with the investments made.

- (197) In addition, the subsidies in question have in no way distorted competition with other neighbouring airports (Tarbes-Lourdes-Pyrénées and Biarritz-Anglet-Bayonne) because these have also received similar subsidies from their concession authorities.
- (198) With regard to the sum of EUR 38 000 received from Gaz de France in 2003, the CCIPB notes that this measure is not imputable to the State, but was taken independently by Gaz de France. In addition, this decision has not conferred any economic advantage on Pau airport because Gaz de France has acted as a prudent private investor in a market economy. Gaz de France in fact suggested to the CCIPB that a cogeneration plant be installed so that the airport could make energy savings on its heating and air-conditioning and so that Gaz de France could supply the gas needed for its operation.

Compatibility based on Commission Decision 2005/842/EC

- (199) The CCIPB notes that Commission Decision 2005/842/EC⁽³⁰⁾ (hereinafter the '2005 SGEI Decision') applies to the measures in question. The CCIPB stresses that the scope of this Decision includes 'public service compensation for airports ... for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1 000 000 passengers, in the case of airports' and 'which receive annual compensation for the service in question of less than EUR 30 million' (Article 2). As a result, according to the CCIPB, which takes the view that it has been entrusted with providing an airport public service, if the subsidies paid to the airport do constitute aid, this aid is compatible and exempt from the prior notification obligation based on the 2005 SGEI Decision.

Compatibility based on the 2005 Guidelines

- (200) The CCIPB argues, in the alternative, that the subsidies received by Pau airport and the CCIPB meet the compatibility criteria laid down by the 2005 Guidelines.

6.2.2. RYANAIR

- (201) Ryanair argues that the Commission has wrongly fused AMS's and Ryanair's separate agreements with the CCIPB into a single alleged State aid case. Ryanair further states that the investigation into the relationship between AMS and Pau airport flies in the face of the commercial success of the Ryanair offering, and that AMS has a large range of customers, not just airports, and its model is increasingly being replicated on other airline websites.

6.2.2.1. Consultant's report of 30 March 2011

- (202) Ryanair disputes some of the findings in the consultant's report, in particular the following three claims⁽³¹⁾:
- (a) 'The Ryanair website therefore primarily seems to be comparable to the websites of other airlines that generally host only a limited amount of paid advertising, with airports not featuring among the advertisers.' Ryanair states that it is wrong to claim that other airlines do not offer paid advertising on their websites. It argues that this practice is increasingly widespread and that regional airports, which suffer from low demand, are increasingly seeing the websites of their low-fare airline customers as the best place to advertise. Ryanair is also an example of an airline advertising parking services, on its website, for a hub airport from which it operates.
- (b) Ryanair maintains that it is incorrect to argue that airports are not comparable to other advertisers on its website, in so far as the airport services provided to Ryanair's passengers cannot be dissociated from the services provided to passengers by Ryanair itself. Ryanair argues that potential passengers seeing an advertisement for an airport on its website will generate income for the airport whether or not they fly with Ryanair. It therefore maintains that the position of airports advertising on its website is, contrary to the Commission's opinion, similar to that of other advertisers such as hotels and car rental companies.

⁽³⁰⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽³¹⁾ Decision to extend the formal investigation procedure, recital 38.

- (c) According to Ryanair, the consultant wrongly questions whether it is rational behaviour for airports to spend their own money with airlines in order to attract customers on flights to and from the airport, when these extra passengers will directly benefit said airlines. According to Ryanair, the fact that the provision of marketing services would benefit the provider of the advertising space, namely Ryanair, does not mean that it would not also benefit the airport purchasing those services. Ryanair is indifferent as to whether or not an airport advertises on its website since its load factors are similar on routes to those airports with an AMS advertising agreement to those without. Ryanair adds that regional airports generally have no entrenched market position, so advertising is a necessity. It also claims that the Commission is misguided in focusing on the benefits to the airline, since the MEO test does not require a measure to generate no benefit for a third party, including the provider of the advertising space. Ryanair stresses that the AMS marketing agreements with airports are separate from Ryanair's agreements with airports, and are not contingent upon the alleged 'benefit' that Ryanair may receive from the airport's advertising on ryanair.com.

6.2.2.2. AMS and Ryanair as a single beneficiary

- (203) Ryanair takes the view that the CCIPB's airport services agreement with Ryanair and its marketing agreement with AMS are separate and independent and concern different services, and that there is no link between them justifying their consideration as a single source of 'measures'. In Ryanair's view, the AMS agreements have benefited the CCIPB as the purchaser of advertising services and are not intended to improve Ryanair's load factors or performance on its routes.

6.2.2.3. State resources and lack of imputability

- (204) Ryanair disputes that the decisions made by the CCIPB are imputable to the State, and claims that the CCIPB's agreements with Ryanair and AMS have involved no transfer of resources from the French State.
- (205) Ryanair claims that the CCIPB is not just another facet of the French State and that imputability cannot be established solely on the basis that the CCIPB is a public undertaking and therefore under the control of the French State. Ryanair considers that the Commission must examine the role of public authorities in the CCIPB's decisions in relation to Ryanair and AMS.
- (206) In addition, Ryanair refers to the case-law of the French courts, based on which it takes the view that the chambers of commerce and industry are original entities characterised by their dual nature and that they should be categorised as 'public economic bodies'.
- (207) As regards the involvement of the State in the decision-making process, Ryanair argues that the State has to be informed only about certain types of decision, and only *ex post*.

6.2.2.4. Business plan

- (208) Ryanair maintains that the absence of a business plan when the 2005 agreements were signed cannot be used as evidence that the agreements did not satisfy the MEO test.

6.2.2.5. Ryanair's comments of 10 April 2013

- (209) On 10 April 2013 Ryanair submitted two notes prepared by the company Oxera and an analysis prepared by Professor Damien P. McLoughlin.

First Oxera note — Definition of the market benchmark in the comparative analysis for the MEO test. Ryanair state aid cases, note prepared for Ryanair by Oxera, 9 April 2013

- (210) Oxera takes the view that the Commission's approach of accepting only comparator airports in the same catchment area as the airport under investigation is flawed.
- (211) Oxera argues that market benchmark prices obtained from comparator airports are not affected by State aid granted to surrounding airports. It is therefore possible to robustly estimate a market benchmark when applying the MEO test.

(212) In fact:

- (a) comparator analyses are widely used when applying the MEO test outside the field of State aid;
- (b) companies influence each other's decisions only to the extent that their products are substitutable or complementary;
- (c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face limited competition from public airports in their catchment area (less than one-third of the commercial airports in the catchment area of the comparator airports are fully state-owned, and none of the airports in the same catchment area as the comparator airports was the subject of a State aid procedure (in April 2013));
- (d) even where the comparator airports face competition from public airports in the same catchment area, there is reason to believe that their conduct satisfies the MEO test (for example, where the private sector holds a large stake or where the airport is privately operated);
- (e) airports that satisfy the MEO test will not set prices below the marginal cost.

Second Oxera note — Principles underlying the profitability analysis for the MEO test. Ryanair state aid cases, note prepared for Ryanair by Oxera, 9 April 2013

(213) Oxera argues that its profitability analysis in its reports submitted to the Commission uses the principles that would be adopted by a rational private sector investor and reflects the approach taken in previous Commission decisions.

(214) The principles underlying the profitability analysis are as follows:

- (a) the assessment is undertaken on an incremental basis;
- (b) an *ex ante* business plan is not necessarily required;
- (c) in the case of an uncongested airport, the single-till approach is the appropriate pricing methodology;
- (d) only those revenues associated with the airport's economic activity should be taken into account;
- (e) the entire term of the agreement, including any extensions, should be taken into account;
- (f) future financial flows should be discounted in order to assess the profitability of the agreements.

(215) The incremental profitability resulting from Ryanair agreements with airports should be assessed on the basis of internal rate of return estimates or net present value measures.

Analysis by Professor Damien P. McLoughlin — Brand building: why and how small brands should invest in marketing, note prepared for Ryanair, 10 April 2013

(216) This document aims to set out the commercial logic underlying regional airports' decisions to purchase advertising space on ryanair.com from AMS.

(217) There is a large number of very robust, well-known and regularly used airports. Weaker competitors have to overcome the static purchasing behaviour of consumers to grow their business. Smaller regional airports need to find a way to continuously communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their means.

(218) Advertising via AMS:

- (a) offers an opportunity to reach a significant number of people already considering a travel purchase;
- (b) entails relatively low costs (prices in line with commercial rates for online communication);
- (c) allows communication at the point of purchase;
- (d) offers the possibility of creative advertising.

6.2.2.6. Ryanair's comments of 20 December 2013

- (219) On 20 December 2013 Ryanair submitted comments on the payments made to AMS. Ryanair disagrees with the Commission's preliminary assessment that the payments made to AMS constitute costs for the airport, as this approach disregards the value of AMS's services to the airport. Ryanair also takes the view that, for the purpose of the MEO test, a distinction should be made between the purchase of marketing services charged at market rates and a related airport-airline agreement.
- (220) In support of its arguments, Ryanair submits an analysis comparing the prices charged by AMS with prices for comparable services offered by other travel websites ⁽³²⁾. The analysis concludes that the prices charged by AMS were either lower than the average or within the mid-range of prices charged by comparator websites.
- (221) According to Ryanair, this shows that AMS's prices are in line with market prices and that the decision by a public airport to purchase AMS's services satisfies the MEO test. Ryanair also produces evidence of the services provided to airports under the AMS agreements in order to prove the value of these services to the airports.
- (222) According to Ryanair, if the Commission insists on subjecting the AMS agreements and the Ryanair airport services agreements to one and the same MEO test (an approach with which Ryanair disagrees), the value of AMS's services to the airports should not be underestimated.
- (223) In addition, Ryanair refers to the conclusions of various reports confirming that Ryanair has a strong pan-European brand capable of generating value for its advertising services.

6.2.2.7. Ryanair's comments of 17 January 2014

- (224) Ryanair submitted a report prepared by its economic advisor concerning the principles that it believes should be applied in an MEO profitability test encompassing both the airport services agreements concluded between Ryanair and airports and the marketing services agreements concluded between AMS and the same airports ⁽³³⁾. Ryanair stresses that this does not in any way prejudice its position that the AMS agreements and the airport services agreements should be subject to separate MEO tests.
- (225) The report states that AMS-associated income should be included on the revenue side in a joint profitability analysis where AMS expenditure is included on the cost side. In order to do this, the report proposes a cash-flow-based method in which AMS expenditure is treated as additional recurrent expenditure.
- (226) The report argues that marketing activities contribute to creating and enhancing brand value, which is likely to generate business and profits not only during the term of the marketing services agreement, but also after its expiry. This is particularly the case when, due to an agreement with Ryanair, other airlines are attracted to the airport, in turn attracting commercial operators and thus increasing the airport's non-aeronautical revenue. According to Ryanair, if the Commission carries out a joint profitability analysis, these profits should be taken into account by treating the AMS expenditure as additional recurrent expenditure, with the additional profits being calculated net of the AMS payments.

⁽³²⁾ Oxera: 'Are prices set by AMS in line with the market rate?', prepared for Ryanair, 20 December 2013.

⁽³³⁾ Oxera: 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?', prepared for Ryanair, 17 January 2014.

- (227) Ryanair believes in addition that a terminal value could be included in the projected additional profits at the end of the term of the airport services agreement in order to take account of the value generated after the expiry of the agreement. The terminal value could be set based on a conservative assumption as to the probability of the agreement with Ryanair being renewed or similar terms being agreed with other airlines. Ryanair takes the view that this would enable a lower bound for the profits generated jointly by the AMS agreement and the airport services agreements to be estimated, taking into account the uncertainty of the additional profits after the expiry of the airport services agreement.
- (228) In support of this approach, the report summarises the results of studies on the effect of advertising on brand value. These studies recognise that advertising can build brand value and improve customer loyalty. In particular, according to the report, advertising on ryanair.com increases brand visibility in the case of an airport. The report adds that smaller regional airports aiming to increase their traffic can particularly build their brand value by entering into advertising agreements with AMS.
- (229) The report indicates that the cash-flow-based approach is preferable to a capitalisation approach in which the AMS expenditure would be treated as capital expenditure on an intangible asset (namely, the brand value of the airport). The marketing expenditure would be capitalised as an intangible asset and then amortised over the useful life of this asset, with a projected residual value on the planned expiry of the airport services agreement. This approach would not, however, take into account additional profits made by the airport as a result of signing the airport services agreement with Ryanair, and estimating the intangible asset value due to brand expenditure and the length of the asset's useful life would also be difficult.

6.2.3. AIRPORT MARKETING SERVICES (AMS)

- (230) AMS states that it has not benefited from State aid and that the CCIPB has acted towards it in accordance with the MEO principle.
- (231) AMS argues that the amounts payable by the CCIPB to AMS for marketing services corresponded to the market price for services having a real value to the airport.
- (232) AMS states that the following three claims made in the consultant's report, as set out in the extension decision, are flawed for the following reasons:
- (a) 'The Ryanair website seems to be comparable to those of other airlines that, as a general rule, do not host paid advertising and on which airports do not advertise' — AMS maintains that it is incorrect to claim that other airlines do not host paid advertising on their websites. According to AMS, other airlines do host such advertising, but ryanair.com was simply the first to take this approach. AMS argues that the Ryanair website is different because its popularity makes it a particularly interesting proposition for advertisers. AMS notes that, for airports, advertising on ryanair.com is especially advantageous since it uniquely targets potential passengers, increases non-aeronautical revenue and enhances the airport's international brand recognition.
- (b) 'Airports are not comparable to other potential advertisers on the websites of airlines such as Ryanair because the services provided by an airport to Ryanair passengers are by nature indissociable from the services of Ryanair itself, unlike other services such as accommodation or car rental' — AMS states that the services provided by airports to passengers (such as retail stores, car parks, restaurants, etc.) are easily dissociable from the services provided to passengers by Ryanair. AMS adds that whether or not the airport's services to passengers can be 'associated' with those provided by Ryanair does not in any way diminish the value of such advertising for the airport. According to AMS, the same reasoning applies to private airports that pay for the company's services and to Ryanair's partner hotels and car rental companies, whose services could also be described as associated (or not) with those provided by Ryanair.
- (c) 'It is not rational behaviour for airports to spend their own money with airlines in order to encourage passengers to use the flights of the said airlines to those airports, when these extra passengers will directly benefit the said airlines' — AMS argues that airports advertise on ryanair.com because they want to increase the number of inbound passengers who are generally the source of higher non-aeronautical revenue for the airports. AMS adds that airports also need to advertise in order to establish their international brand recognition, and that their approach is similar to the advertising carried out by leading multinational corporations such as Coca-Cola, McDonald's, Nike, etc. According to AMS, Ryanair is indifferent as to whether or not an airport advertises on its website since this makes no difference to the overall number of Ryanair passengers and, in any case, the fact that Ryanair may or may not also benefit from an airport's advertising on ryanair.com is commercially irrelevant to the airport.

- (233) AMS stresses that there is no reason to question the commercial logic underlying a decision by an airport to advertise on ryanair.com where the services are offered at market price. It adds that regional airports need such advertising for their survival and growth.
- (234) AMS considers that advertising on the Ryanair website increases the number of inbound passengers who are much more likely to generate non-aeronautical revenue for the airport than outbound passengers travelling abroad. It concludes that it is therefore more prudent to advertise on the Ryanair website to attract inbound passengers than to use advertising targeting local passengers in newspapers or other media.
- (235) AMS argues that the 2005 Guidelines do not apply to the relationship between an airport and a marketing services provider, and the fact that AMS's parent company is an air carrier is not sufficient to make the Guidelines applicable.

6.3. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION OF A NOTICE INVITING MEMBER STATES AND INTERESTED THIRD PARTIES TO SUBMIT THEIR COMMENTS ON THE APPLICATION OF THE NEW GUIDELINES TO ONGOING CASES

6.3.1. AIR FRANCE

- (236) Air France questions the application of the new Guidelines to cases involving operating aid for airports, even where this aid was paid prior to the publication of the said Guidelines, for a number of reasons.
- (a) According to Air France, this retroactive application of the new Guidelines favours non-virtuous operators by legitimising conduct that did not comply with the rules applicable at the time. By contrast, this approach penalises operators who did comply with the 2005 Guidelines by refraining from claiming public funds.
- (b) Air France also maintains that the application of the new Guidelines to operating aid granted to airports before the new Guidelines entered into force is contrary to general principles of law and European case-law.
- (237) Air France claims that the new Guidelines will have the effect of favouring new operators to the detriment of incumbent operators. By allowing a new airline to pay only the incremental cost associated with its activity, they will discriminate against incumbent operators at the airport, who will be subject to higher charges.
- (238) Lastly, Air France points out that, although the condition of non-discriminatory accessibility to the infrastructure of an airport may seem easy to fulfil in theory, the situation is quite different in practice, with certain operating models being consciously disadvantaged.

6.3.2. CCIPB

- (239) The CCIPB refers to its previous comments and submits an analysis of the reasons why, if the equipment subsidies were regarded as operating aid, they would be compatible with the provisions of Section 5.1.2 of the new Guidelines, which enable the retroactive authorisation of operating aid paid to airports before the new Guidelines entered into force.

6.3.3. TRANSPORT & ENVIRONMENT (T&E)

- (240) This non-governmental organisation has made comments criticising the new Guidelines and the Commission decisions in the aviation sector to date, due to their allegedly harmful consequences for the environment.

7. COMMENTS FROM FRANCE

7.1. COMMENTS SUBMITTED BY FRANCE FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

7.1.1. 2005 AIRPORT SERVICES AGREEMENT

- (241) France notes that the 2005 airport services agreement simply sets out the airport's charges, which are public and apply in identical fashion to any carrier operating from the airport.

- (242) With regard to the parking charge, the airport's rules state that this charge is payable only after the aircraft has been parked for more than two hours at the airport. As a result, according to France, given that the turnaround time of aircraft operated by Ryanair is generally limited to 25 minutes, it is normal for this airline not to be invoiced for any parking charges.
- (243) Likewise, the lighting charge is payable only when the lights are used (in other words, at night or in cases of poor visibility). According to France, as Ryanair's flights operate only during the daytime, they do not need the lights to be used and the corresponding charge is not therefore payable.

7.1.2. CIVIL AVIATION TAX

- (244) France provides further information on the airport tax, described in Section 4.3.2, and on the civil aviation tax.
- (245) With regard to the civil aviation tax laid down by Article 302a K of the General Tax Code, this is collected by the State from carriers and is used to finance the tasks of the Directorate-General for Civil Aviation that are not funded through fees for services provided. It is based on the number of passengers and weight of freight and mail loaded on departure from France. Its intra-Community rate is set by the aforementioned article and is identical throughout the French territory. The tax rate is set by the State, which also collects the tax, with airport operators not being involved in this process.

7.1.3. AGREEMENT BETWEEN THE CCIPB AND AMS

- (246) With regard to the agreement between the CCIPB and AMS, which forms the basis of the notification procedure, the French authorities note that this agreement states that AMS has an exclusive licence to offer marketing services on the travel website www.ryanair.com. France notes that this website also offers air services from numerous airports in Europe.
- (247) France points out that the CCIPB has provided documentation forming part of the commercial offer of the website www.voyages-sncf.com, in which the services offered seem to be fairly close to those covered by the agreement with AMS. These services are costed at EUR [...] excluding taxes, i.e. EUR [...] including taxes, which seems to be a comparable figure to that invoiced by the Ryanair subsidiary.
- (248) France takes the view that the other features of this agreement should also be taken into account, in particular:
- its 5-year term,
 - the circumstances of its conclusion, in particular the absence of any prior call for competition relating to the purchase of services in the market sector,
 - the charges for these marketing services, which were set in advance as a one-off payment and not after the fact using the website traffic statistics of www.ryanair.com,
 - the exclusivity clauses covering the provision of ancillary services (car rental, accommodation), which allow only undertakings with which the Ryanair group has commercial agreements to provide these services.

7.2. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (249) France did not respond to the comments submitted by interested third parties following the opening of the formal investigation procedure.

7.3. COMMENTS SUBMITTED BY FRANCE FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

7.3.1. ALLEGED AID GRANTED TO AIRLINES

- (250) France takes the view that the airport services agreements and marketing services agreements must be assessed together for each period in question in order to determine whether an economic advantage exists.

- (251) France also considers that the conduct of the CCIPB as a whole, of the CCIPB as airport operator and of the State or other public authorities supervising the airport operator or involved in its financing should be assessed together, in terms of their relations with Ryanair and AMS, in order to apply the private operator in a market economy test.
- (252) However, France notes that the considerations underlying the decisions of public authorities to participate in certain financing do not solely involve airport profitability criteria but also, more widely, the economic and social benefits of the airport's activity for the region, which are not taken into account in the reasoning conducted by the private operator in a market economy.
- (253) France refers in this respect to two studies carried out in 2005 and 2011 by the CCIPB on the impact of the traffic brought by Ryanair. These studies show the significant economic benefits generated by the airline for the region.
- (254) With regard to the doubts expressed by the Commission in the extension decision on the compatibility with the internal market of possible aid measures granted by the agreement signed with Ryanair in 2003 and the 2005 agreements, France recalls that it itself notified this situation in January 2007 in order to raise its doubts and obtain a Commission decision on the regularity of the possible aid measures granted by the 2005 agreements with the Community rules on State aid. In this context, France is not in a position to prove said compatibility.
- (255) France confirms that the activities of the airlines financed by the CCIPB have an important impact on regional economic development. However, France cannot therefore conclude that this is compatible with the internal market based on Article 107(3)(c) TFEU or the rules on services of general economic interest.

7.3.2. FINANCIAL CONTRIBUTIONS TO THE AIRPORT

- (256) As regards the existence of State aid in the financial contributions to Pau airport, France takes the view that, for this airport as for most other airports of the same size, the investment decisions of contributing public authorities are based not on a direct consideration paid by the concession-holder, but on the economic and social benefits generated by the airport's activity for the region.
- (257) France also refers to the legal mechanism for financing safety and security tasks, described in Section 4.3.2. France takes the view that this mechanism precludes any overcompensation of the costs incurred by airport operators in carrying out the safety and security tasks, which are sovereign tasks of the State. As a result, according to France, the sums paid by the State to cover the safety costs (staff and equipment or vehicles for firefighting, wildlife hazard prevention, fencing) and security costs (staff and equipment for screening passengers and their baggage) do not constitute State aid.

7.4. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

- (258) France did not respond to the comments submitted by interested third parties following the extension of the formal investigation procedure.

7.5. COMMENTS FROM FRANCE ON THE APPLICATION OF THE NEW GUIDELINES TO THIS CASE

- (259) France notes that the new Guidelines are more flexible on operating aid than the previous guidelines. According to France, their retroactive application to all aid will therefore mean that previous situations at certain airports will be treated less punitively.
- (260) France notes, however, that investment aid will be assessed more harshly than before under the new Guidelines as these lay down maximum aid intensities authorised according to the size of the airport.

7.6. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES ON THE APPLICATION OF THE NEW GUIDELINES TO THIS CASE

- (261) France did not respond to the comments submitted by interested third parties on the application of the new Guidelines to this case.

8. ASSESSMENT

- (262) In order to assess the measures in question, a distinction should be made between the potential aid granted to airlines (Section 8.1 of this Decision) and the potential aid granted to the Pau airport operator in the form of financial contributions (Section 8.2 of this Decision).

8.1. MEASURES IN FAVOUR OF AIRLINES

8.1.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (263) Under Article 107(1) TFEU, 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (264) For a measure to constitute State aid, all the following conditions must be met: (1) the measure in question is financed by state resources and is imputable to the State; (2) it confers an economic advantage; (3) this advantage is selective; (4) the measure in question distorts or threatens to distort competition and may affect trade between Member States; and (5) the beneficiary is an undertaking within the meaning of Article 107(1) TFEU, which implies that it engages in an economic activity.

8.1.1.1. *State resources in the agreements between the CCIPB and the airlines during the period under review*

- (265) The marketing services and airport services agreements were entered into between the airlines, on the one hand, and the CCIPB, on the other hand.
- (266) The chambers of commerce and industry are public bodies under French law. According to the current version of Article L.710-1 of the Commercial Code, departmental bodies or chambers that are members of the network of chambers of commerce and industry shall each, in their capacity as intermediate state authorities, function as representatives of the interests of industry, commerce and services before public or foreign authorities. They shall act as the interface between the various stakeholders concerned and shall carry out their activities without prejudice to the representation tasks conferred on professional or interprofessional organisations by the laws and regulations in force or to the tasks carried out by local authorities within the context of their administrative freedom. The network and each member departmental body or chamber shall contribute to the economic development, attractiveness and land planning of the area, and shall also support businesses and their associations by fulfilling, under the conditions laid down by decree, any public service mission and any general interest mission necessary for the fulfilment of such missions.

- (267) The same provision stipulates as follows:

To this end, each departmental body or chamber in the network may undertake, in accordance with the applicable sectoral plans, where appropriate:

- 1° general interest missions conferred on it by laws and regulations;
- 2° support, mentoring, liaison and advisory missions with those starting up or taking over businesses and with businesses in general, in accordance with the applicable laws and regulations on competition law;
- 3° a support and advisory mission to encourage the international development of businesses and the export of their production, in partnership with the French Agency for International Business Development;
- 4° a mission to encourage initial or ongoing vocational training, in particular through public and private educational establishments that it sets up, manages or finances;
- 5° a mission to set up and operate facilities, particularly port and airport facilities;
- 6° profit-making missions conferred on it by a public entity or that may prove necessary for the fulfilment of its other missions;
- 7° any expert assessment, consultation or research mission requested by public authorities on an issue relating to industry, commerce, services, economic development, vocational training or land planning, without prejudice to any work that it may initiate.

- (268) Article L.710-1 of the Commercial Code also states: The assembly of French chambers of commerce and industry, regional chambers of commerce and industry, local chambers of commerce and industry and inter-chamber groups

shall be public bodies supervised by the State and administered by elected managers.

- (269) This legislative provision has changed during the course of the period under review, i.e. from 2003 to 2010. However, its fundamental principles remain the same. Throughout this period, chambers of commerce and industry such as the CCIPB have remained public bodies set up by law, administered by elected managers and supervised by the State. Furthermore, as intermediate state authorities, their *raison d'être* and primary objective is (under Article L.710-1 of the Commercial Code) to fulfil the general interest missions conferred on them by law, i.e. mainly to represent the interests of industry, commerce and services before public authorities, support local businesses, and develop the attractiveness and land planning of their areas. The industrial and commercial activities of chambers of commerce and industry are ancillary to their general interest missions and are designed to help fulfil those missions.
- (270) It should also be noted that national laws lay down specific financing arrangements for chambers of commerce and industry, in particular in Article L.710-1 of the Commercial Code. The resources of chambers of commerce and industry therefore consist in particular of tax revenues (the tax to cover the costs of chambers of commerce and industry, established by Article 1600 of the General Tax Code), subsidies or even resources arising out of training and transport infrastructure operation activities. As a result, chambers of commerce and industry do not have to rely solely on their commercial revenue to cover their costs. This tends to corroborate the conclusion that the industrial and commercial activities of chambers of commerce and industry are ancillary to their general interest missions and are designed to help fulfil those missions.
- (271) France has confirmed this conclusion with regard to the CCIPB as it has stated that, as the legal representative of the interests of 13 000 local businesses, the CCI Pau Béarn is their spokesperson before local and public authorities. France has also stated that, in the context of these missions, the operation of Pau-Pyrénées airport makes total sense as the latter forms a tool for growth and development of economic activity within the area of the CCI Pau Béarn. France has therefore confirmed that CCIs have a legal general interest mission that is linked to the economic development and improved attractiveness of their areas, among other aspects. According to France, the provisions cited also indicate that the operation of airport facilities clearly falls within the scope of this mission.
- (272) France has added that CCIs regularly conduct and finance lobbying actions to improve the attractiveness of their areas and promote new facilities. It has stated that they also conduct specific actions to promote tourism through their participation in various regional and departmental structures in this area, particularly through the regional and departmental tourism committees provided for by Articles L.131-4 and L.132-3 of the Tourism Code. It has further stated that a policy of developing the attractiveness of an area requires a series of simultaneous actions to attract capital, markets, businesses, talent, students and tourists who will support local businesses and the region, with this attractiveness also having an international dimension. France has confirmed that low-fare airlines with their websites can contribute to this policy. Lastly, France has stated that the region's inhabitants are themselves demanding new routes, a diverse offer and, more specifically, 'low-fare' services so that they can more easily travel to Europe at a lower cost.
- (273) These statements unequivocally confirm that the main *raison d'être* and objective of the CCIPB are, as for all chambers of commerce and industry, to serve the interests of local businesses as a whole and to contribute to the economic development and attractiveness of the area. France's aforementioned statements also indicate that, for a chamber of commerce and industry such as the CCIPB, a commercial activity such as the operation of Pau airport is not pursued in the interests of profitability, but as a necessary counterpart to the general interest missions with which this body is invested by law. As noted above in recital 142, the CCIPB regards itself as a non-profit-making public body.
- (274) In the light of all the above, chambers of commerce and industry such as the CCIPB must be regarded as public authorities and all their decisions, just like those of the national government or local authorities, must be regarded as 'imputable to the State', within the meaning of the case-law on State aid⁽³⁴⁾, with their resources constituting state resources⁽³⁵⁾. It is irrelevant in this respect that chambers of commerce and industry are managed by persons elected by traders and business leaders and representatives, and not by officials appointed by other public authorities. In fact, even though national parliaments are elected by all citizens having the right to vote, they represent one of the constitutional powers of any democratic State and their decisions are necessarily imputable to the State.

⁽³⁴⁾ See, for example, judgments in Case C-303/88 *Italian Republic v Commission of the European Communities* [1991] ECR I-1433, paragraph 11, and in Case T-358/94 *Compagnie nationale Air France v Commission of the European Communities* [1996] ECR II-2109, paragraphs 58 to 61.

⁽³⁵⁾ See, in this respect, the Commission Decision of 14 July 2004 in Case C25/2004 — *Germany — DVB-T in Berlin-Brandenburg*, recital 20.

- (275) The situation of chambers of commerce and industry is therefore different from that of public undertakings, with regard to which the Court of Justice stated in the *Stardust Marine* ⁽³⁶⁾ judgment: 'Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State ... Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures'.
- (276) In the case of a measure taken by a public undertaking established in order to carry out an economic activity, it must be determined whether the public authorities controlling that undertaking, for example due to the capital share that they hold in said undertaking, are involved in the measure in question. The situation of a chamber of commerce and industry is different in that such a body is itself part of the public administration or an 'intermediate state authority' or a 'public body', and therefore a public authority created by law to satisfy general interests. As a result, in order to determine whether a decision of a chamber of commerce and industry is imputable to the State, it is not necessary to determine whether another public authority (for example, the State in the strict sense or the municipality or other local authorities) has been involved in the decision in question. In reality, such a decision necessarily meets the imputability criterion.
- (277) This approach has previously been taken by the Commission in its decision-making practice. Accordingly, the Commission stated with regard to the Chamber of Commerce and Industry of Var that, due to its status as a public body under French law, it pursues its activity in a defined geographical area, is managed by elected members and has tax resources collected from undertakings registered in the Register of Trade and Companies, and therefore falls within the category of 'public authorities' within the meaning of Commission Directive 2000/52/EC ⁽³⁷⁾. It is not therefore necessary to determine whether the measure is imputable to the State within the meaning of the *Stardust Marine* case-law ⁽³⁸⁾.
- (278) The CCIPB has disputed that the agreements covered by the formal investigation procedure are imputable to the State as it denies that the State and local authorities are involved in its decisions. In the light of the above, this argument does not appear to stand up as the CCIPB is itself a public authority whose decisions are necessarily imputable to the State within the meaning of the case-law on State aid, regardless of the role played in its decisions by other authorities. For the same reasons, the CCIPB's argument that supervision by the State does not imply subordination is also without merit. As already highlighted in recital 273, in its comments on the opening decision, the CCIPB presented itself as a non-profit-making public body, thus confirming the Commission's argument that the CCIPB is a public authority and that all its decisions are imputable to the State, without the involvement of other public authorities in those decisions having to be ascertained.
- (279) Ryanair's comments on this point are substantially similar to those of the CCIPB. Ryanair has in particular indicated that the Commission should examine the imputability criterion by assessing the involvement of 'public authorities' in the CCIPB's decisions with regard to Ryanair and AMS. Ryanair has also cited a Council of State opinion that suggests that chambers of commerce and industry are independent from the State in the strict sense. According to this opinion, the fact that chambers of commerce and industry answer to the State, in so far as any public body must technically answer to a legal person, does not in itself imply any subordination. Ryanair argues in this respect that the State (in the strict sense) is involved only in certain decisions of the CCIPB, of which it is informed only after the fact. For all the reasons given above, this argument is without merit as there is no need to ascertain whether any public authorities, other than the CCIPB, are involved in the latter's decisions.
- (280) Likewise, the CCIPB's argument that it operates Pau airport under the rules of private law is without merit, as the measures in question were adopted by a public body and are therefore necessarily imputable to the State ⁽³⁹⁾.

⁽³⁶⁾ See judgment in Case C-482/99 French Republic v Commission of the European Communities [2002] ECR I-4397, paragraph 52.
⁽³⁷⁾ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

⁽³⁸⁾ See the Commission Decision of 22 June 2006 in Case N 563/2005 — *France — Aide à la compagnie Ryanair pour la ligne aérienne desservant Toulon et Londres*, recital 16.

⁽³⁹⁾ Moreover, the Commission stresses that, for the purpose of applying the rules on state aid, a distinction should not be made between the CCIPB and the specific CCIPB service operating the airport, given that the service operating Pau airport does not have its own legal personality distinct from that of the CCIPB and is simply a link in the chain of services within the CCIPB that has no decision-making autonomy other than in relation to the day-to-day operation of the airport. Accordingly, the various airport services agreements and marketing services agreements covered by the formal investigation procedure were signed by the President of the CCIPB, following authorisation from the General Assembly of the CCIPB. Furthermore, neither France nor the third parties have argued that the measures covered by the formal investigation procedure should be imputed solely to this service.

- (281) In conclusion, the various agreements covered by this assessment are imputable to the State and involve the use of state resources.

8.1.1.2. ***Selective advantage for Ryanair, AMS and Transavia in the agreements signed with the CCIPB during the period under review***

- (282) In order to determine whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions ⁽⁴⁰⁾.
- (283) In order to make this assessment, the MEO test should be applied to the measures in question. This involves determining whether a hypothetical MEO acting in place of the CCIPB and motivated by the prospect of profits would have entered into similar agreements.
- (284) In order to correctly apply this test, a number of general questions should be answered first, particularly the following.
- Should a marketing services agreement and an airport services agreement that were signed at the same time be analysed separately or together ⁽⁴¹⁾?
 - In applying the MEO test to the marketing services agreements, should the CCIPB be regarded as having acted as Pau airport operator or as a public authority purchasing marketing services in the context of its local economic development mission, regardless of its function as airport operator?
 - What benefits could a hypothetical MEO acting in place of the CCIPB have expected from the marketing services agreements?
 - What, for the purposes of applying the MEO test, is the relevance of comparing the terms of the airport services agreements covered by the formal investigation procedure with the airport charges invoiced at other airports?
- (285) After answering these questions, the Commission will apply the MEO test to the various measures in question.

Joint analysis of the airport services agreements and marketing services agreements

- (286) In the extension decision, the Commission considered that the two types of agreement covered by the formal investigation procedure, namely the airport services agreements and the marketing services agreements, should be analysed together, for each period in question, at the time when each of the agreements was signed. This approach particularly involves each set of agreements below, entered into by the CCIPB, being treated as a single measure:
- airport services agreement signed on 30 June 2005 with Ryanair and marketing services agreement signed on the same date with AMS, with regard to the Pau-London Stansted route,
 - letter from the CCIPB to Ryanair of 25 September 2007 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Charleroi route ⁽⁴²⁾, and the marketing services agreement signed on the same date with AMS,
 - letter from the CCIPB to Ryanair of 17 March 2008 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Bristol route, and the marketing services agreement signed on 31 March 2008 with AMS with regard to this same route,

⁽⁴⁰⁾ See, in particular, judgment of 29 April 1999 in Case C-342/96 Kingdom of Spain v Commission of the European Communities [1999] ECR I-2459, paragraph 41.

⁽⁴¹⁾ This question does not apply to the agreement signed on 23 January 2006 by the CCIPB with Transavia, which covers both airport services and marketing services, or to the agreement signed on 28 January 2003 by the CCIPB with Ryanair, which also contains provisions on both airport services and marketing services.

⁽⁴²⁾ This type of letter can be likened to an airport services agreement, as it indicates the terms for setting airport charges and for groundhandling services. It will be included hereinafter among the acts referred to as 'airport services agreements'.

- letter from the CCIPB to Ryanair of 16 June 2009 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Bristol route, and the marketing services agreement signed on the same date with AMS with regard to this same route,
- marketing services agreement signed on 28 January 2010 with AMS with regard to the Pau-London, Pau-Charleroi and Pau-Beauvais routes. No airport services agreement was formally signed in parallel with this marketing services agreement. However, an ‘implicit’ airport services agreement can be identified. This implicit agreement stems from the general airport charges, adopted following discussions within the airport’s economic advisory committee, and the charges for groundhandling services stipulated by the airport services agreement of 30 June 2005 continuing to be applied to Ryanair for the three routes described in the marketing services agreement⁽⁴³⁾. France has in fact indicated that, when the airport services agreement of 30 June 2005 expired on 30 June 2010, this was not renewed and the charges applied thereafter to Ryanair continued to be those adopted by the airport’s economic advisory committee for the regulated charges and those stipulated by the agreement of 30 June 2005 for the groundhandling services.
- (287) France has stated that it agrees with the approach taken in the extension decision to analyse together the airport services agreements and marketing services agreements signed at the same time. On the other hand, certain interested third parties, particularly the CCIPB and Ryanair, question this approach as they consider that the marketing services agreements should be analysed separately.
- (288) However, the facts on record confirm that the approach taken in the extension decision, and approved by France, is well-founded. This is clear in the case of Transavia and the agreement signed with Ryanair in 2003, as the marketing services and airport services are the subject of a single agreement. For the reasons given in recitals 289 to 313, this is also valid for the other agreements signed with Ryanair and AMS.
- (289) Firstly, each marketing services agreement was signed at virtually the same time as an airport services agreement. These two types of agreement were signed on each occasion on the same date, except in the case of the marketing services agreement of 31 March 2008, which, however, was signed very shortly after (14 days) an airport services agreement for the Pau-Bristol route, which was the same route covered by the marketing services agreement.
- (290) Moreover, the two types of agreement were signed by the same parties. AMS is actually a wholly-owned subsidiary of Ryanair and its managers are senior Ryanair executives⁽⁴⁴⁾. As a result, Ryanair and AMS form a single economic entity, in the sense that AMS acts in Ryanair’s interests and under its control, and AMS’s profits go to Ryanair in the form of dividends or increased company value. Moreover, as will be detailed further on, the various marketing services agreements are connected with the operation of certain routes by Ryanair from Pau airport. The marketing services agreements in fact indicate that they are rooted in Ryanair’s commitment to operate these routes, and they were also signed at the same time as airport services agreements between the CCIPB and Ryanair for these same routes. Consequently, the fact that the marketing services agreements were signed by the CCIPB with AMS and not Ryanair cannot prevent a marketing services agreement and an airport services agreement that were signed at the same time from being regarded as forming a single transaction, particularly for the purpose of analysing these agreements in the light of the MEO test, and in the context of this analysis, Ryanair and AMS from being regarded as forming a single economic entity.
- (291) Lastly, a number of other facts, set out in recitals 292 to 313 for each agreement, reveal additional very close links between, on the one hand, each marketing services agreement and, on the other hand, the airport services agreement signed at the same time as the latter.
- (292) Accordingly, the marketing services agreement of 30 June 2005 was signed for a term of 5 years, just like the airport services agreement signed on the same date, through which Ryanair undertook to offer a daily service between London and Pau. Moreover, the marketing services agreement establishes an explicit link between itself and the air transport services covered by the airport services agreement: ‘This Agreement is rooted in Ryanair’s commitment to operate on a daily basis a route between Pau and London Stansted’. This wording unequivocally shows that the marketing services agreement would very likely not exist if Ryanair were not operating the route covered by the airport services agreement.

⁽⁴³⁾ According to this marketing services agreement, Ryanair undertook to operate these three routes under the conditions stipulated by this same agreement.

⁽⁴⁴⁾ See the report of the Aquitaine Regional Audit Chamber on the CCIPB, referred to in recital 72, which concludes in particular that AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives.

- (293) The marketing services agreement of 30 June 2005 also indicates as follows in its preamble: ‘... [Airport Marketing Services Limited] is — for technical reasons — the only company with the potential to undertake the promotion of the Pau-Béarn region through the original and exclusive website www.ryanair.com with a view to ensure reservations of Ryanair tickets to Pau’. This wording tends to confirm that the primary objective of the marketing services agreement is not to promote the Pau-Béarn region in general, but, much more specifically, to maximise sales of Ryanair tickets to Pau by promoting this region.
- (294) Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting messages and links on the Pau destination page of the Ryanair website, and inserting a link to the website designated by the CCIPB on the English homepage of the same website. However, the Pau destination page of the Ryanair website is mainly targeted at people who have already decided to use or are likely to consider using Ryanair’s services to Pau. As for the website homepage, this is certainly targeted at a much wider audience, but only its English version is covered by the marketing services agreement. This further indicates that the marketing services are essentially designed to promote Ryanair’s services between Pau and London, and not equally travel to Pau and its region. If they were designed to promote Pau and its region to all tourists and business travellers likely to be interested in the region, the CCIPB would in all likelihood have asked for the link to a website of its choosing to be placed on all, or at least several versions of, the Ryanair website homepage, and not just the English version.
- (295) Lastly, the marketing services agreement of 30 June 2005 stipulates as follows: ‘If any of the material conditions of trading change substantially following the signature of this agreement, including the level of inbound passengers generated as a result of this Agreement, the Parties will in good faith undertake to amend the contract so as to reflect such a change’. The level of inbound passengers is therefore presented as a ‘material condition of trading’ of the marketing services agreement, which once again confirms that it is not so much travel to Pau and its region in general that is primarily pursued by the marketing services but, much more specifically, the maximisation of the number of passengers on Ryanair flights to Pau.
- (296) Similar elements can be found in the other marketing services agreements. The marketing services agreement of 25 September 2007 was concluded for a term of 5 years, which corresponds to the period for which the letter from the CCIPB to Ryanair of the same date extended the terms of the airport services agreement of 30 June 2005 to the Pau-Charleroi route. Moreover, the marketing services agreement indicates as follows: ‘This Agreement is rooted in Ryanair’s commitment to operate on a route between PAU and CHARLEROI with a weekly service (3 frequencies per week) subject to force Majeure per full year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of BELGIUM-originating passengers with high spending ability to PAU BEARN’.
- (297) The agreement’s preamble also states as follows: ‘... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region’. These statements tend to confirm that the primary objective of the agreement is not to promote travel to the Pau-Béarn region in general, but, much more specifically, to maximise sales of Ryanair tickets on its Charleroi-Pau route.
- (298) Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the Belgian and Dutch homepage of the Ryanair website. The marketing services are not therefore targeted at anyone who might be convinced to stay in Pau or its region, but specifically at those people who are most likely to use Ryanair’s services between Charleroi and Pau, namely inhabitants of Belgium and the Netherlands.
- (299) The marketing services agreement of 31 March 2008 was concluded for a period between 16 May and 13 September 2008, which corresponds to the period for which Ryanair undertook to operate a route to Bristol, as indicated by the following wording in said agreement: ‘This Agreement is rooted in Ryanair’s commitment to operate on a route between PAU and BRISTOL with a weekly service (3 frequencies per week), from May 16th 2008 to September 13th 2008 subject to force Majeure, for one year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of ENGLISH-originating passengers with high spending ability to PAU BEARN’⁽⁴⁵⁾.

⁽⁴⁵⁾ Original English.

- (300) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region' ⁽⁴⁶⁾. Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the English homepage of the Ryanair website.
- (301) The marketing services agreement of 16 June 2009 was concluded for a period between 1 April and 24 October 2009, which corresponds to the period for which Ryanair undertook to operate a Pau-Bristol route, as indicated by the following wording in said agreement: 'This Agreement is rooted in Ryanair's commitment to operate on a route between PAU and BRISTOL with a weekly service (2 frequencies per week), from April 1st 2009 to October 24th 2009, that is 60 projected flights for the complete 2009 schedule, subject to force Majeure, for one year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of ENGLISH-originating passengers with high spending ability to PAU BEARN'.
- (302) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region'. Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the English homepage of the Ryanair website.
- (303) The marketing services agreement of 28 January 2010 stipulated that it would apply for one year from the launch of the air transport services that Ryanair had undertaken to operate from Pau to London, Charleroi and Beauvais according to Article 1 of this same agreement. This provision in itself reveals a clear link between the marketing services agreement and these air transport services. Moreover, Article 1 of the marketing services agreement stipulates as follows:

'This Agreement is rooted in Ryanair's commitment to establish and to operate routes between:

— PAU and LONDON Stansted from 30 March 2010 with three flights per week during the whole year ...

— PAU and CHARLEROI from 30 March 2010 with three flights per week for summer schedule ...

— PAU and BEAUVAIS, from April 2010, with three flights per week for summer schedule ...

CCIPB therefore, has the potential to advertise the business and tourist attractions of PAU and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of inbound passengers with high spending ability' ⁽⁴⁷⁾.

- (304) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region' ⁽⁴⁸⁾. Furthermore, like the 2005 marketing services agreement, the 2010 agreement stipulates that the services to be provided by AMS consist in inserting messages and links on the Pau destination page of the Ryanair website, and inserting a link to the website designated by the CCIPB (i) on the English homepage of the Ryanair website for the route to London, (ii) on the Belgian and Dutch homepage of the Ryanair website for the route to Charleroi, and (iii) on the French homepage of the Ryanair website for the route to Beauvais. Lastly, the agreement stipulates that, if Ryanair's air transport services to London, Charleroi and Beauvais, as defined in Article 1, are not announced or launched by February 2010, the agreement will lapse without liability to either party. This provision therefore establishes an additional link between the marketing services agreement and the Ryanair services to London, Charleroi and Beauvais.

⁽⁴⁶⁾ See footnote 45.

⁽⁴⁷⁾ See footnote 45.

⁽⁴⁸⁾ See footnote 45.

- (305) These elements of the various marketing services agreements show that the marketing services stipulated in these agreements are, in terms of both their duration and their nature, closely linked to the air transport services offered by Ryanair, as defined in the marketing services agreements and covered by the corresponding airport services agreements. The marketing services agreements even indicate that they are rooted in Ryanair's commitment to operate the transport services in question. Far from being designed to generally and equally increase travel to Pau and its region by tourists and business travellers, the marketing services specifically target those persons likely to use the Ryanair transport services covered by the marketing services agreements, and therefore have the primary objective of promoting those services.
- (306) The marketing services agreements are therefore indissociable from the airport services agreements that they echo and from the air transport services that form their purpose. The facts presented in recitals 286 to 305 also indicate that, in the absence of the routes in question (and therefore the associated airport services agreements), the marketing services agreements would not have been signed. As shown in recitals 286 to 305, the marketing services agreements explicitly indicate that they are rooted in Ryanair's commitment to operate certain routes. They also provide for marketing services that are essentially intended to promote those routes.
- (307) In this respect, the CCIPB's argument that these two types of agreement should be analysed separately because they each have a different purpose is without merit. It is in fact clear from the above that the marketing services agreements form an integral part, together with the airport services agreements, of the commercial relations between Ryanair and the CCIPB with regard to the operation of those routes covered by these two types of agreement.
- (308) Furthermore, it seems that, before signing the marketing services agreements in question, the CCIPB did not organise an invitation to tender open to all companies offering this type of service⁽⁴⁹⁾, nor did it consult various potential providers in order to compare their offers. More generally, it did not consider any providers other than the airlines concerned or their subsidiaries for the marketing services in question. This confirms the close link of dependency between the marketing services agreements and the routes operated by Ryanair from Pau. If the marketing services agreements had been truly independent of the airport services agreements, the CCIPB would in all likelihood have consulted other providers in addition to AMS, particularly as it is a public body that routinely uses competitive procurement procedures.
- (309) Moreover, it also seems that the signature of all the airport services agreements was dependent upon the signature of the marketing services agreements.
- (310) Firstly, according to France, the 2005 agreements (airport services agreement and marketing services agreement of 30 June 2005), although legally independent, were, however, closely linked⁽⁵⁰⁾, and the close link between the airport services agreement signed with Ryanair and the marketing services agreement signed with AMS, a wholly-owned subsidiary of Ryanair, cannot be denied⁽⁵¹⁾. Given the significant similarities between the 2005 agreements and the agreements signed subsequently with Ryanair and AMS, France's aforementioned comments can be easily applied to these subsequent agreements.
- (311) France also indicates in its letter of 30 May 2011 that the CCIPB was induced to sign the agreements on 30 June 2005. It further points out in this letter that, following the non-renewal of the AMS agreement, Ryanair decided, without sending written notice to the CCIPB, not to renew its flights to Pau-Pyrénées airport as from the IATA 2011 summer season (April 2011). This tends to indicate that, at least in certain cases, Ryanair would not agree to operate a route and pay the airport's general charges without a marketing services agreement signed between the airport operator and AMS.
- (312) This approach was also highlighted by the CRC in its report of 5 January 2007⁽⁵²⁾.

⁽⁴⁹⁾ Except for the unsuccessful advertisement in Air & Cosmos (see recital 132).

⁽⁵⁰⁾ Letter from the French authorities of 13 July 2007.

⁽⁵¹⁾ Letter from the French authorities of 30 May 2011.

⁽⁵²⁾ The report states that this services agreement actually constitutes financial aid to Ryanair and is unlawful, given that this aid was not previously notified to the Commission. It also states that, in order to sidestep the effects of the Administrative Court's decision (concluding that the 2003 agreement with Ryanair resulted in unlawful state aid), the Chamber of Commerce and Industry resorted to a new legal framework.

- (313) It is clear from all the above that each marketing services agreement is indissociable from the underlying airport services agreement, forms a single transaction with the latter, and in all likelihood would not have been signed in the absence of the corresponding airport services agreement and the routes covered by these two agreements. Consequently, each marketing services agreement and the airport services agreement signed at the same time should be analysed as a single measure in order to determine whether this agreement constitutes State aid.

Application of the MEO test to the CCIPB with regard to the marketing services agreements

- (314) In order to apply the MEO test with regard to the marketing services agreements, the hypothetical MEO to be used for analysing the conduct of the CCIPB must be identified.
- (315) One approach would be to consider that the CCIPB signed the marketing services agreements as the airport operator⁽⁵³⁾, and therefore to compare its conduct with that of a hypothetical airport operator motivated by the prospect of profits.
- (316) Another approach would be to consider that the CCIPB acted as a public body entrusted with a general interest mission, in this case the economic development of Pau and its region, and that it purchased these marketing services in order to fulfil that mission, regardless of its capacity as the operator of Pau airport. In the context of this second approach, according to the case-law, it needs to be verified, firstly, that the services in question met the 'actual needs' of the public purchaser and, secondly, that they were purchased at a price equal to or below a 'market price'⁽⁵⁴⁾ or, in other words, that an MEO motivated by the prospect of profits and needing equivalent services (without necessarily being an airport operator) would have been prepared to accept similar conditions to those accepted by the CCIPB.
- (317) The comments of certain interested third parties tend to favour the second approach, at least implicitly. In particular, notably in its aforementioned study of 20 December 2013, Ryanair has provided information intended to show that the price of the AMS marketing services did not exceed what may be regarded as a market price for such services. Further to this argument, it has noted that airport operators cannot be distinguished from other types of AMS customer.
- (318) The CCIPB has provided information leading in the same direction and has also noted that it is responsible for developing the economic attractiveness of the area falling within its competence. Accordingly, it states that the sums paid for these marketing services have enabled the assets of Pau and its region to be promoted, with the EUR 56 000 000 that Ryanair passengers spent in 2010 during their stay having directly benefited the accommodation, catering, trade and property sectors (this amount was apparently EUR 8 000 000 in 2005, which the CCIPB claims was very low compared to the impact studies carried out by other airports). This statement suggests that, according to the CCIPB, its conduct should be analysed as that of a public purchaser acquiring the services needed to fulfil its general interest missions.
- (319) The Commission notes in this respect, firstly, that this argument contradicts the theory that the decisions of the CCIPB on the measures in question are not imputable to the State. If the CCIPB maintains that it signed these agreements to fulfil its local economic development task, then it must necessarily accept that its conduct is typically that of a local public authority.
- (320) Secondly, the Commission considers that, out of the two solutions indicated above, the second one must be rejected because it inherently ignores the indissociable nature of the airport services agreements and corresponding marketing services agreements, as found previously. This approach would essentially mean considering that the CCIPB signed the marketing services agreements without any regard to the routes offered by Ryanair from the airport that it operates, and that it would have signed these agreements even in the absence of the routes in question and the corresponding airport services agreements. For the reasons detailed in recitals 286 to 313, such an assumption is highly unlikely.
- (321) Moreover, even if this second approach were used, it would not lead to the conclusion that the marketing services agreements do not confer an economic advantage on Ryanair and AMS.

⁽⁵³⁾ Without prejudice to any public policy objectives of local economic development that the CCIPB might pursue in signing the agreements in question.

⁽⁵⁴⁾ See, for example, judgments in Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* [1999] ECR II-139, paragraphs 75-76, and in *Joined Cases T-116/01 and T-118/01 P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission of the European Communities* [2003] ECR II-2957, paragraph 117.

- (322) In fact, as noted in recital 316, in order for purchases made by a public entity not to confer an economic advantage on the seller, it is not enough for them to have been made at a price equal to or below 'market price'. They must also meet an 'actual need' of the public purchaser.
- (323) It cannot be categorically ruled out that, in fulfilling its economic development mission for Pau and its region, the CCIPB may feel the need to resort to commercial providers in order to promote the area. However, in the present case, this promotion targets the commercial activities of two clearly defined undertakings, namely Ryanair and the CCIPB itself as the operator of Pau airport. A public entity cannot consider that marketing services mainly promoting the activities of one or more clearly defined undertakings form part of this entity's specific task of promoting local economic development. It is logical for such a public entity to start from the assumption that local undertakings must carry out or finance their own marketing operations, and that its own actions are limited to the general promotion of the area and local economic fabric, without targeting specific undertakings.
- (324) Any other approach would mean considering that a public entity responsible for local economic development could, without such measures constituting State aid, purchase marketing services that mainly promote the products or services of certain locally established undertakings, on the grounds that these services encourage local economic development and that they are purchased at 'market price'. Such an approach would circumvent Article 107(1) TFEU.
- (325) As a result, it seems that the marketing services purchased by the CCIPB from AMS cannot be regarded as meeting an 'actual need' of the CCIPB as a public entity invested with a local economic development mission. This conclusion is confirmed by certain information provided by France, according to which, in particular, it is clearly not common practice for CCIs that do not operate an airport to purchase marketing services from airlines ⁽⁵⁵⁾.
- (326) Consequently, applying the second approach envisaged in recitals 316 to 321 would lead to the conclusion that the marketing services agreements confer an economic advantage on the undertakings having provided these services and on the airlines having directly benefited from the marketing services. As a result, based on this approach, the marketing services agreements signed with AMS would constitute aid to AMS as the provider of the marketing services and aid to Ryanair as the direct and main beneficiary of these services.
- (327) Furthermore, when a public entity makes purchases in the exercise of its general interest missions, it is normally expected to minimise its expenditure by organising an invitation to tender, or at the very least by consulting several providers and comparing their offers. This is particularly the case with highly individual goods or services for which there are no clear market price benchmarks, which is plainly the case with marketing services. However, in the present case, the marketing agreements were not the result of an invitation to tender. A call for proposals launched by the CCIPB did not find an airline prepared to operate from Pau airport under the envisaged conditions ⁽⁵⁶⁾. This finding confirms that the second approach is unsuitable.
- (328) This unsuitability also appears to be confirmed by the comments submitted by the CCIPB on the extension decision. It is in fact notable that, in comparing its own conduct to that of various private undertakings in order to prove that the MEO test is satisfied, the CCIPB mainly compares itself to airport operators. It therefore refers to a number of large private British airports, an Italian airport and six French airports. This approach tends to confirm the conclusion that the CCIPB signed the marketing services agreements primarily as an airport operator and not as a public authority acting in the context of its local economic development mission.
- (329) Furthermore, France has indicated that the tourism promotion of Béarn is the responsibility of the Béarn-Basque Country departmental tourism committee and that the CCIs generally conduct specific actions to promote tourism through their participation in various regional and departmental structures in this area, particularly through the regional and departmental tourism committees. However, the marketing services agreements, which, according to the CCIPB, are mainly intended to promote the tourist and business attractions of Pau and its region, were signed directly by the CCIPB, without the intervention of local structures responsible for tourism promotion. This is an additional factor that tends to confirm that the CCIPB signed the marketing services agreements primarily as an airport operator.

⁽⁵⁵⁾ This statement also tends to confirm that the marketing services in question were actually purchased by the CCIPB primarily in its capacity as airport operator, and not as a public authority responsible for regional economic development.

⁽⁵⁶⁾ See recital 132.

- (330) In order to apply the MEO test, the first approach referred to in recital 315 should therefore be used, which involves comparing the conduct of the CCIPB to a hypothetical MEO, motivated by the prospect of profits and operating Pau airport in place of the CCIPB.
- (331) This conclusion, determined for the agreements signed with Ryanair and AMS, is equally valid, for the same reasons, for the agreement signed with Transavia, particularly as, in the latter case, the airport services and marketing services were covered by one and the same agreement.

Benefits that an MEO could have expected from the marketing services agreements and price that it would have been willing to pay for those services

- (332) It is clear from all the above that, in order to apply the MEO test to the marketing services agreements in question, these agreements must be analysed together with the corresponding airport services agreements, as they form a single transaction with the latter⁽⁵⁷⁾, and that the CCIPB's conduct must be assessed in relation to the conduct of a hypothetical MEO operating Pau airport in its place.
- (333) When analysing each of the transactions in question, the benefits that this hypothetical MEO, motivated by the prospect of profits, could expect from the marketing services should be determined. This analysis should not take into account the general impact of such services on the region's tourism and economic activity. Only the effects of these services on the airport's profitability may be considered, as it is these alone that would be taken into account by the hypothetical MEO used in this analysis.
- (334) Marketing services may boost passenger traffic on the routes covered by the marketing services agreements and corresponding airport services agreements, as they are designed to promote these routes. Although this effect primarily benefits the airline, it does also benefit the airport operator. An increase in passenger traffic may lead, for the airport operator, to an increase in revenue from certain airport charges and from the provision of groundhandling services, as well as an increase in non-aeronautical revenue from car parks, restaurants and other businesses.
- (335) There can therefore be no doubt that an MEO operating Pau airport in place of the CCIPB would have taken this positive effect into account when considering entering into a marketing services agreement and the corresponding airport services agreement. The MEO would have taken into account the impact of the routes in question on its future revenues and costs by, in this context, forecasting a number of passengers using these routes that would have reflected the positive effect of the marketing services. This effect would have been assessed for the entire operating period of the routes in question, as set out in the airport services agreement and marketing services agreement.
- (336) The Commission accepted this point during the procedure as, when it invited France to reconstruct the revenue and cost forecasts that an MEO would have made before entering into marketing services agreements and airport services agreements, it proposed that France take into account the effects of the marketing services agreements on expected traffic. When an airport operator enters into an agreement for the promotion of certain routes, a fairly high load factor⁽⁵⁸⁾ may be predicted for the routes in question, which may be taken into account when assessing future revenues. In this respect, the Commission notes Ryanair's opinion that marketing services agreements do not generate only a cost for the airport operator, but also a potential benefit.
- (337) It should be determined whether a hypothetical MEO operating Pau airport in place of the CCIPB could reasonably expect and quantify benefits other than those resulting from the positive effect on passenger traffic of the routes covered by the marketing services agreement for the operating period of those routes, as set out in the marketing services agreement or airport services agreement.

⁽⁵⁷⁾ A given marketing services agreement must be analysed together with the corresponding airport services agreement as they form a single transaction. Nevertheless, there are as many separate transactions as there are 'pairs' of marketing services agreements and airport services agreements.

⁽⁵⁸⁾ The load factor is defined as the proportion of seats filled on aircraft used to operate the route in question.

- (338) Certain interested third parties support this argument, in particular Ryanair in its study of 17 January 2014. This study of 17 January 2014 is based on the theory that marketing services purchased by an airport operator, such as the CCIPB, may help to improve the airport's brand image and, as a result, sustainably increase the number of passengers using this airport, and not just the numbers on the routes covered by the marketing services agreement and airport services agreement over the operating period of these routes, as set out in these agreements. In particular, Ryanair found in its study that these marketing services may have sustainable positive effects on passenger traffic at the airport even after the marketing services agreement has expired.
- (339) It should first be noted that there is nothing in this case to suggest that, when the marketing services agreements covered by the formal investigation procedure were signed, the CCIPB ever considered, and still less quantified, any positive effects of the marketing services agreements going beyond the routes covered by these agreements or, in terms of time, going beyond the expected operating period of the routes in question. Moreover, neither France nor the CCIPB has proposed any method for estimating the possible value that a hypothetical MEO operating Pau airport in place of the CCIPB would have given to these effects when assessing whether to enter into the marketing services agreements and airport services agreements.
- (340) As indicated previously, the marketing services purchased from AMS are targeted at those people visiting the Ryanair website and, more specifically, either the Pau destination page on this website or the English homepage (for the marketing services agreements covering the Pau-London and Pau-Bristol routes), Belgian and Dutch homepage (for the agreements covering the Pau-Charleroi route) or French homepage (for the agreement covering the Pau-Beauvais route) of the website. With regard to Transavia, all the marketing services on the www.transavia.com website were focused on the Pau destination page. The marketing services in question were therefore mainly targeted at those people likely to use the routes covered by the marketing services agreement. Their positive effect on passenger traffic on other routes to Pau therefore seems to be much more hypothetical and, in any event, too uncertain to be taken into account and quantified by a prudent MEO assessing the value in signing the marketing services agreement.
- (341) Furthermore, the sustainability of these effects also seems very doubtful. It is possible that advertising Pau and its region on the Ryanair website may have encouraged people visiting this website to buy Ryanair tickets to Pau when this advertising was first posted or just after. However, it is highly unlikely that the effect of this advertising on visitors lasted or had an influence on their ticket purchases for more than a few weeks after it was posted on the Ryanair website. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more advertising media to which consumers are regularly exposed over a given period. For example, an advertising campaign on general television and radio stations, various websites and/or various billboards displayed outdoors or inside public places may have a sustainable effect if consumers are passively and repeatedly exposed to these media. However, promotional activities limited to certain pages of Ryanair's website alone are unlikely to have an effect that lasts much beyond the end of the promotion.
- (342) It is in fact very likely that most people do not visit Ryanair's website often enough to leave them with a lasting impression of the advertising for this region. This argument is well supported by two factors. Firstly, under the various marketing services agreements, the promotion of the Pau region on Ryanair's homepage was limited to the presence of a single link to a website designated by the CCIPB for limited and, in some cases, very brief periods (42 days per year over 5 years for the 2005 agreement, one continuous year for the 2007 agreement, 8 days for the 2008 agreement, 9 days for the 2009 agreement, and 45 days on the English homepage, 25 days on the Belgian and Dutch homepage and 25 days on the French page for the 2010 agreement). Both the nature of these promotional activities (presence of a single link with limited promotional value) and their short lifespan would have significantly limited the effect of these activities beyond the end of the promotion, particularly as these activities were limited to Ryanair's website alone and were not supported by any other media. Secondly, the other marketing activities set out in the agreements signed with AMS were only in relation to the Pau destination page of Ryanair's website. It is highly likely that most people do not visit this page very often, and only do so because they are already potentially interested in this destination.
- (343) The above findings equally apply to the 2006 agreement signed with Transavia. The marketing services set out in this agreement simply entailed inserting messages and links on the Pau destination page of the Transavia website, and emailing offers advertising the attractions of Pau as a destination to regular subscribers of the electronic magazine transavia.com.

- (344) As a result, although the marketing services may have increased passenger traffic on the routes covered by the marketing services agreements for the period of those services, it is very likely that this effect after this period or on other routes was zero or negligible.
- (345) The Ryanair studies of 17 and 31 January 2014 also indicate that the likelihood of the benefits of the marketing services agreements going beyond the routes covered by these agreements or lasting beyond the operating period of these routes, as set out in the marketing services agreements and airport services agreements, was very small and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.
- (346) Accordingly, for example, the study of 17 January 2014⁽⁵⁹⁾ indicates that 'future incremental profits beyond the scheduled expiry of the Airport Services agreement are inherently uncertain'⁽⁶⁰⁾. Furthermore, this study proposes two methods for the *ex ante* assessment of the positive effects of marketing services agreements: a 'cash flow' approach and a 'capitalisation' approach.
- (347) The 'cash flow' approach involves assessing the benefits of the marketing services agreements and airport services agreements in the form of future revenues generated for the airport operator by the marketing services and by the airport services agreement, minus corresponding costs. In the 'capitalisation' approach, improvement of the airport's brand image through the marketing services is treated as an intangible asset, acquired for the price set out in the marketing services agreement.
- (348) However, the study highlights the major difficulties presented by the 'capitalisation' approach and shows that the results produced by this method are unreliable. It suggests that the 'cash flow' approach would be better. In particular, the study states: 'The capitalisation approach should only take into account the proportion of marketing expenditure that is attributable to the intangible asset base of an airport. However, it may be difficult to identify the proportion of marketing expenditure that is targeted towards generating expected future revenues for the airport (i. e., an investment in the intangible asset base of the airport) as opposed to generating current revenues for the airport'⁽⁶¹⁾. It also stresses that 'In order to implement the capitalisation-based approach, it is necessary to estimate the average length of time that an airport would be able to retain a customer due to the AMS marketing campaign. In practice, it would be very difficult to estimate the average period of customer retention following an AMS campaign due to insufficient data'⁽⁶²⁾.
- (349) The study of 31 January 2014 proposes a practical application of the 'cash flow' approach. In this approach, the benefits of the marketing services agreements and airport services agreements that last even after the marketing services agreement has expired are expressed as a 'terminal value' calculated on the agreement's expiry date. This terminal value is calculated based on the incremental profits expected from the airport service and marketing services agreements in the final year of application of the airport services agreement. This method involves taking the incremental profit expected in the final year of application of the airport services agreement and projecting it into the future for the same period as the term of the airport services agreement, but adjusted by the growth rate of the air transport market in Europe and a probability factor deemed to reflect the capacity of the airport services agreement and marketing services agreement to contribute to the airport's profits beyond their expiry⁽⁶³⁾. According to the study of 31 January 2014, this capacity to produce lasting benefits depends on various factors '... including greater prominence and a stronger brand, alongside network externalities and repeat passengers'⁽⁶⁴⁾, although no details are given about these factors. Moreover, this method takes into account a discount rate that reflects capital costs.

⁽⁵⁹⁾ See Section 6.2.2.7.

⁽⁶⁰⁾ Original English.

⁽⁶¹⁾ See footnote 45.

⁽⁶²⁾ See footnote 45.

⁽⁶³⁾ See recitals 356 and 357.

⁽⁶⁴⁾ See footnote 45.

- (350) The study suggests a probability factor of [...] %, which it considers prudent. However, this very theoretical study does not provide any serious evidence for this factor, neither quantitatively nor qualitatively. It does not base itself on any facts relating to Ryanair's activities, air transport markets or airport services to substantiate this rate of [...] %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are deemed to extend the benefits of the airport service and marketing services agreements after their expiry dates. Lastly, it does not in any way base itself on the specific content of the marketing services set out in the various agreements with AMS when analysing to what extent these services may influence the factors mentioned above.
- (351) Moreover, it does not prove that there is any likelihood that, on the expiry of an airport services agreement and marketing services agreement, the profits generated by these agreements for the airport operator in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport services agreement and a marketing services agreement for a given airport.
- (352) A 'terminal value' calculated using the method suggested by Ryanair would therefore be highly unlikely to be taken into account by a prudent MEO when assessing the value of entering into an agreement.
- (353) The study of 31 January 2014 therefore shows that the 'cash flow' approach would lead only to very imprecise and unreliable results, as would the 'capitalisation' method.
- (354) Moreover, neither France nor any interested third party has provided any evidence that the method put forward by Ryanair in this study, or any other method aiming to take into account and quantify the benefits extending beyond the expiry of the airport services agreements and marketing services agreements, has been successfully used by regional airport operators comparable to Pau's operator. France has not for that matter commented on the studies of 17 and 31 January 2014 and has not therefore approved their conclusions.
- (355) Moreover, as stated above, the marketing services considered by the formal investigation procedure clearly target people likely to use the routes covered by the marketing services agreements. If these routes are not renewed on the expiry of the airport services agreement, it is unlikely that the marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport operator to assess the likelihood of an airline continuing to operate a route on the expiry of the term to which it has committed itself in the airport services agreement. Low-fare airlines in particular have proven to be very dynamic in terms of launching and withdrawing routes. Therefore, when entering into a transaction such as those being examined in this formal investigation procedure, a prudent MEO could not rely on an airline being willing to extend the operation of the route in question on the expiry of the agreement.
- (356) Furthermore, it should be noted that a terminal value calculated using the method proposed by Ryanair in the study of 31 January 2014 will be positive (and therefore will have a positive effect on the projected return on the airport services agreement and marketing services agreement) only where the incremental profit expected from these agreements in the final year of application of the airport services agreement is positive. This method involves taking the incremental profit expected in the final year of application of the airport services agreement and projecting it into the future by applying two factors. The first factor is the overall growth in the European air transport market and reflects the expected growth in traffic. The second factor is a rate of [...] % that basically represents the likelihood of agreements that are now expiring encouraging the signature of similar agreements in the future, resulting in similar financial flows. As a result, if the future incremental profit expected in the final year of application of the airport services agreement is negative, the terminal value will also be negative (or at most will be zero), which indicates that the signature of agreements similar to those that are expiring will, just like those agreements, each year erode the airport's profitability.
- (357) The study of 31 January 2014 very briefly considers this scenario, by simply indicating in a footnote, without any comments or explanations, that '... no terminal value can be calculated if incremental profits net of AMS payments are negative in the last year of the period under consideration' ⁽⁶⁵⁾. However, as will be proven further on, all the agreements in this case involve projected incremental flows that have a negative net present value each year, and not just overall. As a result, for these agreements, a 'terminal value' calculated using the method proposed by Ryanair

⁽⁶⁵⁾ Study of 31 January 2014, footnote 17. Original English.

would be zero, if not negative. Taking this terminal value into account would not therefore call into question the conclusion that the various agreements involve an economic advantage.

- (358) In conclusion, it is clear from the above that the only tangible benefit that a prudent MEO would expect from a marketing services agreement, and that it would take into account and quantify when assessing the value of entering into such an agreement, together with an airport services agreement, would be that the marketing services would have a possible positive effect on the number of passengers using the routes covered by the agreements in question for the operating period of those routes, as set out in the agreements. Any other benefits would be deemed too uncertain to be taken into account and quantified, and there is nothing to suggest that they were taken into account by the CCIPB.

Relevance of comparing the terms of the airport services agreements covered by the formal investigation procedure with the airport charges invoiced at other airports

- (359) According to the new Guidelines, when applying the MEO test, aid to an airline using an airport can, in principle, be excluded where:
- (a) the price charged for the airport services corresponds to the market price; or
 - (b) it can be demonstrated through an *ex ante* analysis, i.e. based on available information and foreseeable developments at the time when the measure was granted, that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport ⁽⁶⁶⁾.
- (360) Furthermore, according to the new Guidelines, 'When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term' ⁽⁶⁷⁾.
- (361) However, with regard to the first approach (comparison with a 'market price'), the Commission has strong doubts that, at the present time, an appropriate benchmark can be identified to establish a true market price for the services provided by airports. The Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines ⁽⁶⁸⁾.
- (362) It should be noted in this regard that, in general, the application of the MEO test based on an average price observed in other similar markets may prove helpful where a market price can be reasonably identified or deduced from other market indicators. However, this method may not be as relevant in the case of airport services. The revenue and cost structure tends to differ significantly from airport to airport. These costs and revenues depend on the airport's state of development, number of airlines operating from/to the airport, available capacity in terms of passenger traffic, state of the infrastructure, the regulatory burden, which may vary from Member State to Member State, and historical debts and obligations of the airport ⁽⁶⁹⁾.
- (363) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As the present case amply demonstrates, commercial arrangements between airports and airlines are not necessarily based on a list of public prices for individual services. These commercial relationships vary widely. They include the sharing of risks in terms of traffic and of correlative commercial and financial responsibilities, the generalised use of incentive mechanisms (for example, in the form of discounts connected with the number of links or passengers carried), and variations in the distribution of risk over the term of contracts. As a result, it is difficult to compare transactions based on a price per rotation or per passenger.
- (364) In its study of 9 April 2013, Ryanair essentially argues that the MEO test can be applied based on a comparison with the commercial arrangements of other European airports.

⁽⁶⁶⁾ New Guidelines, point 53.

⁽⁶⁷⁾ New Guidelines, point 66.

⁽⁶⁸⁾ New Guidelines, points 59 and 61.

⁽⁶⁹⁾ See the Commission Decision of 27 January 2010 on State aid C 12/2008 Slovakia — Agreement between Bratislava Airport and Ryanair, OJ L 27, 1.2.2011, recitals 88 and 89.

- (365) It should firstly be noted that, during the procedure, neither France nor any interested third party has suggested to the Commission a sample of comparison airports that may be used in this case and that are sufficiently comparable to Pau airport in terms of traffic volume, type of traffic, type and level of airport services provided, proximity of the airport to a large city, number of inhabitants in the catchment area, prosperity of the surrounding area, and different geographical areas from which passengers could be attracted ⁽⁷⁰⁾.
- (366) Even if such a sample of airports had been available, a comparative method would have been totally unworkable in this case. As proven above, the transactions to be analysed are complex packages consisting of an airport services agreement and a marketing services agreement (sometimes combined within the same legal medium). These transactions involve several 'prices', namely the various airport charges, price of the groundhandling services and price of the marketing services, some of which depend on the number of passengers and others on the number of aircraft movements, with others involving fixed amounts. Each of these transactions therefore leads to a complex set of financial flows between the airport operator and the airline and its subsidiaries, consisting of the revenue from the airport charges, revenue linked to the groundhandling services and revenue linked to the marketing services.
- (367) Accordingly, a comparison between just the airport charges invoiced by the CCIPB to the airlines concerned and the airport charges invoiced at the comparison airports would not provide any useful indication as to whether the MEO test was satisfied. At the very least, in order to validly compare the transactions covered by this assessment, it would be necessary to identify, for the airports in the comparison sample, a set of comparable transactions, which must particularly include equivalent marketing services and equivalent groundhandling services. Identifying such a sample of comparable transactions would prove impossible, given that the transactions covered by this assessment are so complex and specific, and all the more so as the prices of groundhandling services and marketing services are rarely made public and would be difficult to obtain in order to form a basis for comparison.
- (368) Lastly, assuming that it could be established, based on a valid comparative analysis, that the 'prices' applied in the various transactions covered by this assessment were equivalent to or higher than the 'market prices' established using the sample of comparison transactions, the Commission could not, however, conclude that those transactions corresponded to the market price if it proved that, on their conclusion, the airport operator may have expected them to lead to incremental costs higher than the incremental revenues. An MEO would not in fact be interested in offering goods or services at the 'market price' if this led to an incremental loss.
- (369) The Commission considers it appropriate to reiterate in the context of this analysis that, following the adoption of the new Guidelines, both France and the interested parties were invited to submit comments on the application of those guidelines to the present case (see recitals 22 and 23). In the event, neither France nor the interested parties disputed in substance the Commission's approach according to which, where an appropriate benchmark cannot be identified to establish a true market price for the services provided by airports to airlines, the most relevant criterion for assessing the arrangements concluded between these two parties is an *ex ante* incremental profitability analysis.
- (370) In the light of all the above, the Commission considers that the approach generally recommended in the new Guidelines for applying the MEO test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to the present case.
- (371) This approach is justified by the fact that an airport operator may have an objective interest in concluding a transaction with an airline where it may reasonably expect this transaction to improve its profits (or reduce its losses) compared to a counterfactual situation in which this transaction is not concluded ⁽⁷¹⁾, regardless of any comparison with the conditions offered to airlines by other airport operators, or even with the conditions offered by the same airport operator to other airlines.
- (372) On this last point, as the Commission noted in the new Guidelines, 'price differentiation is a standard business practice, as long as it complies with all relevant competition and sectoral legislation. Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the MEO test' ⁽⁷²⁾ (footnotes omitted). In this regard, it should be noted that the comments of certain third parties that basically criticise the CCIPB for not having applied its

⁽⁷⁰⁾ New Guidelines, point 60.

⁽⁷¹⁾ In other words, if the incremental profitability expected from this transaction is positive.

⁽⁷²⁾ New Guidelines, point 62.

general pricing system uniformly to all airlines are not relevant with regard to the application of the MEO test. For example, Air France's comment, summarised in recital 169, that the CCIPB should have invoiced Ryanair for the 'lighting charge' under certain circumstances is without merit. An airport operator does not necessarily confer an economic advantage on an airline by negotiating conditions with that airline that fall outside its general pricing system, or even by negotiating a different pricing system from this general system.

Joint assessment of the conduct of the airport operator and the CCIPB as a whole

- (373) In the opening decision, the Commission considered, as a preliminary observation, that the conduct of the CCIPB as a whole should be assessed together with that of the airport operator and, where applicable, with that of the State or other public authorities supervising the airport operator or involved in its financing.
- (374) France indicated its agreement to the joint assessment of the conduct of the service operating the airport, the CCIPB as a whole and other public authorities.
- (375) In applying the MEO test, the conduct of the CCIPB as a whole, and not just that of its service operating the airport, should be taken into account. The service operating the airport within the CCIPB does not in fact have its own legal personality distinct from that of the CCIPB. Furthermore, although the airport services agreements were signed with the airport, which received the airport charges paid by Ryanair and other airlines, the costs of the marketing services agreements were mainly charged to the CCIPB's general budget and were not necessarily reflected in the airport's accounts. France also indicates in this respect that the CCIPB directly covered these costs⁽⁷³⁾.
- (376) The Commission therefore takes the view that the conduct of the airport operator and the CCIPB as a whole must be assessed together, in terms of their relations with the airlines and their subsidiaries, in order to apply the private operator in a market economy test.

Conclusion on the terms for applying the market economy operator test

- (377) It is clear from all the above that, in order to apply the MEO test to the agreements in question, the Commission must analyse each marketing services agreement together with the corresponding airport services agreement, and must assess whether a hypothetical MEO, motivated by the prospect of profits and operating Pau airport in place of the CCIPB, would have entered into these transactions. To this end, the Commission must determine the incremental profitability of the agreements as it would have been assessed by the MEO at the time of their conclusion, by estimating, for the entire period of application of the agreements:
- the future incremental traffic expected from the implementation of these agreements, possibly taking into account the effects of the marketing services on the load factors of the routes covered by the agreements;
 - the future incremental revenues expected from the implementation of these agreements, including revenue from airport charges and groundhandling services, generated by the routes covered by these agreements, as well as non-aeronautical revenue from the additional traffic generated by the implementation of these agreements;
 - the future incremental costs expected from the implementation of these agreements, including operating costs and any incremental investment costs generated by the routes covered by these agreements, as well as marketing service costs.
- (378) These calculations will provide the future annual flows corresponding to the difference between incremental revenues and costs, which are to be discounted, if necessary, by a rate reflecting the cost of capital for the airport operator. A positive net present value indicates in principle that the agreements in question do not confer an economic advantage, whereas a negative net present value reveals the presence of such an advantage.

⁽⁷³⁾ France stated on this subject that the CCIPB, which is responsible for the economic development of its area among other tasks, directly covered, from its own budget and not from the airport's budget, the financial arrangements set out by the agreement signed on 30 June 2005 with AMS for the Pau-London route.

- (379) It should be noted that, in this assessment, the arguments of the CCIPB and Ryanair that the price of the marketing services purchased by the CCIPB is equivalent to or less than what may be regarded as a 'market price' for such services are without merit. A hypothetical MEO motivated by the prospect of profits would not be prepared to purchase such services, even at a price at or below 'market price', if it were predicted that, despite the positive effect of such services on passenger traffic on the routes concerned, the incremental costs generated by the agreements would exceed the incremental revenues at present value. In such a scenario, the 'market price' would be higher than the hypothetical MEO was prepared to pay, and the services in question would therefore logically be rejected.
- (380) For the same reasons, the fact that the prices set for the airport services in the airport services agreement may be equivalent to or higher than the prices invoiced by even slightly comparable airport operators for comparable services would be irrelevant in this analysis if these prices were not expected to generate sufficient incremental revenues to cover the incremental costs at present value.

Application of the market economy operator test

- (381) For the purpose of assessing the agreements in question and given the above findings, it should be noted that both the existence and the amount of aid in these agreements fall to be assessed in the light of the situation prevailing at the time they were signed⁽⁷⁴⁾ and, more specifically, in the light of the information available and developments foreseeable at that time.
- (382) In its letter of 30 May 2011, France indicated that, at the time when the 2005 agreements were signed with Ryanair and AMS, no market study or business plan assessing and economically supporting the undertakings made by the airport to Ryanair existed.
- (383) According to the information provided by France, it also seems that no market study, business plan or profitability calculation was prepared by the CCIPB before signing the other agreements covered by the formal investigation procedure, except for the 2006 agreement with Transavia, for which a business plan was prepared in December 2005 ('the Transavia business plan').
- (384) Except for the Transavia business plan, the only financial calculation provided by France is an impact study carried out for the 2003-2004 period, which estimated the financial impact of Ryanair passengers on the region at EUR 8 000 000-10 000 000. A survey conducted among the airport's passengers in January 2011, also provided by France, confirms these results and estimates the average spend per passenger on a Ryanair flight to Pau at EUR 339. However, these studies are not relevant for the purpose of applying the MEO test. This is because they concern the impact of Ryanair's activity on the regional economic fabric in general, and not just on the airport's profitability. However, it is settled case-law that regional development considerations cannot be taken into account when applying the MEO test⁽⁷⁵⁾.
- (385) According to Ryanair, the lack of a business plan when agreements such as those covered by the formal investigation procedure are signed cannot be used as evidence that the MEO test is not satisfied.
- (386) The Commission considers that the lack of a business plan is a serious indication that the agreements signed with Ryanair and AMS do not satisfy the MEO test, particularly as neither France nor the CCIPB has been able to provide, in respect of these agreements, any profitability calculation, even incomplete, that was carried out before the agreements were signed.
- (387) In general terms, France has not provided any information indicating that the airport operator analysed the risk taken with regard to the possible benefits of the agreements at the time when these were signed with Ryanair and AMS. On the contrary, according to France, the CCIPB was guided by a regional development objective. This further suggests that the agreements with Ryanair and AMS do not satisfy the MEO test.

⁽⁷⁴⁾ See, for example, judgments in Case T-318/00 *Freistaat Thüringen (Germany) v Commission of the European Communities* [2005] ECR II-4179, paragraph 125, and in Case C-124/10 P, *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraphs 85, 104 and 105.

⁽⁷⁵⁾ See judgment in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission of the European Communities* [1999] ECR II-17, paragraph 120.

- (388) As explained further on, these indications are confirmed by the Commission's assessment of the profitability analysis that a hypothetical MEO would have carried out.
- (389) During the procedure, the Commission invited France to reconstruct the profitability analysis that an MEO would have carried out before signing the agreements with Ryanair and AMS, based on the objective information known to the CCIPB when these agreements were signed and on the foreseeable developments.
- (390) In response to this invitation, France provided a reconstruction of the projected incremental costs and revenues associated with each agreement signed with Ryanair and AMS. This analysis is mainly based on *ex post* data, i.e. data observed after the agreements were signed. As a result, the method used by France involved calculating the average unit costs and revenues per passenger based on the operating costs, revenues and airport traffic observed during the period from 2003 to 2011. In its analysis of each agreement, France multiplied these data by the projected incremental traffic for each agreement, i.e. the traffic that, on the signature of the agreement, this could be expected to generate. As this analysis is mainly based on cost and revenue data observed after the various agreements were signed, and not necessarily on information foreseeable at the time when the agreements were signed, this method cannot reflect the profitability analysis that an MEO would have carried out before deciding whether to enter into these agreements.
- (391) Moreover, as regards the incremental operating costs, the method used by France is in fact based on the full unit costs, i.e. all the airport's operating costs per passenger, instead of the incremental costs, i.e. the costs per passenger specifically generated by each agreement. However, the incremental costs may differ from the full unit costs and, as a general rule, are markedly lower, given the high proportion of fixed costs at an airport. The use of full unit costs is therefore a second weakness in the method proposed by France. It also clearly reduces the profitability of certain agreements, thus penalising the airlines concerned that have signed the agreements in question.
- (392) Consequently, the Commission has carried out its own analysis by reconstructing the incremental costs and revenues of the various agreements, as an MEO would have calculated them *ex ante*, in order to apply the MEO test. The assumptions used and results of the analysis are presented in recitals 393 to 440. As regards the agreement with Transavia, the Commission has directly used the Transavia business plan in order to make its assessment.

Time frame

- (393) When assessing the value in entering into an airport services agreement and/or a marketing services agreement, an MEO would have chosen the term of the agreements in question as the time frame of its assessment. In other words, it would have assessed the incremental costs and revenues for the period of application of the agreements.
- (394) There does not seem to be any justification for choosing a longer period. On the dates when the agreements were signed, a prudent MEO would not have relied on these agreements being renewed on their expiry, whether under the same terms or under different terms, particularly as low-fare airlines such as Ryanair and Transavia were and are known to be very dynamic in terms of launching and withdrawing routes, or even increasing and reducing frequencies. The possible renewal of these agreements would therefore have been a distant future prospect that was too uncertain for an MEO to base reasonable economic decisions on this prospect.
- (395) Furthermore, it should be noted that, except for certain agreements, the effective start date of the activities covered by the agreement was not the date of signature of the agreement. In this case, it is the effective start date that has been used as the starting point, and not the date of signature ⁽⁷⁶⁾.
- (396) It should also be noted that, in applying the MEO test, the fact that Ryanair did not operate certain routes for the entire period stipulated in certain agreements has not been taken into account as this factor was not known or foreseeable at the time when the agreements were signed.
- (397) The Commission will now examine the agreements signed with Ryanair and AMS in terms of incremental traffic, revenues and costs in the light of the assumptions used, before presenting its analysis of the agreements signed with Ryanair and AMS, followed by its analysis of the agreement signed with Transavia.

⁽⁷⁶⁾ See Table 6.

Incremental traffic and number of projected rotations (agreements with Ryanair and AMS)

- (398) The analysis conducted by the Commission is based on the incremental traffic (in other words, the number of additional passengers) that an MEO operating Pau airport in place of the CCIPB could have predicted when the agreements were signed. With regard to the 2003 agreement for example, this involves determining the number of passengers that the Pau airport operator could have expected, in 2003, to use the Pau-London route operated by Ryanair, over the term of the agreement.
- (399) The projected incremental traffic has been determined based on the number of routes and frequencies stipulated in the various airport services agreements and marketing services agreements, and on the resulting number of annual rotations.
- (400) Furthermore, the Commission has taken into account the capacity of the aircraft used by Ryanair, namely the Boeing 737-800 configured with 189 seats⁽⁷⁷⁾.
- (401) The Commission started from the assumption of a load factor of 85 % per flight, which is favourable to Ryanair because 85 % is a high load factor. This is also slightly above the average load factor for flights operated by Ryanair on its network⁽⁷⁸⁾, and equal to or above the load factor proposed by France for the various agreements in its reconstruction of the profitability analyses. However, the Commission takes the view that this high load factor can be used, even if it is a favourable assumption, in order to reflect a possible beneficial effect of the marketing services on passenger traffic on the routes covered by the various agreements, and in the absence of other elements quantifying the foreseeable impact of these services on the load factor.
- (402) Where the period of application of an agreement did not coincide with full calendar years, the Commission took this into account by calculating, for each year of application of the agreement, the projected traffic in proportion to the number of days in the year when the agreement applied.
- (403) Some agreements contained indications as to the number of passengers expected on the routes covered. However, as these indications were not legally binding, they would not necessarily have been taken into account by a prudent MEO in its profitability analysis. The Commission therefore ignored them and used the assumption of an 85 % load factor for all the agreements (which is higher than these indications).
- (404) Furthermore, some agreements contained a commitment by the airline with regard to the minimum number of passengers to be carried on the routes concerned. However, an MEO would have probably banked on a number of passengers higher than the minimum guaranteed by the airline. In fact, an MEO would have probably assumed that the airline had allowed for a safety margin between the traffic level to which it was committing and the traffic that it was reasonable to expect. The Commission therefore decided to ignore these compulsory minima in its assessment.
- (405) The additional traffic calculated by the Commission is generally higher than both the binding minima and the non-binding indications contained in the various agreements.
- (406) Lastly, it should be noted that in 2009 the CCIPB and Ryanair/AMS amended the terms of the 2005 agreements by reducing the frequency of the Pau-London route, setting a projected number of flights for 2009 of 211, and reducing the annual price of the marketing services to EUR [...]. In applying the MEO test, the Commission used the same reasoning as for the other agreements, namely it worked on the basis that the incremental traffic associated with this amendment corresponded to all the routes, frequencies and flights mentioned in that amendment.

Incremental revenues (agreements signed with Ryanair and AMS)

- (407) For each transaction covered by its analysis, the Commission sought to determine the incremental revenues, i.e. the revenues generated by the transaction, as an MEO would have predicted them.
- (408) Applying the 'single-till' principle, the Commission takes the view that both aeronautical and non-aeronautical revenues should be taken into account.

⁽⁷⁷⁾ The 2003 agreement mentions two aircraft models likely to be used by Ryanair: the Boeing 737-200 and the Boeing 737-800. In its analysis, the Commission has used a favourable assumption with regard to the traffic generated by Ryanair, based on the larger capacity aircraft (Boeing 737-800).

⁽⁷⁸⁾ See <http://corporate.ryanair.com/investors/traffic-figures/>

- (409) Aeronautical revenue consist of the proceeds from the various charges to be paid by the airline to the airport operator, namely:
- the landing charge, namely an amount per rotation;
 - the passenger charge, namely an amount per rotation;
 - the charge paid for the groundhandling services, which takes the form of an amount per rotation set in the various airport services agreements.
- (410) The landing charge and passenger charge applied by the CCIPB are in principle regulated charges for access to the airport infrastructure, which are invoiced to all user airlines following a process of consultation and which are published. The various airport services agreements signed with Ryanair and Transavia stipulate that the airport's public charging system is applicable. For these various agreements, the Commission has used, as projected unit amounts of the landing charge and passenger charge, the public charges in force when the agreements were signed, plus indexation of 2 % per year. The Commission takes the view that an MEO could have predicted an inflation rate of 2 %, as this is the target rate of the European Central Bank ('ECB') for the euro area ⁽⁷⁹⁾. In fact, it was reasonable to predict that the regulated charges would increase each year in line with inflation.
- (411) The charges for groundhandling services are not regulated, but are negotiated bilaterally. In the various airport services agreements signed with Ryanair and in the agreement signed with Transavia, these charges take the form of fixed amounts per rotation, without any indexation. These amounts have therefore been used by the Commission in its analysis.
- (412) In order to calculate the proceeds from the three aforementioned airport charges that an MEO would have expected from each agreement, the Commission has used the number of planned rotations (for the landing charge and for the charge for groundhandling services) and the number of additional passengers expected (for the passenger charge), determined for each agreement, and has multiplied these by the unit charge.
- (413) The non-aeronautical revenue is in principle essentially proportional to the number of passengers. In fact, the activity of car parks, restaurants and other businesses situated in the airport depends on the number of passengers. The same is therefore true for the revenue received by the airport operator from these activities. The most reasonable approach for determining the projected incremental non-aeronautical revenue therefore involves determining an amount of non-aeronautical revenue per passenger, which is then multiplied by the projected incremental traffic.
- (414) With regard to the amount of non-aeronautical revenue per passenger, the Commission considers it likely that a reasonable MEO would have determined this, when the various agreements were signed, based on the airport's total non-aeronautical revenue per passenger over a long enough period to be representative, and immediately preceding the signature of the agreement in question ⁽⁸⁰⁾. The Commission takes the view in this respect that a period of 3 years is reasonable ⁽⁸¹⁾. The Commission also takes the view that an MEO would have projected the indexation of

⁽⁷⁹⁾ 'In the pursuit of price stability, the ECB aims at maintaining inflation rates below, but close to, 2 % over the medium term'. See: <http://www.ecb.europa.eu/mopo/intro/html/index.en.html>

⁽⁸⁰⁾ The Commission notes that the Air France traffic at Pau airport is dominated by business travellers, whereas the Ryanair and Transavia traffic is mainly leisure traffic. The non-aeronautical revenue generated by these two categories of traveller, reduced to the number of passengers, may differ, for example due to possible differences in purchasing power. However, it is difficult to assess these differences, particularly as factors other than purchasing power may have an influence. For example, business travellers are generally time-sensitive and tend to minimise their time in airports, which may therefore limit their spend. In addition, as the non-aeronautical revenue of the airport operator does not pass through the airlines, it is difficult for an airport operator to assess to what degree the average amount of non-aeronautical revenue per passenger may vary from one airline to another. In light of these factors, an MEO operating Pau airport in place of the CCIPB would in all likelihood, in its assessment of the incremental non-aeronautical revenue, use the non-aeronautical revenue per passenger observed over previous years for all the airport's traffic, without attempting to incorporate the fact that this amount per passenger may possibly vary from one airline to another.

⁽⁸¹⁾ An MEO would have chosen the period in question by taking account of several factors: the smoothing effect afforded by a relatively long period, and the disadvantages of a very long period, such as possible changes in passenger spending preferences and methods over a long period. As a result, using the average of the non-aeronautical revenue per passenger over a single year would make the amount obtained overly dependent on the specific circumstances in that year, which justifies the choice of a longer period. On the other hand, a five-year period seems too long because the behaviour of passengers in terms of non-aeronautical spending may substantially change over such a period. Consequently, a 3-year period seems to be a reasonable choice.

this amount over time in order to reflect inflation. In this respect the Commission has used a rate of 2 % ⁽⁸²⁾ (applied from the year in the middle of the 3-year period).

- (415) The following table gives the airport's total non-aeronautical revenue for the period from 2000 to 2011, year by year, and, for each year, the average unit amount of non-aeronautical revenue per passenger over the previous 3 years.

Table 5

Non-aeronautical revenue

Year	Non-aeronautical revenue	
	Total amounts (thousand EUR)	Average unit amount per passenger over the previous 3 years (EUR)
2000	726	
2001	730	
2002	953	
2003	1 206	1,34
2004	1 191	1,55
2005	1 206	1,69
2006	1 270	1,69
2007	1 293	1,66
2008	2 218	1,67
2009	2 097	2,04
2010	2 297	2,47
2011	2 385	

Incremental costs (agreements signed with Ryanair and AMS)

- (416) The incremental costs that could be expected *ex ante* from each transaction (consisting, where applicable, of an airport services agreement and a marketing services agreement) by an MEO operating the airport in place of the CCIPB fall into the following three categories:

- marketing service purchase costs,
- incremental investment costs, due to investments made as a result of the transaction,
- incremental operating costs, namely operating costs (staff, sundry purchases) that may be generated as a result of the transaction.

- (417) With regard to the costs of the marketing services agreements, the Commission has taken into account the amounts stipulated in these various agreements. The marketing services agreements generally stipulate annual or total fixed amounts. The agreement signed with Ryanair in 2003 for the Pau-London route involved a particular arrangement, namely an initial payment, with annual payments per passenger up to an annual maximum of EUR 400 000. Given

⁽⁸²⁾ See recital 410.

the traffic forecasts associated with the 2003 agreement, based on a load factor of 85 %, the MEO would seemingly have expected this maximum of EUR 400 000 to be reached. The Commission has therefore used this maximum amount as the cost of the marketing services, in addition to the initial payment defined in the agreement.

- (418) As with the traffic forecasts, the projected marketing payments do not necessarily represent the amounts actually paid, because certain events occurring after the agreements were signed may have resulted in deviations from these initial figures. This is particularly the case where the agreement was terminated early. However, these events should not be taken into account when applying the MEO test because they postdate the signature of the agreements.
- (419) With regard to incremental investment costs, it should be noted that, according to France, no investment had to be made within Pau airport due to the various agreements under review. As a result, and given that there is nothing to indicate that an MEO would have expected to have to make certain investments due to one or more of the agreements covered by the formal investigation procedure, no incremental investment cost has been taken into account in this analysis.
- (420) In the absence of a business plan for each agreement, the incremental operating costs that were foreseeable when the various agreements were signed are the most difficult category to determine. In particular, the approach used for the non-aeronautical revenue, which involved using the airport's total non-aeronautical revenue to determine the incremental non-aeronautical revenue per passenger, cannot be used for the operating costs. Such an approach would involve considering the airport's total operating costs, reduced to the number of passengers, as incremental costs. However, a significant proportion of an airport's operating costs is fixed, which means that the total operating costs per passenger are likely to be markedly higher, in most cases, than the incremental costs associated with the signature of a new agreement generating additional traffic.
- (421) In order to estimate the incremental operating costs, the Commission must use the airport operator's analysis elements, as it is unable to estimate itself how a given agreement may influence the various airport cost items.
- (422) However, the only estimate that the Commission can use is in the Transavia business plan, in which the CCIPB estimated that the agreement signed with Transavia would result in an average incremental operating cost of EUR [...] per additional passenger over the period of the Transavia business plan from 2006 to 2012⁽⁸³⁾. In the absence of anything better, the Commission considers that this figure is an acceptable basis for determining the impact of additional traffic on the airport's operating costs. The Commission has therefore used this figure in its assessment of the agreements signed with Ryanair and AMS, with indexation of 2 % per year⁽⁸⁴⁾ from 2009, which lies in the middle of the 2006-2012 reference period. Moreover, the Commission considers that this indexation is coherent with the indexation mentioned above in relation to revenues.
- (423) The Commission notes that this estimate was made by the CCIPB before signing most of the agreements with Ryanair and AMS that are covered by the formal investigation procedure, and was therefore available when those agreements were signed. The only exceptions are the agreements signed with Ryanair and AMS in 2003 and 2005. These are examined in recitals 425 and 426.
- (424) The Commission notes that the Transavia business plan was prepared for a different airline from Ryanair. However, the Commission considers that Transavia uses a 'low-fare' carrier economic model that is comparable to Ryanair's and that, as a result, the incremental operating costs projected by an MEO would in all likelihood be similar, when reduced to the number of passengers, for both airlines.

⁽⁸³⁾ The elements (incremental from the launch of the new Amsterdam-Pau route) included in this figure are explained in the business plan: 'Impact of Labour and Costs: this new route will generate marginal additional work for certain services: accounting (processing of invoices), operations (allocation of airport resources), reception (reservations, tourist services and information) and security (screening). The other services will not be affected: management, environment, quality, maintenance, development and safety. Only the assistance costs will be affected: on average over seven years, the estimated labour and costs figure per outbound passenger is EUR [...]. This amount per outbound passenger has been divided by two to arrive at the amount of EUR [...] per passenger.

⁽⁸⁴⁾ See recital 410.

- (425) The Transavia business plan dates from 15 December 2005. It therefore postdates the signature of the 2003 and 2005 agreements with Ryanair and AMS, namely 28 January 2003 and 30 June 2005. However, the Commission considers that an MEO would not have estimated different incremental operating costs per passenger for June 2005 and December 2005, i.e. only 6 months later. It is actually highly unlikely that the cost structure of an airport operator would alter considerably over a 6-month period. The December 2005 estimate is therefore an acceptable approximation of the estimate that an MEO would have made in June 2005 in order to assess the value in signing agreements with Ryanair and AMS.
- (426) The 2003 agreement was signed nearly 3 years before the Transavia business plan was prepared. However, the airport's traffic structure and activities did not alter significantly over this 3-year period. As a result, and in the absence of a better alternative, the Commission takes the view that the average incremental operating cost of EUR [...] per passenger, with indexation of 2 % from 2009, is also appropriate for assessing the 2003 agreement.
- (427) The Commission notes that the incremental operating cost proposed by France (EUR [...] per passenger), calculated as the average of the operating costs per passenger observed over the 2003-2011 period, is markedly above the incremental cost per passenger used by the Commission, which the latter deems to be more relevant given the above findings.
- (428) For each transaction, the incremental operating cost per passenger is multiplied by the projected incremental traffic in order to determine, year by year, the total incremental operating cost associated with the agreement.

Presentation of the results for the agreements signed with Ryanair and AMS

- (429) Having therefore determined, for each agreement, all the incremental revenues and all the incremental costs that an MEO would have predicted, the Commission is in a position to determine, for each agreement and year by year over the planned term of the agreement, the discounted incremental flows (revenues less costs). These results are presented in Tables 6 to 11 below.
- (430) The Commission notes that, for all the agreements and for the amendment of 16 June 2009 to the 2005 agreement for the Pau-London route, all the annual incremental flows are negative, as indicated in the following tables, despite the assumptions favourable to Ryanair that the Commission has used, particularly with regard to the incremental traffic and incremental costs.
- (431) The Commission also notes that this conclusion would remain valid for the 2007, 2008, 2009 and 2010 agreements even if all the incremental operating costs were excluded and only the marketing service purchase costs were used as incremental costs.
- (432) Consequently, it is clear that the agreements and the amendment of 16 June 2009 to the 2005 agreement for London, signed by the CCIPB with Ryanair and AMS and covered by this investigation, each confer an economic advantage on Ryanair and/or AMS. As this advantage results from contractual provisions specific to Ryanair or AMS, it is selective.
- (433) The amendment of 16 June 2009 to the 2007 agreement for the Pau-Charleroi route, which increased the promotional cost from EUR [...] to EUR [...] per year as from 1 January 2009 without altering the services, also confers a selective advantage on Ryanair and AMS, given that the CCIPB received nothing in exchange for the additional payment of EUR [...] per year, and in particular could not expect any additional traffic from this.

Table 6

Passengers ('s') = seasonal)

Agreement	flights/week	flights/year	Date of signature of agreement(s)	Effective start date	Effective end date originally planned
London 2003	7	365	28/01/2003	28/01/2003	27/01/2008

Agreement	flights/week	flights/year	Date of signature of agreement(s)	Effective start date	Effective end date originally planned
London 2005	7	365	30/06/2005	30/06/2005	29/06/2010
Charleroi 2007	3	156	25/09/2007	30/10/2007	24/09/2012
Bristol 2008 (s)	3	50	31/03/2008	16/05/2008	13/09/2008
Bristol 2009 (s)	2	58	16/06/2009	01/04/2009	24/10/2009
2009 amendment to the 2005 agreement for London		211	15/06/2009	01/01/2009	29/06/2010
London, Charleroi (s) & Beauvais (s) 2010	6	312	28/01/2010	30/03/2010	29/03/2011

Table 7

2003 agreement for the Pau-London route

(EUR)

	2003	2004	2005	2006	2007	2008
total number of in-bound and outbound passengers	108 479	117 275	117 275	117 275	117 275	8 796
number of rotations per year	338	365	365	365	365	27
<i>landing charge</i>	41 797	46 089	47 011	47 951	48 910	3 742
<i>passenger charge</i>	192 550	212 325	216 572	220 903	225 322	17 237
<i>groundhandling services</i>	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
total aeronautical revenue	[100 000-299 999]	[100 000-299 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[0-99 999]
non-aeronautical revenue	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[0-99 999]
total revenues	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[0-99 999]
operating costs (staff, sundry purchases, etc.)	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[0-99 999]
marketing costs	450 000	400 000	400 000	400 000	400 000	30 000

(EUR)

	2003	2004	2005	2006	2007	2008
total costs	[600 000-999 999]	[600 000-999 999]	[600 000-999 999]	[600 000-999 999]	[600 000-999 999]	[0-99 999]
incremental flows (revenues less costs)	[- 100 000 to - 299 999]	[- 100 000 to - 299 999]	[- 100 000 to - 299 999]	[- 100 000 to - 299 999]	[- 100 000 to - 299 999]	[-1 to - 99 999]

Table 8

2005 agreement for the Pau-London route

(EUR)

	2005	2006	2007	2008	2009	2010
total number of inbound and outbound passengers	58 963	117 275	117 275	117 275	117 275	58 311
number of rotations per year	184	365	365	365	365	181
landing charge	22 832	46 319	47 246	48 191	49 154	24 929
passenger charge	105 544	214 120	218 402	222 770	227 226	115 241
groundhandling services	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
total aeronautical revenue	[100 000-299 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[100 000-299 999]
non-aeronautical revenue	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]
total revenues	[100 000-299 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[100 000-299 999]
operating costs (staff, sundry purchases, etc.)	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]
marketing costs	219 714	437 000	437 000	437 000	437 000	217 286
total costs	[300 000-599 999]	[600 000-999 999]	[600 000-999 999]	[600 000-999 999]	[600 000-999 999]	[300 000-599 999]
incremental flows (revenues less costs)	[-1 to - 99 999]	[- 100 000 to - 299 999]	[- 100 000 to - 299 999]	[-1 to - 99 999]	[-1 to - 99 999]	[-1 to - 99 999]

Table 9

Amendment of 16 June 2009 to the marketing services agreement of 30 June 2005

(EUR)

	2009	2010
total number of inbound and outbound passengers	67 794	33 709
number of rotations per year	211	105
<i>landing charge</i>	29 173	14 795
<i>passenger charge</i>	162 706	82 519
<i>groundhandling services</i>	[0-99 999]	[0-99 999]
total aeronautical revenue	[100 000-299 999]	[100 000-299 999]
non-aeronautical revenue	[100 000-299 999]	[0-99 999]
total revenues	[300 000-599 999]	[100 000-299 999]
operating costs (staff, sundry purchases, etc.)	[100 000-299 999]	[0-99 999]
marketing costs	[100 000-299 999]	[100 000-299 999]
total costs	[300 000-599 999]	[100 000-299 999]
incremental flows (revenues less costs)	[-1 to - 99 999]	[-1 to - 99 999]

Table 10

2007 agreement for the Pau-Charleroi route

(EUR)

	2007	2008	2009	2010	2011	2012
total number of inbound and outbound passengers	13 366	50 123	50 123	50 123	50 123	36 757
number of rotations per year	42	156	156	156	156	114
<i>landing charge</i>	5 409	20 691	21 104	21 526	21 957	16 424
<i>passenger charge</i>	26 264	100 461	102 470	104 520	106 610	79 744
<i>groundhandling services</i>	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
total aeronautical revenue	[0-99 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]

(EUR)

	2007	2008	2009	2010	2011	2012
non-aeronautical revenue	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
total revenues	[0-99 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]	[100 000-299 999]
operating costs (staff, sundry purchases, etc.)	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
marketing costs	[0-99 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[100 000-299 999]
total costs	[100 000-299 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]	[300 000-599 999]
incremental flows (revenues less costs)	[-1 to -99 999]	[-100 000 to -299 999]	[-100 000 to -299 999]	[-100 000 to -299 999]	[-100 000 to -299 999]	[-100 000 to -299 999]

Table 11

2008 and 2009 agreements for the Pau-Bristol route and 2010 agreement for the Pau-London, Pau-Charleroi and Pau-Beauvais routes

(EUR)

	2008 Bristol agreement	2009 Bristol agreement	2010 London, Charleroi and Beauvais agreement	
	2008	2009	2010	2011
total number of inbound and outbound passengers	16 111	18 635	75 463	24 783
number of rotations per year	50	58	235	77
landing charge	6 933	8 019	32 472	10 878
passenger charge	37 700	44 725	181 110	60 669
groundhandling services	[0-99 999]	[0-99 999]	[0-99 999]	[0-99 999]
total aeronautical revenue	[0-99 999]	[0-99 999]	[100 000-299 999]	[0-99 999]
non-aeronautical revenue	[0-99 999]	[0-99 999]	[100 000-299 999]	[0-99 999]
total revenues	[0-99 999]	[100 000-299 999]	[300 000-599 999]	[100 000-299 999]
operating costs (staff, sundry purchases, etc.)	[0-99 999]	[0-99 999]	[100 000-299 999]	[0-99 999]

(EUR)

	2008 Bristol agreement	2009 Bristol agreement	2010 London, Charleroi and Beauvais agreement	
	2008	2009	2010	2011
marketing costs	[100 000-299 999]	[100 000-299 999]	[1 000 000-1 499 999]	[300 000-599 999]
total costs	[100 000-299 999]	[100 000-299 999]	[1 000 000-1 499 999]	[300 000-599 999]
incremental flows (revenues less costs)	[-1 to - 99 999]	[-1 to - 99 999]	[- 600 000 to - 999 999]	[- 100 000 to - 299 999]

Application of the market economy operator test to the agreement signed with Transavia

- (434) The Commission recalls that the CCIPB prepared a business plan before signing its agreement with Transavia for the Pau-Amsterdam route ('the Transavia business plan'). The Commission takes the view that this business plan constitutes an appropriate starting point for applying the MEO test to the agreement signed with Transavia and has no reason to question the assumptions used, except on one point, namely the time frame used in the assessment. This point will be discussed below.
- (435) The Commission notes that this business plan indicates an 'annual financial result' (similar to the incremental flows (revenues less costs) in the analysis of the agreements with Ryanair/AMS) that is negative for the period from 2006 to 2008, and then positive for the period from 2009 to 2012 (see Table 12 below).
- (436) The Transavia business plan states that it is only during the seventh year that the investment (return on investment) becomes profitable (cumulatively). In other words, the plan does not apply any discount rate to the projected annual flows in order to calculate the net present value and therefore ascertain whether, in terms of the airport's profitability, the positive flows at the end of the period in question offset the negative flows in the early period. In fact, the business plan uses the cumulative total of the flows without any discounting (see 'cumulative result' in Table 12 below), which is negative for the period from 2006 to 2011, but becomes positive in 2012⁽⁸⁵⁾.
- (437) The Commission invited France to carry out a detailed analysis, based on the objective information known to the CCIPB when the agreement with Transavia was signed, in order to ascertain whether this agreement would have been signed by an MEO motivated by the prospect of profits.
- (438) For the purpose of this analysis, France used the 'annual financial result' from the Transavia business plan, from which it deducted corporation tax for the years in which the flows were positive, and then applied a discount rate of 6,5 % to calculate the net present value. The result of this analysis is therefore a net present value of EUR [- 100 000 to - 200 000], calculated on the planned launch date of the Pau-Amsterdam route, namely 26 April 2006.
- (439) However, the Commission notes that both the Transavia business plan and France's calculation are based on a profitability estimate for the period from 2006 to 2012, whereas the agreement itself was due to apply, according to its own terms, only until 2009, without there being any automatic renewal clause. For the reasons set out in recitals 393 to 397, the projected profitability analysis must therefore be based on the period of application of the agreement as originally planned, and not on a longer period. This is particularly because, when signing an

⁽⁸⁵⁾ The Commission notes that the CCIPB comments in the business plan that, in non-cumulative terms, as soon as the marketing costs fall significantly in 2009 (fourth year), the annual result is positive. This is explained by the fact that, under the terms of the agreement, the marketing payments were EUR [...] per passenger (with an annual maximum of EUR [...]) during the third year, and were set to fall in the fourth year to EUR [...] per passenger (EUR [...] for the fifth year and EUR [...] for the sixth and seventh years). See recital 84.

agreement, a reasonable and prudent MEO cannot bank on its renewal, whether under identical terms or under different terms⁽⁸⁶⁾. The Commission notes that a net present value recalculated for the period from 2006 to 2009, based on the annual flows presented in the business plan for these years alone and using the discount rate proposed by France, would be EUR [- 300 000 to - 400 000].

- (440) Accordingly, the Commission notes that the agreement results in annual incremental flows that are all negative over the period covered by the profitability analysis (except for 2009 when the incremental flow is almost zero), which necessarily results in a negative net present value whatever discount rate may be used. The 2006 agreement with Transavia therefore confers an economic advantage on Transavia. As this is conferred on only one undertaking, it is selective.

Table 12

Adapted business plan for the Amsterdam-Pau route with Transavia

(thousand EUR)

Pau-Amsterdam		2006	2007	2008	2009	2010	2011	2012
Traffic (pax)		22 662	32 542	40 402	48 724	55 198	64 368	64 368
Revenue	Total (A)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Costs	of which — marketing services	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	Total (B)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Annual financial result	(A-B)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Cumulative result		[...]	[...]	[...]	[...]	[...]	[...]	[...]
Corporation tax		[...]	[...]	[...]	[...]	[...]	[...]	[...]
Incremental financial flow after corporation tax		[...]	[...]	[...]	[...]	[...]	[...]	[...]
Net present value 2006-2009	[-300 to - 400]							

8.1.1.3. Distortion of competition

- (441) When Member State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. According to settled case-law⁽⁸⁷⁾, for a measure to distort or threaten to distort competition, it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.
- (442) Since the entry into force of the third air transport liberalisation package on 1 January 1993⁽⁸⁸⁾, nothing prevents EU air carriers from operating flights on routes within the EU and benefiting from unlimited cabotage authorisation.

⁽⁸⁶⁾ A reasonable and prudent MEO might also take into account the likelihood of the agreement being terminated early. The likelihood of such a scenario would depend on the detail of the agreement's termination clauses.

⁽⁸⁷⁾ Judgment in Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* [1998] ECR II-717.

⁽⁸⁸⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

- (443) The advantages received by Ryanair, AMS and Transavia through the various agreements and amendments covered by this investigation have strengthened their position with regard to all other EU air carriers that are actually competing or may compete with Ryanair and Transavia for the routes that they operate. As a result, they have distorted or threatened to distort competition and have affected intra-Community trade.

8.1.1.4. **Conclusion**

- (444) The various agreements and amendments signed by the CCIPB with Ryanair, AMS and Transavia and covered by the formal investigation procedure meet all the criteria in Article 107(1) TFEU and therefore all constitute State aid.

8.1.2. UNLAWFUL NATURE OF THE AID

- (445) As these measures were implemented without having been authorised by the Commission, they constitute unlawful aid.

8.1.3. COMPATIBILITY WITH THE INTERNAL MARKET

- (446) The aid in question constitutes operating aid. However, such aid can be declared compatible only under exceptional and duly justified circumstances.

- (447) Moreover, it is settled case-law⁽⁸⁹⁾ that France should have indicated on what legal basis the aid in question could have been regarded as compatible with the internal market and should have proven that the conditions of compatibility were met. The Commission therefore invited France, in the opening decision and in a request for further information, to indicate the potential legal bases for compatibility and to establish whether the applicable conditions of compatibility were met, particularly if the aid in question were to be regarded as start-up aid for the launch of new routes. However, France never argued that the measures in question constituted start-up aid compatible with the internal market, and never proposed any other bases for their possible compatibility or any grounds allowing this aid to be declared compatible with the internal market. In addition, no interested third party has attempted to prove that these measures are compatible with the internal market.

- (448) Nevertheless, the Commission considers it useful to assess to what extent this aid could be declared compatible in terms of its possible contribution to the launch of new routes or new frequencies. However, it should be stressed that this assessment is superfluous given that, in the absence of evidence provided by the Member State or interested third parties that proves the compatibility of the aid, this should be declared incompatible.

- (449) The new Guidelines state as follows with regard to such aid: 'As regards start-up aid to airlines, the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014'⁽⁹⁰⁾.

- (450) The 2005 Guidelines stipulate that 'The Commission will assess the compatibility of all aid to finance airport infrastructure, or start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty, on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*. In other cases, the Commission will carry out an assessment based on the rules applicable when the aid started to be paid'⁽⁹¹⁾.

- (451) The Commission points out that the aid in question was granted to encourage the launch of new routes, increase the frequency on existing routes or maintain routes that might otherwise have been withdrawn. It is therefore operating aid, which aims to promote outbound air traffic from a regional airport. In this respect, it should be pointed out that, according to the Commission's decision-making practice, operating aid is rarely likely to be declared compatible with the internal market as it usually distorts conditions of competition in the sectors in which it is granted.

⁽⁸⁹⁾ See judgment in Case C-364/90 Italian Republic v Commission of the European Communities [1993] ECR I-2097, paragraph 20.

⁽⁹⁰⁾ New Guidelines, point 174.

⁽⁹¹⁾ Point 85 of the 2005 Guidelines.

8.1.3.1. Measures predating the entry into force of the 2005 Guidelines

- (452) The 2003 agreement and the 2005 agreements were signed before the 2005 Guidelines were published on 9 December 2005 ⁽⁹²⁾. With regard to the compatibility of aid granted before this date, point 85 of the 2005 Guidelines and point 174 of the new Guidelines refer to the rules applicable at the time when the aid was granted.
- (453) Before the 2005 Guidelines were adopted, the Commission had adopted the 1994 Guidelines ⁽⁹³⁾. However, these guidelines did not specifically deal with the issue of operating aid aimed at promoting outbound air traffic from regional airports. This issue in fact gradually appeared as a result of a build-up of congestion at certain large European airports and the development of low-fare airlines, which did not yet exist in 1994. Consequently, the Commission takes the view that the 1994 guidelines also cannot be applied to this case. The Commission must therefore assess the compatibility of the aid in question directly on the basis of Article 107(3)(c) TFEU.
- (454) In this respect, it should be noted that the Commission's assessment of this type of State aid has been refined over time, although some points have remained unchanged. These points stem from the general principles governing the compatibility of aid in accordance with the aforementioned provision of the Treaty.
- (455) Accordingly, in the decision on Manchester airport of June 1999 ⁽⁹⁴⁾, the Commission found that reductions in airport charges granted in a non-discriminatory and time-limited manner as measures aimed at promoting new routes were compatible with the rules on State aid.
- (456) Subsequently, in its decision of February 2004 on Charleroi airport ⁽⁹⁵⁾, the Commission explained that 'Operational aid measures intended to help the launch of new airlines or strengthen certain frequencies may be a necessary tool for the development of small regional airports. The measures may indeed persuade the interested companies to take the risk of investing in new routes. However, in order to declare such aid compatible on the basis of Article 87(3)(c) of the Treaty, it should be determined whether this aid is necessary and in proportion to the objective sought, and whether it affects trade to an extent that is contrary to the common interest'. The Commission therefore identified certain conditions to be met in order for this operating aid to be declared compatible, in particular the following.
- The aid must contribute to the objective of Community interest of developing a regional airport through a net increase in traffic on new routes ⁽⁹⁶⁾.
 - The aid must be necessary in the sense that it is not granted for a route already operated by the same or another airline or a similar route ⁽⁹⁷⁾.
 - The aid must have an incentive effect in the sense that it must help to develop an activity that, after a certain period, is likely to become profitable, which implies that the aid is limited in time ⁽⁹⁸⁾.
 - The aid must be proportional, i.e. the amount must be linked to the net development of traffic ⁽⁹⁹⁾.
 - The aid must have been granted transparently and without discrimination and must not be combined with other types of aid.

⁽⁹²⁾ See footnote 18.

⁽⁹³⁾ Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽⁹⁴⁾ See Decision NN 109/98 of 14 June 1999 entitled 'United Kingdom, Manchester Airport'.

⁽⁹⁵⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 280). This decision was annulled by the judgment in Case T-196/04 *Ryanair Ltd v Commission of the European Communities* ('Charleroi' judgment) [2008] ECR II-3643. However, it shows how the Commission's assessment of the aid in question has developed.

⁽⁹⁶⁾ See paragraphs 283 to 297.

⁽⁹⁷⁾ See paragraphs 288 to 309.

⁽⁹⁸⁾ See paragraphs 311 to 317.

⁽⁹⁹⁾ See paragraphs 318 to 325.

- (457) The 2005 Guidelines and the new Guidelines precisely define these compatibility principles, but it remains the case that operating aid granted to airlines may be declared compatible by the Commission where it contributes to the development of smaller airports through a net increase in traffic on new routes, where the aid is necessary in the sense that it is not granted for a route already operated by the same or another airline or a similar route⁽¹⁰⁰⁾, where it is limited in time and where the route for which the aid is granted is likely to become profitable⁽¹⁰¹⁾, where the amount is linked to the net development of traffic and where the aid is granted transparently and without discrimination, and where it is not combined with any other type of aid⁽¹⁰²⁾.
- (458) In this regard, in paragraph 140 of the extension decision, the Commission stated that it would assess the compatibility of these measures in the light of all five criteria mentioned above. It should be noted that neither France nor any interested third party has disputed the application of these criteria.
- (459) In conclusion, the Commission takes the view that, in this case, the compatibility of the 2003 agreement and the 2005 agreements should be assessed in the light of the aforementioned general principles.

Contribution to the development of smaller airports through a net increase in traffic on new routes

- (460) In 2003 to 2005 the annual traffic at Pau airport was in the region of 700 000 passengers per year. The Commission takes the view that, at that time, the airport was small.
- (461) The Commission considers that, with regard to the new Pau-London Stansted route, the 2003 agreement involved the launch of a new route likely to result in a net increase in traffic. However, the 2005 agreements involved the continued operation of the same route, 2 years after its launch, without any increase in frequency. Consequently, the Commission considers that the condition relating to a net increase in traffic is not met by the 2005 agreements.

The aid is not granted for a route already operated by the same or another airline or a similar route

- (462) When the Pau-London Stansted route was launched by Ryanair in 2003, no airline was operating this route.
- (463) However, the 2005 agreements involved the same Pau-London Stansted route. This route had already been operated by Ryanair for nearly 2 years under the 2003 agreement, with the same frequency as that stipulated by the 2003 agreement. Consequently, the Commission considers that the aforementioned condition is not met with regard to the 2005 agreements.

The aid must be limited in time and involve a route likely to become profitable

- (464) The Commission notes that, despite its invitation in this respect, France has not provided any viability study for the Pau-London route covered by the 2003 and 2005 agreements, which Ryanair would have submitted to prove that the aid granted through the agreements in question was justified. Accordingly, based on the facts on record, it seems that, for the authorities that granted the aid in question, there was no clear prospect of the Pau-London route becoming viable without aid in the more or less short term. The Commission stresses in this respect that the studies submitted by the French authorities on the economic benefits of the routes operated by Ryanair analyse the impact that they might have on the region's development, but do not include projections of the future viability of these routes or other routes likely to be operated by Ryanair in the future. On the contrary, an analysis of the various agreements signed with Ryanair proves that the aid granted to the latter for these routes was set to increase over time, even after the 2003 and 2005 agreements were terminated, precisely to ensure that these routes were profitable enough for Ryanair to continue operating them.
- (465) Moreover, the Commission notes that, although these measures were limited in time, the 5-year term of each agreement was not necessary for or proportional to the costs incurred in launching a new route given that, in the aviation sector, a contractual term of under 3 years is usually sufficient⁽¹⁰³⁾.

⁽¹⁰⁰⁾ See points 71 to 75 and 79(b) and (c) of the 2005 Guidelines, and points 139, 140, 141 and 151 of the new Guidelines.

⁽¹⁰¹⁾ See point 79(b), (d) and (i) of the 2005 Guidelines, and point 147 of the new Guidelines.

⁽¹⁰²⁾ See points 79(g) and (h) and 80 of the 2005 Guidelines, and points 150, 152 and 153 of the new Guidelines.

⁽¹⁰³⁾ New Guidelines, point 147.

- (466) The Commission therefore considers that neither the 2003 agreement nor the 2005 agreements meet the condition that the measures must be limited in time and involve routes likely to become profitable.

The amount must be linked to the net development of traffic

- (467) The 2003 agreement was linked to the launch of a new daily route between Pau and London, for which the Commission estimates that an annual total number of passengers of 117 275 was feasible (see Table 7). This agreement was therefore linked to a net increase in the number of passengers, as this route did not previously exist.
- (468) However, the 2005 agreements were not linked to the launch of a new route, but involved the continued operation of the pre-existing Pau-London route, without any increase in frequency. The Commission therefore considers that the aid amounts resulting from the 2005 agreements were not linked to the net development of traffic.

The aid must have been granted transparently and without discrimination and must not be combined with other types of aid

- (469) When asked whether the aid was granted transparently and without discrimination, France simply referred to publications made by the CCIPB in 2007 and 2009, which postdate the 2003 and 2005 agreements and are therefore irrelevant to this analysis. It is clear from all the records that the 2003 and 2005 agreements were negotiated bilaterally, without any transparency, and without a process guaranteeing the absence of discrimination, such as a public invitation to tender. The aid in question does not therefore meet the condition of transparency and non-discrimination.

Conclusion

- (470) It is clear from the above that the Commission considers that the 2003 agreement and the 2005 agreements constitute unlawful aid incompatible with the internal market.

8.1.3.2. Measures postdating the entry into force of the 2005 Guidelines

- (471) The Commission applies the 2005 Guidelines to agreements signed after they entered into force.
- (472) Point 27 of the 2005 Guidelines stipulates that operating aid granted to airlines (such as start-up aid for new routes) can be declared compatible with the internal market only under exceptional circumstances and under strict conditions in underprivileged regions of Europe, i.e. regions covered by the derogation set out in Article 107(3)(a) TFEU, the most remote regions and sparsely populated areas.
- (473) As Pau airport is not situated in this type of region, this derogation does not apply.
- (474) As with the measures predating the entry into force of the 2005 Guidelines, the Commission notes that neither France nor any interested third party has proven the compatibility of these measures with the internal market, whether on the basis of the 2005 Guidelines or on any other basis.
- (475) With regard to the conditions set out in point 79(a) to (l) of the 2005 Guidelines, the Commission notes as follows in recitals 476 to 480.
- (476) Certain conditions, such as those set out in point 79(a) and (b) of the 2005 Guidelines, which concern the possession of an operating licence by the airline and the airport category, are met.
- (477) The condition set out in point 79(h) (Non-discriminatory allocation) of the 2005 Guidelines is worded as follows: 'any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services'. The Commission notes that, in this case, the agreements were directly negotiated with the airlines concerned, without any publicity. This therefore means that the aid was granted without any competitive procedure in which other potentially interested airlines could have offered to operate the routes concerned, under the same terms, in order to benefit from the start-up aid.

- (478) Nevertheless, the Commission notes that the CCIPB published notices in the Air & Cosmos magazine ⁽¹⁰⁴⁾ in 2007 and 2009 in order to invite interested airlines to develop new services in exchange for start-up aid. However, France has indicated that these approaches were unsuccessful, which led the CCIPB to negotiate directly with certain airlines. Consequently, the unlawful aid identified in this investigation does not stem from the publication of the aforementioned notices, but from bilateral negotiations. The condition set out in point 79(h) is therefore not met.
- (479) As regards the condition set out in point 79(i) (Business plan showing the viability of the route and analysis of the impact of the new route on competing routes) of the 2005 Guidelines, the Commission invited France to indicate whether such business plans had been prepared and, if so, to provide copies. Neither France nor any interested third party reported the existence of such business plans. Consequently, the condition set out in point 79(i) is not met.
- (480) The condition set out in point 79(j) (Publicity) of the 2005 Guidelines stipulates that the public authorities concerned must publish the list of subsidised routes, in each instance indicating the source of public funding, recipient company, amount of aid paid and number of passengers concerned. In this case, France has confirmed that the list of routes and companies receiving financial incentives or marketing payments has not been published each year. The condition set out in point 79(j) of the 2005 Guidelines is not therefore met.

Conclusion

- (481) The various agreements and amendments signed by the CCIPB with Ryanair, AMS and Transavia and covered by the formal investigation procedure all constitute unlawful State aid incompatible with the internal market.

8.2. MEASURES IN FAVOUR OF THE AIRPORT OPERATOR

- (482) Between 2000 and 2010 the CCIPB received equipment subsidies from a number of public authorities, totalling approximately EUR 17 800 000. It also received a subsidy of EUR 3 521 000 intended to cover the costs arising, according to the French authorities, from sovereign tasks carried out by the airport (hereinafter 'the sovereign task subsidies') ⁽¹⁰⁵⁾.

8.2.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (483) Under Article 107(1) TFEU, 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (484) For a measure to constitute State aid, all the following conditions must be met: (1) the measure in question is financed by state resources and is imputable to the State; (2) it confers an economic advantage; (3) this advantage is selective; (4) the measure in question distorts or threatens to distort competition and may affect trade between Member States; and (5) the beneficiary is an undertaking within the meaning of Article 107(1) TFEU, which implies that it engages in an economic activity.
- (485) In order to determine whether the subsidies referred to in recitals 88 to 108 constitute State aid, it must first be ascertained whether their beneficiary, the operator of Pau airport, was engaged in an economic activity at the time when they were granted. The Commission will examine this question first, before assessing the sovereign task subsidies and equipment subsidies in order to determine whether they constitute State aid.

8.2.1.1. *Concepts of undertaking and economic activity*

- (486) As the Commission explained in the new Guidelines ⁽¹⁰⁶⁾, from the date of the judgment in 'Aéroports de Paris' (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control. Conversely, due to the uncertainty that existed prior to this judgment, public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted before 12 December 2000.

⁽¹⁰⁴⁾ See recital 132.

⁽¹⁰⁵⁾ See Table 3.

⁽¹⁰⁶⁾ Points 28 and 29.

- (487) Furthermore, as also indicated in the new Guidelines⁽¹⁰⁷⁾, not all the activities of an airport are necessarily of an economic nature. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid.
- (488) According to Table 4, the equipment subsidies granted in 2004 and 2009 were used to finance investments in the taxiway, runway, lighting and car park. This infrastructure and equipment is commercially operated by the CCIPB, which is the airport operator and which invoices the costs to users of these assets. Such investments are therefore inherent in the airport operator's commercial activity. The equipment subsidies granted in 2004 and 2009 therefore benefited economic activities. They were also granted after 12 December 2000. With regard to the concepts of undertaking and economic activity, they may therefore fall within the scope of the rules on State aid.
- (489) Conversely, the equipment subsidies granted in 1999 and 2000, referred to in Table 4 and used to finance investments in the freight and passenger terminals, runway equipment and cogeneration plant, were granted before 12 December 2000. Consequently, the Commission must not examine these measures in the context of this Decision.
- (490) The subsidies paid by the Departmental Council of Pyrénées-Atlantiques from 2000 to 2005 to repay the capital of a loan taken out by the CCIPB, in the amount of EUR 779 000⁽¹⁰⁸⁾, are covered by an agreement on the Pau airport financing plan concluded on 5 November 1990. This agreement contained an irrevocable undertaking on the part of the public authorities to repay the debt in question. As this agreement predates the judgment in 'Aéroports de Paris', the Commission must not examine the payments made under this agreement with regard to the rules on State aid.
- (491) In Section 8.2.1.2 the Commission examines to what extent the sovereign task subsidies were effectively used to finance activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority.

8.2.1.2. *Sovereign task subsidies*

- (492) As indicated in Table 3, the formal investigation procedure covers the FIATA subsidies and the subsidies used to finance various investments, namely premises and vehicles for the Aircraft Fire and Safety Service (SSLIA) and CT scanners⁽¹⁰⁹⁾. These various subsidies were granted under the general system for financing sovereign tasks in French airports, described in Section 4.3.2.
- (493) As recalled above, according to the new Guidelines and case-law, activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid. According to the new Guidelines, activities such as air traffic control, police, customs, firefighting, measures designed to protect civil aviation from acts of unlawful interference, and investment in the infrastructure and equipment needed for such activities are regarded, as a general rule, as not being economic in nature⁽¹¹⁰⁾.
- (494) The new Guidelines also stipulate that, so as not to constitute State aid, the public financing of such non-economic activities must be strictly limited to compensating the costs to which they give rise and must not lead to undue discrimination between airports. The guidelines clarify with regard to this second condition that, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature⁽¹¹¹⁾.

⁽¹⁰⁷⁾ Points 34 and 35.

⁽¹⁰⁸⁾ See the penultimate row of Table 3.

⁽¹⁰⁹⁾ See the first and second rows of Table 3.

⁽¹¹⁰⁾ Point 35.

⁽¹¹¹⁾ Points 36 and 37.

- (495) The activities financed by the general system for financing sovereign tasks at French airports, described in Section 4.3.2, involve the protection of civil aviation from acts of unlawful interference⁽¹¹²⁾, police tasks⁽¹¹³⁾, rescue and firefighting⁽¹¹⁴⁾, air traffic safety⁽¹¹⁵⁾, and protection of the human and natural environment⁽¹¹⁶⁾. These activities may legitimately be regarded as falling under the responsibility of the State in the exercise of its official powers as a public authority. Consequently, France may legitimately regard these tasks as 'sovereign' in nature, in other words non-economic, under the rules on State aid. It may therefore provide for public financing to compensate the costs incurred by airport operators in carrying out these tasks in so far as these are entrusted to the latter by national law and provided that this financing does not give rise to overcompensation or discrimination between airports.
- (496) It is clear from the description in Section 4.3.2 that the system laid down by French law is based on strict cost control mechanisms, both *ex ante* and *ex post*, ensuring that airport operators receive, through the airport tax and supplementary scheme, only those amounts strictly needed to cover the costs.
- (497) Moreover, this system applies to all French civil airports in terms of both the types of task giving rise to compensation and the financing mechanisms. The non-discrimination condition is therefore met. Although French law entrusts airport operators with sovereign tasks, it does not require them to finance these tasks, but rather the State. Accordingly, the compensation of the costs arising from these tasks by public funds does not reduce the costs that airport operators should normally bear under French law.
- (498) The financing received by French airport operators under this system does not therefore constitute State aid.
- (499) Accordingly, the sovereign task subsidies referred to in the second and third rows of Table 3, used to finance investments in the protection of civil aviation from acts of unlawful interference and in aircraft rescue and firefighting, do not constitute State aid.

8.2.1.3. *Equipment subsidies granted in 2004 and 2009*

- (500) It now has to be examined whether the equipment subsidies granted in 2004 and 2009 constitute State aid. These subsidies are presented in Table 13 below.

Table 13

Equipment subsidies and investments from 2004 and 2009

(million EUR)

Entities granting the equipment subsidies	Years granted	Nature of the investments	Total amount paid	Total amount of the investment
Pyrénées-Atlantiques Departmental Council	2004	Taxiway work	1,6	2,6
Aquitaine Regional Council				
European Union (ERDF)				

⁽¹¹²⁾ This category includes screening of hold baggage, screening of passengers and cabin baggage, and access control to the restricted area.

⁽¹¹³⁾ This category includes automated border controls through biometric identification.

⁽¹¹⁴⁾ As indicated in recital 493, these three categories are explicitly referred to in the new Guidelines as examples of non-economic activities.

⁽¹¹⁵⁾ This category includes wildlife hazard prevention.

⁽¹¹⁶⁾ This category includes environmental control measures.

(million EUR)

Entities granting the equipment subsidies	Years granted	Nature of the investments	Total amount paid	Total amount of the investment
<i>Syndicat Mixte de l'Aéroport de Pau-Pyrénées</i>	2009	Renovation of runway and lighting Car park extension	4,1	5,1
Total			5,8	7,7

State resources and imputability to the State

- (501) The Departmental Council of Pyrénées-Atlantiques granted the CCIPB subsidies financed through resources of the department of Pyrénées-Atlantiques, which is a decentralised local authority. As a reminder, the resources in question are state resources. Indeed, the resources of local authorities are regarded as state resources under Article 107 TFEU ⁽¹¹⁷⁾. Furthermore, decisions taken by such authorities are imputable to the State, in the same way as measures taken by the central authority ⁽¹¹⁸⁾.
- (502) The same is true for the subsidies received from Aquitaine Regional Council and the *syndicat mixte*, with the latter being a grouping of local authorities entirely controlled by those authorities.
- (503) Furthermore, the taxiway work was partly financed by the ERDF. Funding from the ERDF is regarded as constituting state resources and being imputable to the State given that this is granted under the control of the Member State concerned ⁽¹¹⁹⁾.
- (504) The 2004 and 2009 equipment subsidies were therefore entirely financed through state resources and are imputable to the State, within the meaning of Article 107(1) TFEU.

Selective advantage for the airport operator

- (505) In order to ascertain whether a state measure constitutes aid, it must be determined whether the recipient undertaking received an economic advantage enabling it to avoid having to bear costs that would normally have had to be met out of its own financial resources, whether it received an advantage that it would not have received under normal market conditions ⁽¹²⁰⁾, or whether the measure in question can be regarded as compensation for discharging public service obligations satisfying the conditions of the *Altmark* judgment ⁽¹²¹⁾.
- (506) With regard to this last point, it should first be noted that France has not clearly indicated that, in its opinion, the Pau airport operator was entrusted with providing a genuine service of general interest. In its comments on the extension decision, France simply indicated in this respect that, in the absence of a legal basis clearly applicable at the time (before the publication of the 2005 Guidelines), the French authorities were able to legitimately consider that the financing of airport infrastructure decided at that time constituted a land planning policy measure, that this airport was on the whole performing a task of general economic interest, and that this task did not come under the rules on state aid ⁽¹²²⁾.

⁽¹¹⁷⁾ Judgment in Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais* (T-267/08) and *Communauté d'agglomération du Douaisis* (T-279/08) v *European Commission* [2011] ECR II-1999, paragraph 108.

⁽¹¹⁸⁾ Judgment in Joined Cases T-127/99, T-129/99 and T-140/99 *Territorio Histórico de Álava — Diputación Foral de Álava* (T-127/99), *Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA* (T-129/99) and *Daewoo Electronics Manufacturing España, SA* (T-148/99) v *Commission of the European Communities* [2002] ECR II-1330, paragraph 142.

⁽¹¹⁹⁾ With regard to the qualification of ERDF resources as state aid, see, for example, the Commission Decision in Case N 514/06 *South Yorkshire digital region broadband project*, recital 29, and the Commission Decision in Case N 44/10, *Development of infrastructure on Krievu Sala for relocation of port activities out of the city centre*, recitals 69 to 70.

⁽¹²⁰⁾ Judgment in Case C-301/87 *French Republic v Commission of the European Communities* [1990] ECR I-307, paragraph 41.

⁽¹²¹⁾ Judgment in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht ('Altmark')* [2003] ECR I-7747.

⁽¹²²⁾ Paragraph 13(1).

- (507) France added that it considers that airports with less than one million passengers per year should as a whole be regarded as services of general economic interest, given their important role in terms of land planning, the economic and social development of their region, and the overlapping of their activities. The French authorities also take the view that these airports have only a limited impact on the internal market. They therefore consider that financing granted to these airports should not be regarded as State aid or that such financing should be declared compatible with the internal market and exempted from notification in accordance with the Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty (Article 106(2) TFEU) to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, which applied until 20 December 2011 ⁽¹²³⁾.
- (508) However, the Commission takes the view that this justification is insufficient to conclude that the Pau airport operator is responsible for operating a genuine service of general economic interest. As indicated in the new Guidelines ⁽¹²⁴⁾, the Commission considers that it is possible for the overall management of an airport, in well-justified cases, to be considered a service of general economic interest. However, the Commission considers that this can only be the case if at least part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development.
- (509) In the light of this principle, it cannot be presumed that the operation of any French airport with less than one million passengers per year is a genuine service of general economic interest. France must assess the specific situation of each airport in this category and present this analysis to the Commission if it wants to maintain the view that the operation of this airport is a service of general economic interest. It is only under these circumstances that the Commission would be in a position to ascertain, on a case-by-case basis, whether France has committed a manifest error of assessment in considering the airport in question as a service of general economic interest.
- (510) In this case, no specific analysis of this nature has been provided for Pau airport. Moreover, given the proximity of Tarbes airport, which is 50 km and less than 40 minutes away by road, it cannot be stated that, without Pau airport, part of the area potentially served by this airport would be isolated from the rest of the Union to an extent that would prejudice its social and economic development. Maintaining such a view would indicate a manifest error of assessment in this respect.
- (511) According to the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ⁽¹²⁵⁾, in order for the first *Altmark* condition to be satisfied, the public service task must be assigned by way of one or more acts that, depending on the legislation in Member States, may take the form of legislative or regulatory instruments or contracts. Moreover, the act or series of acts must at least specify the content and duration of the public service obligations, the undertaking and, where applicable, the territory concerned, the nature of any exclusive or special rights assigned to the undertaking by the authority in question, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and recovering any overcompensation. The only acts produced by France that could possibly fulfil this function are the 1965 Order ⁽¹²⁶⁾ and its subsequent amendments, in so far as they impose various obligations on the CCIPB in terms of operation (including on points such as opening times or equal treatment of users), servicing, maintenance and development, for a specified period. However, none of these acts lays down arrangements for calculating and reviewing any financial compensation mechanism.
- (512) As a result, the Commission takes the view, based on the facts on record, that the operation of Pau airport cannot be regarded as a genuine service of general economic interest.
- (513) Even assuming that this were the case, the equipment subsidies covered by this investigation would not, however, satisfy all the conditions of the *Altmark* judgment. In fact, these equipment subsidies consist of several specific subsidies paid at different times to cover investment costs that proved necessary at those times. These subsidies do not therefore stem from a compensation mechanism established in an objective and transparent manner and in advance, i.e. when the public authorities entrusted the airport's operation to the CCIPB or on the occasion of acts renewing or clarifying the terms of this operation. Accordingly, these subsidies do not satisfy the second condition of the *Altmark* judgment, which is worded as follows: 'the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings' ⁽¹²⁷⁾.

⁽¹²³⁾ Paragraph 13(3).

⁽¹²⁴⁾ Point 72.

⁽¹²⁵⁾ OJ C 8, 11.1.2012, p. 4, paragraph 52.

⁽¹²⁶⁾ See recital 27.

⁽¹²⁷⁾ See the judgment in *Altmark*, cited in footnote 121, paragraph 90.

- (514) As the equipment subsidies in question do not satisfy the conditions of the *Altmark* judgment, it must be examined, as indicated above, whether they were granted under normal market conditions.
- (515) In this respect, it should be recalled that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' ⁽¹²⁸⁾.
- (516) In order to determine whether the 2004 and 2009 equipment subsidies were granted under normal market conditions, the MEO test should be applied to them. This involves assessing whether, when these subsidies were granted, the public authorities could have expected a financial return, with this analysis excluding, as such, any expected benefits in terms of local economic development.
- (517) In this case, the Commission notes firstly that the airport is operated by the CCIPB under a concession expiring in 2015. Ownership of this airport, which initially belonged to the State, was transferred to the *syndicat mixte* on 1 January 2007. The CCIPB does not therefore own the land and infrastructure.
- (518) In its comments, the CCIPB has stated in this respect, on the subject of the equipment subsidies, that these sums correspond to investments made by the owners of the airport infrastructure in maintaining and improving that infrastructure, with these investments therefore being made solely for the benefit of the owners. The CCIPB has argued that these sums did not confer any economic advantage on the CCIPB, in its capacity as airport operator. The CCIPB has added that, as a result, in paying these equipment subsidies, the concession authority and local authorities acted quite naturally, in their capacity as owners of the airport infrastructure and under the public equipment concession, to ensure that work to maintain, upgrade and improve the airport public service was carried out with a view to developing their assets. According to the CCIPB, these were therefore investments that were naturally the responsibility of the public equipment owner and not its operator.
- (519) However, it is clear from the facts on record that, under the financial terms of the concession, it is the responsibility of the CCIPB, and not the public owner, to finance the necessary investments. Accordingly, the 1965 Order granting the concession clearly entrusts the concession-holder with the establishment, development and maintenance of the structures, buildings, facilities and equipment. France has confirmed this as it has stated that the investments needed to upgrade, renovate, maintain, extend or modernise the airport are the responsibility of the concession-holder.
- (520) France has noted in this respect that the amendment of 8 November 2001 ('the third amendment') to the 1965 Order did not alter the financial terms of the concession, particularly with regard to responsibility for the investments needed to maintain and renovate the airport. Moreover, it has noted that the amendment of 3 March 2010 ('the fourth amendment'), concluded between the *syndicat mixte* and the CCIPB following the transfer of ownership in 2007, also did not alter the financial terms of the concession. Just like the previous amendments, it made the concession-holder responsible for the investments needed for its activity ⁽¹²⁹⁾.
- (521) Accordingly, as proven by the examination of the 1965 Order and its amendments, as confirmed by France and contrary to the CCIPB's suggestions, the latter is indeed responsible for making and financing investments such as those covered by the equipment subsidies in question.
- (522) Furthermore, it appears that, when granting the equipment subsidies in 2004 and 2009, the various public authorities involved could not have expected a return on their investment likely to satisfy an MEO having acted in their place. The land and infrastructure in fact belonged to the State in 2004, and to the *syndicat mixte* in 2009. However, for each of these public owners, the only revenue generated by Pau airport was a minimal state fee of FRF 100 per year up to 2010, increased to EUR 100 per year after that date. The 2004 and 2009 equipment subsidies did not result in any increase in this state fee, which was set by the 1965 Order and revised by some of its amendments. As a result, neither the State nor the *syndicat mixte*, as owners, could have expected the equipment subsidies granted respectively in 2004 and 2009 to produce a tangible return on their investment, at least until the planned expiry of the concession in 2015. Furthermore, there is nothing in the records to suggest that, in 2004 and 2009 respectively, the State or the *syndicat mixte* expected these equipment subsidies to increase the value of the

⁽¹²⁸⁾ See the judgment in *Stardust Marine*, cited in footnote 36, paragraph 69.

⁽¹²⁹⁾ The fourth amendment lays down the rules governing the 'returnable assets' of the concession, which comprise all the movable and immovable assets made available to the concession-holder by the concession authority. The returnable assets therefore include the land, structures, buildings, facilities, systems and intellectual works needed to operate the airport, renewed or established by the concession-holder during the term of the concession, and the movable assets needed to operate the airport, renewed or established by the concession-holder during the term of the concession. According to the fourth amendment, these assets must be returned free of charge and in perfect condition to the concession authority on the expiry of the concession agreement. The fourth amendment also stipulates that, at the end of the concession, the concession authority will pay the annual interest and amortisation for loans duly taken out by the concession-holder to equip the concession, and will reimburse to the concession-holder those advance payments that the latter may have made from its own resources or the non-depreciated value of the facilities that it has established using these same resources, if this reimbursement cannot be made through a charge against the airport's working capital. These financial provisions, which apply from the end of the concession, do not alter the fact that the investments needed to operate the airport are the responsibility of the concession-holder at the time when these investments are made.

assets, which could in turn result in a return on the investment made by these two entities in the context of the new concession from 2016. In particular, France has not provided any information on the plans of the State or the *syndicat mixte* with regard to the financial terms of the future concession and any fees that the airport owner might be able to expect.

- (523) The public authorities having participated in the financing of the subsidies in question without, at the time when they were granted, owning the land and infrastructure, whether directly or indirectly through the *syndicat mixte*, also and in particular could not have expected a return on their investment likely to produce a profit from their investment expenditure. This observation applies to the Departmental Council of Pyrénées-Atlantiques and to the Aquitaine Regional Council, which did not own the airport at the time when they decided to contribute, in 2004, to the financing of the taxiway work.
- (524) It should also be noted that, according to France, the decision made by the public authorities to invest was not solely based on the prospect of a direct profit, and the CCIPB paid only a symbolic fee. Apparently the decision made by the authorities to invest was based on the benefit expected in the long term for the region in terms of economic and tourism development. This statement confirms that the public authorities did not expect their investment expenditure to produce any profit. The only benefit expected by the authorities, namely in terms of economic and tourism development, would not have been taken into account by an MEO acting in place of these authorities. This suggests that the MEO principle is not even applicable to the equipment subsidies in question.
- (525) In the light of the above, the 2004 and 2009 equipment subsidies do not satisfy the MEO test. These subsidies in fact reduced the investment costs that the CCIPB should have borne, without any prospect of a sufficient return on their investment for the authorities having granted these subsidies. In addition, as these advantages benefited a single undertaking, they are selective.

8.2.1.4. *Effect on intra-Community trade and competition*

- (526) As the operator of Pau airport, the CCIPB is in particular in competition with other airport platforms, and especially with airports serving the same catchment area. In this respect, the Commission notes that Tarbes-Lourdes-Pyrénées airport is 50 km from Pau airport and has also offered flights to London since 2009. Biarritz-Anglet-Bayonne airport is also less than 100 km from Pau airport, and offers flights to Charleroi, London Stansted, Manchester and other destinations in the United Kingdom. Aid granted to the CCIPB therefore risks distorting competition. As the airport service market and air transport market are open to competition within the EU, aid also risks affecting trade between Member States.
- (527) More generally it should be noted that EU airport operators are in competition with each other to attract airlines. Airlines decide on which routes to operate and their corresponding frequencies based on a range of criteria. These criteria not only include the potential customers that they can expect on these routes, but also the characteristics of the airports situated at either end of these routes.
- (528) Airlines particularly look at criteria such as type of airport services provided, population or economic activity around the airport, congestion, whether there is access by land, or even the level of charges and overall commercial conditions for use of airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition⁽¹³⁰⁾.
- (529) Consequently, airlines allocate their resources, particularly aircraft and crew, to the various routes by looking at the services offered by airport operators and the prices charged for those services, among other criteria.
- (530) It is clear from all the above that the 2004 and 2009 equipment subsidies, by conferring an economic advantage on the CCIPB, may have strengthened the latter's position in relation to other European airport operators. Consequently, these subsidies may have distorted competition and affected trade between Member States.

⁽¹³⁰⁾ New Guidelines, point 43.

8.2.1.5. *Conclusion on the existence of aid*

- (531) For the reasons set out in recitals 483 to 530, the equipment subsidies granted to the CCIPB in 2004 and 2009 constitute State aid within the meaning of Article 107(1) TFEU.

8.2.2. UNLAWFUL NATURE OF THE AID

- (532) The 2004 and 2009 equipment subsidies were granted without being notified.
- (533) As indicated above, France has stated in its comments that it considered that airports with less than one million passengers per year should as a whole be regarded as services of general economic interest and therefore that the financing granted to them should not be regarded as State aid or that such financing should be declared compatible with the internal market and exempted from notification in accordance with the 2005 SGEI Decision.
- (534) However, as set out above, the Commission takes the view, based on the facts on record, that the operation of Pau airport cannot be regarded as a genuine service of general economic interest. For this reason, the 2004 and 2009 subsidies could not have been exempted from the notification obligation laid down by Article 108(3) TFEU based on the 2005 SGEI Decision.
- (535) Moreover, as indicated above, these subsidies do not stem from a compensation mechanism established in an objective and transparent manner and in advance, i.e. when the public authorities entrusted the airport's operation to the CCIPB or on the occasion of acts renewing or clarifying the terms of this operation. Accordingly, these subsidies do not satisfy the condition laid down in Article 4(d) of the 2005 SGEI Decision, according to which the act or acts entrusting the operation of a service of general economic interest must specify the parameters for calculating, controlling and reviewing the compensation. This is a second reason why the 2004 and 2009 subsidies could not have been exempted from the notification obligation laid down by Article 108(3) TFEU based on the 2005 SGEI Decision.
- (536) In the light of the above, the 2004 and 2009 equipment subsidies constitute unlawful aid.

8.2.3. COMPATIBILITY WITH THE INTERNAL MARKET

- (537) As explained above, the equipment subsidies granted in 2004 and 2009 reduced the investment costs that the CCIPB would normally have had to bear. They therefore constitute investment aid. Furthermore, they were granted before 4 April 2014, which was the date when the new Guidelines entered into force. According to said guidelines, the Commission will apply to unlawful investment aid to airports the rules in force at the time when the aid was granted⁽¹³¹⁾.
- (538) With regard to the 2009 subsidy, the 2005 Guidelines were in force when this subsidy was granted and this is therefore the text that should be applied. However, the 2004 subsidy was granted before the 2005 Guidelines entered into force, at a time when there was no specific compatibility criterion for investment aid to airports. The Commission must therefore assess this subsidy directly on the basis of Article 107(3)(c) TFEU, taking into account its decision-making practice in this regard. It should be recalled that the Commission's decision-making practice with regard to the assessment of the compatibility of aid granted to airport operators was consolidated by the 2005 Guidelines. The Commission therefore takes the view that the compatibility of the 2004 subsidy with the internal market should be assessed in the light of the criteria set out in the 2005 Guidelines.
- (539) Therefore, based on the 2005 Guidelines⁽¹³²⁾, the Commission has assessed the 2004 and 2009 equipment subsidies in terms of the following criteria:
- the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),
 - the infrastructure is necessary and proportional to the objective which has been set,
 - the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure,

⁽¹³¹⁾ New Guidelines, point 173.

⁽¹³²⁾ Point 61.

— all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,

— the development of trade is not affected to an extent contrary to the Union's interest.

- (540) Moreover, in addition to the need to comply with the criteria set out in recital 539, State aid to airports, like any other State aid, must be necessary and proportional to the objective that has been set in order to be declared compatible with the internal market based on Article 107(3)(c) TFEU. The Commission will therefore assess compliance with these criteria of necessity and proportionality in addition to the aforementioned criteria from the 2005 Guidelines.
- (541) The Commission notes first of all that, according to the 2005 Guidelines, costs eligible for investment aid to an airport must be limited to the investment costs of airport infrastructure properly speaking (runways, terminals, aprons, etc.) or facilities that directly support them (firefighting facilities, security or safety equipment). However, eligible costs must exclude the costs of commercial activities not directly linked to the airport's core activities, such as the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks.
- (542) The entire 2004 subsidy was used to finance taxiway work. All the investment costs of this work were eligible for investment aid under the 2005 Guidelines as the taxiway is an airport infrastructure. The 2009 subsidy was granted to help finance a series of investments in the runway and lighting and also, with regard to a small portion of the total investment costs⁽¹³³⁾, in an extension to the car park. The runway and lighting form part of the airport infrastructure. Consequently, the investments costs of this infrastructure are eligible. However, the car park costs must be excluded from the eligible costs as car parks do not form part of the airport infrastructure. The total amount of the 2009 subsidy, i.e. EUR 4 100 000, does not exceed the total amount of the eligible costs of the runway and lighting, i.e. EUR 4 700 000. As a result, the 2009 subsidy was used purely to finance eligible costs⁽¹³⁴⁾.
- (543) The 2004 and 2009 equipment subsidies (for which the total amounts are respectively EUR 1 600 000 and EUR 4 100 000) do not exceed the eligible costs calculated for these two subsidies (respectively EUR 2 600 000 and EUR 4 700 000), but do involve high aid intensities (respectively 62 % and 88 %).

8.2.3.1. *Clearly defined objective of common interest*

- (544) The 2004 equipment subsidy was used to finance taxiway work in order to upgrade this equipment to ensure a better flow of commercial traffic at peak times.
- (545) The eligible investments funded through the 2009 equipment subsidy involved runway and lighting repair work that was needed so that the aerodrome could maintain its capacity and be recertified for medium-sized aircraft with a capacity of 200 to 250 seats. The Category III lighting that was installed in 1992-1993 and the surface of the manoeuvring areas that was laid in 1990 needed, on the one hand, to be repaired in view of their age (given that the service life is usually in the order of 10 to 15 years) and, on the other hand, to be upgraded. This upgrading was necessary because the performance required by the Order on the conditions of approval and operation of aerodromes, particularly with regard to Category III precision approaches, could in the short term have led to the airport's certification being withdrawn.
- (546) As a result, neither the 2004 subsidy nor the 2009 subsidy resulted in significant increases in capacity. They essentially funded repair and upgrade work designed to keep the infrastructure in a condition to continue accommodating the type of aircraft and volume of traffic handled up to that point, and to improve the airport's operation at peak times.

⁽¹³³⁾ Less than 10 % of the total investment costs (see Table 4, *ibid.* footnote 1).

⁽¹³⁴⁾ See the Commission Decision in Case SA.38168 — Croatia — Dubrovnik Airport Development, paragraphs 10 and 28.

- (547) Pau airport handles a significant amount of business traffic, as this accounts for between 60 % and 70 % of all its traffic. This is due to the presence of numerous businesses in Pau and its surroundings. France has indicated in this respect that the Pau basin was the third main economic area in the Greater Southwest Region, behind the basins of Lacq and Oloron. Pau is home to the international and regional headquarters of a variety of large businesses and also research and production centres. The absence of an airport at Pau or a significant reduction in its capacity could harm this economic activity as business travellers generally prefer to minimise their journey time, particularly so that they can make round trips within the day. As a result, if business travellers to and from Pau had to use an airport, such as Tarbes airport, that was not in the immediate vicinity of the city, this could be regarded as a handicap by numerous businesses.
- (548) Furthermore, Pau airport handles significant tourist flows, particularly due to its proximity to the Pyrénées and their winter sports resorts. Studies conducted by the CCIPB specifically indicate that Ryanair passengers alone, who form the bulk of the tourist traffic, spent a total of EUR 8 000 000 in 2005 and EUR 56 000 000 in 2010 during their stay in the Pau region.
- (549) For all these reasons, the equipment subsidies received by the CCIPB in 2004 and 2009 contributed to the economic development of Pau and its region, given this airport's impact on tourism and economic activity in general.
- (550) These subsidies also contributed to the region's accessibility, particularly for tourists and business travellers. In this respect, it should be noted that Pau airport is 50 km from Tarbes airport and 100 km from Biarritz airport. Biarritz airport is therefore unlikely, given its distance from Pau airport, to be regarded as a viable alternative to the latter by time-sensitive travellers, particularly business travellers.
- (551) Moreover, it seems that these three airports have quite different types of traffic.
- Pau handles a large volume of business traffic, marked by the relatively high proportion of national traffic carried by Air France and regional traffic within its total traffic figures.
 - Biarritz handles a large volume of tourist traffic heading for the Atlantic coast and Spanish border, marked by considerable seasonal traffic in summer and significant 'low-fare' traffic.
 - Tarbes is primarily a niche market focused on the religious site at Lourdes, with significant international charter traffic. This is illustrated by the fact that this airport's traffic remained at around 400 000 passengers per year over the 2001-2011 period, except in 2008 when there was a peak of 678 000 passengers due to the Lourdes site celebrating an anniversary.
- (552) This information tends to indicate that these airports serve fairly different market segments and are therefore only imperfect substitutes for each other. It has also been corroborated by traffic statistics, which are presented in more detail in recitals 567 to 572 as part of the analysis of the extent of the competition distortions caused by the aid. As a result, investment aid enabling Pau airport to remain in good condition contributes to the region's accessibility to a certain extent, as it avoids passengers and airlines having to choose an imperfect substitute.
- (553) Furthermore, there is no high-speed railway line through Pau, with the closest one being in Bordeaux, which is about 1 hour 40 minutes away by road. For most of the destinations accessible by a short-haul flight from Pau, using the train as an alternative mode of transport would therefore markedly increase the journey time, making the train a very imperfect substitute. Even the closest Spanish airports are around two hours away by road and therefore, for most passengers, probably do not constitute viable alternatives to Pau airport.
- (554) As a result, it seems that, despite the existence of alternative modes of transport to flights from Pau and despite the proximity of Tarbes airport, the 2004 and 2009 equipment subsidies helped to improve the region's accessibility and also regional economic development.

8.2.3.2. *The infrastructure is necessary and proportional to the objective set*

- (555) As indicated in recital 546, the work funded by the 2004 and 2009 equipment subsidies did not significantly increase capacity, but was simply designed to keep the infrastructure in a condition to accommodate the traffic handled up to that point and to cope better with peak periods.

- (556) These investments did not therefore exceed what was necessary in order for the airport to continue accommodating, under good conditions, including in peak periods, the traffic that it had handled up to that point. These investments were therefore necessary and proportional to the objective set.

8.2.3.3. *The infrastructure has satisfactory medium-term prospects for use*

- (557) It should be noted that, between 2000 and 2009, traffic at Pau airport fluctuated between around 580 000 and 820 000 passengers per year, with a maximum of 820 000 in 2008. In the 2000-2009 period, 2002 was the only year when traffic fell below 600 000 passengers. However, even in this year, the number of passengers (580 000) was still close to this threshold. Given this fairly variable traffic, but which almost always exceeded 600 000 passengers per year, and also given the stable presence of Air France, which accounted for most of the traffic and a significant proportion of the business traffic, in both 2004 and 2009 the CCIPB could therefore rely on substantial prospects for use, which were at least equal to the airport's basic level of activity, namely around 600 000 passengers per year.
- (558) These prospects therefore justified the investments aimed at keeping the infrastructure in a condition to accommodate the traffic handled up to that point and at coping better with peak periods, without, however, significantly increasing capacity. It should be recalled in this respect that the taxiway work funded by the 2004 subsidy was designed to upgrade the infrastructure so that peak periods could be better managed. Furthermore, with regard to the runway and lighting repair work carried out in 2009, this involved like-for-like repairs as there was no increase in area, no runway extension to accommodate more efficient aircraft and no improvement in the operating minima under low-visibility conditions. The service life of this equipment is in the order of 10 to 15 years. The equipment replaced had been in use for between 16 and 19 years prior to the work. The 2009 equipment subsidy was therefore used purely to renew investments that had reached the end of their useful life.
- (559) In conclusion, the renovated infrastructure therefore had satisfactory medium-term prospects for use when the equipment subsidies were granted.

8.2.3.4. *Access to the infrastructure in an equal and non-discriminatory manner*

- (560) Pau airport can be accessed, without any particular restrictions, by any airline wanting to use it. This infrastructure can therefore be accessed in an equal and non-discriminatory manner within the meaning of the 2005 Guidelines.

8.2.3.5. *Development of trade not affected to an extent contrary to the common interest*

- (561) As indicated above, Pau airport is 50 km from Tarbes airport and 100 km from Biarritz airport. Biarritz airport is unlikely, given its distance from Pau airport, to be regarded as a viable alternative to the latter by a substantial proportion of travellers. It is therefore unlikely to have been significantly affected by the aid received by Pau airport.
- (562) By contrast, Tarbes airport is fairly close to Pau airport, given that it is 50 km away and less than 40 minutes by road. At first sight, its activity is therefore likely to have been substantially affected by the 2004 and 2009 equipment subsidies.
- (563) However, several factors temper this observation. Firstly, Pau airport is a long-standing airport that has been handling scheduled flights for many decades. The equipment subsidies under review involved one-off aid, fairly distant in time, and basically limited to the financing of work needed to keep the infrastructure in a condition to accommodate the traffic handled up to that point. They were not used to finance significant increases in capacity. As a result, the basic impact of the equipment subsidies on Tarbes airport was to keep in good condition a long-standing airport that was relatively close and that, without these subsidies, could not have continued to operate, or only under degraded conditions. These subsidies did not, however, create new capacity in competition with Tarbes airport.
- (564) Furthermore, the equipment subsidies in question were not operating aid financing a chronic operating deficit. No such operating aid has been identified in this case, which involves only investment aid.

- (565) In addition, as indicated above, Pau and Tarbes airports serve quite different market segments. The traffic at Tarbes airport is dominated by charter flights mainly bringing visitors to the religious site at Lourdes, with a significant proportion being international flights ⁽¹³⁵⁾.
- (566) Unlike Tarbes airport, Pau airport handles a large volume of business traffic, marked by the relatively high proportion of national traffic carried by Air France and regional traffic within its total traffic figures, particularly on the Pau-Paris route. As indicated in recital 547, business traffic accounts for between 60 % and 70 % of all the traffic at Pau airport, with the Pau basin being the third main economic area in the Greater Southwest Region, behind the basins of Lacq and Oloron. As a result, Pau and Tarbes airports target different market segments. Accordingly, the closure of Pau airport or a deterioration in its operating conditions would not necessarily result in traffic automatically transferring to Tarbes airport and vice versa.
- (567) If the development of traffic at Pau, Tarbes and Biarritz airports is compared, as illustrated by Table 14, this shows that there is no clear correlation between the variations in traffic at these airports:

⁽¹³⁵⁾ According to the airport's website: 'With an average of 400,000 to 450,000 passengers per year, this airport is the 2nd largest in the Midi-Pyrénées region. It mainly handles charter traffic as it is right next to the Marian City of Lourdes. More than 80 European and worldwide destinations are served each year by about 50 different airlines'. See: <http://www.tlp.aeroport.fr/gp/Presentation/117>

Table 14
Compared development of traffic at Pau, Biarritz and Tarbes airports in thousands of passengers

Aerodrome	Type of traffic	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Tarbes	National traffic excluding low-fare airlines	63	114	49	55	89	97	98	110	114	100	115
	Ryanair traffic	1							1	13	7	41
	Other low-fare and charter airlines	351	326	328	356	373	353	346	577	354	327	346
	Total	415	440	377	411	462	450	444	678	481	436	452
	National traffic excluding low-fare airlines	595	582	624	619	615	628	630	643	572	553	599
Pau	Ryanair traffic											
	Other low-fare airlines											
	Charter airlines	5	3			6	4	3	6	5	8	10
	Total	600	585	682	721	729	763	761	817	691	674	640
	National traffic excluding low-fare airlines	673	658	660	649	652	666	666	616	611	609	658
Biarritz	Ryanair traffic	108	117									
	Other low-fare airlines											
	Charter airlines	9	3									
	Total	790	778	799	786	816	865	928	1 028	1 011	989	1 033

[illegible]

(thousand EUR)

Years	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Internal financing capacity	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Documents produced by France.

- (575) This table shows that the airport accumulated losses every year between 2003 and 2011 inclusive. These losses reached close to EUR 1 000 000 in 2009. The airport's internal financing capacity also varied between EUR [...] and EUR [...] per year over this period. In 2005, which was the year when the 2004 equipment subsidy was paid, the airport's internal financing capacity was only EUR [...], i.e. a very modest figure compared to the cost of the taxiway work (EUR 2 600 000). In 2009 and 2010, which were the years when the 2009 equipment subsidy was paid, the airport's internal financing capacity was EUR [...] and EUR [...] respectively. These two figures, even when added together, are well below the costs of the runway and lighting repairs (EUR 4 700 000). The resources generated by the airport's operation were therefore insufficient to make any significant contribution to the financing of these investments.
- (576) The figures available show that the airport's budgetary outcome after investments but before payment of the equipment subsidies was EUR [...] in 2005 (year when the taxiway work was carried out) and EUR [...] in 2009 (year when most of the runway and lighting repair work was carried out). These figures must be compared with the airport's net income after subsidies, i.e. EUR [...] in 2005 and EUR [...] in 2009. As a result, financing all or even a significant part of the investments in question from the airport's own resources would have very considerably increased its losses, which were already substantial.
- (577) Furthermore, given the long-term nature of the losses, it is unlikely that the CCIPB would have been able to finance a significant part of the investments in question by increasing its debt, which was around EUR [...] in 2005 and EUR [...] in 2009.
- (578) Accordingly, the 2004 and 2009 subsidies were necessary so that the investments that they financed could be made. In other words, they had an incentive effect because the CCIPB would not have undertaken these investments without these subsidies. Moreover, they comply with the principle of proportionality as the CCIPB could not have significantly increased its contribution to the financing of these investments.

8.2.3.7. Conclusion on the 2004 and 2009 equipment subsidies

- (579) For the reasons set out in recitals 537 to 578, the Commission considers that the 2004 and 2009 equipment subsidies are aid compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (580) This conclusion is based on the criteria set out in the 2005 Guidelines for investment aid to airports. It is without prejudice to any assessment of any future investment aid to Pau airport that the Commission may be required to make in the future based on the new Guidelines.

9. CONCLUSIONS

- (581) In the light of the above, the Commission finds that France unlawfully granted the 2004 and 2009 equipment subsidies in breach of Article 108(3) of the Treaty on the Functioning of the European Union⁽¹³⁶⁾. However, the 2004 and 2009 equipment subsidies are aid compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (582) The subsidies shown in the first two rows of Table 3, which financed sovereign tasks, do not constitute State aid.
- (583) The other subsidies shown in Table 3 were granted to the Pau airport operator before 12 December 2000. Consequently, this Decision does not concern them⁽¹³⁷⁾.

⁽¹³⁶⁾ See recital 536.

⁽¹³⁷⁾ See recitals 489 and 490.

- (584) Furthermore, the Commission finds that the various airport and marketing services agreements signed between the CCIPB and Ryanair, AMS and Transavia and covered by the formal investigation procedure involve State aid, which was granted in breach of Article 108(3) TFEU and which is incompatible with the internal market.

Recovery

- (585) According to settled case-law of the Court of Justice, when the Commission has found that aid is incompatible with the internal market, it is competent to decide that the Member State concerned must abolish or alter it ⁽¹³⁸⁾.
- (586) According to Article 14 of Council Regulation (EC) No 659/1999 ⁽¹³⁹⁾, 'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. According to settled case-law of the Court of Justice, where aid is regarded by the Commission as incompatible with the internal market, the purpose of the obligation imposed on the State is to re-establish the previously existing situation ⁽¹⁴⁰⁾. In this respect, the Court of Justice considers that the purpose is achieved when beneficiaries have repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage that they enjoyed over competitors. In this way, the situation prior to payment of the aid is restored ⁽¹⁴¹⁾.
- (587) In this case, it appears that no general principle of Union law prevents recovery of the unlawful and incompatible aid identified in this Decision. In particular, neither France nor the interested third parties have presented any arguments in this respect.
- (588) France must therefore take all necessary measures to recover from Ryanair, AMS and Transavia the unlawful aid granted through the agreements in question.
- (589) The aid amounts to be recovered for each agreement and amendment must be determined as follows. Each transaction under review (consisting, where applicable, of an airport services agreement and a marketing services agreement) must be regarded as having given rise to an annual aid amount ⁽¹⁴²⁾ for each year that the agreements forming the transaction applied. Each of these amounts is calculated using the negative part of the projected incremental flow (revenues less costs) at the time when the transaction was concluded, as shown in Tables 7 to 12. These amounts in fact correspond to the sums that should be deducted each year from the amount for the marketing services (or that should be added to the airport charges and groundhandling charges invoiced to the airlines) so that the net present value of the agreement is positive, in other words so that this complies with the MEO principle.
- (590) In order to take account of the effective advantage received by the airline and its subsidiaries under the agreements, the amounts referred to in the above recital may be adjusted, using evidence provided by France, according to (i) the difference between, on the one hand, the actual payments, as determined *ex post*, that were made by the airline for

⁽¹³⁸⁾ Judgment in Case 70/72 *Commission of the European Communities v Federal Republic of Germany* [1973] ECR 813, paragraph 13.

⁽¹³⁹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽¹⁴⁰⁾ Judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission of the European Communities* [1994] ECR I-4103, paragraph 75.

⁽¹⁴¹⁾ Judgment in Case C-75/97 *Kingdom of Belgium v Commission of the European Communities* [1999] ECR I-3671, paragraphs 64-65.

⁽¹⁴²⁾ As explained when assessing the existence of an economic advantage in the various agreements, the aid stems from bidirectional flows between the CCIPB and Ryanair or Ryanair/AMS. These flows have different frequencies, with some being continuous flows or having payment frequencies that cannot be precisely predicted when the agreements are signed. The same is true for payment of the airport charges. However, when assessing the existence of an economic advantage, it is the projected incremental flows that count. It is clear from the Transavia business plan and from the proposed reconstructions of the incremental business plans provided by France that the practice of a reasonable MEO would be, in the present case, to establish the projected incremental flows associated with the various agreements on an annual basis. It is therefore logical for the aid amounts resulting from the various agreements also to be established on an annual basis. These aid amounts in fact correspond to the sums that, during negotiation of the various agreements, an MEO would have asked Ryanair/AMS to pay it each year in addition to the airport charges and groundhandling charges, all else being equal (particularly the marketing payments), in order to make the agreement profitable.

the landing charge, passenger charge and groundhandling services under the airport services agreement and, on the other hand, the (*ex ante*) projected flows corresponding to these income items, as indicated in Tables 7 to 12, (ii) the difference between, on the one hand, the actual marketing payments, as determined *ex post*, that were made to the airline or its subsidiaries under the marketing services agreement and, on the other hand, the corresponding (*ex ante*) projected marketing costs, as indicated in Tables 7 to 12.

- (591) In addition, the Commission considers that the effective advantage received by the airline is limited to the effective term of the agreement in question. In effect, after the termination of each agreement, Ryanair/AMS did not receive any payments under these agreements and did not benefit from access to the airport infrastructure and groundhandling services under these agreements. Consequently, the aid amounts calculated as indicated above and associated with a given agreement are reduced to zero for the years in which the agreement ceased to apply (particularly due to early termination by mutual agreement between the parties).
- (592) As a result, the aid amounts to be recovered from Ryanair and AMS for certain agreements that did not run to term must be reduced to zero for the period from the effective expiry date of the agreement to the expiry date stipulated when the agreement was signed. This point applies to the agreements of 28 January 2003, 30 June 2005 and 25 September 2007, and to the two amendments to the last two agreements.
- (593) Table 16 gives information on the amounts to be used to calculate the amounts to be recovered. These amounts consist of the negative parts of the incremental flows (revenues less costs) established by applying the MEO test, with reductions for the Ryanair and AMS agreements for the years that these agreements did not run to term ⁽¹⁴³⁾.

⁽¹⁴³⁾ With regard to the agreement on the Pau-London route of 28 January 2003, given its effective expiry on 30 June 2005, the aid amounts received under this agreement are zero for the years 2006 to 2008 inclusive. For 2005, the aid amount corresponds to the negative part of the projected incremental flow calculated for 2005, adjusted by a factor corresponding to the part of 2005 during which the agreement effectively applied. The same logic has been applied to the agreements of 30 June 2005, which effectively ceased to apply on 1 January 2009 (due to the amendment of 16 June 2009). This logic has also been applied to this same amendment of 16 June 2009, to the agreement of 25 September 2007 and to the amendment of 16 June 2009 amending the latter, all of which effectively ceased to apply on 30 March 2010, which was the date when the new agreement on the London, Charleroi and Beauvais routes came into force. However, the amounts in Table 16 may be adjusted in order to calculate the amounts to be recovered (see recital 589).

Table 16

Information on the amounts to be recovered

Identity of the beneficiary	Agreements	Indicative amount of the aid received under the various agreements ⁽¹⁾									Indicative amount of the aid to be recovered (Principal)
		2003	2004	2005	2006	2007	2008	2009	2010	2011	
Ryanair	London — 28 January 2003	[100 000-299 999]	[100 000-299 999]	[0-99 999]							[300 000-599 999]
Ryanair/ AMS	London — 30 June 2005			[0-99 999]	[100 000-299 999]	[100 000-299 999]	[0-99 999]				
	Amendment of 16 June 2009 to the agreement of 30 June 2005 (London)							[0-99 999]	[0-99 999]		
	Charleroi — 25 September 2007					[0-99 999]	[100 000-299 999]	[100 000-299 999]	[0-99 999]		
	Amendment of 16 June 2009 to the agreement of 25 September 2007 (Charleroi)							[0-99 999]	[0-99 999]		
	Bristol — 17 and 31 March 2008						[0-99 999]				
	Bristol — 16 June 2009							[0-99 999]			
	London, Charleroi & Beauvais — 28 January 2010								[300 000-599 999]	[100 000-299 999]	
	Total (Ryanair/AMS)			[0-99 999]	[100 000-299 999]	[100 000-299 999]	[300 000-599 999]	[100 000-299 999]	[600 000-999 999]	[100 000-299 999]	[1 500 000-2 199 999]
Transavia	Amsterdam — 23 January 2006				[100 000-299 999]	[100 000-299 999]	[100 000-299 999]				[300 000-599 999]

⁽¹⁾ With regard to the calculation of interest, the aid is regarded as having been paid on 31 December of the year in question. See recital 597.

⁽¹⁾ With regard to the calculation of interest, the aid is regarded as having been paid on 31 December of the year in question. See recital 597.

- (594) As explained in recital 290, the Commission considers that, for the purpose of applying the State aid rules, Ryanair and AMS form a single economic entity, and that the marketing services agreements and airport services agreements that were signed at the same time must be regarded as forming a single transaction between this entity and the CCIPB. Consequently, the Commission considers that Ryanair and AMS are jointly and severally responsible for repaying all the aid received through the agreements signed from 2005 to 2010, with an indicative principal amount of EUR [1 500 000- 2 199 999]. However, Ryanair alone is responsible for repaying the aid inherent in the agreement of 28 January 2003, with an indicative principal amount of EUR [300 000-599 999], as this single agreement was signed directly between the CCIPB and Ryanair, without AMS being involved in this transaction.
- (595) The aid effectively paid from 2006 to 2009 under the airport services agreement and marketing services agreement signed on 26 January 2006 between the CCIPB and Transavia is an indicative amount of EUR [300 000-599 999].
- (596) The French authorities must recover the amounts indicated above within 4 months of the date of notification of this Decision.
- (597) The French authorities must also add recovery interest to the aid amount, which shall be calculated from the date on which the aid in question was put at the disposal of the undertaking, namely on each effective date of granting of the aid, until the date of its effective recovery⁽¹⁴⁴⁾, in accordance with Chapter V of Commission Regulation (EC) No 794/2004⁽¹⁴⁵⁾. Given that, in this case, the flows making up this aid are complex and stem from several dates during the year, and are even continuous for certain categories of revenue, the Commission takes the view that it is acceptable, in calculating the recovery interest, to consider that the moment of payment of the aid concerned is at the year end, namely 31 December of each year in question.
- (598) In accordance with settled case-law, if a Member State encounters unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission, it may submit those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions⁽¹⁴⁶⁾ of the TFEU.
- (599) The Commission invites France to submit to it any problem encountered in implementing this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid unlawfully granted by France to Ryanair in breach of Article 108(3) of the Treaty on the Functioning of the European Union, under the airport and marketing services agreement signed on 28 January 2003 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair for the Pau-London Stansted route, is incompatible with the internal market.
2. The following measures, which contain State aid, were unlawfully granted by France jointly to Ryanair and Airport Marketing Services in breach of Article 108(3) of the Treaty on the Functioning of the European Union and are incompatible with the internal market:
 - (a) airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services, with regard to the Pau-London Stansted route;
 - (b) amendment of 16 June 2009 to the marketing services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services, with regard to the Pau-London Stansted route;
 - (c) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 25 September 2007 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services to the Pau-Charleroi route, and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services;

⁽¹⁴⁴⁾ See Article 14(2) of Regulation (EC) No 659/1999 (op. cit.).

⁽¹⁴⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁴⁶⁾ See, for example, judgments in Case 94/87 *Commission of the European Communities v Federal Republic of Germany* [1989] ECR 175, paragraph 9, and in Case C-348/93 *Commission of the European Communities v Italian Republic* [1995] ECR I-673, paragraph 17.

- (d) amendment of 16 June 2009 to the marketing services agreement signed on 25 September 2007 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services;
 - (e) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 17 March 2008 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair to the Pau-Bristol route, and marketing services agreement signed on 31 March 2008 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the same route;
 - (f) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 16 June 2009 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair to the Pau-Bristol route, and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the same route;
 - (g) marketing services agreement signed on 28 January 2010 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the Pau-London, Pau-Charleroi and Pau-Beauvais routes, and identified 'implicit' airport services agreement ⁽¹⁴⁷⁾.
3. The State aid unlawfully granted by France to Transavia in breach of Article 108(3) of the Treaty on the Functioning of the European Union, under the airport and marketing services agreement signed on 23 January 2006 by the Chamber of Commerce and Industry of Pau-Béarn with Transavia, is incompatible with the internal market.

Article 2

1. The 2004 and 2009 equipment subsidies granted by France to the Chamber of Commerce and Industry of Pau-Béarn, amounting to EUR 5 800 000, constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union and were granted by France in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
2. The aid referred to in paragraph 1 of this Article constitutes State aid compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Article 3

1. France is required to make the beneficiaries repay the aid referred to in Article 1.
2. The amounts to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiaries to the date of their effective recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 ⁽¹⁴⁸⁾ amending Regulation (EC) No 794/2004.
4. France shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. France shall ensure that this Decision is implemented within 4 months of the date of its notification.

Article 5

1. Within 2 months of notification of this Decision, France shall communicate the following information to the Commission:
- (a) aid amounts to be recovered under Article 3;
 - (b) calculation of recovery interest;

⁽¹⁴⁷⁾ See recital 286.

⁽¹⁴⁸⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (c) a detailed description of the measures already taken and planned for the purpose of complying with this Decision;
- (d) documents proving that the beneficiaries have been ordered to repay the aid.

2. France shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the aid amounts and interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 23 July 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

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