Reports of Cases

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

13 December 2018 *

(State aid — Agreements between the Chamber of Commerce and Industry of Pau-Béarn and Ryanair and its subsidiary Airport Marketing Services — Airport services — Marketing services — Decision declaring the aid incompatible with the internal market and ordering its recovery — Notion of State aid — Imputability to the State — Chamber of Commerce and Industry — Advantage — Private investor test — Recovery — Article 41 of the Charter of Fundamental Rights — Right of access to the file — Right to be heard)

In Case T-165/15,

Ryanair DAC, formerly Ryanair Ltd, established in Dublin (Ireland),

Airport Marketing Services Ltd, established in Dublin,

represented by G. Berrisch, E. Vahida, I.-G. Metaxas-Maranghidis, lawyers, and B. Byrne, Solicitor,

applicants,

v

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

defendant,

APPLICATION under Article 263 TFEU seeking the partial annulment of 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 (OJ 2015 L 201, p. 109),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of G. Berardis, President, S. Papasavvas, D. Spielmann (Rapporteur), Z. Csehi and O. Spineanu-Matei, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 25 October 2017,

gives the following

* Language of the case: English.

Judgment [1]

I. Background to the dispute

A. Measures at issue

1 The applicants, namely Ryanair DAC, formerly Ryanair Ltd, and Airport Marketing Services Ltd ('AMS'), are, the first, an airline established in Ireland which operates more than 1 600 flights daily connecting 189 destinations in 30 countries across Europe and North Africa, and, the second, a subsidiary of Ryanair which provides marketing strategy solutions, its activity consisting primarily in the sale of advertising space on Ryanair's website.

2 Pau-Pyrénées Airport ('Pau airport') is situated in the Department of Pyrénées-Atlantiques in France. It is operated by the Chamber of Commerce and Industry (CCI) of Pau Béarn ('the CCIPB'). On 1 January 2007, ownership of Pau airport was transferred by the French Republic to a group of local authorities, the syndicat mixte de l'aéroport Pau-Pyrénées ('the syndicat mixte'), whose members include the Regional Council of Nouvelle-Aquitaine, the Departmental Council of Pyrénées-Atlantiques, the Urban Community of Pau Béarn Pyrénées and more than 10 municipal groups. On becoming the owner of Pau airport, the syndicat mixte replaced the State as concessionary authority and took over the concession agreement signed with the CCIPB, which therefore remained the operator of the airport after the transfer of ownership to the syndicat mixte.

3 Ryanair began operating at Pau airport in April 2003. During the period under review, from 2003 to 2011, Ryanair operated several routes, in particular to London (United Kingdom), Charleroi (Belgium), Bristol (United Kingdom) and Beauvais (France).

4 Accordingly, on 28 January 2003, the CCIPB entered into an agreement with Ryanair ('the 2003 agreement'), which, by means of the payment by the CCIPB of a one-off sum of EUR 80 000, provided the basis for Ryanair's launch of a daily route between Pau (France) and London Stansted airport. The CCIPB also undertook to pay a monthly sum per departing passenger, capped at EUR 400 000 per annum, in consideration of the marketing of Pau airport through internet links provided on Ryanair's website and certain other advertising methods. In addition, the CCIPB was to provide, against payment of airport charges, groundhandling and related services applicable to flights operated by Ryanair.

5 The 2003 agreement was declared void by the Tribunal administratif de Pau (Administrative Court, Pau, France), and was replaced by two new agreements, concluded by the CCIPB on 30 June 2005, one with Ryanair and the other with AMS ('the 2005 agreements'). The initial term of the 2005 agreements was five years.

6 Under the first of those agreements, an Airport Services Agreement ('the 2005 ASA'), Ryanair undertook to operate an initial flight programme of one route, Pau to London Stansted, on a daily basis. Ryanair was to use its best endeavours [*confidential*]. [2] As for the CCIPB, it would receive, for access to the airport's infrastructure, the regulated airport charges applicable in the airport (including passenger charges and landing charges) and, for groundhandling services, non-regulated airport charges (namely groundhandling charges).

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

2 Confidential data omitted.

7 Under the second of the 2005 agreements, a Marketing Services Agreement ('the 2005 MSA'), AMS undertook to provide a range of advertising services on Ryanair's website, in particular on its Pau destination page, in consideration of an annual payment by the CCIPB of EUR 437 000.

8 By means of side letters, the parties subsequently extended the terms of the 2005 ASA to the additional routes which Ryanair opened at Pau airport. They also entered into additional marketing services agreements and side letters.

9 Thus, first of all, on 25 September 2007, the CCIPB and Ryanair agreed an amendment to the 2005 ASA, extending, for a period of five years, the terms laid down in the 2005 ASA to the Pau-Charleroi route, which was to be operated with three flights per week. On the same day, the CCIPB and AMS entered into a marketing services agreement, with an initial term of five years, under which AMS undertook to provide links on the Belgian and Dutch homepage of Ryanair's website to the website designated by the CCIPB, in consideration of an annual payment of [*confidential*] by the CCIPB.

10 Next, on 17 March 2008, the CCIPB and Ryanair agreed an amendment to the 2005 ASA extending, for a period of one year, the terms laid down in the 2005 ASA to the Pau-Bristol route, which was to be operated with three flights per week. On 31 March 2008, the CCIPB and AMS entered into a marketing services agreement, for the period from 16 May to 13 September 2008, under which AMS undertook to provide a link on the English homepage of Ryanair's website to the website designated by the CCIPB, for eight days, in consideration of a payment of [*confidential*] by the CCIPB.

11 In addition, on 16 June 2009, the CCIPB and Ryanair agreed an amendment to the 2005 ASA extending the terms laid down in the 2005 ASA to the Pau-Bristol route for the 2009 summer season. On the same day, the CCIPB and AMS entered into a marketing services agreement relating to that route, for the period from 1 April 2009 to 24 October 2009, under which AMS undertook to provide a link on the English homepage of Ryanair's website to the website designated by the CCIPB, for nine days, in consideration of the payment of [*confidential*] by the CCIPB.

12 On 16 June 2009, two further amendments to the marketing services agreements which had been entered into earlier were agreed between the CCIPB and AMS. First, the amendment to the 2005 MSA relating to the Pau-London Stansted route limited the annual payment by the CCIPB to [*confidential*] in 2009, taking account of a reduction in the number of flights planned by Ryanair. Secondly, the amendment to the marketing services agreement of 25 September 2007 relating to the Pau-Charleroi route increased the annual payment by the CCIPB to [*confidential*], with effect from 1 January 2009, without any alteration of the services covered.

13 Lastly, on 28 January 2010, a new marketing services agreement was signed by the CCIPB and AMS for an initial term starting on the date of signature and ending one year after the date of the launch of the first service. The promotional activities undertaken by AMS were linked to the Pau-London Stansted route, from 30 March 2010, with three flights per week and a minimum of 220 flights, to the Pau-Charleroi route, from the same date, with three flights per week and a minimum of 100 flights, and the Pau-Beauvais route, from April 2010, with three flights per week and a minimum of 100 flights. In return for links on the English, Belgian, Dutch and French homepages of Ryanair to the website designated by the CCIPB for periods of 25 or 45 days, the CCIPB paid a sum of [*confidential*].

14 Taking the view that the four routes concerned had ceased to be viable, Ryanair terminated its operations at Pau airport in February 2011.

…

C. Contested decision

25 At the end of the formal investigation procedure, the Commission adopted Decision (EU) 2015/1227 of 23 July 2014 on State aid SA.22614 (C 53/07) implemented by France in favour of the CCIPB, Ryanair, AMS and Transavia (OJ 2015 L 201, p. 109, 'the contested decision').

26 In the contested decision, the Commission gave a detailed description of the measures which had been the subject of the decision to initiate the procedure and the extension decision. Those measures consisted in financial contributions to Pau airport concerning equipment subsidies and the funding of costs linked to sovereign tasks (recitals 88 to 107 of the contested decision) and the agreements which the CCIPB had entered into with the applicants, in particular the 2003 agreement, the 2005 agreements and the various amendments and agreements concluded after 2005, as described in the preceding paragraphs (recitals 38 to 82 of the contested decision).

27 The Commission found that the 2004 and 2009 equipment subsidies in favour of Pau airport constituted aid within the meaning of Article 107(1) TFEU, which was nevertheless compatible with the internal market on the basis of Article 107(3)(c) TFEU. It also found that the funding of costs linked to sovereign tasks did not constitute State aid (recitals 581 and 582 of the contested decision).

28 As regards the marketing services and airport services agreements and their amendments which the CCIPB had entered into with the applicants, the Commission concluded that they constituted State aid within the meaning of Article 107(1) TFEU.

29 In this respect, the Commission considered that the various agreements concluded by the CCIPB were imputable to the French Republic (recitals 265 and 281 of the contested decision). In order to determine whether any advantage had been conferred, the Commission considered whether a hypothetical market economy operator acting in the place of the CCIPB and motivated by the prospect of profits would have entered into similar agreements.

30 The Commission began by taking the view that it was necessary, (i) to analyse the marketing services agreements and the airport services agreements together as a single measure (recitals 286 to 313 of the contested decision), (ii) to consider that the CCIPB had acted as the operator of Pau airport and not as a public body entrusted with a general interest mission (recitals 314 to 331 of the contested decision), (iii) to take into consideration only the possible positive effect of the marketing services on the number of passengers using the routes covered by the agreements in question for the operating period of those routes, to the exclusion of any other excessively uncertain benefits (recitals 332 to 358 of the contested decision), (iv) to depart, for the purposes of applying the operator in a market economy test, from the method consisting in making a comparison with the 'price on the market' ('the comparative analysis') and to confine itself to an *ex ante* incremental profitability analysis ('the incremental profitability analysis') (recitals 359 to 372 of the contested decision), and (v) to assess together the conduct of the CCIPB as a whole and that of the operator of Pau airport (recitals 373 to 376 of the contested decision).

31 As a second step, the Commission carried out, for each pair of marketing services agreements and airport services agreements, its own incremental profitability analysis, following which it found that, in the case of all the agreements and the amendment of 16 June 2009 to the 2005 MSA for the Pau-London Stansted route, the annual incremental flows (revenues less costs) were negative. It concluded from this that the agreements and the amendment in question conferred an economic advantage on the applicants (recitals 354 to 432 of the contested decision).

32 The Commission found that the aid granted to the applicants constituted operating aid incompatible with the internal market (recitals 446 to 481 of the contested decision).

33 As a third step, the Commission determined, for each transaction, consisting of an airport services agreement and a marketing services agreement, the amount of recoverable aid using the negative part, for each year that the agreements forming the transaction had applied, of the projected incremental flow at the time when the transaction was concluded. The Commission assessed the recoverable aid at an indicative principal amount of EUR 1 500 000 to EUR 2 199 999.

…

II. Procedure and forms of order sought

35 By application lodged at the Registry of the General Court on 7 April 2015, the applicants brought the present action.

36 By separate document lodged at the Court Registry on 21 October 2015, the applicants made an application for measures of organisation of procedure, by which they requested that the Commission produce certain documents.

37 The Commission submitted its observations within the prescribed period.

38 Upon hearing the Judge-Rapporteur, the Court requested, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the parties to reply to some questions and requested the Commission to produce certain documents. Those parties replied within the prescribed period.

39 By decision of 17 May 2017, the Court decided to refer the case to the Sixth Chamber, Extended Composition.

40 On a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure.

41 By decision of the President of the Sixth Chamber, Extended Composition, of the Court of 28 August 2017, the parties having been heard, Cases T-111/15, T-165/15 and T-53/16 were joined for the purposes of the oral part of the procedure, pursuant to Article 68(1) of the Rules of Procedure.

42 The parties presented oral argument at the hearing on 25 October 2017.

43 The applicants claim that the Court should:

– annul Articles 1(1), 1(2), and, in so far as they concern the applicants, Articles 2 to 5 of the contested decision;

– order the Commission to pay the costs.

44 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

45 In their application, the applicants rely on five pleas in law in support of the action.

46 In response to a written question from the Court, the applicants withdrew the fifth plea, alleging infringement of Article 107(1) TFEU and Article 108(2) TFEU, in that the Commission manifestly erred when determining the amount of recoverable aid.

47 It is therefore necessary to examine only the first four pleas, alleging (i) infringement of the principle of good administration enshrined in Article 41 of the Charter and of the rights of defence, (ii) incorrect imputation of the agreements in question to the French Republic, (iii) infringement of Article 107(1) TFEU in that the Commission failed properly to apply the operator in a market economy test, and (iv) infringement of Article 107(1) TFEU in that the Commission failed to establish that the condition of selectivity was fulfilled.

A. The first plea in law, alleging breach of the principle of good administration enshrined in Article 41 of the Charter and of the rights of defence

48 The applicants maintain that the Commission infringed the principle of good administration enshrined in Article 41(1) and (2)(a) and (b) of the Charter by failing to allow them access to the investigation file and by failing to inform them of the facts and considerations on which it intended to base its decision and thereby depriving them of the opportunity to make their views known effectively. According to the applicants, those procedural errors also infringed their rights of defence and should result in the annulment of the contested decision.

49 In particular, the applicants state that, since the entry into force of the FEU Treaty on 1 December 2009, Article 41 of the Charter forms part of primary EU law and overrides any contrary provisions of secondary EU law, such as Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p.1).

50 In support of their plea, the applicants claim that they have the right to invoke the right to good administration under Article 41 of the Charter, since the State aid investigation conducted by the Commission in respect of their trade agreements with the CCIPB constitutes an ‘affair’ of the applicants within the meaning of Article 41(1) of the Charter. They consider that they enjoy the procedural rights laid down in Article 41(1) and (2) of the Charter, since those provisions go beyond the rights conferred by Regulation No 659/1999. Firstly, Article 41(2)(b) of the Charter grants every person a right to have access to ‘his or her’ file, in the present case the Commission State aid file relating to the agreements concluded between the applicants and the CCIPB. Secondly, the right to be heard, laid down in Article 41(2)(a) of the Charter, requires that the applicants should be put in a position to make their views known effectively, which implies access to the Commission’s file and prior notification of the facts and considerations on which the Commission intended to base its final decision.

51 The Commission disputes that line of argument.

52 In that regard, in the first place, it should be noted that Article 41 of the Charter provides for the right of good administration. As set out in paragraph 1 of that article, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions of the Union. In addition, under Article 41(2) of the Charter, that right includes in particular (i) the right of every person to be heard before any individual measure which would affect him or her adversely is taken, and (ii) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

53 The explanations relating to the Charter, published in the *Official Journal of the European Union* of 14 December 2007 (OJ 2007 C 303, p. 17), state that Article 41 of the Charter is based on the existence of the Union as subject to the rule of law, whose characteristics have been developed in the

case-law which has enshrined good administration as a general principle of law. Moreover, under Article 52(7) of the Charter, those explanations are to be given due regard by the courts of the Union and of the Member States.

54 In addition, according to the case-law, it is for the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14).

55 Furthermore, according to settled case-law, observance of the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law. That principle requires that a person against whom the Commission has initiated administrative proceedings must have been afforded the opportunity during those proceedings to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of EU law (see judgment of 30 April 2014, *Tisza Erőmű* v *Commission*, T-468/08, not published, EU:T:2014:235, paragraph 204 and the case-law cited).

56 In the second place, it should be recalled that, according to settled case-law, the procedure for reviewing State aid provided for in Article 108 TFEU is a procedure opened only against the Member State responsible for granting the aid. Only the Member State concerned, as the addressee of the future Commission decision, may therefore rely on actual rights of defence. By contrast, the recipient undertakings of aid and their competitors are considered only to be parties concerned in the procedure for the purpose of Article 108(2) TFEU. No provision reserves any special role to the recipients of aid, among all the parties concerned. They cannot rely on rights as extensive as the rights of the defence as such and cannot seek to engage in an adversarial debate with the Commission (see, to that effect, judgments of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 81 to 83, and of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraphs 71 and 78).

57 Thus, the parties concerned, unlike the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents of the Commission's administrative file (judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 58).

58 The parties concerned have essentially the role of information sources for the Commission in the procedure for reviewing State aid. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, parties concerned have only the right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case (see judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 74 and the case-law cited).

59 The applicants' first plea in law must be examined in the light of those principles.

60 In this respect, it should be noted that the applicants are parties concerned within the meaning of Article 108(2) TFEU, so that they have a right to see the Commission's investigation into their agreements with the CCIPB conducted impartially and fairly within the meaning of Article 41(1) of the Charter, especially since the finding of State aid in relation to their trade agreements with Pau airport is likely to result in financial consequences for them in terms of the recovery of amounts received.

61 However, the reasoning of the applicants cannot be followed where they consider that Article 41(2) of the Charter grants them the right of access to the Commission's administrative file in State aid matters and the right to be heard on matters on which the Commission intends to base its final decision.

62 Although the right to good administration under Article 41(1) of the Charter reflects the obligation to examine carefully and impartially all the elements of the case, Article 41(2) of the Charter lists a set of rights to be observed by the Union's administration, including the rights of defence, which include the right to be heard and the right to have access to the file.

63 However, in the procedure for reviewing State aid, the applicants, as beneficiaries of the aid, cannot rely on actual rights of defence.

64 It has already been held that the Charter was not intended to alter the nature of the review of State aid established by the FEU Treaty or to confer on third parties a right of scrutiny which Article 108 TFEU did not provide (see, to that effect, judgments of 9 December 2014, *Netherlands Maritime Technology Association* v *Commission*, T-140/13, not published, EU:T:2014:1029, paragraph 60, and of 6 July 2017, *SNCM* v *Commission*, T-1/15, not published, EU:T:2017:470, paragraph 86). The applicants' argument that the Charter would be rendered meaningless if a right which it lays down could be excluded simply because it was not expressly reproduced in the FEU Treaty must therefore be rejected.

65 In that regard, the Court of Justice has held that if the persons concerned in the context of a procedure for reviewing State aid were able to obtain access to the documents in the Commission's administrative file, the system for the review of State aid would be called into question. Whatever the legal basis on which it is granted, access to the file enables the parties concerned to obtain all the observations and documents submitted to the Commission and, as the case may be, to adopt a position on those matters in their own observations, which is likely to modify the nature of the procedure for reviewing State aid (see, to that effect, judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 58 and 59).

66 Similarly, the obligation for the Commission to send the applicants prior notification of the evidence on which it intends to base its final decision would amount to establishing an adversarial debate such as that initiated for the Member State responsible for granting the aid, although the applicants, as beneficiaries, essentially play only the role of a source of information in the procedure (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 180 and 181).

67 Therefore, the applicants' argument that the exercise of additional procedural rights of access to the file and the right to be heard, as claimed on the basis of Article 41 of the Charter, is not excluded by Articles 107 and 108 TFEU must be rejected.

68 It follows that, by adopting the contested decision without having granted access to the file and without having given notice beforehand of the facts and considerations on which it intended to base that decision, the Commission did not disregard the principle of good administration in Article 41(1) and (2) of the Charter or the applicants' rights of defence, without prejudice, however, to the observance of their procedural rights as parties concerned guaranteed by Article 108(2) TFEU.

69 None of the other arguments put forward by the applicants is capable of undermining those conclusions.

70 In the first place, the applicants cannot validly rely on the judgment of 12 July 1973, *Commission* v *Germany*, (70/72, EU:C:1973:87, paragraph 19), concerning the aim of the communication required by Article 108(2) TFEU, in order to claim that that provision does not preclude the granting to the parties concerned of rights additional to the right to submit their observations during the administrative procedure. On the contrary, that case-law essentially confers on the parties concerned the role of information sources. Likewise, according to the case-law, the Commission is not obliged, under the system of Articles 107 and 108 TFEU, to involve third parties in the administrative procedure in an extensive manner (judgment of 22 October 1996, *Skibsværftsforeningen and Others* v *Commission*,

T-266/94, EU:T:1996:153, paragraph 258). It cannot be deduced from that case-law, therefore, that the extensive involvement of third parties, as claimed by the applicants, is compatible with the general scheme of the procedure for monitoring State aid established by Article 108 TFEU.

71 In the second place, the applicants submit that observance of the right of access to the file and of the right to be heard, under Article 41 of the Charter, furthers the aim of Article 108(2) TFEU, which is the gathering by the Commission of the most pertinent and comprehensive information. The observance of the procedural rights of the parties concerned is especially important in State aid proceedings, in which the Member State responsible for the aid and the beneficiary of it often have conflicting interests, as is demonstrated in the present case by the existence of a conflict of interest for the French Republic, being a major shareholder in Air France, which was the primary user of Pau airport, and the minimal, not to say harmful, participation of the French Republic in the Commission's investigation.

72 In that regard, it should be borne in mind that, according to case-law, the parties concerned cannot rely on actual rights of defence comparable to those of the Member State even if that State, which granted the State aid, and the parties concerned, as the recipients thereof, may have diverging interests in the context of such a procedure (see, to that effect, judgments of 15 December 2009, *EDF* v *Commission*, T-156/04, EU:T:2009:505, paragraph 104, and of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 54).

73 The fact that the Member State concerned does not defend the interests of the recipient of the aid is not capable of altering the role of the recipient during the administrative procedure or the nature of its participation in that procedure, so as to confer on it, in respect of the rights of the defence, guarantees comparable to those of that Member State (judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 77).

74 In the third place, to the extent that the applicants call into question the validity of Regulation No 659/1999 as being contrary to the Charter, it is necessary, in any event, to reject that argument, since it is also based on the erroneous premiss that the Charter grants to recipients of State aid the right of access to the Commission's State aid file and the right to be informed in advance of the facts and considerations on which the Commission intends to base its final decision.

75 For the same reasons, and contrary to what is claimed by the applicants, the fact that they could take note only of relevant information contained in the decision to initiate the procedure and the extension decision cannot constitute in itself an infringement of their rights.

76 In the fourth place, as regards the applicants' argument that the judgment of 9 December 2014, *Netherlands Maritime Technology Association* v *Commission* (T-140/13, not published, EU:T:2014:1029), is irrelevant owing to the fact that the applicant in that case was a complainant, it is sufficient to recall that, according to settled case-law, no special role is reserved to the recipients within the framework of State aid control (see paragraph 56 above). Likewise, although the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376), concerns State aid proceedings which were closed before the Charter became part of primary EU law, that judgment remains relevant in so far as it highlights the fact that the granting to aid recipients of a right of access to the Commission's file would call into question the system for the review of State aid.

77 In the fifth place, in so far as it follows from the foregoing that the Commission did not infringe either Article 41 of the Charter or the applicants' rights of defence, it is unnecessary to address the argument put forward by the applicants that the outcome of the procedure might have been different if the Commission had granted access to the file and had informed them of the considerations and evidence on which it intended to base its final decision.

78 It follows that the applicants' arguments mentioned in paragraphs 70 to 77 above must be rejected.

79 However, in so far as, in the context of the present plea, an infringement of rights of defence is invoked, it is necessary also to examine the right which the parties concerned, within the meaning of Article 108(2) TFEU, have to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see the case-law cited in paragraph 58 above).

80 In that regard, it must be borne in mind that it is settled case-law that, in the context of an examination under Article 108(2) TFEU, the Commission is obliged to give notice to the parties concerned to submit their comments (see judgment of 8 May 2008, *Ferriere Nord* v *Commission*, C-49/05 P, not published, EU:C:2008:259, paragraph 68 and the case-law cited). With regard to that obligation, the Court of Justice has ruled that the publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a procedure has been initiated (judgment of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraph 17), while also pointing out that the sole aim of that communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 56 and the case-law cited).

81 In addition, according to the case-law, where the Commission decides to initiate the formal investigation procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the internal market (judgment of 23 October 2002, *Diputación Foral de Guipúzcoa and Others* v *Commission*, T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraph 104).

82 Thus, a decision to initiate the formal investigation procedure must give the parties concerned the opportunity effectively to participate in that procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the internal market (judgment of 30 April 2002, *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, EU:T:2002:111, paragraph 138).

83 In the present case, it is common ground that, following publication of the letters informing the French Republic of the decision to initiate the procedure and the extension decision, together with a summary of those decisions calling on all the parties concerned to submit their comments, the Commission received comments from the applicants. Accordingly, by letter of 31 August 2011, Ryanair submitted comments on the decision to initiate the procedure. Furthermore, by separate letters of 30 April 2012, the applicants both submitted comments on the extension decision. They also lodged a number of additional documents during the formal investigation procedure.

84 In the decision to initiate the procedure and the extension decision, the Commission explained sufficiently clearly the reasons on which it had based its provisional conclusion that the agreements under investigation conferred aid within the meaning of Article 107(1) TFEU on the applicants and that the aid was incompatible with the internal market.

85 In the decision to initiate the procedure, the Commission gave a description of the 2005 agreements and carried out a provisional assessment of the potential aid under those agreements in the light of the criteria laid down in Article 107(1) TFEU comprising the definition of State aid, before finally examining the compatibility of the aid with the internal market.

86 In addition, in the extension decision, first of all, the Commission submitted general information concerning Pau airport and described the agreements concluded between the CCIPB and the applicants between 2003 and 2008. The Commission then carried out a provisional assessment of the

potential aid granted to the applicants in the light of the criteria for State aid, including the private investor in a market economy test, before finally examining the compatibility of the aid with the internal market. In particular, as regards the application of the private investor test, the Commission considered that, on the basis of the information available to it, the two types of agreements, namely the airport services agreements and the marketing services agreements, had to be assessed together.

87 As regards the applicants' complaint that they did not have access to the consultant's report of 30 March 2011, it must be held that, in the extension decision, the Commission summarised, in a sufficiently precise manner, the doubts expressed in that report regarding the interest for Pau airport in buying the marketing services at issue offered by the applicants. Moreover, it is not apparent from the contested decision that the Commission relied on that report for the assessment of the measures at issue, since that assessment was based on the reasoning contained in the decision.

88 Further, it is common ground that, in response to the Commission's letters of 24 February and 13 March 2014 and the publication of the notice of 15 April 2014 in the Official Journal, Ryanair inter alia submitted, by letter of 2 May 2014, comments on the approaches set out in the 2014 Guidelines for the purposes of the application of the market economy operator test, namely the comparative analysis and the incremental profitability analysis.

89 As regards their mere right to be involved in the administrative procedure to the extent appropriate, the applicants have adduced no evidence to show that they did not have sufficient knowledge of the reasoning provisionally followed and, therefore, that they were not able properly to submit their observations in that regard.

…

B. The second plea, alleging the lack of imputability of the measures in question to the French Republic

92 The applicants claim that the Commission wrongly imputed to the French Republic the conclusion by the CCIPB of the airport services agreements and the marketing services agreements. According to the applicants, the Commission erred in finding that the CCIPB was a public authority whose decisions were automatically imputable to the State and in taking no account of its role as an undertaking. Moreover, the applicants assert that the reasoning in the contested decision concerning the nature of the CCIPB is contradictory.

1. The first complaint, concerning the nature of the CCIPB

93 The applicants acknowledge that decisions of a public authority are always imputable to the Member State concerned, but state that, as was noted in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), decisions taken by public undertakings may be considered to be imputable to that Member State only if certain indicators are present that show that the Member State exercised control with respect to the decision at issue. In the present case, the applicants claim that the Commission erred in taking the view that the CCIPB had to be considered as a public authority all of whose decisions were necessarily imputable to the French State: CCIs are hybrid entities with a statutory and actual role both as representation bodies for undertakings and as undertakings in their own right. The Commission considered that the commercial activities of the CCIPB were merely ancillary in the light of the exercise of its general interest missions, without providing any evidence that those tasks take precedence over those activities. In fact, the commercial activities of CCIs are usually predominant and are often governed by private law and subject to the jurisdiction of the civil and commercial courts. Even if the commercial activity of the CCIPB had to be regarded as secondary, the activity in question here would nevertheless be that of the management of Pau airport,

for which the CCIPB has a clearly economic role, with the result that it should have been regarded as an undertaking. Consequently, the Commission erroneously characterised the CCIPB as a public authority and failed to state adequate reasons for its conclusion that the CCIPB was solely or at least primarily a public authority and not an undertaking. Because of that failure, the applicants were not in a position to ascertain whether the Commission's refusal to apply the ruling factors of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), was justified.

94 The Commission disputes those arguments.

95 As a preliminary point, it should be borne in mind that, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.

96 In that regard, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State (see judgment of 15 July 2004, *Pearle and Others*, C-345/02, EU:C:2004:448, paragraph 35 and the case-law cited).

97 Furthermore, intervention by a Member State or through State resources is not necessarily effected by the central State authority of the respective Member State. It may equally be effected by an authority situated below the national level. According to settled case-law, a measure adopted by a regional or local authority and not the central authorities can constitute aid if the conditions laid down by Article 107(1) TFEU are satisfied (judgments of 14 October 1987, *Germany* v *Commission*, 248/84, EU:C:1987:437, paragraph 17, and of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 55). In other words, measures adopted by infra-State entities (decentralised, federated, regional or other) of the Member States, whatever their status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 107(1) TFEU if the conditions laid down by that provision are satisfied (see judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraphs 108 and 110 and the case-law cited).

98 In the present case, it should be noted at the outset that it is common ground that Pau airport was the property of the French Republic until 1 January 2007 and, thereafter, of a group of local authorities, the syndicat mixte. The airport management is ensured by the CCIPB, and in particular by a specialised service within the CCIPB.

99 Furthermore, it is apparent from the contested decision that the basic principles of the French legislation on CCIs remained unchanged during the period under review. Thus, they are public bodies set up by law, administered by elected managers and supervised by the State. Moreover, the French Commercial Code classifies CCIs as intermediate State authorities, their primary objective being 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 contested decision also explains that the industrial and commercial activities of CCIs, such as the operation of airport facilities, are ancillary to their general interest missions and are designed to help fulfil those missions. In addition, national laws lay down specific financing arrangements for CCIs. In this respect, their resources consist of tax revenues, subsidies or arise out of training and transport infrastructure operation activities, which corroborates the fact that their industrial and commercial activities are ancillary to their general interest missions (recitals 265 to 270 of the contested decision).

100 In relation to the CCIPB, to which the operation of Pau airport was entrusted, the contested decision referred to the statement by the French authorities that, for the CCIPB, a commercial activity such as the operation of Pau airport was not pursued in the interests of profitability, but as a counterpart to the general interest missions with which it was invested, namely the development of economic activity and attractiveness of its area (recitals 271 to 273 of the contested decision).

101 In that context, the Commission was correct to take the view, in accordance with the case-law cited in paragraph 97 above, on the basis of all those factual elements, that CCIs such as the CCIPB had to be considered as public authorities all of whose decisions, just like those of the central administration or local authorities, were necessarily imputable to the State (recital 274 of the contested decision).

102 That conclusion is not undermined by the applicants' arguments relating to the hybrid nature of CCIs and the economic nature of the CCIPB's airport management activity. It is true that the CCIPB ensures, within its organisation, the management of Pau airport and decided to conclude trade agreements with the applicants in relation to the operation of air routes. While the CCIPB must therefore be considered from that perspective as having economic activities (judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 93), it is, however, common ground that the management of Pau airport was integrated into the structures of the CCIPB, which the Commission considered to be a public authority on the basis of a body of evidence. There is nothing to preclude an economic activity being carried out by a State body (see, to that effect, judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 21), irrespective of the position of that body in the organisation of the State, whether it belongs to the central administration or whether it is a decentralised entity such as the CCIPB.

103 Moreover, since the agreements in question had been concluded by the CCIPB, which is a State body, it was not necessary for the Commission to determine the imputability of the State in the light of the criteria set out in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294). That case-law was based by the Court of Justice on the finding, set out in paragraph 52 of that judgment, that a public undertaking could act with more or less independence, according to the degree of autonomy left to it by the State, and that, therefore, actual exercise of State control in a particular case cannot be automatically presumed. However, the situation of the CCIPB is different since that entity, while carrying out an economic activity and concluding the agreements at issue, is an organ of the State, in the light of the factors referred to in paragraphs 99 and 100 above.

104 Furthermore, those factors relied on by the Commission to conclude that the CCIPB constitutes an organ of the State, namely its status as a publicly owned establishment, its general interest missions and its submission to State supervision, correspond to certain evidence which the case-law has identified as being relevant for the imputation of measures taken by a public undertaking to the State (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 56, and of 27 February 2013, *Nitrogénművek Vegyipari* v *Commission*, T-387/11, not published, EU:T:2013:98, paragraphs 63 to 65).

105 Finally, the Commission found, albeit for the sake of completeness, in the contested decision that there was no need to differentiate between the CCIPB and the specific service of the CCIPB which carried out the economic activity of management of Pau airport, since that service does not have its own legal personality distinct from the CCIPB and is only a part of the internal services of the CCIPB which has no decision-making autonomy except for in relation to the daily management of Pau airport. Thus, the Commission noted that the various airport services agreements and marketing services agreements had been signed by the President of the CCIPB following authorisation from the General Assembly of the CCIPB. Likewise, the French authorities have not claimed that the conclusion of the agreements with the applicants had to be imputed solely to that service (recital 280 of the contested decision).

106 In those circumstances, the Commission was entitled to consider that the measures taken by the CCIPB, including the conclusion of the agreements in question, were imputable to the State.

107 None of the other arguments put forward by the applicants is of such a kind as to disprove that conclusion.

108 In the first place, as regards the applicants' argument that the Commission did not state the reason why it had given priority to the public law tasks of the CCIPB over its commercial and principal activities, it must be noted that, as is apparent from the contested decision (recitals 26 to 210), the Commission based the finding of the essential role played by general interest missions of the CCIs and the ancillary nature of their commercial activities both on the legislative framework relating to the CCIs and on the declarations of the French authorities. The applicants have adduced no evidence to call that analysis into question.

109 In the second place, as for the applicants' argument that the CCIs are subject to private law and the jurisdiction of the civil and commercial courts, it must be stated that, while accepting that that finding, to the extent that it is correct, may constitute a factor of relevance in refusing to classify the CCIPB as a public authority, it constitutes only one factor among others in assessing the nature of the entity concerned, which does not by itself call into question the classification as a public authority based on all the other factors mentioned by the contested decision (see paragraphs 99 and 100 above).

110 In the third place, as for the applicants' argument that the Commission considered, in another passage of the contested decision, that the CCIPB had acted as an airport operator and not as a public authority acting in the context of its local economic development mission (recital 328 of the contested decision), it must be observed that that passage, which deals with the application of the market economy operator test, forms part of a line of reasoning of the Commission that, in connection with a first approach which it took, the conduct of the CCIPB as the airport operator had to be compared with that of a hypothetical private airport operator (recitals 315 and 320 of the contested decision). On the other hand, according to the Commission, there was no need to use the second approach, namely that the CCIPB had acted as a public body entrusted with a general interest mission, in this case the economic development of the Pau region (recitals 316 and 320 of the contested decision). It cannot be inferred from that passage that, by adopting the first approach, the Commission accepted that the CCIPB was not a public authority (see recitals 314 to 331 of the contested decision). According to settled case-law, it is necessary, in connection with the application of the private investor test, to compare the conduct of a public authority acting as an economic operator with that of a private operator (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 78, 81, 92 and 103, and of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraphs 95, 115 and 118), which is what the Commission did in this case.

111 In the fourth place, it is necessary to reject the applicants' argument, alleging a failure to state reasons, that they were not in a position to verify whether the Commission's refusal to apply the ruling factors of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), was justified. In recitals 269 to 276 of the contested decision, the Commission explained, in a sufficiently clear manner, how the situation of the CCIs, combining general interest missions and the exercise of economic activities, was different from that of the public undertakings with regard to which the Court of Justice gave the abovementioned judgment.

112 In the light of the foregoing, the first complaint of the second plea must be rejected.

2. The second complaint, alleging contradictory reasoning in the contested decision

113 The applicants raise a second complaint, alleging that the contested decision is not properly reasoned, since it contains a contradiction regarding the nature of the CCIPB. According to the applicants, the Commission considered that the CCIPB was part of the public administration and, at the same time, for the purposes of the same activity, was an undertaking in receipt of State aid (recitals 487 and 488 and Article 2 of the contested decision). The Commission therefore also erred in law. The same entity could not be part of the public administration and an undertaking in receipt of aid with respect to one and the same activity, since the two characterisations are mutually exclusive.

114 In that regard, the applicants acknowledge that the same entity can both grant and receive State aid, but state that it must in both cases be regarded as an undertaking. The assessment of the imputability to the State of a decision to grant aid must then be made on the basis of the criteria mentioned in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294). By failing to classify the CCIPB as either an undertaking or another entity, the contested decision prevented the applicants from determining which criterion of imputation to the State applied to the CCIPB, that is to say, the criteria mentioned in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), or the mere fact that it belonged to the public administration. The contested decision is therefore vitiated by a flaw in the statement of reasons for the classification of the CCIPB.

115 The Commission disputes those arguments.

116 In that regard, first of all, it should be noted that, in the context of the examination of the measures granted to the CCIPB as the operator of Pau airport, the Commission found that the CCIPB ensured the commercial exploitation of airport infrastructure and equipment and that the equipment subsidies which it had been granted in 2004 and in 2009 constituted State aid within the meaning of Article 107(1) TFEU (recitals 488 and 531 of the contested decision).

117 Next, it must be observed that, in the context of the investigation of the aid granted to the applicants, the Commission relied on a number of factors, such as the status as a public body established by law, the fulfilment of general interest missions, the ancillary nature of the economic activities and the State supervision, in order to infer that the CCIPB was part of the public administration and constituted a public authority whose conduct was imputable to the State (recitals 269 to 276 of the contested decision). The conclusion of trade agreements with the applicants formed part of that conduct.

118 It must be stated that the Commission considered that, by its economic activity, the CCIPB had received State aid, in this case equipment subsidies, but also that it was an entity which, regarded as a public entity, had consented to the granting of aid to the applicants, in the present case by the conclusion of the trade agreements at issue.

119 Nevertheless, since the State aid at issue is distinct and was examined separately in the contested decision, it cannot be considered, as the applicants claim, that the classifications as recipient of aid and as entity considered to be a public authority are incompatible in the present case. A public entity can be the recipient of State aid once the undertaking is active in the marketplace. However, nothing prevents the public body having been invested with general interest missions under the supervision of the State and exercising an economic activity within that context from not only being considered to be a public authority, but also from granting aid to undertakings such as the applicants by way of a separate measure (see, to that effect, judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraphs 143 and 145).

120 In that regard, it should be borne in mind that nothing prevents the exercise of an economic activity from being integrated into the context of public administration organisations (judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 21). Similarly, the fact that an entity is engaged in economic and non-economic activities at the same time does not prevent it from being

classified as an undertaking within the meaning of the State aid rules as regards the first activities (see, to that effect, judgment of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 74).

121 In addition, the inclusion of an entity, such as the operator of an airport, in the public administration does not preclude that entity from being able to be a beneficiary of State aid. It should be recalled that the existence or otherwise of legal personality distinct from that of the State, conferred by national law on a body carrying out economic activities, does not prevent the existence of financial relations between the State and that body and, consequently, the possibility that that body will benefit from State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraphs 128 and 129 and the case-law cited).

122 It follows that, contrary to what the applicants claim, the contested decision is not vitiated by contradiction or an error of law or by a failure to state reasons in so far as it classifies the CCIPB as both a recipient of aid and as a public authority.

123 The second complaint of the second plea must accordingly be dismissed.

124 In the light of the foregoing, the second plea must be rejected in its entirety.

C. The third plea, alleging incorrect application of the market economy operator test

125 By their third plea, the applicants claim that the Commission misapplied the market economy operator test and thereby infringed Article 107(1) TFEU.

126 This plea is divided into two parts. In the first place, the applicants submit that the Commission wrongly refused to carry out a comparative analysis, whereas the carrying out of such an analysis would have led it to conclude that there was no aid. According to the applicants, the contested decision is also vitiated by defects of reasoning on that point. In the second place, the applicants submit that the Commission made manifest errors of assessment in its incremental profitability analysis and did not sufficiently reason that analysis.

127 The Commission rejects that line of argument.

128 Before examining the two parts of this plea, it should be borne in mind as a preliminary point that, according to the settled case-law of the Court of Justice, State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the EU Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87 and the case-law cited).

129 The Court of Justice has nevertheless held that judicial review is limited with regard to whether a measure comes within the scope of Article 107(1) TFEU, in a case where the appraisals by the Commission are technical or complex in nature (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 88).

130 In that regard, where, in order to determine whether a measure comes within the scope of Article 107(1) TFEU, the Commission must apply the criterion of a prudent private investor in a market economy, as a rule, the application of that test requires the Commission to make a complex economic assessment (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 89).

131 However, although the General Court must not substitute its own economic assessment for that of the Commission, it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 91 and the case-law cited).

1. The first part, alleging errors of assessment and failures to state reasons committed by the Commission in that it refused to conduct a comparative analysis in relation to the airport services agreements and the marketing services agreements …

(a) The rejection of the comparative analysis as a method of application of the market economy operator test

138 The applicants argue that the Commission failed to have regard to the fact that the comparative analysis was the main method of assessment for the purposes of the application of the market economy operator test to determine whether the arrangement had conferred an advantage on the private party, since that method is indeed consistent with the principle of legal certainty. Relying on the judgment of 3 July 2003, *Chronopost and Others* v *Ufex and Others* (C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraphs 38 and 39), they submit that, as a general EU law principle, it is only in cases where a comparative analysis, in particular a private investor comparator, is not available that the Commission may rely on an incremental profitability analysis.

139 In this regard, it is settled case-law that the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through State resources (judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 78, and of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 70). That assessment is made, in principle, by the application of the market economy operator test (see, to that effect and by analogy, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 71).

140 In order to ascertain whether a State measure constitutes aid, it is necessary to determine whether, in similar circumstances, a market economy operator of a size comparable to that of the bodies managing the public sector might have been prompted to conclude the agreements at issue (see, to that effect and by analogy, judgments of 21 March 1990, *Belgium* v *Commission*, C-142/87, EU:C:1990:125, paragraph 29, and of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraphs 40 and 42).

141 However, determining whether a market economy operator would have made an arrangement such as that in question cannot necessarily imply for the Commission the obligation to use the comparative analysis method. That method is merely one analytical tool amongst others to determine if the recipient undertaking has received an economic advantage which it would not have obtained in normal market conditions (see, to that effect and by analogy, judgments of 6 March 2003,

Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 250 and 254, and of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraphs 43 and 44).

142 The selection of the appropriate tool is a matter for the Commission within the framework of its obligation to conduct a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the recipient undertaking and of the relevant market, to determine whether the recipient undertaking has received an economic advantage which it would not have obtained in normal market conditions (see, to that effect and by analogy, judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 251 and 258, and of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 45).

143 In the present case, without it being necessary to consider at this stage the merits of the grounds relied on by the Commission to depart from the comparative analysis in the present case, it must be held that the Commission could therefore, without committing an error, analyse in detail, in recitals 359 to 372 of the contested decision, what was the most appropriate assessment method to choose for the purposes of the application of the market economy operator test. Thus, questioning whether it was possible to define an appropriate benchmark to establish a true market price for the airport services and taking into account the divergence of costs and revenues between airports, the low comparability of the transactions between airports and airlines, the difficulty of finding a sample of airports and comparable transactions and the provision of services at a price leading to an incremental loss, the Commission opted for the incremental profitability analysis method and departed from the comparative analysis.

144 That approach of the Commission is not undermined by the case-law relied on by the applicants, namely the judgment of 3 July 2003, *Chronopost and Others* v *Ufex and Others* (C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraphs 38 and 39), according to which, in the absence of any possibility of comparing the situation of a public undertaking with that of a private undertaking not operating in a reserved sector, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available, such as the costs incurred by the public undertaking. That case-law must be read in the context of the circumstances of the case which gave rise to that judgment, namely the impossibility of applying a comparative analysis and therefore the lack of choice between such analysis and other methods. Consequently, in the abovementioned judgment, contrary to what the applicants essentially argue, the Court of Justice did not rule on the existence of a hierarchy between the comparative analysis and other methods, but merely stated that it was not possible to have recourse to a comparative analysis in the case at hand.

145 It follows that the applicants' argument concerning the existence of a general principle of EU law allegedly referred to in the judgment of 3 July 2003, *Chronopost and Others* v *Ufex and Others* (C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388), which is said to establish a hierarchy between the comparative analysis and other methods, cannot succeed.

146 Similarly, the applicants cannot properly rely on the fact that the judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* (T-228/99 and T-233/99, EU:T:2003:57), and of 3 July 2014, *Spain and Others* v *Commission* (T-319/12 and T-321/12, not published, EU:T:2014:604), concerned the analytical tool of an average return in the sector, given that, in those judgments, the General Court held that the use of an average return in the sector is only one analytical tool amongst others in the context of the application of Article 107(2) TFEU.

147 Nor can the applicants properly rely on the case-law according to which the fact that the transaction at issue is reasonable for the public authority does not exempt the Commission from ascertaining whether the measure in question conferred on the recipient undertaking an economic advantage

which it would not have obtained under normal market conditions (judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 315, and of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 213). The incremental profitability analysis aims precisely at establishing whether, by the conclusion of the agreement, the public authority acting as a market economy operator finding itself, to the extent possible, in the same situation conferred an economic advantage on the other party to the agreement which it could not have obtained under normal market conditions.

148 Lastly, as regards the applicants' argument that the conclusion of a contract which is not profitable for the public airport because of the airport's own inefficiency does not confer any advantage on the airline under normal market conditions, it should be noted that, according to the case-law (paragraph 140 above and paragraph 181 below), the application of the market economy operator test is not designed to require minimum efficiency in the operation of a given activity, but to determine whether, in similar circumstances, a comparable private investor could have been prompted to take the measure at issue. In that regard, it is necessary to take into account the structure of the costs and revenues of the public entity whose conduct is being compared to that of a market economy operator. The applicants' argument must therefore be rejected.

149 It follows that the applicants' argument that the Commission had to carry out a comparative analysis for the purposes of applying the market economy operator test must be rejected.

(b) The grounds relied on by the Commission in the contested decision to depart, in the present case, from the comparative analysis

150 The applicants dispute the specific reasons on which the Commission relied in recitals 360 to 369 of the contested decision to depart from the comparative analysis in the present case.

151 In particular, they put forward essentially five complaints that those grounds contain errors of assessment and failures to state reasons.

(1) The first complaint, alleging that the Commission erred in finding that diversity among airports invalidated the comparative analysis

152 The applicants assert that the Commission erred in claiming that diversity among European airports' conditions invalidated the comparative analysis.

153 In the first place, as regards the ground relating to the difference in the cost and revenue structure and other conditions between airports (recital 362 of the contested decision), the applicants assert that the Commission has not provided any data or examples to explain the degree and importance of those differences. It was for the Commission to put forward arguments specific to the case in order to justify the rejection of the comparative analysis, which is the main method of assessment for the purposes of applying the private investor test.

154 In that regard, it is sufficient to note that the Commission found, in recital 362 of the contested decision, that the cost and revenue structure tends to differ significantly from airport to airport and, in support of that finding, the Commission listed a series of indicators of cost and revenue discrepancy. Furthermore, the applicants have not put forward any specific argument permitting the inference that the account of those indicators is vitiated by a manifest error of assessment.

155 In the second place, as for the ground relating to the low comparability of the transactions between airports and airlines (recital 363 of the contested decision), the applicants argue that the Commission incorrectly asserted that airport charges were generally not comparable between airports.

156 In this respect, it should be noted that the applicants make an incorrect reading of the contested decision when they claim that the Commission considered that airport charges between airports were not comparable. In recital 363 of the contested decision, the Commission explained that, as shown by the case at hand, commercial relationships between airports and airlines were not necessarily based on a list of public prices for individual services, but varied widely and therefore it was difficult to compare them based on a price per rotation or per passenger. Furthermore, the file shows that the agreements between Pau airport and the applicants went well beyond a mere application of the general schedule of charges in force at the airport in terms of airport charges and consisted of the conclusion of airport services agreements and marketing services agreements.

157 Similarly, the applicants' argument that the Commission erred in recital 363 of the contested decision in claiming that published charges were not necessarily representative of commercial agreements between airports and airlines cannot be accepted.

158 Contrary to what the applicants claim, the level of charges negotiated individually between airports and certain airlines, which are lower than the published charges, is not sufficient in itself to support the view that a comparative analysis on the basis of the published charges constitutes a relevant approach. In this respect, it should be noted that the Commission found, in recital 366 of the contested decision, that the transactions in question involved several prices, namely airport charges, the price of the groundhandling services and the price of the marketing services, which the applicants do not dispute. However, as is apparent from recital 367 of the contested decision, such transactions cannot be usefully compared if the comparison is limited to the published charges, thereby omitting to take into account, in particular, the remuneration of marketing services.

159 Moreover, so far as concerns the applicants' argument that the Commission could not invoke the liberalisation of the air transport sector in Europe to justify the rejection of the comparative analysis without providing evidence to substantiate it, it should be noted that the Commission alluded, in recital 363 of the contested decision, to the liberalisation to explain the heterogeneity of commercial practices among airports, which makes it more complicated to carry out a purely comparative analysis. Contrary to what the applicants claim, the contested decision does not aim to exclude the comparative analysis in determining whether a market economy operator would have made a specific arrangement in liberalised sectors, or in all sectors.

160 In the third place, as regards the applicants' argument that the rejection of the comparative analysis of airports is inconsistent with the Commission's approach in other sectors, it should be borne in mind that the concept of State aid is a legal concept and must be interpreted solely on the basis of Article 107(1) TFEU, and not on the basis of any previous administrative practice of the Commission, assuming that it is established (see judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 46 and the case-law cited).

161 In addition, the mere fact that the Commission did not use the data collected by its requests for information concerning the comparison of airports does not call into question the credibility of the contested decision. As the Commission explains, it cannot be criticised for not having accepted data which it had not ultimately considered to be relevant for the approach adopted. In recital 365 of the contested decision, it noted that no interested third party had suggested to it a sample of airports which were sufficiently comparable to Pau airport having regard to a number of specific parameters.

162 Accordingly, in view of all of the foregoing, the Court finds that the applicants' argument that the Commission erred in considering that diversity among airports' conditions invalidated, in the present case, 'Ryanair's Comparator Study' must be rejected.

(2) The second complaint, alleging the erroneous reference to the marketing services agreements signed with AMS

163 As a preliminary point, it should be observed that the applicants rely on a report prepared by their economic consultant which they submitted to the Commission during the administrative procedure ('the study of 31 August 2011'). First of all, that study identifies three comparison airports on the basis of a previously defined methodology. It then compares the charges paid by Ryanair to Pau airport with the charges which it pays to those airports. Finally, the study concludes that the level of charges paid by Ryanair to Pau airport is substantially higher than the level of charges paid to those comparison airports, both on the basis of a price per rotation and on the basis of a price per passenger. According to that study, those results suggest that the charges paid by Ryanair to Pau airport were at a level consistent with the charges that it would have been offered in similar circumstances by a private market economy investor owning an airport. In addition, the study of 31 August 2011 indicates that the analysis carried out does not take into account the marketing agreements, that is to say the marketing services agreements established between Pau airport and AMS.

164 The applicants claim that the Commission was wrong to reject the study of 31 August 2011 as not being useful on the ground that it was limited to payments under the airport services agreements and did not take account of payments under the marketing services agreements. According to the applicants, the price of the marketing services reflects an independent market value, as has been demonstrated by several economic studies produced during the administrative procedure, and that price fully offsets that value, producing a net zero result. The fact that the airport services agreements and the marketing services agreements were signed on the same date and by companies belonging to the same group does not enable the Commission to treat payments under the marketing services agreements as a rebate on the airport charges provided for in the airport services agreements.

165 In that regard, it must be borne in mind that, when the Commission reviews whether a specific transaction contains State aid elements, it is required to take into account the context in which that transaction takes place (see, to that effect, judgment of 13 December 2011, *Konsum Nord* v *Commission*, T-244/08, not published, EU:T:2011:732, paragraph 57). The examination of a transaction outside its context could lead to purely formal results which do not correspond to economic reality (judgment of 8 January 2015, *Club Hotel Loutraki and Others* v *Commission*, T-58/13, not published, EU:T:2015:1, paragraph 91 and the case-law cited).

166 When applying the private investor test, it is necessary to envisage the commercial transaction as a whole in order to determine whether the public entity has acted as a rational operator in a market economy. When assessing the measures at issue, the Commission must examine all the relevant features of the measures and their context (see judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59 and the case-law cited).

167 In the present case, the Commission held in the contested decision that each marketing services agreement was indissociable from the underlying airport services agreement and that it was therefore appropriate, for each marketing services agreement, to analyse that agreement and the airport services agreement signed at the same time as a single measure (recitals 286 to 313 of the contested decision). In order to reach that conclusion, it found, inter alia, in recitals 289 and 290 of the contested decision, that all the marketing services agreements and the corresponding airport services agreements had been signed at virtually the same time and by the same parties, forming a single economic entity. Furthermore, the Commission mentioned, in recitals 291 to 313 of the contested decision, a number of other elements which revealed additional and close links between the marketing services agreements and the airport services agreements signed at the same time. Thus, after an examination of the content of the various marketing services agreements, the Commission found, in recital 305 of the contested decision, that the marketing services were, in terms of both their duration and their nature, closely linked to the air transport services offered by Ryanair and covered by the airport

services agreements. In that regard, the Commission noted that the marketing services agreements indicated that they were rooted in Ryanair's commitment to operate the air transport services in question. The Commission also noted that, far from being designed to generally and equally increase travel to Pau and its region by tourists and business travellers, the marketing services specifically targeted those persons likely to use the Ryanair transport services, and therefore had the primary objective of promoting those services. In addition, the Commission found, in recital 306 of the contested decision, that the facts presented above indicated 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. Finally, the Commission inferred from the statements of the French authorities that the conclusion of all the airport services agreements seemed to have been dependent upon the conclusion of the marketing services agreements (see recitals 309 to 311 of the contested decision).

168 The applicants have failed to call that analysis into question. The Commission did not rely solely on the fact that each marketing services agreement had been signed virtually on the same day as an airport services agreement by parties belonging to the same group of companies. It took not only those factors into consideration, but also other factors such as, in particular, the very terms of the marketing services agreements and the finding that, in the absence of the routes in question, the marketing services agreements would not have been concluded. In this respect, it should be noted that the marketing services agreements in question expressly provided that they were rooted in Ryanair's commitment to operate a route from Pau airport.

169 Moreover, the applicants have not adduced any evidence to invalidate the Commission's assessment that each marketing services agreement is closely linked to an airport services agreement and the air transport services covered by it.

170 It follows that the Commission was entitled to find, and did not err in so doing, that it was appropriate to analyse, for each marketing services agreement, that agreement and the airport services agreement signed at the same time as a single measure.

171 Consequently, the Commission was entitled, without erring, to hold that the transactions to be analysed were complex packages consisting of an airport services agreement and a marketing services agreement and that a comparison between just the airport charges invoiced by the CCIPB to the airlines concerned and the airport charges invoiced at other airports did not provide any useful indication as to whether the market economy operator test was satisfied (recital 367 of the contested decision). The study of 31 August 2011 was limited to comparing airport charges, whereas a correct application of the market economy operator test implied that, in the case at hand, the airport services agreements and the marketing services agreements are taken into account as a single transaction.

172 The applicants' argument that the price of the marketing services offset the value of those services must be dismissed. That argument is based on the wrong assumption that the marketing services and the airport services were distinct and independent (see paragraphs 165 to 170 above) and that, therefore, the purchase price of the marketing services cannot be inferred from airport charges resulting from the air route operated by Ryanair and forming the subject matter of the airport services agreement signed at the same time as the marketing services agreement at issue.

173 It follows that the applicants' claim that the price paid for the marketing services would fully offset the value of those services must be rejected.

174 Consequently, it is necessary to reject the applicants' argument alleging the erroneous reference to the marketing services agreements signed with AMS.

(3) The third complaint, relating to the rejection of the comparative analysis on the ground that the agreements under investigation generated higher incremental costs than incremental revenues

175 The applicants assert that the Commission erred in dismissing the application of a comparative analysis on the ground that the agreements under investigation were allegedly expected to generate higher incremental costs than incremental revenues. The Commission's approach entails the carrying out of an incremental profitability analysis in the context of a comparative analysis, and therefore the cumulative application of the two analyses, which is contrary to the case-law.

176 In that regard, indeed, the Commission held in the contested decision that, 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, it 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. According to the Commission, a market economy operator would not be interested in offering goods or services at the market price if this led to an incremental loss (recital 368 of the contested decision).

177 It should be noted that the comparative analysis is only one analytical tool amongst others for the purposes of applying the private investor test in accordance with Article 107(1) TFEU and that the use of that method of analysis does not relieve the Commission of its obligation to make a complete analysis of all factors that are relevant to the transaction at issue and its context. The Commission was therefore entitled to take into account the fact that a negative return was foreseeable in a given transaction (see, to that effect, judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraphs 44 and 45).

178 Therefore, the Commission did not err, in the case at hand, by referring to the negative return on the agreements at issue when it examined the adequacy of the comparative analysis.

…

(c) The complaint alleging that the comparative analysis shows that no advantage was conferred through the marketing services agreements and the airport services agreements

228 The applicants submit, with reference to the economic reports and other evidence in the administrative file, that the comparative analysis shows that the marketing services agreement and the airport services agreement conferred no economic advantage. According to the applicants, it is apparent from several economic reports that the price stipulated in the marketing services agreement was in line with the market price received by AMS from private customers and the market price paid by private customers for comparable services supplied by other service providers. Moreover, the applicants submit that the study of 31 August 2011 shows that the airport charges paid by Ryanair to Pau airport were compatible with the level of charges that would have been offered to Ryanair by an airport-owning market economy operator in similar circumstances.

229 In that regard, it must be stressed that, as the Commission states, the applicants' line of argument, which is based on the aforementioned economic reports and the study of 31 August 2011, is ineffective, since it starts from the incorrect premiss that the marketing services and the airport services are distinct and independent, whereas, in relation to the agreements at issue, it was appropriate to analyse, for each marketing services agreement, that agreement and the corresponding airport services agreement as a single measure in order to determine whether they constituted an advantage (see paragraphs 165 to 170 above).

230 So far as concerns the marketing services agreements, it must be borne in mind that the economic reports at issue do not take into account the fact that AMS's marketing services were acquired by Pau airport in order to promote the operation of air routes ensured by Ryanair. Thus, two economic reports compare the prices of advertising space and marketing on Ryanair's website with the prices charged by the websites of other airlines or other travel websites for advertisements on the internet. Similarly, another economic report compares the prices set by AMS in its rate cards with rate card prices for advertising services on a wide selection of other European travel websites. The reports do not claim, in particular, that advertisers on other travel websites are comparable to airports which purchase marketing services linked to air transport services of an airline.

231 Moreover, the economic reports in question, which are based on the assumption of distinct and independent marketing services and airport services, make no attempt to call into question the Commission's analysis that the marketing services agreements are indissociable from the airport services agreements and the air transport services forming the subject matter thereof. The applicants cannot therefore validly rely on those economic reports in order to refute that analysis.

232 With regard to the examples of marketing services agreements by which certain private airports purchased AMS's services, it is sufficient to state that the applicants have failed to show that the private airports were in a situation comparable to that of Pau airport when they concluded those agreements.

233 So far as concerns the airport services agreements, the study of 31 August 2011 merely compares the airport charges imposed in Pau airport with the airport charges imposed in the comparator airports without taking account of the corresponding marketing services agreement, although the two types of agreement must be considered as a single measure.

234 Accordingly, the applicants' complaint must be rejected.

…

2. The second part, alleging errors of assessment and insufficient reasoning as regards the incremental profitability analysis

…

(a) The non-allocation by the Commission of an appropriate value to AMS's marketing services in the incremental profitability analysis

250 The applicants argue that the Commission allocated all of the costs of the marketing services agreements to the airport services agreements, while at the same time asserting that the only benefit that the CCIPB could expect from the marketing services agreements was an increase in traffic (in this case to ensure an 85% load factor on flights) for the duration of the operation of the Ryanair routes and that the other benefits were too uncertain to be taken into account in the analysis of the profitability of the agreements. The Commission thereby spread the cost of the marketing services over the lifetime of the agreements under investigation, without including any of the other benefits of the marketing services agreements.

251 In particular, in the first place, the applicants maintain that, in the absence of evidence of overpricing, the proper value of a service, including a marketing or advertising service, is its market price. Given that the Commission included the sums paid by Pau airport to AMS on the costs side of its incremental profitability analysis, the value of the services provided by AMS should have been included on the benefits side, producing a net zero result.

252 In the second place, the applicants maintain that the purpose of the marketing services agreements was not to ensure high load factors on the Ryanair routes. Pau airport secured the level of traffic it wished to achieve through the airport services agreements, and the high load factors on routes are ensured by Ryanair through its own marketing, in particular by advertising very low prices on selected routes for short periods of time and at frequent intervals. An airport cannot do that work for Ryanair through AMS marketing.

253 In the third place, the applicants argue that the Commission wrongly asserted that Ryanair's website could be useful only to advertise Ryanair routes and could offer only marketing with a short-term effect because it was not as effective as a set of other websites. The applicants submit that the Commission failed to address the evidence which Ryanair provided, which proves the enormous popularity of the latter's website, but simply stated that the site was not as effective as others and that television advertisements and posters would reach more consumers.

254 The applicants claim that the Commission therefore made a manifest error of assessment and failed to state reasons by not attributing any appropriate value to AMS's marketing services.

255 The Commission disputes the applicants' arguments.

256 As a preliminary point, it should be noted that, by their arguments put forward in support of the present complaint, the applicants challenge the way in which the value of the marketing services was incorporated into the incremental profitability analysis concerning the agreements in question.

257 In this respect, it should be observed that the Commission analysed, in the contested decision, the benefits that a market economy operator acting in the place of the CCIPB could have expected from the marketing services agreement. In particular, it found that marketing services were capable of boosting passenger traffic on the routes covered by the agreements at issue. It added that that effect benefited not only the airline, but also Pau airport, given that the increase in the number of passengers was capable of leading, for the airport operator, to an increase in airport and non-airport revenues. It concluded from this that, when assessing the value in entering into the agreements under investigation, a market economy operator would have taken that positive effect into account (recitals 332 to 335 of the contested decision). However, the Commission rejected as being too uncertain the full benefits of the marketing services agreement beyond the routes covered by the agreements at issue and their duration (recitals 337 to 358 of the contested decision). The Commission subsequently included, in its incremental profitability analysis, that possible beneficial effect in the load factor chosen for the routes covered by the agreements (recital 401 of the contested decision). On the other hand, it included the sums paid by the CCIPB to AMS for the purchase of marketing services among the costs to be deducted from the incremental revenues linked to the routes concerned (recitals 416 and 429 of the contested decision).

258 It must be held that the line of argument alleging insufficient reasoning of the contested decision must, in the light of the above, be rejected. The way in which the Commission took into account the value of marketing services provided by AMS in the incremental profitability analysis clearly follows from the contested decision.

259 Furthermore, the Commission did not commit a manifest error of assessment.

260 In the first place, as for the applicants' argument criticising the Commission's analysis concerning the usefulness of Ryanair's website, which it is appropriate to examine before the other arguments, it must be underlined that, by assessing the sustainability of the positive effects of the marketing services agreement which a market economy operator would have envisaged, the Commission did not call into question the popularity of Ryanair's website, as apparent from the evidence provided, in terms of the number of direct visits or visits by search engine, but examined its impact on the purchasing behaviour of the persons who had just visited it. The Commission considered, in particular, that it

was highly unlikely that the memory which visitors to Ryanair's website would retain of the advertising of Pau and its region as a travel destination would last or have an influence on their ticket purchases for more than a few weeks (recital 341 of the contested decision).

261 Consequently, the applicants' argument that the Commission did not examine the evidence demonstrating the popularity of Ryanair's website must be rejected. As the Commission correctly observes, the popularity of that website does not make it possible to draw any conclusions regarding the expected long-term effects, on the behaviour of consumers and traffic towards Pau airport, of a visit to the page of that website devoted to Pau, given the limited duration of such an advertisement and the fact that it was almost exclusively limited to the page of the same website devoted to Pau, and not visible on the overall website.

262 Moreover, to assess the effects on consumer behaviour, the Commission found, in recital 341 of the contested decision, that an advertising campaign was likely to have a sustainable effect when the promotional activities involved one or more advertising media to which consumers were regularly exposed over a given period. It mentioned, as examples, an advertising campaign on general television and radio stations, on various websites or on various billboards displayed outdoors or inside public places, since such a campaign may have a sustainable effect on consumers if they are passively and repeatedly exposed to those media. However, the Commission took the view that promotional activities limited to certain pages of Ryanair's website alone were unlikely to have an effect that lasts much beyond the end of the promotion. According to the Commission, it was highly unlikely that visitors to Ryanair's website have a recollection of the advertising of Pau and its region which is sustainable and capable of influencing their ticket purchases for more than a few weeks. In that regard, the Commission considered, in recital 342 of the contested decision, that it was likely that consumers do not visit the website in question often enough to leave them with a lasting memory that that site offered a promotion on a certain destination.

263 It follows that, in order to assess the effects of the marketing services, the Commission relied primarily on the distinction between (i) the effects of campaigns to which consumers were exposed frequently, or even passively and repeatedly, and (ii) those of the promotional scheme on Ryanair's website, limited to certain pages during a limited number of days over a period of five years, and therefore devoid of sustainable effects beyond the duration of the promotion.

264 The applicants submit that the Commission's position disregards the extremely long duration of visits to Ryanair's website and ignores the opinion of marketing experts, who established that targeted marketing operations directed at captive audiences were more effective and profitable than non-discriminate and passive marketing operations targeting the general public. They rely in this regard on two economic reports.

265 In that regard, it should be noted that the Commission explained, and found, in recital 342 of the contested decision, that the promotion of the Pau region on Ryanair's homepage was limited to a single link to a website designated by the CCIPB for limited and, in some cases, very brief periods in terms of the number of days, which was unlikely to have sustainable effects after the end of those promotional activities. In particular, the Commission explained that the applicants had not attempted to analyse and quantify the alleviation effects of the marketing services under the marketing services agreements on the behaviour of consumers and their long-term impact on traffic at Pau airport.

266 Although the passages of the economic reports at issue explain, in a general manner, the advantages of advertising directed at a captive audience, in particular through AMS, they do not allow adequate conclusions to be drawn about the actual long-term effects of such advertising on the purchasing behaviour of visitors to Ryanair's website and on passenger traffic on the air routes covered by the agreements at issue.

267 Consequently, the applicants fail to demonstrate that the Commission committed a manifest error of assessment by considering, in recitals 341 and 342 of the contested decision, that it was highly unlikely that access to the promotion for the destination of Pau on Ryanair's website may have encouraged visitors to that website to purchase Ryanair tickets for Pau for more than a few weeks after that access or that the promotion on that website may have had an effect that lasts much beyond the end of the promotion campaign.

268 Accordingly, it is necessary to reject the applicants' argument that the Commission incorrectly considered that the promotion on Ryanair's website had only a short-term effect not extending beyond the duration of the agreements at issue or routes not covered by those agreements.

269 Therefore, it follows that the applicants have failed to show that the Commission committed a manifest error of assessment in considering, in recital 344 of the contested decision, that, although the marketing services might have boosted passenger traffic on the routes covered by the marketing services agreements during the implementation period of those services, it was very likely that such an effect was zero or negligible after that period or on other routes.

270 For the same reasons, it is necessary to reject the applicants' argument that the Commission was wrong not to examine whether the advertising on Ryanair's website had increased the general visibility of Pau airport in relation to all potential Ryanair passengers and companies specialising in airport retail.

271 Consequently, it is necessary to reject the applicants' argument that the Commission wrongly assessed the marketing effect of Ryanair's website.

272 In the second place, the argument that, since the value of the marketing services was equal to the market price, it offset the purchase price of those services as a cost in the incremental profitability analysis, is tantamount to considering that the marketing services and the airport services are distinct and independent and that the value of the marketing services must therefore be assessed independently of the operation by Ryanair of the air routes covered by the airport services agreements which concern them.

273 The applicants do not validly refute the opposite approach, adopted in the contested decision, that the marketing services agreement and the airport services agreement are closely linked in that the marketing services are essentially designed to promote the air routes (see paragraphs 165 to 170 above and paragraphs 279 and 280 below). By that approach, the Commission was entitled, without erring, to consider the purchase price of the marketing services as an incremental cost to be deducted from the incremental revenues deriving from the air routes at issue.

274 Furthermore, nor do the applicants validly refute the Commission's analysis that a market economy operator would have considered any other benefit than that resulting from the positive effect on passenger traffic on the air routes operated by Ryanair as being too uncertain to be taken into account in a quantifiable manner (see recitals 337 to 358 of the contested decision).

275 The Commission found that, even though the marketing services might have boosted passenger traffic on the routes covered by the agreements at issue during the term of those agreements, it was very likely that such an effect was zero or negligible after that period or on other routes (recitals 339 to 342 and 344 of the contested decision). The applicants have not succeeded in calling that finding into question (see paragraphs 260 to 268 above).

276 Moreover, the applicants have not provided any evidence to refute the Commission's analysis that the two methods proposed by Ryanair in the studies of 17 and 31 January 2014 during the administrative procedure for assessing the benefits of the marketing services agreements going beyond the air routes in question and the term of operation of those routes gave very uncertain and unreliable results (recitals 345 to 357 of the contested decision).

277 In those circumstances, the applicants have not established that the Commission committed a manifest error of assessment in basing the incremental profitability analysis on the assumption that a market economy operator would take into account the marketing services agreement only for the positive effect on the number of passengers using the route provided by Ryanair and, therefore, on the additional incremental revenues linked to passenger traffic on that route, while regarding the purchase price of the marketing services to be paid to AMS as an incremental cost for Pau airport to be deducted from the incremental revenues, and not as being offset by the value of the marketing services.

278 In the third place, it is necessary to reject the applicants' argument that the Commission wrongly considered that the purpose of the marketing services agreement was to ensure a high load factor on the routes operated by Ryanair.

279 In that regard, it must be observed that the Commission considered, on the basis of various factors relating to the marketing services agreements as described in recitals 292 to 304 of the contested decision, that the marketing services specifically targeted persons likely to use Ryanair's transport services and had as their main objective the promotion of those services, and not generally and equally travel to Pau and its region by tourists and business travellers (recital 305 of the contested decision).

280 It is appropriate to approve that analysis, which is based on the finding that the marketing services provided to the operators of Pau airport were addressed to the potential Ryanair passengers who would use the air routes operated by that airline towards or departing from Pau airport, even though those services promoted tourist attractions and business appointments in the Pau region. Accordingly, those services proved to be closely linked to the air routes operated by Ryanair.

281 In addition, the promotion of Ryanair's air routes by means of the marketing services purchased from AMS did not prevent Ryanair from itself ensuring high load factors by its own promotion.

282 In the fourth place, the applicants submit in the reply that the Commission wrongly refrained from including the benefits of marketing services in its incremental profitability analysis on the ground, mentioned in recital 379 of the contested decision, that a market economy operator would be unwilling to enter into a transaction involving a marketing services agreement and an airport services agreement if the incremental costs incurred under the transaction exceeded the incremental revenues in discounted value terms, even if the price payable for such services in the market was at or below market price.

283 According to the applicants, that assertion of the Commission does not take account of the economic reality. First, private companies often invest large sums in programmes for the development of their brand, while suffering from incremental losses at first or in a start-up situation. The goal is not to achieve an immediate return on investment, but to achieve long-term benefits. The applicants invoke the Commission's previous practice in taking decisions whereby it has taken into account, in the incremental profitability analysis, the qualitative and strategic goals of airports going beyond a mere analysis of the costs and the benefits. The contribution of marketing to the image of an airport has also been selected for the benefit of that analysis. Furthermore, they refer to paragraph 66 of the 2014 Guidelines, which provides that, when assessing arrangements between airports and carriers, the Commission is to also take into account the extent to which the arrangements 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. Secondly, marginal losses are, in accordance with the case-law, consistent with the market economy operator test where there is no better alternative. A negative sale price may be consistent with that test unless other options such as bankruptcy are available and involve a lesser loss for the State that is the seller. The applicants submit that the Commission wrongly failed to assess the losses that would have been caused by the closure of the airport.

284 In that regard, it must be stressed at the outset that, according to the case-law, the classification of a measure as State aid cannot depend on a subjective assessment by the Commission and must be determined regardless of any previous administrative practice of that institution, assuming it to have been established (see judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 46 and the case-law cited).

285 It follows that there is no need to examine whether the Commission's previous practice in taking decisions relied on by the applicants is proven.

286 By contrast, it is necessary to examine the applicants' argument in the light of the market economy operator test, as is apparent from Article 107(1) TFEU.

287 In the present case, the Commission found, in recital 379 of the contested decision, that a hypothetical market economy operator motivated by the prospect of profits would not be prepared to purchase marketing services if it were predicted that, despite the positive effect of such services on passenger traffic on the air routes concerned, the incremental costs incurred by the agreements would exceed the incremental revenues in discounted value terms.

288 However, without it being necessary to rule on the question whether, in the light of Article 107(1) TFEU, a market economy operator operating an airport would be likely to purchase marketing services while suffering an incremental loss in net present value, it must be found that, in any event, the applicants do not show that a market economy operator acting in the place of the CCIPB would have been prepared, in the present case, to act in such a way.

289 In the present case, the applicants confine themselves in their arguments to stating generally that private companies often invest large sums in developing their brands while suffering from initial incremental losses, without obtaining an immediate return on investment, in order, however, to achieve long-term benefits. They do not show that the Commission committed a manifest error of assessment in finding in recitals 345 to 357 of the contested decision that the benefits of the marketing services agreements going beyond the routes covered by the agreements and the term of operation of those routes were extremely uncertain and could not be quantified with a degree of reliability that would be considered sufficient by a market economy operator.

290 In particular, the applicants have not provided any evidence to refute the Commission's analysis that the two methods proposed by Ryanair in the studies of 17 and 31 January 2014, during the administrative procedure, for assessing the benefits of the marketing services agreements going beyond the air routes in question and the term of operation of those routes, that is to say the future revenues resulting in particular from the prominence and the strong brand image due to the marketing services, gave very uncertain and unreliable results (see recitals 347 to 350 and 353 of the contested decision).

291 It follows that the applicants have not shown that a market economy operator acting in the place of the operators of Pau airport would have taken the view that the marketing services purchased from AMS were an investment likely to generate profits in the longer term.

292 Finally, so far as concerns the applicants' argument relating to the least onerous solution, it must be pointed out that, in the contested decision, the Commission did not err in stating that a market economy operator placed in the situation of operator of Pau airport would have expected the agreements at issue to be unprofitable. Therefore, as the Commission correctly states, the refusal to sign the agreements at issue would have been a better alternative for such an operator, given that those agreements had a negative incremental profitability and that their conclusion would have therefore resulted in a deterioration of the financial situation of that airport.

293 Therefore, even assuming that the closure of Pau airport would have led to a greater loss for its owner than the incremental loss expected from the implementation of the combination of the agreements at issue, a market economy operator motivated by the prospect of profits, acting as the operator of that airport, would have rather preferred in the case at hand not to conclude those agreements.

294 It follows that the applicants' line of argument must be rejected.

295 In the light of all the foregoing, it must be concluded that, without committing a manifest error of assessment, the Commission was entitled to take into account, in the incremental profitability analysis, only revenue generated by the routes covered by the agreements under examination during the planned duration of those agreements, even though it included the costs associated with the marketing services agreement, which were deemed to be generated in their entirety during that period.

296 It follows that all of the applicants' arguments that the Commission failed to attribute an appropriate value to AMS's marketing services must be rejected.

297 Finally, the applicants argue, in the reply, that the Commission's assertion in the defence that a market economy operator would not be prepared to pay its customer for a period of up to eight years in the expectation that it would recover the money spent in future years is unfounded.

298 In that regard, the applicants submit, first, that airports are large, long-term infrastructure projects whose horizon of investment covers several decades and, secondly, that, according to the economic and financial literature, the profitability of an investment should not necessarily be restricted to the expected net present value of future cash flows generated by that investment, but could also include the value of strategic options. A market economy operator could make a loss-making investment in the short term, even with a zero or negative net present value, if it had a strategic value and provided the undertaking with an option to undertake more profitable investments in the longer-run, which would compensate for the initial losses. Thus, a loss-making advertising campaign could be a strategic investment in that it increases the value of the brand and so increases the company's long-term profitability.

299 In that regard, first, the Commission did not make a manifest error of assessment in considering that a market economy operator finding itself in the situation of operator of Pau airport would not have counted on a renewal of the agreements at issue and would not have therefore agreed to incur losses during the planned duration of the agreements on the ground that it would obtain compensation for this by future benefits (see paragraphs 365 to 380 below).

300 Secondly, it should be noted that, as stated by the Commission, the applicants do not demonstrate that the economic and financial literature which relates to the electricity sector and to capital investment projects would be relevant for assessing the conduct of the operator of Pau airport when it opens a new air route. In any case, with regard to the development of the value of the brand in the long term by the establishment of a marketing programme, it is sufficient to refer to paragraphs 289 and 290 above.

301 Consequently, the Court must reject the applicants' argument and reject the complaint in its entirety.

(b) The dismissal of the rationale underlying the decision of the operator of Pau airport to conclude the marketing services agreement

302 The applicants submit that the Commission's assertion in recital 379 of the contested decision that an operator motivated by the prospect of profits would not be prepared to conclude the marketing services agreement if it were predicted that the incremental costs incurred by the agreements at issue

would exceed the incremental revenues fails to reflect the commercial reality. Private companies often invest heavily in order to build their brands with full knowledge that they will suffer initial incremental losses. Their goal is not to achieve an immediate return on investment, but to achieve long-term benefits.

303 The applicants assert that the Commission failed to recognise the numerous qualitative and strategic benefits which the CCIPB could reasonably expect to achieve as a result of the marketing services agreements, which included enhancing the image of Pau airport and increasing its asset value, the diversification of airlines and an increase in the proportion of inbound traffic.

304 The applicants rely on the case-law requiring the Commission to take account, when assessing the measures at issue, of all the relevant features of the measures, the Commission's past decision-making practice relating to aid measures for airports, which took account of the qualitative and strategic objectives in addition to the cost benefit analysis, and paragraph 66 of the 2014 Guidelines. In the reply, the applicants add that the inclusion of the foreseeable benefits in the analysis would have led to the incremental costs not exceeding the incremental revenues in discounted value terms.

305 The Commission considers that the incremental profitability condition provided for in paragraph 63 of the 2014 Guidelines, according to which an agreement concluded between an airline and an airport can be deemed to be in line with the market economy operator test when it contributes progressively, from an *ex ante* standpoint, to the profitability of the airport, and the requirement to take into account the extent to which the agreement may be regarded as forming part of an overall strategy of the airport expected to lead to profitability at least in the long term, provided for in paragraph 66 of the same guidelines, are cumulative conditions. The Commission explains that, having found that all the agreements at issue failed to satisfy the incremental profitability condition, it was entitled to conclude that they all failed to satisfy the market economy operator test, without having to examine the other cumulative condition laid down in paragraph 66 of the 2014 Guidelines.

306 In this regard, it must be recalled at the outset that, according to the case-law, the classification of a measure as State aid cannot depend on a subjective assessment by the Commission, with the result that there is no need to examine whether the Commission's past decision-making practice invoked by the applicants is proven (see paragraphs 284 and 285 above).

307 It is appropriate to examine the applicants' complaint that the Commission wrongly disregarded the rationale underlying the decision of the operator of Pau airport to conclude the marketing services agreement, in the light of the market economy operator test, as is apparent from Article 107(1) TFEU.

308 It should be recalled that, in the context of applying the private investor test, the Commission must examine, when assessing a measure, all the relevant features of the measure and its context (see judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59 and the case-law cited).

309 In the present case, the Commission found, in recital 379 of the contested decision, that a hypothetical market economy operator motivated by the prospect of profits would not be prepared to purchase marketing services if it were predicted that, despite the positive effect of such services on passenger traffic on the air routes concerned, the incremental costs incurred by the agreements would exceed the incremental revenues in discounted value terms.

310 Without there being any need to rule on the Commission's argument that an agreement concluded between an airline and an airport resulting in an incremental loss in net present value cannot be deemed to be in line with the private market economy operator test on the ground that it forms part of an overall strategy of the airport expected to lead to profitability in the long term, it should be

noted, in any event, for the reasons set out below, that the applicants do not show, in the case at hand, that the Commission made a manifest error of assessment by failing to take into account the supposed qualitative and strategic advantages invoked by the applicants.

311 In the first place, the applicants argue, referring in particular to an economic report and certain submissions which the CCIPB made during the course of the administrative procedure, that the Commission ought to have taken account of the fact that, for the CCIPB, the goal of the marketing services agreements was to put Pau airport on the map, particularly for the public in countries at the other end of the routes operated by Ryanair, and to enhance the airport's reputation and appeal. Advertising is a necessity for regional airports. The CCIPB was able to reasonably expect that the image of the airport and, ultimately, its market value for its owners would be enhanced.

312 In that regard, it should be noted at the outset that, in the contested decision, the Commission did not dispute the usefulness or the necessity for regional airports to develop a marketing strategy.

313 On the other hand, the Commission considered, in the contested decision, that AMS's marketing services were not likely to enhance the image of Pau airport in the long term. The applicants have not adduced any evidence showing that the Commission's analysis was vitiated by a manifest error of assessment in this respect (see paragraphs 260 to 268, 289 and 290 above).

314 Furthermore, it is apparent from the file that, as the Commission has explained, the passages from the economic report on which the applicants rely do not specify which type of AMS's publicity could result in long-lasting effects or specifically indicate whether AMS's marketing services bought by the operator of Pau airport were likely to influence the conduct of customers and improve the image of that airport sustainably beyond the time span of the marketing services agreements or on routes other than those operated by Ryanair from Pau airport. In addition, as the Commission explains, the passages from the report in question do not take into consideration the exact scope of those agreements, unlike the contested decision.

315 Accordingly, the Court rejects the applicants' argument that the Commission made a manifest error of assessment concerning the taking into account of the desire to improve the image and, therefore, the market value of Pau airport thanks to the marketing services agreements.

316 In the second place, the applicants allege that the CCIPB could expect that the marketing services agreements would increase the diversification of airlines at Pau airport. Relying on an economic report, they explain that demonstrated success by an airport which has engaged in advertising to promote itself could encourage additional airlines to include that airport on their schedules. The applicants note that although, at the beginning of Ryanair's operations at Pau, the airport was served mainly by Air France and therefore depended heavily on that airline, that role was gradually eroded by fast train links. For Pau airport, it would be commercially rational to allocate the unused capacity to an airline that would help it become less dependent on the Air France Group.

317 However, it must be held that the applicants have failed to establish that the marketing services provided by AMS would have allowed a market economy operator acting in the place of the CCIPB to attract other airlines at Pau airport. The Commission found inter alia in recitals 337 to 358 of the contested decision that the only certain benefit which such an operator could expect to achieve as a result of the marketing services agreements consisted in the increase in passenger numbers on the routes operated by Ryanair. By contrast, it considered that any benefit going beyond those routes was too uncertain to be taken into account in a quantifiable manner. The applicants have adduced no evidence to call into question that assessment of the Commission.

318 Furthermore, as the Commission rightly states, although the desire to attract other airlines in order to fill the unused capacity of an airport may constitute a cost-efficient strategy, a market economy operator in the circumstances of the present case would require at the very least that the arrival of a new airline does not generate incremental costs in excess of incremental revenues.

319 In response to the claim made by the applicants in the reply that Ryanair's extensive international network compensated for the lack of recognition of Pau airport abroad, the Commission plausibly explained that travellers from all over the world were able to get there using Air France, passing through Paris (France), and that Ryanair was an airline which provided only 'point-to-point' direct connections and which did not offer a connecting service with other destinations.

320 Accordingly, the applicants' complaint that the Commission made manifest errors of assessment concerning the benefit which the diversification of airlines constituted for Pau airport must be rejected.

321 In the third place, the applicants claim that the Commission did not rule on the question whether the marketing services agreements were intended to increase the proportion of passengers coming from the other end of routes to Pau (inbound passengers) in the total number of passengers that Ryanair had committed to bring to Pau airport. Increasing that proportion in the total number of Ryanair passengers at the airport is unrelated to increasing the total number of passengers. The first increase concerns the split between passengers originating in the catchment area of the airport (outbound passengers) and passengers originating at the other end of routes to Pau (inbound passengers), whereas the second increase concerns absolute numbers. The aim of enhancing the proportion of 'inbound passengers' is prominent in the very terms of those agreements. Consequently, given that 'inbound passengers' were likely to generate higher non-aeronautical revenue than 'outbound passengers', the Commission's incremental profitability analysis probably underestimated the level of non-aeronautical revenues that the airport in question could reasonably expect to achieve as a result of those agreements.

322 In that regard, the Commission explained that, rather than the proportion of 'inbound passengers' in the light of the total number of passengers, the objective had to have been the absolute number of 'inbound passengers', since that factor was relevant to the revenue obtained for both Ryanair and the CCIPB, through airport charges, which were partly based on the number of passengers, and through non-aeronautical revenues. Moreover, the Commission stated that, unlike the proportion of 'inbound passengers' in the light of the total number of passengers, the absolute number of 'inbound passengers' was not unrelated to increasing the total number of passengers, since the latter was the sum of 'inbound passengers' and 'outgoing passengers'. In addition, the Commission explained that the impact of the marketing services agreements on the absolute number of inbound passengers, as a subset of the total number of passengers, on the routes at issue had served as a basis to estimate revenue streams from airport charges and non-aeronautical revenues.

323 The applicants reply that Ryanair and the operators of Pau airport do not have the same interests, given that Ryanair takes care of the absolute number of passengers and benefits from the transport of 'inbound passengers' or 'outgoing passengers', whereas the airport has an interest in ensuring that the absolute number is made up of the highest possible number of inbound passengers. Therefore, the Commission's claim that the absolute number of 'inbound passengers' is related to the increase in the total number of passengers constitutes an erroneous generalisation.

324 In that regard, while assuming that the absolute number of passengers and the proportion of 'inbound passengers' are not necessarily in an invariable relationship, it must be noted that, as the Commission states, it carried out, in the contested decision, the analysis of the impact of the marketing services agreements on the expected incremental revenues for the purposes of applying the market economy operator test on the basis, for non-aeronautical revenues, of the three-year moving averages of

historical revenues of Pau airport, adjusted to take account of inflation and using a load factor of 85% per flight, which was favourable to the applicants (see recitals 401, 414 and 415 of the contested decision).

325 In those circumstances, it cannot reasonably be maintained that the Commission made a manifest error of assessment in carrying out an analysis on the basis of the total number of 'inbound passengers' without making an adjustment in the light of the ratio between 'inbound passengers' and 'outgoing passengers', particularly since the operator of Pau airport had not itself established an *ex ante* assessment of future non-aeronautical revenues expected to be generated by the marketing services agreements.

326 Consequently, it is necessary to reject the applicants' argument concerning the benefits linked to the increase in inbound traffic.

327 In view of the above, the Court must reject the applicants' argument regarding the dismissal of the rationale underlying the decision of Pau airport to conclude the marketing services agreement.

(c) The dismissal of the possibility that part of the marketing services may have been purchased for general interest purposes

328 The applicants argue that the Commission wrongly dismissed the possibility that the marketing services were, in part, purchased for general interest purposes. In that regard, they take issue with the Commission's position, expressed in recital 324 of the contested decision, that a public entity cannot take the view that the purchase of marketing services promoting the activities of specific undertakings forms part of the entity's own tasks of promoting local development, and thereby circumvents Article 107(1) TFEU. That position disregards the fact that marketing on Ryanair's website under the marketing services agreements was marketing to promote the Pau region, not to promote Ryanair's air transport services. Furthermore, the Commission's position introduces a blanket prohibition on the purchase by publicly owned entities of marketing services from companies that provide other services locally, regardless of the content of the marketing services and the application of a market price.

329 The Commission rejects the applicants' arguments.

330 It should be noted first of all that the Commission examined, in recitals 323 and 324 of the contested decision, the marketing services from the point of view of the operator of Pau airport acting as an entity entrusted with a mission of general interest. The Commission considered the question of whether, accepting that the conduct of the operator of Pau airport had to be assessed in the light of its role as a public entity entrusted with a mission of general interest, in this instance the development of Pau and its region, and not as the manager of an airport, the specific marketing services at issue could be seen as fulfilling effective needs of a public buyer (recitals 315, 316 and 322 of the contested decision).

331 In that context, the Commission considered, in recital 323 of the contested decision, that, although it could not be ruled out that, in fulfilling its economic development mission for the Pau region, the CCIPB may feel the need to resort to commercial providers in order to promote the area, AMS's marketing services did however concern a promotional activity targeting the commercial activities of two clearly defined undertakings, namely Ryanair and the operator of Pau airport. The Commission added, in recital 324 of the contested decision, that to enable an entity responsible for local economic development to purchase marketing services that mainly promote the products or services of certain locally established undertakings, on the ground that those services encouraged local economic development, without such measures constituting State aid, would circumvent Article 107(1) TFEU. In recital 325 of the contested decision, the Commission concluded from this that the marketing services purchased by the operator of Pau airport could not be regarded as meeting an actual need.

332 The applicants' criticism that the marketing services were intended to promote the region and not Ryanair's air transport services cannot be accepted. It is apparent from paragraphs 165 to 170 and from paragraphs 279 and 280 above that the Commission was entitled to find, without erring, that the various marketing services agreements were closely linked to the air transport services offered by Ryanair and that, far from being designed to generally and equally increase travel to Pau and its region by tourists and business travellers, the marketing services specifically targeted those persons likely to use Ryanair's air transport services, and had the primary objective of promoting those services (see, inter alia, recitals 292 to 305 of the contested decision).

333 That finding is not invalidated by the fact that the regional authorities had become aware, by reading a study of the CCIPB, of the economic benefits of the influx of visitors in their region and that one of their missions was the promotion of the region. In addition, the applicants have adduced no other evidence to call into question the Commission's finding.

334 Finally, the applicants' argument that the Commission's position expressed in recitals 323 and 324 of the contested decision imposed too broad a ban with regard to the purchase of marketing services by public authorities cannot be accepted. The problem identified by the Commission in those recitals concerned the fact that the marketing services purchased by a public entity could serve as an instrument targeting mainly the promotion of Ryanair flights to Pau airport. Contrary to what the applicants claim, the Commission did not therefore refer to purchases of marketing services from a company which provided other services locally, independently of the content of the marketing services.

335 Accordingly, the applicants' argument must be rejected.

(d) The assessment of the agreements concluded with AMS without having taken into consideration the viewpoint of a market economy operator owning the airport, separate from the viewpoint of a market economy operator operating the airport

336 The applicants argue that the Commission was wrong not to examine the CCIPB and the syndicat mixte as market economy operators having distinct yet interrelated interests, namely those of manager and those of owner of Pau airport respectively. In particular, the Commission omitted the syndicat mixte from its analysis of the marketing services agreements, even though the CCIPB was under an obligation to hand the airport back to the syndicat mixte along with its intellectual property, including its brand image, on the imminent expiry of its concession on 31 December 2015. It would have been reasonable for the syndicat mixte to attach even greater value to the airport's long-term brand image and value, while the CCIPB's interests were influenced by the imminent expiry of its concession, even though it was seeking to maximise the airport's value and, thus, to demonstrate its competence and be re-awarded the concession.

337 In this respect, it should be noted that it is necessary, when applying the private investor test, to envisage the commercial transaction as a whole. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context (see judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59 and the case-law cited), including those relating to the situation of the authority or authorities responsible for granting the measures at issue.

338 In the present case, even assuming that the obligation for the CCIPB to return the airport's property in perfect condition included Pau airport's brand image, it should be noted at the outset that the marketing services agreements were concluded only by the CCIPB, which is the operator of the airport, and not by the owner of the airport.

339 Furthermore, it is apparent from the contested decision that the marketing services agreements were not likely to have sustainable effects on Pau airport's brand image and visibility beyond their duration (see recitals 345 to 353 of the contested decision) and that none of those agreements remained in effect beyond 1 April 2011. In those circumstances, as the Commission rightly points out, those agreements were not likely to have a direct impact on the situation of the syndicat mixte, which was not to retake possession of the airport before 31 December 2015.

340 It follows that the Commission was entitled, without making a manifest error of assessment, to apply the operator in a market economy test to the airport services agreements without ruling on the interest of the syndicat mixte in obtaining the return of Pau airport on 31 December 2015, that is more than four years after the expiry of the marketing services agreements.

…

(f) The application of too short a time horizon adopted by the Commission for the purposes of the market economy operator analysis

365 The applicants argue that, by restricting its analysis to the duration of each of the agreements under investigation, the Commission chose too short a time horizon when applying the market economy operator test.

366 In that regard, in the first place, the applicants maintain that the Commission's approach is at odds with the commercial reality of larger airports, which often do not receive any commitments from airlines and operate on the basis of standard terms and conditions that allow those airlines to discontinue their activities at an airport immediately. The business plans of airports are established over several decades and their revenue and cost projections are based on a reasonable analysis of the airport's capacity, without any contractual commitment on the part of airlines. Short-term business plans fixated on the duration of each individual agreement, as proposed by the Commission, are likely to lead to negative results.

367 In the second place, the applicants argue that the Commission was wrong to consider that a market economy operator would not have counted on the renewal of the agreements at issue upon their expiry or have been unaware that low-cost airlines like Ryanair were known to be very dynamic in the way they conduct their business. Rationally managed airports aspire to enter into a long-term commercial relationship with airlines going well beyond the duration of the initial agreement. Market economy operators are willing to take risks and to conclude contracts that may be loss-making for an initial period, in the expectation that the business will be successful and that the contract will be renewed. For Ryanair, the commitment to open a new air route constitutes only a justified risk in the expectation of a long-term commercial relationship, which is confirmed by the specific clauses in the airport services agreement. Moreover, most airports negotiating with Ryanair expect their commercial relationship to extend beyond the duration of the initial agreement. Accordingly, on the whole, commercial relationships between Ryanair and airports develop over the long term and last longer than five years. Furthermore, since the applicants and the CCIPB concluded a series of airport services agreements and marketing services agreements, the first signed in 2003 and the last in 2010, a market economy operator would have assumed, by 2005 at the latest, that long-term business cooperation was being forged, going beyond the initial duration of the agreements in question.

368 The Commission contends that the Court should reject the applicants' line of argument.

369 It is apparent from the case-law (see paragraph 140 above) that it is necessary to examine whether the Commission was entitled to find, without erring, that a market economy operator acting in the place of the CCIPB would have assessed the value in signing each of the agreements under investigation by choosing a time horizon limited to the duration of the agreements at issue.

370 The conduct of a market economy operator is guided by prospects of profitability in the longer term (judgment of 21 March 1991, *Italy* v *Commission*, C-305/89, EU:C:1991:142, paragraph 20). Such an operator wishing to maximise profits is prepared to take calculated risks in determining the appropriate return to be expected for its investment.

371 In the present case, the Commission found in the contested decision that, when assessing the value in entering into an airport services agreement or a marketing services agreement, a market economy operator would have chosen the term of the agreements in question as the time horizon for its assessment (recital 393 of the contested decision). The Commission also found that a market economy operator would not have relied on those agreements being renewed on their expiry, whether under the same terms or under different terms, particularly as low-cost airlines such as Ryanair are known to be very dynamic in terms of launching and withdrawing routes, or even increasing and reducing frequencies. The Commission took the view that any renewal of the agreements was therefore a distant future prospect that was too uncertain for a market economy operator to base reasonable economic decisions on that prospect (recitals 393 and 394 of the contested decision).

372 Furthermore, it is common ground that the airport services agreements and marketing services agreements were concluded for fixed periods. It is also common ground, as the Commission states without being contradicted by the applicants, that, at the time of concluding each of the agreements at issue with the applicants, the CCIPB had not drawn up any business plan and had not carried out any incremental profitability analysis evaluating the commitments made by Pau airport towards the applicants.

373 In that context, the Commission was entitled to find, and did not err in so doing, that a market economy operator would have assessed the profitability of the agreements in the light of the expected costs and revenue for their period of application.

374 Likewise, the Commission was entitled to find, without committing a manifest error of assessment, that it was 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 had committed itself in the airport services agreement, in the knowledge that airlines, in particular low-fare ones, have proven to be very dynamic in terms of launching and withdrawing routes (see recitals 355 and 394 of the contested decision). In those circumstances, the Commission was entitled to find, without committing an error, that a normally prudent and diligent market economy operator, acting in the place of the CCIPB, would not have counted on Ryanair's willingness to extend the operation of the air route in question on expiry of the agreement.

375 The fact that the 2003 agreement and the 2005 MSA were concluded with the possibility of extensions for additional periods of five years does not in itself suggest, contrary to what the applicants claim, that a market economy operator would have already counted on the renewal of the air routes in question at the time of the conclusion of the agreements. Furthermore, it must be noted that, as the Commission states without being contradicted by the applicants, Ryanair could abandon the planned air route with relative ease before the end of the agreement, upon payment of penalties.

376 Indeed, a normally prudent and diligent market economy operator may be willing to take a commercial risk by concluding an agreement which is loss-making throughout the planned duration, in the real prospect of renewing the agreement and, thus, of future profits to offset those losses. That behaviour seeking long-term profitability may respond to economic rationality. However, it is clear from the foregoing that the Commission was entitled to find, without making a manifest error of assessment, that such an operator would not, in the case at hand, have counted on the renewal of the agreement at its end. In addition, it must be borne in mind that the applicants have failed to demonstrate that the Commission committed a manifest error of assessment in finding that a market economy operator acting in the place of the CCIPB would have taken the view that, except for the possible positive effect of the marketing services on the number of passengers using the routes covered by the agreements in

question for the operating period of those routes, any other benefits in the longer term were too uncertain to be taken into account in a quantifiable manner (see paragraphs 260 to 270, 276 and 290 above).

377 As regards the fact that the applicants and the CCIPB concluded a series of agreements and amendments between 2003 and 2010, it is necessary to stress that they were all concluded for a fixed period, in particular when they related to the launching of new air routes. In those circumstances, the Commission was entitled to find, without committing a manifest error of assessment, that a market economy operator acting in the place of the CCIPB would not have counted on Ryanair's willingness to extend the operation of a route on expiry of the agreement or the amendment at issue.

378 Lastly, the evidence adduced by Ryanair to show that the average duration of the trade links between it and the airports at which it was active exceeded five years does not make it possible to establish the duration of the air routes from or to Pau airport. Indeed, as the Commission rightly explains, the total duration of the commercial links between Ryanair and those airports does not guarantee the durability of other individual routes. In addition, the conduct of a market economy operator must be assessed by placing it in a situation as close as possible to that of the operator of Pau airport. As the Commission rightly observes, the maintaining of Ryanair operations at an airport depends on the specific situation of the airport in question and the specific conditions offered.

379 Similarly, the evidence produced by Ryanair concerning the average duration of its trade relations with the airports where it is present does not invalidate the finding made by the Commission that low-cost airlines are known to be very dynamic both in terms of launching and withdrawing air routes and in terms of increasing and reducing frequencies. That evidence makes it possible, at most, to establish the durability of certain individual routes.

380 Accordingly, it is necessary to reject the applicants' argument criticising the Commission for having limited its time projection to the duration of the agreements for the purposes of its incremental profitability analysis.

(g) The fact that the Commission wrongly based its assessment on the air routes covered by the agreements at issue

381 The applicants argue that the Commission wrongly based its assessment solely on the routes covered by the agreements at issue.

382 In that regard, they maintain that Ryanair actually increased the number of routes in 2003 up to three routes in 2008, in accordance with the reasonable expectations that a market economy operator might have had during previous years. That prospect is also reflected in the commitment made by Ryanair in the 2003 agreement and in the 2005 MSA to develop additional routes and frequencies. Moreover, the development of Ryanair's operations at Pau was consistent with the general development of its operations at other French airports. A market economy operator would therefore have considered that there was a strong likelihood that the number and frequency of Ryanair routes would increase by the end of the first five years.

383 The Commission contends that the Court should reject the applicants' line of argument.

384 It is apparent from the case-law (see paragraph 140 above) that it is necessary to examine whether the Commission was entitled to find, without committing an error, in the analysis of incremental profitability that a market economy operator acting in the place of the operator of Pau airport would have assessed the value in entering into the agreements at issue by taking into account only the routes covered by those agreements.

385 It should be noted at the outset that it is common ground that the Commission based its own incremental profitability analysis on the routes covered by the agreements and the amendments at issue.

386 In this respect, it should be observed that, without being contradicted by the applicants, the Commission indicated that, although certain agreements mentioned routes other than those covered by the agreements at issue, those provisions were always embedded in a best endeavours formulation.

387 Moreover, the Commission explained, without being contradicted by the applicants, that the launching of new air routes was always linked to the conclusion of new contracts and, for the CCIPB, to new higher payments in consideration for the marketing services, and could not translate into an expectation, for a market economy operator, that Pau airport's profitability would be improved.

388 In addition, it should be borne in mind that the evidence adduced by Ryanair showing that the substantial number of airports that it served in France made it possible to ensure several air routes cannot be decisive, given that the conduct of a market economy operator must be assessed by placing that operator in a position as close as possible to that of the operator of Pau airport.

389 As regards the applicants' argument that the Commission did not take account of the positive effect of economies of scale, which result from the increase in the number of passengers, on Pau airport's incremental costs and non-aeronautical revenues, it must be observed that, without being contradicted by the applicants, the Commission stated that the French authorities did not mention economies of scale or attempt to quantify them, that no business plan had been drawn up by Pau airport prior to the conclusion of the agreements and that the economies of scale made by that airport originated mainly from the operation of Air France. The evidence provided by the applicants in relation to the improved economies of scale on the basis of the increase in the number of passengers and the size of the airports does not call into question the explanations provided by the Commission. Moreover, as the Commission rightly states, the mere fact that the conclusion of an agreement might increase the number of passengers at an airport is not of itself sufficient for a market economy operator to accept such a conclusion regardless of the conditions attached.

390 In the light of the foregoing, the Commission was entitled to consider, without committing a manifest error of assessment, that a prudent market economy operator in the situation of the CCIPB would not have based its assessment of profitability on the prospect of any other additional route.

(h) The fact that the Commission was wrong to disregard the wider benefits derived by Pau airport from its relations with Ryanair

391 The applicants submit that the Commission incorrectly failed to take account, in its incremental profitability analysis, of the positive network effects that a market economy operator could expect from Ryanair's operations at Pau airport and the longer-term effects of AMS's marketing services. According to the applicants, an increase in passenger numbers at Pau airport due to Ryanair's presence improves the appeal of that airport and opens up possibilities of launching new routes and of other airlines and commercial outlets arriving.

392 In this respect, it should be noted that, as the Commission states, the concept of network externalities, as invoked by the applicants, is linked to the prospect of a larger number of passengers.

393 It follows from the foregoing that the Commission was entitled to take the view, without committing any error, that a prudent market economy operator acting in the place of the CCIPB would not rely on the commercial relationship with Ryanair extending beyond the operation of the air routes covered by the agreements at issue. Consequently, it must be accepted that a normally prudent and diligent

operator acting as airport operator would not have made its calculations of the revenues and costs on the basis of a larger number of passengers arising from an increased frequency of existing air routes or the setting up of additional routes by Ryanair.

394 Similarly, a rational market economy operator would not count on the arrival of other airlines or commercial outlets within the airport concerned beyond the duration of the agreements and amendments concluded with Ryanair.

395 In those circumstances, the Commission did not commit a manifest error of assessment by not taking into account too uncertain network effects.

396 The third plea in law must therefore be rejected.

D. The fourth plea, alleging infringement of Article 107(1) TFEU, in that the Commission failed to establish that the condition of selectivity was fulfilled

397 The applicants refer to the judgment of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758) and argue that the Commission has not established that they received a selective advantage because not all contractual measures are necessarily selective. In particular, the Commission did not verify whether the same advantages were offered to other existing or potential users of Pau airport.

398 In that regard, it must be recalled that Article 107(1) TFEU prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid (judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 54).

399 It must also be borne in mind that the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings. It falls to the Commission to show, in particular, that the measure at issue creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others (judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 59, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 48).

400 It must, however, be observed that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (see, to that effect, judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49).

401 In the present case, the agreements at issue, as analysed in the contested decision, must be considered as involving individual aid.

402 Indeed, the Commission found, in recital 432 of the contested decision, that the advantage conferred on the applicants was selective since it resulted from contractual provisions specific to Ryanair or AMS.

403 That finding must be approved. The airport services agreements and the corresponding marketing services agreements, which must be examined as a single measure (see paragraphs 165 to 174 above and, in particular, paragraph 172), include terms that were individually agreed between the parties. They specify, first, the routes to be operated by Ryanair and the airport services that the CCIPB is required to provide to Ryanair and, secondly, the marketing services that AMS undertook to provide to Pau airport. They lay down in detail the airport charges and remuneration for the marketing services that the applicants and the CCIPB will pay. In particular, it is apparent from the contested decision that remuneration for the marketing services, as negotiated between the CCIPB and the applicants, represented a substantial part of the incremental costs and therefore an important element contributing to the foreseeable negative incremental flow (revenues less costs) which represents the advantage in favour of the applicants (see recitals 416 and 417 and Tables 7 to 11 of the contested decision). Although regulated airport charges are in principle applicable to all airlines using Pau airport, remuneration for the marketing services was specific to the relationship between the CCIPB and the applicants.

404 In those circumstances, since the agreements at issue contain conditions specifically agreed between Pau airport and the applicants and result in an advantage for the latter, they therefore have a selective character.

405 It is therefore not necessary to establish whether the agreements in question provide advantages to the applicants in relation to other operators which are in a comparable legal and factual situation (see, to that effect, judgment of 26 February 2015, *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 52).

406 The test requiring a comparison of the beneficiary with other operators in a comparable factual and legal situation in the light of the aim pursued by the measure in question is based on, and justified by, the assessment of whether measures of potentially general application are selective. That test is therefore irrelevant where, as in the present case, it would amount to assessing the selective nature of an ad hoc measure which concerns just one undertaking and is intended to modify certain competitive constraints which are specific to the undertaking (judgments of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraphs 53 and 54, and of 26 February 2015, *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 53).

407 As regards the judgment of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758), it should be pointed out that it is not relevant in the present case, since it concerned a measure applying to a set of economic operators the selectivity of which had to be examined within the context of the specific legal regime in order to assess whether, in such a context, that measure constituted an advantage for certain undertakings over others which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 53 and 54), which is not so in the present case, particularly in the light of the remuneration for the marketing services specifically agreed upon between Pau airport and the applicants on the basis of AMS's rate card.

408 The fourth plea must therefore be dismissed, as must the action in its entirety.

409 The action must therefore be dismissed in its entirety and it is not necessary to rule on the applicants' application for measures of organisation in so far as it concerns measures other than those already ordered.

IV. Costs

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

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Ryanair DAC and Airport Marketing Services Ltd to bear their own costs and to pay those incurred by the European Commission.**

Berardis Papasavvas Spielmann

Csehi Spineanu-Matei

Delivered in open court in Luxembourg on 13 December 2018.

E. Coulon
Registrar

President