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

13 December 2018 (*)(1)

(State aid — Agreements concluded with the airline Ryanair and its subsidiary Airport Marketing Services — Airport services — Marketing services — Decision declaring the aid to be incompatible with the internal market and ordering its recovery — Notion of State aid — Advantage — Private investor test — Recovery — Article 41 of the Charter of Fundamental Rights of the European Union — Access to the file — Right to be heard)

In Case T-165/16,

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, L. Armati, and S. Noë, acting as Agents,

defendant,

supported by

Council of the European Union, represented by S. Boelaert and S. Petrova, acting as Agents,

intervener,

ACTION under Article 263 TFEU for the partial annulment of Commission Decision (EU) 2016/287 of 15 October 2014 on State aid SA.26500 — 2012/C (ex 2011/NN, ex CP 227/2008) implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd (OJ 2016 L 59, p. 22),

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 4 July 2018,

gives the following

Judgment

Background to the dispute

Measures at issue

1 The first applicant, Ryanair DAC, formerly Ryanair Ltd ('Ryanair'), is an airline established in Ireland which operates more than 1 800 flights daily connecting 200 destinations in 31 countries across Europe and North Africa. The second applicant, Airport Marketing Services Ltd ('AMS'), is a subsidiary of Ryanair which provides marketing strategy solutions. Its activity consists primarily of selling advertising space on Ryanair's website.

2 Altenburg-Nobitz airport is located in the south of Land Thüringen, Germany. That airport is owned and operated by the company Flugplatz Altenburg-Nobitz GmbH ('AOC'), whose shareholders are public authorities or fully publicly owned.

3 Ryanair operated daily flights from that airport to London Stansted (United Kingdom) between 2003 and 2011. It also began operating a route to Barcelona-Girona airport (Spain) in 2007. Similarly, it launched a route to Edinburgh airport (United Kingdom) in 2009 and one to Alicante airport (Spain) in 2010.

4 On 3 March 2003, AOC and Ryanair signed an airport services agreement for a duration of 10 years under which Ryanair undertook to operate daily scheduled flights to London Stansted airport. Ryanair was required to pay a fee for the provision of airport services, in accordance with Altenburg-Nobitz airport's schedule of airport charges in force at the time of their performance, as well as a sum comprising passenger security charges and State taxes. The applicants maintained that the airport services agreement served as a basis for an expansion of the parties' cooperation to four routes (to London, Girona, Edinburgh and Alicante).

5 Furthermore, AOC concluded three marketing services agreements, the first with Ryanair and the other two with AMS.

6 Under the first marketing services agreement, signed on 7 April 2003 for a duration of 10 years, Ryanair was required to carry out marketing activities to promote the area of Altenburg-Nobitz. AOC was required in return to pay two charges. First, it paid a 'success fee' per departing passenger, resulting in a net charge to be paid by Ryanair per passenger in respect of landing, local air traffic control, lighting, parking (not including overnight parking), ramp and passenger handling, infrastructure and airport taxes per passenger. AOC calculated the net charge per passenger according to the passenger load sheets and presented the calculation to Ryanair at the end of each week. Ryanair calculated the success fee and presented the calculation to AOC within 30 days of the end of each month. The calculation was based upon the services of the preceding calendar month. Ryanair could deduct its success fee from AOC's monthly bills for landing fees. Second, AOC paid a 'success fee', based on a certain percentage of any increase in fees at the airport, consisting in: 100% of any increase in the security tax levied by the government up to a maximum of 10% over the existing published rate in a five-year period, and 100% of any increase in published fees or additional fees, charges or taxes introduced in the published charges of the airport up to a maximum of 10% of the existing total published fee paid by Ryanair, in a five-year period.

7 Under the second marketing services agreement, signed on 28 August 2008 for an initial duration of two years, AMS was required to provide marketing services consisting of advertisements on Ryanair's website, against payment by AOC of [*confidential*] (2) in 2008 and [*confidential*] in 2009. The agreement was linked to Ryanair's commitment to operate a route

between Altenburg-Nobitz airport and London Stansted airport in the summer (daily) and in the winter (four times a week) and a route to Girona (three times a week only in the summer).

8 Under the third marketing services agreement, signed on 25 January 2010 for an initial duration of one year, AMS again undertook to provide marketing services consisting in advertisements on Ryanair's website, against payment by AOC of [*confidential*]. The agreement was related to Ryanair's commitment to offer — as from summer 2010 and for the IATA summer season only starting on 28 March 2010 and ending on 30 October 2010 — routes between Altenburg-Nobitz airport and London Stansted airport (seven times a week), Girona airport (three times a week) and Alicante airport (twice a week).

9 The Barcelona-Girona, Edinburgh and Alicante airport routes were all subsequently withdrawn, as was the London Stansted airport route, on 31 March 2011, with the result that, as of that date, Ryanair completely ceased to operate out of Altenburg-Nobitz airport.

Administrative procedure

10 On 27 August 2008, the European Commission received a complaint from the Bundesverband der deutschen Fluggesellschaften e.V. (Federal Association of German Airlines) alleging that AOC and Ryanair had received unlawful State aid. The Commission forwarded the complaint to the German authorities and asked them for information. The German authorities provided the information sought.

11 On 8 April 2011, the Commission requested additional information from Ryanair. Ryanair provided the information requested on 20 June 2011.

12 By letter of 25 January 2012, the Commission notified the German authorities of its decision to open the procedure laid down in Article 108(2) TFEU in respect of the aid granted to AOC, the application of reduced airport charges to airlines and the conclusion of the marketing services agreements with Ryanair ('the opening decision'). In the publication of that decision in the *Official Journal of the European Union* on 25 May 2012 (OJ 2012 C 149, p. 5), the Commission called on the interested parties to submit their comments on those measures.

13 The German authorities provided their comments on the opening decision as well as replies to the requests for information subsequently sent by the Commission.

14 By letters of 29 May and 20 July 2012, Ryanair's legal counsel requested, in accordance with Article 41(1) and (2) of the Charter of Fundamental Rights of the European Union ('the Charter'), that the Commission inform Ryanair, before adopting a final decision, of those facts and considerations on which it intended to base its decision, grant it access to the file, particularly to the evidence on which the Commission based its decision, and afford it an opportunity to present its views, within a reasonable period of time after notification of the abovementioned facts and considerations. By letters of 19 June and 4 October 2012, the Commission refused that request.

15 By letters of 25 June 2012, the applicants submitted their comments on the opening decision.By several subsequent letters, Ryanair sent further comments. The Commission forwarded those comments to the German authorities.

16 By letters to the German authorities and third parties on 24 and 25 February 2014, the Commission informed them of the adoption on 20 February 2014 of the new Guidelines on State aid to airports and airlines (OJ 2014 C 99, p. 3; 'the 2014 Guidelines') and of the fact that those

2014 Guidelines would become applicable to the relevant case from the date of their publication in the *Official Journal of the European Union*. In addition, on 15 April 2014, a notice was published in the *Official Journal of the European Union* (OJ 2014 C 113, p. 30) inviting the Member States and interested parties to submit comments in this regard. By letter of 2 May 2014, Ryanair submitted its comments on the 2014 Guidelines.

Contested decision

17 At the end of the formal investigation procedure, on 15 October 2014, the Commission adopted Decision (EU) 2016/287 on State aid SA.26500 — 2012/C (ex 2011/NN, ex CP 227/2008) implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd (OJ 2016 L 59, p. 22; 'the contested decision'). In that decision, the Commission set out a detailed description of the measures at issue, comprising, on the one hand, the award of subsidies to AOC for the financing of infrastructure investments and for the financing of operating losses (recitals 36 to 44 of the contested decision) and, on the other, airport charges and payments to Ryanair under the airport services agreement and marketing services agreements (recitals 45 to 64 of the contested decision).

18 The Commission took the view that the public subsidies at issue to finance infrastructure investments and operating losses at Altenburg-Nobitz airport, referred to in paragraph 17 above, constituted aid within the meaning of Article 107(1) TFEU, but found that such aid was nonetheless compatible with the internal market.

19 As regards the agreements concluded with Ryanair and AMS, the Commission considered that the conclusion on 3 March 2003 of the airport services agreement, in combination with that, on 7 April 2003 and 28 August 2008, of the marketing services agreements, did not constitute State aid granted to those undertakings within the meaning of Article 107(1) TFEU (recital 274 of the contested decision).

20 By contrast, the Commission found that the airport services agreement concluded on 3 March 2003, combined with the marketing agreements concluded on 7 April 2003 and 25 January 2010, constituted State aid to Ryanair/AMS, within the meaning of Article 107(1) TFEU (recital 275 of the contested decision).

21 In order to determine whether that combination of agreements conferred an economic advantage, the Commission examined whether an airport operating under normal market conditions and guided by prospects of profitability in the long term would have, in similar circumstances, entered into the same or similar commercial arrangements as those concluded by AOC (recital 228 of the contested decision).

22 In that regard, the Commission made clear that both types of agreement with Ryanair and AMS had to be considered together (paragraph 233 of the contested decision). Moreover, it considered that it was necessary to depart from the method consisting of making a comparison with the 'market price' ('the comparative analysis') and to confine itself to an *ex ante* incremental profitability analysis ('the incremental profitability analysis') (see recitals 228 and 235 of the contested decision). In the present case, it found that the marketing services agreement of 25 January 2010, in conjunction with the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003, was not profitable for Altenburg-Nobitz airport from an *ex ante* perspective (recital 265 of the contested decision). The Commission concluded that the conditions offered to Ryanair/AMS under those three agreements were not market compliant and that their combination conferred a selective economic advantage on the applicants (recital 268 of the contested decision).

23 The Commission took the view that Ryanair and AMS received unlawful aid in breach of Article 108(3) TFEU, which must be repaid (recitals 350 and 354 of the contested decision). It set the provisional amount to be recovered at EUR 318 569 (recital 356 of the contested decision and Table 20).

24 In so far as is relevant, the operative part of the contested decision reads as follows:

‘*Article 1*

...

4. The State aid unlawfully provided by [the Federal Republic of Germany] in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Ryanair/AMS by means of the combination of the airport services agreement concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair on 3 March 2003, the marketing services agreement concluded on 7 April 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing services agreement concluded on 25 January 2010 between Flugplatz Altenburg-Nobitz GmbH and AMS is incompatible with the internal market.

...

Article 2

1. [The Federal Republic of Germany] shall recover the incompatible aid referred to in Article 1(4) from the beneficiaries.

2. Taking into account that Ryanair and AMS constitute a single economic unit for the purpose of the present Decision, they shall be jointly liable to repay the State aid received by either, by virtue of the combined application of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010.

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

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

5. [The Federal Republic of Germany] shall cancel all outstanding payments of the aid referred to in Article 1(4) with effect from the date of adoption of this Decision.

...

Article 4

1. Within two months following notification of this Decision, [the Federal Republic of Germany] shall submit the following information:

(a) the total amount (principal and interest) of aid received by the beneficiaries;

(b) the total amount (principal and interest) to be recovered from the beneficiaries in accordance with Article 2;

(c) a detailed description of the measures already taken or planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. [The Federal Republic of Germany] shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already repaid by the beneficiaries.'

Procedure and forms of order sought

25 By application lodged at the Court Registry on 18 April 2016, the applicants brought the present action.

26 By separate document lodged at the Court Registry on 30 May 2016, the applicants applied for the adoption of measures of organisation of procedure.

27 By document lodged on 20 June 2016, the Commission submitted its observations on that application within the prescribed period.

28 By document lodged on 22 June 2016, the Council of the European Union applied for leave to intervene in the present case in support of the form of order sought by the Commission. By decision of 6 September 2016, the President of the Sixth Chamber of the General Court granted that application.

29 By decision of 15 March 2018, the Court decided to refer the case to the Sixth Chamber, Extended Composition.

30 Acting upon a report of the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 88 of its Rules of Procedure, requested the parties to answer certain questions.

31 The parties presented oral argument at the hearing on 4 July 2018.

32 The applicants claim that the Court should:

– annul Article 1(4) and Articles 2 and 4 of the contested decision;

– order the Commission to pay the costs.

33 The Commission, supported by the Council, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

34 The applicants rely on four pleas in law in support of the action.

35 In reply to a written question of the Court, the applicants withdrew the fourth plea in law, alleging infringement of Article 107(1) and Article 108(2) TFEU, in that the Commission committed a manifest error in considering that the aid to the applicants was equal to the cumulated incremental losses instead of the benefit actually obtained by the applicants.

36 Accordingly, it is necessary to examine only the first three pleas in law, alleging, first, infringement of Article 41 of the Charter, of the principle of good administration and the rights of the defence, second, infringement of Article 107(1) TFEU, in that the Commission failed to establish that the condition linked to selectivity was fulfilled and, third, infringement of Article 107(1) TFEU, in that the Commission incorrectly concluded that the arrangements concluded between Altenburg-Nobitz airport and the applicants conferred an advantage on the latter.

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

37 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.

38 In particular, the applicants state that, since the entry into force of the TFEU 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).

39 In support of the present plea in law, 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 commercial agreements with AOC constitutes an ‘affair’ of the applicants within the meaning of paragraph 1 of that article. They consider that they enjoy the procedural rights laid down in paragraphs 1 and 2 of that article, which go beyond the rights conferred by Regulation No 659/1999. First, paragraph 2(b) of that article 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 in question. Second, the right to be heard, laid down in paragraph 2(a) of the article in question requires that the applicants should be put in a position to make their views known effectively, which would entail access to the Commission’s file and prior notification of the facts and considerations on which the Commission intends to base its final decision.

40 The Commission and the Council dispute that argument.

41 In that regard, in the first place, it should be noted that Article 41 of the Charter provides for the right of good administration. Pursuant to 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 and bodies of the European Union. In addition, under paragraph 2 of that article, that right includes (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.

42 The explanations relating to the Charter (OJ 2007 C 303, p. 17) state that Article 41 of the Charter is based on the existence of the European Union as subject to the rule of law, whose characteristics were developed in the case-law which enshrined inter alia 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.

43 In addition, according to the settled 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).

44 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).

45 In the second place, it must be recalled that, according to the 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).

46 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).

47 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, to that effect, judgments of 8 May 2008, *Ferriere Nord* v *Commission*, C-49/05 P, not published, EU:C:2008:259, paragraph 69, and of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraphs 59 and 60).

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

49 In this respect, it should be noted that the applicants are parties concerned within the meaning of Article 108(2) TFEU, with the result that they have a right to see the Commission's investigation into the relevant agreements with AOC 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 commercial agreements with Altenburg-Nobitz airport is likely to result in financial consequences for them in terms of the recovery of amounts received.

50 However, 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.

51 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) lists a set of rights to be observed by the European Union's administration, including the rights of the defence, which include the right to be heard and the right to have access to the file.

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

53 It has already been held that the Charter is not intended to alter the nature of the review of State aid established by the Treaty or to confer on third parties a right of scrutiny which Article 108 TFEU does 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.

54 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 that procedure (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).

55 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 (see, to that effect, 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).

56 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 therefore be rejected.

57 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 their procedural rights as parties concerned guaranteed by Article 108(2) TFEU.

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

59 In the first place, the applicants cannot 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 judgment 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 (see, to that effect, 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.

60 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. 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.

61 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).

62 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).

63 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.

64 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 opening decision cannot constitute in itself an infringement of their rights.

65 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 in the present case owing to the fact that the applicant was a complainant in that case, 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 45 above).

Likewise, although the applicants claim that the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376) is no longer relevant in the present case, in so far as it concerns State aid proceedings which were closed before the Charter became part of primary EU law, that argument cannot succeed since that judgment highlights the fact that the granting to recipients of aid of a right of access to the Commission's file would call into question the system for the review of State aid. Likewise, the fact that the judgment of 16 March 2016, *Frucona Košice* v *Commission* (T-103/14, EU:T:2016:152) concerns proceedings that were conducted before the entry into force of the Charter does not call into question its relevance, since that judgment is based on the limited role of the beneficiary of the aid which is intrinsic to the very nature of those rules and which was not amended by the Charter.

66 In the fifth place, in so far as it cannot be held that the Commission infringed 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.

67 It follows that the applicants' arguments mentioned in paragraphs 59 to 66 above must be rejected.

68 However, in so far as, in the context of the present plea, an infringement of rights of defence is invoked, it is necessary 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 47 above).

69 In that regard, first, 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 required 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 duty, the Court of Justice ruled that the publication of a notice in the Official Journal was an appropriate means of informing all the parties concerned that a formal investigation 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 this 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).

70 It should also be remembered that, according to settled 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 Guipúzcoaand Others* v *Commission*, T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraph 104).

71 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).

72 In the present case, it is not disputed that, following publication of the letter informing the Federal Republic of Germany of the opening decision, together with a summary of that decision calling on the parties concerned to submit their comments, the Commission received comments from the applicants. The applicants submitted their observations on that decision by letter of 25 June 2012. In addition, it is apparent from the file that the applicants lodged multiple observations and additional documents during the formal investigation procedure.

73 However, in the opening decision, the Commission explained sufficiently the reasons on which it had based its provisional conclusion that the introduction, by the agreements in question, of charges and payments for marketing services conferred aid within the meaning of Article 107(1) TFEU on the applicants and that that aid was incompatible with the internal market.

74 In the opening decision, the Commission first submitted general information concerning Altenburg-Nobitz airport and describes the airport services agreement of 3 March 2003 and the marketing services agreements of 7 April 2003 and 25 January 2010. The Commission then carried out a provisional assessment of the potential aid granted to the applicants by virtue of those agreements 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.It invited the German authorities to submit information to it concerning the profitability of Altenburg-Nobitz airport, including all the operating costs linked to or attributable to the accommodation of Ryanair and the financial flows between AOC and the applicants in the context of the agreements in question.

75 It is apparent from the observations and documents submitted by the applicants in response to the opening decision and during the formal procedure that, in particular, they expressed their point of view on carrying out a comparative analysis with other airports and the types of costs to be taken into account in a profitability analysis.

76 Moreover, it is common ground that, further to the Commission's letter of 24 February 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.

77 As regards their mere right to be involved in the administrative procedure to an appropriate extent, 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.

78 It follows that, during the formal investigation procedure which led to the adoption of the contested decision, the Commission did not infringe the applicants' procedural rights.

79 In the light of the foregoing, the first plea in law must be rejected in its entirety.

The second plea in law, alleging infringement of Article 107(1) TFEU on the ground that the Commission failed to establish that the condition of selectivity was fulfilled

80 The applicants argue that the Commission failed to establish that they had obtained any selective advantage. In the first place, the applicants claim that the Commission's finding that the airports services and marketing services agreements were concluded solely with the applicants and, accordingly, constituted selective measures, is contradicted by the Court's reasoning in its judgment

of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758). Although that reasoning concerned a general regulation on airport charges, it also applies to individual measures such as contracts. In the second place, the failure to conclude a marketing services agreement with airlines operating previously at Altenburg-Nobitz airport is explained by their inability to offer the airport marketing services on a website of comparable value and by their lack of interest in investing in the promotion of the airport as a destination. In the third place, the Commission confused the conditions relating to selectivity and to the existence of an advantage. The Commission should have verified whether the same alleged advantages were unavailable to other existing or potential users of Altenburg-Nobitz airport.

81 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).

82 It must also be borne in mind that, according to the case-law, 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 was also required to establish that that advantage specifically benefited one or more undertakings. It falls to the Commission to show that the measure, in particular, 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).

83 According to the case-law, a distinction must be made according to 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).

84 Contrary to what the applicants claim, that case-law, although it concerns different circumstance and measures from those at issue, is relevant in the present case, since it specifies that the requirement of selectivity plays a role which differs depending on whether the measure in question is envisaged as individual aid or as a general scheme of aid.

85 In the present case, the combination of the airport services agreement concluded on 3 March 2003 and the marketing services agreements concluded on 7 April 2003 and 25 January 2010, between AOC and the applicants and analysed in the contested decision, must be envisaged as involving individual aid.

86 First, the Commission found in recital 269 of the contested decision that the airport services agreement and the marketing services agreements were concluded solely with Ryanair and AMS. Second, it stated, in recital 270 of the contested decision, that, although, in the period from 2000 to 2002, other airlines (Eurowings and Air Berlin) also operated flights from Altenburg-Nobitz airport, they did not benefit from such marketing services agreements. Third, the

Commission considered, in recital 270 of the contested decision, that, although the German authorities declared that the provisions of the airport services agreement had been drawn up in accordance with the schedule of airport charges in force at the time and applicable to all potential airlines, the combination of that specific airport services agreement with the subsequent marketing services agreements provided an advantage to Ryanair. The Commission concluded that those agreements constituted selective measures for the purposes of Article 107(1) TFEU.

87 That analysis must be upheld. The agreements in question include terms which were individually agreed by the parties. They specify or establish, first, the routes to be operated by Ryanair and the airport services that AOC is required to provide to that airline and, second, the marketing services that Ryanair and AMS undertake to provide to Altenburg-Nobitz airport. They set out in detail the airport charges and remuneration for marketing services in terms of a 'success fee' and specific amounts that the applicants and AOC are to pay. In particular, it is apparent from the contested decision that remuneration for the marketing services, as negotiated between AOC and the applicants, represented a substantial part of the incremental costs and the element contributing to the foreseeable negative incremental flow (revenues less costs) which represents the advantage in favour of the applicants (see recitals 261, 265 and Table 19 of the contested decision). Although the charges for airport services are, in principle, in accordance with the schedule of airport charges at Altenburg-Nobitz airport in effect on the day of their performance, applicable to all airlines using the airport, it must be held that the remuneration for marketing services was specific to the relationship between AOC and the applicants.

88 Moreover, the applicants' claim that other airlines operating at the airport previously were not able to offer marketing services comparable to those of the applicants and did not demonstrate any interest in getting involved in that regard can only confirm the individual nature of AOC's measure with regard to the applicants.

89 In those circumstances, since the agreements in question contain conditions specifically agreed between Altenburg-Nobitz airport and the applicants and result in an advantage for the latter, they therefore have a selective character.

90 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).

91 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 (judgment of 26 February 2015, *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 53; see also, to that effect, judgment of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraphs 53 and 54).

92 Consequently, contrary to what the applicants claim, the Commission was not obliged to examine whether other airlines wishing to operate flights to Altenburg-Nobitz airport could have concluded similar or identical agreements to those concluded by the applicants.

93 Likewise, as regards the judgment of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758), it must be noted that it is irrelevant in the present case, given that it concerns a measure applying to a set of economic operators. In such a case, selectivity must be examined within the context of the specific legal regime in order to assess whether that measure constitutes 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 Altenburg-Nobitz airport and the applicants on the basis, among other factors, of AMS's rate card.

94 Accordingly, the second plea in law must be rejected.

Third plea in law, alleging infringement of Article 107(1) TFEU as a result of the Commission's failure to establish the existence of an advantage

95 By the third plea in law, the applicants argue that the Commission failed to demonstrate the existence of an advantage and thus infringed Article 107(1) TFEU.

96 The third plea in law is divided into four parts. In the first place, according to the applicants, the Commission disregarded the fact that the comparative analysis was the primary method used to apply the market economy operator principle. In the second place, the Commission was wrong to refuse to apply the market economy operator comparative analysis. In the third place, it is apparent from the comparative analysis that no advantage was granted by means of the marketing services agreements and the airport services agreement. In the fourth place, the Commission committed manifest errors of assessment and failed to state reasons in its profitability analysis.

97 The Commission contests that plea in law.

98 At the outset, it must be noted that, according to the Court's settled case-law, 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).

99 The Court of Justice has nevertheless held that judicial review was limited with regard to whether a measure came within the scope of Article 107(1) TFEU, in a case where the appraisals by the Commission were 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).

100 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).

101 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).

102 In the contested decision, the Commission sets out, in the context of the application of the market economy operator test, the scenarios in which the existence of an advantage can normally be excluded:

– according to the comparative analysis, if the price charged for the airport services corresponds to the market price;

– or, according to the incremental profitability analysis, if it can be demonstrated through an *ex ante* analysis that the agreements with the airline incrementally contributed to the profitability of the airport and form part of an overall strategy leading to profitability in the long term (recital 228 of the contested decision).

103 The Commission considers in recital 235 of the contested decision an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of the agreements between AOC and Ryanair. Accordingly, it carried out, in recitals 258 to 266 of the contested decision, a joint profitability analysis of the airport services agreement of 3 March 2003 and the marketing services agreements of 7 April 2003 and 25 January 2010, instead of undertaking a comparative analysis.

First part, alleging that the Commission failed to have regard to the fact that the comparative analysis was the primary method for the purpose of applying the market economy operator principle

104 The applicants argue, in essence, 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), they submit that, as a general EU law principle, it was only in cases where a comparative analysis, in particular a 'private investor' comparator, was not available that the Commission could rely on an incremental profitability analysis.

105 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).

106 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 in question (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).

107 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. That method is merely one analytical tool amongst others to determine if the recipient undertaking receives an economic advantage which it would not have obtained under 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).

108 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 receives an economic advantage which it would not have obtained under 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).

109 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 any error, analyse, in recital 235 of the contested decision, what was, in the present case, the most appropriate assessment method to choose for the purposes of the application of the market economy operator test. Thus, having strong doubts, in the present case, as to whether an appropriate benchmark can be identified to establish the true market price for the services provided by Ryanair or AMS and, in any event, taking into account the difficulty of identifying comparator airports in the present case, the Commission was entitled to use the incremental profitability analysis while departing from the comparative analysis.

110 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, namely the impossibility of applying a comparative analysis and therefore the lack of choice between such analysis and other methods. Consequently, 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) 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.

111 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.

112 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.

113 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 confers 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 its counterpart in the agreement which it could not have obtained under normal market conditions.

114 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 cited in paragraph 106 above, 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.

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

The second part concerning the reasons relied on by the Commission in the contested decision for departure, in the present case, from the comparative analysis

116 The applicants dispute the specific reasons on which the Commission relied in recitals 232 to 235 of the contested decision to depart, in the present case, from the comparative analysis as an assessment method for the purposes of applying the market economy operator test.

117 In particular, they criticise the Commission for having wrongly rejected the two comparator studies of 20 June 2011 and 25 June 2012, which they produced during the administrative procedure, on the ground that, in order to be valid, a comparative analysis should have taken into account the marketing services agreements (first complaint) and should have included a sufficient number of comparator airports (second complaint).

– The complaint alleging that the Commission erred in considering that, in order to be valid, the comparative analysis should have taken into account the marketing services agreements with AMS

118 At the outset, it must be noted that the applicants rely on two comparator studies prepared by their economic consultant in the administrative procedure. The first study, dated 20 June 2011, includes a comparison of the charges paid by Ryanair to Altenburg-Nobitz airport with those it paid to Bournemouth airport (United Kingdom) as a comparator airport. That study concludes that the general level of charges paid by that airline to Altenburg-Nobitz airport is higher than the comparable charges paid by that airline to Bournemouth airport. The second study, dated 25 June 2012, compares the charges paid by Ryanair to Altenburg-Nobitz airport with those it paid to four additional comparator airports (Prestwick (United Kingdom), Grenoble (France), Knock (Belgium) and Maastricht (Netherlands)). That study concludes that the charges paid by that airline to Altenburg-Nobitz airport under the airport services agreement are within the range of charges paid by that airline in the comparator airports under the corresponding airport services agreements. Moreover, each of the studies indicates that the analysis carried out does not take into account the marketing services agreements of 7 April 2008 and 25 January 2010.

119 The applicants claim, in the first place, that the Commission was wrong to reject the comparator studies as not useful on the ground that they were limited to payments by Ryanair under the airport services agreement and did not take account of payments to Ryanair or AMS under the marketing services agreements. According to the applicants, the Commission was wrong to assess the airport services agreement and the marketing services agreements jointly. The applicants maintain that the price for the marketing services provided under those contracts reflects their independent market value, as is demonstrated by several economic reports and documents which they adduced during the administrative procedure. In any analysis applying the market economy operator test, that price was offset fully by that value, producing a net zero result. Therefore, the applicants were right to instruct their economic consultant to exclude the payments to AMS for marketing services and the corresponding value of those services from the comparator study. The fact that Ryanair and AMS belong to the same group of undertakings does not permit the Commission to treat payments under the marketing services agreements as a reduction in the airport charges provided for under the airport services agreement, in complete disregard of the value to the airport of the services purchased from AMS.

120 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).

121 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 and their context (judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59; see also, to that effect, judgment 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 270).

122 In the present case, it is apparent from recitals 232 and 233 of the contested decision that the Commission rejected the German authorities' argument that the marketing services agreements concluded with Ryanair and AMS had to be considered separately from the airport services agreement concluded between AOC and Ryanair. In that regard, the Commission pointed out, in recital 233 of the contested decision, that AMS was a wholly owned subsidiary of Ryanair, with the

result that both types of agreements with Ryanair and AMS had to be considered together. As regards possible separate consideration of the airport services agreement with Ryanair and the marketing services agreement of 7 April 2003, the Commission pointed out, in recital 233 of the contested decision that that marketing services agreement itself contained a provision under which the 'success fee' per outgoing passenger, which constituted remuneration for the marketing services provided by Ryanair, should be deducted from the calculation of the net charge to be paid by Ryanair. It added that the agreement itself opted for a net result of the airport services charges to be paid by Ryanair, on the one hand, and the marketing charges to be paid by the airport, on the other.

123 Furthermore, the Commission pointed out, in recital 234 of the contested decision, that, in order to determine whether the company concerned had paid the market price, it had to take into consideration the overall price paid by the airline. It notes that, during the years 2003 to 2011, during which it served Altenburg-Nobitz airport, Ryanair, in fact, paid airport charges to AOC and received payments for marketing services from the airport. AOC, for its part, charged Ryanair a fixed landing fee per aircraft and a passenger fee per passenger. The Commission specifies that those fees were, however, reduced by the marketing 'success fee', so in the end Ryanair only paid the airport a fixed fee per departing passenger of a certain amount. According to the Commission, Ryanair consequently received a discount from the official fees as set out in the schedule of charges of Altenburg-Nobitz airport.

124 It must be held that none of the arguments raised by the applicants can call into question the Commission's approach in the contested decision, consisting in treating the airport services agreement and the marketing services agreements jointly. The fact that AMS is a subsidiary of Ryanair is a relevant criterion that the Commission was entitled to take into consideration in order to deal with the airport services agreement together with the marketing services agreement of 25 January 2010. Moreover, the Commission relied on the fact, which the applicants do not dispute, that the marketing services agreement of 7 April 2003 provided for remuneration for marketing services which, throughout the years 2003 to 2011 was granted in the form of a 'success fee' — on the basis of the number of outgoing passengers taking Ryanair flights — and deducted from the charges provided for in the airport services agreement.

125 However, as regards the marketing services agreement of 25 January 2010 specifically, as the Commission explained before the Court and as indicated in recital 60 of the contested decision, that agreement, by which AMS agrees to provide marketing services to Altenburg-Nobitz airport, stipulates expressly that it rests on an undertaking by Ryanair to operate routes, from summer 2010, exclusively during the IATA summer season, between Altenburg-Nobitz airport and London Stansted, Girona and Alicante airports.

126 Moreover, it is apparent from recital 32(d) and recital 64 of the contested decision, as the Commission submitted at the hearing, that Ryanair ceased to operate any route to and from Altenburg-Nobitz airport when the public shareholders and airport management refused to pay the amount of EUR 420 000 required by Ryanair as marketing fees for the 2011 summer flight plan (see also, in that regard, paragraphs 192 to 194 below).

127 In those circumstances, the Commission was entitled without making any manifest error of assessment to consider that it was necessary to analyse the airport services agreement, which served as the basis for the operation of routes by Ryanair, and the marketing services agreements jointly.

128 Consequently, the applicants' argument that the Commission was wrong to reject the comparative analysis carried out by their economic consultant as ineffective must be rejected. That economic consultant's two studies merely compare the airport charges imposed by Altenburg-

Nobitz airport with the airport charges imposed by certain airports in Europe used for the purposes of comparison and state, moreover, expressly that the marketing services agreements of 28 August 2008 and 25 January 2010 were not taken into consideration in the analysis.

129 It is indeed significant that, as the Commission maintained, the applicants' economic consultant itself stated in its comparator study of 25 June 2012 that, if the marketing services agreements were relevant in the context of application of the market economy operator principle, it would need to review the analysis it made in the study.

130 Finally, the applicants' argument that the price paid under AMS's marketing services agreements corresponds to the value of those services must be rejected. That argument relies on the incorrect assumption that marketing services must be assessed separately from airport services and the operation of the routes in question (see paragraphs 122 to 129 above) and that, accordingly, the price to be paid for the marketing services, in terms of the 'success fee' or specified amount, cannot be deducted from the airport charges arising from routes operated by Ryanair.

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

132 Accordingly, it is necessary to reject the complaint alleging that the Commission was wrong to find that, in order to be valid, the comparative analysis should have taken into account the marketing services agreements with AMS.

– The complaint alleging that the Commission was wrong to reject the choice of airports made by Ryanair, failed to give reasons and infringed its obligation to investigate in that regard

133 The applicants argue that the Commission summarily rejected the choice of comparator airports used in the comparative analysis carried out by their economic consultant and, in particular, failed to carry out any methodological or economic analysis of that choice. In the contested decision, the applicants claim that the Commission did not even try to explain why the airport service charges paid to Bournemouth airport could not be validly compared to the airport service charges paid to Altenburg-Nobitz airport. In those circumstances, the Commission's dismissal of the selection criteria relied on in the studies prepared by Ryanair's economic consultant constitutes a manifest error of assessment and is vitiated by a failure to state reasons. In their reply, the applicants maintain that the arguments which the Commission has raised in the proceedings before the General Court in order to discredit the choice of comparator airports made by their economic consultant are not mentioned in the contested decision and cannot remedy *ex post* the error of assessment committed or the failure to state reasons. Finally, the applicants maintain that the Commission failed to discharge its burden of proof, since it did not request additional information, during the administrative procedure, which was capable of supporting its findings that the airports selected by the economic consultant were insufficient.

134 First, as regards the complaint alleging infringement of the obligation to state reasons, it must be noted that, in the contested decision, the Commission expresses serious doubt, in the present case, as to whether an appropriate benchmark can be identified to establish the true market price for the services provided by Ryanair or AMS. Next, the Commission states that, in any event, it considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts or any other incentive), across a sufficient number of suitable 'comparator airports', whose managers behave as market economy operators. In view of the difficulty in this case of finding comparator airports, the Commission considers an *ex ante* incremental profitability analysis to be the most relevant criterion

for the assessment of the agreements between AOC and Ryanair or AMS (recital 235 of the contested decision).

135 First, it must be held, as the Commission correctly maintained, that, in so far as the two studies of Ryanair's economic consultant do not take into account payments made under the marketing services agreements concluded with AMS, they are unsuitable for any proper assessment (see paragraphs 128 and 129 above).

136 In addition, it must be pointed out that the fact that the contested decision does not set out, for each of the airports selected in the two studies of the applicants' economic consultant, the reasons why they cannot be identified as comparators does not, by itself, permit the conclusion that there was a failure to state reasons for the purposes of Article 296 TFEU.

137 In that regard, it should be noted that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that provision must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63 and the case-law cited).

138 In the present case, it follows from recital 235 of the contested decision that the Commission merely refers to the difficulty of identifying comparator airports in the present case.

139 Consequently, in the contested decision, the Commission does not specify the reasons why it did not accept the sample of airports chosen in the two studies of the economic consultant as a valid benchmark.

140 However, it cannot be disputed that the determination of comparator airports is based on complex technical assessments. Since the contested decision clearly disclosed the Commission's reasoning, enabling the substance of that decision to be challenged subsequently before the competent court, it would be excessive to require a specific statement of reasons for each of the technical choices or each of the figures on which that reasoning is based (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 108, and of 27 April 2017, *Germanwings* v *Commission*, T-375/15, not published, EU:T:2017:289, paragraph 45; see also, by analogy, judgment of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 134).

141 In the present case, it may be considered that an explanation, for each of the airports of the sample selected by the applicants, of the reasons why they could not be accepted was not necessary for the applicants to understand the reasoning followed by the Commission or to be capable of developing their pleas in law.

142 Thus, the applicants were able to challenge the Commission's rejection of the sample of airports chosen in the comparative studies of their economic consultant before the Court.

143 Therefore, the line of argument alleging failure to state reasons must be rejected.

144 Second, the applicants fail to demonstrate that the Commission made a manifest error of assessment concerning the method of selecting the comparator airports. In that regard, they claim that the Commission was wrong to reject the choice of comparator airports made by Ryanair's economic consultant. They submit that Ryanair submitted two comparator studies including a comparison of the charges paid by Ryanair to Altenburg-Nobitz airport with those that it paid to five other airports sharing several broadly similar features with Altenburg-Nobitz airport.

145 The Commission maintains, first that comparative assessment is not a suitable method for the purpose of establishing market prices if the available benchmarks have not been defined on the basis of considerations associated with the market or if the existing prices are clearly distorted by public interventions. According to the Commission, those distortions have been shown to exist in the aviation industry for the following reasons set out in points 57 to 59 of the 2014 Guidelines.

'Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound *ex ante* profitability prospects, but essentially having regard to social or regional considerations.

Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

In those circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future, in particular once the State aid rules apply in full to public financing of airports.'

146 Next, it must be noted that, in the present case, the Commission considered that a more detailed examination of the five comparator airports selected by the applicants' economic consultant revealed their unsuitability as comparators.

147 In particular, the Commission maintained that (i) Bournemouth airport was owned by an entity in majority State ownership and had negative profitability (EBITDA) in 2012, (ii) Prestwich airport was loss-making before its private owner sold it to the Scottish Government in 2013, (iii) Grenoble airport only operated in winter, during the ski season, (iv) Maastricht airport, which has significant cargo operations, had received significant State aid since 2004 and was also passed into public ownership in 2013, after it seemingly had to be rescued by the Netherlands State, and (iv) Knock airport, although privately owned, received considerable taxpayer support, namely grants of EUR 13 million between 1997 and 2012.

148 The arguments put forward by the applicants are not capable of demonstrating that the Commission committed a manifest error of assessment in considering that the reference airports referred to by the applicants did not constitute suitable comparator airports.

149 In the first place, as regards the argument that Bournemouth airport was profitable between 2001 and 2011, without receiving any subsidies, it must be pointed out that while it is true that those factors are relevant in order to consider the conduct of the airport to be that of a market economy operator, the fact remains that that airport belongs to a public entity.

150 In the second place, as regards the applicants' arguments that Prestwick airport belonged to a private entity and was profitable between 2000 and 2008, it must be held that while it is true that those factors weigh in favour of the conduct of a market economy operator, they do not call into question the Commission's clarification that the airport became loss-making and had to be sold to the Scottish authorities in 2013.

151 Since the Commission must carry out, in the context of applying the market economy operator principle, a global assessment taking into account all relevant evidence (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 86), it was required to take into account the fact that the airport had to be saved after the State aid investigation period (2003 to 2011) in order to assess whether it had been operated in the same way as by a market economy operator during that period.

152 In the third place, as regards the applicants' arguments that the business model of Maastricht airport is similar to that of Altenburg-Nobitz airport, since both airports concentrate entirely on low-cost airlines and are of similar size with similar catchment areas, it must be held that those factors do not call into question the fact that Maastricht airport had significant cargo activities, received certain capital and operating grants, and had to be saved by the Member State concerned after making losses. The Commission was therefore entitled, without committing any manifest error of assessment, to refer to those factors in considering that Maastricht airport did not constitute a valid comparator airport.

153 In the fourth place, as regards the applicants' argument that Ryanair operated multiple summer routes to and from Grenoble airport between 2006 and 2009 and that, moreover, that airport, although owned by public entities, was operated by a private operator which imposed the highest airport charges of the comparator airports, it must be held that, although Ryanair operated routes outside the winter season, those activities do not appear to have led to the continuation of those routes throughout the year. In that regard, the applicants' argument does not contradict the Commission's finding that the activity of Grenoble airport was highly focused on the winter season, which distinguishes it from the situation of Altenburg-Nobitz airport where, overall, throughout its period of activity, at least for the route to and from London Stansted airport, Ryanair operated routes on a daily basis or several times a week throughout the year.

154 In the fifth place, as regards the applicants' argument that, according to the information provided by the Commission, the capital grants granted to Knock airport amounted only to 6% of the airport's assets for the period between 2002 and 2012, it must be noted that the Commission was entitled to find, without committing any manifest error of assessment, that public funding of that magnitude was a relevant factor in its assessment of that airport's appropriateness as a comparator.

155 Consequently, it must be held, in the light of all the evidence viewed as a whole, that the Commission did not commit any manifest error of assessment in rejecting the sample of comparator airports contained in the two studies of Ryanair's economic consultant.

156 As regards the applicants' argument alleging the lack of effort on the part of the Commission, during the administrative procedure, to request additional information capable of substantiating its

conclusions that the five comparator airports were inadequate, it must be noted that that complaint concerns the extent of the Commission's investigation obligations when it is called upon to apply the market economy operator test to the agreements in question.

157 In accordance with the case-law, 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).

158 In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private economy operator, which is in a situation as close as possible to that of the Member State concerned, must be regarded as being relevant (see, by analogy, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 60).

159 It should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 70).

160 The information 'available' to the Commission includes that which seemed relevant to the assessment to be carried out in accordance with the case-law referred to in paragraph 158 above and which could have been obtained, upon request by the Commission, during the administrative procedure (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71).

161 In the present case, it must be noted, first, that the Commission submitted, in the proceedings before the Court, with reference to points 57 to 59 of the 2014 Guidelines that, having regard to the current situation of airports in the European Union, it has serious doubts as to whether it is currently possible to define a suitable comparator for the purposes of determining a true market price for the services provided by airports (see paragraph 145 above). Accordingly, even if it is conceivable that a sufficient number of suitable comparator airports can be found, the Commission considers that the incremental profitability analysis is the most relevant criterion for the assessment of the arrangements concluded by airports with airlines (point 61 of the 2014 Guidelines).

162 It must be noted, second, that, in the opening decision, the Commission had invited the interested parties to submit comments and that Ryanair produced, during the administrative procedure, the two comparative studies drafted by their economic consultant including a sample of five comparator airports.

163 Having received those studies and noted that that sample did not include appropriate benchmarks, it is without infringing its obligation to investigate that the Commission was entitled to choose, in the present case, to carry out an incremental profitability analysis rather than a comparative analysis, without requesting additional information concerning that sample.

164 In the light of all the foregoing, the applicants' complaint alleging that the Commission was wrong to reject the choice of airports made by Ryanair, failed to give reasons and infringed its obligation to investigate in that regard must therefore be rejected.

The third part alleging that the comparative analysis shows that no advantage was conferred by means of the agreements in question

165 The applicants claim, with reference to the economic reports and the other evidence on the case file, that the comparative analysis shows that the agreements in question conferred no economic advantage. First, it is apparent from several economic reports that the price stipulated in the marketing services agreement of 25 January 2010 is 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. Second, the comparative analysis conducted in the two studies of the applicants' economic consultant shows that the charges paid by Ryanair under the airport services agreement to Altenburg-Nobitz airport are compatible with the level of charges that would have been offered to Ryanair in similar circumstances by an airport-operating market economy investor.

166 In that regard, it must be pointed out that the applicants' line of argument, which is based on those reports and studies, is ineffective, since it starts from the incorrect premiss that marketing services must be assessed separately from airport services and the operation of the routes in question (see paragraphs 120 to 132 above).

167 Thus, as regards the marketing services agreements, it must be borne in mind that the economic reports in question do not take into account the fact that AMS's marketing services were acquired by Altenburg-Nobitz airport in relation to the routes operated by Ryanair to that airport.

168 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 marketing services agreements are closely connected to 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.

169 As regards airport services, the two comparative studies prepared by the applicants' economic consultant merely compare the charges paid by Ryanair to Altenburg-Nobitz airport under the terms of the airport services agreement with the charges imposed on Ryanair in the comparator airports without taking into account the marketing services agreements concluded with AMS, whereas the two types of contracts must be considered jointly.

170 Accordingly, the applicants' complaint alleging that the comparative analysis shows that no advantage was conferred through the agreements in question must be rejected.

The fourth part, alleging that the Commission committed manifest errors of assessment and failed to state reasons in its profitability analysis

171 The applicants argue that the incremental profitability analysis on which the Commission relied in order to apply the market economy operator test and reach a finding of the existence of State aid, within the meaning of Article 107(1) TFEU, is vitiated by manifest errors of assessment and a failure to state reasons.

172 In that regard, it should be noted, at the outset, that, in the contested decision, the Commission examined by means of an *ex ante* profitability analysis whether the airport services agreement of 3 March 2003, the marketing services agreement of 7 April 2003 and the marketing services agreement of 25 January 2010, taken together, contributed incrementally to the profitability of Altenburg-Nobitz airport. It carried out that profitability analysis for the seven-month period during which Ryanair offered marketing services under the agreement of 25 January 2010 (recitals 258 and 259 of the contested decision).

173 In the present case, it is common ground that the Commission did not find, during its investigation, any business plan or *ex ante* profitability analysis, or forecast of costs and revenues drawn up by the operators of Altenburg-Nobitz airport before the agreements in question were concluded. Consequently, the Commission had to reconstruct, using material produced by the German authorities in response to its requests for information, the *ex ante* profitability analysis on which a market economy operator, acting in place of Altenburg-Nobitz airport, would have had to rely in order to assess the value in concluding the agreements in question.

174 In that incremental profitability analysis, the Commission assessed, first, the incremental costs, namely the cost of the marketing services and the operating costs directly incurred by the agreements in question (recitals 260 to 262 of the contested decision) and, second, the incremental revenues arising from aeronautical activities and non-aeronautical activities (recitals 263 and 264 of the contested decision). It noted negative cash flow during the period concerned, with the result that the marketing services agreement of 25 January 2010, in combination with the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003, was therefore not profitable for Altenburg-Nobitz airport from an *ex ante* perspective. It inferred that the combination of those agreements provided a selective economic advantage for Ryanair and AMS (recitals 265 and 268 of the contested decision).

175 In that regard, the applicants essentially put forward five complaints the validity of which is contested by the Commission.

– The complaint alleging failure to attribute an appropriate value to AMS's marketing services

176 The applicants argue that the Commission included, as a cost, the full payment to AMS for 2010 in the *ex ante* profitability analysis of the marketing services agreement of 25 January 2010 and also used the 'success fee' provided for in the marketing services agreement of 7 April 2003 to calculate aeronautical charges over the duration of the marketing services agreement of 25 January 2010, but did not include in its calculation any of the advantages flowing from those marketing services agreements.

177 In particular, in the first place, the applicants claim that, in the absence of evidence of overpricing, the proper default value of a service, including a marketing or advertising service, is the market price. Consequently, given that the Commission included the sums paid by Altenburg-Nobitz airport to AMS in respect of marketing services on the costs side of its profitability analysis, the value of the services should have been included on the benefits side, producing a net zero result.

178 In the second place, the applicants assert that the Commission erroneously failed to take account of the effectiveness of advertising on Ryanair's website. It failed to examine the evidence provided by Ryanair, demonstrating the huge popularity of its website, and implicitly considered that the services provided under the marketing services agreements had zero value. The contested decision is therefore vitiated by a failure to state reasons preventing the applicants from ascertaining the real reasons behind the treatment of the marketing services provided under the marketing services agreements of 7 April 2003 and 25 January 2010. In the reply, the applicants maintain that the Commission's position neglects the extremely long duration of visits to Ryanair's website and ignores the opinions of marketing experts establishing that exposure to captive targeted audiences was more profitable than untargeted passive exposure aimed at the general public. They rely in that regard on two economic reports.

179 Accordingly, the applicants submit that the Commission committed a manifest error of assessment and failed to state reasons in not attributing any value to the marketing services provided under the marketing services agreements.

180 The Commission disputes the arguments put forward by the applicants.

181 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 carried out by the Commission concerning the agreements in question.

182 It is apparent from recitals 263 and 264 of the contested decision that, in order to assess incremental revenues, the Commission took into account, in its *ex ante* profitability analysis, revenues from aeronautical and non-aeronautical activities and that it relied on the number of passengers that AOC should have expected from the signature of the marketing services agreement of 25 January 2010. In order to make that calculation, it determined the number of passengers relating to three destinations provided for in that agreement and applied an 80% load factor for an aircraft with 189 seats, which represents the capacity referred to in the marketing services agreement.

183 In that regard, the Commission explained before the Court that the marketing services agreements were likely to stimulate traffic on the routes in question with corresponding benefits for AOC in terms of increased aeronautical and non-aeronautical charges and that, in the contested decision, it reflected that effect in the load factor in question, which was assessed at 80%, which it applied for the whole duration of the marketing services agreement.

184 Without it being necessary at this stage to examine the question whether the Commission correctly assessed the load factor in question at 80% (see paragraphs 261 to 265 below), it must be noted that the arguments put forward by the applicants are not such as to establish that the Commission committed a manifest error of assessment as regards taking into account the effects of marketing services in the incremental profitability analysis.

185 As regards, in the first place, the applicants' argument alleging the effectiveness of the advertising on Ryanair's website, while it is true that the evidence adduced by the applicants during the administrative procedure established that the Ryanair website is very popular, that evidence, as the Commission maintains, does not support the applicants' conclusion that the price paid by AOC for promotion on that site must automatically be considered to be equivalent to the market value of that service. In addition, the popularity of Ryanair's website does not permit conclusions concerning the value of those marketing services, taking into account in particular the limited duration of the services and the fact that they almost exclusively concerned the web page devoted to Altenburg-Nobitz airport.

186 As regards the long-term effects of the market services and as regards the economic reports produced in that regard, in must be noted, inter alia, that the Commission maintained, without committing any manifest error of assessment, that the promotion of the region of Altenburg-Nobitz airport on the home page of the Ryanair website amounted to mere links to a website, which were hardly likely to lead to long-lasting effects on the memory of a significant number of people visiting that page. In that regard, it submitted that the applicants did not attempt to analyse or quantify the alleged effects of the marketing services under the marketing services agreements on the conduct of consumers and the long-term effect on traffic at Altenburg-Nobitz airport.

187 Thus, although it is true that the passages of the economic reports in question 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 on the purchasing behaviour of visitors to Ryanair's website and on passenger traffic on the air routes covered by the airport services agreement in question.

188 For the same reasons, it is necessary to reject the applicants' argument that the Commission ignores that the advertising on Ryanair's website increases the general visibility of Altenburg-Nobitz airport in relation to companies specialising in airport retail.

189 Finally, the applicants' argument alleging failure to state reasons must be rejected. The reasoning in recital 264 of the contested decision shows in a sufficiently clear manner that, in the context of the incremental profitability analysis, the Commission assessed the effect of the marketing services agreement of 25 January 2010 on expected revenues by means of a load factor for the type of aircraft serving the routes in question.

190 In the second place, it must be pointed out that the applicants' 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 marketing services must be assessed separately from airport services and the routes operated by Ryanair.

191 The applicants have not succeeded in rebutting the approach used in the contested decision, to the effect that marketing services agreements must be considered jointly with airport services and the operation of the routes by Ryanair (see paragraphs 120 to 127 above).

192 In that regard, concerning the link between the marketing services agreement of 25 January 2010 and Ryanair's commitment to operating routes to Altenburg-Nobitz airport covered by the airport services agreement, the Commission refers, in its pleadings, to recital 32 of the contested decision, citing a report from the management of the airport.

'In 2009 the government of the Land of Thuringia changed and the new government proved to be more reluctant to provide further contributions to the airport. The new government in particular rejected decisions taken by the former government to pay marketing contributions to the airport for the 2009 to 2012 period. As the public shareholders refused to pay further marketing contributions to Ryanair, in the 2010/2011 winter season, only one route to/from London was operated with financial support from regional companies. The shareholders and the board of directors of Flugplatz Altenburg-Nobitz GmbH then refused to grant the EUR 420 000 required by Ryanair as its marketing fee for the 2011 summer flight plan. Ryanair then decided to move its regional hub to Magdeburg/Cochstedt and to end its activities at AOC in March 2011.'

193 In order to highlight the link between marketing services and Ryanair's operation of routes at Altenburg-Nobitz airport, the Commission also refers in its pleadings to recital 224 of the contested decision which refers to a press article on the conclusion of the marketing services agreement of 25 January 2010 as follows:

'Before that, the district council decided to grant the Irish low-cost carrier Ryanair a marketing contribution of EUR 670 000 to open an additional route. Without this decision, scheduled air services would effectively have come to an end and the airport necessarily would have become without purpose, said the District Administrator and Chairman of the Supervisory Board of the operating company Flugplatz Altenburg-Nobitz GmbH to justify the financial injection. As of

March 2010, a route to Alicante (twice a week) will be added to the existing connections to and from Stansted (London), Edinburgh (Scotland), and Girona (Barcelona).'

194 In those circumstances, it does not follow from the evidence in the file that the marketing services agreement of 25 January 2010 includes the sale of marketing services by AMS which must be assessed independently of the air transport services operated by Ryanair.

195 Consequently, the Commission was entitled, without committing any manifest error of assessment, to consider that the marketing services agreements and airport services agreement should be examined jointly and that the purchase price of the marketing services, in the form of a 'success fee' or specified amount, should be deducted from the incremental revenues arising from the routes in question.

196 In conclusion, the applicants' complaint alleging failure to attribute an appropriate value to AMS's marketing services must be rejected.

– The complaint concerning the grounds underlying the decision of the operator of Altenburg-Nobitz airport to purchase marketing services

197 The applicants criticise the Commission for failing to take into account, in the incremental profitability analysis, the numerous qualitative and strategic benefits that AOC, the manager of Altenburg-Nobitz airport, could reasonably expect from the marketing services agreement,namely enhancement of that airport's image and an increase in its market value, diversification of airlines and an increase in the proportion of inbound traffic.

198 The applicants recall the Commission's decision-making practice in relation to State aid measures for airports in which it took into account, in the incremental profitability analysis, the qualitative and strategic goals of airports going beyond a mere cost-benefit analysis. The contribution of marketing to the image of an airport was also considered as part of that analysis. Furthermore, they refer to point 66 of the 2014 Guidelines which states that, when assessing arrangements between airports and airlines, the Commission will 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.

199 The applicants submit that the Commission's finding, based on recitals 228, 236 and 237 of the contested decision, that a market economy operator would refuse to purchase marketing services if the incremental costs incurred under the transaction formed by the services agreements and the parallel airport services agreement exceeded the incremental revenues in discounted value terms, does not reflect economic reality. First, the qualitative benefits flowing from the marketing services agreements must be added to the result of the Commission's incremental profitability analysis. Moreover, private undertakings often invest heavily in building their brands, with full knowledge that they will suffer initial incremental losses. Furthermore, marginal losses can, according to the case-law, be 'compatible with the [market economy operator principle] where there is no better alternative'. A negative sale price may be consistent with the market economy operator principle unless other options such as bankruptcy were available and involved a lesser loss for the State that was the seller. The Commission was wrong not to assess that cost.

200 The Commission disputes that line of argument. It contends, in particular, on the one hand, that the incremental profitability condition provided for in point 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 principle when it contributes progressively, from an *ex*

ante standpoint, to the profitability of the airport, and, on the other hand, 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 point 66 of those guidelines, are cumulative conditions. It maintains, for that reason, it was entitled to conclude, in the present case, that the market economy operator test was not satisfied for all the agreements in question which do not fulfil the 'incremental profitability' condition, without needing to examine the other cumulative condition set out in point 66 of the 2014 Guidelines.

201 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).

202 It follows that there is no need to examine whether the Commission's previous decision-making practice relied on by the applicants exists.

203 Next, it is necessary to examine the applicants' argument that the Commission did not take into account the grounds underlying the decision of the manager of Altenburg-Nobitz airport to purchase marketing services in the light of the market economy operator principle, as follows from Article 107(1) TFEU, and not in the light of the 2014 Guidelines.

204 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, to that effect, judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59).

205 In the present case, the Commission submits that a 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.

206 Without there being any need to rule on the Commission's argument that an agreement concluded between an airport and an airline resulting in an incremental loss in net present value cannot be deemed to be in line with the private economy operator principle on the ground that it forms part of an overall strategy of the airport expected to lead to profitability in the long term (see paragraph 200 above), it should be noted, in any event, for the reasons set out below, that the applicants do not show, in the present case, that the Commission made a manifest error of assessment by failing to take into account the advantages invoked by the applicants as qualitative and strategic.

207 In the first place, the applicants claim, in reliance inter alia on an economic report, that the Commission should have taken into account the fact that, for the manager of Altenburg-Nobitz airport, the purpose of the marketing services agreement was to raise awareness of that airport, in particular with the public at the other end of the routes operated by Ryanair. Advertising is a necessity for regional airports. Furthermore, raising the profile of an airport and enhancing its image increases its market value for its owners. As the manager and owner of Altenburg-Nobitz airport, AOC was naturally interested in enhancing the value of its asset.

208 In that regard, it should be noted at the outset that, in the contested decision, the Commission did not dispute that regional airports have an interest in purchasing marketing services or require them.

209 By contrast, the Commission considered, in the contested decision, that AMS's marketing services were not likely to enhance the image of Altenburg-Nobitz airport in the long term.However, the applicants have not adduced any evidence to refute that explanation (see paragraphs 185 to 189 above).

210 It must be noted, inter alia, that, as the Commission has explained, the passage from the economic report on which the applicants rely does not specify which type of publicity could result in long-lasting effects or specifically indicate whether AMS's marketing services bought by the manager of Altenburg-Nobitz airport were likely to influence the conduct of customers and improve the image of that airport in the long term beyond the period covered by the marketing services agreements or on routes other than those operated by Ryanair to or from that airport.

211 Accordingly, the Court rejects the applicants' argument that the Commission made a manifest error of assessment as regards taking into account image enhancement and, therefore, the asset value of Altenburg-Nobitz airport thanks to the marketing services agreements.

212 In the second place, the applicants claim that Altenburg-Nobitz airport could have expected the marketing services agreement to help with the diversification of airlines. They state that, until Ryanair's arrival in 2003, the airport had been struggling to attract an airline that would operate regular routes. Altenburg-Nobitz airport had unused capacity and its only regular user, the air cargo carrier Omega, had gone bankrupt in 2003. The applicants explain, based on an economic report, that visibility on Ryanair's website was a means of promoting the Altenburg-Nobitz airport's credibility as a destination. Demonstrated success by an airport which has engaged in advertising to promote itself could encourage other airlines to include it in their schedule. Proof of its ability to enhance its image through advertising would incentivise airlines to begin serving it.

213 In that regard, it must be held, first, as the Commission maintains, that the applicants' line of argument does not succeed in demonstrating that the marketing services provided by AMS were reasonably intended to attract airlines other than Ryanair to Altenburg-Nobitz airport. It is apparent inter alia from the contested decision that the evidence available suggested that, by concluding the marketing services agreement of 25 January 2010 and paying a specified amount under that agreement, the regional authorities and the airport's main concern was rather to maintain Ryanair's air activities at Altenburg-Nobitz airport (see paragraphs 192 and 193 above).

214 Furthermore, as the Commission also rightly maintains, although attracting other airlines in order to fill the unused capacity of an airport may constitute a cost-efficient strategy, it is plausible that a market economy operator in the same situation as Altenburg-Nobitz airport would require at the very least that the arrival of a new airline does not generate expected incremental costs in excess of incremental revenues. Even if a market economy operator might be led in certain circumstances to sign an agreement involving incremental loss, the applicants have not shown that such an operator, acting in place of Altenburg-Nobitz airport, would have been prepared to adopt such conduct.

215 Accordingly, the applicants' complaint that the Commission failed to take into account the advantage relating to diversification of airlines at Altenburg-Nobitz airport must be rejected.

216 In the third place, the applicants claim that the Commission did not take any position on the question whether the marketing services agreements were intended to increase the proportion of passengers coming from the airports served by Altenburg-Nobitz airport (inbound passengers) in the total number of passengers that Ryanair had committed to bring to the airport. The aim of increasing the proportion of 'inbound passengers' was prominent in the very terms of the marketing services agreements. The strategy of targeting passengers from the United Kingdom was a rational one for a market economy operator, given that inbound passengers are likely to generate higher non-aeronautical revenues than 'outbound passengers'.

217 In that regard, it must be noted that the Commission explained that, rather than the percentage of 'inbound passengers' as a proportion of the total number of passengers, the absolute number of 'inbound passengers' had to be referred to by the parties, since that factor was relevant to the revenue obtained by both Ryanair and the manager of Altenburg-Nobitz airport, through airport charges, which were partly based on the number of passengers, and through non-aeronautical revenues. In addition, the Commission has submitted that any effect of the marketing services agreements on the number of 'inbound passengers' and, consequently, on the total number of passengers, had been incorporated in the load factor referred to in the contested decision and used as the basis for estimating revenue streams from airport charges and non-aeronautical revenues.

218 The applicants claim that Ryanair and Altenburg-Nobitz airport do not have the same interests since Ryanair seeks to carry a large number of passengers and receives the same amount of revenue both from 'inbound passengers' and 'outbound passengers', whereas the airport has an interest in ensuring a higher number of incoming travellers among the passengers. Thus, according to the applicants, the Commission's claim that the percentage of 'inbound passengers' as a proportion of the total number of passengers was not a matter of concern either for AMS or for the airport operator cannot be accepted**.**

219 In that regard, while assuming that the increase in the total number of 'inbound passengers' can be separated from a separate objective to increase the total number of passengers, it must be held that, as it maintains, the Commission carried out its analysis of the impact of marketing services agreements on expected incremental revenues for the purposes of applying the market economy operator test, relying, for non-aeronautical revenues, exceptionally, in the absence of relevant *ex ante* information, on *ex post* historic data, without any distinction between inbound and outbound passengers (see recital 254 of the contested decision).

220 The Commission cannot be criticised for carrying out an analysis on the basis of the total number of 'inbound passengers' without making an adjustment on the basis of the ratio between 'inbound passengers' and 'outgoing passengers', given that the manager of Altenburg-Nobitz airport had not itself established an *ex ante* assessment of future non-aeronautical revenues generated by the marketing services agreements.

221 Accordingly, the applicants' argument concerning the lack of distinction between inbound and outbound passengers in the contested decision must be rejected.

222 In the light of the foregoing, it must be held that the contested decision is not vitiated by any manifest error of assessment concerning the benefits that the managers of Altenburg-Nobitz airport could reasonably expect from the marketing services agreements in the context of an *ex ante* profitability analysis of the agreements concluded between AOC and Ryanair.

223 Finally, as regards the applicants' argument relating to the least onerous solution (see second argument, paragraph 199 above), 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 manager of Altenburg-Nobitz airport would have expected the combination of the airport services agreement of 3 March 2003 and the marketing services agreements of 7 April 2003 and 25 January 2010 to be unprofitable. Accordingly, as the Commission rightly submitted, not signing the agreement of 25 January 2010 was a better alternative for such an operator, since the conclusion of that agreement led to negative incremental profitability and would therefore have harmed the financial situation of that airport compared with a situation in which that agreement was not concluded.

224 Therefore, a market economy operator guided by the prospect of profitability, acting in place of the airport manager, would, in the present case, prefer not to sign those agreements.

225 Accordingly, the applicants' argument concerning the least onerous solution must be rejected.

226 In the light of the foregoing, the applicants' complaint regarding the grounds underlying the decision of the manager of Altenburg-Nobitz airport to purchase marketing services must be rejected.

– The complaint alleging refusal to take into consideration the possibility that part of the marketing services could have been purchased for general interest purposes

227 The applicants argue that, under the terms of the marketing services agreement of 25 January 2010, the aim of Altenburg-Nobitz airport was economic development of the region. The airport manager, AOC, pursued general interest purposes when it purchased certain marketing services, probably on behalf of its shareholder, Landkreis Altenburger Land (Altenburger Land district, Germany). Since the market economy operator test does not apply in the case of measures of general interest, the Commission should have simply verified that the price paid by the Altenburger Land district through an intermediary such as the airport was the market price. Furthermore, the applicants claim that, since the Commission did not address the notion that the purchase of marketing services could at least partly satisfy general interest purposes pursued by local and regional authorities, the contested decision is vitiated by a failure to state reasons.

228 The Commission disputes the line of argument put forward by the applicants.

229 In that regard, it should be noted that the applicability of the private investor test in a market economy ultimately depends on the Member State concerned having conferred, in its capacity as an economic operator, and not in its capacity as a public authority, an economic advantage on an undertaking (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 82, and of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraphs 95 and 118).

230 In the present case, the Commission examined, in recitals 236 and 258 to 266 of the contested decision, the question whether a market economy operator in the situation of Altenburg-Nobitz airport would have concluded the marketing services agreement of 25 January 2010, in combination with the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003. It must be noted that the Commission did not consider the possibility that the purchase of marketing services could, at least partly, have served the general interest purposes pursued by the regional and local authorities.

231 However, it must be recalled that the Commission was entitled to assume, without committing any manifest error of assessment, that the marketing services agreement of 25 January

2010 was linked to Ryanair's operation of routes to Altenburg-Nobitz airport, as covered by the airport services agreement (see paragraphs 120 to 127, 192 and 193 above). In that regard, the evidence of the application of the market price by AMS submitted by the applicants during the administrative procedure does not call into question the link between marketing services and the operation of routes by Ryanair (see paragraph 168 above).

232 Consequently, in so far as the remuneration for marketing services under the marketing services agreement of 25 January 2010 did not constitute compensation for the provision of services to local or regional authorities, but was associated with the operation of Ryanair's air services at Altenburg-Nobitz airport, it was the responsibility of AOC in its capacity as the economic operator of an airport. Accordingly, the applicants' argument concerning the purchase of marketing services for general interest purposes must be rejected.

233 Finally, it follows from the foregoing that the decision shows in a sufficiently clear manner the grounds on which the Commission applied the market economy operator test to the measures in question.

234 Accordingly, the applicants' complaint alleging refusal to take into consideration the possibility that part of the marketing services could have been purchased for general interest purposes and failure to state reasons in that regard must be rejected.

– The complaint alleging use of inappropriate assumptions in the calculation of profitability

235 The applicants claim that the Commission's analysis of incremental revenues and costs underlying its finding concerning the existence of State aid, set out in recitals 236 to 275 of the contested decision, is vitiated by several manifest errors of assessment. In annex to the application, they submit the note of 14 April 2016 prepared by their economic adviser which contains a more detailed analysis of the errors allegedly committed by the Commission ('the note of 14 April 2016').

236 In the first place, the applicants submit that the Commission incorrectly examined the profitability of the 2010 marketing services agreement based solely on the IATA summer season period of seven months, during which Ryanair operated the routes mentioned in the agreement.

237 In that regard, first, the applicants maintain that the very short time horizon of seven months is inconsistent with the 2014 Guidelines, which require that profitability should be examined over the 'medium term' and 'long term' (see points 63 and 66 of those guidelines).

238 Second, the applicants claim that even a reference to the 'medium term' in connection with airport profitability reflects an overly conservative approach. Instead, the business plans of market economy airport operators have multi-decade time horizons and include traffic projections derived from a reasonable analysis of the airport's ability to attract and retain traffic. Short or medium-term business plans based on the duration of each individual agreement, or an even shorter duration, along the lines proposed in this case by the Commission, ignore commercial reality and are likely to lead to negative results.

239 In the reply, the applicants submit that, that in so far as agreements relating to routes serving underused regional airports involve an investment and hence an element of risk both for the airlines and the airports concerned, the parties agree, in accordance with the economic market operator principle, on agreements of a relatively short duration, with consecutive extensions, as a mutually acceptable commercial compromise. In addition, it is also consistent with that principle for

marketing campaigns to produce beneficial effects for a period that is far longer than the duration of the marketing campaign itself.

240 Third, the applicants argue that, at the very least, it would have been more appropriate for the Commission to examine the expected profitability of the marketing services agreement of 25 January 2010 over the period from the contractual start date until the contractual end date of the airport services agreement of 3 March 2003, to which it was linked, in April 2013. As a result, the time horizon would be 2010 to 2013, instead of the seven months taken by the Commission. The applicants adduce the note of 14 April 2016 of their economic consultant which analyses the marketing services agreement of 25 January 2010 as a renegotiation of the airport services agreement of 3 March 2003 and the marketing services agreement of 28 August 2008 and concludes, on the basis of the inclusion of revenues associated with the traffic specified in the latter two agreements concerning the period between January and March 2010 and the period between October 2010 and April 2013, that the marketing services agreement of 25 January 2010 was profitable and did not confer State aid.

241 In the second place, the applicants contend that the Commission was overly conservative in assuming a load factor of 80%, whereas it relied on a factor of 85% in other State aid cases involving agreements concluded by the applicants with airports, without providing any explanation for its choice.

242 In the third place, the applicants claim that the Commission based its forecasts of non-aeronautical revenues for 2010 on average figures for 2008 and 2009. In doing so, the Commission ignored the potential for network externalities that could result from a significant increase in Ryanair's presence at Altenburg-Nobitz airport. A market economy operator would have taken such network externalities into account.

243 The Commission contends that the applicants' line of argument should be rejected.

244 First and foremost, it must be recalled that, according to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with Article 76(d) of the Rules of Procedure, must appear in the application. The annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments (see judgment of 14 March 2013, *Dole Food and Dole Germany* v *Commission*, T-588/08, EU:T:2013:130, paragraph 462 and the case-law cited).

245 Accordingly, it is necessary to reject the applicants' argument in so far as they invoke errors of assessment on the part of the Commission concerning profitability by referring generally to the note of 14 April 2016 without specifying the essential elements of their line of argument in the body of the application. In that regard, the Court finds that, as the applicants submitted in the reply, the errors for which the Commission is criticised are limited to the three errors set out in the application, recalled in paragraphs 235 to 242 above.

246 It is therefore necessary to examine the merits of the applicants' arguments concerning those three errors allegedly made by the Commission in its incremental profitability analysis.

247 In the first place, as regards the argument that the Commission examined the profitability of the agreements in question using a time horizon limited to seven months, it must be recalled, first of all, that that argument must be examined directly in the light of the market economy operator principle as reflected in Article 107(1) TFEU and not in the light of the 2014 Guidelines.

248 Next, is apparent from the case-law (see paragraph 106 above) that it is necessary to examine whether the Commission was entitled to find, in the context of its incremental profitability analysis, that a market economy operator acting in place of the manager of Altenburg-Nobitz airport would have assessed the value in concluding the agreement of 25 January 2010, in combination with the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003, on the basis of a time horizon limited to seven months.

249 The conduct of a prudent operator in a market economy 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.

250 In the present case, however, it is common ground that the three agreements in question, and in particular the marketing services agreement of 25 January 2010 were concluded for a fixed period. Thus, the Commission found in recital 259 of the contested decision that the latter agreement started on 25 January 2010 and ended one year after the start of the first flight connection, which was supposed to start with the 2010 summer season. Given that Ryanair's air services extended solely over a seven-month period, namely the IATA summer season in 2010, the Commission carried out its profitability analysis only over that period.

251 It is also common ground that, as the Commission maintained, without being contradicted by the applicants, before the conclusion of the agreements in question, the operator of Altenburg-Nobitz airport had not prepared a business plan in respect of the operation of routes to London, Girona and Alicante airports.

252 In that context, the Commission was entitled to consider, without erring, that a market economy operator would assess the incremental profitability of the combination of the three agreements in question in relation to the costs and revenues during the operating period of the air route in question, namely seven months.

253 The applicants' argument that the Commission was wrong to find in recital 259 of the contested decision that the marketing services agreement of 25 January 2010 ended one year after the launch of the first Ryanair route and not after the provision of AMS's marketing services is ineffective. The applicants have not established that such an error, regrettable as it may be, had a tangible effect on the calculation of incremental profitability expected from the marketing services agreement of 25 January 2010. As the Commission explained at the hearing in reply to a question put by the Court, it appears that, even if the agreement had been concluded for an initial duration of one year from the introduction of the first marketing service by AMS, the incremental revenues from aeronautical and non-aeronautical activities and the incremental operating costs expected from the operation of Ryanair's routes to Altenburg-Nobitz airport did not change. Likewise, it has not been established that the time lag for invoicing by AMS to AOC of the price of the marketing services had any effect on the amount payable by AOC under the marketing services agreement, which formed part of the costs to be taken into account in the incremental profitability analysis of the marketing services agreement of 25 January 2010.

254 The fact that the Commission took into account the actual duration of the operation of Ryanair's route, and not the duration of the agreement of 25 January 2010, that is to say one year, does not affect the validity of the incremental profitability analysis carried out in the contested decision. The Commission was entitled to assume, without committing any manifest error of assessment, that a market economy operator would only count on the incremental revenues during the period in which Ryanair had undertaken to operate the route in question. In that regard, it must be recalled that the applicants have not shown that the Commission had committed a manifest error of assessment by assuming that the marketing services provided by AMS were not likely to have long-term effects on the behaviour of visitors to Ryanair's website (see paragraphs 184 to 188 above).

255 Finally, the argument that the Commission should have analysed the profitability of the marketing services agreement of 25 January 2010 over the period from the date of the start of that agreement until the date of expiry of the airport services agreement of 3 March 2003 cannot succeed.

256 While acknowledging that the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003 continued to apply after the expiry of the marketing services agreement of 25 January 2010, it must be held that, after the entry into force of those 2003 agreements, which provided inter alia for daily scheduled flights to London Stansted airport throughout the year (recital 47 of the contested decision), the parties, reviewed, or added to, the terms of their subsequent collaboration both in terms of undertakings to operate flights and remuneration for marketing services. Thus, by the marketing services agreement of 28 August 2008, Ryanair undertook to operate a route to that airport on a daily basis in summer and four times a week in winter, as well as a route to Girona airport, in summer only, three times a week (recital 57 of the contested decision), whereas, by the marketing services agreement of 25 January 2010, Ryanair undertook to operate routes to London Stansted airport (seven times a week), Girona airport (three times a week) and Alicante airport (twice a week) during the IATA summer season. Likewise, by the marketing services agreement of 28 August 2008 and the marketing services agreement of 25 January 2010, AOC undertook to pay the amount of [*confidential*] (see paragraph 7 above) and [*confidential*] (see paragraph 8 above) for marketing services from AMS. Those payments were added to the 'success fee' stipulated in the marketing services agreement of 7 April 2003 as remuneration for the marketing services provided by Ryanair.

257 Consequently, it is reasonable to assume that a market economy operator, acting in place of AOC, would have expected at the time of concluding the agreement of 25 January 2010 that, at the time of expiry of that agreement, the applicants would not simply agree to go back to the terms of the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003, but would also insist on renegotiating the undertaking to operate flights from Altenburg-Nobitz airport and on new payments for marketing services.

258 Moreover, the fact that Ryanair was not prepared simply to go back to the initial terms of the 2003 agreements without requiring new payments is confirmed *ex post* by the fact that, first, Ryanair operated a single route during the IATA 2010/2011 winter season, starting on 30 October 2010 and ending on 28 March 2011, to and from London Stansted airport, with the financial support however of private regional undertakings (recital 32(d) and recital 64 of the contested decision), and by the fact that, second, after the shareholders and management of AOC refused to pay the sum of EUR 420 000 required by Ryanair as marketing charges for the 2011 summer schedule, Ryanair ended its activities at Altenburg-Nobitz airport in March 2011.

259 In those circumstances, it has not been established that it would have been more appropriate for the Commission to examine the expected profitability of the marketing services agreement of 25 January 2010 over the period from the contractual start date of that agreement until the contractual end date of the airport services agreement of 3 March 2003, to which it was linked, that is to say in April 2013, and thus extend the time horizon from 2010 to 2013 instead of the seven months used by the Commission. In that regard, it must be held that, it is true that the note of 14 April 2016 produced by the applicants states that the conclusion of the marketing services agreement of 25 January 2010, in combination with the two other agreements, would have been profitable if the profitability analysis had been carried out over the period from January 2010 to April 2013. However, as the Commission correctly maintained, the analysis in the note of 14 April 2016 does not include the new payments expected for marketing services.

260 In the light of the foregoing, the applicants' complaint concerning the time horizon of the profitability analysis must be rejected.

261 In the second place, as regards the applicants' argument concerning the load factor measuring the use of an aircraft's capacity, it must be held that, in order to calculate the expected number of passengers by virtue of the marketing services agreement of 25 January 2010, the Commission used, in recital 264 of the contested decision, a factor of 80% in an aircraft with 189 seats corresponding to the capacity referred to in that agreement.

262 The Commission explained before the Court that a load factor of 80% was a reasonable hypothesis. In that regard, the Commission refers to Ryanair's 2009 annual report, which states, first, that flights operated by Ryanair on its network had an average load factor of 81% and, second, that the load factors on new routes such as the new route to Alicante airport provided for in the marketing services agreement of 25 January 2010 were generally lower.

263 Moreover, in reply to a question put by the Court, the Commission explained that the load factor of 80% that it applied was a more optimistic scenario than that adopted by Altenburg-Nobitz airport concerning the revenues expected from Ryanair's activities. In that regard, the Commission produced the table that the German authorities provided during the administrative procedure which included several scenarios concerning load factors of 70% to 90%. That table provided that, even with a load factor of 70%, a positive result could be obtained with Ryanair's activity (see recital 99 of the contested decision).

264 It follows that, in order to determine the load factor applied in the contested decision, the Commission relied on objective factors which, moreover, sufficiently justified that divergence from the 85% load factor applied in other State aid cases concerning agreements concluded by the applicants with other airports. Since the load factor calculation methods applied in those other cases and the contested decision were different, it must be held that the Commission's approach cannot be regarded as inconsistent.

265 Accordingly, the applicants' complaint concerning a load factor of 80% must be rejected.

266 In the third place, as regards the applicants' argument concerning the failure to take into account the network externalities in calculating the non-aeronautical revenues for 2010, it must be noted that, in the absence of relevant *ex ante* information, the Commission proceeded from the assumption that, in January 2010, when the marketing services agreement was signed, Altenburg-Nobitz airport took into consideration, in the calculation of the non-aeronautical revenues, its actual revenues from the preceding years, which had risen significantly in comparison with 2006 and 2007. Thus, the Commission assumed that in 2010 Altenburg-Nobitz airport had based its forecasts

of non-aeronautical revenues on the two preceding years, with an average amount of EUR 1.80 to 2.30 per passenger for 2008 and 2009 (recital 263(b) of the contested decision).

267 It must be held that that calculation of non-aeronautical revenues for 2010 is not vitiated by any manifest error of assessment on the part of the Commission.

268 As the Commission explained, it follows from the evidence in the case file that the applicants had provided very similar services in previous years under the agreement of 28 August 2008, in combination with the airport services agreement of 3 March 2003 and the marketing services agreement of 7 April 2003, with the result that there was no reason for a market economy operator to suppose that there would be a sudden increase in non-aeronautical revenues per passenger on account of network externalities.

269 The complaint alleging use of inappropriate assumptions in the calculation of profitability must therefore be rejected.

– The complaint alleging refusal to take into consideration the wider benefits stemming from Altenburg-Nobitz airport's relationship with Ryanair

270 The applicants submit that the Commission wrongly failed to take account, in its incremental profitability analysis, of the positive network externalities that a market economy operator, acting in place of the manager of Altenburg-Nobitz airport, could expect from Ryanair's activities at that airport, and of the longer-term effects achieved through AMS's marketing services. The higher number of airport users due to Ryanair's presence would increase the attractiveness of that airport, thus leading to additional routes, airlines and commercial outlets. In the reply, the applicants also maintain that an underused airport, acting as a market economy operator, would sign an agreement with Ryanair in order to create a virtuous circle of growth and, as a result, kick-start the airport to profitability.

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

272 It must be held, as the Commission maintains, that the applicants have not adduced any specific evidence to show that the presence of Ryanair and the marketing services provided by AMS under the agreement of 25 January 2010 were likely to attract other airlines, new Ryanair routes and businesses to Altenburg-Nobitz airport leading to an increase in the number of passengers. In the absence of any indication of such effects, it is plausible to assume that a prudent market economy operator in the situation of Altenburg-Nobitz airport would not count on the presence of Ryanair in order to hope for such a future increase in the number of passengers in connection with the arrival of other airlines at the airport and, accordingly, an increase in its revenues.

273 Moreover, the applicants have not justified their line of argument that 'for an unknown regional airport, like Altenburg, an initial agreement with a market leader such as Ryanair is a valuable first step towards the creation of such network externalities'. As the Commission rightly maintains, the agreement of 25 January 2010 was signed seven years after the start, on 1 May 2003, of Ryanair's activities at Altenburg-Nobitz airport and was the third agreement of that type to be concluded. It is apparent from the file that, since its arrival, Ryanair had been the sole airline to offer routes from and to that airport.

274 In those circumstances, the Commission did not commit any manifest error of assessment in not taking into account the potential effects of externalities arising from Ryanair's operation of the routes provided for in the agreement of 25 January 2010.

275 In the light of all the foregoing, the applicants' complaint alleging refusal to take into consideration the wider benefits stemming from Altenburg-Nobitz airport's relationship with Ryanair must be rejected.

276 The third plea in law must be rejected as a whole.

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

Costs

278 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.

279 The Council is to bear its own costs, in accordance with Article 138(1) of the Rules of Procedure.

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;**

3. **Orders the Council of the European Union to bear its own costs.**

Berardis Papasavvas Spielmann

Csehi Spineanu-Matei

Delivered in open court in Luxembourg on 13 December 2018.

E. Coulon G. Berardis

Registrar President

Table of contents

Background to the dispute

Measures at issue

Administrative procedure

Contested decision

Procedure and forms of order sought

Law

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

The second plea in law, alleging infringement of Article 107(1) TFEU on the ground that the Commission failed to establish that the condition of selectivity was fulfilled

Third plea in law, alleging infringement of Article 107(1) TFEU as a result of the Commission's failure to establish the existence of an advantage

First part, alleging that the Commission failed to have regard to the fact that the comparative analysis was the primary method for the purpose of applying the market economy operator principle

The second part concerning the reasons relied on by the Commission in the contested decision for departure, in the present case, from the comparative analysis

– The complaint alleging that the Commission erred in considering that, in order to be valid, the comparative analysis should have taken into account the marketing services agreements with AMS

– The complaint alleging that the Commission was wrong to reject the choice of airports made by Ryanair, failed to give reasons and infringed its obligation to investigate in that regard

The third part alleging that the comparative analysis shows that no advantage was conferred by means of the agreements in question

The fourth part, alleging that the Commission committed manifest errors of assessment and failed to state reasons in its profitability analysis

– The complaint alleging failure to attribute an appropriate value to AMS's marketing services

– The complaint concerning the grounds underlying the decision of the operator of Altenburg-Nobitz airport to purchase marketing services

– The complaint alleging refusal to take into consideration the possibility that part of the marketing services could have been purchased for general interest purposes

– The complaint alleging use of inappropriate assumptions in the calculation of profitability

– The complaint alleging refusal to take into consideration the wider benefits stemming from Altenburg-Nobitz airport's relationship with Ryanair

Costs

---

* Language of the case: English.

---

1 This judgment is published in extract form.

---

2 Confidential data omitted.