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

13 December 2018 (*)(1)

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

In Case T-53/16,

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 and S. Noë, acting as Agents,

defendant,

supported by

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

intervener,

APPLICATION under Article 263 TFEU seeking the partial annulment of Commission Decision (EU) 2016/633 of 23 July 2014 on State aid SA.33961 (2012/C) (ex 2012/NN) implemented by France in favour of Nîmes-Uzès-Le Vigan Chamber of Commerce and Industry, Veolia Transport Aéroport de Nîmes, Ryanair Limited and Airport Marketing Services Limited (OJ 2016 L 113, p. 32),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

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

Registrar: P. Cullen, Administrator,

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

gives the following

Judgment

I. Background to the dispute

A. Measures at issue

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

2 Nîmes-Garons Airport ('Nîmes airport'), which is owned by the French Republic, is situated in the Department of Gard in France. The airport was initially operated by the Chamber of Commerce and Industry (CCI) of Nîmes-Uzès-Le Vigan. On 1 February 2006, responsibility for the equipment, maintenance, operation and development of the civilian area of that airport was entrusted to the Syndicat mixte pour l'aménagement et le développement de l'aéroport de Nîmes-Alès-Camargue-Cévennes ('the SMAN'), which is a public body whose members include the Departmental Council of Gard, the Urban Community of Metropolitan Nîmes and the Urban Community of Grand Alès en Cévennes. The SMAN temporarily entrusted the operation of the airport in question, from 1 February 2006 to 31 December 2006, to that CCI by a public service delegation. Following a tendering procedure, the SMAN then chose to subcontract the operation of the same airport to Veolia Transport under a public service delegation agreement which took effect on 1 January 2007. Veolia Transport was succeeded by its wholly owned subsidiary, Veolia Transport Aéroport Nîmes ('VTAN'), in the performance of the agreement.

3 Ryanair began operating at Nîmes airport in June 2000. The initial operation of a single route between that airport and London Stansted airport was expanded to four routes.

4 In that regard, on 11 April 2000, the CCI of Nîmes-Uzès-Le Vigan entered into an airport services agreement with Ryanair for a term of 10 years. Under that agreement, Ryanair undertook to fly daily services between London Stansted airport and Nîmes airport ('the 2000 ASA').

5 The 2000 ASA was amended following an exchange of letters in late 2001 and in March 2004, which provided for an increase in the payments made by the CCI of Nîmes-Uzès-Le Vigan to Ryanair with a view to the development of additional routes. On 10 October 2005, a new airport services agreement was concluded by the CCI and Ryanair, for an initial term of five years, under which Ryanair undertook to operate certain routes to and from Nîmes airport. On the same day, a marketing services agreement was concluded by that CCI and AMS, which consisted of the provision of advertising services on Ryanair's website and by email, for which the CCI in question agreed to pay annual sums.

6 On 2 January 2007, VTAN entered into an airport services agreement with Ryanair under which Ryanair was to be paid a contribution per passenger under an incentive scheme for the development of traffic and a marketing services agreement with AMS for the purchase of services at a given sum. Those agreements were valid from 1 January 2007 to 31 October 2007. On 1 August 2007, VTAN and AMS signed an amendment to that agreement, providing for a further contribution by VTAN. On 1 November 2007, two new agreements were concluded by the same parties in order to extend the abovementioned agreements, which had expired. The payments to Ryanair and AMS were increased. Likewise, on 27 August 2008, two new agreements concluded by the same parties replaced the previous contractual framework as from 1 November 2008, for a term of one year

renewable twice. The first of those agreements included, in particular, an undertaking by Ryanair to operate certain routes to and from Nîmes airport and an incentive scheme for the development of traffic. Two amendments of 25 August 2009 extended those agreements to 31 December 2011. Lastly, on 18 August 2010 and 30 November 2010, the same parties signed amendments to the second of the agreements in question which provided for an increase in the contributions to be paid by VTAN.

B. Administrative procedure

7 On 26 January 2010, the European Commission registered a complaint concerning advantages which Ryanair had allegedly received at a number of French airports, including Nîmes airport.

8 By letter of 26 April 2012, the Commission notified the French Republic of its decision to open the procedure laid down in Article 108(2) TFEU with respect to the measures from which Ryanair was alleged to have benefited concerning Nîmes airport ('the decision to initiate the procedure'). In the publication of that decision in the *Official Journal of the European Union* on 10 August 2012 (OJ 2012 C 241, p. 11), the Commission called on interested parties to submit their comments on the measures.

9 The French authorities submitted their observations to the Commission and answered the questions set out by the Commission in its decision to initiate the procedure and subsequently.

10 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 the facts and considerations on which it had intended to base its decision, grant it access to the file, particularly to the evidence on which the Commission envisaged basing 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 those requests.

11 By letters of 28 September 2012, the applicants submitted their observations on the decision to initiate the procedure. By several subsequent letters, Ryanair sent further observations. The Commission forwarded those observations to the French authorities, which did not comment on them.

12 The Commission sent letters to the French authorities and to the interested third parties that had submitted observations to inform them of its intention to assess the compatibility of the aid measures in question with the internal market on the basis of the guidelines on State aid to airports and airlines, published in the Official Journal on 4 April 2014 (OJ 2014 C 99, p. 3; 'the 2014 Guidelines'). It invited the addressees of its letters to submit their observations on the matter. On 15 April 2014, a notice was published in the Official Journal (OJ 2014 C 113, p. 30) inviting the Member States and the interested parties to submit their observations on the matter.

13 By letter of 2 May 2014, Ryanair submitted observations on the application of the 2014 Guidelines to the State aid cases in which it was involved. In that letter, Ryanair also gave its view on those guidelines.

C. Contested decision

14 At the end of the formal investigation procedure, the Commission adopted Decision (EU) 2016/633 of 23 July 2014 on State aid SA.33961 (2012/C) (ex 2012/NN) implemented by France in favour of the CCI of Nîmes-Uzès-Le Vigan, VTAN, Ryanair and AMS (OJ 2016 L 113, p. 32; 'the contested decision').

15 In the contested decision, the Commission gave a detailed description of the measures subject to the formal investigation procedure. Those measures consisted (i) in financial support to successive operators of Nîmes airport, including the financing of the costs associated with sovereign tasks (recitals 32 to 75 of the contested decision), and (ii) in the agreements which the CCI of Nîmes-Uzès-Le Vigan and VTAN concluded with the applicants, in particular the various agreements and amendments as described in paragraphs 4 to 6 above (recitals 77 to 102 of the contested decision).

16 The Commission found that some of the financial support for the operators of Nîmes airport constituted aid within the meaning of Article 107(1) TFEU, but was nevertheless compatible with the internal market on the basis of Article 107(3)(c) TFEU. It also found that the sovereign task subsidies did not constitute State aid (recitals 630 and 683 of the contested decision).

17 As regards the various agreements and amendments concluded successively by the CCI of Nîmes-Uzès-Le Vigan and VTAN with the applicants, as described in paragraphs 4 to 6 above, the Commission found that, with the exception of the 2000 ASA, they all included elements of State aid within the meaning of Article 107(1) TFEU (recital 502 of the contested decision).

18 In that regard, the Commission found that the various agreements and amendments concluded by the CCI of Nîmes-Uzès-Le Vigan and VTAN with the applicants, as described in paragraphs 4 to 6 above, could be imputed to the French State and involved the use of State resources (recitals 274 and 301 of the contested decision).

19 In order to determine whether any advantage had been conferred, the Commission considered whether a hypothetical market economy operator acting in the place of the CCI of Nîmes-Uzès-Le Vigan and VTAN and motivated by the prospect of profits would have concluded with the applicants the various agreements and amendments concluded, described in paragraphs 4 to 6 above.

20 In that regard, as a first step, the Commission took the view that it was necessary (i) to assess together the conducts of the CCI of Nîmes-Uzès-Le Vigan and of its arm operating Nîmes airport and those of VTAN and the SMAN in terms of their relations with the airlines and their subsidiaries (recitals 306 to 309 of the contested decision), (ii) to analyse the marketing services agreements and the airport services agreements as a single measure (recitals 310 to 329 of that decision), (iii) to consider that the CCI of Nîmes-Uzès-Le Vigan and VTAN had acted as airport operators and not as public bodies entrusted with a general interest task (recitals 330 to 346 of that decision), (iv) to take into consideration only the positive effect of the services provided under the marketing services agreements on the number of passengers using the routes covered by those agreements during the operating period of those routes, to the exclusion of any other excessively uncertain benefits (recitals 347 to 375 of the same decision), and (v) to depart, for the purposes of applying the operator in a market economy test, from the method consisting in making a comparison with the 'price on the market' ('the comparative analysis') and to confine itself to an *ex ante* incremental profitability analysis ('the incremental profitability analysis') (recitals 376 to 392 of the decision in question).

21 As a second step, the Commission carried out an incremental profitability analysis for each pair of marketing services agreements and airport services agreements and, at the end of its analysis, it found that, in the case of all the various agreements and amendments concluded successively by the CCI of Nîmes-Uzès-Le Vigan and VTAN with the applicants, as described in paragraphs 5 and 6 above ('the contracts at issue'), the incremental flows (revenues less costs) were negative. The Commission concluded from this that those agreements conferred an economic advantage on Ryanair and AMS (recitals 393 to 498 of the contested decision) and involved operating aid which was, moreover, incompatible with the internal market (recitals 505 to 552 of that decision).

22 As a third step, the Commission determined, for each transaction, the amount of recoverable aid using the negative part, for each year that the agreements forming the transaction had been applied or for each period for which the estimated incremental flows had been calculated, of the projected incremental flow at the time when the transaction was concluded. It arrived at an indicative principal amount between EUR 5 and 7 million.

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

'*Article 1*

1. The following measures, which contain State aid unlawfully granted by [the French Republic] to Ryanair in breach of Article 108(3) [TFEU], are incompatible with the internal market:

(a) the transaction amending the agreement signed on 11 April 2000 between the [CCI of Nîmes-Uzès-Le Vigan] and Ryanair, consisting of the correspondence exchanged between the [CCI of Nîmes-Uzès-Le Vigan] and Ryanair dated 28 November 2001, 11, 18, 21 and 24 December 2001, and 2, 5 and 15 February 2002;

(b) the transaction amending the agreement signed on 11 April 2000 between the [CCI of Nîmes-Uzès-Le Vigan] and Ryanair, consisting of the correspondence exchanged between the [CCI of Nîmes-Uzès-Le Vigan] and Ryanair dated 10 and 16 March 2004.

2. The following measures, which contain State aid unlawfully granted by [the French Republic] jointly to Ryanair and [AMS] in breach of Article 108(3) [TFEU], are incompatible with the internal market:

(a) the airport services agreement signed on 10 October 2005 between the [CCI of Nîmes-Uzès-Le Vigan] and Ryanair and the marketing services agreement signed on the same date between the [CCI of Nîmes-Uzès-Le Vigan] and [AMS];

(b) the airport services agreement signed on 2 January 2007 between [VTAN] and Ryanair and the marketing services agreement signed on the same date between [VTAN] and [AMS];

(c) the amendment of 1 August 2007 to the marketing services agreement signed on 2 January 2007 between [VTAN] and [AMS];

(d) the airport services agreement signed on 1 November 2007 between [VTAN] and Ryanair and the marketing services agreement signed on the same date between [VTAN] and [AMS];

(e) the airport services agreement signed on 27 August 2008 between [VTAN] and Ryanair and the marketing services agreement signed on the same date between [VTAN] and [AMS];

(f) the amendment of 25 August 2009 to the airport services agreement signed on 27 August 2008 between [VTAN] and Ryanair and the amendment of 25 August 2009 to the marketing services agreement signed on 27 August 2008 between [VTAN] and [AMS];

(g) the amendment of 18 August 2010 to the marketing services agreement signed on 27 August 2008 between [VTAN] and [AMS];

(h) the amendment of 30 November 2010 to the marketing services agreement signed on 27 August 2008 between [VTAN] and [AMS].

...

Article 4

1. [The French Republic] shall recover the State aid referred to in Article 1 from the beneficiaries. Ryanair and [AMS] are jointly and severally responsible for repaying the aid referred to in Article 1(2).

2. The amounts to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiaries to the date of their effective recovery.

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

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

Article 5

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. [The French Republic] shall ensure that this Decision is implemented within four months of the date of its notification.

Article 6

1. Within two months of notification of this Decision, [the French Republic] shall communicate the following information to the Commission:

(a) aid amounts to be recovered under Article 4;

(b) calculation of recovery interest;

(c) a detailed description of the measures already taken and planned for the purpose of complying with this Decision;

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

2. [The French Republic] shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1

has been completed. At the Commission's request, it shall immediately submit information on the measures already taken and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the aid amounts and interest already recovered from the beneficiaries.'

II. Procedure and forms of order sought

24 By application lodged at the Registry of the General Court on 5 February 2016, the applicants brought the present action.

25 By separate document lodged at the Court Registry on 2 March 2016, the applicants made an application for measures of organisation of procedure, by which they requested that the Commission produce certain documents.

26 The Commission submitted its observations within the prescribed period.

27 By document lodged on 26 May 2016, the Council of the European Union sought leave to intervene in the present case in support of the form of order sought by the Commission. By decision of 5 July 2017, the President of the Sixth Chamber of the Court granted that application.

28 By decision of 21 June 2017, the Court decided to refer the case to the Sixth Chamber, Extended Composition.

29 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral part of the procedure, to request the parties to submit their observations on the possible joinder of the case with Cases T-111/15 and T-165/15 for the purposes of the oral part of the procedure and to invite, by way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, the parties to answer certain questions.

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

31 The parties presented oral argument at the hearing on 26 October 2017.

32 The applicants claim that the Court should:

– annul Articles 1 and 4 to 6 of the contested decision;

– order the Commission to pay the costs.

33 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

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

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

36 It is therefore necessary to examine only the first four pleas, alleging (i) infringement of the principle of good administration enshrined in Article 41 of the Charter and of the rights of defence, (ii) incorrect imputation of the agreements in question to the French Republic, (iii) infringement of Article 107(1) TFEU in that the Commission wrongly considered VTAN's resources to be State resources, and (iv) infringement of Article 107(1) TFEU in that the Commission failed to prove the existence of a selective advantage.

A. The first plea in law, alleging breach of the principle of sound administration enshrined in Article 41 of the Charter and infringement of the applicants' rights of the 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 FEU Treaty on 1 December 2009, Article 41 of the Charter forms part of primary EU law and overrides any contrary provisions of secondary EU law, such as Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p.1).

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

40 The Commission and the Council dispute that line of 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. As set out in paragraph 1 of that article, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions of the Union. In addition, under paragraph 2 of that article, that right includes in particular (i) the right of every person to be heard before any individual measure which would affect him or her adversely is taken, and (ii) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

42 The explanations relating to the Charter, published in the *Official Journal of the European Union* of 14 December 2007 (OJ 2007 C 303, p. 17), state that Article 41 of the Charter is based on the existence of the Union as subject to the rule of law, whose characteristics have been developed in the case-law which has enshrined good administration as a general principle of law. Moreover, under Article 52(7) of the Charter, those explanations are to be given due regard by the courts of the Union and of the Member States.

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

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

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, being parties concerned within the meaning of Article 108(2) TFEU, have a right to see the Commission's investigation into the

agreements at issue conducted impartially and fairly within the meaning of Article 41(1) of the Charter, especially since the finding of State aid in relation to their trade agreements with Nîmes airport is likely to result in financial consequences for them in terms of the recovery of amounts received.

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

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, paragraph 2 of that article lists a set of rights to be observed by the Union's administration, including the rights of defence, which include the right to be heard and the right to have access to the file.

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

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, although the applicants, as beneficiaries, essentially play only the role of a source of information in the procedure (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 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 scheme of Articles 107 and 108 TFEU, to involve third parties in the administrative procedure in a broad way (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. The observance of the procedural rights of the parties concerned is especially important in State aid proceedings, in which the Member State responsible for the aid and the beneficiary of it often have conflicting interests, as is demonstrated in the present case by the fact that the French Republic is the major shareholder in Air France, which, in response to Nîmes airport's attempt to diversify its operations, abandoned that airport shortly after the arrival of Ryanair, and by the fact that Air France was apparently the complainant in the State aid procedure.

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 decision to initiate the procedure, as

required by Article 6 of Regulation No 659/1999, 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 the case which gave rise to that judgment, 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, the applicants' argument that the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376), is not relevant either in the present case, in so far as that judgment concerns State aid proceedings which had been closed before the Charter became part of primary EU law, cannot succeed given that that judgment highlights the fact that the granting to aid recipients of a right of access to the Commission's file would call into question the system for the review of State aid.

66 In the fifth place, in so far as it follows from the foregoing that the Commission did not infringe either Article 41 of the Charter or the applicants' rights of defence, it is unnecessary to address the argument put forward by the applicants that the outcome of the procedure might have been different if the Commission had granted them 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, it must be borne in mind that it is settled case-law that, in the context of an examination under Article 108(2) TFEU, the Commission is obliged to give notice to the parties concerned to submit their comments (see judgment of 8 May 2008, *Ferriere Nord* v *Commission*, C-49/05 P, not published, EU:C:2008:259, paragraph 68 and the case-law cited). With regard to that obligation, the Court of Justice has ruled that the publication of a notice in the OfficialJournal constituted 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 that communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 56 and the case-law cited).

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

71 Thus, a decision to initiate the formal investigation procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for interested

parties 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 common ground that, following publication of the letter informing the French Republic of the decision to initiate the procedure, together with a summary of that decision calling on interested parties to submit their comments, the Commission received comments from the applicants. Accordingly, by letter of 28 September 2012, Ryanair submitted comments on that decision. In addition, the applicants lodged a number of additional documents during the formal investigation procedure.

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

74 In the decision to initiate the procedure, the Commission first of all submitted general information concerning Nîmes airport and described the various agreements and amendments concluded between the operators of that airport and the applicants between 2000 and 2010. The Commission then carried out a provisional assessment of the potential aid granted to the applicants in the light of the criteria for State aid, including the private investor in a market economy test, before finally examining the compatibility of the aid with the internal market. In particular, as regards the application of the private investor test, the Commission at that stage considered that, on the basis of the information available to it, the airport services agreements and the marketing services agreements had to be assessed together. It also stated that the French authorities had not provided any comparator for the assessment of whether the price paid by Ryanair reflected the normal price and considered that the study of the costs incurred by the operator of that airport in the provision of the airport services at issue could contribute to the assessment of the 'normal market conditions'. It invited the French authorities to set out all the operating costs linked or attributable to hosting Ryanair and to present the prospect of profits or, failing that, the last budget estimates established prior to the conclusion of each substantial modification of the contractual and commercial framework with Ryanair.

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

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

77 It follows that, during the formal investigation procedure which resulted in the adoption of the contested decision, the Commission did not infringe the applicants' procedural rights.

78 In the light of all the foregoing considerations, the first plea must be dismissed in its entirety.

B. The second plea in law, relating to the imputability of the agreements at issue to the French Republic

79 The applicants claim that the imputation to the French Republic, by the Commission, of the decisions taken by the CCI of Nîmes-Uzès-Le Vigan, VTAN and the SMAN is vitiated by a failure to state reasons and manifest errors of assessment.

80 It should be borne in mind, as a preliminary point, that Nîmes airport was initially operated only by the CCI of Nîmes-Uzès-Le Vigan. Since 1 February 2006, responsibility for the operation and development of the civil zone of that airport fell within the competence of the SMAN, which temporarily entrusted, between 1 February 2006 and 31 December 2006, the operation of that airport to that CCI through a public service delegation and, subsequently, subcontracted that operation, under a public service delegation agreement that took effect on 1 January 2007, to Veolia Transport, which was succeeded by its subsidiary VTAN.

1. The complaint concerning the imputability to the French Republic of the decisions of the CCI of Nîmes-Uzès-Le Vigan

(a) The nature of CCIs

81 The applicants acknowledge that decisions of a public authority are always imputable to the State, but state that decisions taken by so-called public undertakings, following the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), may be considered to be imputable to the State only if certain indicators are present that show State involvement and initiative in the adoption of the measures. In the present case, the Commission erred in taking the view that CCIs should be regarded as public authorities all of whose decisions should be considered automatically imputable to the State: French CCIs are hybrid entities with a statutory and actual role both as representation bodies for undertakings and as undertakings in their own right. The Commission took the view that the commercial activities of the CCI of Nîmes-Uzès-Le Vigan were merely ancillary to its role of serving the general interest, without providing any evidence to support that view. The activities related to the management of Nîmes airport exercised by that CCI are not subordinate to other non-economic activities, but separate from them. Moreover, the commercial activities of CCIs are usually predominant and are often governed by private law and subject to the jurisdiction of the civil and commercial courts. Lastly, as regards the activity related to the management of Nîmes airport, the CCI at issue had a clearly economic role, and it should have been regarded as an undertaking. Furthermore, the French Government stated that that CCI was acting autonomously. Consequently, the Commission was wrong to classify the CCI of Nîmes-Uzès-Le Vigan as a public authority and failed to state adequate reasons for its conclusion that that CCI was solely or at least primarily a public authority and not an undertaking. Based on that lack of reasoning, the applicants consider that they were not in a position to establish whether the Commission's refusal to note the presence of certain indicators showing State involvement and initiative in the adoption of the measures for the purpose of that judgment was justified.

82 The Commission contests those arguments.

83 As a preliminary point, it should be borne in mind that, under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

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

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

86 In the present case, it should be noted at the outset that it is common ground that the property of Nîmes airport is the property of the French Republic. The airport management was ensured until 31 January 2006 by the CCI of Nîmes-Uzès-Le Vigan, and in particular by a specialised service within that CCI.

87 Furthermore, in the contested decision, the Commission stated that the basic principles of the French legislation on CCIs had remained unchanged during the period under review. It explained that they are public bodies set up by law, administered by elected managers and supervised by the State. Moreover, the French Commercial Code classifies CCIs as intermediate State authorities, their primary objective being to fulfil the general interest missions conferred on them by law, i.e. mainly to represent the interests of industry, commerce and services before public authorities, support local businesses, and develop the attractiveness and land planning of their areas. In that decision, the Commission also explained that the industrial and commercial activities of CCIs, such as the operation of airport facilities, were ancillary to their general interest missions and designed to help fulfil those missions. In addition, national laws lay down specific financing arrangements for CCIs. In this respect, their resources consist of tax revenues, subsidies or arise out of training and transport infrastructure operation activities, which corroborates the fact that their industrial and commercial activities are ancillary to their general interest missions (recitals 256 to 261 of the contested decision).

88 In relation to the CCI of Nîmes-Uzès-Le Vigan, to which the operation of Nîmes airport was entrusted, the Commission referred to the statement by the French authorities that, for that CCI, a commercial activity such as the operation of that airport was not pursued in the interests of profitability, but as a counterpart to the general interest missions with which it was invested, namely the development of economic activity and attractiveness of its area (recitals 262 to 264 of the contested decision).

89 In that context, in recital 265 of the contested decision, the Commission was correct to take the view, in accordance with the case-law cited in paragraph 85 above, on the basis of all those factual elements, that CCIs such as that at issue had to be considered as public authorities all of whose decisions, just like those of the central administration or local authorities, were imputable to the State.

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

91 Moreover, since the agreements in question had been concluded by the CCI of Nîmes-Uzès-Le Vigan, which is a State body, it was not necessary for the Commission to determine the imputability of the State in the light of the criteria set out in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294). That case-law was based by the Court of Justice on the finding, set out in paragraph 52 of that judgment, that a public undertaking could act with more or less independence, according to the degree of autonomy left to it by the State, and that, therefore, actual exercise of State control in a particular case cannot be automatically presumed. However, the situation of that CCI is different since that entity, while carrying out an economic activity and concluding those agreements, is an organ of the State, in the light of the factors referred to in paragraphs 87 and 88 above.

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

93 In addition, in the contested decision, the Commission found, albeit for the sake of completeness, that there was no need to differentiate between the CCI of Nîmes-Uzès-Le Vigan and the specific service of it which carried out the economic activity of management of Nîmes airport, since that service does not have its own legal personality distinct from that CCI and is only a part of its internal services which has no decision-making autonomy except for in relation to the daily management of that airport. Accordingly, the Commission observed that the 2000 ASA, the airport services agreement and the marketing services agreement of 10 October 2005 were all signed by the president of the CCI of Nîmes-Uzès-Le Vigan. As regards the amendments to the 2000 ASA concluded in 2001 and 2004, the Commission found that they did not bear the signature of that president, but that the French authorities had indicated that the agreements and amendments concluded with Ryanair came under the industrial and commercial services management powers entrusted to that president. Lastly, the Commission stated that the French authorities had not claimed that the conclusion of the agreements with the applicants had to be imputed solely to that service (recital 272 of that decision).

94 In those circumstances, the Commission was entitled to find, without committing an error, that the conclusion by the CCI of Nîmes-Uzès-Le Vigan of the agreements at issue was imputable to the State.

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

96 In the first place, as regards the applicants' argument that the Commission did not state the reason why it had stressed the main role of the public law tasks of the CCI of Nîmes-Uzès-Le Vigan having regard to its commercial and principal activities, it must be noted that, as is apparent from recitals 256 to 264 of the contested decision, the Commission based the finding of the essential role played by general interest missions of the CCIs and the ancillary nature of their commercial activities both on the legislative framework relating to the CCIs and on the declarations of the French authorities. The applicants have adduced no evidence to call that analysis into question.

97 In the second place, as for the applicants' argument that the CCIs are subject to private law and the jurisdiction of the civil and commercial courts, it must be stated that, while accepting that that finding, to the extent that it is correct, may constitute a factor of relevance in refusing to classify the CCI of Nîmes-Uzès-Le Vigan as a public authority, it constitutes only one factor among others in assessing the nature of the entity concerned, which does not by itself call into question the classification as a public authority based on all the other factors mentioned by the contested decision (see paragraphs 87 and 88 above).

98 In the third place, it is necessary to reject the applicants' argument, alleging a failure to state reasons, that they were not in a position to establish whether the Commission's refusal to note the presence of certain indicators showing State involvement and initiative in the adoption of the measures for the purpose of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), was justified. In recitals 256 to 267 of the contested decision, the Commission explained, in a sufficiently clear manner, how the situation of the CCIs, combining general interest missions and the exercise of economic activities, was different from that of the public undertakings with regard to which the Court of Justice gave that judgment.

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

(b) The alleged contradictory reasoning

100 The applicants claim that the Commission's statement of reasons for the contested decision is contradictory by considering, in the context of its examination of imputability to the State, that the CCI of Nîmes-Uzès-Le Vigan not only was part of the public administration, but also, for the purposes of the same activity, was an undertaking to which State aid had been granted. The Commission therefore also erred in law. The same entity could not be part of the public administration and an undertaking in receipt of aid with respect to one and the same activity, since the two characterisations are mutually exclusive.

101 In that regard, the applicants acknowledge that the same entity can both grant and receive State aid, but state that it must in both cases be regarded as an undertaking. The assessment of the imputability to the State of a decision to grant aid must then be made on the basis of the criteria mentioned in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294). According to the applicants, by failing to classify the CCI of Nîmes-Uzès-Le Vigan either as an undertaking or as another entity, the contested decision does not enable them to determine whether the Commission based the criterion of imputation to the State chosen in the case of that CCI on the

criteria mentioned in that judgment or on the mere fact that it belonged to the public administration. That decision is therefore vitiated by a flaw in the statement of reasons for the classification of that CCI.

102 The Commission contests those arguments.

103 In that regard, it should be noted first of all that, in the context of the examination of the aid measures in favour of the operator of Nîmes airport, the Commission found that the CCI of Nîmes-Uzès-Le Vigan had managed that airport until 31 January 2006 and that the exceptional operating subsidies and repayable advances which had been granted to it constituted State aid within the meaning of Article 107(1) TFEU (recitals 557 and 616 of the contested decision).

104 Next, it must be observed that, in the context of the examination of the agreements at issue, the Commission relied on a number of factors, such as the status as a public body established by law, the fulfilment of general interest missions, the ancillary nature of the economic activities and the State supervision, in order to infer that the CCI of Nîmes-Uzès-Le Vigan was part of the public administration and constituted a public authority whose conduct was imputable to the State (recitals 256 to 265 of the contested decision). The conclusion of those agreements with the applicants formed part of that conduct.

105 It must be stated that the Commission considered that, through its business activity, the CCI of Nîmes-Uzès-Le Vigan had received State aid, in this case exceptional operating subsidies and repayable advances from equipment subsidies, and was, in addition, an entity which, forming part of the public administration, had consented to the granting of aid to the applicants, in the present case by the conclusion of the agreements at issue.

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

107 In that regard, it should be borne in mind that nothing prevents the exercise of an economic activity from being integrated into the context of public administration organisations (see, to that effect, judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 21). Similarly, the fact that an entity is engaged in economic and non-economic activities at the same time does not prevent it from being classified as an undertaking within the meaning of the State aid rules as regards the first activities (see, to that effect, judgment of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 74).

108 In addition, the inclusion of an entity, such as the operator of an airport, in the public administration does not preclude that entity from being able to be a beneficiary of State aid. It should be recalled that the existence or otherwise of legal personality distinct from that of the State, conferred by national law on a body carrying out economic activities, does not prevent the existence of financial relations between the State and that body and, consequently, the possibility that that body will benefit from State aid within the meaning of Article 107(1) TFEU (see, to that effect,

judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraphs 128 and 129 and the case-law cited).

109 It follows that, contrary to what the applicants claim, the contested decision is not vitiated by contradiction or an error of law or by a failure to state reasons in so far as it classifies the CCI of Nîmes-Uzès-Le Vigan as both a recipient of aid and as an entity forming part of the public administration.

110 The present complaint must therefore be rejected.

2. The complaint concerning the imputability to the French Republic of the SMAN's decisions

111 The applicants claim that the Commission wrongly imputed the SMAN's decisions to the State. In this connection, they maintain that the SMAN is a group of public entities and provides airport services as co-manager of the airport. Since the SMAN was a public undertaking, the Commission was required, following the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), to verify whether the public authorities were involved in the adoption of the measures which the SMAN took in favour of the applicants. Going against that judgment, the Commission based, in recital 573 of the contested decision, its conclusion concerning the imputability to the State on the single organic criterion of ownership, or in other words, the composition of the SMAN board. In addition, in breach of the requirements of that ruling, the Commission undertook no multi-criteria examination of the involvement of public authorities in the SMAN's decisions.

112 The applicants take the view that the approach taken by the Commission in the contested decision leads to the result that the criteria of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294) cannot apply to any undertakings owned by any State, central or local, entities. However, those authorities can establish an undertaking and be its sole shareholder without that undertaking thereby becoming a public authority. That approach amounts to a systematic piercing of the corporate veil, as if public companies did not exist.

113 At the outset, it should be noted that, in its analysis of the imputability to the State of the agreements at issue, the Commission takes into account, in respect of the agreements concluded with the CCI of Nîmes-Uzès-Le Vigan, only the latter's public authority character without assigning any role to the SMAN. Consequently, the applicants' complaint is ineffective in so far as it seeks to criticise the analysis of the imputability to the State of those agreements. By contrast, in respect of the agreements concluded with VTAN, it should be noted that the Commission found, in recital 277 of the contested decision, that VTAN's commercial policy towards the applicants had been largely influenced by a framework established by the SMAN, which had led VTAN to deviate from the normal conduct of an airport operator free to decide its commercial policy and motivated by the prospect of profits. At the end of its analysis, the Commission concluded, in recital 299 of that decision, that the agreements concluded with VTAN had to be regarded as imputable to the SMAN, and therefore to the French Republic in the broad sense.

114 Therefore, it is necessary to examine the present complaint in so far as the applicants argue that the Commission erred in not establishing that the measures taken by the SMAN in their favour, in that the influence of VTAN's commercial policy favoured them, were imputable to the French Republic in the broad sense.

115 In that regard, it is appropriate from the outset to recall the case-law according to which measures adopted by local and regional authorities or other infra-State entities fall, in the same way as measures taken by the central authority, within the ambit of Article 107(1) TFEU if the conditions laid down by that provision are satisfied (see case-law cited in paragraph 85 above).

116 In the present case, it must be noted that the Commission emphasised, in recitals 26 and 572 of the contested decision, that the SMAN was a public body which brought together three local and regional authorities, namely the Departmental Council of Gard, the Urban Community of Metropolitan Nîmes and the Urban Community of Grand Alès en Cévennes.

117 Moreover, the Commission stated, in recitals 572 and 573 of the contested decision, that decisions of local authorities had to be regarded as imputable to the State in the broad sense and that that conclusion was valid, by extension, for a group of local authorities such as the SMAN.

118 In addition, the Commission observed, in recital 573 of the contested decision, that the SMAN was managed by a board consisting solely of representatives of its member local authorities.

119 The Commission concluded from this, in recital 573 of the contested decision, that all decisions of the SMAN were imputable to the State.

120 Having regard to the case-law mentioned in paragraph 85 above, it is necessary to confirm that conclusion.

121 That conclusion is not invalidated by the applicants' argument that the SMAN is a company providing airport services and that, therefore, the Commission was required to assess the imputation to the State of the SMAN's decisions on the basis of the criteria established in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294).

122 It is necessary to stress that the Commission found in recital 277 of the contested decision that VTAN's conduct towards the applicants did not have to be considered in isolation from that of the SMAN, which is the group of public authorities acting as concession authority in terms of granting and implementing the public service delegation, and that, in particular, VTAN's commercial policy towards the applicants was largely influenced by a framework established by the SMAN.

123 Although the SMAN can exercise business activities, just like other organs of the State can, it must be observed that it constitutes a group of local authorities acting moreover, in the case at hand, as concession authority in terms of the public service delegation, and that, consequently, it was not necessary, as regards the measures adopted by it, to establish imputability to the State on the basis of the approach laid down in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294).

124 The present complaint must therefore be rejected.

3. The complaint concerning the imputability to the State of VTAN's decisions

125 The applicants state that the decisions of a private undertaking such as VTAN are generally not imputable to the State, especially in the absence of any State ownership in the undertaking concerned. In any event, the Commission did not establish that the decisions adopted by VTAN were imputable to the State. Thus, simple influence by the SMAN, by means of the public service delegation agreement, on the conduct of VTAN is not sufficient in that regard. In addition, the

SMAN systematically refrained from exercising its power to influence VTAN in its negotiations with Ryanair. Moreover, according to the applicants, VTAN was free to find a substitute for Ryanair and had a broad margin to negotiate contracts with them.

126 The Commission disputes the applicants' line of argument.

127 In that regard, it should be borne in mind that, according to settled case-law, no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid. EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (see judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23 and the case-law cited).

128 Similarly, the appointment by the State of a private entity to grant aid cannot in itself allow the measures adopted by that entity to escape the application of those rules.

129 As regards the condition that the measure must be attributable to the State, it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of that measure (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17 and the case-law cited). Therefore, it is necessary to examine whether the Commission was entitled to consider, following its analysis of State imputability, that the SMAN was involved in the conclusion of contracts entered into by VTAN with the applicants.

130 In that regard, it must be observed that the Commission identified, in recitals 278 to 299 of the contested decision, a series of indicators to support such an involvement on the part of the SMAN.

131 First, the Commission noted that the public service delegation agreement concluded between the SMAN and Veolia Transport, whose carrying out was entrusted to VTAN, was not limited to granting the latter the commercial operation of Nîmes airport, but also charged it with a development of traffic task. Thus, according to the Commission, that public service delegation agreement constrained and influenced VTAN's commercial policy towards the airlines, particularly as the development of traffic is not in itself the ultimate goal of a private airport operator entirely free to decide its commercial policy. The objective pursued by such a private operator is to maximise its profitability, which is not compatible in all circumstances with the development of traffic (recitals 278 to 281 of the contested decision). Moreover, the Commission noted that Veolia Transport's response to the invitation to tender had been influenced by the traffic development objective set by the SMAN and, more generally, by the local economic development objectives pursued by the SMAN (recitals 282 to 285 of that decision). Secondly, the Commission found that Veolia Transport's various statements during the invitation to tender process confirmed that it was aware of the fact that the commercial relationship with Ryanair was likely to harm the profitability of the operation of Nîmes airport and that it was prepared to pursue that relationship under similar conditions to those previously established by the CCI of Nîmes-Uzès-Le Vigan only in the light of the SMAN's traffic development objectives, the commitments made to the SMAN in order to win the airport operation concession, and the flat-rate contribution offered by the SMAN ensuring the concession's financial stability (recital 287 of that decision). Thirdly, in respect of that flat-rate operating subsidy, the Commission found that the profitability of VTAN's concession relied on that contribution, that its amount had been calculated based on a provisional budget which incorporated the costs and revenues associated with the agreements at issue and that the SMAN had therefore

granted VTAN a contribution that was designed to allow Ryanair's activity to continue under similar conditions to those under which that airline had offered its services from Nîmes airport when the CCI of Nîmes-Uzès-Le Vigan was operating the airport. Furthermore, the Commission stated that the adjustment of the flat-rate contribution on the basis of Ryanair's activity reduced the incentives for VTAN to adopt decisions likely to result in a reduction in Ryanair traffic (recitals 288, 289 and 291 of the same decision).

132 It must be held that the Commission proved to the requisite legal standard that, as it indicated in recitals 292 and 293 of the contested decision, the framework laid down by the SMAN through the invitation to tender process, the objectives set in the public service delegation agreement concluded between the SMAN and Veolia Transport and the flat-rate contribution had a sufficiently decisive influence on VTAN's conduct towards the applicants that the agreements in question can be regarded as imputable to the State pursuant to the case-law. On that basis, the Court endorses the Commission's conclusion set out in recital 299 of that decision according to which the causal link between the terms of that agreement, the invitation to tender process and the flat-rate contribution, on the one hand, and the agreements signed by VTAN with the applicants, on the other hand, was strong enough to prove that the SMAN was clearly involved in the measures in question, with the result that those measures must be imputable to the SMAN.

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

134 In the first place, the applicants claim that simple influence by the SMAN on VTAN's conduct, by means of the public service delegation agreement concluded between the SMAN and Veolia Transport, is not tantamount to control and imputation to the State. However, that claim gives an erroneous interpretation of the contested decision, which is based on a set of indicators to find that the SMAN exerted a decisive influence over the decisions taken by VTAN with regard to the applicants. The Commission therefore did not limit itself in the contested decision to establishing the existence of mere State influence on the conduct of an undertaking in order to conclude on the imputability to the State.

135 In the second place, the applicants assert that the SMAN systematically refrained from exercising its power to influence VTAN's conduct in negotiations with Ryanair. That argument is ineffective, however. It is apparent from recital 296 of the contested decision that the simple option that the SMAN had to become involved in those negotiations gave it a certain degree of influence and that it could have intervened if VTAN had tried to impose conditions on Ryanair that may have prompted the latter to reduce its traffic at Nîmes airport. As the Commission states, VTAN knew that the SMAN could intervene and had every reason to take that factor into consideration in its own decisions, which were already part of the framework set by the SMAN.

136 In the third place, the applicants submit that VTAN had a broad margin of manoeuvre to negotiate contracts with them. In that regard, it must be pointed out that although, in the contested decision, the Commission states that the public service delegation agreement concluded between the SMAN and Veolia Transport refers to 'total freedom' for VTAN in negotiating agreements with aviation users, it then explains that that freedom could be exercised only within the general framework laid down by that agreement and the commitments made by Veolia Transport in response to the invitation to tender, which were such as to constrain and influence VTAN's conduct to a considerable extent. Furthermore, it must be held that, notwithstanding the existence of a degree of commercial freedom enjoyed by VTAN in negotiating agreements (recitals 292 and 299 of that decision), the Commission demonstrated to the requisite legal standard, on the basis of converging indicators listed in paragraph 131 above, that that general framework had resulted in the

SMAN having a sufficiently decisive influence on VTAN's commercial relationships with the applicants in order to conclude on the imputability to the State. The applicants have not adduced any evidence to show that the existence of a commercial margin of manoeuvre enjoyed by VTAN challenged that analysis of imputability conducted by the Commission.

137 In the fourth place, the applicants take the view that it is apparent from the contested decision that the French authorities confirmed VTAN's contractual autonomy. However, as the Commission rightly states, recital 92 of that decision on which the applicants rely only sets out the information from the Member State as to the procedure followed within VTAN itself for decision-making and, in that recital, it did not take a view on the influence of the SMAN on the content of the contracts entered into by VTAN.

138 In the fifth place, the applicants contend that VTAN was free to find a substitute for Ryanair and that no sanction applied to that type of decision. However, as the Commission rightly points out, that factor could not have a bearing on the question of the imputability to the State of the agreements at issue. In fact, the SMAN could well have been equally happy with another carrier chosen by VTAN. The fact remains that, by the general framework laid down by means of the invitation to tender process, the traffic development objectives set out in the public service delegation agreement concluded between the SMAN and Veolia Transport and the flat-rate contribution, the SMAN exerted a decisive influence on the conditions offered by VTAN to airlines. Moreover, as the Commission correctly points out, the possibility of replacement of Ryanair's activity referred to in recital 411 of the contested decision was envisaged only in the long term, not during the period to which that decision relates.

139 In the sixth place, the applicants claim that there was no sanction for VTAN in not following its commitments towards the SMAN, other than hypothetical damage to reputation. However, that argument is based on an incorrect reading of the contested decision. Recital 286 of that decision does not refer in any way to sanctions, but states that VTAN's conduct towards the applicants was fundamentally influenced by the traffic development objective set by the SMAN. In that context, the Commission observed in that recital that the successful tenderer's tender necessarily bound the latter for the whole term of the concession, from a legal point of view but also in other respects, and considered that an undertaking that sets objectives and makes commitments in response to an invitation to tender organised by a local authority and that subsequently acts in a manner contrary to those objectives and commitments runs the risk of its reputation being compromised among local authorities. The Commission concluded from this that Veolia Transport, which in 2007 was looking to establish itself in the airport operation market, would not have run such a risk.

140 In the seventh and last place, as regards the applicants' argument that the SMAN had at most given VTAN only assurances to cover certain losses should VTAN decide to continue a 'legacy situation' with them, it is necessary to point out that the Commission inferred, in recitals 278 to 299 of the contested decision, the imputability to the State of the agreements at issue not only from the grant of the flat-rate contribution to ensure the stability of Nîmes airport, but also from a set of elements including, in particular, traffic development commitments, which were likely to harm the profitability of that airport and would have been acceptable only if financial compensation was granted.

141 In the light of the foregoing, it is necessary to reject this complaint and, therefore, the second plea.

C. The third plea in law, alleging infringement of Article 107(1) TFEU, in that the Commission wrongly considered VTAN's resources to be State resources

142 The applicants argue that the Commission has not established that the condition that State resources are used was fulfilled. Indeed, the flat-rate contribution which the SMAN paid to VTAN remained under VTAN's control and VTAN had a discretion as to whether or not to use it and whether or not to transfer it to the applicants. VTAN's resources did not, therefore, remain under constant public control, within the meaning of the case-law.

143 In that regard, it should be recalled first of all that, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, among other conditions, be granted directly or indirectly through State resources (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

144 In this respect, the concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 20 and the case-law cited).

145 The Court of Justice has also held that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21 and the case-law cited).

146 The fact that the resources concerned may be administered by entities separate from the public authorities is irrelevant in that respect (see, to that effect, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 35).

147 In the present case, it is common ground that State resources were transferred from the SMAN in the form of a flat-rate contribution to VTAN, which is a private company operating the airport.

148 Moreover, it should be noted that the Commission observed, in recital 300 of the contested decision, referring to recital 298 of that decision, that the financial stability of the operation of Nîmes airport relied on the flat-rate contribution granted by the SMAN, the amount of which had been determined, inter alia, according to the parameters of the commercial relationship between the CCI of Nîmes-Uzès-Le Vigan and the applicants in 2006 and therefore in order to allow Ryanair to continue its activity from Nîmes airport under the same conditions as when that CCI was operating the airport. The Commission concluded from this, in the same recital, that the advantages conferred on the applicants by those agreements had therefore been financed through that flat-rate contribution, and consequently through State resources.

149 In particular, the Commission found, in recital 288 of the contested decision, that the profitability of the concession for VTAN relied on the flat-rate subsidy paid by the SMAN, which therefore participated directly in financing the operation of Nîmes airport. The Commission explained that the existence of that subsidy, granted by the SMAN, demonstrated the latter's influence over VTAN's commercial relations with the applicants given that, without that subsidy, it was likely that no operator would have agreed to operate the airport under a concession for which the economic model was based on a traffic development objective and relations with an airline that

were likely to result in a negative margin for the airport's operation. The Commission considered that the granting of the subsidy in question was therefore one of the elements that had allowed the agreements to be signed with the applicants.

150 In those circumstances, the criteria established by the case-law mentioned in paragraph 145 above are satisfied. It is apparent from the contested decision that the SMAN granted VTAN a contribution that was designed to allow Ryanair's activity to continue under similar conditions to those in force when the CCI of Nîmes-Uzès-Le Vigan was operating Nîmes airport (see also recital 289 of that decision) and that, without that contribution, VTAN would have borne the full burden of the advantages conferred on the applicants through the agreed agreements.

151 The fact that VTAN enjoyed a certain freedom when negotiating its agreements with the applicants and that there was no mechanical link between the amount of the flat-rate contribution and the parameters of the contracts negotiated does not mean that the connection between that contribution and the advantage given to the applicants has been eliminated. It must be found that, in economic terms, the flat-rate contribution in favour of VTAN made the conclusion of the agreements with the applicants possible and enabled VTAN to not have to bear the cost of the advantages conferred on the applicants through those agreements. Thus, those advantages are the result of the payment of the flat-rate contribution to VTAN (see, to that effect, judgment of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraphs 26 and 27).

152 In the light of all of the foregoing, the third plea must be dismissed.

D. The fourth plea in law, alleging infringement of Article 107(1) TFEU, in that the Commission failed to establish the existence of a selective advantage

153 The applicants argue that the Commission failed to demonstrate the existence of a selective advantage and thus infringed Article 107(1) TFEU.

154 In the first place, the applicants claim that the Commission failed to establish that the advantage which they had allegedly received was selective in nature. In the second place, they take the view that the Commission wrongly refused to carry out a comparative analysis, whereas such an analysis would have led it to conclude that there was no aid. According to the applicants, the contested decision is also vitiated by defects of reasoning on that point. In the third place, the applicants argue that the Commission made manifest errors of assessment in its incremental profitability analysis and did not sufficiently reason that analysis.

155 The Commission disputes this plea.

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

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

158 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).

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

1. The first part, alleging that the Commission did not establish that the agreements conferred a selective advantage

160 The applicants argue that the Commission failed to establish that they had obtained a selective advantage. According to the applicants, the Commission did not examine the question of selectivity, even in a cursory manner, focusing instead directly on the question of an alleged advantage. They add, relying on the judgment of 9 September 2014, *Hansestadt Lübeck* v *Commission* (T-461/12, EU:T:2014:758), that the Commission should have established whether the same alleged advantages existed for other existing or potential users of Nîmes airport. The applicants point out, in this connection, that the agreements at issue had been concluded on a non-exclusive basis and that any other airline meeting similar objective criteria could have concluded the same or similar agreements.

161 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).

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

163 It must, however, be observed that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (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).

164 In the present case, the agreements in question, which were concluded between the operators of Nîmes airport and the applicants and as analysed in the contested decision, must be considered as involving individual aid.

165 The agreements at issue, which must be examined as a single measure (see paragraphs 207 to 216 below, and in particular paragraph 214), include terms that were individually agreed between the parties. They specify, first, the routes to be operated by Ryanair and the airport services that the operators of Nîmes airport are required to provide to Ryanair and, secondly, the marketing services that AMS undertook to provide to that airport. They lay down in detail the airport charges, remuneration for the marketing services and the financial incentives provided for. In particular, it is apparent from the contested decision that remuneration for the marketing services, as negotiated between those operators and the applicants, represented a substantial part of the incremental costs and therefore an important element contributing to the foreseeable negative incremental flow (revenues less costs) which represents the advantage in favour of the applicants (see recitals 439 and 440 and Tables 7 to 16 of that decision). Although regulated airport charges are in principle applicable to all airlines using Nîmes airport, the fact remains that remuneration for the marketing services was specific to the relationship between those operators and the applicants.

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

167 The fact that the agreements at issue were concluded on a non-exclusive basis is not such as to alter that conclusion.

168 Therefore, contrary to the applicants' claim, it is not necessary to establish whether the agreements in question provide advantages to them 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).

169 The test requiring a comparison of the beneficiary with other operators in a comparable factual and legal situation in the light of the aim pursued by the measure in question is based on, and justified by, the assessment of whether measures of potentially general application are selective. That test is therefore irrelevant where, as in the present case, it would amount to assessing the selective nature of an *ad hoc* measure which concerns just one undertaking and is intended to modify certain competitive constraints which are specific to the undertaking (judgments of 26 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).

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

services specifically agreed upon between Nîmes airport and the applicants on the basis of AMS's rate card.

171 It follows that the first part of the third plea must be rejected.

2. The second part, alleging errors of assessment and failure to state reasons concerning the decision to depart, in the present case, from the comparative analysis

172 The applicants argue that the Commission 'wrongly refused to have recourse to a comparator analysis and that, had it carried out such an analysis, it would have found an absence of aid', with regard to the agreements at issue.

173 In the contested decision, the Commission noted that paragraph 53 of the 2014 Guidelines provided for two methods of assessment for the purposes of applying the market economy operator test:

– the comparative analysis under which aid to an airline using an airport could, in principle, be excluded where the price charged for the airport services corresponded to the market price;

– the incremental profitability analysis under which such aid could be excluded if it could be demonstrated through an *ex ante* analysis that the airport/airline arrangement would lead to a positive incremental profit contribution for the airport (recital 376 of the contested decision).

174 The Commission also noted that, in the 2014 Guidelines, it expressed doubts that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports. The Commission had therefore considered an incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines (recital 378 of the contested decision).

175 In the contested decision, the Commission relied in particular on the following considerations to reject the comparative analysis:

– the revenue and cost structure tended to differ significantly from airport to airport (recital 380 of the contested decision);

– the liberalisation of the air transport market complicated any purely comparative analysis; commercial arrangements between airports and airlines varied widely and it was therefore difficult to compare them based on a price per rotation or per passenger (recital 381 of the contested decision);

– the method adopted by Ryanair in its comparative analysis submitted during the administrative procedure ('the study of 28 September 2012') was ineffective since it limited itself to the services and payments resulting from the airport services agreements without taking into account the marketing services agreements (recitals 382 and 383 of the contested decision);

– Ryanair had not shown how the airports which it mentioned in the study of 28 September 2012 were sufficiently comparable to Nîmes airport in terms of the various criteria listed in the 2014 Guidelines (recital 384 of the contested decision);

– neither the French authorities nor any interested third party had proposed any comparison airports with evidence that such airports were sufficiently comparable to Nîmes airport in terms of those criteria mentioned above (recital 384 of the contested decision).

176 In those circumstances, the Commission considered that the approach generally recommended in the 2014 Guidelines, namely the *ex ante* incremental profitability analysis, had to be applied in the present case (recital 385 of the contested decision).

177 Furthermore, the Commission considered, in recital 395 of the contested decision, that a hypothetical market economy operator motivated by the prospect of profits would not be prepared to purchase marketing services, even at a price at or below market price, if it were predicted that, despite the positive effect of such services on passenger traffic on the air routes concerned, the incremental costs generated by the agreements would exceed the incremental revenues at present value.

178 In that regard, the Court must examine whether the Commission could, without making an error, depart from the comparative analysis in the present case.

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

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

180 In that regard, it is clear from 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).

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

182 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 had received an economic advantage which it would not have obtained in normal market conditions (see, to that effect and by analogy, judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 250 and 254, and of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraphs 43 and 44).

183 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 had received an economic advantage which it would not have obtained in normal market conditions (see, to that effect, 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).

184 In the present case, without it being necessary to consider at this stage the merits of the grounds relied on by the Commission to depart from the comparative analysis in the present case, it must be held that the Commission could therefore, without committing an error, analyse in detail, in recitals 376 to 392 of the contested decision, what was the most appropriate assessment method to use for the purposes of the application of the market economy operator test. Accordingly, doubting that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports and taking into account considerations related to the divergence of costs and revenues between airports, the low comparability of the transactions between airports and airlines and the inadequacy of the study of 28 September 2012, the Commission opted for the incremental profitability analysis method and departed from the comparative analysis.

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

186 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.

187 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.

188 Nor can the applicants properly rely on the case-law according to which the fact that the transaction at issue is reasonable for the public authority does not exempt the Commission from ascertaining whether the measure in question conferred on the recipient undertaking an economic advantage which it would not have obtained under normal market conditions (judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 315, and of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 213). The incremental profitability analysis aims precisely at establishing whether, by the conclusion of the agreement, the public authority acting as a market economy operator finding itself, to the extent possible, in the same situation conferred an economic advantage on the other party to the agreement which it could not have obtained under normal market conditions.

189 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 an advantage on the airline which it would not have obtained under normal market conditions, it should be noted that, according to the case-law cited in paragraph 181 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.

190 It follows that the applicants' argument that the Commission had to carry out a comparative analysis in the case of airport or marketing services must be rejected.

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

191 The applicants dispute the specific reasons on which the Commission relied in recitals 378 to 392 of the contested decision to depart, in the present case, from the comparative analysis as a method of assessment for the purposes of the application of the market economy operator test.

192 In particular, the applicants put forward six complaints that the grounds at issue contain errors of assessment and failures to state reasons.

(1) The complaint alleging that the Commission erred in finding that diversity among airports justified it departing, in the present case, from the comparative analysis

193 The applicants maintain that the Commission wrongly considered that the comparative analysis was not suitable in the case of airport services because of the diversity among airports.

194 In that regard, firstly, the applicants contend that the Commission did not provide any data or examples to explain the level and importance of the difference in cost and revenue structure and other conditions across airports (recital 362 of the contested decision). It was for the Commission to put forward arguments specific to the case in order to justify the rejection of the comparative analysis, which is the main method of assessment for the purposes of applying the 'private investor' test.

195 In that regard, it is sufficient to note that the Commission found, in recital 380 of the contested decision, that the cost and revenue structure tends to differ significantly from airport to airport and, in support of that finding, the Commission listed a series of indicators of cost and revenue discrepancy. Furthermore, the applicants have not put forward any specific argument permitting the inference that the account of those indicators is vitiated by a manifest error of assessment.

196 Secondly, the applicants argue that the Commission wrongly asserted that airport charges were generally not comparable from one airport to another. Furthermore, the heterogeneity of an airline's commercial relationships across airports in its network can be 'controlled for' in the comparative analysis, provided that charges paid by the airline are compared across airports and the overall measure of charges takes into account any differentiation in particular in the charges, incentive arrangements, marketing agreements and range of services offered.

197 In this respect, it should be noted that the applicants make an incorrect reading of the contested decision when they claim that the Commission asserted that airport charges were not comparable. In recital 381 of that decision, the Commission found that, as shown by the case at hand, commercial relationships between airports and airlines were not based on a list of public prices for individual services, but varied widely and therefore it was difficult to compare them based on a price per rotation or per passenger.

198 Furthermore, the file shows that the agreements at issue went well beyond a mere application of the general schedule of charges in force at Nîmes airport in terms of airport charges and consisted of the conclusion of airport services agreements and marketing services agreements.

199 Similarly, the applicants' argument that the Commission erred in recital 381 of the contested decision in claiming that published charges were not always representative of commercial agreements between airports and airlines cannot succeed.Contrary to what the applicants claim, the level of charges negotiated individually between airports and certain airlines, which are lower than the published charges, is not sufficient in itself to support the view that a comparative analysis on the basis of the published charges constitutes a relevant approach. In this respect, it should be observed that it is apparent from the file that the agreements at issue concern airport charges, groundhandling services and marketing services, which the applicants do not dispute. However, such agreements cannot be usefully compared if the comparison is limited to the published charges alone, thereby omitting to take into account, in particular, the remuneration of marketing services.

200 Thirdly, the applicants assert that the Commission could not invoke the liberalisation of the air transport sector in Europe in order to justify it departing, in the present case, from the comparative analysis without adducing evidence of such a kind as to support it.

201 In that regard, it should be pointed out that, in recital 381 of the contested decision, the Commission mentioned the liberalisation in order to explain the heterogeneity of commercial practices among airports, which makes it more complicated to carry out any purely comparative analysis. Contrary to what the applicants claim, the contested decision does not therefore aim to exclude the comparative analysis in determining whether a market economy operator would have made a specific arrangement in liberalised sectors, or in all sectors.

202 Fourthly, so far as concerns the applicants' argument that it is not 'credible' for the Commission to claim that the comparative analysis 'has no role to play' in the case of airport services, even though it collected data relating to the comparison of airports during the administrative procedure following requests for information, it is sufficient to note that the

Commission ultimately considered that that data was not relevant for the purposes of the application of the market economy operator test. In addition, as it found in recital 384 of the contested decision, Ryanair had not established that the comparison airports which it was proposing were sufficiently comparable to Nîmes airport having regard to a number of parameters.

203 Fifthly, in respect of the applicants' argument that the Commission's departure, in the present case, from the comparative analysis in order to determine whether a market economy operator would have made a specific arrangement in the air transport sector is inconsistent with the approach previously followed by that institution concerning other sectors, it should be borne in mind that the concept of State aid is a legal concept and must be interpreted solely on the basis of Article 107(1) TFEU, and not on the basis of any previous administrative practice of the Commission, assuming it to have been established (see, to that effect, judgments of 30 September 2003, *Freistaat Sachsen and Others* v *Commission*, C-57/00 P and C-61/00 P, EU:C:2003:510, paragraphs 52 and 53, and of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 46).

204 Accordingly, in view of all of the foregoing, the Court finds that the applicants' complaint that the Commission erred in considering that diversity among airports justified it departing, in the present case, from the comparative analysis must be rejected.

(2) The complaint alleging that the Commission erred in finding that the comparative analysis should be based on a comparison of the agreements at issue taken together with other similar transactions

205 As a preliminary point, it should be observed that the applicants rely on the study of 28 September 2012 prepared by their economic consultants during the administrative procedure. First of all, that study identifies five comparison airports on the basis of a previously defined methodology.It then compares the charges paid by Ryanair to Nîmes airport with the charges which it pays to the comparison airports. Finally, the study concludes that the general level of charges paid by Ryanair to Nîmes airport is on average higher than the level of charges paid to those comparison airports, both on the basis of a price per rotation and on the basis of a price per passenger. According to that study, those results suggest that the charges paid by Ryanair to Nîmes airport were at a level consistent with the charges that it would have been offered in similar circumstances by a private market economy investor owning an airport.In addition, that study indicates that the analysis carried out does not take into account the marketing agreements, that is to say the marketing services agreements referred to in paragraphs 5 and 6 above.

206 The applicants submit that the Commission erred, in recital 383 of the contested decision, in rejecting the conclusions of the study of 28 September 2012 on the ground that it was limited to services and payments under the airport services agreements and did not take into account payments to AMS under the marketing services agreements. According to the applicants, the price of the services provided under the marketing services agreements reflects their independent market value, as is demonstrated by several economic studies which they produced during the administrative procedure, and that price fully offsets that value, producing a net zero result. The applicants take the view that the fact that the airport services agreements and the marketing services agreements were signed on the same date and by companies belonging to the same group does not permit the Commission to treat payments made under the marketing services agreements as a rebate on the airport charges provided for in the airport services agreements.

207 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).

208 When applying the private investor test, it is necessary to envisage the commercial transaction as a whole in order to determine whether the public entity has acted as a rational operator in a market economy. When assessing the measures at issue, the Commission must examine all the relevant features of the measures and their context (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, paragraph 270).

209 In the present case, the Commission held in the contested decision that each marketing services agreement was closely linked to the underlying airport services agreement and that it was therefore appropriate, for each marketing services agreement, to analyse that agreement and the corresponding airport services agreement as a single measure (recitals 310 to 329). In order to reach that conclusion, the Commission found, inter alia, that each marketing services agreement and the corresponding airport services agreement had been signed at the same time and by the same parties, forming a single economic entity. According to the Commission, certain amendments to marketing services agreements had been concluded in return for Ryanair's operation of certain air routes or their operating frequency, with the result that an implicit airport services agreement could be associated with that amendment. Moreover, the Commission mentioned other factors which, in its view, revealed additional very close links between each marketing services agreement and its corresponding airport services agreement (recitals 315 to 324). In this respect, the Commission referred to the position of the French authorities and to the airport's provisional operating accounts showing that the marketing services payments had been regarded as forming an integral part of the commercial framework between the airport and Ryanair (recitals 315 and 316). Furthermore, following an examination of the terms and content of the various marketing services agreements, the Commission found that the marketing services were, in terms of both their duration and their nature, closely linked to the air transport services offered by Ryanair and covered by the airport services agreements (recital 325). In that regard, the Commission noted that the marketing services agreements indicated that they were rooted in Ryanair's commitment to operate the air transport services in question. The Commission also noted that, far from being designed to generally and equally increase travel to Nîmes (France) and its region by tourists and business travellers, the marketing services specifically targeted those persons likely to use the Ryanair transport services, and therefore had the primary objective of promoting those services. In addition, the Commission found that the facts presented above indicated that, in the absence of the routes in question, and therefore the associated airport services agreements, the marketing services agreements would not have been signed (recital 306 of the contested decision).

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

211 Moreover, the applicants have not adduced evidence which invalidates the Commission's assessment that, in respect of the agreements at issue, each marketing services agreement was closely linked to the airport services and air transport services agreement covered by it.

212 It follows that the Commission was entitled to find, and did not err in so doing, that, in respect of the agreements at issue, it was appropriate to analyse, for each marketing services agreement, that agreement and the corresponding airport services agreement as a single measure.

213 Consequently, the Commission was entitled, without committing any error, to reject the conclusions of the study of 28 September 2012 as ineffective and to rely on a joint analysis of the airport services agreements and the corresponding marketing services agreements (recital 383 of the contested decision). That study was limited to comparing the airport charges imposed by Nîmes airport with the airport charges imposed by certain European airports chosen for comparison, while the correct application of the market economy operator test meant that, in the present case, the airport services agreements and the corresponding marketing services agreements are taken into account as a single measure.

214 The applicants' argument that the price paid under the marketing services agreement corresponded to the actual value of the services to be performed under that agreement must be rejected. That argument is based on the unsubstantiated assumption that the marketing services and the airport services are distinct and independent (see paragraphs 207 to 212 above) and that, therefore, the price to be paid for the marketing services cannot be inferred from airport charges resulting from the air route operated by Ryanair and forming the subject matter of the airport services agreement signed at the same time as the marketing services agreement concerned.

215 It follows that the applicants' claim that, in respect of the agreements at issue, the price paid under the marketing services agreement corresponded to the actual value of the services to be performed under that agreement must be rejected.

216 Accordingly, it is necessary to reject the complaint alleging that the Commission erred in finding that the comparative analysis should be based on a comparison of the agreements at issue taken together with other similar transactions.

(3) The complaint that the Commission was wrong to find that the agreements at issue generated higher incremental costs than incremental revenues

217 The applicants assert that the Commission erred, in recital 395 of the contested decision, in dismissing the application of a comparative analysis on the ground that the agreements at issue were allegedly expected to generate higher incremental costs than incremental revenues. The Commission's approach implies that, in order to satisfy the market economy operator test pursuant to the comparative analysis, it is necessary to apply a profitability analysis, which amounts to a cumulative application of the two analyses.

218 In that regard, it is appropriate to note at the outset that the Commission found, in recital 395 of the contested decision, that a market economy operator would not be prepared to purchase marketing services, even at a price at or below market price, if it were predicted that, despite the positive effect of such services, the incremental costs which they would generate would exceed the incremental revenues at present value. The Commission made that statement in order to reject the arguments put forward by Ryanair and the operators of Nîmes airport that the fact that the price of the marketing services paid by those operators is equivalent to, or less than, the market price was not relevant to the incremental profitability analysis.

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

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

221 None of the other arguments put forward by the applicants is capable of undermining that conclusion.

222 The applicants consider that the Commission failed to take account of the fact that, pursuant to the comparative analysis, the market price was established by reference to prices charged by market economy operators and that that price reflected a price at which a market economy operator could offer comparable products or services, namely a price that was higher than its incremental costs. According to the applicants, if that price did not allow the public operator to be incrementally profitable, it would have higher costs than those of a market economy operator.

223 That argument effectively prevents the Commission from taking into account the profitability of the transactions concerned as a relevant factor in the application of the market economy operator test and the assessment of the adequacy of the comparative analysis. It should be borne in mind that, in applying the market economy operator test, it is for the Commission to make a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the beneficiary undertaking and of the relevant market, in order to verify whether that undertaking received an economic advantage which it would not have obtained under normal market conditions (see paragraph 183 above).

224 Moreover, as for the applicants' argument that the Commission's approach loses sight of the fact that the incremental loss that a market economy operator suffers did not constitute an advantage conferred on those purchasing the services or goods concerned, it is sufficient to recall that the incremental profitability analysis aims precisely at establishing whether the beneficiary of the measure in question has obtained an advantage that a market economy operator finding itself, to the extent possible, in the same situation would not have been led to grant (see paragraph 188 above).

225 Accordingly, it is necessary to reject the complaint that the Commission was wrong to find that the agreements at issue generated higher incremental costs than incremental revenues.

(4) The complaint alleging that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport and a failure to state reasons in that regard

226 The applicants assert that the Commission was wrong to find that Ryanair had failed to show that the five airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport. In that regard, they submit that the Commission did not refute the 'specific selection' of comparator airports or the detailed arguments in that study, which was supplemented by additional studies. That being so, the Commission's dismissal of the selection criteria used in that

study constitutes a manifest error of assessment and a failure to state reasons. In their reply, the applicants maintain that the arguments put forward by the Commission before the General Court in order to discredit the choice of comparator airports in the study of 28 September 2012 were not mentioned in the contested decision and cannot remedy *ex post* the error of assessment or the failure to state reasons. Moreover, the applicants argue that the Commission at no point approached a privately owned or privately operated airport in order to find out about prices charged and therefore made no attempt to find comparator airports, despite their obvious existence.

227 In that regard, in respect of the line of argument that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport, it must be observed that, as the Commission states, the failure to take into account the marketing services agreements was already sufficient to exclude the method used in that study (recital 383 of the contested decision). The application of the private investor test in the case at hand required that all the combinations of airport services agreements and corresponding marketing services agreements, which had to be regarded each time as a single transaction, be analysed jointly (see paragraphs 207 to 212 above). Accordingly, that line of argument must be rejected as ineffective.

228 In addition, the fact that the contested decision does not set out, for each of the airports selected in the study of 28 September 2012, the reasons why they could not be identified as comparables does not, by itself, allow the conclusion that there was a failure to provide a statement of reasons for the purpose of Article 296 TFEU.

229 It should be borne in mind in this regard 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 such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court 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).

230 In the present case, in recital 378 of the contested decision, the Commission recalled its doubts, as expressed in paragraph 59 of the 2014 Guidelines, that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports. Furthermore, referring to the parameters listed in paragraph 60 of those guidelines, the Commission noted, in recital 384 of that decision, that Ryanair had not shown how the airports mentioned were sufficiently comparable in terms of traffic volume and type of traffic, type and level of airport services, presence of a large city in the vicinity of the airport, number of inhabitants in the catchment area, prosperity in the surrounding area and existence of other geographical areas likely to attract passengers.

231 Admittedly, in the contested decision, the Commission does not specify in more detail the reasons why it did not accept the sample of airports chosen in the study of 28 September 2012 as a valid benchmark.

232 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 was 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).

233 Thus, an explanation, for each of the airports selected in the study of 28 September 2012, of the reasons why they could not be accepted was not necessary in the contested decision for the applicants to understand the reasoning followed by the Commission.

234 Accordingly, the applicants were in a position to challenge before the Court the Commission's rejection of the sample of airports selected in the study of 28 September 2012.

235 Therefore, the line of argument based on a failure to state reasons must be rejected.

236 In addition, 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 submit that the Commission erred in taking the view that Ryanair had not proposed a sample of comparator airports which includes airports sufficiently comparable to Nîmes airport. They assert that the study of 28 September 2012 submitted by Ryanair included a systematic comparison of the conditions laid down by the airport services agreements signed with other airports which were majority privately owned, privately operated or otherwise operating as market economy investors and which shared several features that were similar to those of Nîmes airport.

237 The Commission replies that that claim is belied by a thorough examination of the airports selected in the study of 28 September 2012.

238 In that regard, the Commission stated that, so far as concerns the issue of the establishment of reliable points of reference, (i) Bournemouth airport was owned by a majority State-owned entity and had a negative profitability in 2012, (ii) Prestwick airport was loss-making before its private owner sold it to the Scottish Government in November 2013, (iii) Maastricht airport had received substantial subsidies since 2004 and had also passed into public ownership in 2013 after it seemingly had to be rescued by the Dutch State, and (iv) Knock airport, although privately owned, had received considerable taxpayer support, namely capital grants of the order of EUR 13 million between 1997 and 2012.

239 Moreover, so far as concerns the characteristics of the airports selected in the study of 28 September 2012 for the purpose of paragraph 60 of the 2014 Guidelines, the Commission explained that, in any event, they were to a large extent dissimilar from those of Nîmes airport:

– it is apparent from the study of 28 September 2012 that the volume of total passenger traffic at the airport varied significantly from one airport to another; the differences were even more striking as regards Ryanair's passenger volumes at those airports;

– the activities of Grenoble airport are heavily concentrated on the winter season;

– Maastricht airport performs significant cargo operations;

– the closest cities to each airport are of very different sizes; thus, as for the parameter of proximity to a large city, the study of 28 September 2012 mentions the city of Nîmes and, for Knock airport, the town of Sligo (Ireland), but the distances are very different;

– concerning the parameter of the number of inhabitants in the airport catchment area, the study of 28 September 2012 refers only to the population in the largest city within a 150 kilometre radius, and not to the number of inhabitants in the catchment area of the airport;

– so far as concerns the parameter relating to the prosperity of the surrounding area, the proxies of the regions chosen in the study of 28 September 2012 did not precisely reflect the catchment areas of the airports in question, and prosperity varies substantially across regions;

– there is nothing about the parameter of the airport's hinterland in the study of 28 September 2012, either for outgoing passengers or for incoming passengers; however, having regard to the touristic attractiveness of the Mediterranean coast, Nîmes airport is an airport focusing on incoming passengers, whereas Prestwick and Bournemouth airports provide a potential market for outgoing passengers.

240 It follows that, on the basis of all those elements, the Commission was entitled to consider, without committing a manifest error of assessment, that the airports selected in the study of 28 September 2012 were not sufficiently comparable to Nîmes airport.

241 The arguments put forward by the applicants are incapable of calling that conclusion into question.

242 In the first place, as regards the argument that Bournemouth airport made profits between 2001 and 2011 without receiving subsidies, it must be stated that although it is true that that factor is relevant for considering the conduct of that airport as being that of a market economy operator, the fact remains that that airport belongs to a public entity.

243 In the second place, as regards the applicants' argument that Prestwick airport was not only under private ownership, but was also profitable between 2000 and 2008, it must be held that, although those circumstances argue in favour of market economy operator conduct, they do not call into question the clarification made by the Commission in its written pleadings and at the hearing that that airport had become loss-making and had to be sold to the Scottish Government in 2013 and, accordingly, did not constitute an appropriate benchmark for the purposes of establishing a true market price for airport services (see recital 378 of the contested decision).

244 In the third place, as regards the applicants' argument that Ryanair had operated multiple summer routes to and from Grenoble airport between 2006 and 2009 and, moreover, that that airport was operated by a private operator imposing the highest airport charges among the comparator airports, it must be observed that, although Ryanair operated routes outside the winter season, those activities did not appear to have led to the continuation of those services throughout the year. In that regard, the applicants' argument does not contradict the Commission's finding that the activity of Grenoble airport was heavily concentrated on the winter season, which distinguished it from the situation of Nîmes airport where Ryanair had operated, at the very least, a number of daily connections throughout the year, as is apparent from the contested decision.

245 In the fourth place, as for the applicants' argument that, according to the information provided by the Commission, capital grants to Knock airport amounted to only 6% of assets of the airport for the period 2002 to 2012, it must be observed that the Commission was entitled to find, without committing a manifest error of assessment, that a contribution of public funds of such a magnitude constituted a relevant factor in its assessment of the adequacy of that airport as a point of reference.

246 In the fifth place, as for the applicants' argument that four of the comparator airports were similar to Nîmes airport concerning the parameter relating to total traffic or Ryanair's traffic, the Court finds, as the Commission observes, that the figures mentioned in the study of 28 September 2012 show that the total passenger traffic of the airports and Ryanair's traffic in those airports varied significantly from one airport to another and with regard to Nîmes airport. Thus, it is apparent from that study that there are, in particular, considerable differences between the traffic at Nîmes airport and the traffic at Prestwick (for all the period concerned), Bournemouth and Knock (for the last part of the period concerned) airports.

247 Likewise, as for the applicants' argument that the study of 28 September 2012 presented, as regards the parameter relating to the prosperity of the surrounding area, data for Knock airport at a regional level for the comparison of the annual gross domestic product per inhabitant even though the estimate relating to monthly earnings was presented for Ireland as a whole, the Court finds that that argument is not capable of invalidating the Commission's findings as regards some other parameters.

248 Consequently, notwithstanding the findings made in paragraphs 242 and 243 above, it must be concluded that, in the light of all the dependable points of reference and the different parameters mentioned in recital 365 of the contested decision, the Commission did not commit a manifest error of assessment in rejecting the sample of comparator airports suggested in the study of 28 September 2012.

249 As regards the applicants' argument alleging the lack of effort on the part of the Commission to make enquiries with privately owned or privately operated airports in order to find points of comparison, it must be noted that that complaint relates to the scope of the Commission's investigation obligations when it is called upon to apply the market economy operator test to the agreements at issue.

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

251 In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent market economy operator, who 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).

252 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).

253 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 251 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).

254 In the present case, in the first place, it should be observed that, in recital 378 of the contested decision, the Commission recalled its doubts, as expressed in the 2014 Guidelines, that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports. The Commission refers in particular, in paragraphs 56 to 58 of those guidelines, to the fact that the vast majority of Union airports benefit from public funding, that 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, that public airports’ charges tend therefore not to be determined with regard to market considerations, but having regard to social or regional considerations, and that even the prices charged by private airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports. Therefore, even if it cannot be excluded that a sufficient number of suitable comparator airports may be found, as the Commission explained at the hearing, it found that, in accordance with paragraph 61 of the 2014 Guidelines, the incremental profitability analysis constituted the most relevant criterion for assessing the agreements at issue.

255 In the second place, it should be noted that the Commission mentioned, in the contested decision, the difference in the cost and revenue structures between airports and the low comparability of transactions between airports as considerations justifying a departure from the comparative analysis (recitals 362 and 363 of the contested decision).

256 In the third place, it should be observed that, in the decision to initiate the procedure, the Commission called on interested parties to submit observations, whilst further indicating in that decision that the French authorities had not provided any comparator for the assessment of whether the price paid by Ryanair reflected the normal market price.

257 Thus, during the administrative procedure, Ryanair submitted the study of 28 September 2012 showing a sample of comparator airports.

258 In answer to a question from the Court at the hearing, the Commission explained that, even if the 2014 Guidelines foresaw the possibility of conducting a comparative analysis, the information in the file did not allow a useful comparative analysis to be carried out in the case at hand.

259 In the fourth place, as the Commission states, in order to assess airport service charges, it is necessary to take into consideration not only published charges, but also the wide range of bespoke discounts agreed with each airline and any marketing services agreement. In general, the latter information is confidential and not freely available to the Commission.

260 In those circumstances, the Commission did not err in choosing, in the case at hand, to carry out an incremental profitability analysis rather than a comparative analysis, without having approached, in its investigation, privately owned or privately operated airports with the aim of identifying possible airports which are sufficiently comparable to Nîmes airport and of finding a sample of comparable transactions in those airports.

261 In the light of all of the foregoing, the applicants’ complaint alleging that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports

selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport and a failure to state reasons in that regard must therefore be rejected.

(5) The complaint alleging that the Commission wrongfully failed to conduct a 'joint' comparative analysis

262 The applicants claim that, even if the payments to AMS for marketing services should have been deducted from the airport charges paid by Ryanair for the purpose of a comparative analysis, the Commission nevertheless committed a manifest error of assessment in failing to conduct such a 'joint' analysis. They produce a study of 2 February 2016 including an identical analysis, prepared by their economic advisers, according to which the net charges paid to Nîmes airport by Ryanair taking into account payments received by AMS under the marketing services agreements were higher than the average charges paid at the comparator airports on both a per-passenger and a per-turnaround basis.

263 In that regard, it should be recalled that, according to the case-law, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 60, and of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, EU:T:2004:4, paragraph 49). In addition, according to the case-law, 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 (see paragraph 252 above).

264 However, the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 141).

265 In the present case, it should be recalled that, in the decision to initiate the procedure, the Commission stated that it considered at that stage that it was necessary, for the purposes of applying the private investor test, to assess the airport services agreements and the marketing services agreements jointly.

266 However, the applicants rely on a joint comparative analysis of net airport charges of marketing payments carried out by their economic advisers in the study of 2 February 2016, which was produced only for the first time before the Court. Therefore, the Commission cannot be criticised for not having taken it into account.

267 Furthermore, for the reasons explained in paragraphs 254 to 260 above, the Commission was not, in the present case, required to take other measures to obtain data in order to carry out a joint comparative analysis.

268 Consequently, the applicants' complaint alleging that the Commission wrongfully failed to conduct a 'joint' comparative analysis must be rejected.

(6) The complaint alleging that the comparative analysis shows that no advantage was conferred through the agreements at issue

269 The applicants submit, with reference to the economic reports and other evidence in the administrative file, that the comparative analysis shows that the agreements at issue conferred no economic advantage. It is apparent from several economic reports that the price stipulated in the marketing services agreement was in line with the market price received by AMS from private customers and the market price paid by private customers for comparable services supplied by other service providers. Moreover, the study of 28 September 2012 shows that the airport charges paid by Ryanair to Nîmes airport were compatible with the level of charges that would have been offered to Ryanair by an airport-owning market economy operator in similar circumstances.

270 In that regard, it must be stressed that, as the Commission states, the applicants' line of argument, which is based on the aforementioned economic reports and the study of 28 September 2012, is ineffective, since it starts from the incorrect premiss that the marketing services and the airport services are distinct and independent, whereas, in relation to the agreements at issue, it was appropriate to analyse, for each marketing services agreement, that agreement and the corresponding airport services agreement as a single measure in order to determine whether they constituted an advantage (see paragraphs 207 to 212 above).

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

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

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

274 So far as concerns the airport services agreements, the study of 28 September 2012 merely compares the airport charges imposed in Nîmes airport with the airport charges imposed in the comparator airports without taking account of the corresponding marketing services agreement, although the two types of agreement must be considered as a single measure.

275 Consequently, it is necessary to reject the applicants' complaint that the comparative analysis shows that no advantage was conferred through the agreements at issue.

276 In the light of the foregoing, all the complaints and arguments put forward in the context of the second part of this plea must be rejected and that part must be dismissed.

3. The third part, alleging manifest errors of assessment and insufficient reasoning as regards the incremental profitability analysis

277 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.

278 In that regard, as a preliminary point, the Commission stressed in the contested decision that, in order to apply the market economy operator test to the agreements at issue, it had to analyse those agreements together and assess whether a hypothetical market economy operator, motivated by the prospect of profits and operating Nîmes airport would have entered into those agreements (recital 393). In the Commission's view, to that end, it had to determine the incremental profitability of the same agreements for their duration as it would have been assessed by that operator at the time of their conclusion.

279 In the present case, it is common ground that, prior to the conclusion of the agreements with the applicants, the CCI of Nîmes-Uzès-Le Vigan had not prepared any business plan or any profitability analysis, the only economic assessment provided by the French authorities in the last part of the operating period of that CCI being a 2006 study of the economic impact of the airport on the development of the region (recitals 406 and 408 of the contested decision). By contrast, VTAN had prepared a business plan in September 2006, a few months before it became the new airport operator, in order to assess the financial stability of the new public service delegation ('the VTAN business plan'). That business plan detailed the projected costs and revenues for the entire airport operation for the whole term of the new public service delegation (recital 398 of that decision). However, in that business plan, VTAN did not carry out any specific profitability analysis of the various agreements signed with the applicants (recital 409 of that decision).

280 The Commission carried out the incremental profitability analysis by reconstructing the incremental costs and revenues of the agreements at issue, as a market economy operator would have calculated them at the time of their conclusion (recital 416 of the contested decision).

281 Thus, the Commission assessed, in the contested decision, the incremental profitability of the agreements at issue for their duration, taking into account:

– the incremental traffic (number of additional passengers) expected from the implementation of those agreements, taking into account the effects of the marketing services on the load factors of the air routes covered by those agreements (recitals 393 and 422 to 428);

– the future incremental revenues expected from the implementation of the agreements, including revenues from airport charges and groundhandling services generated by the air routes in question as well as non-aeronautical revenue from the additional traffic generated by the implementation of the same agreements (recitals 393 and 429 to 438);

– the future incremental costs expected from the implementation of those agreements, including the costs of marketing services, financial incentives and the incremental operating costs (recitals 393 and 439 to 448).

282 In recitals 452 to 498 of the contested decision, the Commission presented the results of its assessment, displaying, for each agreement, the incremental traffic, the incremental revenues and the incremental costs associated with the agreements at issue. It found that, for several of the agreements, the annual incremental flows (revenues minus costs) were negative. Therefore, it considered that those agreements conferred an economic advantage on the applicants.

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

(a) The complaint based on the failure to attribute an appropriate value to AMS's services

284 The applicants argue that the Commission allocated all of the costs of the marketing services agreements to the airport services agreements, while at the same time asserting that the only benefit that the CCI of Nîmes-Uzès-Le Vigan could expect from the marketing services agreements was an increase in traffic (i.e. to ensure a load factor of 85%) only for the duration of the operation of the Ryanair routes and that the other benefits were too uncertain to be taken into account in the analysis of the profitability of those agreements. The Commission thereby spread the cost of the marketing services over the lifetime of the agreements under investigation, without including any benefits of the marketing services agreements.

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

286 In the second place, the applicants argue that incremental losses are not an obstacle to the assessment of the marketing services on the basis of their market price. They consider that, by its assertions which appear in recital 388 of the contested decision, the Commission is suggesting that a market economy operator, in deciding on how much marketing services it would buy, would seek to ensure that the total incremental costs never exceed the total incremental revenues. According to the applicants, 'the Commission's approach is at odds with economic reality'. Indeed, private companies often invest heavily when building brands, knowing that they will suffer incremental losses. The goal is not to achieve an immediate return on investment, but to achieve long-term benefits. The applicants refer, in this connection, to the economic and financial literature, according to which the assessment of the profitability of an investment should not necessarily be restricted to the expected net present value of future cash flows generated by that investment, but may also take into account the value of strategic options. Thus, such an operator may be willing to undertake a loss-making advertising campaign if that investment built brand value and was likely to lead to profits in the longer term.

287 In the third place, the applicants maintain that an increase in the normal load factor for aircraft, which the Commission estimates at 75% without marketing, is an incorrect method for assessing the value of the marketing services. The Commission does not justify why those services should increase that load factor by 10%. That assessment is pure guesswork and therefore constitutes a failure to state reasons.

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

289 In the fifth place, the applicants argue that the Commission wrongly asserted that Ryanair's website could be useful only to advertise Ryanair routes and could offer only marketing with a

short-term effect because it was not as effective as a set of other websites. The applicants submit that the Commission wrongly failed to address the evidence which Ryanair provided, which proves the enormous popularity of the latter's website, but simply stated that the website was not as effective as others and that television advertisements and posters would reach more consumers.

290 Therefore, the Commission made a manifest error of assessment and failed to state reasons by not attributing any actual and appropriate value to AMS's marketing services.

291 The Commission disputes the applicants' arguments.

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

293 In this respect, it should be observed that the Commission analysed, in the contested decision, the benefits that a market economy operator acting in the place of the operator of Nîmes airport could have expected from the marketing services agreement. In particular, it found that marketing services were capable of boosting passenger traffic on the routes covered by the agreements at issue. It added that that effect benefited not only the airline, but also the operator of the airport, given that the increase in the number of passengers was capable of leading, for the operator of that airport, to an increase in airport and non-airport revenues. It concluded from this that, when assessing the value in entering into those agreements, such an operator would have taken that positive effect of marketing services into account (recitals 347 to 350 of that decision). However, the Commission rejected as being too uncertain the full benefits of the marketing services agreement beyond the routes covered by those agreements and their duration (recitals 352 to 375 of that decision). The Commission subsequently included, in the incremental profitability analysis of the agreements signed from October 2005, that possible positive effect in the load factor, which it estimated at 85%. For the agreements signed before October 2005, the Commission however used lower load factors, for the reasons explained in the same decision. The Commission included, in that analysis, the incremental traffic resulting from those load factors and the associated incremental revenues and incremental operating costs. Furthermore, it included the amounts payable by the operators of that airport for the conclusion of the marketing services agreement by deducting them from the incremental revenues linked to the routes concerned (see, in particular, recitals 425, 426, 439, 440 and 453 to 498 of the decision in question).

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

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

296 In the first place, as for the applicants' argument concerning the Commission's analysis of the usefulness of Ryanair's website, which it is appropriate to examine before the other arguments, it must be stressed that, by assessing the sustainability of the positive effects of the marketing services agreement which a market economy operator would have envisaged, the Commission did not call into question the popularity of Ryanair's website, as is apparent from the evidence provided, in terms of the number of direct visits or visits by search engine, but examined only its impact on the purchasing behaviour of the persons who had just visited it. The Commission considered, in particular, that it was highly unlikely that the memory which visitors to Ryanair's website would retain of the advertising of Nîmes and its region as a travel destination would last or have an

influence on their ticket purchases for more than a few weeks (recital 356 of the contested decision).

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

298 Moreover, to assess the effects on consumer behaviour, the Commission found, in recital 356 of the contested decision, that an advertising campaign was likely to have a sustainable effect when the promotional activities involved one or more advertising media to which consumers were regularly exposed over a given period. It mentioned, as examples, an advertising campaign on general television and radio stations, on various websites or on various billboards displayed outdoors or inside public places, since such a campaign may have a sustainable effect on consumers if they are passively and repeatedly exposed to those media. However, the Commission took the view that promotional activities limited to certain pages of Ryanair's website alone were unlikely to have an effect that lasts much beyond the end of the promotion. According to the Commission, it was highly unlikely that visitors to that website keep a recollection of the advertising of Nîmes and its region which is sustainable and capable of influencing their ticket purchases for more than a few weeks. In that regard, the Commission considered, in recital 357 of that decision, that it was likely that consumers do not visit the website in question often enough to leave them with a lasting memory that that site offered a promotion on a certain destination.

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

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

301 In this connection, it should be noted that the Commission explained, and found, in recital 358 of the contested decision, that the promotion of the Nîmes region on Ryanair's homepage was limited to a single link to a website designated by the operators of Nîmes airport for limited and, in some cases, very brief periods in terms of the number of days, which was unlikely to have sustainable effects after the end of those promotional activities. In particular, the Commission explained that the applicants had not attempted to analyse and quantify the alleviation effects of the marketing services under the marketing services agreements on the behaviour of consumers and their long-term impact on traffic at Nîmes airport.

302 Although the passages of the economic reports at issue explain, in a general manner, the advantages of advertising directed at a captive audience, in particular through AMS, they do not allow adequate conclusions to be drawn about the actual long-term effects on the purchasing

behaviour of visitors to Ryanair's website and on passenger traffic on the air routes covered by the agreements at issue.

303 Consequently, the applicants fail to demonstrate that the Commission committed a manifest error of assessment by considering, in recitals 356 and 357 of the contested decision, that it was highly unlikely that access to the promotion for the destination of Nîmes on Ryanair's website may have encouraged visitors to that website to purchase Ryanair tickets for Nîmes for more than a few weeks after that access or that the promotion on that website may have had an effect that lasts much beyond the end of the promotion campaign.

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

305 Therefore, it follows that the applicants have failed to show that the Commission committed a manifest error of assessment in considering, in recital 361 of the contested decision, that, although the marketing services might have boosted passenger traffic on the routes covered by the marketing services agreements during the implementation period of those services, it was very likely that such an effect was zero or negligible after that period.

306 For the same reasons, it is necessary to reject the applicants' argument that the Commission also ignored that advertising on Ryanair's website increased visibility for Nîmes airport towards companies specialised in airport retail.

307 Consequently, it is necessary to reject the applicants' argument concerning the Commission's analysis of the usefulness of Ryanair's website.

308 In the second place, 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 the marketing services and the airport services are distinct and independent and that the value of the marketing services must therefore be assessed independently of the operation by Ryanair of the air routes covered by the airport services agreements which concern them.

309 The applicants do not validly refute the approach adopted in the contested decision that the marketing services agreement and the airport services agreement are closely linked in that the marketing services are essentially designed to promote the air routes (see paragraphs 207 to 212 above and paragraphs 324 and 325 below). As part of that approach, the Commission was entitled, without erring, to consider the purchase price of the marketing services as an incremental cost to be deducted from the incremental revenues deriving from the air routes at issue.

310 Furthermore, nor do the applicants validly refute the Commission's analysis that a market economy operator would have considered any other benefit than that resulting from the positive effect on passenger traffic on the air routes operated by Ryanair as being too uncertain to be taken into account in a quantifiable manner (recitals 352 to 392 of the contested decision).

311 The Commission found that, even though the marketing services might have boosted passenger traffic on the routes covered by the agreements at issue during the term of those agreements, it was very likely that such an effect was zero or negligible after that period or on other routes (recitals 356 to 361 of the contested decision). The applicants have not succeeded in calling that finding into question (see paragraphs 296 to 307 above).

312 Moreover, the applicants have not provided any evidence to refute the Commission's analysis that the two methods proposed by Ryanair in the studies of 17 and 31 January 2014 during the administrative procedure for assessing the benefits of the marketing services agreements going beyond the air routes in question and the term of operation of those routes gave very uncertain and unreliable results (recitals 362 to 370 of the contested decision).

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

314 In the third place, as for the applicants' argument that incremental losses were not an obstacle to the assessment of the marketing services on the basis of their market price, it should be noted that, by that argument, they essentially claim that the Commission erred in finding that a market economy operator would be prepared to conclude marketing services agreements only if the total incremental costs, including the marketing costs, never exceeded the total incremental revenues.

315 In the present case, the Commission observed in recital 388 of the contested decision that the French authorities and the operators of Nîmes airport had stated that its position as a new entrant justified the need for VTAN to ensure Ryanair's presence and develop the airport, if necessary through an initial loss, in order to allow it to acquire the experience needed to develop its airport operation activity. Next, it found that that argument was tantamount to accepting that VTAN could have entered into agreements leading to negative incremental profitability, without that conduct implying any economic advantage for Ryanair. It rejected that argument, finding in particular that those authorities had not provided any analysis showing that the net incremental cost caused for Veolia Transport would have been offset by future benefits resulting for the Veolia Transport group from that initial airport operation experience.

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

317 The applicants confine themselves in their arguments to stating generally that private companies often invest large sums in developing their brands while suffering initial incremental losses, without obtaining an immediate return on investment, in order, however, to achieve long-term benefits. They do not show that the Commission committed a manifest error of assessment in finding in recitals 362 to 375 of the contested decision that the benefits of the marketing services agreements going beyond the routes covered by the agreements at issue and the term of operation of those routes were extremely uncertain and could not be quantified with a degree of reliability that would be considered sufficient by a market economy operator.

318 In particular, the applicants have not provided any evidence to refute the Commission's analysis that the two methods proposed by Ryanair in the studies of 17 and 31 January 2014, during the administrative procedure, for assessing the benefits of the marketing services agreements going beyond the air routes in question and the term of operation of those routes, that is to say the future

revenues resulting in particular from the prominence and the strong brand image due to the marketing services, gave very uncertain and unreliable results (recitals 364 to 367 and 370 of the contested decision).

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

320 It follows that the applicants' argument that incremental losses were not an obstacle to the assessment of the marketing services on the basis of their market price must be rejected.

321 In the fourth place, as regards the applicants' argument concerning the increase in the load factor per flight due to marketing services, it should be pointed out that, in recital 425 of the contested decision, the Commission assumed a load factor of 85% per flight. It stated therein that it was a high load factor and, therefore, an assumption favourable to Ryanair and that that load factor was slightly above the average load factor for flights operated by Ryanair on its network. The Commission took the view that that high load factor could be used on the ground that it reflected the possible beneficial effect of the marketing services on passenger traffic on the routes covered by the agreements at issue.

322 It follows that the Commission gave sufficient reasons for the choice of a load factor of 85% per flight which it took into consideration. In addition, it is necessary to reject the applicants' claim that that load factor was based on pure guesswork, given that, as the Commission explains without being contradicted by the applicants, that load factor was slightly above the load factor published by Ryanair itself.

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

324 In that regard, it must be observed that the Commission considered, on the basis of various factors relating to the marketing services agreements as described in recitals 318 to 324 of the contested decision, that the marketing services specifically targeted persons likely to use Ryanair's transport services and had as their main objective the promotion of those services, and not generally and equally travel to Nîmes and its region by tourists and business travellers (recital 325 of that decision).

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

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

327 In the light of all the foregoing, it must be concluded that, without committing a manifest error of assessment, the Commission was entitled to take into account, in the incremental profitability analysis, only revenue generated by the routes covered by the agreements at issue

during the duration of those agreements, even though it included the costs associated with the marketing services agreements, which are generated in their entirety during that period.

328 Consequently, it is necessary to reject the applicants' complaint based on the failure to attribute an appropriate value to AMS's marketing services.

(b) The complaint concerning the rationale underlying the decision of the operators of Nîmes airport to conclude the marketing services agreements

329 The applicants argue that the Commission wrongly did not take account, in the incremental profitability analysis, of the numerous qualitative and strategic benefits which the operators of Nîmes airport could reasonably expect from the marketing services agreements, namely the enhancing of the image of that airport, an increase in its market value, the diversification of airlines and an increase in the proportion of inbound traffic.

330 The applicants refer to the Commission's previous practice in taking decisions relating to airport aid measures, whereby it has taken into account, in the incremental profitability analysis, the qualitative and strategic goals of airports going beyond a mere analysis of the costs and the benefits. The contribution of marketing to the image of Nîmes airport has also been selected for the benefit of that analysis. Furthermore, they refer to paragraph 66 of the 2014 Guidelines, which provides that, when assessing arrangements between airports and carriers, the Commission 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.

331 The applicants contend that the Commission's assertion, set out in recital 395 of the contested decision, that a market economy operator would refuse to purchase marketing services if it were predicted that the incremental costs generated by the agreements would exceed the incremental revenues at present value is erroneous. First, the qualitative benefits flowing from the marketing services agreements must be added to the result of the Commission's incremental profitability analysis. Furthermore, private undertakings often invest heavily in building their brands, with full knowledge that they will suffer initial incremental losses. Secondly, incremental losses may, in accordance with the case-law, be 'compatible with the market economy operator test if there [was] no better alternative'. A negative sale price may be consistent with the market economy operator principle unless other options such as bankruptcy are available and involve a lesser loss for the State that is the seller. The Commission was wrong not to assess that cost.

332 The Commission replies that the incremental profitability condition provided for in paragraph 63 of the 2014 Guidelines, according to which an agreement concluded between an airline and an airport can be deemed to be in line with the market economy operator test when it contributes progressively, from an *ex ante* standpoint, to the profitability of the airport, and the requirement to take into account the extent to which the agreement may be regarded as forming part of an overall strategy of the airport expected to lead to profitability at least in the long term, provided for in paragraph 66 of those guidelines, are cumulative conditions. According to the Commission, an agreement which is not expected to be incrementally profitable for the purpose of paragraph 63 of those guidelines cannot be consistent with that test on the ground that it forms part of an overall strategy of the airport expected to lead to profitability at least in the long term, as provided for by paragraph 66 of the same guidelines. The Commission explains that, for that reason, it could conclude, in the present case, that all the agreements at issue failing to meet the incremental profitability test failed to fulfil the market economy operator test, without having to examine the other cumulative condition laid down in paragraph 66 of the guidelines in question.

333 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).

334 It follows that it is not necessary to examine whether the Commission's previous practice in taking decisions relied on by the applicants is proven.

335 Next, it is necessary to examine the applicants' line of argument that the Commission wrongly did not take account of the rationale underlying the decision of the operators of Nîmes airport to conclude the marketing services agreements, in the light of the market economy operator test, as is apparent from Article 107(1) TFEU.

336 It must 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).

337 In the present case, the Commission found, in recital 395 of the contested decision, 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.

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

339 In the first place, the applicants argue, referring in particular to an economic report, that the Commission ought to have taken account of the fact that, for the CCI of Nîmes-Uzès-Le Vigan and VTAN, the goal of the marketing services agreements was to put Nîmes airport on the map, particularly for the public in countries at the other end of the routes operated by Ryanair. Advertising is a necessity for regional airports.

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

341 On the other hand, the Commission considered, in the contested decision, that AMS's marketing services were not likely to enhance the image of Nîmes airport in the long term.The applicants have not adduced any evidence showing that the Commission's analysis was vitiated by a manifest error of assessment in this respect (see paragraphs 295 to 307, 317 and 318 above).

342 Furthermore, it is apparent from the file that, as the Commission has explained, the passages from the economic report on which the applicants rely do not specify which type of AMS's publicity could result in long-lasting effects or specifically indicate whether the marketing services

bought by the operators of Nîmes airport were likely to influence the conduct of customers and improve the image of that airport sustainably beyond the time span of the marketing services agreements or on routes other than those operated by Ryanair from Nîmes airport. In addition, as the Commission explains, the passages from the report in question do not take into consideration the exact scope of those marketing services agreements, unlike the contested decision.

343 Accordingly, the Court rejects the applicants' argument that the Commission made a manifest error of assessment by not taking into account the desire to improve the image of Nîmes airport.

344 In the second place, the applicants observe that raising the profile of an airport and enhancing its image will increase its market value for its owner. As managers of Nîmes airport, the CCI of Nîmes-Uzès-Le Vigan and VTAN had to further the aims of its owner, which included an increase in the airport's value. Moreover, a concessionaire would seek to maximise the value of the airport in order to increase its chances of being selected for the renewal of the concession. In addition, the applicants argue that the Commission wrongly failed to regard the French Republic, which is the owner of Nîmes airport, and the operators of the airport as market economy operators with distinct interests and consequently failed to assess the degree to which the marketing services could increase the market value of that airport to the benefit of the State. In that context, the applicants point out that the principal asset for that airport is its brand image and visibility to the public and the market.

345 In that regard, it is common ground that the marketing services agreements were concluded by the CCI of Nîmes-Uzès-Le Vigan and VTAN, and not by the State. Furthermore, the Commission observed, without being contradicted by the applicants, that the operators of Nîmes airport were only concessionaires and that the management of that airport was to revert, after the end of the relevant concession period, either to the State or to the SMAN depending on the moment in time when the marketing services agreement concerned had been concluded. Accordingly, the Commission did not err in taking the view that the asset value should not constitute a direct goal of those operators.

346 In any event, it is apparent from the contested decision that AMS's marketing services were not likely to have sustainable effects beyond their implementation and that any improvement of the image of Nîmes airport going beyond that period and the routes in question was considered too uncertain to be taken into account (recitals 354 to 375 of that decision). The applicants have adduced no evidence to call into question that analysis (paragraphs 296 to 307 above).

347 In those circumstances, the applicants have not demonstrated that AMS's marketing services were likely to increase the market value of Nîmes airport.

348 It is therefore necessary to reject the applicants' argument that the Commission committed a manifest error of assessment in failing to assess the degree to which it could reasonably be expected that the marketing services agreements would increase the market value of Nîmes airport.

349 In the third place, the applicants allege that Nîmes airport could expect the marketing services agreements to help with the diversification of airlines. In that regard, the applicants point out that, after the departure of Air France from that airport, owing to competition with the high-speed rail connection between Nîmes and Paris (France), that airport had unused capacity and appeared to be actively engaged in attracting new airlines. The applicants explain, based on an economic report, that visibility on Ryanair's website was a means of promoting its credibility as a destination. Proof of the ability of an airport to improve its image through advertising was likely to encourage other airlines to include it in their programme, since that proof is likely to persuade airlines to begin service to it.

350 However, it must be held that the applicants have failed to establish that the marketing services provided by AMS would have allowed a market economy operator acting in the place of the operators of Nîmes airport to attract other airlines to the airport. It is apparent in particular from the contested decision that the Commission found that the only certain benefit which such an operator could expect to achieve as a result of the marketing services agreements consisted in the increase in passenger numbers on the routes operated by Ryanair. By contrast, it considered that any benefit going beyond those routes was too uncertain to be taken into account in a quantifiable manner (recitals 362 to 375 of that decision). The applicants have adduced no evidence to call into question that assessment of the Commission.

351 Furthermore, as the Commission rightly states, although it may be considered that attracting other airlines in order to fill the unused capacity of an airport constitutes a cost-efficient strategy, it is plausible that a market economy operator in the circumstances of the present case would have required at the very least that the arrival of a new airline does not generate expected incremental costs in excess of incremental revenues.

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

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

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

355 In that regard, the Commission explained that, rather than the percentage of 'inbound passengers' in the light of the total number of passengers, the objective had to have been the absolute number of 'inbound passengers', since that factor was relevant to the revenue obtained for both Ryanair and the operators of Nîmes airport, through airport charges, which were partly based on the number of passengers, and through non-aeronautical revenues. Moreover, the Commission stated that, unlike the proportion of 'inbound passengers' in the light of the total number of passengers, it could not be said of the absolute number of 'inbound passengers' that it was unrelated to increasing the total number of passengers, since the latter was the sum of 'inbound passengers' and 'outgoing passengers'. In addition, the Commission explained that the possible impact of the marketing services agreements on the absolute number of 'inbound passengers', as a subset of the total number of passengers on the routes at issue, had been captured in the load factor mentioned in

the contested decision and had served as a basis to estimate revenue streams from airport charges and non-aeronautical revenues.

356 The applicants reply that Ryanair and the operators of Nîmes airport do not have the same interests, given that Ryanair takes care of carrying a high number of passengers and makes the same amount of revenue from 'inbound passengers' and 'outgoing passengers', whereas that airport has an interest in ensuring a high number of inbound travellers among the passengers. Therefore, the Commission's claim that the absolute number of 'inbound passengers' is related to the increase in the total number of passengers constitutes an erroneous generalisation.

357 In that regard, while assuming that the absolute number of passengers and the proportion of 'inbound passengers' are not necessarily in an invariable relationship, it must be noted that, as the Commission states, it carried out its analysis of the impact of the marketing services agreements on the expected incremental revenues for the purposes of applying the market economy operator test on the basis, for non-aeronautical revenues, of either the amount resulting from a study carried out for VTAN by an economic consultancy firm ('the VTAN study') or the three-year moving averages of historical revenues of Nîmes airport, adjusted to take account of inflation and using a load factor of 85% per flight, which was favourable to the applicants (recitals 425, 435 to 437 of the contested decision).

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

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

360 In the light of the foregoing, it must be held that the Commission did not commit a manifest error of assessment regarding the benefits that the operators of Nîmes airport could expect from the marketing services agreements.

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

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

363 In view of the above, the Court must reject the applicants' complaint regarding the rationale underlying the decision of the operators of Nîmes airport to conclude the marketing services agreements.

(c) The complaint based on the refusal to take into account the possibility that part of the marketing services may have been purchased for general interest purposes

364 The applicants argue that the Commission wrongly dismissed the possibility that the marketing services were, in part, purchased for general interest purposes. In that regard, they take issue with the Commission's position, expressed in recitals 340 and 341 of the contested decision, that a public entity cannot take the view that the purchase of marketing services promoting the activities of specific undertakings forms part of the entity's own tasks of promoting local development, and thereby circumvents Article 107(1) TFEU. That position disregards the fact that marketing on Ryanair's website under the marketing services agreements was marketing to promote the Nîmes region, not to promote Ryanair's air transport services. Furthermore, that position introduces a blanket prohibition on the purchase by publicly owned entities of marketing services from companies that provide other services locally, regardless of the content of the marketing services and the application of a market price. The Commission failed to draw a distinction between a benefit accruing to the applicants and a benefit accruing to other parties, such as local businesses. The purchase by the CCI of Nîmes-Uzès-Le Vigan and VTAN of marketing services for general interest purposes could potentially constitute a benefit for local businesses, but it could not constitute a benefit for the seller of those services at the market price.

365 The Commission disputes the applicants' line of argument.

366 It should be noted first of all that the Commission examined, in recitals 340 and 341 of the contested decision, the marketing services from the point of view of the operators of Nîmes airport acting as entities entrusted with a mission of general interest. The Commission considered the question of whether, accepting that the conduct of those operators had to be assessed in the light of their role as a public entity entrusted with a mission of general interest, in this instance the development of Nîmes and its region, and not as airport managers, the specific marketing services at issue could be seen as fulfilling effective needs of a public buyer (recitals 331, 332 and 338 of that decision).

367 In that context, the Commission considered, in recital 340 of the contested decision, that, although it could not be ruled out that, in fulfilling their economic development mission for the region, entities such as the CCI of Nîmes-Uzès-Le Vigan or VTAN may feel the need to resort to commercial providers in order to promote the area, AMS's marketing services did however concern a promotional activity targeting the commercial activities of two clearly defined undertakings, namely Ryanair and the operators of Nîmes airport. The Commission added, in recital 341 of that decision, that to enable an entity responsible for local economic development to purchase marketing services that mainly promote the products or services of certain locally established undertakings, on the ground that those services encouraged local economic development, without such measures constituting State aid, would circumvent Article 107(1) TFEU. In recital 342 of the contested decision, the Commission concluded from this that the marketing services purchased by those operators could not be regarded as meeting an actual need.

368 The applicants' criticism that the marketing services were intended to promote the region and not Ryanair's air transport services cannot be accepted. It is apparent from recitals 207 to 212 and from paragraphs 324 and 325 above that the Commission was fully entitled to find that the various marketing services agreements were closely linked to the air transport services offered by Ryanair and that, far from being designed to generally and equally increase travel to Nîmes and its region by tourists and business travellers, the marketing services specifically targeted those persons likely to use Ryanair's air transport services, and had the primary objective of promoting those services (recitals 317 to 329 of that decision).

369 That finding is not invalidated by the statements of the CCI of Nîmes-Uzès-Le Vigan and VTAN that they concluded the marketing services agreements in order to fulfil general interest obligations towards the regional authorities.

370 Finally, the applicants' argument that the Commission's position expressed in recitals 340 and 341 of the contested decision imposed too broad a ban with regard to the purchase of marketing services by public authorities cannot be accepted. The problem identified by the Commission in those recitals concerned the fact that the marketing services purchased by a public entity could serve as an instrument targeting mainly the promotion of Ryanair flights to Nîmes airport. Contrary to what the applicants claim, the Commission did not therefore refer to purchases of marketing services from a company which provided other services locally, independently of the content of the marketing services.

371 Accordingly, the applicants' complaint based on the refusal to take into account the possibility that part of the marketing services were purchased for general interest purposes must be rejected.

(d) The complaint alleging the erroneous assertion that the SMAN and VTAN constitute a single entity

372 The applicants claim that the Commission wrongly considered that VTAN and the SMAN constituted a single entity for the purposes of applying the market economy operator test. In deciding that the connection of ownership was not a necessary condition, and that other economic links between those two entities were sufficient, the Commission misinterpreted the case-law and made a manifest error of assessment.

373 In that regard, it must be recalled that it has been held that it was necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, had acted as rational operators in a market economy. When assessing the measures at issue, the Commission must examine all the relevant features of the measures and their context, including those relating to the situation of the authority or authorities responsible for granting the measures at issue (see judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59 and the case-law cited).

374 In the present case, although there was no connection of ownership between the SMAN and VTAN, the Commission found, however, in recitals 277 to 299 of the contested decision, that the SMAN had exercised decisive influence over the decisions taken by VTAN with regard to the applicants.

375 In those circumstances, it must be held that the Commission rightly found that there were sufficiently close economic links between the SMAN and VTAN for their conduct to be assessed together in their relations with the applicants for the purposes of applying the market economy operator test (recitals 307 to 309 of the contested decision).

376 Consequently, the applicants' complaint alleging the erroneous assertion that the SMAN and VTAN constitute a single entity must be rejected.

(e) The complaint alleging the reliance on incomplete and inappropriate data

377 The applicants argue that the Commission's profitability analysis contained certain errors concerning the data used.

378 In the first place, the applicants refer to two studies prepared by their economic advisers, dated 2 February 2016, and allege that the assumptions used in the profitability assessment in the contested decision contain a number of flaws. In particular, the estimate of non-aeronautical revenues per departing passenger assumed in the analysis of the profitability of the agreements signed with VTAN (that is, from 2007 onwards) is considerably low in the light of the observed data on such revenues prior to 2007, which the Commission used in the analysis of the incremental profitability of the agreements signed with the CCI of Nîmes-Uzès-Le Vigan. Similarly, that estimate is also considerably low in the light of non-aeronautical revenues at airports other than Nîmes airport at which Ryanair operates. Moreover, the Commission's approach does not capture the wider benefits of Ryanair's operation from that airport. It merely uprates estimates of non-aeronautical revenues per departing passenger by the much lower rate of inflation.

379 In that regard, firstly, it should be pointed out that the applicants rely on two studies of 2 February 2016, which were prepared by their economic advisers and annexed to the application, to allege that the incremental profitability analysis carried out by the Commission contains a number of flaws without however specifying, in the application, those flaws or the relevant elements in those studies. 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 21 of the Statute of the Court of Justice of the European Union and 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).

380 Therefore, it is necessary to reject the applicants' argument that the incremental profitability analysis set out in the contested decision is vitiated by several errors, in so far as they were not specified in the body of the application.

381 Secondly, as regards the arguments alleging the incorrect estimate by the Commission of non-aeronautical revenues in relation to the agreements signed by VTAN, it should be stressed that the fact that those revenues are lower than non-aeronautical revenues per passenger at other European airports is irrelevant. It is apparent from the case-law that the conduct of a market economy operator must be assessed by placing that operator in a situation as close as possible to that of VTAN (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 79, and of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 72). As the Commission rightly observes, such an operator would base its *ex ante* profitability analysis on the specific features of the airport it operates and not on the figures of other airports which, for specific reasons, might record significantly higher non-aeronautical revenues.

382 Thirdly, as regards the difference between the forecast data concerning non-aeronautical revenues in relation to the agreements signed with VTAN and the observed data on non-aeronautical revenues in relation to the agreements signed with the CCI of Nîmes-Uzès-Le Vigan, it should be noted that it is apparent from recital 435 of the contested decision that the Commission

followed the approach proposed by the French authorities, which involved using the amount of the incremental non-aeronautical revenue per passenger resulting from the VTAN study, which was itself based on the VTAN business plan and which detailed the *ex ante* projected costs and revenues for the entire airport operation for the whole term of the new public service delegation (2007-2011) (recitals 398 and 399 of that decision). The Commission found in detail, in recital 405 of that decision, that that study and that business plan provided reliable information which could be taken into account in the application of the market economy operator test and in particular in the incremental profitability analysis.

383 The applicants have adduced no evidence to call into question the approach followed by the Commission in the contested decision. In particular, the fact that the agreements concluded by VTAN result in a lower non-aeronautical commercial revenue per passenger than the historical average commercial non-aeronautical revenue per passenger prior to 2007 taken into account by the Commission for the agreements concluded by the CCI of Nîmes-Uzès-Le Vigan does not, of itself, mean that that approach is manifestly erroneous. Indeed, having regard to the various periods and methods used, there was no reason why the figures contained in the VTAN study should coincide with the historical average incremental aeronautical revenues per passenger observed at the airport for the period prior to 2007. The amounts of the incremental non-aeronautical revenue per passenger for the period 1999-2006 had, in particular, been determined by the Commission on the basis of the airport's total commercial non-aeronautical revenue per passenger over a representative period of three years immediately preceding the signature of the agreement concerned concluded by the same CCI during the period 2000-2006.

384 While acknowledging that it cannot be excluded that the amounts of the non-aeronautical revenue determined on the basis of the VTAN study may be less than the amounts of such revenue if that revenue were calculated on the basis of its historical average immediately preceding the signature of the agreements at issue, as the applicants indeed submit, relying on one of the economic reports of 2 February 2016, the Court finds, however, that the figures of that study, although carried out subsequently, are based on *ex ante* forecasts which were set out in the business plan carried out by Veolia Transport before it became the new operator of the airport. In those circumstances, the Commission could find, correctly, that that study was a sound basis to reconstruct the *ex ante* incremental profitability analysis that a market economy operator would have done before concluding the agreements at issue, to which VTAN was a party.

385 Lastly, the applicants do not demonstrate that the Commission should have taken into account a more accelerated growth in non-aeronautical revenue than that in the inflation rate, due to the presence of Ryanair at Nîmes airport, to reflect the conduct of a normally prudent and diligent market economy operator. It follows from the foregoing that the Commission was entitled to find, without committing a manifest error of assessment, that any benefit resulting from the marketing services going beyond the air routes in question and their duration was too uncertain for a market economy operator to take it into account.

386 In that regard, the applicants rely on the empirical analysis of data from a large number of airports prior to the closure of the administrative procedure, carried out by their economic advisers in the report of 2 February 2016, which had not, however, been submitted to the Commission during that procedure. However, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 60, and of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, EU:T:2004:4,

paragraph 49). In addition, according to the case-law, 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 (see paragraph 252 above).

387 That document cannot therefore be effectively relied upon before the Court in order to assess whether the Commission committed a manifest error of assessment by taking into account only an inflation rate of 2% when calculating the non-aeronautical revenue of the airport during the period 1999-2006 (recital 436 of the contested decision).

388 Consequently, it is necessary to reject the applicants' line of argument concerning the incorrect estimate of non-aeronautical revenues in the analysis of the profitability of the agreements.

389 In the second place, the applicants argue that the Commission wrongly included the costs of purchasing the marketing services in its calculation of the incremental costs.

390 In this connection, it is sufficient to refer to the finding made in paragraphs 207 to 212 above that the Commission was entitled to find, and did not err in so doing, that, in respect of the agreements at issue, it was appropriate to analyse, for each marketing services agreement, that agreement and the corresponding airport services agreement as a single measure.

391 It follows that the Commission was entitled, without committing any error, to include the costs of purchasing the marketing services in its calculation of the costs for the purposes of conducting the incremental profitability analysis.

392 Consequently, it is necessary to reject the applicants' line of argument concerning the inclusion of the costs of purchasing the marketing services.

393 In the third place, the applicants argue, on the basis of the limited information provided in the contested decision, that the Commission did not attempt to satisfy its obligation to exclude costs relating to a public service remit. The Commission accepted that the information obtained on incremental costs was not very reliable, but that, in the absence of any better source, it had relied on the VTAN business plan.

394 In that regard, it must be observed that, in reply to a written question from the Court, the Commission referred to the response of 19 February 2014 which the French authorities had provided to its request for information of 23 December 2013. It explained, in particular, that the VTAN business plan contained both a revenue item called 'Taxe d'aéroport', which was linked to public policy remit activities, and various cost items covering public policy remit activities. It stated that, in the VTAN study, those data had however been processed so as to exclude both revenue and costs linked to public remit. Moreover, the Commission stated that, in its assessment of the agreements signed with VTAN, it used the data produced by that study, which excluded public remit costs and revenues.

395 In those circumstances, it is necessary to reject the applicants' line of argument that the Commission did not attempt to satisfy its obligation to exclude costs related to the public policy remit.

396 As regards the applicants' argument that the Commission failed, in some circumstances, to exclude incremental investment costs and staff costs related to the public policy remit, it should be observed that, in reply to a question from the Court, the Commission explained that, so far as concerns the agreements entered into by VTAN, the incremental cost figures used in the contested

decision were based on the data resulting from the VTAN study. Furthermore, the Commission explained that, as regards the agreements entered into by the CCI of Nîmes-Uzès-Le Vigan, it was apparent from that decision that, in the absence of *ex ante* elements, it had also used the data resulting from that study, even though the realisation of the VTAN business plan was subsequent to those agreements (recitals 448 to 451 of that decision). Therefore, the Commission was entitled to find, without committing an error, that the costs related to the public policy remit were excluded for those two types of agreement.

397 Consequently, it is necessary to reject the applicants' argument that the Commission failed, in some circumstances, to exclude incremental investment costs and staff costs related to the public policy remit.

398 In the fourth place, the applicants argue that the Commission did not include, in its analysis of the 2002 and 2004 amendments, the revenues associated with the traffic specified in the 2000 ASA that would have been expected in the periods covered by those amendments.

399 In that regard, it should be noted that, in the incremental profitability analysis, in respect of the 2002 and 2004 amendments, the Commission took as a basis the incremental traffic expected from the implementation of each of those amendments and the incremental revenues and costs associated with those amendments (recitals 458 to 461 and 463 to 467 of the contested decision), without taking into consideration the revenues linked to the incremental traffic resulting from the implementation of the 2000 ASA.

400 It must be held that the applicants have not shown that that approach is manifestly incorrect. To establish the required link between the additional traffic and the amendments at issue in the context of the incremental profitability analysis, it is logical to determine that traffic under a counterfactual situation where the unaltered 2000 ASA would have continued to apply. Therefore, it is necessary to reject the applicants' line of argument alleging that account was not taken of the revenues linked to the 2000 ASA.

401 In the fifth place, the applicants assert that, when calculating incremental revenues, the Commission failed to take into consideration revenues taking the form of a commission of [*confidential*] (2) on direct ticket sales, a commission of [*confidential*] on car rentals at Nîmes airport and a commission on excess baggage, although the agreements at issue had mentioned those revenues.

402 In this respect, it should be observed that the Commission explained that those commissions had been taken into consideration in the contested decision under the aggregate heading of non-aeronautical revenue, which was based on the total amount of such revenue of Nîmes airport over a period generally of three years immediately preceding the conclusion of the agreement concerned (recitals 435 to 437 of that decision).

403 In reply to a written question from the Court, the Commission inter alia explained, so far as concerns the agreements concluded by the CCI of Nîmes-Uzès-Le Vigan, that the total non-aeronautical revenues of Nîmes airport for the period 1999-2006, mentioned in Table 5 of the contested decision, had been established from the information provided by the French authorities in a note of 27 July 2012, which included as an annex a table giving details of the amounts of historical non-aeronautical revenue for the period 1999-2011 for the three airlines present at that airport during those years. The Commission stated that those revenues which concerned the years 1999 to 2006 had been added up and used to form the 'total commercial non-aeronautical revenue per passenger' column of Table 5 of the contested decision.

404 In those circumstances, given that there was no *ex ante* forecast, the Commission was entitled to find, and did not err in so doing, that the income deriving from revenues, in the form of commissions on direct ticket sales, car rentals and excess baggage, was included in the amounts of the non-aeronautical revenue as submitted by the French authorities.

405 So far as concerns the agreements signed with VTAN from 2007, the Commission explained that the non-aeronautical revenue forecasts stemmed from the VTAN study, which was itself derived from the VTAN business plan. The Commission observed that, according to that study, that business plan contained *ex ante* forecasts for the aeronautical revenues generated by Ryanair and by other users as well as several categories of non-aeronautical revenues for the whole of Nîmes airport for the period 2007-2011. The Commission explained that that study had derived reconstructed forecasts for the non-aeronautical revenues linked to the Ryanair traffic and had provided amounts per passenger for incremental non-aeronautical revenues — namely commercial revenues, financial products and 'other products'. The Commission stated that it had used the total in its market economy operator assessment of the various agreements concluded with VTAN as non-aeronautical revenue per passenger. Thus, it considered that it was clear from the study in question that VTAN had not specifically assessed commissions on excess baggage, direct sales and car rentals.

406 In the light of those factors, it must be held that the Commission was entitled, without erring, to consider that the abovementioned commissions were included in the broader categories of commercial revenues or 'other products'. There was no reason for the Commission to doubt that, in its business plan, VTAN had taken into account the commissions in those income categories.

407 Consequently, it is necessary to reject the applicants' argument that, when calculating incremental revenues, the Commission failed to take into consideration revenues taking the form of a commission of [*confidential*] on direct ticket sales, a commission of [*confidential*] on car rentals at Nîmes airport and a commission on excess baggage, although the agreements at issue had mentioned those revenues.

408 In the light of the foregoing, it is necessary to reject the applicants' complaint alleging the reliance on incomplete and inappropriate data.

(f) The complaint alleging refusal to take into account the wider benefits of Nîmes airport's relationship with Ryanair

409 The applicants submit that the Commission incorrectly failed to take account, in the incremental profitability analysis, of the positive network externalities that a market economy operator acting in the place of the operators of Nîmes airport could expect from Ryanair's operations at that airport and the longer-term effects achieved through AMS's marketing services. An increase in passenger numbers at that airport brought about by the presence of Ryanair improves the airport's appeal for additional routes, other airlines and commercial outlets.

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

411 It must be held that the Commission was entitled to take the view, without committing any error, that a normally prudent and diligent market economy operator acting in the place of the operators of Nîmes airport would not rely on the commercial relationship with Ryanair extending beyond the operation of the routes covered by the agreements at issue. In particular, the applicants

have not succeeded in calling into question the Commission's analysis that any benefit going beyond the routes at issue and their duration would be too uncertain to be taken into account (see recitals 332 to 358 of the contested decision). Therefore, it is reasonable to assume that such an operator would not have made calculations of revenue and costs on the basis of a larger number of passengers resulting from an increased frequency of the routes in operation or additional Ryanair routes.

412 Likewise, for the same reasons, it is reasonable to assume that a normally prudent and diligent rational market economy operator acting in the place of the operators of Nîmes airport would not count on the arrival of other airlines or commercial outlets at that airport beyond the duration of the agreements at issue.

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

414 In the light of all the foregoing, it is necessary to reject the applicants' complaint alleging refusal to take into account the wider benefits of Nîmes airport's relationship with Ryanair.

(g) The complaint alleging the failure to verify the data submitted by Nîmes airport and to compare with a well-run airport

415 The applicants argue that the Commission wrongly failed to verify the cost data submitted by Nîmes airport and to compare that data with the data typical of a well-run airport. In the present case, the incremental operating costs incurred by Nîmes airport, as reported by the Commission in the contested decision, are, the applicants allege, significantly higher than those which it had found in other cases, and so Nîmes airport must be run very inefficiently. Thus, those costs are not market costs that an efficiently run airport would incur and they cannot be taken as a benchmark for assessing whether Ryanair had obtained an advantage that it would not have obtained from a market economy operator.

416 In that regard, it should be recalled that, according to case-law, it falls to the Commission to assess whether a rational market economy operator who is in a situation as close as possible to that of the public entity concerned might have been prompted to take the measure at issue (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 84). It is therefore necessary to take into account the structure of the actual costs and revenues of the public entity whose conduct is being compared to that of a market economy operator.

417 In the present case, it follows that, contrary to what the applicants claim, it was not for the Commission, in the case in point, to verify, when applying the market economy operator test, whether the incremental operating costs and non-aeronautical revenue of Nîmes airport corresponded to those which could be expected from an average airport or a well-run and efficient airport. Accordingly, the Commission could, without making an error, use the actual projected costs and revenues of Nîmes airport to assess whether the applicants had obtained an economic advantage.

418 For the same reasons, nor was the Commission required to take account of costs recorded in airports other than Nîmes airport.

419 Moreover, the revision that gave rise to the actual figures of costs and revenues of a public undertaking would be contrary to the precept of Article 107(1) TFEU, which does not distinguish between measures of State intervention of a public body by reference to their causes or their aims

but defines them in relation to their effects (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 77).

420 Consequently, the Commission did not commit a manifest error of assessment in not ascertaining whether the costs and revenues provided by Nîmes airport corresponded to those generally associated with a well-run or efficient airport.

421 The fourth plea must therefore be rejected as unfounded.

422 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.

IV. Costs

423 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.

424 The Commission 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

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

(1) The complaint alleging that the Commission erred in finding that diversity among airports justified it departing, in the present case, from the comparative analysis

(2) The complaint alleging that the Commission erred in finding that the comparative analysis should be based on a comparison of the agreements at issue taken together with other similar transactions

(3) The complaint that the Commission was wrong to find that the agreements at issue generated higher incremental costs than incremental revenues

(4) The complaint alleging that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport and a failure to state reasons in that regard

(5) The complaint alleging that the Commission wrongfully failed to conduct a 'joint' comparative analysis

(6) The complaint alleging that the comparative analysis shows that no advantage was conferred through the agreements at issue

3. The third part, alleging manifest errors of assessment and insufficient reasoning as regards the incremental profitability analysis

(a) The complaint based on the failure to attribute an appropriate value to AMS's services

(b) The complaint concerning the rationale underlying the decision of the operators of Nîmes airport to conclude the marketing services agreements

(c) The complaint based on the refusal to take into account the possibility that part of the marketing services may have been purchased for general interest purposes

(d) The complaint alleging the erroneous assertion that the SMAN and VTAN constitute a single entity

(e) The complaint alleging the reliance on incomplete and inappropriate data

(f) The complaint alleging refusal to take into account the wider benefits of Nîmes airport's relationship with Ryanair

(g) The complaint alleging the failure to verify the data submitted by Nîmes airport and to compare with a well-run airport

IV. Costs

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* Language of the case: English.

1 This judgment is the subject of a publication by extracts.

2 Confidential data omitted.