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

13 December 2018 (*)

(State aid — Agreements concluded with the airline 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 — Advantage — Private investor test — Recovery — Selectivity)

In Case T-77/16,

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

defendant,

supported by

Republic of Latvia, represented initially by D. Pelše, J. Treijs-Gigulis and I. Kalniņš, and subsequently by I. Kucina, acting as Agents,

and by

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

interveners,

ACTION under Article 263 TFEU for partial annulment of Commission Decision (EU) 2016/152 of 1 October 2014 on State aid SA 27339 (12/C) (ex 11/NN) implemented by Germany for Zweibrücken airport and airlines using the airport (OJ 2016 L 34, p. 68),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

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

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 4 July 2018,

gives the following

Judgment

Background to the dispute

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

2 Zweibrücken Airport is situated to the south-east of the city of Zweibrücken in Rhineland-Palatinate in Germany. At the material time, that airport was owned and operated by Flughafen Zweibrücken GmbH ('FZG'), a company wholly owned by Flugplatz GmbH Aeroville Zweibrücken ('FGAZ'), itself a subsidiary of which 50% belonged to the Land Rheinland-Pfalz (Land Rhineland-Palatinate, 'the *Land*') and 50% to the Zweckverband Entwicklungsgebiet Flugplatz Zweibrücken, an association of local authorities of the Land.

3 Ryanair operated a single route from Zweibrücken airport to London Stansted airport (United Kingdom) from 28 October 2008 until 22 September 2009, when it ceased providing services at Zweibrücken airport.

4 On 22 September 2008, FZG concluded an airport services agreement with Ryanair under the terms of which Ryanair launched a route between London Stansted and Zweibrücken airports. FZG, for its part, granted Ryanair certain discounts on airport charges.

5 The schedule of charges applicable to Zweibrücken airport had been in force since 1 October 2005.

6 On 6 October 2008, the *Land* and AMS concluded a marketing services agreement, under which AMS carried out various marketing activities, such as placing links to websites designated by the *Land* on Ryanair's website and including short texts about the *Land* on that website. In return for those services, the *Land* paid AMS a specific sum in the first year. For the second year the services were to be reduced and the *Land* was to pay a lesser sum.

7 Similarly, the airlines Germanwings and TUIFly concluded contracts with FZG concerning the launch of routes to and from Zweibrücken airport. They also obtained discounts on airport charges.

8 Following a question by an MEP, a complaint and after sending requests for information to the German authorities and Ryanair, the European Commission decided, on 22 February 2012, to initiate the formal investigation procedure laid down in Article 108(2) TFEU concerning, first, measures in favour of FZG and FGAZ and, second, measures in favour of airlines operating from Zweibrücken airport, including Ryanair.

9 At the end of the formal investigation procedure, the Commission adopted, on 1 October 2014, Decision (EU) 2016/152 on State aid SA 27339 (12/C) (ex 11/NN) implemented by Germany for Zweibrücken airport and airlines using the airport ('the contested decision').

10 As regards the discounts on airport charges and the marketing services agreement with AMS, the Commission took the view that Ryanair had received State aid which was unlawful and

incompatible with the internal market. The Commission drew the same conclusion regarding the airport discounts granted to Germanwings and TUIFly.

11 In order to determine whether any economic advantage had been conferred, the Commission stated, in recital 332 of the contested decision, that it had been necessary to examine whether, at the time when the agreement with the airline was concluded, a prudent market economy operator, acting in place of the airport, would have expected the agreement in question to lead to a higher profit than would have been achieved otherwise (recital 332 of the contested decision).

12 As regards the applicants, the Commission found that, for the purposes of the application of the market economy operator principle, it was necessary to analyse the marketing services agreement and the airport services agreement jointly (recitals 338 to 346 to the contested decision).

13 Next, the Commission applied the market economy operator principle in carrying out an *ex ante* analysis of incremental profitability of the various contracts concluded by FZG and the *Land* with the airlines in question. It concluded that an economic advantage had been conferred on the airlines, including Ryanair.

14 Moreover, the Commission explained, in recitals 388 to 391 of the contested decision, that the economic advantage identified was selective.

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

‘*Article 1*

...

2. The State aid, unlawfully put into effect by [the Federal Republic of Germany] in breach of Article 108(3) [TFEU] in favour of ... and Ryanair/AMS by means of the airport services agreements and marketing services agreements concluded on ... and 22 September 2008/6 October 2008 (Ryanair/Airport Marketing Services (“AMS”)) is incompatible with the internal market.

...

Article 3

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

...

3. Ryanair and AMS shall be jointly liable to repay the State aid received by either of them.

4. The sums to be recovered are as follows:

...

(g) in respect of the airport services agreement and marketing services agreements concluded between Ryanair and FZG on 22 September 2008 and between AMS and the Land Rhineland-Palatinate on 6 October 2008: the amount of incompatible aid.

5. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

6. [The Federal Republic of Germany] shall provide the exact dates on which the aid provided by the State was put at the disposal of the respective beneficiaries.

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

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

Article 4

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

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

Article 5

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

...

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

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

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

2. [The Federal Republic of Germany] shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.'

Procedure and forms of order sought

16 By application lodged at the Registry of the General Court on 19 February 2016, the applicants brought the present action.

17 By separate document lodged at the Court Registry on 11 March 2016, the applicants lodged an application for measures of organisation of procedure.

18 The Commission submitted its observations within the prescribed period.

19 By application lodged on 30 May 2016, the Council of the European Union applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By order of 5 July 2016, the President of the Ninth Chamber of the General Court granted that application.

20 By document lodged on 17 June 2016, the Republic of Latvia applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. On 27 July 2016, the applicants requested that certain information in the case file be treated as confidential. By order of 16 September 2016, the President of the Ninth Chamber of the General Court granted the application to intervene. A non-confidential version of every procedural document served on the main parties was communicated to the Republic of Latvia. However, that Member State did not submit a statement in intervention within the prescribed period.

21 By decision of 23 March 2018, the Court decided to refer the case to the Sixth Chamber, Extended Composition.

22 Acting on a report of the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 89 of its Rules of Procedure, requested the parties to answer certain questions.

23 The parties presented oral argument on 4 July 2018.

24 The applicants claim that the Court should:

– annul Article 1(2), and Articles 3, 4 and 5 of the contested decision, in so far as they concern them;

– order the Commission to pay the costs.

25 The applicants claim that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

26 The applicants put forward, in the application, four pleas in law in support of their action. By the first, they allege breach of the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union and of the rights of the defence. By the second, they allege infringement of Article 107(1) TFEU, in that the Commission failed properly to apply the market economy operator principle and erred in concluding that the agreements which they had concluded with the airport had conferred an advantage on them. By the third, they allege infringement of Article 107(1) TFEU, in that the Commission failed to establish the selective nature of the measure. By the fourth, they allege infringement of Article 107(1) and Article 108(2) TFEU, in that the Commission committed a manifest error in its determination of the amount of recoverable aid.

27 In response to a written question put by the Court, the applicants withdrew the fourth plea in law, so that there is no longer any need to examine it.

28 The Court considers it appropriate to begin by examining the third plea in law, alleging an infringement of Article 107(1) TFEU in the light of the selectivity criterion and, then, the second plea in law in so far as it concerns the complaint alleging that the Commission used incomplete and inappropriate data in the analysis of the incremental profitability of the agreements concluded with the applicant.

The third plea in law, alleging that the Commission failed to establish the selective nature of the measure

29 The applicants claim that, even supposing that they benefited from an economic advantage, the Commission has not established that they benefited from a selective advantage.

30 The Commission replies that the economic advantage resulting from the agreements at issue arose from contractual provisions specific to the applicants. There is nothing to indicate that those measures were anything other than individual in nature, rather than covering an indeterminate group.

31 In that regard, it must be noted that the selective application of a State measure constitutes one of the characteristics of State aid within the meaning of Article 107(1) TFEU (see judgment of 9 September 2014, *Hansestadt Lübeck* v *Commission*, T-461/12, EU:T:2014:758, paragraph 44 and the case-law cited). That article prohibits 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).

32 In the first place, it is necessary to recall the Commission's reasoning in concluding that there was an advantage in the present case.

33 The Commission stated, in recital 332 of the contested decision, that, in order to assess whether an agreement between a publicly owned airport and an airline confers an economic advantage on the latter, it is necessary to analyse whether that agreement complied with the market economy operator test. It considered that, in applying that test to an agreement between an airport and an airline, it must be assessed whether, at the date when the agreement was concluded, a prudent market economy operator would have expected the agreement to lead to a higher profit than would have been achieved otherwise. In this regard, it specified that that higher profit was to be measured by the difference between the incremental revenues and incremental costs expected to be generated by the agreement. According to the Commission, the resulting cash flows were to be discounted with an appropriate discount rate.

34 In the present case, it is apparent inter alia from recitals 376 to 387 of the contested decision that the Commission applied the market economy operator principle to the various agreements with the airlines in question. Thus, it is apparent from recital 379 of the contested decision that the German authorities prepared, at the Commission's request, an overview of the incremental costs and revenues that could have been expected at the time of the conclusion of those agreements. For each of these agreements, those authorities prepared data, which are summarised in Table 8 of the contested decision.That table is included in recital 379 of the contested decision and contains the incremental costs and revenues associated with the agreements concluded with the airlines in question. In particular, it is apparent from that table that the incremental revenues include expected additional revenues associated with aviation (including handling and landing, cleaning and de-icing charges) and expected revenues not associated with aviation (parking charges, spending in the terminal). As regards the first category of revenues, recital 380(d) of the contested decision states that they were calculated over the duration of the agreement on the basis of the conditions agreed on

with each airline, taking into account the relevant discounts and incentives. Moreover, it is apparent from that table that the expected incremental costs include, first, additional costs associated with the depreciation of investments necessary for handling commercial aviation and additional personnel and materials costs and, second, as regards the agreements with the applicants, the payments relating inter alia to the aid by virtue of the marketing services agreement between the *Land* and AMS.

35 The Commission thus noted, in recital 386 of the contested decision, that the expected discounted result (revenues less costs) was negative for the agreements concluded with the applicants. It concluded from that that FGAZ and FZG had not acted like a market economy operator, since Zweibrücken airport could not have expected to cover at least the incremental costs brought about by those agreements with the result that they conferred an economic advantage on Ryanair.

36 It follows from the foregoing that the economic advantage thus highlighted in recitals 376 to 386 of the contested decision results, first, from the contractual provisions agreed by FGAZ, FZG and Ryanair, which set out the conditions concerning airport charges, taking into account the discounts and incentives applied and, second, the payments made by the *Land* to AMS in return for marketing services.

37 In the second place, it should be noted that the selective nature of the advantage thus determined is examined by the Commission in recitals 388 to 391 of the contested decision, under the heading ‘Selectivity’.

38 Thus, the Commission considered in recital 388 of the contested decision that the economic advantage highlighted in point 376 et seq. of that decision had been granted selectively, given that only airlines operating out of Zweibrücken airport had benefited from them. In that context, in reply to the argument of the German authorities that the discounts on the charges were offered to all airlines wishing to operate out of Zweibrücken, which made them allegedly non-selective (recital 389 of the contested decision), the Commission noted in recital 390 of the contested decision that the various agreements concluded with the airlines diverged from the schedule of charges as well as from one another (see recitals 67 to 72 of the contested decision), and thus contained individually negotiated conditions. It concluded that the advantage granted was selective with regard to each airline viewed separately. Moreover, the Commission considered, in recital 391 of the contested decision, that even if the schedule of charges had been applied in the same way to each airline wishing to operate out of Zweibrücken airport, any advantage conferred would still have to be considered selective. In that regard, it referred to the Opinion of Advocate General Mengozzi in *Deutsche Lufthansa* (C-284/12, EU:C:2013:442, points 50 to 52), to the effect that to accept Germany’s argument would have led to radically denying the possibility of classifying as State aid the conditions on which an undertaking offers its services where those conditions are applicable to all its contracting parties without distinction, such an exclusion not being in line with the case-law of the Court of Justice.

39 It must be noted that the advantage, in respect of which the Commission examined selectivity in recitals 388 to 391 of the contested decision, differs from that highlighted in recitals 376 to 386 of that decision. Thus, in recitals 388 to 391 of the contested decision, the Commission examined the selective nature of the advantage that allegedly resulted from the granting of discounts on airport charges to Ryanair. However, those discounts constitute merely an element of the advantage identified by the Commission in recitals 376 to 386 of that decision, which corresponds to the negative expected discounted result (revenues less costs) resulting from the agreement concluded by

Ryanair. The Commission did not therefore examine the selective nature of that advantage in the contested decision.

40 In those circumstances, the applicants are justified in claiming that the Commission failed to establish the selective nature of the advantage from which they benefited.

41 In any event, it should be noted that the grounds set out in recitals 388 to 391 of the contested decision — in addition to the fact that they appear difficult to reconcile or contradictory — are not such as to establish the selective nature of an advantage which consisted in granting discounts on airport charges.

42 First, the ground set out in recital 388 of the contested decision, to the effect that airlines operating from Zweibrücken Airport benefited from discounts on airport charges, is not, in itself, a decisive criterion for establishing that the economic advantage identified in the present case is selective (see, to that effect, judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 47 to 50, and of 9 September 2014, *Hansestadt Lübeck* v *Commission*, T-461/12, EU:T:2014:758, paragraph 54).

43 Second, nor does the ground set out in recital 390 of the contested decision suffice to consider that the economic advantage identified is selective. It follows from that recital of the contested decision that the Commission examined whether 'the individual agreements concluded with the airlines diverge from the schedule of charges and from each other ..., thus containing individually negotiated conditions', with the result that the advantage granted appears to be selective with regard to each company viewed individually. However, it is not apparent from any evidence in the case file that the discounts on the schedules of charges granted to Ryanair differed from those generally applicable to all airlines using the airport. Contrary to what the Commission claims in response to a written question put by the Court in that regard, it was not for the applicants to establish that the conditions they obtained were accessible to all airlines operating out of that airport, but it was for the Commission itself to establish that such conditions were more favourable than those applicable to other airlines using the airport and that they were, accordingly, selective.

44 Third, the ground set out in recital 391 of the contested decision, to the effect that, even if the schedule of charges had been applied in the same way to each airline wishing to operate out of Zweibrücken airport, any advantage conferred would still have to be considered selective is also incorrect. The Court of Justice has expressly rejected the Commission's view that a measure laying down the conditions on which a public undertaking offers its own goods or services always constitutes a selective measure (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 50).

45 In those circumstances, it must be held that the Commission's conclusion that the economic advantage identified in the contested decision was selective is, in the light of the reasons given in that decision, incorrect.

46 It follows from the foregoing that the third plea in law must be upheld.

47 Consequently, the contested decision must be annulled.

48 The Court considers that it is also necessary to examine the applicants' complaint that the Commission based its findings on incomplete and inappropriate data for its calculation of profitability, in so far as that complaint reveals additional errors in the profitability analysis made by the Commission.

The complaint alleging the use of incomplete and inappropriate data as raised in the context of the third part of the second plea in law

49 In essence, by their line of argument, the applicants dispute the application made by the Commission of the market economy operator test in so far as it committed certain errors concerning the data used in the incremental profitability analysis of the agreements in question.

50 In that regard, it must be noted that, in order to examine whether or not the Member State or public entity concerned has adopted the conduct of a prudent private operator in a market economy, it is necessary to place oneself in the context of the period during which the measures in question were taken in order to assess the economic rationality of the conduct of the Member State or public entity, and thus to refrain from any assessment based on a later situation (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 71). Thus, in particular for the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken. That is especially so where, as in the present case, the Commission is seeking to determine whether there has been State aid in relation to a measure which was not notified to it and which, at the time when the Commission carries out its examination, has already been made by the public entity concerned (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105).

51 Moreover, it must be recalled that, in general, the application of the private investor test requires the Commission to make a complex economic assessment (see judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 68 and the case-law cited). The review by the EU judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 66 and the case-law cited).

52 In addition, in the context of the application of the private investor principle, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by the Member State concerned — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority of that State. In particular, the nature and subject matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 86).

53 That assessment on the part of the Commission must be based on, or corroborated by, objective and verifiable evidence, provided where relevant by that Member State (see, to that effect, judgment of 27 April 2017, *Germanwings* v *Commission*, T-375/15, not published, EU:T:2017:289, paragraph 77).

54 The arguments put forward by the applicants, in so far as they reveal errors in the analysis made in the contested decision, must be examined in the light of those principles.

55 The applicants criticise, in essence, the assessment of the number of passengers expected, expected non-aeronautical incremental revenues, marketing support costs and incremental costs associated with the agreements in question. The various items of the incremental profitability analysis are summarised in Table 8 which is contained in recital 379 of the contested decision. It is

not disputed that the Commission based the estimates for those items on the table submitted to it by the German authorities during the administrative procedure ('the German authorities' table'). The Commission produced that table in reply to a question put by the Court.

56 In the first place, the applicants relied, at the hearing, on the German authorities' table in order to dispute the estimate of the number of passengers expected taken into account in the incremental profitability analysis. In particular, the applicants explained that, in Table 8 of the contested decision, the Commission indicated under the item 'Expected passengers' an estimate of [*confidential*] (1). They add that they had thus inferred that that estimate corresponded to the number of outbound passengers. They claim that it is apparent from the analysis of the German authorities' table produced by the Commission before the Court that that figure related to the total number of expected passengers associated with the agreements in question and not merely to outbound passengers, the number of which amounted only to [*confidential*]. According to the applicants, it therefore appears that the estimate of [*confidential*] passengers provided by the German authorities was significantly below the volume of outbound passengers that Ryanair undertook to generate annually under the airport services agreement. Moreover, the applicants explain that the average load factor of a Ryanair aircraft is approximately 80%. However, by using in their reconstruction of revenues and *ex ante* costs a total number of [*confidential*] passengers, the German authorities applied a load factor of a value between just 40% and 50%. That figure is not credible, all the more so since, as the applicants maintain, in other cases, the Commission applied a load factor close to the average factor for Ryanair's flights of 80% across its network.

57 In that regard, concerning the question whether that argument, which is new, is admissible, it must be recalled that a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see judgment of 17 July 2014, *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraph 161 and the case-law cited). In the present case, given that that argument may be linked to the complaint alleging the use of incomplete and inappropriate data, it must be considered to be admissible.

58 As regards the merits of the applicants' arguments, it must be held that, in the contested decision, the Commission included the estimate of expected passengers as forwarded by the German authorities during the administrative procedure, without however, comparing that estimate with other evidence in the case file, in particular the airport services agreement which was the subject, together with the marketing services agreement, of the State aid procedures in question. The airport services agreement provides that Ryanair undertakes to generate at least 50 000 outbound passengers on an annual basis. Likewise, the agreement provides that Ryanair is entitled to a discount of [*confidential*] in return for generating a total number of passengers of [*confidential*]. The contractual commitment of an airline relating to the volume of passengers, may, in principle, constitute relevant evidence for the purpose of assessing the conduct of a market economy investor. Moreover, the estimate made by the German authorities departs very significantly from an estimate taking into account Ryanair's contractual commitment and presupposes a load factor for the Ryanair aircraft concerned which is significantly below the average load factor for Ryanair aircraft.

59 In those circumstances, the Commission should have noted significant differences between the data provided by the German authorities and the other evidence in the case file, in particular Ryanair's contractual commitments, and requested additional explanations from the German authorities. Accordingly, the Commission has failed properly to establish the estimate of expected passengers that it took into account in the incremental profitability analysis of the agreements concluded with the applicants.

60 Accordingly, the applicants' arguments relating to the Commission's error concerning the estimate of expected passengers must be upheld.

61 In the second place, the applicants were justified, at the hearing, with regard to the German authorities' table, in calling into question the reliability of the estimate of 'expected additional costs' contained in Table 8 of the contested decision. In particular, they claim in essence that the German authorities' table shows that the staff investment costs were forecast at the same amount of [*confidential*] for 2008 and 2009, whereas the airport services agreement was only signed on 22 September 2008 and Ryanair in particular operated the route to and from Zweibrücken airport in 2009.

62 The Commission contends that, even though the German authorities' table refers to an amount of [*confidential*] for each of the four years (2008, 2009, 2010 and 2010), the Commission, in calculating the advantage, took into account only the amount for one year (duration of the agreement), irrespective of the fact that the calculation is made either strictly on the basis of one year, or three months for the first calendar year and nine months for the second.

63 In that regard, even though it was raised at the hearing, that argument must be regarded as admissible, since it is linked to the present complaint (see paragraph 57 above). In addition, it must be held that, by merely stating that, in calculating the advantage, only the amount of the staff investment costs relating to the year covered by the agreement had been taken into account, the Commission does not dispute the fact that the German authorities' table states that the amount of [*confidential*] in 2008 and the same amount in 2009 were cumulatively taken into account in order to calculate the expected additional costs set out in Table 8 of the contested decision.

64 Accordingly, by failing to adduce evidence justifying the taking into account of an amount of [*confidential*] for the whole of 2008 and 2009, the Commission has not properly established the amount of the expected additional costs set out in Table 8 of the contested decision.

65 Accordingly, the applicants' arguments relating to the Commission's error concerning the estimate of expected additional costs must be upheld.

66 It is necessary to uphold the applicants' complaint, alleging the use of incomplete and inappropriate data in so far as it has been demonstrated that the Commission committed errors concerning the estimate of the number of expected passengers (paragraph 60 above) and the expected additional costs (paragraph 65 above) linked to the agreements concluded with the applicants.

67 In conclusion, given that, in addition to those errors in the profitability analysis, the Commission's analysis concerning the selectivity of the aid is incorrect (paragraphs 29 to 47 above), the contested decision must be annulled.

Costs

68 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 Commission has been unsuccessful, it must be ordered to pay its own costs together with those of the applicants, in accordance with the form of order sought by the applicants.

69 The Council and the Republic of Latvia are to bear their 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. **Annuls Article 1(2) of Commission Decision (EU) 2016/152 of 1 October 2014 on State aid SA 27339 (12/C) (ex 11/NN) implemented by Germany for Zweibrücken airport and airlines using the airport, and Articles 3, 4 and 5 of that decision, in so far as they concern Ryanair DAC and Airport Marketing Services Ltd;**

2. **Orders the European Commission to bear its own costs and to pay the costs incurred by Ryanair and Airport Marketing Services;**

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

4. **Orders the Republic of Latvia 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

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* Language of the case: English.

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1 Confidential data omitted.