

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/1698**of 20 February 2014****concerning measures SA.22932 (11/C) (ex NN 37/07) implemented by France in favour of Marseille Provence Airport and airlines using the airport***(notified under document C(2014) 870)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 8 May 2006, the Commission received a complaint, lodged by Ryanair, about unlawful aid due to different airport charges being applied to national flights and international flights respectively. By letter of 21 June 2006, the Commission asked France for information on the points raised by this complaint.
- (2) On 27 March 2007, the Commission received a second complaint, dated 15 March 2007 and lodged by Air France, about unlawful aid granted by the Departmental Council of Bouches-du-Rhône (‘the Departmental Council’) to Marseille Provence Airport, and also about unlawful aid granted by the airport to Ryanair and other airlines. These advantages allegedly involved, in particular, reduced airport charges to encourage flights from the new ‘Marseille-Provence 2’ terminal (‘Terminal mp2’).
- (3) By letter of 27 November 2009, Air France lodged a complaint about unlawful aid granted by several French regional and local airports, including Marseille Provence Airport.
- (4) By letter of 13 July 2011, the Commission informed France that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (‘TFEU’) ⁽¹⁾.
- (5) The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (6) The Commission received comments on 13 December 2011 from the Marseille-Provence Chamber of Commerce and Industry (‘CCIMP’) and on 15 December 2011 from Air France, Ryanair, AMS, Association of European Airlines and the CCIMP. It forwarded these comments to France by letter of 10 February 2012. France was given the opportunity to respond to them within one month. The Commission received comments from France by letter of 12 March 2012.

⁽¹⁾ OJ C 334, 15.11.2011, p. 8.

- (7) It also received additional comments from Ryanair dated 13 April 2012, 10 April 2013, 20 December 2013, and 17 and 30 January 2014. These additional comments were forwarded by letter to France on, respectively, 13 July 2012, 3 May 2013, 9 January 2014 and 4 February 2014. By letters of 17 July 2012, 4 June 2013, 29 January 2014 and 5 February 2014, France informed the Commission that it had no response to make.
- (8) France sent additional information to the Commission by letters of 26 March 2012, 10 April 2012, 20 September 2012, 30 October 2013 and 24 December 2013 after this was requested by the Commission by letters of 23 February 2012, 12 June 2012 and 20 November 2013.

2. DETAILED DESCRIPTION OF THE FACTS

2.1. THE PARTIES CONCERNED

2.1.1. MARSEILLE PROVENCE AIRPORT

- (9) Marseille Provence airport is one of the largest French airports, after those of Paris, Nice and Lyon. In 2012, the airport handled 8 295 479 passengers.

Table 1

Development in the number of passengers

	2005	2006	2007	2008	2009	2010	2011	2012
Passenger traffic mp1	5 859 480	6 008 466	6 028 292	5 907 174	5 619 879	5 799 435	5 990 703	6 483 863
Passenger traffic mp2	0	107 478	934 481	1 058 703	1 670 240	1 722 732	1 372 164	1 811 616
Total traffic	5 859 480	6 115 944	6 962 773	6 965 877	7 290 119	7 522 167	7 362 867	8 295 479

Source: France's submission of 24 December 2013

2.1.2. MARSEILLE-PROVENCE CHAMBER OF COMMERCE AND INDUSTRY, CONCESSION-HOLDER FOR MARSEILLE PROVENCE AIRPORT

- (10) In France, chambers of commerce and industry ('CCI') are public administrative bodies. They represent the general interests of trade, industry and services before public authorities. Their tasks and powers are laid down by law ⁽²⁾ and they come under the administrative supervision ⁽³⁾ of the government, through the regional prefect. The supervisory authority has automatic access to all general meetings of the chambers of commerce and industry and can have one or more items added to the agenda. The supervisory authority can, where applicable, suspend or dismiss a member of the CCI. At the very least, decisions on the budget, use of debt or signature of agreements with third parties are enforceable only after approval by the supervisory authority ⁽⁴⁾. The CCIMP manages its subsidiaries, in particular Marseille Provence Airport and several training bodies. Its subsidiaries do not have their own legal personality ⁽⁵⁾. However, separate accounts are kept for the airport activities. Acts are enforceable only if they have been addressed to the supervisory authority.

⁽²⁾ Act No 2005-882 of 2 August 2005 in favour of small and medium-sized enterprises.

⁽³⁾ Under French law, administrative supervision is a form of power exercised by one legal person governed by public law over another. Regional and local chambers of commerce and industry are supervised by the regional prefect, assisted by the regional public finance officer. In accordance with the Constitution and the law, administrative supervision concerns only control of the legality of acts adopted by the legal person under supervision.

⁽⁴⁾ Articles R.712-2 to R.712-11-1 of the Commercial Code.

⁽⁵⁾ See http://www.ccimp.com/ccimp/nous_connaitre/une_structure_publique

- (11) Since 1934 the CCIMP has managed Marseille Provence Airport under a development, maintenance and operation concession granted by the French State, which owns the airport. In 1987 this concession was renewed for 30 years ⁽⁶⁾.

2.1.3. THE ECONOMIC ADVISORY COMMITTEE OF MARSEILLE PROVENCE AIRPORT

- (12) The Departmental Council of Bouches-du-Rhône, the Provence-Alpes-Côte d'Azur Regional Council and the Marseille Provence Métropole Urban Community are consulted on the airport's management within the framework of the airport's Economic Advisory Committee ('Cocoéco'). This committee's task is to give opinions on the development of investment, the airport's operation and charges for services provided by the airport.
- (13) According to the Civil Aviation Code, this committee meets at least once a year to give an opinion on the rules for establishing and applying charges for airport services at the aerodrome in question, as well as on airport investment programmes. It can be consulted on any matter relating to the services delivered by the airport operator.
- (14) Cocoéco consists of a users panel and an operators panel, with the latter comprising the President of the Provence-Alpes-Côte d'Azur (PACA) Regional Council or his or her representative, the President of the Departmental Council of Bouches-du-Rhône or his or her representative, and the President of the Marseille Provence Métropole Urban Community or his or her representative.

2.2. THE NEW 'LOW-COST' TERMINAL MP2

2.2.1. JUSTIFICATION FOR THE CONSTRUCTION OF TERMINAL MP2

- (15) Following the loss of over a million passengers since 2001, mainly due to competition from the TGV Méditerranée high-speed railway line between Marseille and Paris, the attacks of 11 September 2001 and the bankruptcies of several airlines (Sabena, SwissAir, etc.), Marseille Provence Airport was looking to revitalise its traffic and redirect its development towards European destinations. To this end, in 2004 the airport decided to set up a 'low-cost' terminal.
- (16) The CCIMP therefore decided to convert the former cargo terminal No 1 into this new terminal. This building was inexpensively refurbished to handle low-cost customers. Work began in December 2005 and Terminal mp2 started operating in September 2006.
- (17) The distribution of the number of passengers (actual figures) between Terminals mp1 and mp2 from 2006 to 2013 is indicated in the table in recital 9.

2.2.2. COMPANIES USING THE NEW TERMINAL MP2

- (18) To assess the interest of airlines in using Terminal mp2, in 2004 the CCIMP launched a call for projects aimed at the airlines. Air France, Ryanair and easyJet responded. The total volume of the proposals made by these airlines did not exceed the terminal's planned capacity and no selection was therefore necessary.
- (19) Ryanair is the main user of Terminal mp2, but France has also mentioned bmibaby.com, Condor, easyJet, Jet4you.com and Myair.com.
- (20) On 12 July 2004 Air France submitted an application to the CCIMP with regard to Terminal mp2. It indicated that 'La Navette' shuttle passengers (Marseille/Paris-Orly connections) could potentially use Terminal mp2. Air France proposed a schedule of 19 flights per day from Monday to Friday, with 14 flights on Saturdays and 18 flights on Sundays to Paris-Orly. Negotiations between Air France and the CCIMP with regard to transferring

⁽⁶⁾ Decree of 22 July 1987 granting the development, maintenance and operation concession for Marseille-Marignane aerodrome to the Marseille Chamber of Commerce and Industry, Official Gazette of the French Republic of 29 July 1987, p. 8487.

the shuttle service failed. For Air France, there were two main obstacles: the restriction of Terminal mp2 traffic to 'point-to-point' flights, and the fact that the terminal was set to handle only national and intra-EU flights.

- (21) According to the information provided by France, all airlines wanting to use Terminal mp2 were able to do so.

2.3. MEASURES UNDER INVESTIGATION

- (22) The opening decision investigated the following measures:

- (a) over the 2001-2010 period, an investment subsidy of EUR 24,2 million to the CCIMP, including a subsidy for the construction of Terminal mp2, amounting to EUR 7,577 million;
- (b) over the 2001-2010 period, financial flows amounting to EUR [...] (*) million between the CCIMP and the general arm of the CCI;
- (c) setting of the passenger charge amount for Terminal mp2;
- (d) reduced passenger charges for national flights;
- (e) reduction of airport charges in connection with the creation of new routes;
- (f) reduction of the overnight parking charge;
- (g) financing of marketing activities;
- (h) agreement to purchase advertising space concluded with Airport Marketing Services without prior publicity or competitive tendering;
- (i) profitability of Terminal mp2 revealed by the business plan presented by the CCIMP.

2.3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (23) According to the information available to the Commission, the investment in constructing the new Terminal mp2 was funded through a EUR 7,577 million subsidy from the Departmental Council of Bouches-du-Rhône.
- (24) In addition, over the 2001-2010 period, the CCIMP received investment subsidies from the Departmental Council, Regional Council, Marseille Provence Métropole, State (Directorate-General for Civil Aviation — 'DGAC' — part of the Ministry of Ecology, Sustainable Development and Energy) and the European Regional Development Fund (ERDF), which totalled EUR 16,624 million. It received three subsidies from the Departmental Council in order to extend and restructure the airport, which were respectively EUR 1,519 million, EUR 210 000 and EUR 2,997 million. The Regional Council granted it EUR 3,616 million to extend and develop the airport and EUR 255 000 to develop the cargo area. Marseille Provence Métropole granted it a subsidy of EUR 889 000 to develop international traffic. The State (DGAC) funded the screening of hold baggage to the tune of EUR 464 000, as well as the enhanced screening of baggage and the purchase of baggage screening equipment at EUR 5,032 million. Lastly, the ERDF subsidised the development of air cargo (cargo aircraft parking areas, cargo area road, redevelopment of cargo terminals, servicing of the area) in the amount of EUR 1,520 million.
- (25) Under Articles 2(1^o)(b) and 15(1^o) of the schedule of conditions applicable to the Marseille aerodrome concession, the concession-holder must finance investments.

2.3.2. FINANCIAL FLOWS BETWEEN THE CCIMP AND THE GENERAL ARM OF THE CCI

- (26) Between 2001 and 2010, the financial flows between the CCIMP and the general arm of the CCI appear to have totalled EUR [...] * million.

(*) Information covered by professional secrecy.

2.3.3. REDUCED PASSENGER CHARGES FOR USERS OF TERMINAL MP2

- (27) The passenger charges vary depending on the terminal used by the airlines. They are lower for those using the 'low-cost' Terminal mp2, and higher for those using Terminal mp1 (Halls 1-4). These charges are decided by the CCIMP. Air France challenged the original charges at Marseille Provence Airport for 2006, 2007 and 2008 and these were annulled by the Council of State.
- (28) On 7 May 2008 the Council of State annulled ⁽⁷⁾ the approved passenger charges applicable to Terminal mp2 at Marseille-Provence airport as from 1 June 2006, as well as those applicable from 1 January 2007, due to the accounting information used to calculate the charge not providing sufficient justification. In this case, the Council of State did not annul the passenger charges applicable to the main terminal.
- (29) On 26 December 2008 the Council of State annulled the passenger charges applicable to the main terminal and to Terminal mp2 at Marseille-Provence airport as from 1 January 2008.
- (30) In a judgment of 15 May 2009, the Council of State upheld the refusal by the competent ministers to approve the charges applicable to Terminal mp2 as from 1 January 2009.
- (31) Following the annulment of these charges, the DGAC commissioned the consultancy firm Mazars to carry out a study, delivered in November 2008, on the methods for allocating costs and revenues and on the charges at the two terminals. Based on this audit, the CCIMP decided on new passenger charges that were applicable retroactively. These retroactive charges applied to Terminal mp1 (Halls 1 to 4) for 2008, and to Terminal mp2 for 2006 to 2008. According to the CCIMP, these new charges were set such that the passenger cost coverage rates ⁽⁸⁾ were similar for Terminals mp1 and mp2.
- (32) By decision of 25 May 2009, the CCIMP set the passenger charges applicable from 1 August 2009. As the supervisory authorities objected to the charges proposed by the CCIMP as from 1 July 2010, the charge from 1 August 2009 continued to apply.
- (33) On 17 July 2009 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of 25 May 2009 in so far as it set the passenger charges applicable retroactively to Terminals mp1 and mp2 as from 1 January 2008 and also the passenger charges applicable from 1 August 2009.
- (34) On 17 July 2009 Air France also lodged an interim application. On 28 July 2009 the Council of State suspended payment of 20 % of the passenger charge due for 2008 and from 1 July 2009. Pending a judgment on the main action, this suspension was applied to the charges renewed in 2010 and from 1 January 2011.
- (35) On 14 June 2010 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of 2010, which renewed the previous charges as from 1 July 2010.
- (36) On 27 July 2011 the Council of State ⁽⁹⁾ annulled the CCIMP's decision of 25 May 2009, which set the passenger charges for Terminal mp2 for 2008, 2009 and from 1 August 2009, on the basis that these charges were calculated taking into account a subsidy of EUR 2,4 million granted by the Departmental Council of Bouches-du-Rhône to fund part of the mp2 terminal construction work, of which Marseille Provence Airport was the direct beneficiary and the airlines were the indirect beneficiaries. According to the Council of State, this decision resulted in unlawfully granted State aid that vitiated the CCIMP's decision by unlawfulness. The Council of State also ruled that the fact of the charges for Terminal mp2 being annulled had no effect on the lawfulness of the

⁽⁷⁾ The Commission understands that the Council of State judgment had the effect of annulling the charges *ex tunc*, i.e. from their entry into force. After being annulled, these charges were therefore deemed never to have existed. The Commission understands that, in the absence of new approved charges, Article 224-4-1-II of the Civil Aviation Code provides that the previous charges (applicable before 1 June 2006) apply.

⁽⁸⁾ Coverage rate by the airport charges in both cases of $[50-80] \times \%$ on average from 2007-2012, and overall coverage rates of $[100-150] \times \%$ (mp1) and $[100-150] \times \%$ (Terminal mp2) on average (including non-aeronautical revenues from the car parks, shops and rental companies).

⁽⁹⁾ Council of State, 27 July 2011, Air France et al., No 329818, 340540.

charges set for Terminal mp1, which it underlined were justified by precise accounting studies. The Council of State stated in its decision that it was apparent from the evidence on record that communication costs of around EUR 800 000, which, according to the applicants (Air France and Britair), should have been charged only to Terminal mp2, had in fact been charged in full to overheads and were therefore split between the terminals according to a formula that had not been proven as being vitiated by a manifest error of assessment. The Council of State therefore confirmed the passenger charges for Terminal mp1. In the same decision, the Council of State annulled the landing charge for 2009 on the ground that it covered nearly three times the costs of providing this service and accounted for over a quarter of the total revenue from the airport charges. It did not therefore allow for limited offsetting between the revenue from this charge and the revenue from other charges, as required by national law ⁽¹⁰⁾. Lastly, the Council of State noted that the applicants had withdrawn their request for annulment of the traffic development incentive measures.

- (37) On 15 December 2010 Air France lodged an application with the Council of State seeking annulment of the CCIMP's decision of December 2010, which renewed the previous charges as from 1 July 2011. Air France eventually withdrew in 2011 all its actions brought at national level.
- (38) Throughout the period, the charges for Terminal mp2 were 57 % to 66 % lower for national traffic and 66 % to 80 % lower for intra-EU flights ⁽¹¹⁾ compared with the charges for Halls 1-4, respectively for national traffic, intra-EU traffic and international traffic.

2.3.4. REDUCED PASSENGER CHARGES FOR NATIONAL FLIGHTS

- (39) The passenger charges applicable for passengers departing from Halls 1-4 at the airport have traditionally differed according to the destination of flights, with one charge for national flights, one charge for flights to destinations within the European Union, and one charge for international flights.
- (40) The charges applicable in 2006 and 2007 were originally set by a CCIMP decision of 26 July 2006. The charges were significantly lower for national flights, with a difference of over 50 %.
- (41) Following a complaint by Ryanair, infringement proceedings were initiated. France informed the Commission in its note of 2 August 2007 that it had 'reminded the operator on numerous occasions that it must end the difference between charges according to the destination of flights as this could not be justified by a difference in costs'.
- (42) New charges were adopted for 2006 and 2007 and the differentiation in question was abandoned for the future.

2.3.5. REDUCTION OF CERTAIN AIRPORT CHARGES IN CONNECTION WITH THE CREATION OF NEW ROUTES

- (43) To encourage the creation of new routes or improvements in flight schedules, preferential charging conditions can be granted to airlines. This discount applies to the landing, lighting and parking charges for passenger flights and to the landing and lighting charges for cargo flights.
- (44) An initial arrangement for the reduction of airport charges was introduced by the CCIMP by decision of 7 September 2004 and came into force on 1 March 2005. These measures were referred to the airport's Cocoéco for an opinion during its meeting of 6 December 2004 ⁽¹²⁾. This arrangement was applied until 31 July 2009.

⁽¹⁰⁾ Article L.224-2 of the Civil Aviation Code states that the overall income from these charges cannot exceed the cost of the services provided at the airport.

⁽¹¹⁾ Up to 31 December 2007, there were different charges for national, EU and international destinations from Terminal mp1. There was no differentiation for Terminal mp2. From 1 January 2008 (and for the 2006 and 2007 retroactive charges), there have been different charges for Schengen EU/non-Schengen EU/International for Terminal mp1 and National + EU/International for Terminal mp2.

⁽¹²⁾ Air France's representative on Cocoéco did not vote against the introduction of the start-up aid (see Air France's complaint of 27 March 2007, p. 14).

- (45) The discount applied was 90 % in the first year of operation and 50 % in the second year. These discounts were only granted for a new route meeting the following conditions ⁽¹³⁾.
- the new route had to be operated to an airport without a regular service when the route was created;
 - the new route had to be operated to an airport at least 75 km away from an airport already served or with a substantially different catchment area from that of an airport already served;
 - the route's destination could not be within a 160 km radius of a destination served during the previous 12 months by the same airline, one of its subsidiaries, an airline belonging to the same group or an airline connected by commercial agreements (in particular franchise, code-sharing to said destination, etc.);
 - the route had to be operated at least once a week for a minimum of two consecutive months;
 - during the period that an airline was benefiting from the above reductions due to operating to a given destination, if one or more other airlines decided to operate a route to this same destination, the latter would benefit from the same measure for the same timescale as that set for the first airline.
- (46) The discounts were granted to airlines operating from both Terminal mp1 and Terminal mp2.
- (47) In a judgment of 30 June 2009, Marseille Administrative Court allowed Air France's application seeking annulment of the charge reduction arrangement adopted in 2005. The CCIMP did not appeal against this judgment as, in the meantime, the incentive arrangement had been partly renewed based on a new charging decision. Air France and its subsidiaries Britair et Regional then lodged an action for annulment with the Council of State against the CCIMP's decision setting the charges for 2008 and 2009, which included not only the aeronautical charges but also the arrangement incentivising the creation of new routes. This action for annulment was accompanied by an interim application for suspension, which the Council of State, in an interim ruling of 28 July 2009, partly allowed by ordering, in particular, the suspension of this incentive arrangement. In its decision on the main action of 27 July 2011 ⁽¹⁴⁾, the Council of State noted that the applicants had withdrawn their requests for annulment of the traffic development incentive measures for 2009 and 2010.
- (48) From 1 February 2010 to 31 October 2011, the new discount in the landing, lighting and parking charges was applied to the benefit of all airlines meeting the objective conditions for this to be granted.
- (49) The discount applied was:
- 60 % in the first year of operation;
 - 45 % in the second year of operation; and
 - 20 % in the third year of operation.
- (50) These discounts were only granted for a new route meeting the following conditions ⁽¹⁵⁾:
- passenger flights and cargo flights were eligible;
 - the new route had to be operated at least once a week for a minimum of four consecutive months;
 - the new route had to be operated to an airport at least 50 km away from an airport already served or with a substantially different catchment area from that of an airport already served;
 - the new route could not have been operated during the previous 18 months by the same airline, one of its subsidiaries, an airline belonging to the same group or an airline connected by commercial agreements.

⁽¹³⁾ Air France sent a copy of the conditions to the Commission.

⁽¹⁴⁾ Council of State, 27.7.2011, Air France et al., No 329818, 340540.

⁽¹⁵⁾ Air France sent a copy of the conditions to the Commission.

- (51) In the event of seasonal suspension, the discount was re-applied when the route's operation resumed, as if it had never been suspended: the period of interruption was included in the discount period. This incentive measure applied to both terminals and all airlines at Marseille Provence Airport.

2.3.6. FREE OVERNIGHT PARKING

- (52) In its submission of 28 December 2010, the CCIMP mentions the introduction of the 'waived overnight parking charge' measure as from 1 February 2010. As a result, parking between 22.00 and 06.00 is free under the following conditions:

- passenger transport activity;
- five weekly frequencies to the same destination during a minimum IATA season;
- aircraft parking for at least six consecutive hours between 22.00 and 06.00.

- (53) This incentive measure applied to both terminals and all airlines at Marseille Provence Airport.

2.3.7. FINANCING OF MARKETING ACTIVITIES

- (54) By decision of 21 November 2005, the CCIMP introduced a financial incentive arrangement for the creation of new routes by partly paying the specific marketing and promotional costs incurred for media approved by Marseille Provence Airport. Under this arrangement, the beneficiary airline had to provide proof of the expenditure on promoting this route. The aid amount could not exceed 50 % of the proven expenditure.
- (55) The decision to introduce a 'marketing' payment was made, without prior authorisation by France, before the publication of the Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ('the 2005 Guidelines') ⁽¹⁶⁾. By letter of 22 August 2006, France asked the CCIMP to end this arrangement no later than 1 June 2007 on the basis that this type of 'marketing' payment did not meet the criteria laid down by the 2005 Guidelines.
- (56) The CCIMP confirmed that the marketing expenditure contribution initially envisaged had not been applied, except for one contribution [of less than EUR 300 000]* to bmibaby.

2.3.8. AGREEMENT TO PURCHASE ADVERTISING SPACE WITH AMS

- (57) On 19 May 2006 the CCIMP concluded, for a term of five years, without prior publicity or competitive tendering, an agreement to purchase advertising space with the company Airport Marketing Services ('AMS'), a wholly-owned subsidiary of the airline Ryanair.
- (58) According to the provisions of this agreement, the CCIMP was to pay AMS:
- EUR [...] per month between November 2006 and October 2007,
 - EUR [...] per month between November 2007 and May 2008,
 - EUR [...] per month from June 2008.
- (59) It was indicated in the Cocoéco decision of 18 February 2009 on the charges that were set in the decision of 25 May 2009 that 'the cost of the AMS agreement over the agreed term, i.e. October 2006-October 2011, is EUR [...]*, i.e. EUR [...] per year'.

⁽¹⁶⁾ Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

- (60) The information provided by France also allows the cost of the AMS agreement to be determined, as indicated in Table 2:

Table 2

Costs of the AMS agreement according to the information provided by France (EUR '000)

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

- (61) According to the CCIMP, the objective of this agreement was to publicise Marseille as a destination in order to attract high passenger numbers. This would ensure the sustainability of Terminal mp2 and a good return on the services offered by the airport operator.
- (62) In this respect, the CCIMP considered that the pursuit of this objective relied on a combination of two factors:
- a high volume of internet users;
 - European internet users open to the low-cost model.
- (63) The CCIMP justifies the conclusion of this agreement with AMS by the fact that only the latter's website met the CCIMP's needs in 2006, as it offered the following services:
- a unique and exclusive Ryanair ticket marketing system, with Ryanair being the only operator to undertake to establish a significant aircraft base at the new Terminal mp2;
 - a large audience of internet users targeted by the CCIMP's promotional policy;
 - marketing services appropriate to the purchase of flight tickets to Provence as a destination.
- (64) The complainant takes the view that this agreement concluded with AMS represents aid to Ryanair in order to attract the latter to Marseille Provence Airport. In this respect, it provides evidence in support of its position, based on the preparatory dossier for the CCIMP 'airport advisory committee' meeting on 15 November 2005.

2.3.9. BUSINESS PLAN FOR TERMINAL MP2 AND APPLICATION OF THE MARKET ECONOMY OPERATOR PRINCIPLE

- (65) In November 2004 the CCIMP drew up a business plan to prove the profitability of Terminal mp2. This plan was updated in 2005. Further updates of this business plan were assessed by PricewaterhouseCoopers (PwC) at the request of Air France in February 2005, November 2005 and May 2006.
- (66) The business plan submitted by France compares, for the 2004-2020 period, a scenario with Terminal mp2 and a scenario without Terminal mp2. According to France, the total of the annual cash flows for the 2004-2020 period and the net book value in 2020 are:
- EUR [...]* million in the scenario without Terminal mp2;
 - EUR [...]* million in the scenario with Terminal mp2.
- (67) France therefore concludes that the scenario with Terminal mp2 is EUR [...]* million more beneficial than the scenario without Terminal mp2, which would correspond to a rate of return of [...]* %.

- (68) The business plan also contains a sensitivity analysis for different traffic and charging assumptions. The 'traffic' scenarios studied were a scenario 'without transfer of the Air France shuttle' and a 'lower growth in Terminal mp2 traffic' scenario. The 'charging' scenarios studied involved charges of EUR [...] * and EUR [...] * per passenger for Terminal mp2.
- (69) The business plan was updated in 2005. On this occasion, three scenarios were simulated as follows:
- **First simulation:** the 2005 traffic forecasts became the basis for the calculations, transfer of the Air France shuttle to Terminal mp2 was no longer included in the base scenario, and the calculations were made for the 2005-2021 period. Based on these assumptions, the internal rate of return was put at [in excess of 7,5 %]*.
 - **Second simulation:** the internal rate of return was set at 7,5 % and the number of passengers corresponding to this internal rate of return was calculated. The simulation concluded that the number of passengers over the 2007-2021 period could be 1,32 million less than in the first simulation.
 - **Third simulation:** if Terminal mp2 traffic in 2010 was only 1 million passengers (instead of the 1,65 million used in the first simulation), what additional charges would have to be applied per passenger from 2011 to maintain an internal rate of return of 7,5 %? The simulation concluded that the charges would need to be increased by EUR [...] *.
- (70) The assessments made by PwC at the request of Air France in the action before the Council of State involve simulations from February 2005, September 2005 and May 2006 produced by the CCIMP and aimed at establishing the internal rate of return and net present value (NPV) of the Terminal mp2 project based on expected cash flows. In this respect, PwC makes several remarks and criticisms about the business plan in question.

3. FRANCE'S COMMENTS

3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

3.1.1. SOME OF THE SUBSIDIES GRANTED ARE SUBJECT TO LIMITATION

- (71) France contests the Commission's view that the EUR 7,577 million allocated between 2005 and 2007 for construction of Terminal mp2 and the EUR 16 million granted from 2001 for investment in the airport constitute in their entirety State aid that may be analysed by the Commission.
- (72) Pursuant to Article 15 of Council Regulation (EC) No 659/1999 ⁽¹⁷⁾, France maintains that the subsidies indicated below in Table 3 are subject to limitation:

Table 3

Body	Date and signature of agreement	Description of subsidy	Total amount paid (EUR '000)
Departmental Council	14 December 1999	Work to extend and restructure the airport facilities	3 064
Regional Council	24 October 1997	Work to extend and develop the airport	8 032
Regional Council	8 July 1994	Development of the cargo area	1 372

⁽¹⁷⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

Body	Date and signature of agreement	Description of subsidy	Total amount paid (EUR '000)
State	26 April 2000	Upgrading of instruction and information signs	290
State	23 June 1999	Screening of hold baggage	579

- (73) France maintains that the subsidies subject to limitation cannot be included in a recovery order and are therefore necessarily excluded from the scope of the Commission's investigation.

3.1.2. SOME OF THE SUBSIDIES GRANTED WERE USED TO FUND NON-ECONOMIC ACTIVITIES AND INFRASTRUCTURES AND DO NOT THEREFORE CONSTITUTE STATE AID

- (74) France maintains that some subsidies were used to fund activities or infrastructures connected with the exercise of powers in respect of public safety, firefighting and operational safety, namely:

- the subsidy granted by the State on 19 December 2001, given that this was allocated to improve the aviation safety arrangements, and in particular to finance the random search of a certain percentage of hand baggage, the systematic inspection of staff entering restricted areas and the acceleration of the hold baggage screening programme to achieve a rate of 100 % by the start of the second half of 2002, in a total amount of EUR 5 032 000;
- the subsidy granted by the Departmental Council on 27 September 2002, given that this was allocated to cable runway 2, improve the computer backup room and a space within the TFE building, renovate the façade of the technical unit within the air navigation premises, replace the central low-voltage distribution board at substation B, and upgrade the terminal alarm system and the fire safety system in the computer room, in a total amount of EUR 209 885;
- the subsidy granted by the Departmental Council on 26 April 2003, given that this was allocated to renew the lighting equipment, enlarge and improve access to the car park, reconfigure the border police booth, create a care unit, improve the perimeter road in the southern zone, replace fan coil units, install a CCTV camera network, and replace the boiler in the TFE building, the firefighting system in the western zone and the digital protection equipment, in a total amount of EUR 2 111 542,82;
- the subsidy granted by the Departmental Council on 19 May 2005 to partly finance Terminal mp2, which was partly allocated to fund non-economic infrastructures in a total amount of EUR 2 273 258,64. France points out that the tasks identified as being non-economic are carried out within an area representing 16,96 % of Terminal mp2 and considers that an equivalent part of the work involved the areas allocated to these tasks. France consequently maintains that 16,96 % of the cost of the work after deducting the investments associated with the non-economic activities, i.e. EUR 1 416 238,75, must also be deducted from the Commission's assessment;
- the subsidy granted by Marseille Provence Métropole on 26 July 2004, given that this was allocated to runway lighting, in an amount of EUR 72 095;
- the ERDF subsidy granted on 22 August 2002, given that this was allocated to carry out lighting work in the cargo aircraft parking areas, in a total amount of EUR 587 350,53.

- (75) According to France, the sums concerned must be deducted from the amount assessed by the Commission.

3.1.3. COMPATIBILITY OF THE INVESTMENT SUBSIDIES WITH THE 2005 GUIDELINES

- (76) France maintains that, under the principle of protection of legitimate expectations, the Commission must assess whether the subsidies granted before publication of the 2005 Guidelines constitute State aid under the guidelines on State aid in the aviation sector of 10 December 1994, and consequently conclude that these subsidies do not constitute State aid.

- (77) In the alternative, France takes the view that the subsidies granted are compatible with the 2005 Guidelines.

3.1.3.1. Compatibility of the Departmental Council subsidy for investment in Terminal mp2

- (78) France maintains that this subsidy meets a clearly defined objective of general interest involving the creation and maintenance of direct jobs in a region with an unemployment rate higher than the national average, regional economic development in an area eligible for regional aid under the derogation in Article 107(3)(c) TFEU, airport capacity-building given a risk of saturation ⁽¹⁸⁾, and improvement of local connectivity in relation to new traffic that was not served by the TGV line or Terminal mp1 and that benefited from the increased number of destinations served.
- (79) France takes the view that the infrastructure was necessary and proportional to the objectives pursued. Although part of Terminal mp1 had overcapacity after 2001, Terminal mp2, which was a new product offering a different service, was created as a complementary offer to that of the main terminal. Moreover, given the traffic forecasts, Marseille Provence Airport needed to confront congestion problems that would have necessitated the opening of new departure areas in 2008 and 2018. According to France, construction of Terminal mp2 enabled the necessary infrastructure improvements to be postponed (to 2016 and after 2020), while offering better prospects for profitability. In addition, the new Terminal mp2 was in direct line with the airport's strategy of attracting low-cost airlines, which could not have established themselves at Terminal mp1 given its significantly higher charges and the fact that it does not lend itself to the need for the rapid boarding and disembarkation of passengers. France maintains that in 2007, the first full year of operation of Terminal mp2, the terminal's usage rate was 68 %, which proves that there was no real overcapacity. It adds that the spare capacity of Terminal mp1 from 2007 to 2011, linked to the creation of Terminal mp2, allowed Air France's new needs to be met in terms of opening its base on 2 October 2011 for the creation of 13 new routes and an increase in frequencies. Lastly, the construction of Terminal mp2 within a former cargo terminal, as also the reduced comfort offered to passengers at this terminal, have enabled the investment and maintenance costs to be minimised.
- (80) France maintains that the long-term prospects for the use of Terminal mp2 are satisfactory. The construction of this terminal was in line with the desire to develop new traffic at the airport, which was not served by Terminal mp1 and which enabled the airport to avoid opening routes already served by the TGV. The increase in the number of destinations offered, from 100 in 2005 to 119 in 2010, has further boosted the attractiveness of this new service, and therefore its long-term prospects for use. France underlines that the traffic forecasts for Terminal mp2, which have been confirmed by real traffic figures for 2007 to 2010, indicate that 50 % of its capacity should be in use after five years. Lastly, the increase in Air France traffic from Terminal mp1 as of 2 October 2011 proves that the additional capacity provided by Terminal mp2 does not constitute competition for the main terminal, but an asset for the airport, having enabled it to respond favourably to Air France's demand.
- (81) France maintains that the subsidies granted have had only a limited effect on intra-Community trade. As regards Avignon Airport, which is less than 60 minutes away from Marseille Provence Airport, France observes that the low-cost traffic at this airport has remained stable since 2007, that further improvements have been made to the airport since 2007, with new routes having been opened, and that none of the destinations served are accessible from Marseille Provence Airport. If the area is expanded to include Nîmes and Toulon Airports, France notes that these fall under the category of small regional airports and do not therefore have the same vocation as Marseille Provence Airport, where the traffic exceeds 5 million passengers. The fact that the destinations served are not all (except for London and Brussels) accessible from Marseille Provence Airport proves that there is no competition between these airports.
- (82) France maintains that the Departmental Council subsidy was necessary to achieve the break-even point usually demanded by operators. As the May 2006 business plan indicated an internal rate of return of [...] % if the Departmental Council subsidy were deducted, France maintains that the project's profitability would have been reduced to [...] % in the absence of this subsidy. France also maintains that the subsidy was proportional as it enabled a satisfactory internal rate of return to be achieved, in the absence of a less onerous option that would have allowed the same results to be achieved. It points out that the work on the terminal was subject to public

⁽¹⁸⁾ Communication from the Commission — an action plan for airport capacity, efficiency and safety in Europe, COM(2006) 819 final, not published in the OJ.

procurement, which may confirm that the costs were minimised. Lastly, France notes that the subsidy granted covered only 50 % of the total amount of the Terminal mp2 project, i.e. 80 % of the work in respect of aircraft and 30 % of the work in respect of the terminal.

3.1.3.2. *Compatibility of the ERDF subsidies of 22 August 2002 for the development of air cargo*

- (83) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted therefore needs to be recognised as compatible with the TFEU rules ⁽¹⁹⁾.
- (84) France points out that the application for financing for Marseille Provence Airport was made to the ERDF under the programming for Objective 2 of the Structural Funds for the 2000-2006 period, for which the Provence-Alpes-Côte d'Azur region was eligible, and which was approved by the European Commission on 22 March 2001.
- (85) According to France, the aid granted met a clearly defined objective of general interest: optimisation of the existing infrastructure in order to develop the cargo activity, in response to the fall in tonnage transported and in connection with the pool of jobs provided by the airport ⁽²⁰⁾ in an area affected by a particularly high unemployment rate.
- (86) France maintains that the infrastructure concerned was necessary and proportional to the objective. It explains that this infrastructure involved the construction of a new ring road and roundabout to manage road traffic flows with a view to increased traffic, redevelopment of the cargo terminals in premises left vacant, creation of aircraft parking areas close to the cargo terminals to reduce handling time, and expansion of the cargo area to increase its attractiveness.
- (87) France maintains that the traffic results ⁽²¹⁾ prove that the infrastructure had satisfactory long-term prospects for use, and points out that the infrastructure is available to all operators.
- (88) Lastly, France maintains that a subsidy justified by the need to develop an area facing structural difficulties, and which financed only 28 % of the total project cost, could not have affected intra-Community trade. It believes that the project financing cannot be called into question as the ERDF eligibility criteria were met. France underlines that the financing granted helped to improve road access to the airport infrastructure and remedy the issues preventing the free movement of goods.

3.1.3.3. *Compatibility of the subsidy of 26 June 2003 for the extension and restructuring of the airport*

- (89) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted, i.e. EUR 888 457,18, therefore needs to be recognised as compatible with the TFEU rules.
- (90) France maintains that this subsidy met a clearly defined objective of general interest involving the economic development of the Bouches-du-Rhône department and Provence.
- (91) France believes that the investments concerned were necessary and proportional to that objective as they aimed to increase the number of hourly aircraft movements by renovating runway 1, constructing ramps and creating quick exits.

⁽¹⁹⁾ The Commission highlights an inconsistency in France's response, which claims that the aid amount to be subject to a compatibility analysis is first EUR 932 649 (p. 26) and then EUR 980.

⁽²⁰⁾ France explains that an impact study conducted by the CCIMP concluded that the airport's cargo activities accounted for 582 jobs in 2000 and 614 jobs in 2009.

⁽²¹⁾ France explains that cargo traffic increased by 20,86 % between 2005 and 2010, and totalled 52 179 tonnes in 2010.

- (92) France maintains that the investments were essential in order to handle additional traffic. As a result, the work carried out increased the runway capacity to 140 000 commercial aircraft movements per year. However, in its response, France cites traffic targets of 113 909 movements in 2015 and 122 449 movements in 2020. The improvements made therefore meant that runway capacity work would not have to be envisaged for the next 10 years, while benefiting from satisfactory medium-term prospects for use according to France.
- (93) France confirms that the infrastructure is accessible to all users and maintains that the only commercial airport less than 60 minutes away by road is Avignon Airport. As this is a Category D airport, with which Marseille Provence Airport is not in competition, the aid in question has not affected intra-Community trade.

3.1.3.4. *Compatibility of the subsidy of 26 July 2004 for the development of the airport*

- (94) As a preliminary point, France notes that part of the subsidy was for investments in non-economic activities and that only the remainder of the aid granted, i.e. EUR 816 535, therefore needs to be recognised as compatible with the TFEU rules.
- (95) France maintains that this subsidy met a clearly defined objective of general interest involving the development of the Marseille metropolis and region, by consolidating national traffic and developing international traffic at Marseille Provence Airport, as well as its rail connection.
- (96) France asserts that meeting this objective necessitated the work carried out, namely an increase in the capacity of Hall 1 and its upgrading in line with international standards, optimisation of runway 1 and reconstruction of runway 2, and construction of a railway station accessible to the TGV.
- (97) France maintains that the increase in passenger traffic proves that these facilities have satisfactory long-term prospects for use. It adds that the planned construction of the railway connection could only increase use of the airport.
- (98) According to France, the infrastructure is accessible to all users without discrimination. It underlines that the allocation of the halls to national, Schengen and international flights is necessary for the smooth management of passenger flows in line with the rules on border control, and that the location of flights at one or other of the terminals does not alter the fact that all airlines are free to access both terminals according to the flights that they operate.
- (99) France notes its belief that the work carried out has not affected intra-Community trade, given the absence of any airport in the same category located within the same area of activity, and it also stresses that the investments covered by the subsidy of 26 July 2004 were not directly intended to increase the airport's capacity.
- (100) France maintains that the conditions for the granting of the subsidy in question were such that they guaranteed compliance with the principle of proportionality ⁽²²⁾. It notes that the public authority's commitment was limited to EUR 1 million over three years.

3.2. MARKET ECONOMY OPERATOR TEST APPLIED TO TERMINAL MP2

- (101) France maintains that PwC's criticism that deducting a proportion of the investment subsidy from the depreciation of the Terminal mp2 infrastructure distorts the market economy operator test is unfounded. According to France, the accounting rules in force require equipment subsidies attributable to future years to be deducted from the net book values of fixed assets. Moreover, the treatment of subsidies has been the same for Terminals mp1 and mp2, which have both benefited from a subsidy amounting to 30 % of the cost of the work

⁽²²⁾ The agreement concluded between the CCIMP and the Marseille Provence Métropole Urban Community stipulated that the public authority's contribution was set in line with the investment programmes proposed by Marseille Provence Airport and accepted by the authority, that the funds were strictly intended to cover expenditure validated in this way, that the annual public contribution was limited to the expenditure actually incurred by the airport in the year, that each call for funds was to be accompanied by a summary statement of the expenditure, and that the CCIMP was to keep at the authority's disposal all the invoices for the work.

on the terminal. Lastly, if the gross flows had been taken into account in the basis for the passenger charge costs, this would have led the operator to invoice users for costs that it had not actually incurred. More broadly, as France has judged that the subsidy received from the Departmental Council was compatible with French and EU law, it considers that the CCIMP acted as a market economy operator by not including, in the business plan produced, any costs that it may not have actually incurred.

- (102) As regards the inclusion in the business plan of the net book value (NBV) amount of the investments made during the period according to the cash flow taken into account, France asserts that this simply expresses, in accounting terms, the provisions of the schedule of conditions of the 1987 concession agreement. France maintains that this type of provision is common in concession agreements and seeks to take account of the respective durations of the investment project and concession agreement.
- (103) To justify the value of 7,5 % used to reflect the weighted average cost of capital (WACC), France maintains that this is consistent with the average estimate of the WACC for French airports ⁽²³⁾, although it is slightly higher due to the airport's regulated scope and due to the fact that the estimate was made in a period (2004) prior to the referenced estimates. France points out that the Mazars consultancy uses, in its study, the same WACC assumption as the operator of Marseille Provence Airport.
- (104) France maintains that the Commission has wrongly highlighted the absence of any increase in external costs associated with modulations for objectives of general interest (incentive for the creation of new routes), as these modulations were in fact taken into account, not in the costs, but as discounts on the landing, lighting and parking charges in all the cases studied. France adds that these modulations benefited users of both Terminal mp2 and Terminal mp1 and that their application between 2005 and 2010 reveals that, overall, the discounts granted were balanced between the two terminals (EUR [...] million for Terminal mp1 and EUR [...] million for Terminal mp2). France has also submitted a business plan produced *ex post* for the years 2005-2010, which confirms that the business plans presented in September 2005 and May 2006 were based on forecast figures close to the actual figures, and that the profitability of Terminal mp2 has proved to be better than that envisaged at the time of the investment decision.

3.3. OPERATING CONTRIBUTION GRANTED TO THE CCIMP

- (105) With regard to the contributions totalling EUR [...] million paid by public authorities to the CCIMP, France maintains that they do not constitute operating subsidies, but rather compensation for services rendered by the general arm of the CCI to Marseille Provence Airport. France explains that, given the accounting separation between the airport arm of the CCI and its other arms, the sums covered by this Decision correspond to the rebilling of services rendered by the general arm to the airport, and therefore constitute contributions corresponding to services billed for the 2001-2010 period.
- (106) France highlights that a certificate issued by the CCIMP's auditor confirms the absence of financial flows from the central services of the CCIMP to Marseille Provence Airport.
- (107) France has also explained how the airport tax system works in order to show that there is no State aid involved in this mechanism. France states that the airport tax is provided for in Article 1609 *quater* of the General Tax Code (*code général des impôts — CGI*), which stipulates that it is collected for the benefit of public or private persons operating aerodromes, that it is payable by any public air transport undertaking and that it is exclusively used to reimburse costs incurred by airport operators in carrying out sovereign tasks such as fire-rescue-safety services, control of bird hazards and security. France further states that the airport tax amount is set annually, airport by airport, according to the services provided under the regulations in force and the expected trends in traffic figures, costs and other income received by the operator. Aerodrome operators therefore produce an annual declaration of costs and traffic, which is sent to the local civil aviation safety directorate for validation. The tax is calculated by the national government's Directorate-General for Civil Aviation, based on the cumulative results from previous years.
- (108) France disputes the finding that this mechanism could involve elements of State aid. First of all, it underlines that this general system is applicable to all French airports according to the same rules.

⁽²³⁾ The decisions of the airport's advisory committee produced by France refer, in the case of ADP, to a WACC of 5,8 % to 6,5 % for the 2006-2010 period and 6,2 % to 6,8 % for the 2011-2015 period, and to a WACC of 6 % to 6,5 % in the case of Toulouse Airport for the 2009-2013 period.

- (109) It further states that, given the fact that the tax rate is set according to forecast cost and traffic figures, it is difficult to ensure that the tax revenue perfectly matches the costs in any given year, but disputes that there may be overcompensation.
- (110) France points out in this respect that airport operators are reimbursed for costs only *ex post* according to the depreciation charge and that, when a positive balance is recorded, this is added to the cumulative accounts from previous years and carries financial charges payable by the operator, which gives rise to a tax adjustment in the following year. France notes that the airport tax system has been in overall deficit for a number of years (by around EUR 110 million at the end of 2010), meaning that part of the safety and security costs borne by airports is not compensated, with this part being allocated to financial costs payable by the State. France underlines that tax increases occurring *ex post* have to take account of the effects on airlines, which prevents the deficit from being clawed back too quickly.
- (111) Lastly, France refers to the 'reset' mechanism that applies if an airport operator changes, which requires the operator to reimburse any positive balance recorded at the end of its term.
- (112) With regard to Marseille Provence Airport, France states that the cumulative deficit in the airport tax system was EUR 2,7 million at the end of 2000, that the balance was restored in 2010 with a tax rate set at EUR 8,20 and that the rate for 2011 was adjusted downwards (EUR 7,774) so that a surplus was not generated.

3.4. SETTING OF PASSENGER CHARGES FOR TERMINALS MP1 AND MP2

- (113) France maintains that the differentiation in charges between Terminals mp1 and mp2 is in line with the provisions of Directive 2009/12/EC of the European Parliament and of the Council ⁽²⁴⁾ and points out that Terminal mp2 is open to all airlines. It explains that this differentiation in charges between Terminals mp1 and mp2 is due to the underlying cost difference between the passenger functions of these terminals. France states that, in its decision of 26 July 2011, the Council of State accepted that the charges for Terminal mp1 were valid, which, according to France, therefore means that it incidentally accepted the validity of the accounting rules allocating the costs and revenues between Terminals mp1 and mp2. Lastly, France stresses that, due to the 'single till' principle that is applied at Marseille Provence Airport, the difference between the cost price of the passenger charge and the actual passenger charge consists of non-aeronautical resources specific to the terminal in question, which a prudent operator would take into account when determining the charge applicable to the terminal.
- (114) France disputes that the CCIMP took into account only the additional costs that were directly linked with the commissioning and operation of Terminal mp2. It alleges that, as the two terminals are geographically separated, it is possible to separate out all the investments needed for Terminal mp2, i.e. EUR 8,95 million. France notes that the cost structure of an airport essentially consists of fixed costs.
- (115) France then details the elements used to determine the operating costs attributed to Terminal mp2:
- as Terminal mp2 represents only 8,9 % of the airport's total terminal area, it accounts for only 9,8 % of the total for the 'tax and insurance' cost item;
 - as the servicing and maintenance costs essentially involve the repair of mechanical parts such as lifts, travellers and escalators, the simplified-service terminal, which does not have any travellers or escalators, accounts for only 5 % of the 'servicing and maintenance' cost item;
 - as Terminal mp2 is new and better insulated, has a significantly lower ceiling height than Terminal mp1 and represents 8,9 % of the airport's terminal area, it accounts for only 8,6 % of the 'fluids' (energy) costs;
 - 7,8 % of the cleaning costs are allocated to Terminal mp2, given the proportion of the area occupied (8,9 %) and the floor covering (tiling in Terminal mp2, carpeting in Terminal mp1), with an identical cleaning frequency in the two terminals;

⁽²⁴⁾ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p. 11).

- the creation of Terminal mp2 has not resulted in any additional staff costs, except for one hiring at the terminal coordination unit (*poste de coordination de l'aérogare* — PCA) in 2007, one hiring at the operational coordination unit (*poste de coordination d'exploitation* — PCE) and one hiring at the information office (*bureau d'information* — BI) in 2010, which are shown in the table produced by France, with the latter having also detailed in its response the formulas used to allocate the operating costs between the two terminals.
- (116) France therefore maintains that, as the operating costs were allocated at constant staffing levels, the costs allocated to Terminal mp2 are as economical with regard to the passenger charge as for Terminal mp1. France further notes that the costs allocated to Terminal mp2 in fact correspond to the additional costs that would have been borne by Terminal mp1 if the second terminal had not been constructed (Annex 44 and Annex 25).
- (117) France also disputes PwC's conclusion that investments not directly allocated to the terminals must be indirectly allocated, and details the investments that are not included in the passenger charge and how they are taken into account in the accounting plan (investments in buildings separate from the terminals for which separate rental income is received, one-off investments to replace obsolete facilities that are allocated to specific cost centres, and road infrastructure, IT and walkway investments that are allocated to a specific cost centre and, where applicable, included in the overheads). France further disputes PwC's argument that, as Terminal mp2 passengers may use the facilities of Terminal mp1, 10 % of Terminal mp1's depreciation should be allocated to Terminal mp2. It maintains that the clear separation between the airport's infrastructures makes this use very unlikely, that this would involve allocating an area equivalent to the total area of Terminal mp2, and that this would require the commercial revenues of Terminal mp1 to be allocated in the same proportion to Terminal mp2, i.e. a reduction in the margin of the main terminal of EUR [...] million.
- (118) France further underlines that the traffic assumptions used by PwC in its 2006 and 2007 reports are based on forecasts from the November 2004 business plan and do not take account of the downgrading of the traffic figures in the September 2005 and May 2006 business plans, following Air France's decision not to transfer its shuttle service to Terminal mp2, and the six-month delay in the decision to open the new terminal, which significantly reduced the traffic in 2006 and 2007. France disputes the finding in the PwC report that Terminal mp1's traffic was 'cannibalised' by Terminal mp2. It stresses in this respect that Air France did not in the end implement its plan to transfer the Orly shuttle flights to Terminal mp2 and that Air France's traffic over the 2008-2011 period remained stable for each of the two destinations for which Ryanair operated competing routes from Terminal mp2 from 2009 onwards.
- (119) France maintains that, as PwC's arguments are unfounded, the charge of EUR 3,84 per passenger is also unfounded, and points out that this is higher than the charge applied to Terminal mp1 in 2007.
- (120) France notes that, following annulment by the Council of State of the charges applied to Terminal mp2 for 2006, 2007 and 2008 and the charges applied to Terminal mp1 for 2008, the airport operator set new charges for each of the terminals. The justification for an increase in the charges at Terminal mp2 lies in the requirement imposed by the regulator (Ministers for the Economy and Civil Aviation) for the AMS advertising agreement costs to be allocated to this terminal alone, without the formulas for allocating costs between the terminals having been called into question.
- (121) According to France, the CCIMP set the charges at a level to achieve an identical cost coverage rate for each terminal (i.e. [...] %). France maintains that Directive 2009/12/EC provides that the level of airport charges may be differentiated according, inter alia, to their costs and that, to ensure that this differentiation in charges is justified by a difference in costs, the coverage rate of these costs by the passenger charge for each terminal should be equivalent. France adds that this coverage rate can be less than 100 % if the 'single till' regulation regards the overall economic equilibrium of the airport as including non-aeronautical revenues. France notes that the Mazars consultancy estimated in its report that, for 2007, the coverage of passenger costs by the income from the passenger charge was [...] % for Terminal mp1 and [...] % for Terminal mp2.
- (122) France concludes that the passenger charges at Terminal mp2 cannot constitute an economic advantage in favour of an undertaking pursuant to Article 107(1) TFEU as they were set in relation to the costs involved in constructing and operating Terminal mp2, that the difference between the passenger charges for using each of the terminals is objective, transparent and justified by the costs allocated to each terminal, and that the differentiation is, in this respect, expressly provided for by Article 10 of Directive 2009/12/EC.

- (123) The selectivity of the measure is also not proven in this case, as the charges were applicable without distinction to any airline using Terminal mp2.
- (124) As regards the reduced passenger charges for national flights, France states that the Order of 16 October 2009 thereafter prohibited any differentiation in charges for countries in the Schengen area and notes that, in its decision of 28 January 2009, the Commission considered that it was not necessary to propose additional measures.

3.5. REDUCTIONS IN THE CHARGES FOR CREATING NEW ROUTES

- (125) As a preliminary point, France maintains that all state airports and a very large number of decentralised airports in France agree to the modulation of charges for airlines, as assessed by the Commission in recitals 116 to 137 of its opening decision.
- (126) It adds that these measures are intended to encourage the creation of new air routes. They meet an objective of general interest involving improvement of the area's service and connectivity, regional development and integration in the European market.
- (127) According to France, the claimed objective of general interest must be taken into account by the Commission in its analysis of the compatibility with European law of the aid granted in this respect.
- (128) France also maintains that the modulation of charges is annually approved by the State through an approval procedure applicable to all state aerodromes, which ensures that the measures are non-discriminatory. According to France, the annual approval procedure for charges is therefore sufficient to meet the requirement that the Member State must have an appeal mechanism to remedy any discrimination in the granting of aid, which is one of the compatibility criteria for the aid under investigation.
- (129) France points out that the national law (Article R.224-2-2 of the Civil Aviation Code) establishing the possibility of the modulation of charges requires the person responsible for setting charges to define monitoring indicators corresponding to the objective of general interest pursued. France maintains that the monitoring indicators chosen ensure each year that the measure is being correctly implemented and identify any needs for adjustment, and are sufficient to meet the aid compatibility criterion involving the existence of a penalty mechanism if a carrier fails to fulfil its undertakings towards the airport.
- (130) France explains that the assessment of the modulation of charges, since 2005 when this system came into operation, has been regularly included in the dossiers for Cocoéco meetings, which proves that the measures granted have been made public to representatives of airport users, and is sufficient to meet the aid compatibility criterion involving publication of the measures concerned.
- (131) France underlines that the modulation of charges under review complies with the provisions of Directive 2009/12/EC allowing Member States to modulate airport charges for issues of public and general interest. France therefore concludes that the airport operator is not required to act as a market economy operator when applying such a modulation. It stresses that other modulations of charges for issues of general interest exist under French law, particularly environmental issues, such as the modulation of the landing charge according to the aircraft category and the time of day in relation to noise pollution.
- (132) France disputes that such measures constitute start-up aid and maintains that they aim to internalise certain components of public interest (offsetting of environmental damage, improvement of local connectivity, etc.), which would not otherwise be taken into account in the charges.
- (133) France maintains that a business plan showing that the modulations granted are not profitable would not, however, mean that the operator should not grant those modulations as this business plan would not take account of the externalities generated by those measures, such as savings made in terms of pollution and noise emissions or improvement of local connectivity and service. According to France, the difficulty in putting a monetary value on those externalities has meant that a different assumption has been used for these incentive measures under Directive 2009/12/EC.

- (134) France rejects the Commission's methodological approach, which involves applying the market economy operator test, as it claims that this is inappropriate for analysing measures where the object is allow the public interest to benefit from positive externalities.
- (135) France maintains that the information produced in recital 124 of the Commission's opening decision is incorrect. The charges indicated refer to a variable part of the landing charge per passenger. In reality, the variable part of the landing charge is calculated based on the number of tonnes of the aircraft and not on the number of passengers.
- (136) In the alternative, France maintains that the modulated charges for creating new routes are economically profitable for Marseille Provence Airport. With its response, France has produced an *ex post* study of the profitability of the measures granted. According to France, the calculations made using commercial revenues from 2008 prove that the average discount granted for a route operated using the type of aircraft that use Terminals mp1 and mp2 is less than the revenues generated by the revenues allocated to each of these terminals, and results in a net income of EUR [...] per passenger for Terminal mp1 and EUR [...] per passenger for Terminal mp2. France maintains that 83 % of the traffic created by this measure continued after the three years, resulting in additional profit. France states that a further profitability study on the modulations approved by Cocoéco on 6 December 2004 was conducted using the September 2005 business plan, updated in May 2006, based on a 67-tonne B737 aircraft using Terminal mp2 and an A319 aircraft using Terminal mp1. Two traffic assumptions were studied: in the first, the increase in traffic from the third year of the modulations stemmed only from an increase in frequencies on existing routes; in the second, the increase in traffic stemmed exclusively from the new routes. The first assumption results in a net income/turnover ratio of [...] % and an NPV of EUR [...]; the second assumption gives a net income/turnover ratio of [...] % and an NPV of EUR [...].
- (137) France maintains that the modulations were non-discriminatory and were applied to all airlines meeting the eligibility conditions. It therefore disputes that the measure can be characterised as State aid under the selectivity criterion.
- (138) France points out that, in its decision on Manchester Airport ⁽²⁵⁾, cited in its Charleroi decision ⁽²⁶⁾, the Commission recognised that the granting of reductions on landing charges constituted a measure of limited duration and formed part of an arrangement open to all airlines starting a new route from Manchester, such that it precluded any distortion of competition and fell outside the scope of Article 107 TFEU. France therefore concludes that an arrangement accessible to all airlines and granted for a limited duration falls outside the scope of Article 107 TFEU.
- (139) France presents the modulated charge arrangement in force from 15 February to 31 July 2009 and explains that 24 airlines benefited from this. It notes that the arrangement was annulled by Marseille Administrative Court in its judgment of 30 June 2009, on the ground that the modulation was too large, and was replaced from 1 February 2010 by an arrangement under which the proposed discount rates were reduced and the conditions for granting these discounts were made stricter. France maintains that the conditions laid down by the Manchester decision were met in the case of both modulated charge arrangements, with the modulations in question not falling within the scope of Article 107 TFEU. According to France, the Commission therefore wrongly examined, in its opening decision, the modulations in question with regard to the market economy operator principle.

3.6. REDUCTIONS GRANTED ON THE OVERNIGHT PARKING CHARGE

- (140) France maintains that this discount was introduced, like the one for new routes, for general interest issues. Modulation of the overnight parking charge enabled Marseille Provence Airport to increase flight flows at the start and end of the day, ensuring that optimum use was made of the infrastructure. France underlines that the impact of this measure was limited to [...] % of the parking charge turnover, excluding the effects of modulations for creating new routes.
- (141) France states that, in its view, modulations for general interest issues should not be assessed strictly in terms of their profitability. However, it also points out that compliance with the market economy operator principle has been proven in this case, based on the 'calculation of additional costs generated by overnight parking' study

⁽²⁵⁾ Decision of 14 June 1999 on State aid NN 109/98 — *United Kingdom (Manchester Airport)*.

⁽²⁶⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

[illegible]

- (142) Based on a study conducted using the 2008 accounts, the variable costs of the overnight parking charge were EUR [...] per aircraft per night, with the 2004 estimate being EUR [...]*. In the case of a B737-800 with a load factor of 80 %, these costs represent EUR [...] per passenger and, in the case of an A319 with a load factor of 70 %, they are EUR [...] per passenger. However, based on the accounts submitted to Coccoéco on 18 February 2009, the shop and parking activities covered [between 100 % and 150 %] of the passenger costs for Terminal mp1, i.e. a net margin of EUR [...] per passenger, and [between 100 % and 150 %] of the passenger costs for Terminal mp2, i.e. a net margin of EUR [...] per passenger. These net margins broadly covered the additional costs of the overnight parking.
- (143) Lastly, France points out that the Commission did not make any criticism of the airport charges system organised at Charleroi Airport.

3.7. FINANCING OF MARKETING ACTIVITIES

- (144) As regards the aid scheme established by the CCIMP decision of 21 November 2005, which resulted in a single payment [of less than EUR 300 000] to bmibaby, France states in its submission of 28 December 2010 that this amount, even if it did constitute State aid, would in any event be covered by Commission Regulation (EC) No 1998/2006 ⁽²⁷⁾ (*de minimis* aid). Furthermore, it stresses that, following the announcement of this company's sale, the CCIMP may not have been able to obtain a sworn statement regarding aid received from other European airports.

3.8. AGREEMENT TO PURCHASE ADVERTISING SPACE WITH AMS

- (145) As regards the agreement to purchase advertising space concluded with AMS on 19 May 2006, France maintains that this agreement was awarded, in accordance with public procurement regulations, without any prior competition due to the existence of a single supplier.
- (146) France notes that the promotional policy has a direct effect on an airport infrastructure's profitability due to the revenues generated through airport and non-aeronautical charges. It explains that the advertising carried out by airlines is insufficient and underlines that, in 2006, AMS was the only service-provider offering the combination of a unique and exclusive Ryanair ticket marketing system, with Ryanair being the only airline to undertake to establish an aircraft base at the new Terminal mp2, a large audience of internet users targeted by the promotional policy, and marketing services appropriate to the purchase of flight tickets to Provence as a destination.
- (147) France maintains that the CCIMP acted as a market economy operator by concluding the agreement with AMS, such that this agreement does not contain any form of aid.
- (148) France firstly considers that the agreed price was in line with market practices, particularly given the results of the prior comparative study conducted using the viamichelin.com website. France therefore disputes that the marketing services were provided by AMS under preferential conditions and points out that the European Commission, in its decision on Ostend Airport ⁽²⁸⁾, accepted that the promotional programme involving a tour operator's catalogue did not constitute State aid.
- (149) Moreover, France maintains that the marketing services agreement concluded with AMS represented a profitable investment for Marseille Provence Airport, particularly with regard to the development of Terminal mp2. France explains that the terms of the agreement were determined based on a profitability study of the financial margins generated by a flight operated by Ryanair, which was conducted prior to the agreement being concluded and which has been produced in support of its claims. This study showed that the contractual arrangement would become profitable from the fourth year of operation, with a margin of EUR [...] per flight after advertising. France emphasises that the same study shows that the profitability of all the modulations for the creation of new routes and the AMS agreement, with regard to Ryanair flights alone in the 2007-2021 period, results in an

⁽²⁷⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

⁽²⁸⁾ Commission Decision 98/337/EC of 21 January 1998 concerning aid granted by the Flemish Region to the company Air Belgium and the tour operator Sunair in connection with the use of Ostend Airport (OJ L 148, 19.5.1998, p. 36).

average profit margin ([...]* %) that is in line with the standard profitability in the sector, estimated by the European Commission at 7,31 % in its decision on Bratislava Airport ⁽²⁹⁾.

- (150) The profitability simulation updated using actual traffic figures and costs audited by the Mazars consultancy indicates a profit margin from the third year of EUR [...]* per flight.
- (151) France points out that the costs associated with the AMS agreement were taken into account in the September 2005 business plan, updated in May 2006, which indicated an overall profitability for Terminal mp2 [in excess of 7,5]* % over the 2005-2021 period. Based on the 2006 charges, the average net income/turnover ratio of the AMS agreement in relation to Ryanair traffic was [in excess of 7,5]* % and the NPV was EUR [...]* million.
- (152) France further maintains that, taking into account not only the revenue from airport charges, non-aeronautical charges and airport tax, but also the revenue from other charges, the margin per outbound passenger was calculated, before the agreement was signed ⁽³⁰⁾, at EUR [...]*. With the estimated average amount of the marketing measures (including AMS in particular) being EUR [...]* per outbound passenger, the net margin of the marketing costs was therefore EUR [...]* per passenger. According to France, it should therefore be concluded that each passenger at Terminal mp2 was financially beneficial to the airport.
- (153) As a result, between 2006 and 2012 the airport recorded an average billing rate per passenger between EUR [...]* per passenger and EUR [...]* per passenger, with a seven-year average slightly below expectations, but still sufficient at EUR [...]* per passenger.
- (154) France adds that the agreement concluded with AMS contained various undertakings on the part of Ryanair with regard to the number of aircraft based at Marseille Provence Airport and the number of daily frequencies and passengers per year.
- (155) Accordingly, adding the costs of the AMS agreement per Ryanair passenger to the total incremental cost per Ryanair passenger results in a total cost of EUR [...]* per passenger, with the incremental margin associated with Ryanair's presence, taking into account the costs associated with the AMS agreement, therefore sitting at a satisfactory level of EUR [...]* per passenger.
- (156) Lastly, France maintains that Marseille Administrative Court, in an interim ruling of 20 October 2009, found that the annual amounts stipulated by the agreement concluded with AMS, when compared with the services to be provided by the latter and the size of the audience reached by the promotional arrangement, were not devoid of purpose or an adequate quid pro quo.

3.9. BUSINESS PLAN FOR TERMINAL MP2 AND APPLICATION OF THE MARKET ECONOMY OPERATOR PRINCIPLE

- (157) France maintains that the market economy operator criterion is met where the policy adopted by the airport has positive financial effects on the airport's operation. To this end, the analysis should be based on multiannual business plans in the light of certain criteria such as the net present value (NPV) and internal rate of return (IRR), accompanied by sensitivity tests. In this respect, two principles underlie the analysis of the airport's investments: 'genuine' cash flows must be used, and the effect of time must be taken into account by updating those cash flows.
- (158) France considers that the construction of Terminal mp2 has had the following effects in particular:
- Certain costs have been pooled between the two terminals, thus reducing the costs of the main terminal.
 - Certain investments with a cost affecting the IRR have been postponed, such as the construction of the Europe check-in area and the Europe/International departure hall.

⁽²⁹⁾ Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24).

⁽³⁰⁾ Airport advisory committee meeting of 15 November 2005.

- (159) The pooling of costs and the delay of certain investments as a result of the new Terminal mp2 have had an effect on the charges adopted for the latter and the turnover included in the IRR calculation.
- (160) France therefore takes the view that the approach adopted by the airport corresponds to the choice that would have been made by a private operator. Accordingly, it considers that the analysis conducted by PwC is incorrect in so far as the latter criticises France for not having produced a business plan 'built on assumptions specific to mp2', although this phrase is not explained by PwC. France notes in this respect that the allocation of costs between the various users of the different terminals is covered by the airport's differentiated charges analysis, and not by the profitability study for the new terminal project.

4. COMMENTS BY THIRD PARTIES

4.1. AIR FRANCE

4.1.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (161) Air France maintains that, although the subsidies granted for upgrading the airport's infrastructure have benefited all carriers present at Marseille Provence Airport, the investment subsidies specifically for Terminal mp2 have had the potential to distort competition between the airlines using each of the two terminals.
- (162) Air France disputes the Commission's assessment in the opening decision that access to Terminal mp2 has been equal and non-discriminatory. The CCIMP's decision to reserve Terminal mp2 for 'point-to-point' traffic would have forced Air France, which also operates international flights and in particular carries connecting passengers, to split its operations from Marseille between the two terminals, as a result of which Air France refrained from using Terminal mp2. According to Air France, the launch in October 2006 of international flights operated by Ryanair from Terminal mp2 proves the preferential treatment given to this operator by the CCIMP. Moreover, Air France notes that Terminal mp2 offered services only for aircraft with fewer than 200 seats, which excluded the Airbus A321, and that an application was lodged by Air Méditerranée with Marseille Administrative Court seeking recognition of the arbitrary and discriminatory nature of this clause in the rules governing use of Terminal mp2.
- (163) Air France maintains that the eligibility conditions for Terminal mp2 imposed initially by the CCIMP seem to have been solely intended to prevent it from seeking to use the new terminal, even though the economic equilibrium of the platform would have no doubt been assured if Air France could have transferred all its operations to Terminal mp2, where the level of charges was significantly lower.

4.1.2. OPERATING SUBSIDIES FOR THE CCIMP

- (164) Air France claims that the level of airport tax, collected on behalf of the State but paid back in full to the airport operator, may not have corresponded to the costs actually incurred by the airport in financing measures falling under the responsibility of the public authorities, and may therefore have constituted an operating subsidy for Marseille Provence Airport.

4.1.3. AID GRANTED BY MARSEILLE PROVENCE AIRPORT TO CERTAIN AIRLINES

4.1.3.1. *Reduced passenger charges for national flights*

- (165) Air France does not dispute the Commission's finding in its opening decision that the creation of a low-cost terminal may meet a market demand. However, Air France notes that the airport operator must ensure that this project is profitable.
- (166) Air France disputes the Commission's assertion that it seems normal for a private airport operator to try and demand higher charges for the transport of passengers of those airlines that choose to offer a more comfortable

service, whose customers are characterised as having a greater 'willingness to pay'. Air France maintains that it has played no part in determining the service quality level offered in the 'comfortable' terminal, and wonders whether the criteria applied by the airport operator for access to the new terminal dedicated to the new low-cost operators have been truly non-discriminatory. Air France claims that airlines having historically used certain terminals are often captives of these infrastructures. Air France takes the view that, as airport operators have a monopoly over their airports, they can unfairly increase their charges to such captive customers in order to offer lower charges to customers using the low-cost terminals, with the latter being capable of easily moving their operations from one airport platform to another.

- (167) Air France considers that the charges applied at Marseille Provence Airport stem from accounting treatment choices that have the sole logic of favouring those airlines using Terminal mp2. According to Air France, the method of allocating the overheads allows the passenger charge applicable to Terminal mp2 to be artificially reduced. Air France would like the Commission to include in its reasoning the fact that airports are 'essential infrastructures' as far as airlines are concerned and that, as a result, an airport operator must apply charges reflecting the cost of the service provided (obligation also imposed by Directive 2009/12/EC).
- (168) Air France underlines that, to its knowledge, the CCIMP has never taken any steps to recover the additional charges due as a result of the retroactive reassessment of the passenger charges at Terminal mp2. Air France notes that, although, through its interim ruling of 28 July 2009, the Council of State suspended payment of 20 % of the passenger charge applied to Terminal mp1, the CCIMP did not, however, increase the passenger charge applicable to Terminal mp2. Air France points out that, as the Council of State did not annul the charges applicable to Terminal mp1 (decision of 27 June 2011), the entire 20 % suspended under the interim ruling was eventually paid to the CCIMP.
- (169) Air France notes that, in an earlier decision ⁽³¹⁾, the Commission concluded that an aid scheme involving a system for differentiating between airport charges according to the flight destination (national/international) was incompatible with the internal market. Air France points out that, as France took steps to abolish this system, the Commission did not want to adopt any further appropriate measures. Air France therefore concludes that the Commission's earlier decision means that any new investigation into this aid scheme is pointless.

4.1.3.2. *Charges in relation to new routes*

- (170) Although Air France accepts that every airport has to adopt this type of approach, the airline points out, however, that the airport must prove that it has acted as a market economy operator. In this respect, it must prove that the measure aims to achieve an eventual return on investment. The objective must therefore be to improve its own revenues and not to increase the region's tourist numbers.
- (171) Air France adds that, in order to be acceptable, this type of measure must be transparent, non-discriminatory, degressive and time-limited so that it does not constitute public financing of the operating costs of the carrier benefiting from the measure.

4.2. RYANAIR

4.2.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (172) Ryanair maintains that the investment subsidies granted for the construction of Terminal mp2 reflect the conduct of a market economy operator.
- (173) According to Ryanair, the Commission's analysis should take into account the non-aeronautical revenue generated by Terminal mp2 through vehicle rentals, car park charges and additional commercial revenue generated by sales to Terminal mp2 passengers, who are likely to go to the shops in the main terminal, which is situated less than one minute's walk from Terminal mp2. Ryanair concludes that the non-aeronautical revenue generated by Terminal mp2 passengers makes a significant contribution to the profitability of the main terminal.

⁽³¹⁾ Commission Decision of 28 January 2009 on State aid E4/2007, C(2009) 184 final.

- (174) The airport's closure, which would have resulted in additional costs (redundancy and decontamination costs, opportunity costs of investments already made) when the airport's sale price was likely to be low if not negative, was not an economically appropriate alternative in 2006.
- (175) The strategy pursued by the airport, which has increased traffic and revenues and reduced the airport's unused capacity, has helped to improve its market value. Ryanair maintains that the assets of Terminal mp2 and the investments made could increase the value in the event of a sale, contrary to PwC's argument.

4.2.2. SETTING OF THE PASSENGER CHARGES FOR TERMINAL MP2

- (176) Ryanair maintains that the decision setting the passenger charge applicable to Terminal mp2 is not imputable to the State, in accordance with the criteria explained by the *Stardust Marine* judgment ⁽³²⁾. Ryanair underlines that the CCIs are regarded by French law as belonging to a specific category of public entities, characterised by a lack of subordination to the State ⁽³³⁾. Ryanair therefore challenges the Commission's view, which simply presumes that the measures in question are imputable to the State due to the fact that the CCIMP is under state control, and points out that the Commission should examine, in each case, the specific circumstances determining whether or not the measure is imputable to the State.
- (177) Ryanair adds that, in the case of the CCIMP, France could not have initiated, or acted in such a way as to encourage, the adoption by the airport of the measures in question. Ryanair maintains that, on the contrary, the DGAC repeatedly rejected the charges adopted by the CCIMP ⁽³⁴⁾.
- (178) In the alternative, Ryanair maintains that the passenger charges for Terminal mp2 were set in accordance with the market economy operator test. Ryanair claims that, in its analysis, the Commission did not correctly apply the prudent operator test, as required by the Court of Justice ⁽³⁵⁾, for a number of reasons.
- (179) Firstly, the Commission omitted to make a primary comparison between the charges applicable at Marseille Provence Airport and the market price. Ryanair has submitted a study that maintains that the market price for airport services can be established on the basis of a comparison with the prices paid at comparable private airports throughout Europe. The airline uses a comparison with Luton, East Midlands, Prestwick and Liverpool airports. It alleges that those airports are operated without State aid or public intervention and that the prices that it pays at those airports are, on average, three times lower than those at Marseille Provence Airport. Ryanair therefore concludes that the price that it pays at Marseille Provence Airport for the airport services is not below the market price for those services and that the price paid does not therefore include elements of State aid.
- (180) Secondly, the Commission included sunk costs in its calculations, instead of basing its assessment on incremental costs alone. Ryanair notes in this respect that Marseille Provence Airport was constructed in 1922 and was used in particular, before the liberalisation of air transport, for regional traffic funded by the State in the form of a public service and as a base for forest firefighting aircraft. Ryanair adds that, in order to address the drop in traffic recorded between 2001 and 2003, the airport implemented a strategy to open up to low-cost airlines by creating a terminal specifically designed for their use. Ryanair points out that, for a number of years, it has accounted for over 40 % of the traffic at Terminal mp2. Ryanair maintains that regional airports are less attractive to airlines, which can legitimately expect to negotiate lower charges with the airport given the high volume of passengers that they bring. Ryanair notes that, when deciding on the existence of aid, the Commission is required to take into account the situation that prevailed at the time when the measure was granted to the beneficiary. Ryanair maintains in this case that, on the date when it started to operate from Marseille Provence Airport, given the contractual undertakings that it had made regarding the volume of passengers carried, the airport operator could legitimately have expected a significant increase in traffic due to Ryanair's presence at the airport. Ryanair asserts that, as the economic situation at small regional airports with overcapacity is different

⁽³²⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294.

⁽³³⁾ In support of this argument, Ryanair cites the Council of State's opinion of 16 June 1992, No 351 654.

⁽³⁴⁾ Ryanair refers in this respect to paragraphs of the opening decision on the non-recovery by the CCIMP of reimbursements resulting from the application of the retroactive charges, France's repeated requests for the reduced charges for national flights to be ended, and the introduction by the CCIMP of marketing aid without France's prior authorisation.

⁽³⁵⁾ Ryanair refers to the judgment in *Ryanair v Commission*, T-196/04, EU:T:2008:585.

from that analysed by the Court of Justice in the Charleroi judgment, the cost analysis, if applicable to them, must be adapted. Taking into account only the incremental costs and revenues associated with the agreements concluded with Ryanair would reflect the conduct of a prudent market economy operator. Ryanair adds that the costs associated with investments made before its arrival and fixed operating costs must not be taken into account. Ryanair further states that whether the airport in general is profitable or loss making is irrelevant in terms of the existence of aid for the benefit of the airline.

- (181) Ryanair maintains that the cost analysis conducted by the Commission for the prudent operator test is incorrect as it fails to take account of the service level offered at Terminal mp2, which is below the level of the services offered to traditional airlines and is therefore in line with the applicable level of charges. Ryanair asserts that Terminal mp2 offers only basic infrastructures ⁽³⁶⁾ and has a considerably smaller area per passenger compared with the main terminal (1,66 m² as opposed to 6,06 m²). Ryanair argues that low-cost airlines should not pay charges for services that they do not use, or that they use to a lesser extent than traditional airlines ⁽³⁷⁾. Ryanair points out that it applies baggage fees to encourage its passengers not to check luggage, which has had the result that only one-third of Ryanair passengers check baggage. Moreover, Ryanair passengers take their baggage themselves from the check-in desks to security, which eliminates the need for any infrastructure at the terminal. By comparison, Ryanair notes that Air France makes extensive use of the ground handling services associated with baggage at the airport.
- (182) Ryanair maintains that its aircraft are the largest operating at Marseille Provence Airport, which means that the airport does not have to incur the opportunity costs associated with the operation of small aircraft in relation to the number of passengers carried. Ryanair stresses that it operates on the basis of 25-minute rotations, whereas the traditional airlines, such as Air France, have rotation times between 45 and 60 minutes. A reduced rotation time limits the amount of time that ground areas are used by aircraft and passengers. Ryanair also notes that the criteria for using Terminal mp2 include the requirement to use C-type aircraft that can accommodate up to 200 seats and operate with reduced rotation times.
- (183) Lastly, Ryanair criticises the fact that the Commission has not taken into account in its decision the positive externalities associated with Ryanair's presence at the airport, namely the fact that the infrastructure's value has increased due to its presence, bearing in mind the risks inherent in operating the initial routes from the airport. Moreover, Ryanair claims that the presence of an airline at an airport creates a ripple effect leading to an increase in passenger numbers at that airport, and therefore an improvement in its commercial and transport infrastructures, which makes the airport more attractive. Ryanair underlines that it contractually undertook to carry a certain number of passengers to and from Marseille Provence Airport, which has therefore helped to generate these externalities, as apparently proven, firstly, by the increase in traffic at the airport, and particularly at Terminal mp2, and secondly by the increase in the number of airlines operating from the airport. Ryanair also highlights that this type of undertaking means that it is the airline that bears all the risk associated with operating the route, which proves that the airport is in a position to accept a lower rate of return than it would have required in the absence of such undertakings.
- (184) Ryanair encourages the Commission to adopt the 'single till' approach in its analysis, which involves taking joint account of both the aeronautical revenue and the commercial revenue generated by the presence of an airline at an airport. Ryanair notes in this respect that it carries more passengers per flight than Air France and that it operates 'point-to-point' flights where the passengers, in its opinion, are more likely to generate commercial revenue than transit passengers. Ryanair underlines that, since it started operating at Marseille Provence Airport, numerous businesses and several vehicle rental companies have set up in Terminal mp2 and that the non-aeronautical revenue generated by these activities contributes to the terminal's profitability.
- (185) Ryanair argues further that the fact that the charges set for Terminal mp2 meet the market economy operator test proves that there has been no redistribution to Ryanair of the public resources allocated to the airport operator. Even if it is proven that the airport has benefited from aid, Ryanair claims that it cannot be concluded that it has been the final beneficiary of that aid.

⁽³⁶⁾ Ryanair points out that Terminal mp2 does not have the following: expensive marble flooring, suspended ceilings, monitors above departure gates, system for transporting baggage to the main hall, luggage trolleys, waiting rooms, information desk, escalators and travellers, telescopic bridge.

⁽³⁷⁾ In support of this statement, Ryanair cites the UK CAA decision of 27 May 2011 on the complaint made by Ryanair about a charge applied in a discriminatory manner at Gatwick Airport.

- (186) Next, Ryanair maintains that the charges applied at Terminal mp2 are not in any way selective, as the Commission has not proven that Ryanair has benefited from more favourable conditions than other airlines at Marseille Provence Airport. Ryanair underlines that it is not enough to find that different levels of charges are applied to different airlines in order to reach this conclusion, but that the Commission should take account of the cost of the services offered to each airline by the airport as well as the positive externalities and non-aeronautical revenue generated by each airline. Ryanair notes that its business model means that it carries, on each flight, a higher number of passengers than other airlines and that this saving made by the airport in the opportunity costs thus avoided must be reflected in the level of charges applied to Ryanair.
- (187) Lastly, Ryanair claims that the differentiation of charges between national flights and international flights constitutes abusive discrimination pursuant to Article 102 TFEU as it results from a decision made by the airport, given its dominant position in terms of the infrastructure's availability. Ryanair maintains that the services provided to passengers do not fundamentally differ according to their destination (domestic, national or international flight) and that the checking of international passengers' travel documents is a state responsibility and should not therefore be funded through the airport charges. Ryanair regrets that France has not extended the finding made on the differentiation between national flights and Schengen flights to non-Schengen flights, which has resulted in the application of a charge that is 56 % higher than at the main terminal. Ryanair also maintains that this differentiation mechanism constitutes State aid. Ryanair points out that Air France and its affiliated companies operate most of the domestic flights and therefore benefit from the system of differentiated charges. Consequently, Ryanair asks the Commission to include, in the measures covered by this investigation, the advantage granted to Air France resulting from the differentiation of charges between Schengen flights and non-Schengen flights so that it can seek damages before the French courts.
- (188) Ryanair has submitted additional information on the subject of AMS and the analysis to be conducted by the Commission. Ryanair maintains that the existence of aid in the AMS agreement should be assessed separately from the other measures. However, if the Commission decides to assess this together with the conditions from which Ryanair has benefited at the airport, Ryanair has submitted an economic analysis and concludes on this basis that the AMS agreement would have been profitable for the airport in the short term.

4.3. CCIMP

4.3.1. INVESTMENT SUBSIDIES FOR THE CCIMP

- (189) The CCIMP agrees with France's arguments that the subsidies subject to limitation and the subsidies allocated to finance non-economic activities cannot be classed as State aid. In any event, the public financing granted before the 2005 Guidelines entered into force does not constitute State aid on the basis of the 1994 Communication. In the alternative, the subsidies constituting State aid are compatible with the TFEU rules, in particular on the basis of Article 107(3)(c) TFEU. The CCIMP agrees with France's view on the compatibility of the aid under investigation with the conditions laid down by the guidelines, in particular the conditions of proportionality and necessity.
- (190) The CCIMP underlines the direct and indirect economic impact of the new terminal in the Marseille region and its role in reducing congestion at the central airports, ensuring European territorial cohesion and airport capacity-building given the risks of saturation ⁽³⁸⁾.
- (191) The CCIMP considers that the development of a new terminal was essential to attract low-cost airlines that rarely operate from traditional infrastructures, which have characteristics that do not fit with their business model. The CCIMP states that only the creation of a low-cost terminal could meet the requirements of the low-cost airlines in terms of airport charges, under conditions of transparency and non-discrimination.

4.3.2. OPERATING SUBSIDIES GRANTED TO THE CCIMP

- (192) The CCIMP explains, in line with the comments made by France, that the financial flows totalling EUR [...] million involved contributions paid to the CCI's general arm for services rendered. It stresses that there was no financial transfer of resources from the CCI to Marseille Provence Airport. It notes that, like any other business in the region, Marseille Provence Airport must pay the tax to cover the costs of chambers of commerce and industry, which totalled EUR 213 553 in 2010.

⁽³⁸⁾ See footnote 18.

4.3.3. SETTING OF THE PASSENGER CHARGES FOR TERMINAL MP2

- (193) The CCIMP points out that the low-cost Terminal mp2 offers simplified services, which allows differentiated charges to be applied, and confirms that all costs were taken into account when setting those charges. The CCIMP therefore concludes that Marseille Provence Airport is able to invoke the prudent operator principle to justify the existence of differentiated charges at each of the terminals.
- (194) The CCIMP takes the view that the 'contributory' method used to calculate the rate of return of Terminal mp2 is the only one that can take into account the transfer of an airline from one terminal to the other, with economies of scale resulting in stability of the costs concerned, whereas their distribution by terminal would have led to a reduction at the main terminal. It notes that the construction of Terminal mp2 resulted in certain costs being pooled between the two terminals, which had the effect of reducing costs at the main terminal, and certain investments being postponed (delay of the construction of the Europe check-in area and the Europe/International departure hall).

4.3.4. INCENTIVE MEASURES FOR THE LAUNCH OF NEW ROUTES

- (195) The CCIMP states that it adopted a development plan intended to increase the number of passengers at the airport, particularly through the launch of new routes. According to the CCIMP, the incentive measures were designed to achieve that objective, in line with the normal practice of airport operators, as apparently accepted by the Commission in its decision on Manchester Airport ⁽³⁹⁾. The CCIMP believes that the arrangement introduced must be regarded as a commercial practice excluding any aid pursuant to Article 107 TFEU, given that the arrangement was open, non-discriminatory and applied for a limited time based on objective criteria.
- (196) The CCIMP further maintains that this arrangement cannot be classed as aid because a prudent operator acting under normal market economy conditions could have taken the same approach. The CCIMP states that the modulations adopted were intended to maximise the airport's profitability and were based on a business plan contained in the preparatory dossier submitted to the Cocoéco meeting of 14 September 2009. The update of this study, as explained in France's response, confirms the profitability of the measures.
- (197) The CCIMP adds that, when its conduct is assessed in the light of normal market practices, the arrangement introduced remains reasonable.

4.3.5. MARKETING AID — AGREEMENT CONCLUDED WITH AMS

- (198) The CCIMP maintains that it acted as a market economy operator by concluding the agreement with AMS. It states that it paid a price that was clearly proportionate and reasonable given the services provided and practices in the sector, and disputes the relevance of the study submitted by Air France, which covers only general websites. The CCIMP notes that, conversely, products advertised on the Ryanair website reach a large audience of internet users looking for flight tickets.
- (199) The CCIMP explains that, as the objective was to increase traffic at Terminal mp2, and more specifically international passenger traffic with high purchasing power, only a targeted advertising action was appropriate. According to the CCIMP, only the Ryanair website offered maximum visibility and efficiency of the advertising.
- (200) The CCIMP notes that the annual cost of the AMS agreement according to the number of passengers carried was in the order of EUR [...] in 2010.

⁽³⁹⁾ Decision of 14 June 1999 on State aid NN 109/98 — *United Kingdom (Manchester Airport)*.

4.4. ASSOCIATION OF EUROPEAN AIRLINES

4.4.1. SUBSIDIES GRANTED TO THE CCIMP

- (201) The Association of European Airlines (AEA) states that it supports all measures likely to contribute to regional development, but that subsidies granted to small regional airports must not have the effect of distorting competition. According to the AEA, the aviation sector should be regarded as a business sector in which any intervention, whether regulatory or financial, may cause distortions of competition. Subsidies granted to small regional airports are therefore acceptable only in so far as they benefit all users without discrimination and do not create distortions between airports situated within the same catchment area.
- (202) The AEA maintains that a binding framework should be adopted at European level for the aviation sector as a whole in order to prevent uncontrolled subsidies and guarantee a competitive environment between economic operators. This should be based on the principle of infrastructure aid being assessed according to demand, and should not encourage the shift of traffic to regions where demand is less dynamic.

4.4.2. DIFFERENTIATION OF CHARGES AT TERMINAL MP2

- (203) The AEA supports the idea that an airport can differentiate between its infrastructures according to the services offered to users. However, the AEA maintains that, in this scenario, the airport must observe the principles of transparency and cost-relatedness when calculating charges. In practice, the AEA suggests that a distinction should be made between, on the one hand, costs associated with using common infrastructures and, on the other hand, costs associated with using specific infrastructures. According to the AEA, all airlines should pay the same charges for using the central infrastructures (runways, parking, aviation safety equipment, security checks, baggage handling, and environmental and noise pollution taxes, where applicable). The terminal and handling charges may vary from one terminal to another, depending on the quality of the services offered to airlines, and must be determined based on the costs incurred.
- (204) The AEA also maintains that access to terminals with reduced services should not be limited to low-cost airlines, but should be open to all airlines in accordance with the principle of non-discrimination.
- (205) To ensure that there is no distortion of competition between airlines at the same airport, the AEA underlines that airport operators must not increase charges at the main terminal to offset the costs associated with the reduced-services terminal.

4.4.3. START-UP AID

- (206) The AEA maintains that the airlines are the real beneficiaries of these arrangements, with the regional airports benefiting only indirectly. The AEA considers that such aid should not be granted for routes that are already operated by another airline. According to the AEA, a route should not be regarded as 'new' where an identical route is already being operated from an airport situated within the same catchment area. The AEA states that, ideally, airports less than 100 km away or 120 minutes by TGV should be regarded as located within the same catchment area.
- (207) The AEA takes the view that three years is an extraordinarily long time for start-up aid. The AEA maintains that the viability of a route becomes clear after just a few months, and at most after a year. The AEA stresses that the aid should not cover recurrent operating costs, such as aircraft depreciation, aircraft leasing costs or use of airport infrastructures.
- (208) According to the AEA, it should not be possible for start-up aid to be combined with other aid granted to operate the same route. The AEA maintains that penalties should be imposed on carriers failing to comply with contractual undertakings. The AEA stresses that aid granted in the aviation sector must always be restrictive and can be authorised only on the basis of a case-by-case examination.

- (209) The AEA maintains that aid must be granted only on the basis of a transparent and non-discriminatory procedure. The conditions under which start-up aid is granted should be published in the *Official Journal of the European Union*. In addition, the AEA states that each financial contribution granted by a local authority to a regional airport should be notified to the Member State concerned, at least three months before it enters into force, so that the latter can decide whether this should be notified to the European Commission. In the event of notified aid, the AEA underlines that local authorities should be reminded that any payment of aid before approval by the European Commission may be regarded as unlawful aid.

4.5. AIRPORT MARKETING SERVICES

- (210) Firstly, AMS maintains that the decision to conclude the agreement of 19 May 2006 was not imputable to the French State. AMS highlights that, although consultation of the State through Cocoéco before any decision is taken on airport charges is a relevant indicator of the imputability of these decisions, the same cannot be said for the decision on the purchase of marketing services. AMS claims that the purchase of marketing services was not in any way linked with the decisions on the applicable airport charges, and did not differ from any other purchase of advertising space. AMS also notes that the organic criterion used in the Commission's analysis to establish the imputability to the State of the decisions of the Chamber of Commerce and Industry is insufficient with regard to the requirements set out by the *Stardust Marine* judgment ⁽⁴⁰⁾.
- (211) Secondly, AMS maintains that the conclusion of the agreement to purchase marketing services reflected the conduct of a market economy operator. AMS stresses that this agreement is similar to those concluded with private airports such as Liverpool or Oslo Rygge, which undoubtedly acted as market economy operators. AMS explains that it does not discriminate between public and private airports and that the rates applied are public and easily accessible on its website.
- (212) In the alternative, AMS maintains that the rates applied were in line with market prices. AMS explains that the rates were set based on a study conducted in 2004 by Mindshare, a subsidiary of WPP and a marketing services company, at Ryanair's request. AMS adds that partners such as Hertz and NeedaHotel purchase available space on the website to promote their own services, and that the agreements concluded with those operators allow a better assessment to be made of the market price. Lastly, AMS states that it has developed a rate offer based on a standard method of calculating online advertising exposure in order to value the exposure offered on the Ryanair website. Rates are set based on the costs per thousand page views, and the volume of hits determines a price range for most of the advertising services offered.
- (213) AMS maintains that Air France has submitted a comparison between the AMS price offer when the agreement was signed, i.e. in 2006, and the Viamichelin price offer for 2011, whereas Marseille Provence Airport duly based its comparison on the Viamichelin price offer for 2006. Given that price offers for marketing services generally increased over this six-year period, AMS considers that the comparisons made by Air France are not relevant.
- (214) AMS maintains that particularly advantageous commercial conditions were offered to Marseille Provence Airport. In this respect, AMS points out that the rates were frozen between 2006 and 2011 based on the number of visitors to the Ryanair website in April 2005, whereas in reality this number increased from 0,65 million per day in 2005 to 1,2 million per day in 2011. In addition, the number of recipients on the mailing list was frozen at the number recorded in April 2005, whereas it actually increased from 1,2 million to 2,6 million. AMS stresses that Air France's comparison does not take account of these factors in relation to the volume of hits, which means that its comparison is incorrect.
- (215) AMS notes that the number of visitors to the Viamichelin website is less than the number visiting the Ryanair website, and that the Viamichelin website is not well known outside France. AMS considers that this website is not therefore suited to promoting an airport at European level, which is supported by the fact that no airport has used its services to date. AMS emphasises that the Lonely Planet website is an Australian site that is not well known in Europe and that generates a volume of hits well below that of the Ryanair website. Lastly, AMS stresses that websites that are not linked to airlines are unsuitable as they do not allow the visitor to reserve a flight ticket

⁽⁴⁰⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294, paragraphs 52 and 58.

at the same time. AMS considers that the rates for marketing services on the Air France, British Airways and Expedia websites are higher than those applied on the Ryanair website, despite a lower volume of hits.

- (216) AMS also disputes the suggestion that Ryanair forced Marseille Provence Airport to conclude the marketing services agreement. AMS maintains that it is not in its interest to force the sale of space on the Ryanair website, which constitutes a limited resource for which there is significant demand.
- (217) AMS claims that the presence of advertising links on the Ryanair website attracts the attention of airport operators or owners and, by indicating the presence of a regular airline and the associated non-aeronautical revenue, increases the intrinsic value of airports in the eyes of potential buyers.
- (218) AMS maintains that the Commission recognised, in its Bratislava decision, the value of marketing services ⁽⁴¹⁾.
- (219) Lastly, AMS claims that the 2005 Guidelines do not apply to relations between an airport and a marketing services provider.

5. COMMENTS BY FRANCE ON THE COMMENTS BY THIRD PARTIES

- (220) In its comments on the third-party comments, France maintains that Air France's contribution contains several false allegations.
- (221) France notes that, contrary to what Air France says, access to Terminal mp2 is equal and non-discriminatory.
- (222) France makes clear that Marseille Provence Airport cannot be criticised for not having anticipated the opening up of Terminal mp2 to non-Schengen international flights, as this was envisaged only after the Open Skies Agreement was signed between Morocco and the European Union on 29 December 2006. France notes that, until that point, the studies on traffic development prospects were limited to essentially intra-Schengen development prospects and that the initial set-up of Terminal mp2 therefore did not provide for infrastructure for border control systems, which would have represented an unnecessary additional cost. France further stresses that Air France, which maintains that this inability to operate international flights from Terminal mp2 was specifically designed to prevent it from accessing this terminal, still does not operate flights from Terminal mp2, despite this having been opened up to international traffic.
- (223) France notes that the rules for accessing Terminal mp2 are governed by comfort and safety considerations established by the airport, such as the limited size of the departure gates. France points out that the application lodged by Air Méditerranée before Marseille Administrative Court on the subject of access to Terminal mp2 was dismissed by that court ⁽⁴²⁾.
- (224) France disputes Air France's assertion that Terminal mp2 would not have achieved economic equilibrium if Air France had been able to transfer all its operations to a terminal where the charges were significantly lower than those applied at the main terminal. According to France, this assertion is contradicted by the fact that the airport included, in its initial business plan, the assumption that the Air France shuttle would be transferred to Terminal mp2. France considers that Air France is actually criticising Terminal mp2 for its level of service, which does not meet its customers' expectations. France notes in this respect that the differentiation of airport services, and of the charges associated with each of those services, is permitted by European and national law.
- (225) Lastly, France repeats its view that the Council of State, in its decision of 26 July 2011, did not condemn the method of allocating costs between Terminals mp1 and mp2, but confirmed, with regard to the charges at

⁽⁴¹⁾ Decision 2011/60/EU, recital 114.

⁽⁴²⁾ Marseille Administrative Court, interim ruling No 1101332 of 17 March 2011, in which the Court ruled that the situation did not pose a sufficiently serious and immediate threat to a public interest to warrant the urgency. It therefore dismissed the suspension request and the main action continued.

Terminal mp1, that these had been established according to 'a calculation method justified by precise accounting studies'. France disputes Air France's comment that the CCIMP should have increased the passenger charge at Terminal mp2 following the interim ruling of 28 July 2009, given the absence of a judgment on the main action, and notes that the airport substantially reviewed its charging structure following the decision of 26 July 2011.

6. ASSESSMENT OF THE MEASURES IN FAVOUR OF THE CCIMP — EXISTENCE OF AID

6.1. EXISTENCE OF POTENTIAL INVESTMENT AID GRANTED TO THE CCIMP

- (226) In accordance with Article 107(1) of the Treaty, State aid rules apply only where the beneficiary is an 'undertaking'. The Court of Justice of the European Union has consistently defined undertakings as any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed ⁽⁴³⁾. Any activity consisting in offering goods and services on a given market is an economic activity ⁽⁴⁴⁾. The economic nature of an activity as such does not depend on whether the activity generates profits ⁽⁴⁵⁾.
- (227) The activity of airlines consisting in the provision of transport services to passengers and/or businesses constitutes an economic activity. In its *Aéroports de Paris* judgment, the Court of Justice ruled that the operation of an airport consisting in the provision of airport services to airlines and the various service providers was also an economic activity. In its *Leipzig/Halle Airport* judgment, the General Court confirmed that the operation of an airport is an economic activity, from which the construction of airport infrastructure is indissociable.
- (228) As far as past financing measures are concerned, the gradual development of market forces in the airport sector does not allow for a precise date to be determined, from which the operation of an airport should without doubt be considered an economic activity. However, the General Court has recognised the changing nature of airport activities. In its *Leipzig/Halle Airport* judgment, the General Court held that it was no longer possible to exclude the application of State aid rules to airport infrastructure as of 2000. Consequently, from the date of the *Aéroports de Paris* judgment (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control.
- (229) Conversely, before the *Aéroports de Paris* judgment, public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted before the *Aéroports de Paris* judgment.
- (230) Nevertheless, although measures that were granted before any competition developed in the airport sector did not constitute State aid when adopted, they may be considered such pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999 if the conditions of Article 107(1) TFEU are met.
- (231) The Commission points out that the following subsidies were granted before the *Aéroports de Paris* judgment (i.e. before 12 December 2000). It therefore concludes that it does not have the power to examine them under the State aid rules.

— Departmental Council subsidy of 14 December 1999 for EUR 3 064 000,

— Regional Council subsidy of 24 October 1997 for EUR 8 032 000,

— Regional Council subsidy of 8 July 1994 for EUR 1 372 000,

⁽⁴³⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4, part 2.1) and associated case-law, in particular judgment in *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, EU:C:2000:428.

⁽⁴⁴⁾ Judgments in *Commission v Italy*, C-118/85, EU:C:1987:283, paragraph 7; *Commission v Italy*, C-35/96, EU:C:1998:303, paragraph 36); and *Pavlov and Others*, paragraph 75.

⁽⁴⁵⁾ Judgments in *Van Landewyck*, 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 88; *FFSA and Others v Commission*, C-244/94, EU:C:1995:392, paragraph 21; and *MOTOE v Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.

- State subsidy of 26 April 2000 for EUR 290 000,
- State subsidy of 23 June 1999 for EUR 579 000.

(232) The Commission will therefore limit its examination to the following subsidies:

Table 5

Subsidy	Total amount of investment (EUR '000)	Total amount paid (EUR '000)
Departmental Council 27.9.02	2 098	209
Departmental Council 26.6.03	8 920	3 000
Departmental Council 19.5.05	15 580	7 600
Marseille Provence Métropole 26.7.04	16 124	889
French State 19.12.01	NK	5 032
ERDF 22.8.02	5 280	1 520
Total	48 002	18 250

(233) Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

6.1.1. ECONOMIC ACTIVITY AND CONCEPT OF UNDERTAKING

(234) In this respect, the Commission points out that the infrastructure concerned by this Decision is commercially operated by the CCIMP, which is the airport operator and which invoices the costs to users of that infrastructure. Consequently, at least as far as the airport's operation is concerned, the CCIMP is an undertaking within the meaning of EU competition law.

(235) However, irrespective of the legal status of an airport operator, its activities are not necessarily all of an economic nature. It is therefore necessary to distinguish between its activities and to establish to what extent its activities are of an economic nature ⁽⁴⁶⁾.

(236) The Court of Justice has held that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities normally include safety, air traffic control, police and customs ⁽⁴⁷⁾.

⁽⁴⁶⁾ Judgment in *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, EU:C:1994:7.

⁽⁴⁷⁾ Judgment in *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, EU:C:1997:160. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian port sector.

- (237) The Commission therefore considers that, in the absence of a legal obligation for airports to bear the cost of financing these activities and the associated infrastructure, the assumption of this cost by the State does not normally constitute State aid ⁽⁴⁸⁾.
- (238) In the present case, it seems that a distinction needs to be made between the activities concerned as follows.
- (239) With regard to the costs of carrying out sovereign tasks, the costs of public safety and security tasks should be recognised as stemming from non-economic activities.
- (240) First and foremost, those activities intended to ensure public safety within the airport, in so far as they aim to prevent the perpetration of unlawful acts and in particular to combat terrorism, should be recognised as such. In this respect, the costs of policing tasks and ensuring the presence of the marine fire service (*Marins-Pompiers*) from the city of Marseille stem from such activities. The same is true for the customs tasks.
- (241) With regard to activities connected with public safety within the airport, these are intended to ensure the protection of people and property. The same is true where the property in question is public property, as in this case. It should in particular be noted that the following activities fall within this task in this case:
- screening of hold baggage;
 - access control to the restricted area;
 - screening of passengers and cabin baggage;
 - automated border controls through biometric identification;
 - video surveillance.
- (242) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport operators. In fact, although it is normal in a given legal system for some airlines or airport operators to assume certain costs, while others do not, the latter benefit from an advantage even if those costs are linked to activities that, as such, are regarded as non-economic. The legal framework applicable to the airport operator therefore needs to be analysed in order to determine whether, under that legal framework, airport operators or airlines should bear the costs resulting from carrying out certain activities that may not be profitable in themselves, but that are inherent in the pursuit of other economic activities.
- (243) In this regard, the Commission points out that, under French law ⁽⁴⁹⁾, airport operators do not in principle have to finance, from their own funds, the infrastructure and equipment needed for those activities.
- (244) Conversely, the mandatory nature of an activity due to existing legislation is not enough by itself to class a task as a non-economic activity. In this respect, the costs of bringing infrastructure into compliance with laws and standards on fire prevention, in particular the costs of fire detection systems and devices in premises, cannot be regarded as falling within a sovereign task as they are common to all undertakings. Every undertaking must ensure compliance with fire safety standards and bear the associated costs. The same is true with regard to operating safety, even though this may be imposed by the schedule of conditions for the concession. These are costs that every undertaking must normally bear in carrying out its activity.
- (245) It therefore follows from the above that only the activities described in Table 6 as non-economic can benefit from public financing escaping the application of the State aid rules.

⁽⁴⁸⁾ Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. See Commission Decision N 620/2006 of 7 March 2007, Development of Memmingen/Allgäu Regional airport — Germany (OJ C 133, 15.6.2007, p. 8).

⁽⁴⁹⁾ Article L.6332-2 of the Transport Code stipulates that 'The policing of aerodromes ... shall be ensured ... by the state representative in the department'. According to Council of State opinion No 381.644 of 2 September 2008, general interest tasks or sovereign tasks are 'the exclusive responsibility of the State, which, in order to ensure that it has part of the resources necessary, may establish taxes, such as the "airport tax"'. Double financing by investment aid and the 'airport tax' is excluded.

Table 6

Subsidy	Date	Cost of non-economic activities (EUR)				Cost of economic activities (EUR)
		Public safety		Public security		Compliance with legislation and/or operating safety
		Police and customs	Fire service	Video surveillance, screening and control	Access to public property	
Departmental Council	27 September 2002	0	0	0	0	1 118 537,45
Departmental Council	26 June 2003	259 786,3	0	89 883,11	129 022,39	1 632 851,02
Departmental Council	19 May 2005	94 192,24	0	105 228,51	203 702,13	1 870 135,77
Marseille Provence Métropole	26 July 2004	0	0	0	0	72 095,00
ERDF	22 August 2002	0	0	0	0	0
French State	19 December 2001	5 032 000	0	0	0	0

- (246) The above comments together with Table 6 therefore allow a table (Table 7) to be produced that summarises the investment aid received by Marseille Provence Airport and covered by this procedure:

Table 7

Subsidy	Total amount of investment (EUR '000)	Total amount paid (EUR '000)	Amount for non-economic activities (EUR '000)	Remainder after deducting non-economic activities (EUR '000)	Subsidy rate less non-economic activities (%)
Departmental Council 27.9.02	2 098	209	0	209	10
Departmental Council 26.6.03	8 920	3 000	478	2 522	28
Departmental Council 19.5.05	15 580	7 600	403	7 197	46
Marseille Provence Métropole 26.7.04	16 124	889	0	889	6
French State 19.12.01	NK	5 032	NK	0	NK
ERDF 22.8.02	5 280	1 520	0	1 520	29
Total	48 002	18 250	5 913	12 337	26

6.1.2. STATE RESOURCES AND IMPUTABILITY

- (247) The Departmental Council granted the CCIMP subsidies financed through resources of the department of Bouches-du-Rhône, which is a decentralised local authority. The resources of local authorities are State resources under Article 107 TFEU ⁽⁵⁰⁾.
- (248) The same is true for the subsidies received from the Marseille Provence Métropole Urban Community.
- (249) The DGAC subsidies came directly from central government.
- (250) The development of air cargo was partly financed by ERDF resources, which constitute State resources as they are granted under the control of the Member State concerned ⁽⁵¹⁾.
- (251) Given that the authorities that granted the subsidies form part of the public administration and that the final decisions on the use of ERDF funds are made by France, these subsidies are imputable to the French State.
- (252) In conclusion, the subsidies covered by this Decision were granted using State resources and are imputable to the State.

6.1.3. SELECTIVE ADVANTAGE FOR THE CCIMP

- (253) To determine whether a state measure constitutes aid to an undertaking, it must be determined whether the company in question enjoys an economic advantage enabling it to avoid costs that would otherwise have been borne by its own financial resources or whether it enjoys an advantage which it would not have received under normal market conditions ⁽⁵²⁾.
- (254) According to Court of Justice case-law, an airport operator should bear the costs of operating the airport, including the infrastructure costs ⁽⁵³⁾.
- (255) In this respect, it should be noted, however, that capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid ⁽⁵⁴⁾.
- (256) It should therefore be examined whether the Departmental Council acted as a market economy operator in its decision to participate in financing the construction of Terminal mp2.
- (257) France maintains that the CCIMP acted as a market economy operator by including, in the business plan for the construction of Terminal mp2, the net investment flows of the subsidy received from the Departmental Council. As a result, France assesses that Terminal mp2 was profitable for the airport operator, which did not bear all the construction costs. However, it does not prove that the investment was profitable for the grantor of the aid, namely the Departmental Council.
- (258) Consequently, according to France, there is nothing to prove that the Departmental Council, as grantor of the subsidy, expected the investments made in Marseille Provence Airport to be profitable.

⁽⁵⁰⁾ Judgment in *Région Nord-Pas-de-Calais*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 108.

⁽⁵¹⁾ With regard to the qualification of ERDF resources as State aid, see the Commission Decision in Case N 514/2006 *South Yorkshire digital region broadband project*, recital 29, and the Commission Decision in Case N 44/2010, *Development of infrastructure on Krievu Sala for relocation of port activities out of the city center*, recitals 69 to 70.

⁽⁵²⁾ Judgment in *France v Commission*, C-301/87, EU:C:1990:67, paragraph 41.

⁽⁵³⁾ Judgment in *Freistaat Sachsen and Others v Commission*, T-443/08 and T-445/08, EU:T:2011:117, paragraph 107.

⁽⁵⁴⁾ Judgment in *France v Commission*, C-482/99, EU:C:2002:294, paragraph 69.

- (259) France also maintains ⁽⁵⁵⁾ that, by granting a subsidy to finance Terminal mp2, the Departmental Council acted to achieve an objective of general interest involving support for local jobs, regional development and improved local connectivity.
- (260) However, the conduct of a market economy operator is guided by prospects of profitability ⁽⁵⁶⁾. The market economy operator test will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private undertaking, can be expected within a reasonable period. In this context, all social, regional-policy and sectoral considerations should be left aside ⁽⁵⁷⁾.
- (261) As a result, any positive effects on the economy of the region surrounding the airport cannot under any circumstances be included in this evaluation, which is aimed at determining whether or not the intervention conceals elements of aid ⁽⁵⁸⁾.
- (262) France has not invoked anything else that could prove that the Departmental Council intended to act as a prudent investor by granting the subsidies in question. It follows that the Departmental Council, which did not have valid expectations of the planned investments being profitable, did not act as a market economy operator in its decision to grant a subsidy to Marseille Provence Airport to finance the second terminal.
- (263) France does not maintain that the other public authorities that participated in financing the infrastructure of Marseille Provence Airport through their subsidies acted as market economy operators in their decision-making. There is also nothing in the records to prove that this may have been the case.
- (264) It follows that the subsidies granted by the Departmental Council, Marseille Provence Métropole, the French State and the ERDF gave the CCIMP an advantage that it would not have obtained under normal market conditions.
- (265) In this case, the Commission observes that the investment subsidies benefited the CCIMP alone, and no other airport operators or other undertakings in other sectors. The measure is therefore selective within the meaning of Article 107(1) TFEU.

6.1.4. EFFECT ON COMPETITION AND INTRA-COMMUNITY TRADE

- (266) As the operator of Marseille Provence Airport, the CCIMP is in competition with other airport platforms serving the same catchment area within 100 km or 60 minutes. In this respect, the Commission notes in particular that Avignon and Nîmes airports are located within that area. More specifically, the Commission notes that Nîmes Airport and Toulon-Hyères Airport are respectively 98 km and 113 km from Marseille Provence Airport and that those airports also offer flights to Brussels-Charleroi, Fez and London. Furthermore, like Marseille Provence Airport, Nîmes Airport is also served by Ryanair. Aid granted to the CCIMP therefore risks distorting competition. As the airport services market and the air transport market are open to competition within the EU, aid also risks affecting trade between Member States. In addition, there is competition between the airport operators responsible for operating those airports and, consequently, aid granted to the CCIMP may reinforce its position on that market. Furthermore, airports situated outside this catchment area are also in competition given that airlines, and particularly low-cost airlines, choose their destinations from among the various airports in Europe and beyond.

6.1.5. CONCLUSION ON THE EXISTENCE OF AID

- (267) For these reasons, the investment subsidies totalling EUR 12,337 million granted by various public authorities to finance the investment at Marseille Provence Airport, including the subsidy of EUR 7,197 million granted by the Departmental Council for the construction of Terminal mp2, constitute State aid within the meaning of Article 107(1) TFEU.

⁽⁵⁵⁾ France argues in the alternative that the subsidy granted by the Departmental Council to finance Terminal mp2 constitutes aid compatible with the Treaty stipulations.

⁽⁵⁶⁾ Judgement in *Alitalia v Commission*, T-296/97, EU:T:2000:289, paragraph 84; judgement in C-305/89 cited above, paragraph 20.

⁽⁵⁷⁾ See, in this respect, the 2005 Guidelines, point 46.

⁽⁵⁸⁾ See judgement in *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission*, T-129/95, T-2/96 and T-97/96, EU:T:1999:7, paragraph 120. See also judgement in *Belgium v Commission*, 40/85, EU:C:1986:305, paragraph 13.

6.2. EXISTENCE OF POTENTIAL OPERATING AID GRANTED TO THE CCIMP

6.2.1. FINANCIAL FLOWS BETWEEN MARSEILLE PROVENCE AIRPORT AND THE CCI

- (268) France states that the financial flows totalling EUR [...] million between 2001 and 2010 do not constitute a subsidy granted to the CCIMP, but a contribution paid by the airport to the CCI's general arm for services billed, based on the costs incurred by the general arm ⁽⁵⁹⁾. France maintains that Marseille Provence Airport never benefited from financial aid from the CCI's general arm. France has submitted a certificate issued by the CCIMP's auditor, which confirms the reliability of the accounting information provided. There is nothing in the records to prove otherwise. On that basis, it seems that the services were billed according to the actual costs.

6.2.2. POTENTIAL AID RESULTING FROM THE AIRPORT TAX SYSTEM

- (269) Under French law, the airport tax system is intended to finance sovereign tasks such as safety, fire and rescue services, security (screening of hold baggage, access control, screening of passengers and cabin baggage) and automated border controls.
- (270) The Commission must check that this redistribution mechanism cannot lead to overcompensation that may be regarded as aid, particularly as this mechanism depends on the number of passengers.
- (271) However, the system set up by Article 1609 *quater* of the General Tax Code and by the Interministerial Order of 30 December 2009 on returns to be submitted by airport operators to establish the passenger rate of the airport tax, as amended in 2012, aims to prevent any overcompensation by combining a calculation system based on costs incurred with possible *ex post* corrections.
- (272) As a result, the airport tax is calculated as follows: the airport covers the costs of the tasks as defined by the relevant texts and then submits a return indicating these costs and the traffic figures to the local office of the DGAC for checking and certification under the legislation in force. The central administration of the DGAC then carries out a second check, which includes previous years. The rates are then set by interministerial order on an airport-by-airport basis according to the costs incurred by each airport in carrying out the relevant sovereign tasks.
- (273) In addition, the tax calculation is also based on a multiannual forecast of costs and traffic, with adjustment mechanisms from one year to the next. *Ex post* checks also enable any overcompensation to be corrected.
- (274) It follows that, as the proceeds from the tax are effectively used to pay for the sovereign tasks and as Marseille Provence Airport receives an amount not exceeding the costs incurred in carrying out these tasks, there can be no selective advantage benefiting the airport. The airport tax paid to the CCIMP cannot therefore constitute State aid within the meaning of Article 107(1) TFEU.

6.3. COMPATIBILITY OF THE INVESTMENT AID WITH THE INTERNAL MARKET

- (275) The Commission has assessed whether the aid may be considered compatible with the internal market. Article 107(3) TFEU provides for certain exceptions to the general prohibition on aid set out in paragraph 1 of the same article. In this regard, the 2005 Guidelines provide a framework for assessing whether aid to airports may be considered compatible with the internal market pursuant to Article 107(3)(c).
- (276) According to point 61 of the 2005 Guidelines ⁽⁶⁰⁾, financing aid for airport infrastructure may be declared compatible, in particular pursuant to Articles 107(3)(a), (b) or (c) and 93(2), where:
- (i) the construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.);

⁽⁵⁹⁾ According to France, the services provided by the general arm to the airport arm consisted of administrative and organisational work, human resources management and legal expertise.

⁽⁶⁰⁾ For details on the *ratione temporis* assessment under the 2005 Guidelines, the Commission refers to paragraphs 218 to 222 of its opening decision.

- (ii) the infrastructure is necessary and proportional to the objective which has been set;
- (iii) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
- (iv) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
- (v) the development of trade is not affected to an extent contrary to the Community interest.

In addition to meeting these criteria, the necessity of the aid must be established ⁽⁶¹⁾. The aid amount must be limited to what is necessary to achieve the objective which has been set.

6.3.1. COMPATIBILITY OF THE INVESTMENT AID FOR FINANCING TERMINAL MP2

- (i) The construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.)
- (277) According to the schedule of conditions for the Marseille Provence aerodrome concession, the concession-holder is responsible for and must finance the construction of infrastructure. As the airport operator decided on and incurred the investment costs, this therefore involves investment aid in favour of that operator.
- (278) According to France, Marseille Provence Airport was going to face congestion problems in the more or less short term. The business plan produced in November 2004 determined that Marseille Provence Airport would be saturated by 2007 with regard to the check-in desks and by 2016 with regard to the departure areas, if no changes were made. The first objective was therefore to tackle the terminal's saturation in the short term, given the expected increase in air traffic.
- (279) The second objective was to boost the region's economic development through better use of the airport and increased air traffic. To this end, the development of a complementary service to that offered at Marseille Provence Airport, in line with the airport's strategy which had identified the need to attract low-cost airlines, was regarded as a way of developing the airport's activity. On the one hand, the construction of Terminal mp2 was essential in order to offer different services, not yet available in the region, to the low-cost airlines. This terminal was specifically designed to match this new function of the airport as closely as possible. Terminal mp2 therefore meets a different need for customers who are prepared to accept a simplified service level in order to benefit from lower costs. Airlines wanting to offer such simplified services could not have based themselves at Terminal mp1, where the airport charges were significantly higher, in line with the better quality of its infrastructure and the higher level of its costs. This level of charges would necessarily have been reflected in the price of the flight tickets. The demand for this type of simplified service is sensitive to any increase in costs. On the other hand, the operating conditions at Terminal mp1 did not lend themselves to the need for rapid boarding and disembarkation of passengers.
- (280) France maintains that the project was expected to have a significant impact on the region's economic and social development, particularly in terms of stimulating employment, even though the loss of traffic from Terminal mp1 would result in the loss of jobs.
- (281) The construction of Terminal mp2 was therefore in line with the Commission's 2007 action plan for airport capacity, efficiency and safety in Europe ⁽⁶²⁾, which notes that 'given the expected traffic evolution, Europe will face an ever growing gap between capacity and demand' for airports and concludes that this 'capacity crunch at airports poses a threat to the safety, efficiency and competitiveness of all actors involved in the air transport supply chain' ⁽⁶³⁾. According to this action plan, it is not only necessary to make more efficient use of existing infrastructure, but also to provide 'support for new infrastructure'. The Commission notes the importance of regional airports in managing this shortage of capacity.

⁽⁶¹⁾ Commission Decision of 18 February 2011 on State aid NN 26/2009 — Greece — Ioannina airport development, recitals 69 and 70.

⁽⁶²⁾ COM(2006) 819 final.

⁽⁶³⁾ Action plan, paragraph 7 and box on page 3.

(282) In the light of the above, it must be said that the construction and operation of Terminal mp2 meet clearly defined objectives of general interest such that this compatibility criterion is met in this case.

(ii) The infrastructure is necessary and proportional to the objective which has been set

(283) Given the traffic forecasts, the airport operator envisaged two platform development scenarios in order to tackle the saturation problems identified at the check-in desks and departure areas. The business plan produced in November 2004, and updated in September 2005 and May 2006, proves that the scenario involving construction of a new low-cost terminal offered better prospects for profitability. Furthermore, taking into account the aid granted by the Departmental Council, the September 2005 business plan, updated in May 2006, comes to the conclusion that the plan to construct Terminal mp2 offered a better return than the alternative plan for developing the platform, given the traffic assumptions ⁽⁶⁴⁾. The construction of Terminal mp2 was therefore the option best suited to achieving the objective of solving the airport's saturation problems while increasing traffic at Marseille Provence Airport.

(284) Moreover, Terminal mp2 was constructed by reconditioning the former unused cargo terminal, which therefore meant that the existing infrastructure was optimised.

(285) Lastly, Terminal mp2 was specifically designed to offer the low-cost airlines a service level compatible with their business model, whereas Terminal mp1 seemed unsuited to this type of traffic, particularly due to the lack of contact stands and airbridge operation times incompatible with the rotations of under 30 minutes that are a factor in the business models of low-cost airlines. Conversely, Terminal mp2 was designed to allow passengers to walk from the departure hall to the aircraft parking areas. The design of Terminal mp2 therefore made this project specifically suited to low-cost airline traffic, identified as being the essential factor in the strategy to increase traffic at Marseille Provence Airport and to develop the economic activities and regional employment directly and indirectly associated with that traffic.

(286) The other option to prevent the airport's saturation was to expand the existing Terminal mp1. Given the nature of this project, its costs had to be limited as far as possible. The construction of Terminal mp2 was chosen as being the cheaper option that could also result in a larger increase in traffic.

(287) For these reasons, it can be concluded that the infrastructure in question is necessary and proportional to the objectives which have been set.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(288) The November 2004 business plan estimates the capacity of the low-cost terminal's check-in and departure halls at 3,8 million passengers and provides low-cost traffic projections for the 2005-2021 period. These projections indicate that 50 % of the capacity of Terminal mp2 was expected to be used from 2012, rising to 89 % by 2021. The traffic estimates on which this business plan was based have been corroborated by the actual traffic at Terminal mp2 between 2006 and 2010.

Table 8

Years	Estimated traffic (PAX)	Actual traffic	Capacity utilisation rate — estimated (**) (%)
2006	250 000	107 418 (*)	6,58
2007	900 000	934 481	23,68

⁽⁶⁴⁾ The scenario without construction of the new terminal gave a total cumulative cash flow over the period of EUR [...]*, whilst the scenario with construction of Terminal mp2 gave a total cumulative cash flow over the period of EUR [...]*. The differential between the two scenarios resulted in an IRR of [...]* %.

Years	Estimated traffic (PAX)	Actual traffic	Capacity utilisation rate — estimated (**) (%)
2008	1 200 000	1 059 663	31,58
2009	1 450 000	1 670 240	38,16
2010	1 650 000	1 730 000	43,42
2011	1 850 000	1 372 164	48,68
2012	2 050 000	1 811 616	53,94

(*) The limited traffic in 2006 is explained by the late opening (October 2006) of Terminal mp2.

(**) Total capacity: 3,8 million passengers.

- (289) In addition, as Terminal mp1 and Terminal mp2 offer different services, the assessment of the prospects for use of Terminal mp2 must not be based on the traffic developments recorded at the main terminal. In any event, the actual traffic for 2006 to 2010 reveals that the capacity utilisation rate of Terminal mp1 remained stable after the second terminal opened.

Table 9

Years	Actual traffic	Capacity utilisation rate — actual (*) (%)
2006	6 008 466	69,86
2007	6 028 292	70,09
2008	5 907 174	68,68
2009	5 619 879	65,34
2010	5 799 435	67,43
2011	5 990 703	69,65
2012	6 483 863	75,39

(*) Total capacity: 8,6 million passengers.

- (290) Consequently, the new infrastructure has good medium-term prospects for use, in particular as regards the use of existing infrastructure.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

- (291) According to the information submitted by France and particularly the rules governing use of Terminal mp2, which the Commission has already reproduced in its opening decision, all potential users (airlines) have access to the new infrastructure in an equal and non-discriminatory manner.

(v) The development of trade is not affected to an extent contrary to the Community interest

- (292) The aid intensity does not exceed 50 % of the eligible costs. Although Marseille Provence Airport is the only Category B airport in the catchment area, the Terminal mp2 traffic corresponds to point-to-point routes that can also be established at small regional airports. Avignon Airport is around 75 km away, with a journey time of 45 minutes, and Nîmes Garons Airport is around 100 km away, with a journey time of 60 minutes. Toulon Airport is 113 km from Marseille Provence Airport, and therefore potentially also within the same catchment area.

- (293) However, it does not appear from the available information that the opening of Terminal mp2 may have held back the development of these airports or affected the development of trade to an extent contrary to the common interest.

(vi) Necessity of the aid

- (294) According to the business plan estimates, the terminal's construction would not have been profitable without the aid. The aid was therefore necessary at the time when the investment decision was taken, because a private investor would not have constructed the terminal without State support. Moreover, given the limited intensity of this aid, the Commission considers that this is not disproportionate.

6.3.2. COMPATIBILITY OF THE ERDF SUBSIDY FOR THE DEVELOPMENT OF AIR CARGO

(i) The construction and operation of the infrastructure meet a clearly defined objective of general interest ⁽⁶⁵⁾.

- (295) The subsidy granted was intended to develop the cargo transport activity at Marseille-Provence Airport and thus stimulate job-creating economic activities in an area with an unemployment rate significantly higher than the national average.
- (296) The aid granted by the ERDF was included in the 'Objective 2' programming document of the Structural Funds for the 2000-2006 period, which concerned those regions facing structural difficulties and needing support with their economic and social conversion ⁽⁶⁶⁾.
- (297) The subsidy granted by the ERDF to develop the cargo activity at Marseille Provence Airport therefore met a clearly defined objective of general interest.

(ii) The infrastructure is necessary and proportional to the objective which has been set

- (298) It is clear from the available information that the cargo tonnages transported fell sharply at Marseille Provence Airport in 1997 and then again in 2008. Support to maintain the cargo activity was therefore envisaged in order to optimise the existing infrastructure, particularly the runway and ground areas around the runway, which had significant spare capacity, especially at night.
- (299) The improvements made involved securing road flows, redeveloping the vacant cargo terminals, creating aircraft parking areas as close as possible to the cargo terminal in order to reduce handling times, and enlarging plots in order to improve the attractiveness of the area.
- (300) Marseille Provence Airport carried out the work described at a total cost of EUR 5 280 000. The subsidy received, which totalled EUR 1 520 000, therefore represented only 28,79 % of the project's total financial envelope. Moreover, Article 5 of the agreement of 22 August 2002 between Marseille Provence Airport and the Prefecture of the PACA region stipulated that the Community aid would be paid only on production of evidence of the progress of work and subject to the co-financing agreed under the financing plan being effectively respected.

⁽⁶⁵⁾ The Commission applies the same compatibility criterion to cargo transport, see Commission Decision of 23 July 2014 in Case No SA.30743 (11/C) (ex N 138/10) — Germany — Financing of infrastructure projects at Leipzig/Halle airport (OJ C 284, 28.9.2011, p. 6), recital 128.

⁽⁶⁶⁾ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1), Article 1.

(301) It must be concluded that the infrastructure is necessary and proportional to the objective of general interest which has been set.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(302) Although Marseille Provence Airport saw its cargo traffic fall after the withdrawal of Aéropostale (main cargo customer) and due to the lack of hold space on the Marseille-Orly shuttle, the development of a cargo platform to the Maghreb was designed to maintain the local jobs directly linked with this activity while optimising the available infrastructure.

(303) The traffic results show that the tonnage transported rose by over 20 % between 2005 and 2010.

(304) The new infrastructure therefore has good medium-term prospects for use, in particular as regards the use of existing infrastructure, which will be optimised by the planned work.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

(305) According to the available information, no operating rules limit access to the cargo infrastructure. The cargo area is open to express cargo operators, ground handling service operators, cargo companies and road hauliers.

(306) It therefore follows that all users have access to the cargo infrastructure in an equal and non-discriminatory manner.

(v) The development of trade is not affected to an extent contrary to the Community interest

(307) The aid granted to the cargo activity development project is limited to 28 % of the total cost of the work. Moreover, this project has helped to develop the European transport system and boost economic development.

(308) Consequently, it can be concluded that the development of trade is not affected to an extent contrary to the common interest.

(vi) Necessity of the aid

(309) The investment decision was made in the context of the new Paris-Marseille TGV line that was opened in 2000 and the reduction in air traffic after 11 September 2001. The financial capacity of Marseille Provence Airport also steadily and significantly declined from 2000 to 2003. The CCIMP therefore had to respond to the erosion in passenger and cargo traffic. Costly work was planned for the 2005-2006 period in order to renovate the two runways. Under these circumstances, although the project's profitability was not excluded, the return on investment would have been more uncertain, particularly over a reasonable period. It is therefore likely that, without the ERDF subsidy, the airport, which was concerned about the drop in passenger traffic, would have delayed, if not cancelled, its investments in the cargo activity.

(310) Given the prevailing market conditions at the time when the aid was granted, namely variable cargo volumes at the airport, a high level of risk and uncertain prospects for profitability in a newly liberalised market, a private investor would not, in all likelihood, have invested in the development of cargo transport at Marseille Provence Airport. The aid was therefore necessary to meet the objective set. Furthermore, given the limited intensity of the aid, the Commission considers that this was not disproportionate to the achievement of that objective.

6.3.3. COMPATIBILITY OF THE DEPARTMENTAL COUNCIL SUBSIDIES OF 27 SEPTEMBER 2002 AND 26 JUNE 2003 AND OF THE MARSEILLE MÉTROPOLE PROVENCE URBAN COMMUNITY SUBSIDY OF 26 JULY 2004 FOR THE EXTENSION, RESTRUCTURING AND DEVELOPMENT OF THE AIRPORT

(i) The construction and operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.)

(311) The 2002 and 2003 subsidies were for work to renovate the main runway and slab joints in the aircraft parking areas, construct ramps and create quick exits to allow the number of hourly movements to be increased and thus optimise use of the existing infrastructure. It is clear from the information provided by France that the airport's two runways had not seen any changes between 1980 and 2000, even though the number of commercial movements had risen from 46 603 to 100 047. The objective of this measure was therefore to tackle the imminent saturation of the airport's airside areas.

(312) The 2004 subsidy helped to finance an increase in the capacity of Hall 1, the optimisation of runway 1 and the reconstruction of runway 2. These improvements were deemed necessary to allow Marseille Provence Airport to cope with a significant increase in European traffic, given the forecast rise in passenger numbers ⁽⁶⁷⁾.

(313) The construction of a railway station accessible by the TGV was intended to improve coordination between the various transport modes.

(314) In line with its findings in relation to the construction of Terminal mp2, the Commission concludes that the extension, restructuring and development of the airport meet objectives of general interest that involve ensuring the continuity of air traffic and its future development.

(ii) The infrastructure is necessary and proportional to the objective which has been set

(315) The work undertaken was necessary to increase and maintain the airport's airside capacity, solve the existing bottlenecks and optimise the connection with the high-speed train network.

(316) Moreover, the Departmental Council subsidy represented 9,5 % of the cost of the work carried out and 7 % of the initial capital programme. The Marseille Métropole Provence Urban Community subsidy represented 6,2 % of the cost of the work carried out and 5,6 % of the cost of the planned work programme.

(317) It must be concluded that the infrastructure is necessary and proportional to the objective of general interest which has been set.

(iii) The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

(318) The improvements financed were deemed necessary to accommodate additional traffic. It is clear from the available figures that the number of passengers carried at Marseille Provence Airport rose by over 25 % between 2006 and 2012. In addition, the runway capacity now apparently stands at 140 000 movements per year. According to projections in the Noise Exposure Plan report appended to the Prefectural Order of 4 August 2006, the airport traffic target for 2015 will be achieved with 113 909 movements and the 2020 target with 122 449 movements. As a result, improving the runways and access and exit ramps means that the airport can handle the traffic projections to 2020, with the infrastructure therefore having satisfactory prospects for use.

(iv) All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

(319) It is clear from the available information that all potential users of the infrastructure have access to it in an equal and non-discriminatory manner.

⁽⁶⁷⁾ The partnership agreement concluded on 14 May 2004 between Marseille Provence Airport and the Marseille Métropole Provence Urban Community projects an increase in national traffic of 5 % per year and in international traffic of nearly 10 % per year between 2003 and 2006.

(v) The development of trade is not affected to an extent contrary to the Community interest

- (320) As indicated in recitals 293 and 308, the development of traffic at Marseille Provence Airport has not affected the activity of airports situated within the same catchment area and the development of trade is not affected to an extent contrary to the common interest.

(vi) Necessity of the aid

- (321) The investment decision was made in the context of the new Paris-Marseille TGV line that was opened in 2000 and the reduction in air traffic after 11 September 2001. The financial capacity of Marseille Provence Airport also steadily and significantly declined from 2000 to 2003. The CCIMP therefore had to respond to the erosion in passenger and cargo traffic. The intensity of this aid was limited to 13 % ⁽⁶⁸⁾. As the airside investments could not have been avoided, in the absence of the subsidy, the programme would have necessarily been reduced by over EUR 3 million, most likely taken from the internal improvements of Hall 1, such as those intended to provide space for tour operators, enable airlines to have ticket sale counters or create shops. However, these are the investments that have allowed foreign airlines and tour operators to be accommodated and commercial revenues to be increased.
- (322) Given the prevailing market conditions at the time when the aid was granted, namely a lack of experience and initiative among private operators with little inclination to invest in airport infrastructure, a high level of risk and uncertain prospects for profitability in a newly liberalised market, a private investor would not, in all likelihood, have invested in the reconstruction of airport infrastructure or in a TGV connection at Marseille Provence Airport. The aid was therefore necessary to meet the objective set. Furthermore, given the limited intensity of the aid, the Commission considers that this was not disproportionate to the achievement of that objective.

7. ASSESSMENT OF THE MEASURES IN FAVOUR OF AIRLINES USING THE AIRPORT — EXISTENCE OF AID

7.1. POTENTIAL AID GRANTED THROUGH THE REDUCED PASSENGER CHARGE FOR NATIONAL FLIGHTS

- (323) In an earlier decision ⁽⁶⁹⁾, the Commission concluded that an aid scheme existed in favour of airlines operating routes with a national destination, which was incompatible with the internal market. France took steps to abolish this scheme.
- (324) The extract from the 2007 Cocoéco deliberations produced by France shows that the passenger charges applicable to national flights and to flights to EU countries that are members of the Schengen Area were aligned at Marseille Provence Airport from 1 January 2008.
- (325) The Commission therefore considers that this abolished measure does not need re-investigation.

7.2. POTENTIAL AID TO AIRLINES USING THE AIRPORT THROUGH THE DIFFERENTIATION OF AIRPORT CHARGES AND POTENTIAL AID TO RYANAIR AND AMS THROUGH THE MARKETING AGREEMENT

7.2.1. STATE RESOURCES AND IMPUTABILITY

- (326) In order to ascertain whether the resources of the CCIMP constitute State resources, the Commission notes that a public administrative institution (*établissement public à caractère administratif*) constitutes an independent public body that, nevertheless, forms part of the organisation of the public administration and is therefore subject to very close supervision by other public authorities.

⁽⁶⁸⁾ Weighted average.

⁽⁶⁹⁾ See footnote 31.

- (327) Moreover, the general budget of the CCIs is funded by tax revenue collected from companies entered in the trade and companies register.
- (328) In addition, the CCIs come under the category of public authorities pursuant to Commission Directive 2000/52/EC ⁽⁷⁰⁾, they constitute contracting authorities pursuant to Directive 2004/18/EC of the European Parliament and of the Council ⁽⁷¹⁾ or, as applicable, contracting entities pursuant to Directive 2004/17/EC of the European Parliament and of the Council ⁽⁷²⁾, and their purchasing is subject to public procurement procedures.
- (329) According to General Court case-law, those arrangements are part of the internal organization of the public sector, and the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid ⁽⁷³⁾. Under French law, the CCIs are intermediate state authorities. Their acts are therefore, in any event, imputable to the French State, as they form an integral part of the latter. As the CCIs form part of the public administration and are subject to close supervision by other public authorities (see recital 10), the Commission considers that the decisions of these public entities are necessarily imputable to the State. Their situation therefore differs from that of public undertakings. In the case of the CCIs, imputability does not need to be established, as was the case in the *Stardust Marine* judgment, on the basis of another public authority associated with the decision-making process of a public undertaking, as also confirmed by the numerous public interest tasks entrusted to them by law.
- (330) Furthermore, even if the Commission had to establish the imputability to the State of CCIMP decisions while regarding the CCIMP as a simple public undertaking, it would have a number of factors allowing this imputability to be established.
- (331) First of all, the CCIMP is subject to close administrative supervision, as explained in Section 2.1.2. In particular, the CCIMP's decisions on airport charges must be approved by the supervisory authority in order to be enforceable. Moreover, the Cocoéco that consists of the Departmental Council of Bouches-du-Rhône, the Provence-Alpes-Côte d'Azur Regional Council and the Marseille Provence Métropole Urban Community is consulted on each occasion, prior to the introduction of new airport charges, and approves those charges.
- (332) It is therefore highly unlikely that the Cocoéco would not also have approved the decision to sign the marketing services agreement with AMS, or at least that it was not involved in that decision. Although it may not have given a formal opinion on that agreement, it approves the overall balance of the airport's resources, by supervising the airport charges. The decisions on airport charges and on the marketing services agreement signed with AMS should in fact be assessed together.
- (333) Moreover, the CCIMP has concluded several partnership agreements ⁽⁷⁴⁾ with the authorities concerned so that the latter assume financial responsibility for some of the programmes of investment in the airport infrastructure. In return for this financial participation, Marseille Provence Airport has undertaken to pursue a dynamic commercial policy designed to maximise development of national and international air routes ⁽⁷⁵⁾. It is stipulated that this policy must be conducted 'in consultation with the Departmental Council'. The latter can therefore ask the airport to provide it with studies on the development of air traffic and on the prospects for developing new routes.
- (334) Furthermore, as a general point, it has been maintained by both France and the CCIMP that the development strategy adopted by Marseille Provence Airport had objectives of general interest involving the economic dynamism of the surrounding region and the creation of jobs. These are objectives in which the local authorities have a direct interest, as indicated in the agreements concluded with the CCIMP ⁽⁷⁶⁾.

⁽⁷⁰⁾ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

⁽⁷¹⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽⁷²⁾ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

⁽⁷³⁾ Judgment in *Air France v Commission*, T-358/94, EU:T:1996:194, paragraph 62.

⁽⁷⁴⁾ Agreements concluded with the Departmental Council on 3 October 2002, 5 September 2003 and 19 May 2005 and with the Marseille Provence Métropole Urban Community on 14 May 2004.

⁽⁷⁵⁾ Agreements of 5 September 2003 and 19 May 2005.

⁽⁷⁶⁾ See, for example, in the preamble to the agreement of 19 May 2005.

- (335) It also appears, in the light of recital 10, that the CCIs are integrated within the structure of the public administration, that they pursue their economic activities under very special conditions that are in no way comparable with the conditions for private operators, that their legal status is governed by public law, and that the supervision of their management by the public authorities is extensive.
- (336) In the light of the above, it must therefore be concluded that the airport charging measures and the marketing services agreement concluded with AMS were financed through State resources and that their financing is imputable to the State.

7.2.2. SELECTIVE ADVANTAGE FOR THE AIRLINES OPERATING AT MARSEILLE PROVENCE AIRPORT

- (337) In order to ascertain whether a State measure constitutes aid, it must be determined whether the undertaking received an economic advantage enabling it to avoid having to bear costs that would normally have had to be met out of its own financial resources or whether it received an advantage that it would not have received under normal market conditions.
- (338) The Commission points out in this respect that regional development considerations cannot be taken into account when applying the market economy operator test.

Application of the benchmarking approach

- (339) Ryanair maintains that, in order to rule out the existence of an economic advantage that may not have been obtained under normal market conditions, the charges in the 1999 agreements must be compared with airport charges applied at other European airports to low-cost airlines.
- (340) The Commission does not rule out this approach on principle. However, the identification of a benchmark requires first that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.
- (341) In this respect, the Commission notes that, when the 1999 agreements were signed, EU airports were regarded by many as forming part of a public administration pursuing social and regional objectives and were therefore funded by public authorities, whatever their profitability. In fact, a majority of EU airports is still currently benefiting from public funding to cover investment and operating costs. Therefore, the Commission considers that these airports' charges tend not to be determined with regard to market considerations, and in particular sound *ex ante* profitability prospects, but essentially with regard to social or regional considerations.
- (342) The Commission further notes that, even though some airports are privately owned or operated without social or regional considerations, their charges may be heavily influenced by the charges applied by the majority of publicly subsidised airport operators, as these latter charges are taken into account by airlines during their negotiations with the privately owned or operated airports.
- (343) In the present case, the airports used as benchmarks received public funding before their privatisation, and even afterwards. Accordingly, Luton Airport, which is publicly owned, started to be operated by a private company after having received an investment of GBP 80 million under a public-private partnership. Liverpool Airport has benefited in particular from co-financing under the EU Structural Funds, and the loss-making Prestwick Airport was recently renationalised for the symbolic sum of GBP 1. Moreover, it is not clear whether the cost of the existing infrastructure was taken into account when these reference airports were privatised. Lastly, the comparability of the figures in the Oxera study is limited by the fact that the charges paid at Marseille Provence Airport do not take account of the marketing agreement with AMS, whereas the charges indicated for all the other airports are net of any contribution by the airport to Ryanair's marketing activities.
- (344) Under those circumstances, the Commission is unable to identify an appropriate benchmark for establishing a genuine market price for the services provided by the airport operator.

Profitability analysis

- (345) In the absence of a clearly defined benchmark, the Commission considers that the *ex ante* incremental profitability analysis is the relevant criterion for assessing the agreements proposed or concluded by airport operators with individual airlines. In this context, the measures under investigation form part of the airport's overall strategy leading to profitability, at least in the long term.
- (346) The Commission considers that setting different charges is a normal commercial practice. However, this practice must be justified by commercial considerations in order to satisfy the market economy operator test ⁽⁷⁷⁾.
- (347) France argues that Marseille Provence Airport acted rationally, and supports its statement with the airport's *ex ante* calculations.
- (348) In order to assess this criterion, the Commission will take account of both the aeronautical revenue (airport charges) and the revenue from the airport's non-aeronautical activity (shops, car parks, etc.).

7.2.2.1. Reductions in the charges for creating new routes

- (349) The CCIMP introduced two different schemes of reduced charges to encourage the creation of new air routes. On 6 December 2004 the Cocoéco voted to create a reduction of 90 % in the first year and 50 % in the second year on the landing, lighting and parking charges for passenger flights. This scheme applied from 15 February 2005 to 31 July 2009.
- (350) As regards this first measure, France maintains that an *ex ante* profitability study of 8 December 2004 estimated, on the one hand, the annual reduction for existing routes, or for routes that would have been created without this measure, at EUR [...] * and, on the other hand, the additional costs of supplying crews and car parking at an extra EUR [...] * per year. Only 20 % of the new routes were presumed to continue for a third year, equivalent to an amount of EUR [...] *. The revenue from new routes created was estimated at EUR [...] *. The assumptions made in the original study seemed realistic at that time.
- (351) Given that the airport had a positive margin and as this measure did not require any initial investment, the Commission concludes that it satisfies the market economy operator test.
- (352) As regards the reduction applicable from 15 February 2005 to 31 July 2009, France has produced the Cocoéco meeting records of 14 September 2009 according to which, on the one hand, 83,1 % of the reductions benefited routes that continued after the end of the reductions and, on the other hand, the modulation did not involve any capacity investment.
- (353) Lastly, the economic impact study on the modulation proposed during that Cocoéco meeting concluded that, for every passenger taking a flight benefiting from the modulated charges, the average margin over the three years that the measure applied was positive:

— for mp1: EUR [...] * – EUR [...] * = EUR [...] *

— for mp2: EUR [...] * – EUR [...] * = EUR [...] *

- (354) This result showed that the initial *ex ante* calculations were in fact very conservative. In particular, well over 20 % of the new routes continued after the end of the initial reductions. Consequently, when the business plans were updated and subsequent studies were carried out, the assumptions were updated to take account of the initial experience gained with this measure.

⁽⁷⁷⁾ See Decision 2011/60/EU and Commission Decision 2013/664/EU of 25 July 2012 on measure SA.23324 — C 25/07 (ex NN 26/07) — Finland — Finavia, Airpro and Ryanair at Tampere-Pirkkala airport (OJ L 309, 19.11.2013, p. 27).

- (355) Based on this experience, a second incentive scheme for new routes was adopted on 18 September 2009 and came into force on 1 February 2010. This scheme granted a reduction of 60 % in the first year of operation of a new route, 45 % in the second year and 20 % in the third year. It also aimed to generate a profit margin. Based on the above calculations, the profitability of this second scheme was also plausible. This scheme was gradually withdrawn and finally ended on 31 October 2011.
- (356) The Commission therefore concludes that this measure also satisfies the market economy operator test, as it was expected to make additional profits.

7.2.2.2. *Free overnight parking*

- (357) From 1 March 2005 to date, parking between 22.00 and 06.00 has been free for passenger aircraft, for five weekly frequencies to the same destination during a minimum IATA season and for aircraft parking for at least six consecutive hours between 22.00 and 06.00. This measure applies in a non-discriminatory manner to both terminals and to all airlines.
- (358) According to France, overnight parking at the airport allows airlines to board passengers for the first slot in the morning and to land right at the end of the day, which, for medium-haul flights, means that four rotations a day can be accommodated instead of three.
- (359) France maintains that a study conducted as part of the 2004 accounts proves the *ex ante* profitability of this measure for the airport operator.
- (360) This study was based on the assumption that, for Terminal mp1, only national medium-haul flights were likely to generate additional rotations due to the overnight parking charge being waived. For Terminal mp2, each of the aircraft of its low-cost airline customers not operating single daily return flights from their overnight base was regarded as likely to generate an additional daily rotation. A weighting factor of 50 % was applied to these additional rotation assumptions.
- (361) The study used the assumption that the additional costs generated by the overnight parking were limited to labour, maintenance, repair and consumable costs, estimated at EUR [...] * per night and per aircraft.
- (362) The assumptions made in the original study seemed realistic at that time. However, it is apparent from a study conducted in 2008 that the costs were underestimated, but this study relied on the fact that the additional rotations generated by this measure would still result in a net profit from 2010. Consequently, when the business plans were updated and subsequent studies were carried out, the assumptions were updated to take account of the initial experience gained with this measure.
- (363) It appears from all this information that the CCIMP acted as a market economy operator in taking the decision to grant free overnight parking at Marseille Provence Airport.

7.2.2.3. *Financing of marketing activities*

- (364) An initial scheme for financing marketing activities was introduced at Marseille Provence Airport by a CCIMP decision of 21 November 2005. However, this scheme was withdrawn before it entered into force. According to France, it resulted in a single payment [of less than EUR 300 000] * to the airline bmibaby.
- (365) France has argued that this sum, in so far as it may constitute State aid, is covered by Regulation (EC) No 1998/2006. In 2012 bmibaby ceased trading.
- (366) The Commission concludes that this aid does indeed constitute *de minimis* aid.

[illegible]

[illegible]

Table 12

Profitability analysis (EUR '000 at current prices)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	TOTAL 2005- 2021	Internal Rate of Return
TOTAL CASH FLOW with NBV end 2021 without LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
TOTAL CASH FLOW with NBV end 2021 with LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
DIFFERENTIAL CASH FLOW	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Updated TOTAL CASH FLOW with NBV end 2021 with- out LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
Updated TOTAL CASH FLOW with NBV end 2021 with LCT	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
TOTAL DIFFEREN- TIAL CASH FLOW	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Updated Business Plan of 15 September 2005 (NBV — net book value; LCT — low-cost terminal).

- (369) The prudent operator will take into account all the aeronautical and non-aeronautical revenue, as well as the elasticity of traffic demand in relation to the aeronautical charges in question, in order to determine the profitability of the simplified-service terminal and the corresponding charges. The difference between the passenger charge level and the cost of the passenger function, which is covered by the non-aeronautical revenue, does not therefore constitute an advantage granted to airlines, but is the result of the operator's underlying optimisation, which, on the contrary, is aimed at ensuring the profitability of the investment project.
- (370) The passenger charges (excluding check-in desks) applicable at Terminal mp2 are shown in Table 13.

Table 13

Years	Charge per passenger for intra-EU flights (EUR)		Charge per passenger for extra-EU flights (EUR)	
	Original	Retroactive	Original	Retroactive
2006	1,23	2,85	x	2,99
2007	1,22	2,85	1,28	2,99
2008	1,31	2,54	6,75	2,68
2009	1,79		1,93	
2010	1,79		1,93	
2011	1,84		1,99	

- (371) In 2009 the charges were adjusted following their annulment by the Council of State. The Cocoéco decision of 18 February 2009 explains in more detail the calculation methods used to set these charges, based on the costs and revenues allocated to each terminal as specified in the study conducted by the Mazars consultancy in 2008 and covering the next six years. According to this study and based on the projections that it uses, the costs taken into account are the costs of the buildings allocated to each terminal, servicing and maintenance costs, and operating costs in proportion to their allocation to the passenger function and their use for each terminal. The revenues taken into account are the income from airport charges (passenger and check-in desks) and the commercial revenues (shops and parking) generated at the airport and allocated to each of the terminals.
- (372) It appears that the passenger charges were set such that the aeronautical revenue covered the same margin of the passenger function for both Terminal mp2 and Terminal mp1, i.e. [between 50 % and 80 % for the years 2007, 2008, 2009 and 2010]*.
- (373) The figures in the decision of 18 February 2009 reveal that, if both the income from airport charges and the commercial revenues allocated to the passenger function are taken into account, they cover the costs of that function at Terminal mp2 [by between 100 % and 140 % for the years 2007, 2008, 2009 and 2010]*, based on the passenger charge set in the decision of 25 May 2009.
- (374) The passenger charges at Terminal mp2 were set on the basis of a prior financial study that took account of all the applicable reductions. According to this financial study, the charges at each terminal would cover the respective costs. The study concluded that the NPV was positive.
- (375) Although the new retroactive charges were calculated so that they covered all the airport's costs, after correction in order to distribute certain joint costs between the terminals, the original charges in fact already covered the incremental costs directly associated with the arrival of airlines and each additional passenger. As a result, it was always expected that the charges applied to the airlines would cover at least the incremental costs associated with each airline's use of the airport.

- (376) Furthermore, in the original business plan that led to the decision to construct Terminal mp2, the airport expected to achieve a positive NPV. Before any subsequent changes to the charges, the airport produced plausible estimates showing that the measures would positively contribute to the airport's profitability.
- (377) The Commission therefore considers that the decision setting the charges for Terminal mp2 satisfies the market economy operator test. The same is true for the decision of 25 May 2009 setting these charges for the years 2006 to 2008, and from 1 August 2009.

7.2.2.5. **Marketing agreement with AMS**

Joint assessment of an economic advantage granted to Ryanair and AMS

- (378) The Commission must firstly determine whether, for the purposes of identifying an economic advantage from which they may have benefited, Ryanair and its subsidiary AMS should be considered individually or jointly.
- (379) The Commission notes first of all that AMS is a wholly-owned subsidiary of Ryanair and that its managers are senior Ryanair executives ⁽⁷⁸⁾. The Commission further notes that AMS was in fact formed for the sole purpose of providing marketing services on the Ryanair website and that it does not carry out any other activities.
- (380) Moreover, the preparatory dossier for the CCIMP airport advisory committee meeting on 15 November 2005 states that the purchase of advertising services on the Ryanair website and the creation of a start-up aid scheme for new routes were both intended to establish cost conditions at Marseille Provence Airport that would allow Ryanair's profitability criteria to be met, particularly with a view to setting up an aircraft base.
- (381) It is also clear from France's arguments in its response that the financial terms of the agreement concluded with AMS were decided according to the financial margins generated for each flight operated by Ryanair. France has also stated that the agreement concluded with AMS contained various undertakings on the part of Ryanair with regard to the number of aircraft based at the airport, the number of daily frequencies operated and the number of passengers per year. Lastly, France claims in its response that the CCIMP's conduct must be assessed in the light of 'the profitability offered by combining the modulations for the creation of new routes with the AMS agreement for Ryanair flights alone' and stresses that 'this study of the various measures taken as a whole is particularly pertinent in this case' ⁽⁷⁹⁾.
- (382) Lastly, the Commission must point out that it also used this approach in its decision of 29 November 2007 opening the formal investigation procedure on Pau Airport, in its decision of 25 January 2012 extending the procedure on the same airport, and in its decisions of 8 February and 23 March 2012 opening procedures on La Rochelle and Angoulême Airports.
- (383) For all these reasons, the measures in favour of Ryanair and AMS should be assessed jointly in order to determine whether there was an economic advantage, as Ryanair and AMS in fact form a single beneficiary of the measures in question ⁽⁸⁰⁾.
- (384) The Commission also notes that the only advantage potentially gained by airport operators from the marketing services offered by AMS on the Ryanair website would be an increase in the number of passengers using Ryanair. Traffic and load factor estimates therefore constitute an essential component of the analysis of the profitability of entering into a relationship with Ryanair ⁽⁸¹⁾. The Commission therefore considers that, for the purposes of applying the market economy operator test, the assessment of the advisability of entering into a commercial relationship with Ryanair ⁽⁸²⁾ cannot ignore the consequences of the parallel conclusion of marketing agreements, and particularly their costs.

⁽⁷⁸⁾ See the report of the Aquitaine Regional Audit Chamber on the CCIPB, issued on 19 October 2006, which concludes in particular that 'AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives'.

⁽⁷⁹⁾ Letter from France of 12 March 2012, page 108.

⁽⁸⁰⁾ The Commission will therefore use 'Ryanair/AMS' in the rest of the assessment to denote the beneficiary of the measures in question.

⁽⁸¹⁾ Or of the start-up of a new route.

⁽⁸²⁾ Creation of a route, variation in the number of routes or their frequency, etc.

Market economy operator test

- (385) On 19 May 2006 the CCIMP concluded, for a term of five years renewable once for the same period, without prior publicity or competitive tendering, an agreement to purchase advertising space with the company AMS, a wholly-owned subsidiary of the airline Ryanair. It was indicated in the Cocoéco decision of 18 February 2009 on the charges that were set in the decision of 25 May 2009 that the cost of the AMS agreement over the agreed term, i.e. October 2006-October 2011, was EUR [...]*, i.e. EUR [...]* per year.
- (386) France's main argument is that the payments made under this agreement were in line with the market price for online marketing services, from which it concludes that the CCIMP acted as a market economy operator by signing the agreement with AMS.
- (387) However, as stated in Section 7.2.2.5, the Commission considers that any advantages received by AMS and Ryanair must be assessed jointly, given the indissociable nature of the services provided by the airline and its subsidiary. The Commission therefore considers that the potential value of the marketing services provided by AMS lies in an increase in Ryanair traffic.
- (388) France's response seems to suggest that it agrees with this analysis. In fact, France maintains that a prudent operator would have jointly analysed the charging framework applicable to Ryanair and the cost of the marketing services purchased from AMS in order to determine the profitability of a flight operated by Ryanair, which is the reasoning that the CCIMP would have followed in its decision to sign the agreement of 19 May 2006.
- (389) As the marketing services provided by AMS were indissociable from the relationship between Marseille Provence Airport and the airline Ryanair, the advantages granted to these two entities should therefore be studied jointly.
- (390) As a result, the CCIMP's conduct at the time when the agreement of 19 May 2006 was signed with AMS cannot be assessed in relation to the offers of other online advertisers, which do not provide a comparable service.
- (391) In the alternative, France maintains that the agreement concluded by the CCIMP with AMS represented a profitable purchase for Marseille Provence Airport, particularly with regard to the activity of Terminal mp2.
- (392) It should be recalled that the profitability study on investment in the construction of Terminal mp2 (September 2005 business plan updated in May 2006) did not take into account the costs of the agreement concluded with AMS, but rather the costs of the previous scheme for participating in marketing costs. In the end, this scheme was not applied, as explained in Section 7.2.2.3.
- (393) France has produced a profitability study on the financial margins generated by Ryanair flights over the 2007-2021 period, conducted in September 2005 and updated in May 2006 before the agreement was concluded with AMS, which the CCIMP apparently used to make the decision on the agreement of 19 May 2006.
- (394) This study is based on the following information (for 2007):
- the financial margin per flight, ignoring the cost of the AMS agreement, for a B737 aircraft at Terminal mp2 is EUR [...]*
 - the fact that Ryanair traffic accounts for 85 % of the low-cost traffic assumptions;
 - the fact that Ryanair traffic accounts for 2 694 flights (corresponding to an aircraft with 189 seats and a load factor of 75 %).
- (395) This study reveals that the presence of Ryanair at Marseille Provence Airport, under the charging conditions that it was offered, in particular the reductions for new routes and also for overnight parking, and given the purchase of marketing services from its subsidiary, leads to the airport making a loss in the first three years, with a profit being generated for the airport only from the fourth year of operation ⁽⁸³⁾.

⁽⁸³⁾ In addition, the *ex post* study based on the actual traffic figures for 2007 and 2008 and the costs audited by the Mazars consultancy reveals that each flight operated by Ryanair, given the modulated charges from which the airline benefited and the cost of the marketing services, generated a loss for the airport in the first two years.

[illegible]

- (398) As a result, the charges applied to the airlines, taking into account the various reductions and the costs of the agreement with AMS, always cover at least the additional costs associated with each airline's use of the airport.
- (399) Furthermore, in the original business plan that led to the decision to construct Terminal mp2, the airport expected to achieve a positive NPV. Before any subsequent changes to the charges and before the signature of the marketing agreement with AMS, the airport produced plausible estimates showing that the measures would positively contribute to the airport's profitability.
- (400) The assumptions made and other scenarios envisaged in the original business plan and its updates, just like the financial calculations associated with subsequent measures, seemed realistic at the time that they were produced. Subsequent developments have in fact shown that they were rather conservative. Moreover, they have been regularly updated and revised and the charges have been regularly adapted to guarantee the airport's profitability in the long term and changes to the charges in the short term.

7.2.3. Conclusion on the existence of aid

- (401) It is clear from Section 6.3 that Marseille Provence Airport has benefited from investment aid that is compatible with the internal market. The Commission considers that, where an airport operator has benefited from compatible aid, the advantage resulting from such aid cannot be passed on to a specific airline, particularly if the following conditions are met:
- (i) the infrastructure is open to all airlines (including infrastructure that is more likely to be used by certain categories, such as low-cost airlines or charter airlines) and is not reserved for a particular airline, and
 - (ii) the airlines pay charges covering at least the incremental costs.
- (402) In the present case, the Commission firstly notes that Terminal mp2 and its adjacent aircraft parking area are not reserved for a particular airline. Terminal mp2 is open to all airlines wishing to use it, on the understanding that it offers a limited level of service. To ensure that the terminal was open to all interested operators, the airport launched a call for expressions of interest in using the infrastructure. However, as it is not being operated to full capacity, the terminal is available to any interested airline.
- (403) Secondly, according to the assessment set out above (see Sections 7.2.2.1-7.2.2.5), the airlines also pay charges covering at least the incremental costs generated by each agreement.
- (404) The Commission notes that the agreements under investigation form part of the airport's overall strategy leading to profitability, at least in the long term. To assess the effect of agreements between the airport and an airline on the airport's profitability, the Commission takes account of the factual evidence available, as also the developments that could reasonably have been expected at the time when the agreements were concluded. It takes into account in particular:
- (i) the market conditions prevailing at the time, in particular changes occurring following liberalisation of the air transport market, the arrival on the market and development of low-cost airlines⁽⁸⁴⁾ and other 'point-to-point' carriers, changes to the organisational and economic structure of the airport sector⁽⁸⁵⁾, the degree of diversification and the complexity of the functions performed by airports, the reinforcement of competition between airlines and between airports, the uncertain economic context due to changes in market conditions, or any other uncertainty existing in the economic context;
 - (ii) the expected long-term effects on the airport's profitability.

⁽⁸⁴⁾ Increase in the market share of low-cost airlines from 1,5 % in 1992 to 45,94 % in 2013.

⁽⁸⁵⁾ It is only since the *Aéroports de Paris* judgment (12 December 2000) that the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control (see recital 228). Until that judgment, airports were not regarded as undertakings within the meaning of Article 107(1) of the Treaty.

- (405) The Commission points out that, according to the information provided by France, the airport expected, in the original business plan that led to the decision to construct Terminal mp2, to achieve a positive NPV in the long term. According to France, the financial results of Terminal mp2 have confirmed these optimistic expectations. Likewise, the reductions granted on the charges, which were applicable to the entire airport including Terminal mp1, were based on sound financial calculations according to which the airport could expect to achieve profitability by adopting these measures. The Commission takes the view that the forecasts of the profitability and use of Terminal mp2 were reasonable and sound. Most of the time they have proved to be conservative. Consequently, the Commission considers that the charges applied, the reductions granted and the marketing agreement concluded with AMS form part of the airport's overall strategy leading to profitability, at least in the long term.
- (406) It is therefore of the opinion that the agreements concluded between Marseille Provence Airport and the user airlines do not constitute State aid. Furthermore, it considers that, under these circumstances, even if State aid had been granted to the airlines, this would in any event have been compatible with the internal market for the same reasons proving the compatibility of the aid granted to the airport.
- (407) As one of the cumulative criteria pursuant to Article 107(1) TFEU is not fulfilled, the Commission considers that the measures under investigation are free of State aid within the meaning of Article 107(1) TFEU.

8. CONCLUSION

8.1. MEASURES IN FAVOUR OF THE AIRPORT

- (408) The Commission finds that France unlawfully granted investment aid to Marseille Provence Airport in breach of Article 108(3) TFEU. However, it must be stated that this aid is compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- (409) The airport tax and the transfers between the airport and the CCIMP do not constitute State aid within the meaning of Article 107(1) TFEU.

8.2. MEASURES IN FAVOUR OF AIRLINES USING THE AIRPORT

- (410) The Commission finds that the airport acted as a market economy operator in its financial relations with the airlines using the airport. The various modulated charges and the marketing agreement with AMS do not constitute State aid within the meaning of Article 107(1) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The investment subsidies granted by France to Marseille Provence Airport in the amount of EUR 12,337 million are State aid compatible with the internal market pursuant to Article 107(3)(c) TFEU.

The airport tax payable to the airport, the transfers between the airport and the CCIMP, the reduced charges for airlines using the airport, and the marketing agreement with AMS granted by France do not constitute State aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President
