

**COMMISSION DECISION (EU) 2016/2069****of 1 October 2014****concerning measures SA.14093 (C76/2002) implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair***(notified under document C(2014) 6849)***(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 <sup>(1)</sup>,

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 the above Articles <sup>(2)</sup>, and having regard to these comments,

Whereas:

**1. PROCEDURE**

- (1) Following information published in the Belgian press in July 2001 and the receipt of a complaint in January 2002, the Commission was informed that Belgium had granted aid measures to the airline Ryanair Ltd (hereinafter 'Ryanair') for the operation of air services at Charleroi Airport. In letters dated 21 November 2001, 13 June 2002 and 4 July 2002, and in a meeting held on 9 October 2002, Belgium provided information on this subject to the Commission.
- (2) In a letter dated 11 December 2002 <sup>(3)</sup> (hereinafter 'opening decision'), the Commission informed Belgium of its decision to initiate the procedure provided for in Article 108(2) TFEU (hereinafter 'formal investigation procedure') in respect of these measures. Belgium submitted its comments on 14 February 2003.
- (3) The opening decision was published in the Official Journal of the European Union <sup>(4)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (4) The Commission received comments from interested parties. It forwarded the comments to Belgium by letters dated 19 March and 22 April 2003. Belgium was given the opportunity to respond to them. The Commission received Belgium's observations by letters dated 16 and 27 May 2003.
- (5) At the request of the Commission, three meetings were held with the Belgian authorities on 24 June 2003, 23 July 2003 and 25 July 2003. These meetings were followed by the dispatch of additional information on 27 August 2003, as requested by the Commission.
- (6) On 19 December 2003 Belgium sent a letter containing additional information to the Commission. In this letter, the Belgian authorities requested another meeting with the Commission; this meeting was held on 16 January 2004.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the Treaty establishing the European Community ('TEC') have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty. The TFEU also introduced certain changes in terminology, such as replacing 'Community' with 'Union', 'common market' with 'internal market', and 'Court of First Instance' with 'General Court'. The terminology of the TFEU is used throughout this Decision.

<sup>(2)</sup> OJ C 248, 17.8.2012, p. 1.

<sup>(3)</sup> SG(2002)D/233141.

<sup>(4)</sup> OJ C 18, 25.1.2003, p. 3.

- (7) On 12 February 2004 the Commission adopted a partly negative final decision <sup>(5)</sup> (hereinafter ‘2004 decision’).
- (8) This decision was annulled by judgment of the General Court of 17 December 2008 <sup>(6)</sup> (hereinafter ‘2008 judgment’), obliging the Commission to take a new final decision on the measures in question. The General Court found that the Commission’s failure to examine together the measures granted to Ryanair by the Walloon Region (hereinafter ‘Region’) and by the Charleroi airport manager, the public sector company Brussels South Charleroi Airport (hereinafter ‘BSCA’), and to check whether, taken together, these two entities had acted as rational operators in a market economy, was vitiated by an error in law. The 2008 judgment had the effect of reopening the formal investigation procedure, which had been closed by the 2004 decision.
- (9) In a letter dated 23 July 2010, the Commission gave Belgium, and the parties having submitted comments in the formal investigation procedure initiated on 11 December 2002, the opportunity to submit further comments in the formal investigation procedure reopened following the 2008 judgment. At the request of the Commission made on 20 April 2011, the Belgian authorities sent further information in letters dated 14 July and 21 September 2011.
- (10) In a letter dated 21 March 2012, the Commission informed Belgium of its decision to extend the formal investigation procedure to other measures (hereinafter ‘2012 extension decision’).
- (11) The 2012 extension decision was published in the Official Journal of the European Union <sup>(7)</sup>. The Commission invited interested parties to submit their comments on the measures in question.
- (12) Belgium submitted its comments on 22 May 2012. The comments of 22 May 2012 did not contain the summary table in Annex I to the 2012 extension decision. This was submitted on 5 June 2012.
- (13) On 9 August 2012 the Commission requested further information on, inter alia, the costs incurred by the Société Wallonne des Aéroports (hereinafter ‘SOWAER’) due to its investments in Charleroi airport and its work for BSCA. On 3 September 2012 the Belgian authorities submitted SOWAER’s annual accounts for the years 2001 to 2004. They provided further information on 9 October and 18 October 2012.
- (14) On 26 October 2012, following a meeting, the Commission requested further information. Belgium provided this information on 9 November 2012.
- (15) The Commission received comments from the following interested parties:
- comments were received from Interested Party C on 14 September 2012,
  - comments were received from the Board of Airline Representatives on 17 September 2012, as also comments from Air France, the Association of European Airlines and the Brussels Airport Company,
  - comments were received from Brussels Airlines on 18 September 2012,
  - comments were received from BSCA on 4 October 2012,
  - Ryanair submitted its comments on 3 October 2012, making reference to the comments provided on 30 September 2011, 13 April 2012 and 4 July 2012. Ryanair submitted further comments on 10 April 2013, 20 December 2013, and 17 and 31 January 2014.
- (16) The Commission forwarded these comments to Belgium on 2 July and 29 October 2012, 3 May 2013, 22 January and 24 February 2014. Belgium was given the opportunity to respond to them. The Commission received Belgium’s observations by letters dated 17 July 2012, 14 December 2012 and 5 June 2013.

<sup>(5)</sup> 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 (OJL 137, 30.4.2004, p. 1).

<sup>(6)</sup> Judgment of 17 December 2008 in Case T-196/04 *Ryanair Ltd v Commission of the European Communities* [2008] ECR II-3646, ECLI:EU:T:2008:585.

<sup>(7)</sup> See footnote 2.

- (17) On 14 January 2014 the Commission requested further information from Belgium, particularly with regard to applying the market economy operator test to the measures granted to BSCA. Belgium responded in letters sent on 7 and 24 February 2014. However, as these responses were incomplete, the Commission sent a reminder to Belgium on 10 March 2014, indicating the missing responses and asking Belgium to answer accordingly. Further information was submitted by Belgium on 24 March 2014.
- (18) On 7 February 2014 the Commission requested further information from Belgium, particularly with regard to the measures granted to Ryanair. On 18 and 24 March 2014 Belgium provided some answers to the questions asked.
- (19) Also on 7 February 2014, a meeting was held at Charleroi airport between representatives of the Walloon Region, SOWAER and BSCA, on the one hand, and the Commission services on the other.
- (20) On 25 February and 11 March 2014, the Commission asked Belgium for further information, including clarifications on the information provided by Belgium on 7 and 24 February 2014 concerning the measures granted by the Region and SOWAER to BSCA. Belgium responded in letters sent on 25 March and 4 April 2014 (annexes sent on 9 April 2014).
- (21) On 17 and 19 March 2014, following the adoption of the Guidelines on State aid to airports and airlines (hereinafter 'aviation guidelines' <sup>(8)</sup>), the Commission called on Belgium and the interested parties to submit their comments on the application of the aviation guidelines to this case. In addition, on 15 April 2014 a notice was published inviting Member States and interested parties to submit their comments, including in this case, on the entry into force of the EU Guidelines on State aid to airports and airlines. The Commission received comments from the Brussels Airport Company, Brussels Airlines, the Board of Airline Representatives, Air France, and the Association for Transport and Environment. It forwarded these comments to Belgium on 26 May 2014. The latter submitted its comments on 26 June 2014.
- (22) A further meeting was held on 11 April 2014 between the Commission services on the one hand and Belgium, BSCA and SOWAER on the other hand. Following this meeting, Belgium submitted documents together with a note dated 5 May 2014 on the public service tasks entrusted to BSCA.
- (23) On 5 May 2014 the Commission sent a further request for information to Belgium, to which the latter responded on 13 May 2014.
- (24) In a letter of 7 May 2014, Belgium accepted that, in this case and given the undertaking made by the Commission services to provide it as soon as possible with a Dutch translation of the decision, the Commission could exceptionally notify the decision in French under Article 297 TFEU. Belgium accepted that only the French version of the decision would be authentic and that the decision would take effect on its notification in French.
- (25) On 2 July 2014 Brussels Airlines submitted an updated version of the comments that it had submitted on 25 September 2013 following the publication of the draft guidelines on State aid to airports and airlines. These comments were forwarded to Belgium on 4 July 2014 and the latter submitted its comments on 18 July 2014.

## 2. BACKGROUND TO THE MEASURES INVESTIGATED

### 2.1. Creation of BSCA and SOWAER — Background to the commitments made by the Walloon Region and SOWAER concerning Brussels South Charleroi Airport

#### 2.1.1. Institutional reform of 1980

- (26) Following the institutional reform law of 8 August 1980, the Belgian regions were given the necessary powers to equip and operate public airports and aerodromes situated within their territory, except for Brussels National Airport, over which the Belgian Federal State retained such powers.

<sup>(8)</sup> OJ C 99, 4.4.2014, p. 3.

- (27) According to Belgium <sup>(9)</sup>, the Walloon Government therefore decided to take advantage of the economic potential offered by such transport infrastructure and gradually make the necessary investments. On 2 May 1989 the Walloon Government ratified a Ministry of Transport note according to which ‘The main aim of the Executive is therefore to do everything to ensure that Walloon airports and aerodromes reach their breakeven point quickly. To achieve this goal, several actions have to be carried out together, especially in relation to infrastructure.’

#### 2.1.2. *Creation of BSCA and Region/BSCA agreement of 1991*

- (28) In 1991 the Region set up BSCA to manage Brussels South Charleroi Airport (hereinafter ‘Charleroi airport’).
- (29) Under an agreement dated 9 July 1991 (hereinafter ‘Region/BSCA agreement’), the Region granted BSCA for a period of 50 years:
- a service concession for the commercial management of the public property of Charleroi airport,
  - a property concession covering the permanent and exclusive use of the airport zone.
- (30) The Region/BSCA agreement — including the schedule of conditions annexed to the agreement (hereinafter ‘schedule of conditions’) — determines how the costs are shared between the Region and BSCA:
- (a) With regard to the service concession, the Region/BSCA agreement <sup>(10)</sup> provides that BSCA ‘shall be responsible for the cost’ arising from the obligations associated with the technical and commercial management of the airport zone. However, under Article 25 of the schedule of conditions, the Region will cover ‘the cost of fire <sup>(11)</sup> and maintenance <sup>(12)</sup> services’ until 1 January 1997.
- (b) With regard to the property concession, the agreement provides that the Region is responsible for preparing the concession area, as well as for any development, installation and equipment work in this area <sup>(13)</sup>, whilst BSCA is responsible for cleaning and maintaining the concession area ... <sup>(14)</sup>. The schedule of conditions <sup>(15)</sup> also provides for an annual or multiannual equipment programme, proposed by BSCA and decided in agreement with the Region, that will be financed by the concession authority.
- (31) As regards fees, the agreement <sup>(16)</sup> provides that:
- BSCA is authorised to collect air traffic fees as well as fees corresponding to any services provided,
  - as consideration for the concession, BSCA pays the Region an annual fee of 35 % of the airport charges collected by BSCA in the previous year. This fee is allocated to a fund for the financial resolution of any environmental problems caused by the airport’s operation.

#### 2.1.3. *Measures relating to payment of the ‘fire-maintenance’ subsidy by the Region to BSCA from 1997 to 2002*

- (32) Under Amendment No 2 to the schedule of conditions, payment of the ‘fire and maintenance services cost’ by the Region was extended until 1 January 2000.

<sup>(9)</sup> Note from Belgium of 24 February 2014.

<sup>(10)</sup> Article 3.2 of the Region/BSCA agreement.

<sup>(11)</sup> Under Article 12 of the schedule of conditions, the fire service is defined by reference to the standards of the International Civil Aviation Organisation.

<sup>(12)</sup> Under Articles 12 and 19 of the schedule of conditions, the maintenance service is defined as ‘technical maintenance services for buildings, runways, surrounding areas, vehicle fleet, etc.’, and as ‘maintenance of land, buildings and building facilities, and equipment forming part of the concession or placed at the disposal of the concession, such that they are always fit for their intended purpose’.

<sup>(13)</sup> Article 10.1 of the Region/BSCA agreement.

<sup>(14)</sup> Under Article 13.2 of the Region/BSCA agreement, BSCA is responsible for cleaning and maintaining the concession area. It must also carry out all major or minor repairs required. However, Amendment No 1 to the agreement limits BSCA’s responsibility solely to those major repairs caused by a lack of urgent maintenance.

<sup>(15)</sup> Article 22 of the schedule of conditions annexed to the Region/BSCA agreement.

<sup>(16)</sup> Article 18 of the Region/BSCA agreement.

- (33) The Region also paid the fire and maintenance services cost for the years 2000 <sup>(17)</sup> and 2001 <sup>(18)</sup>.
- (34) As regards the year 2002, Belgium states that, although the Region had always planned to continue granting compensation for these costs, the creation of SOWAER and the introduction of a new legal framework led to a delay in formalising the extension of this compensation. According to Belgium, the continuation of this payment was confirmed in a letter of 5 July 2001 sent by BSCA to the Walloon transport and facilities administration, detailing the main lines of BSCA's 2002 budget covering the costs of these services, following a telephone conversation during which the payment of these services by the Region for 2002 had apparently been confirmed.

#### 2.1.4. Formulation of the investment plan for Charleroi airport in 1999-2000

- (35) At the end of the 1990s, a number of studies on the options for developing Charleroi airport were carried out by external consultants. Thus the Region asked Tractebel to conduct a strategic development study on Charleroi airport. This study was completed in April 2000 <sup>(19)</sup>. At the same time, a study carried out by Roland Berger International Management Consultant in July 2000 examined the development of an airport strategy for Wallonia <sup>(20)</sup>. Finally, as part of the negotiations with the Region at the beginning of 2001 with a view to possibly participating in the capital of BSCA, Grands Travaux de Marseille ordered a study into the airport's development potential <sup>(21)</sup>.
- (36) According to Belgium, even before these studies and due to technical constraints associated with the existing infrastructure <sup>(22)</sup>, it was clear that a new terminal needed to be built in the northern part of the site. Land had already been compulsorily purchased by the intercommunal body Igretec, which was responsible for creating the 'Aéropôle' airport business park. The Region itself compulsorily purchased further land during the 1990s, and in 1999 Igretec transferred to the Region the land that it had purchased. It was on this land that the new passenger terminal, which is now operational, was built.
- (37) During a session on 20 July 2000, the Region approved the outlines of a framework agreement on a multiannual investment programme for Charleroi airport, referring in particular to the 'concept of a new passenger terminal', with a total budget of EUR 113,74 million.

Table 1

#### Infrastructure investment planned by the framework agreement of 20 July 2000

	2000	2001	2002	2003	2004	2005	2006	2007	Total BEF	Total EUR
Land	145					38			183	4,54
Infrastructure	340	613	601	1 044	412	100	923	372	4 405	109,20

<sup>(17)</sup> Under the Decree of 16 December 1999 containing the general expenditure budget of the Walloon Region for the budget year 2000, and the Order of 27 September 2000 of the Walloon Government granting an operating subsidy to BSCA intended to cover the costs of the fire and maintenance services at Charleroi airport for the year 2000.

<sup>(18)</sup> Under the Decree of 14 December 2000 containing the general expenditure budget of the Walloon Region for the budget year 2001, and the Order of 4 October 2001 of the Walloon Government granting an operating subsidy to BSCA intended to cover the costs of the fire and maintenance services at Charleroi airport for the year 2001.

<sup>(19)</sup> This study concerned the development plan for Brussels South Charleroi Airport over the medium term (5 years) and long term (20 years). It made reference to the project for a new north terminal and contained a precise description of the proposed investments.

<sup>(20)</sup> This study highlighted the potential niche markets for Charleroi airport, including the possibility of a low-cost airline base, with Ryanair being mentioned. It calculated the investments to be made in order to develop the airport: runway system, compulsory purchases, drainage and other networks, excavation and backfill work, new terminal, service car park and private access to the airport, public road access and other aspects (fuel, control tower, vehicle fleet, etc.).

<sup>(21)</sup> This study confirmed the development segment for Charleroi airport, i.e. low-cost, regional and charter airlines. It confirmed that Ryanair represented an opportunity for the rapid development of traffic in the short term, with five aircraft based at the airport. It also analysed the technical conditions for the arrival of the easyJet and Go airlines, as well as regional and charter airlines.

<sup>(22)</sup> These technical constraints were linked to the need for a Category III ILS (Instrument Landing System) to allow aircraft to land in poor visibility. This system is vital for handling airlines with aircraft based at the airport and also scheduled airlines. At the time, the initial version of the 'Aéropôle' airport business park project extended much further to the south, which would have made it impossible to develop any airport infrastructures.

- (38) On 8 November 2000 the Region adopted a decision implementing its decision of 20 July 2000, amending the assumptions of the multiannual investment programme and increasing the total investment cost to EUR 121 million. However, according to the note attached to this decision, 'investments in the new terminal and its associated infrastructure will only be made as and when specific needs arise. The funding of these investments must be examined as the work is carried out'. The note sets out the calculation, at this stage, of the costs of a new terminal: 'if actually required by the airport ..., the construction of the new terminal and its associated infrastructure could result in an investment in the order of MBEF 1 514', i.e. approximately EUR 37,5 million, without, however, the implementation timetable of this sum being detailed (see Table 9). The arrangements for financing the Charleroi airport investment programme were also not detailed at this stage <sup>(23)</sup>.

Table 2

**Infrastructure investment planned by the note attached to the decision of 8 November 2000**

								(million)
	2000	2001	2002	2003	2004	Post-2004	Total BEF	Total EUR
Total A	93	160	15		38		306	7,59
Total B	12	729	709	548	319	743	3 060	75,86
Terminal	0	0	1 514				1 514	37,53
Total	105	889	2 238	548	357	743	4 880	120,97

A: Direct financing by the Region; B: Investment grants.

2.1.5. Creation of SOWAER on 1 July 2001

- (39) On 1 July 2001 the Region formed a company under its exclusive control, the Société Wallonne des Aéroports (hereinafter 'SOWAER'), to develop the Region's airport infrastructure, place this infrastructure at the disposal of the airport management companies in question, and keep it operational by covering the costs of major repairs and maintenance.
- (40) Beforehand, in a decision of 23 May 2001 concerning the 'establishment of a financial mechanism and [the] creation of a specialised company', the Region had approved the articles of association and financial plan of SOWAER for the years 2001 to 2004 <sup>(24)</sup>, including a total investment amount for Charleroi airport of MBEF 3 753, i.e. approximately EUR 93 million, of which EUR 28 million was intended for the new terminal (see Table 3).

Table 3

**Infrastructure investment planned by the SOWAER financial plan approved by the Region on 23 May 2001**

							(million)
	2001	2002	2003	2004	Total BEF	Total EUR	
Land	253	15	0	38	306	7,59	
Infrastructure	741	709	548	319	2 317	57,44	

<sup>(23)</sup> A financial contribution from the Société Régionale Wallonne du Transport (SRWT) was envisaged at the time, but abandoned in the end. The aforementioned note therefore indicates that 'the existing texts (concession agreement, schedule of conditions and related protocols) will therefore need to be adapted in line with the new arrangements to be made for financing the investments'.

<sup>(24)</sup> Sent as Annex 19 to the letter from Belgium of 26 August 2003.

	(million)					
	2001	2002	2003	2004	Total BEF	Total EUR
Terminal	10	500	500	120	1 130	28,01
Total	1 004	1 224	1 048	477	3 753	93,03

- (41) A more detailed financial plan containing the latest versions of the Liège and Charleroi investment programmes was presented to SOWAER's board of directors in March 2002 <sup>(25)</sup>. This plan was subsequently updated at regular intervals (around once a year).
- (42) The SOWAER financial plan approved on 23 May 2001 also capped the contribution to the environment fund at BEF 75 million (EUR 1,86 million) for the year 2002. This financial plan also included the balance of the environment fund within SOWAER's revenue, given its delegated tasks.

2.1.6. *SOWAER/BSCA agreement of 15 April 2002 and Amendment No 3 of 29 March 2002 to the Region/BSCA agreement*

- (43) On 15 April 2002 SOWAER, which on 29 March 2002 had taken over the property concession granted to BSCA in 1991, concluded a property sub-concession agreement with BSCA (hereinafter '2002 SOWAER/BSCA agreement') under which:
- (a) BSCA can exclusively use the airport zone for operating purposes until 2040. Within this airport zone, SOWAER undertakes to conduct an investment programme (hereinafter 'investment programme'), as detailed in the SOWAER/BSCA agreement, that is identical to the programme mentioned in recital 40 above. SOWAER also undertakes to carry out any major repairs and maintenance on the land, buildings and infrastructure.
- (b) In return for the airport zone being placed at its disposal and for the investment programme and major repairs and maintenance, BSCA must pay a concession fee consisting of:
- an annual variable part equal to 35 % of the airport charges, subject to a cap that will change over time (hereinafter 'capped variable fee'),
  - an annual fixed fee, which will also change over time (hereinafter 'fixed fee').
- (44) Almost at the same time (29 March 2002), the Region and BSCA concluded an amendment to the Region/BSCA agreement. Under this Amendment No 3 to the Region/BSCA agreement <sup>(26)</sup>, the Region undertook to pay BSCA:
- a subsidy enabling the Region to assume the costs of the airport land, buildings and infrastructure being placed at the disposal of BSCA by SOWAER. This subsidy corresponded to the fixed fee mentioned in recital 43, meaning that BSCA ultimately bore only the capped variable fee,
  - a subsidy reimbursing the costs (expenses and investments) incurred by BSCA for the 'fire and maintenance' services. Amendment No 3 also amended Article 25 of the schedule of conditions, in particular providing for the inclusion of investment costs and/or investment depreciation costs in the operating account for the fire and maintenance services cost.

2.1.7. *Revision of the investment programme on 3 April 2003*

- (45) On 3 April 2003 the Walloon Government officially noted a revision to the investment programme. This revision specifically amended the capacity of the new terminal in line with the level decided in the initial version of the investment programme. Instead of a capacity of two million passengers, it was now planned to build

<sup>(25)</sup> Sent as Annex 2 to the letter from Belgium of 24 February 2014.

<sup>(26)</sup> Article 3.2.2 of Amendment No 3 of 29 March 2002 to the Region/BSCA agreement.

a terminal with a capacity of three million passengers, together with a larger car park than the one originally planned. This revision involved an additional investment of EUR 33 million.

2.1.8. *SOWAER/BSCA agreement of 4 April 2006 and Amendment No 5 of 10 March 2006 to the Region/BSCA agreement*

- (46) The 2002 SOWAER/BSCA agreement was replaced on 4 April 2006 by a new agreement (hereinafter '2006 SOWAER/BSCA agreement'). The latter still contained most of the provisions of the 2002 SOWAER/BSCA agreement, but clarified the content of certain services provided by SOWAER to BSCA in addition to the services defined by the 2002 SOWAER/BSCA agreement. It also amended the terms for calculating the concession fees payable by BSCA to SOWAER.
- (47) The Region/BSCA agreement was amended at the same time through Amendment No 5 of 10 March 2006. Article 3.2.2 of the Region/BSCA agreement subsequently provided that:

- the costs incurred by BSCA for the fire protection and ground traffic and airport site safety services would be compensated by the Region,
- this compensation would be capped. The cap, set at EUR 5 774 000 for 2006, would be annually adjusted.

- (48) The Amendment also stipulated that the amount of the financial compensation had to be revised before July 2009.

2.1.9. *Amendment No 6 of 15 January 2008 to the Region/BSCA agreement*

- (49) The Region/BSCA agreement was amended again on 15 January 2008 (Amendment No 6). Under this amendment:
- the Region entrusts BSCA with, in addition to the fire protection and ground traffic and airport site safety services, the flight tracking and recording, provisional flight planning<sup>(27)</sup>, marshalling<sup>(28)</sup> and security<sup>(29)</sup> services (these tasks were previously carried out directly by the Region<sup>(30)</sup>),
  - the Region's subsidy now covers not only BSCA's costs for the fire protection and ground traffic and airport site safety services (with the cap being maintained), but also for those services associated with security, flight tracking and recording, provisional flight planning and marshalling.

## 2.2. Development of Charleroi airport

- (50) Having previously had very few regular users, on 1 May 1997 Charleroi airport welcomed Ryanair, which initially operated one route between Dublin and Charleroi. In April 2001 Ryanair opened its first continental base at Charleroi, initially with two aircraft and some new destinations (Shannon, Glasgow, Pisa, Venice and Carcassonne).
- (51) From 2000 to 2013, traffic at Charleroi increased from around 200 000 passengers to nearly 7 million.

<sup>(27)</sup> This task covers (i) the collection of all information on aircraft movements; (ii) the collection of various aircraft documents; and (iii) the planning and management of aircraft parking stands.

<sup>(28)</sup> Guidance of aircraft to the parking stand.

<sup>(29)</sup> The security services include 'screening, remote surveillance, security rounds and patrols, access control and issue of visitor badges'. The security tasks have been delegated to BSCA Security, a company that is 51 % owned by the Region and 49 % by BSCA.

<sup>(30)</sup> The safety and security tasks within Charleroi airport were entrusted to BSCA under the Decree of 19 December 2007 amending the Decree of 23 June 1994 on the creation and operation of airports and aerodromes located in the Walloon Region. Also under this Decree, the security tasks were delegated by BSCA to BSCA Security, a public limited company created for this purpose and owned 49 % by BSCA and 51 % by the Region.



Table 4

**Annual traffic statistics for Charleroi airport**

Year	Passengers	Year	Passengers
2000	255 317	2007	2 458 980
2001	773 431	2008	2 957 026
2002	1 271 596	2009	3 937 187
2003	1 804 287	2010	5 195 372
2004	2 034 140	2011	5 901 007
2005	1 873 651	2012	6 156 427
2006	2 166 915	2013	6 786 979

- (52) Ryanair has always accounted for over [70-80] (\*) % of the traffic at Charleroi airport.

**2.3. Status and share ownership of BSCA**

- (53) The share ownership of BSCA has been remodelled on numerous occasions since 2001. At the end of 2000, BSCA was over 80 % owned by Sambrinvest <sup>(31)</sup> and, to a lesser extent, by Cockerill Sambre, Igretec <sup>(32)</sup> and a few other shareholders.
- (54) The first alteration stemmed from a decision of the Walloon Government of 8 February 2001. Through this decision, the government ordered Sogepa <sup>(33)</sup>, a company controlled by the Region, to purchase 2 680 shares in BSCA (i.e. 43,79 % of the capital) held by Sambrinvest, the own shares held by BSCA, and the shares that the 'private shareholders' wanted to sell. In the same decision, the government also ordered the minister responsible for airport management to 'prepare a shareholder agreement binding SOWAER, Sambrinvest and possibly Igretec, which will arrange between them the coordination of powers within BSCA, both in the general meeting and on the board of directors and the executive committee.'
- (55) The Region also decided to increase the capital of BSCA at the same time: the principle of such a recapitalisation appeared in May 2001 in a Walloon Government decision <sup>(34)</sup>. This capital increase, totalling EUR 3 941 300, was carried out on 3 December 2002. SOWAER contributed the cash sum of EUR 3 808 660 in return for 49,23 % of the shares in BSCA.

(\*) Information covered by professional secrecy

<sup>(31)</sup> Sambrinvest is a venture capitalist active in the Charleroi-Thuin region. Its object is to support and develop SMEs. Up to 2012, Sambrinvest was 50 % owned by the Walloon Region.

<sup>(32)</sup> Igretec is the Intercommunal Body for the Management and Conduct of Technical and Economic Studies (*Intercommunale pour la Gestion et la Réalisation d'Etudes Techniques et Economiques*). It is participating in the development and restructuring of Charleroi through the development of the airport, the neighbouring airport business park, and industrial areas. Igretec involves 68 communes, mainly in the province of Hainaut. It is chaired by the Prime Minister of the Walloon Region.

<sup>(33)</sup> The Société Wallonne de Gestion et de Participation (Sogepa) is the preferred financial arm of the Walloon Region for assistance given to restructuring businesses. It acts through either loans or capital, and manages the holdings, obligations, advances or interests of the Walloon Region or itself in such companies, through tasks delegated by the government.

<sup>(34)</sup> Decision of 23 May 2001 entitled 'Development of airports, establishment of a financial mechanism and creation of a specialised company'. It was through this decision that the Walloon Government approved SOWAER's articles of association, financial plan, budget forecasts and management structure. It invited Sogepa to form SOWAER and stipulated that 'the financing of environmental measures, excluding insulation, shall be examined by SOWAER in consultation with the concession-holders'.

Table 5

**Change in the composition of the BSCA share ownership <sup>(1)</sup>**

(%)

Year	BSCA	SOWAER	Sogepa	Sambrinvest	Igretec	Belgian airport	Other
2000	6,21	—	0,00	82,84	2,29	0,00	8,66
2001	0,00	—	55,07	39,05	2,29	0,00	3,59
2002	0,00	49,23	27,01	19,16	2,32	0,00	2,28
2003	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2004	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2005	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2006	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2007	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2008	0,00	48,89	27,65	19,16	2,32	0,00	1,99
2009	0,00	22,56	27,65	19,16	2,32	27,65	0,67
2010	0,00	22,56	27,65	19,16	2,32	27,65	0,67
2011	0,00	22,56	27,65	19,16	2,32	27,65	0,67
2012	0,00	22,56	27,65	19,16	2,32	27,65	0,67
2013	0,00	22,56	27,65	19,16	2,32	27,65	0,67

These figures are valid as at 31 December of the year indicated.

<sup>(1)</sup> Letters from the Belgian authorities of 21 September 2011 and 6 February 2014.

- (56) From 2002 to 2008, SOWAER managed around 49 % of BSCA's capital. According to the Belgian authorities, this management was carried out on behalf of the Walloon Government.
- (57) In 2009 BSCA opened its capital to a private partner. The consortium Belgian Airports (hereinafter 'Belgian Airports'), consisting of the Italian group SAVE and the Belgian company Holding Communal S.A. <sup>(35)</sup>, purchased 27,65 % of the shares in the airport manager. Belgian Airports has a right of veto over certain important decisions, including commercial agreements with Ryanair.

### 3. DESCRIPTION OF THE MEASURES

- (58) Two types of measure are covered by this decision:
- the measures granted by the Region and SOWAER to BSCA (Section 3.1),
  - the measures granted by the Region, SOWAER and BSCA to Ryanair (Section 3.2).

<sup>(35)</sup> This company was liquidated in 2011.

### 3.1. Measures granted by the Region and SOWAER to BSCA

(59) The measures granted to BSCA that are covered by the procedure are as follows:

- under the SOWAER/BSCA agreement and investment decisions, the land and infrastructure of Charleroi airport placed at the disposal of BSCA and the implementation of an investment programme intended to modernise and extend said infrastructure, and also the provision of certain services by SOWAER, including major repairs to the infrastructure, in return for a fee paid by BSCA (Section 3.1.1);
- under the Region/BSCA agreement, the granting by the Region of a subsidy for certain services associated with the airport activities (Section 3.1.2);
- the subscription by SOWAER on 3 December 2002 of a capital increase in BSCA (Section 3.1.3).

3.1.1. *Land and infrastructure of Charleroi airport placed at the disposal of BSCA, including infrastructure constructed under the investment programme, and provision of certain services, particularly major repairs, in return for a concession fee*

3.1.1.1. *Land and infrastructure of Charleroi airport placed at the disposal of BSCA, including infrastructure constructed under the investment programme, and provision of certain services, particularly major repairs*

(60) Under the 2002 SOWAER/BSCA agreement, SOWAER:

- grants BSCA a property sub-concession covering the permanent and exclusive use of the airport zone for operating purposes until 2040,
- provides BSCA with new investment. The investment programme, which particularly includes the construction of a new terminal, lengthening of the runway, and construction of a taxiway and parking stand for additional aircraft and navigational aid equipment, totals EUR 93 million <sup>(36)</sup>,

Table 6

#### Investment programme annexed to the 2002 SOWAER/BSCA agreement

	(million)					
	2001	2002	2003	2004	Total BEF	Total EUR
Land	253	15	0	38	306	7,59
Infrastructure	741	709	548	319	2 317	57,44
Terminal	10	500	500	120	1 130	28,01
Total	1 004	1 224	1 048	477	3 753	93,03

<sup>(36)</sup> This programme is identical to the programme mentioned in recital 41.

- carries out any major repairs and maintenance on the airport land, buildings and infrastructure within the concession area.
- (61) The investment programme has been annually revised. These revisions have included both updates connected with additional costs not anticipated in April 2002 and decisions on new investments. In particular, on 3 April 2003 the Walloon Government officially noted a revision to the investment programme approved by SOWAER's board of directors. This revision <sup>(37)</sup> specifically provided for a new terminal with a larger capacity than that originally envisaged (3 million passengers instead of 2 million) and a larger car park than originally planned. It involved an additional investment of EUR 33 million.
- (62) The investment programme was annually revised until 2009 <sup>(38)</sup>. The total cost of SOWAER's investment programme for Charleroi for 2002-2010, as revised during its last update by SOWAER's board of directors in 2009, is EUR 219 103 435 <sup>(39)</sup>. Although this investment programme has been referred to as the 'investment programme for 2002-2010', the expenditure was planned until 2017.

Table 7

**Total cost of SOWAER's investment programme for Charleroi, as revised by SOWAER's board of directors in 2009**

(EUR)	
Type of investment	
Traditional investments	[180 000 000 - 210 000 000]
Of which land	[4 000 000 - 5 000 000]
Of which aircraft parking stand	[36 000 000 - 40 000 000]
Of which new terminal	[80 000 000 - 100 000 000]
Of which control tower	[10 000 000 - 13 000 000]
Previous commitments	[1 000 000 - 2 000 000]
Income generating investments	[3 000 000 - 4 000 000]
Safety - Security - Environment	[8 000 000 - 11 000 000]
Extraordinary maintenance	[4 000 000 - 6 000 000]
<b>Total</b>	<b>219 103 435</b>

Source: Annex 7 to the letter from the Belgian authorities of 21 September 2011.

<sup>(37)</sup> According to the SOWAER note of 3 April 2003 to the Walloon Government, due to this revision, the investment programme increased from EUR 93 million to EUR 150,8 million, i.e. an increase of EUR 57,8 million, of which:

- (a) EUR 33 million was for the extension of the passenger terminal beyond that originally planned;
- (b) EUR 3 million was for the second phase of construction of the control tower;
- (c) EUR 2 million was for the security programme;
- (d) EUR 1,6 million was for SOWAER to cover the budget liabilities;
- (e) EUR 1,5 million was due to recosting the purchases of land around the airport;
- (f) EUR 12 million was to make provision for any deductions and adjustments;
- (g) EUR 4,8 million was described as a 'variation'.

<sup>(38)</sup> See note from Belgium of 6 February 2014.

<sup>(39)</sup> This amount excludes the compulsory additional investment programme (which is not examined in this decision) and the investments financed solely by BSCA.

- (63) In addition to the major repairs and maintenance, under the 2006 SOWAER/BSCA agreement, SOWAER undertook to provide additional services on behalf of BSCA, including consultancy services of all kinds (legal, environmental, financial, administrative, etc.), analysis and recommendations on noise pollution associated with the airport, and creation and update of a Geographical Information System (GIS).

3.1.1.2. *Concession fee payable by BSCA to SOWAER*

- (64) In return for the items described in section 3.1.1.1, BSCA pays SOWAER a concession fee.

(i) Contractual provisions

(a) Period from 15 April 2002 to 31 December 2005

- (65) Under the 2002 SOWAER/BSCA agreement, BSCA was to pay the Region a concession fee consisting of:

— a variable annual amount (hereinafter ‘capped variable fee’), equal to 35 % of the airport charges collected during the current year, with a cap set at EUR 883 689 in 2002, which was increased by 2 % per year from 2003 to 2006. This cap was increased to EUR 2 650 000 in 2007, with a 2 % per year increase thereafter and a review in 2015 <sup>(40)</sup>. This fee is allocated to a fund for the financial resolution of any environmental problems caused by the airport’s operation,

— a fixed annual amount (hereinafter ‘fixed fee’), set at EUR 9 371 000 for 2002 and indexed thereafter. This amount was increased to EUR 13 525 000 from 2010 and indexed thereafter <sup>(41)</sup>.

- (66) However, under the Region/BSCA concession agreement, as amended on 29 March 2002, BSCA benefited from a subsidy from the Region allowing it to ‘perform the public service tasks forming part of the operation of Charleroi airport, namely the costs associated with using the airport land, buildings and infrastructure placed at its disposal by SOWAER’. This subsidy was equal to the fixed fee, so that only the capped variable fee was actually paid by BSCA. Moreover, under the 2002 SOWAER/BSCA agreement, BSCA was exempt from paying the fixed fee if the subsidy from the Region was not received <sup>(42)</sup>.

(b) Period from 1 January 2006

- (67) The 2002 SOWAER/BSCA agreement was revised by the 2006 SOWAER/BSCA agreement, applicable from 1 January 2006. Under this agreement <sup>(43)</sup>, BSCA pays SOWAER:

— a variable annual amount, set at EUR 1.5 per passenger and EUR 8 per tonne of freight, indexed to the Belgian consumer price index <sup>(44)</sup>. This variable amount was contractually capped at EUR 956 533 <sup>(45)</sup> for 2006, and then at EUR 2 651 067 from 2007. Since 2008 it has been increased by 2 % per year, compounded annually,

— an annual fixed amount of EUR 10 094 000, plus 2 % per year.

<sup>(40)</sup> Article 11 of the 2002 SOWAER/BSCA agreement.

<sup>(41)</sup> *Idem*.

<sup>(42)</sup> Article 11.3 of the 2002 SOWAER/BSCA agreement stipulates that ‘BSCA shall be exempt from paying the fixed fee in the amount of the subsidy from the Walloon Region that it has not received or will no longer receive for a reason that is not attributable to BSCA or that is outside its control’.

<sup>(43)</sup> Article 12 of the 2006 SOWAER/BSCA agreement.

<sup>(44)</sup> The indexation is annual from 2007. It is calculated using the Belgian consumer price index.

<sup>(45)</sup> The cap of EUR 956 533 corresponds to the cap of EUR 883 689 (stipulated in the 2002 SOWAER/BSCA agreement) plus 2 % per year.

- (68) At the same time, the service concession agreement between the Region and BSCA of 10 March 2006 amends the terms of the Region's subsidy intended to cover the fixed part of the fees payable by BSCA to SOWAER <sup>(46)</sup> and includes the exemption clause referred to in recital 66 above <sup>(47)</sup>.
- (69) Lastly, through Amendment No 1 of 27 May 2009 to the 2006 SOWAER/BSCA agreement, BSCA and SOWAER agreed that an additional annual amount of EUR [...] per additional square metre <sup>(48)</sup> would be paid by BSCA to SOWAER from 2009 with a view to the acquisition of new land by SOWAER and the correlative extension of the scope of the service agreement. These additional sums amounted to EUR 1 206 in 2010, EUR 1 230 in 2011, EUR 1 255 in 2012 and EUR 1 280 in 2013 <sup>(49)</sup>.
- (ii) Amounts of the fees paid by BSCA to SOWAER
- (70) In the light of these elements, the amounts of the fees actually paid by BSCA to SOWAER are summarised in Table 8, taking into account the compensation paid by the Region to BSCA for transfer to SOWAER.

Table 8

Fees paid by BSCA to SOWAER <sup>(1)</sup>

(EUR)

Year	Fixed part	Variable part	Total fees	Net fees
2002	9 371 000	883 689	10 254 689	883 689
2003	9 558 420	901 363	10 459 783	901 363
2004	9 749 588	919 390	10 668 978	919 390
2005	9 944 580	937 778	10 882 358	937 778
2006	10 094 000	956 532	11 050 532	956 532
2007	10 262 000	2 651 067	12 913 067	2 651 067
2008	10 478 000	2 704 088	13 182 088	2 704 088
2009	10 150 000	2 758 170	12 908 761	2 758 761
2010	10 150 000	2 813 333	12 964 539	2 814 539
2011	10 353 000	2 869 600	13 223 830	2 870 830
2012	10 353 000	2 926 992	13 281 247	2 928 247
2013	10 353 000	2 985 532	13 339 812	2 986 812

In addition to the fixed and variable parts, the total fees include the additional amount associated with the extension of the scope of the service agreement from 2009, as referred to in recital 69. The net fees take into account the subsidy from the Region to BSCA.

<sup>(1)</sup> Annex 2 to the letter from Belgium of 24 February 2014.

<sup>(46)</sup> According to this amendment, the Region's financial compensation to BSCA is no longer intended to cover solely the 'costs associated with using the airport land, buildings and infrastructure placed at its disposal by SOWAER in order to provide the fire protection and ground traffic and airport site safety services'. Amounts are therefore included in the Region's budget under the heading of 'BSCA subsidy allowing it to perform the public service tasks forming part of the operation of airports'.

<sup>(47)</sup> Article 12.3 of the 2006 SOWAER/BSCA agreement stipulates that 'BSCA shall be exempt from paying the price for the services in the amount of the financial compensation from the Walloon Region that it has not received or will no longer receive for a reason that is not attributable to BSCA or that is outside its control'.

<sup>(48)</sup> This amount is indexed at 2 % per year. It applies to the surface areas included within the sub-concession from the date of their acquisition by SOWAER.

<sup>(49)</sup> Annex 2 to the letter from Belgium of 24 February 2014.

3.1.2. *Subsidy paid by the Region for certain services associated with airport activities*

3.1.2.1. *Contractual provisions*

(a) Period from 29 March 2002 to 31 December 2005

(71) Amendment No 3 of 29 March 2002 to the Region/BSCA agreement amended Article 3.2 of this agreement and provided that the Walloon Region would reimburse the costs inherent in the fire and maintenance services:

— the fire service is defined by reference to the standards of the International Civil Aviation Organisation <sup>(50)</sup>,

— the maintenance service is defined as 'technical maintenance services for buildings, runways, surrounding areas, vehicle fleet, etc.' <sup>(51)</sup>, and as 'maintenance of land, buildings and building facilities, and equipment forming part of the concession or placed at the disposal of the concession, such that they are always fit for their intended purpose' <sup>(52)</sup>.

(72) Amendment No 3 of 29 March 2002 also amended Article 25 of the schedule of conditions and provided that the concession-holder would present the concession authority with the budget for the fire and maintenance services and that it would keep a separate operating account that could at any time be analysed and checked by the concession authority.

'This operating account shall particularly include:

— the full cost of the staff responsible for fire protection and maintenance of the airport site and of training for these staff, including employer costs and associated provisions (new activities),

— the costs of various goods and services (including any subcontracting),

— the investment costs and/or investment depreciation costs <sup>(53)</sup>,

— any costs of subcontracting the fire protection and maintenance'.

(b) Period from 10 March 2006 to 31 December 2007

(73) Amendment No 5 of 10 March 2006 to the Region/BSCA agreement amended Article 3.2.2 of this agreement as follows: 'The following shall be annually included in the Walloon Region's budget: ... the financial compensation granted by the Walloon Region to BSCA for the costs of providing the fire protection and ground traffic and airport site safety services, in accordance with the conditions laid down by Article 25 of the schedule of conditions annexed to this agreement'.

(74) Amendment No 5 also amended Article 25 of the schedule of conditions. The amended Article 25 provides that: 'the ground traffic and airport site safety services include routine maintenance of the airport site, technical maintenance services for buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance and any other services ensuring the safety of ground traffic, airport site and infrastructures, except for commercial areas of the airport zone'.

(75) Under Article 25 of the schedule of conditions, the financial compensation was capped at EUR 5 774 000 for 2006. This cap was annually indexed until 31 December 2009. The amount of the financial compensation was to be revised no later than the second half of 2009.

<sup>(50)</sup> Article 12 of the schedule of conditions.

<sup>(51)</sup> *Idem*.

<sup>(52)</sup> Article 19 of the schedule of conditions.

<sup>(53)</sup> Investment costs and/or investment depreciation costs were not mentioned in the earlier texts.

(76) Moreover, Article 25.7 of the schedule of conditions, introduced by Amendment No 5 of 10 March 2006, provides that the amount of the compensation may not exceed the actual costs incurred by BSCA and that any overcompensation of the costs will result in budgetary compensation through the budget entry for the following year.

(c) Period from 1 January 2008

(77) Amendment No 6 of 15 January 2008 to the Region/BSCA agreement amended Article 25.1 of the schedule of conditions and added flight tracking and recording, provisional flight planning, marshalling and security to the services already being provided by BSCA <sup>(54)</sup>.

(78) Flight tracking and recording involve adding information on flights (number of passengers, aircraft registration, name of pilot, type of aircraft, nature of flight, origin, weight of aircraft, etc.) to the database of the Walloon administration. Flight planning involves communications, flight plans, slots, radio announcements and management of aircraft parking stands. Flight tracking and recording and flight planning are provided by the 'navigation office'.

(79) Marshalling consists of two tasks, namely marshalling on stand, which is carried out by the area coordinator when an aircraft arrives, and follow me marshalling, which involves guiding the aircraft with a vehicle. This service is used only for pilots who are unfamiliar with the airport (business aviation) or for Category D large aircraft. At Charleroi airport, the number of such operations is very limited (maximum of 100 per year).

(80) The security services are defined by Article 25.2 of the schedule of conditions, as amended by Amendment No 6 of 15 January 2008, as: 'screening, remote surveillance, security rounds and patrols, access control and issue of visitor badges'. BSCA delegates the security services to the public limited company BSCA Security. BSCA Security's tasks are defined by reference to the Decree of 23 June 1997 on the creation of airports in the Walloon region <sup>(55)</sup>. BSCA Security is 51 % owned by the Region and 49 % by BSCA.

(81) The terms of the financial compensation are set out as follows by Article 25.1 of the amended schedule of conditions:

— with regard to the fire protection and ground traffic and airport site safety services, the Region assumed the costs of their provision under the same terms as those defined by Amendment No 5 (see recital 75) up to 31 December 2009; the parties were to reassess the amount of the compensation no later than during the second half of 2009,

— with regard to the flight tracking and recording, provisional flight planning, marshalling and security services <sup>(56)</sup>, the Region assumed the costs of these services for the years 2008 and 2009. Since 1 January 2010, this assumption of costs has been capped at the indexed amount of the compensation paid for the previous year.

(82) Article 25.7 of the schedule of conditions has been amended and provides that the amount of the compensation may not exceed the actual costs incurred by BSCA, after deducting any fees collected from users to cover these services.

### 3.1.2.2. Amount of the subsidy paid by the Region

(83) Table 9 summarises the subsidies paid by the Region to BSCA and BSCA Security, excluding the 'public task' subsidy compensating the annual fixed fee.

<sup>(54)</sup> The fire protection and ground traffic and airport site safety services.

<sup>(55)</sup> Annex 10 to the letter from Belgium of 5 February 2014 contains the articles of association of BSCA Security.

<sup>(56)</sup> The paragraph in question also refers to the ground traffic and airport site safety services.



Table 9

**Subsidies paid by the Region to BSCA or BSCA Security <sup>(1)</sup> from 2001 to 2013 (excluding the 'public task' subsidy compensating the annual fixed fee)**

	Fire, safety, maintenance	Security	Navigation office, including marshalling	Total
2001	2 892 612	—	—	2 892 612
2002	3 201 000	—	—	3 201 000
2003	4 184 964	—	—	4 184 964
2004	5 182 000	—	—	5 182 000
2005	5 525 000	—	—	5 525 000
2006	5 774 000	—	—	5 774 000
2007	5 774 000	—	—	5 774 000
2008	5 993 000	9 233 984	317 000	15 544 054
2009	6 148 000	13 512 788	417 324	20 078 112
2010	6 148 000	13 596 515	419 909	20 164 424
2011	6 148 000	13 703 323	533 323	20 384 646
2012	6 148 000	14 013 621	454 381	20 616 002
2013	6 148 000	14 013 621	454 381	20 616 002
Total	69 266 576	78 073 852	2 596 388	149 936 816

Source: Annex 9 to the letter from Belgium sent on 6 February 2014, amended for the Giro subsidy by the response from Belgium sent on 25 March 2014.

<sup>(1)</sup> The security subsidy is paid to BSCA Security.

### 3.1.3. Capital increase subscribed by SOWAER

- (84) In the context of its development projects, and particularly the negotiation of the 2001 agreements with Ryanair, a strategy note submitted to the BSCA's board of directors on 31 July 2001 indicated that 'over the next three years, BSCA is expected to accumulate 164 million in losses. Its capital as at 31 December 2003 is therefore expected to fall to 23 million francs, i.e. less than 20 % of the current capital of 153 million [Belgian] francs. That is why a capital increase of EUR 5 million should be planned in order to avoid the company finding itself in a precarious situation.'
- (85) In fact, in its decision of 23 May 2001 on the SOWAER financial plan, the Region had already confirmed the principle of successive capital injections in the companies managing the Walloon airports <sup>(57)</sup>. At that time the SOWAER financial plan suggested 'a capital investment in BSCA in the amount of +/- BEF 60 million ... followed by, spread over three years, three times 30 million (capital of 600 million with SOWAER holding 25 %, i.e. 150 million)', i.e. a capital injection of EUR 3,718 million spread over three years.

<sup>(57)</sup> The financial plan indicates that 'the development envisaged for BSCA and SAB will require significant capital increases (in addition to external financing) and therefore monitoring by SOWAER'.

- (86) In the end, the capital increase was implemented in one go on 3 December 2002. The subscribed capital was fully paid up: SOWAER therefore contributed the cash sum of EUR 3,809 million in return for 49,23 % of the shares in BSCA <sup>(58)</sup>.

### 3.2. Measures granted by the Region and BSCA to Ryanair <sup>(59)</sup>

#### 3.2.1. The 2001 agreements

- (87) The term '2001 agreements' shall mean all the following:

- the commitment of the Walloon Government of 6 November 2001,
- the contract between BSCA and Ryanair of 2 December 2001 (hereinafter '2001 contract'),
- the Promocyc agreement of 12 December 2001 and the contract between Promocyc and Leading Verge of 31 January 2002, on which the decision was taken by the BSCA's board of directors on 31 July 2001 <sup>(60)</sup>.

#### 3.2.1.1. The commitment of the Walloon Government of 6 November 2001

- (88) On 6 November 2001 the Region concluded an agreement with Ryanair. This agreement provided for a landing fee of EUR 1 per departing passenger for Ryanair, i.e. a reduction in the order of 50 % in the landing fee compared with the amount set and published by the Walloon Government, which involved a different calculation method <sup>(61)</sup> (at the time, the airport charges payable by airlines were determined using a fee structure decided and published by the Walloon Government and not BSCA). In addition, the Region undertook to compensate Ryanair for the losses that the airline might directly incur due to a possible change in the level of airport charges or opening hours during the years 2001 to 2016, except where these changes were dictated by the European Union, the Federal State, the International Civil Aviation Organisation or other requirements of international law.

#### 3.2.1.2. The 2001 contract, including the provisions relating to Promocyc

- (89) Under the 2001 contract between BSCA and Ryanair, BSCA set a price for ground handling services for Ryanair of EUR 1 per passenger <sup>(62)</sup>, i.e. 10 % of the price published in 2001 by BSCA for other users.
- (90) BSCA also undertook to contribute, both financially and by providing various services, to the costs associated with opening the Ryanair base at Charleroi <sup>(63)</sup>. This contribution amounted to:
- EUR 250 000 for the hotel and living expenses of Ryanair staff,
  - EUR 160 000 per new route opened, up to a maximum of three routes per aircraft based at the airport, i.e. a maximum of EUR 1 920 000,
  - EUR 768 000 towards the recruitment and training costs of pilots and crews assigned to the new destinations served by the airport,
  - EUR 4 000 for the purchase of office equipment.
- (91) At the same time BSCA had to place at Ryanair's disposal, free of charge, 100 square metres of office space and 100 square metres of engineering store, and also guarantee a non-exclusive right of access to a training room. BSCA also had to use its good offices to ensure that Ryanair paid nothing or very little for the use of an aircraft maintenance hangar.

<sup>(58)</sup> The other shares resulting from the capital increase were subscribed, in the total amount of approximately EUR 133 000, by certain minor shareholders: the companies SONACA, Carolo Parking and Igretec.

<sup>(59)</sup> On 6 July 2012 BSCA concluded a new agreement with Ryanair. As this agreement is not included within either the measures identified in the opening decision or those identified in the 2012 extension decision, it is not examined in this decision.

<sup>(60)</sup> Information provided during the meeting on 24 June 2003 between the Commission and the Belgian authorities.

<sup>(61)</sup> While the landing fee was calculated according to the tonnage weight of aircraft under the general system applicable to all airlines, it was calculated on a different basis for Ryanair and collected for each departing passenger.

<sup>(62)</sup> Point 1.3 of the contract between BSCA and Ryanair of 2 December 2001.

<sup>(63)</sup> Point 1.5 of the contract between BSCA and Ryanair of 2 December 2001.

- (92) In addition, under the 2001 contract, Ryanair and BSCA formed a joint business promotion company called Société de Promotion de Brussels South Charleroi Airport (hereinafter 'Promocy'). Promocy's company object was to develop Charleroi and its region through the commercial operation of the airport <sup>(64)</sup> (for example, Promocy financed part of the cost of Ryanair's promotional tickets). BSCA and Ryanair were to contribute in equal proportions to Promocy's operation <sup>(65)</sup>. As a result, BSCA and Ryanair took equal shares in Promocy's capital, which totalled EUR 62 500. In addition, BSCA and Ryanair each paid a contribution of EUR 4 per departing passenger from Charleroi airport carried by Ryanair.
- (93) The fees per departing passenger applicable to Ryanair's operations under the 2001 contract and the contributions to the financing of Promocy are summarised in Table 10.

Table 10

**Fees applicable to Ryanair under the 2001 contract <sup>(1)</sup>**

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Landing fee	1	1	1,1	1,13	1,13	1,13	1,26	1,3	1,3	1,3	1,3	1,3
Fee per passenger	7	7	7,38	7,5	7,88	8	8	8	8	8	8	8
Ground handling services	1	1	1,1	1,13	1,13	1,13	1,26	1,3	1,3	1,3	1,3	1,3
Promocy	- 4	- 4	- 4	- 4	- 4	- 4	- 4	- 4	- 4	- 4	- 4	- 4
Net total paid by Ryanair	5	5	5,58	5,76	6,14	6,26	6,52	6,6	6,6	6,6	6,6	6,6

Given that the fees under the 2001 contract were revised on 1 April, they have been applied on a pro rata basis so that they are comparable on an annual basis (1 January-31 December).

<sup>(1)</sup> Fees per departing passenger, according to the figures provided in the response from the Belgian authorities of 14 July 2011. The fees for the years 2001 to 2003 are the same as those for 2004.

- (94) In return, Ryanair undertook vis-à-vis BSCA to base a number of aircraft at Charleroi (between two and four) and to operate at least three rotations per day and per aircraft departing Charleroi over the 15-year period (2001-2016) covered by the contract. The Irish company thus assured the airport manager of passenger traffic allowing it to anticipate income, either through airport charges or through non-aviation activities. Under the contract, if Ryanair ceased its operations at Charleroi in the first five years of the contract, the company would be required to reimburse to BSCA the contribution to the costs associated with opening Ryanair's base and the marketing contribution. Beyond the fifth year of the contract, the reimbursement would be calculated on a sliding scale <sup>(66)</sup>.

### 3.2.2. The Ministerial Order of 11 June 2004 and the BSCA letter of 24 June 2004

- (95) According to Belgium, under its national law, the 2004 decision effectively rendered the 2001 agreements null and void. The Region therefore decided to adopt a ministerial order on 11 June 2004 that reduced, on a promotional basis, the landing fees for aircraft at Charleroi airport. This order entered into retroactive force on

<sup>(64)</sup> Point 4 of Annex C to the contract between BSCA and Ryanair of 2 December 2001.

<sup>(65)</sup> Point 1.6 of and Annex C to the contract between BSCA and Ryanair of 2 December 2001.

<sup>(66)</sup> Article 2 of the 2001 contract.

13 February 2004. It stipulated that, on a promotional basis and for all airlines, the landing fee for an aircraft on a scheduled route was EUR 1 per passenger (i.e. the fee paid by Ryanair under the 2001 agreements). This general reduction was valid only for a period of 36 months from the entry into force of the ministerial order.

- (96) In a letter of 24 June 2004 <sup>(67)</sup>, BSCA undertook towards Ryanair to continue applying the terms of the 2001 agreements until 31 March 2006 and guaranteed, in particular, that the company would pay a total cost for using the airport's services of EUR 5 per departing passenger, corresponding to the level that would have resulted from applying the 2001 agreements if they had continued to be applied in 2005 and 2006 (see Table 10). This provisional commercial framework was dependent on a limit of 2 million passengers per year not being exceeded in terms of all the airport's activities <sup>(68)</sup>. However, despite this limit being slightly exceeded in 2004 <sup>(69)</sup>, the conditions offered to Ryanair were not altered in 2004 and 2005.

### 3.2.3. The 2005 amendment

- (97) By Decree of 3 February 2005, the Region delegated responsibility for setting airport charges to airport managers, including BSCA <sup>(70)</sup>.
- (98) From 1 April 2006, the general landing fee payable to BSCA was increased to EUR 2 per departing passenger. This fee of EUR 2 was indexed. In addition, a system of annual discounts according to the number of departing passengers was applied in accordance with Table 11.

Table 11

#### Discounts on landing fees applicable to all airlines operating at Charleroi airport from 1 April 2006 <sup>(1)</sup>

Discounts on an annual basis		
Percentage discount (%)	From number of departing passengers	To number of departing passengers
0	0	15 000
5	15 001	35 000
10	35 001	50 000
25	50 001	100 000
35	100 001	200 000
50	200 001	—

<sup>(1)</sup> Letter from the Belgian authorities of 14 July 2011 and <http://www.charleroi-airport.com/en/b2b/airport-charges/regularcharter-flights/index.html>

- (99) On 9 December 2005 BSCA proposed to Ryanair, which accepted this, a new commercial agreement dated 9 December 2005 (hereinafter '2005 amendment') for the period from 1 April 2006 to 31 December 2015.

<sup>(67)</sup> Letter sent to the Commission in a letter from the Belgian authorities of 13 September 2004. This letter followed on from a Memorandum of Intent (MOI) concluded on 8 April 2004.

<sup>(68)</sup> Point 3b of the letter of 24 June 2004.

<sup>(69)</sup> The total number of passengers having used the airport in 2004 was 2 034 140 (see Table 1).

<sup>(70)</sup> Articles 35 and 36 of the Decree of 3 February 2005 on economic recovery and administrative simplification. These provisions were applied to Charleroi airport through Amendment No 4 to the 1991 concession agreement between the Region and BSCA, which provided in Article 1 that 'the concession-holder shall set and collect from users the amount of the airport charges payable for using the airport that it manages'.

(100) Under the 2005 amendment:

- the landing fee payable by Ryanair was calculated based on the general landing fee, which provided for a 50 % discount above 200 000 passengers (see Table 11),
- the ground handling fee applicable to Ryanair's operations was set until 2015 in accordance with Table 12,
- Ryanair was subject to a new fee, called the 'infrastructure access fee',
- the contract no longer required the contribution by BSCA to Promocyt.

Table 12

**Fees applicable to Ryanair under the 2005 amendment <sup>(1)</sup>**

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Landing fee			[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]
Fee per passenger			0	0	0	0	0	0	0	0	0	0
Ground handling services			[4-6]	[4-6]	[4-6]	[4-6]	[4-6]	[4-6]	[4-6]	[4-6]	[4-6]	[4-6]
Infrastructure access			[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]
Net total paid by Ryanair			[5-7]	[5-7]	[5-7]	[5-7]	[5-7]	[5-7]	[5-7]	[5-7]	[5-7]	[5-7]
Difference compared with the 2001 contract			[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]

The landing fee figures are based on Ryanair's passenger projections at the time when the 2005 amendment was signed.

<sup>(1)</sup> Fees per departing passenger, according to the figures provided in the response from the Belgian authorities of 14 July 2011.

(101) The Commission notes that the amounts per passenger paid by Ryanair in accordance with Table 12 are, except for [...], identical to those stipulated by the 2001 contract <sup>(71)</sup> (see Table 10).

(102) Lastly, the 2005 contract stipulated that, for a period of at least six months after the new terminal's entry into use, Ryanair would base four aircraft at Charleroi with a minimum of [25-32] daily rotations. If it failed to do so, Ryanair would pay a [10-25] % surcharge.

<sup>(71)</sup> The Region's projections do not take account of the annual indexation of the landing fees nor of the increase in the number of Ryanair passengers above 1,75 million. These two corrections have an opposite impact on the actual amount of the fees per passenger paid by Ryanair.

### 3.2.4. *The 2010 amendment*

- (103) On 1 January 2009 BSCA introduced an additional fee per passenger, payable by all airlines operating at Charleroi airport, in relation to Passengers with Reduced Mobility (hereinafter 'PRM fee'). Amendment No 7 to the Region/BSCA agreement authorises BSCA to set such a fee, which, according to Belgium, is in line with Union law <sup>(72)</sup>. The PRM fee was set at 19,5 euro cents per departing passenger in 2009 <sup>(73)</sup>.
- (104) An amendment to the contract between BSCA and Ryanair was concluded on 6 December 2010 (hereinafter '2010 amendment'), following an exchange of letters between BSCA and Ryanair. It provides for:
- a general exemption from the PRM fee, under which Ryanair will pay [10-30] euro cents per passenger for the year from 1 February 2009 to 31 January 2010; moreover, the terms of indexation of the PRM fee provide for a reduction in this fee proportional to the increase in traffic generated by Ryanair <sup>(74)</sup>,
  - a reduction of [10-50] euro cents per Ryanair passenger in the ground handling fee.

### 3.2.5. *Sale of BSCA shares in Promocy*

- (105) On 31 March 2010 BSCA sold its 50 % holding in Promocy <sup>(75)</sup> to Ryanair. BSCA sold the shares at their book value for a total amount of EUR 31 100 (i.e. EUR 100 per share). All the risks and obligations were transferred to the sole shareholder, namely Ryanair.
- (106) According to Belgium, at the time of this sale, Promocy's cash resources totalled EUR 261 073 (balance of the assets, having deducted the capital and statutory reserve) <sup>(76)</sup>. BSCA therefore sold half of Promocy's capital for a price well below half the value of the cash resources.

## 4. COMMENTS FROM INTERESTED PARTIES

### 4.1. **Comments from interested parties on the measures granted to BSCA**

#### 4.1.1. *Brussels Airport Company (hereinafter 'BAC')*

(a) Comments received in September 2012 following the adoption of the 2012 extension decision

- (107) BAC considers that all the measures granted to BSCA, as described in the 2012 extension decision, constitute State aid that cannot be declared compatible with the internal market.
- (108) According to BAC, none of the investments described in the 2012 extension decision was the object of a legally binding decision before 12 December 2000.
- (109) BAC considers that none of the infrastructure investments related to the exercise of public power, as they are all essential elements for the economic activities of the operator, including works to improve the operation of the airport such as landing systems or runway extensions, or to facilitate its economic development such as car parks, access roads or maintenance hangars.

<sup>(72)</sup> Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1).

<sup>(73)</sup> This amount is annually indexed, see <http://www.charleroi-airport.com/en/b2b/airport-charges/regularcharter-flights/index.html>

<sup>(74)</sup> PRM fee year N + 1 = EUR [0,10-0,30] × Ryanair passengers in 2009/Ryanair passengers in year N. The number of Ryanair passengers in 2009 was 3 289 725.

<sup>(75)</sup> Promocy was the joint venture between BSCA and Ryanair, which was formed under the 2001 agreements.

<sup>(76)</sup> Response from Belgium sent on 18 March 2014 to the Commission, entitled 'response to the Commission's request for information of 7 February 2014' (answer to question 18).

(i) BSCA's payment for the concession and infrastructure

- (110) BAC submits that none of the measures granted to BSCA as described in the 2012 extension decision is in line with the market economy investor principle (hereinafter 'MEIP'). Based on industry practice, the return on investment that the Region/SOWAER receives is far below what a private investor would expect <sup>(77)</sup>.
- (111) According to BAC, any investment aid granted to BSCA was not limited to the minimum necessary. This is because BSCA's payment for the concession and infrastructure remained constant between 2002 and 2010, apart from a step up in 2007, while passenger numbers and revenues increased over the same period. This resulted in an increase in the average net value of the infrastructure for BSCA, whereas average net payments decreased.

(ii) Services provided by SOWAER to BSCA and services reimbursed by the Region

- (112) With reference to the services provided by SOWAER to BSCA and the services reimbursed by the Region to BSCA, BAC submits that, apart from public services such as police and customs, the Belgian State does not pay for any other activities at Brussels airport. BAC bears the cost of fire services, safety and maintenance itself. The flight tracking, recording and planning services provided by Belgocontrol are paid for directly by the airlines using Brussels airport. At Charleroi airport, airlines do not have to pay for these services. As such, the services reimbursed by the Region to BSCA do not relate to the exercise of public power.
- (113) BAC considers that these services do not constitute services of general economic interest as they are inherent in the operation of an airport and in the essential aspects of the economic activities of an airport and do not meet the *Altmark* criteria.
- (114) BAC considers that the payments made to reimburse BSCA for these services are not in accordance with the MEIP and constitute operating aid. As the payments made by BSCA to the Region for the use of the infrastructure are less than what a private investor would find acceptable, such an investor would not agree to additional payments being made for services without a corresponding return.
- (115) BAC points out that operating aid can be declared compatible only under exceptional circumstances and under strict conditions in disadvantaged regions. None of these conditions is met in the case of Charleroi airport and the aid cannot be regarded as compatible with the internal market.

(iii) Participation of SOWAER in the BSCA capital increase

- (116) BAC doubts whether the BSCA capital increase of 3 December 2002 complied with the MEIP. BAC further points out that, when assessing whether the capital increase would have been made by a private investor, other aid measures from which BSCA benefits should not be taken into account.

(iv) Impact on competition

- (117) BAC submits that the aid measures have allowed Charleroi airport to strengthen its competitive position in relation to other airports and other means of transport such as high-speed rail, as they enable BSCA to apply low airport charges. This creates a significant disparity between the fees at Brussels airport and at Charleroi airport, particularly due to differences between the passenger fees and safety fees. The airport charges collected by BSCA are below market price in comparison with Brussels airport and other comparable airports in the Charleroi airport catchment area, such as Eindhoven, Lille and Cologne/Bonn airports.

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<sup>(77)</sup> BAC submits that a private investor would expect a return on investment of at least EUR 14 million (5 %) based on the EUR 281 million investment made by SOWAER in the BSCA infrastructure. However, SOWAER received a return of only 0,66 % after corporation tax in 2009, and neither the Region nor SOWAER benefited from other revenues, such as dividends, between 2002 and 2007. Between 2007 and 2009 the dividend paid was less than EUR 400 000, and in 2010 the Region received a EUR 4,66 million dividend. In addition, the BSCA infrastructure costs accounted for only 6,7 % of revenues in 2009, whereas these would normally be expected to be one of the airport's most significant costs. Accordingly, BAC's annual depreciation costs amount to 30 % of annual revenues.

(118) According to BAC, this difference has resulted in a loss of 2,5 million passengers over the 2004-2011 period. The growth of Charleroi airport is not purely the result of additional traffic that Brussels airport has failed to generate, as proven by the fact that the average annual growth of a reference sample of European airports was 20,5 % between 2005 and 2011, whereas traffic at Brussels airport remained constant. In addition, the increase in destinations and frequencies at Charleroi airport has led to a corresponding loss of destinations or reduction in frequencies at Brussels airport.

(b) Comments received in May 2014 following publication of the Guidelines on State aid to airports and airlines

(119) BAC considers that both the investment aid and the operating aid received by BSCA are State aid that cannot be regarded as compatible with the internal market. In its opinion, the entry into force of the aviation guidelines further supports this conclusion.

(i) Investment aid

(120) BAC believes that the investment aid received by BSCA constitutes State aid that must be regarded as incompatible with the internal market because it is not proportional to objectives of common interest (Brussels airport was not congested) and is not limited to the minimum necessary.

(ii) Operating aid

1. Presence of State aid under Article 107(1) TFEU

(121) According to BAC, the opening decision basically focused on the different treatment in the financing of these activities between Charleroi airport and other undertakings within the same Member State, and other airports such as Brussels airport. In that regard, BAC considers that the reimbursement by the Region to BSCA of the costs of these services constitutes State aid and discrimination between BAC and BSCA within the Belgian State, because BAC had to bear these costs alone.

2. Compatibility of State aid measures under Article 107(3)(c) TFEU

(122) Point 137 of the Guidelines on State aid to airports and airlines <sup>(78)</sup> (hereinafter 'aviation guidelines') provides that a number of conditions must be met in order for past operating aid to be regarded as compatible with the internal market. According to BAC, the operating aid received by BSCA does not meet these conditions.

(a) The aid does not contribute to a well-defined objective of common interest

(123) Although Charleroi airport and Brussels airport are in competition in the same catchment area, the aid granted to BSCA has led, in BAC's opinion, to a duplication of airport capacity available in Belgium. The capacity of Charleroi airport has therefore been increased, even though the capacity of Brussels airport was not saturated. Accordingly, the total number of passengers using Charleroi and Brussels airports was 25,4 million in 2012, i.e. still less than the maximum capacity of Brussels airport alone.

(b) Lack of need for State intervention

(124) BAC points out that the annual traffic at Charleroi airport exceeded 1 million passengers in 2001-2002 and 3 million passengers in 2008-2009. In view of the categories laid down by the aviation guidelines, BSCA should have been able to cover the majority, if not all, of the costs incurred at Charleroi airport during the period covered by the Commission investigation.

<sup>(78)</sup> See footnote 8.



(125) According to BAC, no operating aid should have been granted to BSCA since the aviation guidelines entered into force given that the annual passenger traffic has significantly exceeded the threshold of 3 million since 2009.

(c) The aid is not appropriate and its amount is disproportionate

(126) According to BAC, the amounts paid by BSCA for the following services could have been more appropriate: the amount for the airport infrastructure to be placed at its disposal and the amount for the services provided by SOWAER. This is also true of the reimbursement by the Region for certain services. In BAC's opinion, the State aid granted to BSCA was not limited to the minimum necessary and less distortive policy instruments were available to the Region and SOWAER.

(d) The aid has negative effects on competition and trade

(127) Firstly, BAC points out that, contrary to the recommendation in point 131 of the aviation guidelines, the BSCA business plan did not study the effect of the development of its activities on traffic at Brussels airport.

(128) Moreover, BAC draws the Commission's attention to the fact that the case in question cannot be compared with that of Groningen airport, in which the Commission regarded the operating aid as compatible with the internal market. In that case, the Commission recognised the need to relieve congestion at Schiphol airport and the fact that the airports were far enough apart. These two elements are not relevant in the present case.

(129) This aid, which has enabled BSCA to artificially reduce the amount of its airport charges, has had the following negative effects on BAC: a significant fall in its use by passengers and a reduction in the frequency and even the loss of certain routes also served by Charleroi airport.

(130) In terms of the fall in the volume of passengers at Brussels airport, BAC points out that its origin essentially lies in the absorption of its customers by BSCA. Therefore, according to BAC, although the majority of European airports saw passenger numbers increase between 2005 and 2013, these numbers stagnated at Brussels airport, whilst at the same time the volume of passengers at Charleroi airport rose.

(131) BAC considers that the absorption of its customers also explains the loss of routes at Brussels airport and the reduced frequency of certain flights. In particular, it sees a correspondence between the flights lost from Brussels airport following the introduction of equivalent flights at Charleroi airport.

(132) BAC recommends that the Commission states, in its future decision on this aid and in accordance with the thresholds laid down by the new aviation guidelines, (i) that no more operating aid or investment aid can be granted to BSCA from the entry into force of the aviation guidelines, and (ii) that the services at Charleroi airport are charged at a level sufficient to cover the marginal costs generated.

#### 4.1.2. *Brussels Airlines*

(a) Existence of aid granted to BSCA

(i) Economic activity

(133) Brussels Airlines submits that fire, maintenance, safety and security services, and services associated with landing, take-off and infrastructure do not fall within its public service tasks but form part of the economic activity of managing an airport and should not be subsidised in a discriminatory manner. They cannot be regarded as services of general economic interest. Brussels Airlines submits that other industries in the Region finance their own fire services, as does Brussels airport. As the Region covers the safety and security costs at Charleroi airport, BSCA does not recover these costs from airlines, whereas no compensation has been given to Brussels airport for these costs. Passengers departing from Brussels airport are also subject to the Belgian Civil Aviation Authority fee, whereas passengers departing from Charleroi airport are not.

## (ii) Advantage

- (134) Brussels Airlines does not believe that the Region/SOWAER were behaving as a private operator in a market economy when giving support to BSCA. BSCA's profitability appears inflated due to subsidies, grants and compensatory measures, without which it would have a consistently negative profit margin. Brussels Airlines also questions whether the combined profitability of BSCA and SOWAER reflects market-driven practices. Brussels Airlines submits that the Region is not acting as a private investor given that such an investor would not invest in a structurally loss-making company.

## (iii) Distortions of competition

- (135) Between 2004 and 2012, whilst the number of short-haul passengers using Charleroi airport tripled, the number using Brussels airport stagnated, given that this figure was the same in 2012 as in 2004. Brussels Airlines adds that the number of passengers that it carried fell from [...] million to [...] million. Given these findings and the fact that, when viewed as a whole, airport passenger numbers increased by 34 %, Brussels Airlines concludes that Charleroi airport benefited from all the growth. Brussels Airlines notes that from 2004 to 2007 other European airports experienced strong growth (over 20 %), but the growth at Charleroi airport is not explained solely by the increase in traffic, but also by the fact that a large number of passengers who previously used Brussels airport appeared to choose Charleroi airport instead. Brussels Airlines puts this loss at [...] million passengers per year to the benefit of Charleroi airport, i.e. a loss of revenue estimated at over EUR [...] million per year.

## (b) Legal basis on which to assess the compatibility of the aid to BSCA

- (136) According to Brussels Airlines, the Commission does not have any legal basis for authorising operating aid that (i) was granted prior to the entry into force of the aviation guidelines and (ii) was incompatible with the internal market at the time when it was granted. Retroactive application of the aviation guidelines would be contrary to the general principles of law and, in particular, as in this case, where the conditions for authorising operating aid are comparatively less strict than in the past.
- (137) Firstly, the principles of legal certainty and non-retroactivity of European legislation rule out the possibility of a Union regulation taking effect before its publication, save in exceptional circumstances. In this particular case, Brussels Airlines submits that no exceptional circumstances exist.
- (138) Secondly, the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid indicates that the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. Therefore, in the opinion of Brussels Airlines, the Commission cannot depart from its own rules without contravening the general principles of law (equal treatment, legitimate expectations). Brussels Airlines submits that there is consequently no legitimate reason not to apply this notice in the present case.
- (139) Lastly, operating aid is by nature incompatible with the internal market. According to Brussels Airlines, this principle was clearly set out in the 2005 aviation guidelines.
- (140) Brussels Airlines considers that the Commission's approach in this case is all the more unacceptable because:
- the Commission previously prohibited the measures from which Charleroi airport has benefited,
  - in its 2012 extension decision, the Commission extended the scope of the measures covered by the investigation procedure,
  - according to the 2012 extension decision, the measures investigated are clearly incompatible with the internal market.

- (141) Consequently, Brussels Airlines submits that the Region and BSCA were perfectly well aware of the regulations in force on State aid. The prohibition of this aid does not therefore infringe the principle of legitimate expectations. On the contrary, it would be particularly unfair to retroactively justify their unlawful behaviour to the detriment of third parties, and especially to the detriment of those who have complied with the rules. The balance of interests at stake clearly means that this aid must be prohibited.
- (142) According to Brussels Airlines, by retroactively applying the aviation guidelines to past operating aid that is clearly incompatible, the Commission is implicitly acknowledging this incompatibility.
- (c) Compatibility of the aid granted to BSCA based on the new aviation guidelines
- (i) Objective of common interest
- (143) Brussels Airlines draws the Commission's attention to the fact that the positive effects expected of State aid policies, such as the development and accessibility of the regions, are uncertain.
- (144) The phenomenon of regional airports absorbing traffic from established airports has several other negative consequences according to Brussels Airlines:
- Firstly, the fact that capacity is created whilst other capacity still exists results in the inefficient duplication of infrastructure. In support of this argument, Brussels Airlines points out that, during the period in question (2000-2012), the capacity available at Brussels airport was sufficient to accommodate more passengers. As an example, in 2011 the capacity of Brussels airport was a maximum of 28 million passengers, although the airport was being used by only 18,8 million passengers. At the same time, Charleroi was being used by 5,9 million passengers, whereas its capacity was between 6 and 7 million. The total capacity of the two airports in 2011 was 24,7 million, i.e. a total capacity below the maximum capacity of Brussels airport alone.
  - Secondly, Brussels Airlines points out that the development of activities at Charleroi airport, to the detriment of Brussels airport and Brussels Airlines, has seemingly had a negative social and economic impact. Brussels Airlines compares the direct and indirect added value of Brussels and Charleroi airports from 2007 to 2009. The added value of Charleroi airport is apparently EUR 38 million, whereas that of Brussels airport is EUR 358 million. Brussels Airlines also refers to the number of jobs created directly and indirectly by the airports between 2007 and 2009. Whereas employment at Charleroi airport increased over this period by 589 FTE (full-time equivalents), the number of jobs at Brussels airport fell by 1 057. Whilst the number of passengers at Charleroi airport substantially increased between 2007 and 2009, unlike at Brussels airport, the level of direct and indirect employment did not increase to the point of compensating for the loss of jobs at Brussels airport.
  - Finally, according to Brussels Airlines, the absorption phenomenon has had a negative impact on the profitability of traditional airlines to the benefit of the low-cost airlines, whose profitability is mainly due to subsidies. Brussels Airlines states that, whereas the average profitability of the AEA (Association of European Airlines) was low and even negative over the entire period in question (profits before interest and taxes were EUR 0,9 billion in 2000, with a loss of EUR 0,4 billion in 2012), the figure for Ryanair was substantial (profits before interest and taxes were EUR 84 million in 2000 and EUR 617 million in 2012). However, according to Brussels Airlines, this profitability was increased by the subsidies received from the airports. Brussels Airlines states that, without this aid (calculated at EUR 720 million in 2011), Ryanair's profitability would have been substantially lower, and even negative.
- (145) In addition, Brussels Airlines points out that the operating aid was granted to Charleroi airport even though (i) this airport is located in the same catchment area as Brussels airport and (ii) the latter still had available capacity. Consequently, according to Brussels Airlines, a business plan based on cargo and passenger traffic forecasts should have identified the potential impact of this airport's development on traffic at Brussels airport. Brussels Airlines stresses that such an assessment was never made. In any event, if such an assessment had been made, it would have shown that an increase in traffic at Charleroi airport would be to the detriment of traffic at Brussels airport. Brussels Airlines states that, in its view, this was in fact the outcome: an increase in market share for Charleroi airport correlated to a drop in market share for Brussels airport and to a reduction in the frequency and/or to the withdrawal of several Brussels Airlines routes. Brussels Airlines therefore reasserts that the

operating aid granted to BSCA did not contribute to the achievement of an objective of common interest. In fact, on the contrary, these measures resulted in the misuse and wastage of resources.

(ii) Need for aid

- (146) Brussels Airlines points out that, in order to benefit from operating aid, the aviation guidelines require the annual traffic of an airport not to exceed 3 million passengers. Brussels Airlines stresses that this threshold was exceeded in 2009. Moreover, Brussels Airlines notes that the operating aid granted to BSCA did not evolve between 2002 and 2008 although, in theory, BSCA should have been capable of covering an increasing proportion of its operating costs. In addition, from 2009 Charleroi airport should have been able to cover its operating costs and was not eligible to receive further operating aid.

(iii) Inappropriateness of the aid

- (147) According to Brussels Airlines, even if it were proven that Charleroi airport still needed the operating aid in 2008, it was in fact clear that the public financing of BSCA through State aid was an inappropriate policy given that Charleroi airport was not profitable. Moreover, Brussels Airlines points out that the measures in question were all inappropriate because the Region did not, to its knowledge, previously attempt to compare its aid measures with measures that were less likely to hinder competition.

(iv) Distortion of competition

- (148) Brussels Airlines notes that Charleroi airport is located in the same catchment area as Brussels airport and that the latter still had available capacity during the period in question. Moreover, Brussels Airlines points out that, while the number of passengers has increased at Charleroi airport, the number at Brussels airport has stagnated and even declined in recent years, despite the fact that air traffic has risen on the whole in all European countries.

4.1.3. *Board of Airline Representatives (BAR)*

(a) Comments received following the 2012 extension decision

- (149) BAR submits that terminal charges (fees), safety costs and certain security costs, and firefighting costs at Brussels airport are borne by its users, while at regional airports these are borne by the airport or regional authorities. In BAR's opinion this constitutes a substantial advantage for regional airports.

(b) Comments received following publication of the Guidelines on State aid to airports and airlines

(i) Distortion of competition caused by the operating aid granted to Brussels South Charleroi Airport (BSCA)

- (150) BAR briefly notes the nature of the aid in question: operating aid received by BSCA and paid by the Region, 'in all likelihood transferred to Ryanair, at least in part'.
- (151) BAR complains that the Commission, by announcing that it wanted to apply the principles set out in the aviation guidelines 'to all cases concerning operating aid ... to airports even if the aid was granted before 4 April 2014', infringed the principle of legal certainty and adopted an opposite approach to the one recommended in 2002 in its notice on the determination of the applicable rules for the assessment of unlawful State aid, given that, according to BAR, said notice states that aid must be assessed 'in accordance with the texts in force at the time when the aid was granted'. Moreover, BAR considers that this change in Commission policy also infringes the principle that reasons must be given, because the Commission does not explain why developments in the aviation sector would have an impact on the assessment of past operating aid, or why only the latter type of aid is covered and not also past start-up or investment aid. In this respect, BAR points out that, if the Commission were to find that aid granted in the past was compatible with the internal market even though the opposite had

been found previously, this would infringe not only the general principles referred to above, but also the principles of sound administration and legitimate expectations.

(152) According to BAR, the aid measures in question, including those granted in the past to BSCA, are not compatible with the internal market, even when assessed in the light of the provisions of the aviation guidelines, for the following reasons:

- The aid measures are not necessary: BSCA has exceeded the threshold of 1 million passengers, given that it handles 6 million passengers, and must therefore be able to bear its operating costs. In addition, the operating aid granted in the past cannot be regarded as compatible, given that BSCA had 3 million passengers, or necessary, given that BSCA should have been able to bear its operating costs.
- The aid is and was anti-competitive: according to BAR, given that BSCA is located in the same catchment area as Brussels airport, which had spare capacity, the Region should have taken account of this when granting the aid, which did not happen.

(ii) Additional comments on the level playing field

(153) According to BAR, if BSCA considers that aid for the provision of certain public services at the airport must be authorised, then these services must be compared to the same services provided at Brussels airport. However, BAR points out that certain services provided at Charleroi airport are regarded as public services whereas they are not at Brussels airport.

(154) BAR stresses that the collection of airport charges must not lead to a situation of discrimination between users. In particular, BAR refers to the reductions enjoyed by Ryanair on the airport charges and not enjoyed by other airlines established at this airport, and to the fact that the airport charges at Brussels airport are much higher.

(155) BAR notes that, since Brussels airport was privatised, its services are no longer expressly regarded as public services. These services constitute 'regulated activities' for which the charges paid by airport users or passengers are controlled according to a formula.

(156) In addition, BAR draws the Commission's attention to the question of cross-subsidisation given that Ryanair operates at both Charleroi airport and Brussels airport. If such cross-subsidisation were found to exist, this would clearly represent a distortion of competition.

#### 4.1.4. *Association of European Airlines (AEA)*

(a) Comments received following the 2012 extension decision

(157) The AEA submits that subsidies to regional airports are acceptable only if they benefit all airport users without discrimination and do not create distortions between airports within the same catchment area. The AEA acknowledges that airports may adapt their infrastructure to meet the needs of specific users as long as principles of transparency, cost-relatedness and non-discrimination are observed.

#### 4.1.5. *Air France*

(a) Comments received following the 2012 extension decision

(158) Air France asks the Commission not to approve what, in its view, is operating aid distorting competition between airlines and between airports. Air France believes that the Commission should comprehensively compare the fees charged at Charleroi airport and those charged at airports in the same catchment area, in particular Brussels airport.

- (159) Air France also questions the retroactive application of the aviation guidelines to cases involving operating aid for airports, even where this aid was paid prior to the publication of said guidelines, for a number of reasons:
- According to Air France, the retroactive application of the aviation guidelines favours non-virtuous operators by legitimising conduct that did not comply with the rules applicable at the time. By contrast, this approach penalises operators who did comply with the previous guidelines by refraining from claiming public funds.
  - The retroactive application of the aviation guidelines to operating aid granted to airports is contrary to general principles of law and European case-law.
- (160) Air France claims that the new aviation guidelines will have the effect of favouring new operators to the detriment of incumbent operators. By allowing a new airline to pay only the incremental cost associated with its activity, they will discriminate against incumbent operators at the airport, who will be subject to higher fees.
- (161) Lastly, Air France notes that, although the condition of non-discriminatory accessibility to the infrastructure of an airport may seem easy to fulfil in theory, the situation is quite different in practice, with certain operating models being consciously disadvantaged.

#### 4.1.6. BSCA

##### (a) Comments received following the 2012 extension decision

- (162) BSCA calls on the Commission to close its investigation due to the absence of any State aid granted to itself or its trading partners.
- (163) As a preliminary remark, BSCA considers that the time that has passed since the start of the case may have created legitimate expectations for BSCA and its users. BSCA notes that the Commission was previously informed, during its initial investigation that led to the 2004 decision, about the mechanism introduced by the Region and BSCA in 1991 under the concession agreement and its subsequent amendments. BSCA therefore objects to the extension of the scope of the measures examined by the Commission.
- (164) BSCA draws the Commission's attention to the importance of regional airports in terms of economic and social development, regional accessibility and tourism. It considers that the liberalisation of air transport has created a new category of passenger taking city trips and short-haul flights for family reasons, together with new low-cost business models meeting this new demand. BSCA therefore takes the view that competition between Charleroi airport and Brussels airport is only very limited. In this respect, BSCA stresses the limited impact on Brussels airport of the launch in the past of a route between Dublin and Charleroi airport <sup>(79)</sup>. BSCA explains its success by the dynamic policy implemented by the Walloon authorities in recent years and also by the flexibility of its infrastructure and the drive of the airport teams.
- (165) In terms of services of general interest, BSCA notes that since 1991 it has received compensation for services of general interest, as defined by Article 25 of the schedule of conditions concluded with the Walloon public authorities. BSCA disputes the analysis made by the Commission in its 2012 extension decision, refuting the non-economic nature of these activities. The airport manager considers that this represents, firstly, a reversal of position by the Commission in relation to its established decision-making practice and, secondly, a lack of understanding of the international and European regulations on transport safety and security. BSCA reminds the Commission that these services of general interest, which were previously provided by the administration, were transferred with the intention of ensuring sound management and flexibility. The compensation paid by the Walloon authorities is therefore capped and cost-based and does not create any advantage for BSCA. An audit system has been established in order to prevent any overcompensation.
- (166) With regard to the capital increase, BSCA notes that the Commission did not question this during the initial investigation and takes the view that this complies with the market economy private investor principle. The

<sup>(79)</sup> Decision 2004/393/EC, recital 300.

airport manager adds that this increase was decided on the basis of a credible and realistic business plan and that it was justified by its needs due to the considerable development of its activities. In this respect, BSCA stresses that the Commission noted even in 2004 that the expected results for 2003 were higher than those taken into account in the 2001 business plan. Likewise, the number of passengers passing through Charleroi airport and the operating income in 2011 exceeded the estimates in this same business plan. Lastly, in BSCA's opinion, the development of its activities in partnership with Ryanair enabled SOWAER to profit from the good results achieved by BSCA, given that it made a substantial capital gain when it sold some of its shares in 2009.

#### 4.2. Comments from interested parties on the measures granted to Ryanair

##### 4.2.1. *Britannia*

(Comments received following the 2002 opening decision)

- (167) The airline Britannia considers that it is normal for airports to be able to provide marketing support and reductions according to the volume of passengers supplied by airlines, especially in the case of airports that are not yet well established. However, these advantages must remain proportional, realistic and limited in duration. Britannia is worried about the inequality created between competing airlines in this specific case. The airport charges are unequal and unrealistic, even though the low-cost airlines use the runways, terminals and safety and security facilities in the same way as other airlines.

##### 4.2.2. *Scandinavian Airlines*

(Comments received following the 2002 opening decision)

- (168) SAS points out that the deregulation of European airspace has led to increased competition among the traditional airlines and has also allowed the creation of new airlines, which have developed new business concepts. It is of fundamental importance that this competition complies with a regulatory framework applied transparently and without discrimination.

##### 4.2.3. *KLM Royal Dutch Airlines*

(Comments received following the 2002 opening decision)

- (169) KLM explains that low-cost airlines and traditional airlines offer different products and that each one has its own '*raison d'être*' at both commercial and operational level. Low-cost airlines generally avoid large airports, where the logistics can be complicated and usage costs high. Instead they choose regional platforms allowing them to operate rapid rotations at a reduced cost. These developments should not be called into question, but they should not be based on aid. According to KLM, the advantages received by Ryanair at Charleroi airport go well beyond what is permitted under Article 107(1) TFEU, and the consideration offered by Ryanair, consisting of basing a number of aircraft at Charleroi airport, changes nothing in this state of affairs.

##### 4.2.4. *Air France*

(Comments received following the 2002 opening decision)

- (170) Air France considers that the reduction in the fees charged to Ryanair and its absorption by the Region and BSCA create a disadvantage for Ryanair's competitors who provide links on the intra-Community market. The reduction in the landing fee allows Ryanair to reduce its operating costs and in fact makes it more competitive than its competitors, not only for the flights that it operates into or out of Charleroi airport but also throughout the Ryanair network. The compensation commitment made by the Region is also regarded as an advantage guaranteeing stability of operating conditions to Ryanair, given that 'practical experience of using any airport platform demonstrates that the commercial and regulatory environment is never rigid. Airport charges can therefore easily rise if the airport manager is forced to finance specific measures, possibly with the aim of accommodating other carriers wishing to establish themselves at Charleroi airport. In addition, the development of environmental measures can alter the conditions of operation of an airport'.

#### 4.2.5. Austrian Airlines

(Comments received following the 2002 opening decision)

- (171) According to Austrian Airlines, the arrival of low-cost airlines has resulted in a subsidies race between airports and regions wanting to be served by these carriers. These developments have called into question the principle of infrastructure availability payments, even though this is one of the basic rules in the civil aviation world. The aid granted is not degressive, it is independent of the success achieved by Ryanair in the links that it serves and it benefits one airline only, which leads to discrimination. Austrian Airlines concludes that 'cooperation' such as that observed between Ryanair and the Region causes significant distortions of competition between airlines and is largely incompatible with the smooth operation of the internal market for aviation.

#### 4.2.6. Association of Residents and Inhabitants of Municipalities Close to Charleroi-Gosselies Airport (ARACH)

(Comments received following the 2002 opening decision)

- (172) The Association is concerned that the financial aid granted to Ryanair will lead to 'unbridled development of the airport' within an urban site, and that in these terms 'as both citizens and taxpayers, we are concerned about the questionable State aid granted to a private company, as this involves improper use of the Walloon Region's budgetary resources'.

#### 4.2.7. Interested Party A

(Comments received following the 2002 opening decision)

- (173) Interested Party A states that it is 'very concerned' about the subsidies granted by the public authorities, which will affect the conditions of competition between the various modes of transport. 'Ryanair is therefore benefiting in particular from public subsidies for the Charleroi-London link, while Eurostar, operated jointly by SNCB, British railway operators and SNCF, is not benefiting from them. Both means of transport are, however, in direct competition for the Brussels-London link. It is up to the railway operators alone to advertise the link, purchase the rolling stock and engines, pay infrastructure and tunnel tolls, etc. Equal treatment between competitors is therefore upset'.

#### 4.2.8. Interested Party B

(Comments received following the 2002 opening decision)

- (174) Interested Party B points out that the advantages granted to Ryanair reduce its cost structure and enable it to charge lower fares. These practices affect the conditions of competition, whether these companies operate out of Charleroi airport or Brussels airport and whatever the route served. Competition between low-cost airlines is not merely competition that must be analysed on a route-by-route basis. For many travellers, the destinations of Venice or Barcelona are wholly exchangeable. Competition therefore applies to every route.
- (175) This company explains that the direct costs out of Brussels airport are EUR 32,14 per passenger compared with EUR 5 for Ryanair operating out of Charleroi airport <sup>(80)</sup>.
- (176) Even though the ground handling services are more limited for Ryanair than for other airlines, this interested party points out that a considerable number of ground handling services are still necessary for all airlines. The fact that the ground handling market is open to competition at Brussels airport means that these fees should not normally be much higher at Brussels airport than at Charleroi airport. Ground handling fees are, generally

<sup>(80)</sup> Direct costs per aircraft and per rotation out of Brussels airport, including landing, passenger, ground handling and other fees. Based on a forecast volume of 1 700 000 passengers in 2003, the cost difference is EUR 23 million.



speaking, higher at small airports than at large airports, given that companies cannot usually reach the critical size needed to make economies of scale. This interested party estimates that Ryanair saved EUR 17 million in 2003 on ground handling fees and landing fees. In its opinion, it also appears that BSCA has not taken account of Council Directive 96/67/EC<sup>(81)</sup>: the airport should reach two million passengers a year quite quickly and BSCA will need to apply the Directive at this threshold and open the ground handling market to other operators.

- (177) BSCA has allegedly acted not as a private investor in a market economy but for political and social reasons, on the instructions of the Region. The 15-year contract will probably not allow BSCA to establish itself as a profitable business and it is expected to continue to experience operational problems. The prospect of a return on the investment could be undermined if Ryanair withdraws<sup>(82)</sup>.
- (178) BSCA allegedly receives contributions from the Region, such as 65 % of the revenue from the airport charges and the placing at its disposal of the infrastructure free of charge, even though the Region pays a contribution to SOWAER. In principle, each payment from the Region should be limited to the compensation for the costs associated with the public service obligations imposed on BSCA, and the situation is not very clear in this regard.
- (179) For this company, which acknowledges having also on occasion benefited from 'marketing' advantages for the launch of new destinations, but never from reductions in airport charges or ground handling costs, the advantages granted to Ryanair at Charleroi airport go well beyond the bounds of current practice. It considers, however, that it took just as significant commercial risks by setting itself up at Brussels airport at a time when competition from Sabena was very strong.
- (180) The fact that other airport managers grant advantages to Ryanair does not prove that Charleroi airport has acted as a private investor in a market economy. The company refers to the *Steinike & Weiling* judgment<sup>(83)</sup>.

#### 4.2.9. *Brussels International Airport Company, now Brussels Airport Company (hereinafter 'BAC')*

(Comments received following the 2002 opening decision)

- (181) According to BAC, BSCA has not behaved like a private investor given that the advantages granted differ in their extent from those granted by other airports<sup>(84)</sup>. The fact that Ryanair receives advantages from other airports is not at all relevant, as those could also constitute State aid.
- (182) The interested party draws the Commission's attention to several factors that must be taken into account when analysing the potential profitability of BSCA and that appear to exclude medium-term profits:
- (183) BSCA benefited from a recapitalisation by the Region, totalling EUR 4 million, in December 2002.

— BSCA benefited from 'an exemption from half of its fee due to the Region for the period 2001-2006. This advantage totals EUR 1 million per year, which BSCA will, however, have to pay back from 2007 onwards'.

<sup>(81)</sup> Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36). Directive last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ L 284, 31.10.2003, p. 1).

<sup>(82)</sup> The company cites the example of Shannon in Ireland. Shannon granted advantages to Ryanair for a time, but they were not renewed. Ryanair decided to transfer its operations to another airport and Shannon did not achieve the expected reasonable return on investment.

<sup>(83)</sup> Judgment of 22 March 1977 in Case 78/76 *Steinike & Weiling v Federal Republic of Germany* [1977] ECR 595, ECLI:EU:C:1977:52: 'Any breach by a Member State of an obligation under the Treaty in connexion with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased' (paragraph 24).

<sup>(84)</sup> At Frankfurt-Hahn and London Stansted airports, the charges are allegedly higher and the reductions lower, despite which Ryanair operates 49 destinations from London and 15 from Frankfurt-Hahn, compared with 9 from Charleroi.

- The Commission should take account of the costs of the Charleroi airport expansion project, calculated at EUR 95 million, and the methods of financing. If this project is not paid for by BSCA, the conditions under which the Region places this infrastructure at the disposal of BSCA should be checked. This interested party doubts that, given the current state of its infrastructure, the airport is in a position to cater for sufficient passengers to ensure the financial balance of BSCA.
- The Region provides BSCA, free of charge, with the equipment and staff needed for all the security operations at Charleroi airport, namely passenger and baggage screening prior to embarkation, although, 'as a general rule, security costs are borne by the airport users, either through a security fee payable to the airport operator or through a tax where these services are provided by the public authorities'.

#### 4.2.10. *Interested Party C*

(Comments received following the 2012 extension decision)

- (184) Interested Party C believes that the advantages granted by the Region to BSCA and Ryanair harm competition and that Charleroi airport and Brussels airport operate in the same market.
- (185) Interested Party C criticises the relationship between the Region, BSCA and Ryanair and the resulting differences in charges levied on airlines at Brussels airport and Charleroi airport. Notably, (i) maintenance costs are not passed on to users but are compensated by the Region, (ii) landing fees favour Ryanair, [...].
- (186) Interested Party C further submits that Ryanair does not pay for services that are part of normal airport management, such as fire services, expansion and construction of infrastructure and passenger fees.

#### 4.2.11. *Brussels Airlines*

(a) Existence of aid

(i) Selective advantage

- (187) According to Brussels Airlines, Ryanair has benefited from a selective advantage compared to other airlines.
- (188) The aid granted by the Region and SOWAER to BSCA reduces the latter's operating costs, enabling it to charge lower fees to airlines including Ryanair, in turn reducing the latter's operating costs. In particular, given that the Region covers the safety and security costs of Charleroi airport, BSCA does not recover these from the airlines, whereas Brussels airport has not benefited from any compensation in this respect. Brussels Airlines believes that the Region's comprehensive financial support programme for BSCA must be taken into account when assessing the commercial relationship between BSCA and Ryanair.
- (189) Ryanair has also benefited from direct financial measures such as start-up aid and contributions to marketing activities. Brussels Airlines questions whether this aid complies with the conditions laid down by the 2005 guidelines as also the principles of proportionality and transparency.
- (190) Brussels Airlines considers that the cumulative effect of all the measures is to make it impossible to believe that BSCA is acting as a private investor, and it invites the Commission not to examine the measures separately, but as a whole.

#### 1. Benchmarking.

- (191) According to Brussels Airlines, the fees charged by BSCA to Ryanair during the period in question were much lower than those paid by other airlines at comparable airports.

(192) Brussels Airlines uses as its benchmark the airport charges of a number of other airports located in the catchment area of Charleroi airport (Eindhoven, Lille and Cologne) or that are of a similar size (Marseille, Porto and Bologna), and concludes that the airport charges applied at Charleroi airport are not in line with those that a private investor in a market economy would apply.

(193) Brussels Airlines also considers that Brussels airport is a good benchmark for assessing the discriminatory nature of the airport charges: both airports are located in the same catchment area and face the same economic environment. In addition, Brussels airport can pass on its fixed costs to more airlines, which invalidates the argument that the fees applied by Brussels airport are necessarily higher due to its size. A comparison reveals a major difference between the level of airport charges at Brussels airport and at Charleroi airport, even when taking into account the additional services provided at Brussels airport due to differences in airline business models.

## 2. Cost coverage

(194) According to Brussels Airlines, BSCA has not proven that, when the agreements in question (from 2001 and the subsequent amendments) were concluded, BSCA was in a position to cover the costs arising from those agreements, for their entire term, while making a reasonable profit in the medium term. BSCA has not therefore acted as a private investor in a market economy.

(195) Brussels Airlines submits that BSCA's profit margin is much lower than that of other EU airports. In 2006 and 2007, the average profit margin across a range of EU airports was between 7 % and 9 %. BSCA/SOWAER's profit margins, adjusted to take account of the subsidies, were clearly negative and therefore not in line with these margins, suggesting non-market-driven practices.

(196) Brussels Airlines questions whether economies of scale can justify the 50 % reduction granted to Ryanair on these fees. Passenger fees, passenger with reduced mobility fees and ground handling fees appear to be non-existent or extremely low, although these are costs normally borne by airlines.

(197) According to Brussels Airlines, the investment and operating costs that have not been borne by BSCA must be taken into account when examining the aid granted to Ryanair.

(198) Brussels Airlines doubts whether BSCA has accurately projected the airport's estimated revenues and costs over the entire term of the agreements with Ryanair.

(199) In return for the reduced fees, Ryanair could not guarantee BSCA a level of traffic generating income equivalent and proportional to the costs of the advantages granted to Ryanair.

(200) As a result, according to Brussels Airlines, the measures in question do not comply with the private investor in a market economy principle, are state aid and give Ryanair a selective advantage.

## (ii) Distortions of competition

(201) Brussels Airlines submits that the aid measures have an adverse impact on airlines operating from Brussels airport. The aid measures enable BSCA to charge lower fees and thereby reduce the costs of airlines operating from Charleroi airport. These airlines are able to undercut the prices of competitors operating from other airports. As a result, the European point-to-point market out of Belgium has shifted towards Charleroi airport. Only Charleroi has seen its traffic increase in this segment. The number of passengers using Brussels airport has stagnated in recent years, whereas elsewhere in Europe traffic has increased. In other words, according to Brussels Airlines, the increase in local traffic has been entirely to the benefit of Charleroi airport.

(202) Brussels Airlines reiterates that it is based at Brussels airport and that the latter's catchment area almost entirely overlaps with that of Charleroi airport. As a result, Brussels Airlines is in direct competition with Ryanair: they

operate in the same catchment area and attract the same customers. Within the EU market, Brussels Airlines and Ryanair offer the same type of service (point-to-point service) and serve the same destinations. Sixty of the destinations served by Brussels Airlines are also served by Ryanair. Out of 46 destinations, Brussels Airlines is in competition with Ryanair for 16 destinations from the same airport and for 12 destinations from an airport in the same catchment area.

- (203) The result of this situation is that Brussels Airlines has had to withdraw certain routes that are also served by Ryanair (7 since 2007) and reduce the frequency of flights on other routes (for 14 destinations). Between 2004 and 2012 Brussels Airlines' market share fell from [...] % to [...] %. Its market share is continuing to fall to the benefit of Charleroi airport, where the market share has risen from [...] % to [...] %.

(b) Incompatibility with the internal market.

- (204) According to Brussels Airlines, most of the aid granted to Ryanair does not contribute to an objective of common interest. Furthermore, the aid has been granted in such a way that it is distorting competition, which is harming common interests. Brussels Airlines therefore considers that the aid granted to Ryanair is incompatible with the internal market.

#### 4.2.12. BSCA

(Comments received following the 2012 extension decision)

- (205) According to BSCA, the commercial framework agreed with Ryanair in no way involves aid being granted to Ryanair. The results of this partnership clearly show the profitability of the business model. Moreover, BSCA argues that it manages its activities entirely independently, without any direct or indirect intervention by the Walloon Government, particularly in the negotiation of commercial contracts with airlines.

#### 4.2.13. Ryanair

- (206) Ryanair submits that the agreements concluded between Ryanair, BSCA and the Region do not contain any element of State aid for three reasons: the private investor in a market economy principle applies, there is no selectivity and the agreements do not distort competition.

#### 4.2.14. TBI

- (207) According to TBI, the agreements concluded at Charleroi airport are similar to the arrangements entered into by TBI with Ryanair and other low-cost airlines, particularly at Stockholm Skavsta airport. Granting discounts on landing fees and ground handling fees is a common business practice to attract airlines that can bring in a significant volume of passengers. The contributions made in terms of paying hotel, staff training or marketing costs must be compared against the investment made and the risk taken by the carrier. The 'marketing' contributions benefit the airport as its image is improved and it sees an increase in the number of passengers. TBI offers this type of contribution, especially when an operator is establishing a new service or increasing the frequency of certain flights on a given route.

#### 4.2.15. HRL Morrison and Co

- (208) According to HRL Morrison, a private investor might adopt the approach taken by Charleroi airport. It would base its offer on certain determining factors: the volume of passengers that an airline could bring to the airport; the airline's willingness to commit to the long term through contracts; the specific needs of the airline; the schedule of aircraft movements and its dovetailing with airport activities (existing traffic); and the needs in terms of terminal and ground handling resources. It would calculate the expected benefits of the agreement with Ryanair as a whole (and not its component parts taken separately). The benefits of such a transaction should be

envisaged over a period of around 20 years, with activities expected to take off after three to five years. With regard to a 15-year agreement, Morrison's shareholders would regard this as commercially acceptable if a return on the investment could be made within around five years from the agreement being signed.

## 5. COMMENTS FROM BELGIUM

### 5.1. Comments from Belgium on the measures granted to BSCA

#### 5.1.1. Absence of State aid granted to BSCA

##### 5.1.1.1. Comments from Belgium following the 2012 extension decision

###### (a) Provision of the infrastructure by SOWAER

(i) Main argument presented by Belgium: the investment programme was approved by the Walloon Government prior to 12 December 2000

(209) According to Belgium, the investment programme was decided by the Walloon Government in July 2000 and confirmed in November 2000, i.e. before the *Aéroports de Paris* judgment<sup>(85)</sup> (hereinafter 'ADP judgment'). This judgment marks the date when the TFEU rules on State aid became applicable to the financing of airports.

(210) The framework agreement of 20 July 2000, setting out the conditions for the development of regional airports and associated environmental measures, was the agreement reached within the Walloon Government through which the Region undertook to allocate part of its budget to the development of its own infrastructure at Charleroi airport. The decision of 8 November 2000 implemented the decision of 20 July 2000 by converting said framework agreement into a multiannual investment programme. Both decisions must therefore be considered as a whole, as the second supplements and clarifies the first, particularly with regard to the concrete schedule for implementing the financial measures decided.

#### 1. Rebuttal of certain elements presented by the Commission in the 2012 extension decision

##### (a) On the question of the absence of commitment towards a third party

(211) No third-party beneficiary was identified in these decisions, as the Region's investments were intended for itself. According to Belgium, the wording of these two decisions was therefore less formalistic than in a decision granting aid to a third party. In the case of aid granted to a third party, the Region would have adopted the investment principle and amounts in the same way, without any additional procedure, except for sending a letter notifying the government decision, which was pointless in this case.

(212) However, according to Belgium, this lack of formalism did not mean that these decisions were not binding. Although the Region was the beneficiary of the decisions made, the adoption of a government decision creates a commitment on the part of the government. The fact that this commitment was unilateral was not peculiar to this case. In fact, any financial measure, regardless of its beneficiaries, is always decided through a unilateral administrative act of the granting authority, which controls the application, amendment or withdrawal of said act.

(213) No formal letter granting aid was therefore sent to a beneficiary undertaking, even though the *Fleuren Compost* judgment<sup>(86)</sup> states that this is the act that must be regarded as the legally binding act through which the competent authority undertakes to grant the aid and that therefore marks the date of granting of the aid. In the absence of such a document, the only possible date is the date of the government decisions granting the investment (principle, amounts and schedule).

<sup>(85)</sup> Judgment of 12 December 2000 in Case T-128/98 *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-3929, ECLI:EU:C:2000:290.

<sup>(86)</sup> Judgment of 14 January 2004 in Case T-109/01 *Fleuren Compost BV v Commission of the European Communities* [2004] ECR II-127, ECLI:EU:T:2004:4, paragraph 18.

(b) On the question of the irrevocable, firm and definitive nature of the 2000 decisions

- (214) Belgium indicates that, according to the Commission, the decisions of 20 July and 8 November 2000 were substantially amended at a later date and were not therefore irrevocable, firm and definitive.
- (215) According to Belgium, a distinction must be made in this respect between decisions providing for new investments in new projects and decisions implementing investments decided previously, if necessary through certain adjustments.
- (216) In this case, Belgium cites, as evidence that the decisions of July and November 2000 were binding and irrevocable, the fact that no new financing decision was subsequently adopted. The only decisions made subsequently by Wallonia, and then by SOWAER, were for the purpose of applying and implementing the financing measures in accordance with the government decisions of July and November 2000.
- (217) The subsequent adjustments to the investment amounts were not therefore new investment decisions, but the necessary adaptation, as a result of general developments in the situation, of what had already been agreed in July and November 2000. Some of the amounts in the framework agreement and financing programme had to be subsequently reassessed, particularly due to the increased cost of raw materials, the refinement of the necessary investments as a result of technical studies, technical constraints associated with the granting of permissions and the result of organising public procurement. According to Belgium, such budgetary or technical adjustments cannot be regarded as substantial amendments.
- (218) Also, aware of the limitations when estimating such investments, the government had stipulated from the start that certain items (including the construction of a new terminal) might be reassessed 'according to the airport's actual activity' or insofar as they were 'dependent on the airport's actual needs'. As the airport's actual activity and needs inevitably evolved over the life of a framework agreement and investment programme covering several years, in Belgium's opinion it was logical for the government to have calculated certain items subject to the constant change in these factors.
- (219) According to Belgium, the government's desire to calculate and set its commitments from the start, albeit subject to subsequent refinements, was evident on the adoption of the framework agreement of 20 July 2000 and on the adoption of the investment programme of 8 November 2000. The adjustments subsequently made to these decisions cannot call into question the binding nature of the commitment made on these dates by the government.
- (220) In the alternative, if certain adjustments were to be regarded as so substantial that in reality they appeared to be new investments, and not the subsequent adaptation of an investment already granted, which is not the case, only this investment, taken in isolation, could be regarded as subsequent to the decisions of 20 July and 8 November 2000.
- (221) According to Belgium, in order for the reassessment of this investment to result in its requalification as a new investment, the amendment made must apply not only to the extent, but also to the nature of the investment set. This amendment must be such as to allow it to be asserted that the project envisaged at the time of the July and November 2000 decisions could not in any way relate to the project specifically financed and implemented subsequently, regardless of legitimate developments in the general situation. Therefore, for example, an 'additional' investment, not justified by a subsequent change in the airport's actual needs, but decided for the purpose of providing additional infrastructures over and above those initially specified in July and November 2000, could be regarded, in relation to this addition only, as a new investment decided outside the 2000 framework agreement and investment programme.
- (222) In this case, although it appeared that certain items had been underestimated or were unfeasible within the time-limit allowed, all the investments made had in principle been stipulated by the decisions of July and November 2000. Although the amounts were subsequently amended, this was due to new factors that could not have been anticipated or accurately determined at the time of the decisions.

2. Belgium's arguments based on the assessment of the 2000 decisions

(223) According to Belgium, the assessment of the decisions of 20 July 2000 and 8 November 2000 confirms the legally binding nature of the commitments contained in those decisions.

(a) Decision of the Walloon Government of 20 July 2000 approving the framework agreement

(224) The framework agreement and investment programme were genuine decisions, which imposed a binding commitment on the government. Furthermore, the fact that this act was referred to as a 'framework agreement' did not prevent the Commission, in an earlier decision, from finding that this was a legally binding act and from using the date of signature of said act as the date when aid was granted <sup>(87)</sup>.

(225) According to Belgium, the framework agreement of July 2000 went well beyond an agreement in principle, as it specifically covered the charging of the investments. It determined the appropriation items and also assessed the investment costs so that the expenditure could be immediately charged to the budget.

(226) Moreover, the government was careful to stipulate that an 'ad hoc financial mechanism' should be put in place. This confirms that the government was already planning to create a new public body responsible for airport infrastructure.

(227) Confirming the implementation by SOWAER of the government decisions of July and November 2000, the SOWAER financial plan approved by the government on 23 May 2001 referred to the framework agreement of 20 July 2000, which removes any doubt about the commitments made by Wallonia.

(228) According to Belgium, this method of working is not in fact material when compared to the principle of approving the investment programme, which is the fundamental issue in this case. The formation of SOWAER was simply a way of implementing the decisions of July and November 2000, as it is purely Wallonia's financial vehicle. Although the specific financial mechanism for implementing the investments decided by the Region may have been determined after the decisions of July and November 2000, the commitments of the Walloon authorities were real and binding on the financial mechanism ultimately chosen.

(b) Decision of 8 November 2000 of the Walloon Government implementing the framework agreement of 20 July 2000 and approving the multiannual investment programme for Brussels South Charleroi airport

(229) On 8 November 2000 the Walloon Government adopted a decision implementing its decision of 20 July 2000. Through this decision, it approved the 'multiannual physical investment programme 2000-2004 for Brussels South Charleroi Airport and associated financial plan'. Each investment described in the note approved by the government was assessed and its cost precisely determined.

(230) In conclusion, according to Belgium, the investment programme 2001-2010 for Brussels South Charleroi airport was clearly decided prior to 12 December 2000, which was the date of the ADP judgment.

(ii) Argument presented by Belgium in the alternative: the infrastructure financing complies with the private investor principle

(231) In any event, according to Belgium, the infrastructure financing for Charleroi airport complies with the private investor principle.

(232) In order to prove this, Belgium has produced a table of cash flows for the investments in the new terminal and car park between 2002 and 2036 <sup>(88)</sup>. Out of these investment amounts, it has taken into account only 89,7 % of the investments for the car park and 28,1 % for the new terminal, on the basis that the other investments are

<sup>(87)</sup> Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport C 48/06 (ex N 227/06) (OJ L 346, 23.12.2008, p. 1), recital 291.

<sup>(88)</sup> See Annex 3 to the comments from Belgium submitted on 23 May 2012.

for non-economic activities. Furthermore, Belgium has assumed that the public financing of services of general economic interest, and by extension the infrastructures used for these activities, are authorised by the European regulations on State aid. Belgium therefore concludes that, aside from the compensation granted by the Region to BSCA to support some of the fees associated with the infrastructures used for the services of general interest, the rate of return on the financing of these infrastructures is close to 2 %. As a result, the infrastructure has not been placed at BSCA's disposal for a price less than its value.

(b) Services provided by SOWAER to BSCA

(233) Belgium points out that a considerable part of the major repairs and maintenance cost relates to infrastructures used for non-economic activities.

(c) Financing of part of the cost of services of general interest by the Region

(234) In 1991 the principle of accounting separation in order to identify the costs covered by the compensation was laid down by Article 25 of the schedule of conditions.

(i) Main argument: the financing of non-economic activities

1. Fire protection service

(235) According to Belgium, fire protection services are non-economic activities as they fall within the public policy remit.

2. Ground traffic safety services

(236) According to Belgium, ground traffic safety services also fall within the public policy remit.

(237) Belgium states that, when the Commission made its decision on 23 July 2008 on Leipzig/Halle airport, it itself recognised that operational safety services were non-economic activities <sup>(89)</sup>. It is clear from the list of operational safety infrastructures provided by the German authorities and reproduced in the table in recital 58 of that decision that these infrastructures are essential for ground traffic safety, i.e.: uninterruptible power supply for aprons, transformer stations, runway lighting, apron lighting, etc. For the record, this position taken by the Commission was confirmed by the General Court in the *Freistaat Sachsen* judgment <sup>(90)</sup> following an action for annulment brought against the aforementioned Commission decision.

(238) It is clear from the description given of the ground traffic and airport site safety services in Amendment No 5 to the concession agreement of 9 July 1991 and the schedule of conditions concluded on 10 March 2006 that these costs, i.e. routine maintenance of the airport site for the purposes of safety, technical maintenance services for buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, and snow clearance, do relate to the operational safety services accepted by the Commission, in its decision on Leipzig/Halle airport, as non-economic activities.

3. Security services

(239) According to Belgium, security services fall within the public policy remit as they are activities traditionally carried out by the State. Belgium cites European regulations and the Commission decision on Leipzig/Halle airport <sup>(91)</sup> in support of its reasoning.

<sup>(89)</sup> Decision 2008/948/EC, recital 182.

<sup>(90)</sup> Judgment of 24 March 2011 in Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt (T-443/08) and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH (T-455/08) v European Commission* [2011] ECR II 1311, paragraph 225.

<sup>(91)</sup> See footnote 89.



#### 4. Flight tracking and recording, provisional flight planning and marshalling services

- (240) According to Belgium, flight tracking and recording, provisional flight planning and marshalling services are essential parts of civil aviation safety and therefore fall within the public policy remit, given that they are fundamental components in the safety of an airport.

#### 5. Conclusions on the financing of the services of general interest provided by BSCA at the request of Wallonia

- (241) It is clear from the above that, in Belgium's view, all the services of general interest defined by Article 25 of the schedule of conditions and covered by compensation from the Region to BSCA are non-economic activities excluded from the scope of Article 107(1) TFEU, in accordance with the Commission's decision-making practice and European case-law.
- (242) Belgium stresses that these services were previously provided by the Walloon administration, i.e. before 1991 for the fire and maintenance services and before 2008 for the security, flight tracking and recording, provisional flight planning and marshalling services.
- (243) By providing these services, BSCA has simply taken over the obligations imposed on the public authorities under international obligations resulting from the ICAO standards or in accordance with European regulations.

#### (ii) In the alternative: financing of economic activities of general interest in accordance with the *Altmark* judgment

- (244) According to Belgium, if the Commission were to consider that some of the aforementioned activities are economic activities, it should note that these are financed through compensation that does not constitute aid, based on the criteria set out by the *Altmark* judgment<sup>(92)</sup>. In fact, this compensation complies with the criteria established by the *Altmark* judgment, which therefore allows the existence of State aid to be ruled out.

#### 1. Existence of clearly defined public service obligations

- (245) According to Belgium, the activities in question, which involve the safety and security of civil aviation and airport activities, pursue an aim of general interest. Article 25 of the schedule of conditions annexed to the concession agreement of 9 July 1991 defines the obligations incumbent on BSCA in the context of the safety and security tasks. This provision stipulates that these services are to be 'provided by the concession-holder in the general interest'. It is clear from this provision that Wallonia has entrusted the concession-holder with the provision of these services and that it has given the latter a mandate in this respect.

#### 2. Compensation parameters defined in an objective and transparent manner

- (246) The compensation parameters are defined in an objective and transparent manner by Article 25 of the schedule of conditions, which provides for a separate operating account to be kept by BSCA for the activities covered by this article.
- (247) For those costs that are not wholly attributable to a service of general interest, a proportional allocation is made based on the percentage of staff assigned to the service of general interest, on the percentage of the surface area assigned to such services or on other objective criteria that must be authorised by the Region.
- (248) Since 2006 for those items connected with the fire and maintenance services and since 2010 for the security, navigation office and marshalling services, the compensation has been capped at an amount specified in Article 25 of the schedule of conditions, subject to indexation. In any event, the compensation amount cannot exceed the costs actually incurred by BSCA for these services.

<sup>(92)</sup> Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7447, ECLI:EU:C:2003:415.

(249) As a result, compensation parameters have been defined in advance and in detail, which therefore satisfies the second criterion of the *Altmark* judgment.

### 3. Limitation of the compensation to the costs incurred

(250) According to Belgium, various mechanisms have been used to avoid overcompensation:

— Before the compensation was capped, the precise definition of the costs assumed by Wallonia and the accounting separation principle enabled any overcompensation to be avoided. Furthermore, an audit mechanism was established to check, on the one hand, the budget presented by BSCA and, on the other hand, the absence of any overcompensation after the compensation was released.

— Since 2006 the compensation amount received for fire protection and ground traffic and airport site safety services has not been able to exceed EUR 5 774 000, indexed annually.

— The compensation granted for security, navigation office and marshalling services has been capped since 2010 at an amount equivalent to the cost of these services in 2009, indexed annually.

(251) In addition, Article 25 provides that the amount received may never exceed the costs actually incurred, and that, if overcompensation occurs, a budgetary compensation mechanism will be automatically applied to the budget for the following year. For the record, a budget is prepared in advance by BSCA and checked by the Walloon administration. The latter also carries out on-the-spot checks every year to ensure that BSCA is complying with the provisions of Article 25 of the schedule of conditions.

### 4. Comparison with a similar well-run and adequately equipped undertaking

(252) According to Belgium, no comparison between BSCA and a similar well-run and adequately equipped undertaking is necessary because BSCA is quite clearly a well-run and adequately equipped undertaking.

(253) BSCA complies with the applicable international and accounting standards and all the ratios indicated in the Communication from the Commission of 20 December 2011 on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest prove that this company is efficiently managed. This fact also enabled BSCA to attract private investors in 2009 during its partial privatisation.

(254) The fact that BSCA is a well-run and adequately equipped undertaking can mainly be seen from the constant progress made in its financial results since 2000. Whereas in 2000 BSCA recorded a turnover of EUR 7 578 000, in 2010 this figure had reached EUR 81 387 000. It is also evident that, if BSCA were not a well-run and adequately equipped undertaking, Charleroi airport would not have seen the remarkable progress made in its passenger volume between 1997 and 2011 (from 211 065 passengers to 5 901 007 passengers).

(255) Lastly, it is clear from the financing mechanism put in place that, by definition, the compensation paid to BSCA is less than the market price of all the services entrusted to it, insofar as this compensation was capped in 2006 for the fire and ground traffic and airport site safety services and in 2010 for the security services.

#### (d) BSCA's capital increase carried out by SOWAER in 2002

(256) According to Belgium, the Commission never expressed any reservations about BSCA's capital increase until the 2012 extension decision. On the contrary, it explicitly recognised that this operation was carried out in accordance with the private investor principle (see recital 132 of the 2004 decision).

(257) The most recent figures prove that BSCA has generated profits allowing EUR 6 505 595 to be distributed among its public and private shareholders in 2010 alone. The results for the last five years are given in the following table.

INCOME STATEMENTS (in EUR million)	2011	2010	2009	2008	2007
Sales and services	53 618	48 533	35 434	27 002	19 543
Profit for the year	11 310	9 994	4 445	1 915	1 968
Return on capital	6 815	6 506	387	387	387

- (258) The capital increase carried out by SOWAER presents an internal rate of return (IRR) of 26,09 %, which is similar to the estimate made by Deloitte & Touche in 2003, thus confirming the credibility of this analysis. Given the above, it must be accepted that this investment would undoubtedly have been made by a private investor.
- (259) The Commission's assessment of the capital increase, according to which 'these doubts are reinforced by the finding that BSCA has not borne the cost of the infrastructures placed at its disposal or the various services provided by SOWAER', is also marred by an error of law. The Commission should individually apply, to each form of intervention, the necessary criteria for assessing their respective regularity and determining, for each intervention, whether aid exists and, if so, whether or not this aid is compatible with the internal market. The philosophy of a capital increase in BSCA in fact differs from the objective of providing airport infrastructure, particularly given the context at the time. The Commission cannot therefore group both types of intervention together in order to determine the overall profitability.

5.1.1.2. *Comments from Belgium following the comments from third parties on the absence of aid to BSCA received after the 2012 extension decision*

(a) Concession fee paid by BSCA

- (260) In reply to BAC's comments on the fees paid by BSCA for the use of the infrastructure, Belgium indicates that some of the fees mentioned by BAC are not relevant to Charleroi, in particular:
- the 'slot coordination fee' in the absence of congestion at Charleroi airport,
  - the 'terminal navigation charge', which is not imposed on regional airports with a number of commercial flight movements below 50 000.
- (261) Furthermore, according to Belgium and contrary to BAC's assertion, a fee for the centralised infrastructure is charged by BSCA, as infrastructure manager, to the ground handling companies, including BSCA as handler. This fee is included in the contract between BSCA and Ryanair.
- (262) The fee imposed by the federal administration of EUR 0,18 per departing passenger is the responsibility of the Federal State and not BSCA.
- (263) The PRM fee is based on the actual costs incurred by BSCA. In this respect, according to Belgium, the size of the infrastructure at Charleroi airport simply needs to be compared with that at Brussels airport to realise that the management of this service provided to passengers with reduced mobility involves lower costs at Charleroi than at Brussels, if only in terms of the distance to be covered in order to reach the aircraft or leave the terminal.
- (264) In addition, Belgium confirms that it is correct that BSCA does not currently impose any security fee. This task falling within the public policy remit is the subject of compensation from Wallonia, but this compensation has been capped under the concession agreement between BSCA and Wallonia and any costs above this cap are payable by BSCA. However, BSCA is under no obligation to pass on these costs to passengers through a fee.

(265) With regard to the aircraft parking fees, according to Belgium, the figure given in the table provided by BAC is incorrect as it indicates that there are no parking fees at Charleroi airport, which is wrong because the charges published on the BSCA website clearly indicate the existence of such fees set at EUR 1,98 per day (24 hours) and per tonne.

(b) Financing of services of general interest

(266) Several of the third parties having submitted comments, in particular Brussels Airlines and BAC, have remarked on the financing of the services of general interest provided by BSCA to Wallonia. They question whether some of the services provided by BSCA, namely safety, security, fire protection, and ground traffic and airport site safety services, can be regarded as activities excluded from the scope of Article 107(1) TFEU.

(i) Comment on the comparison between Charleroi airport and BAC

(267) Brussels Airlines and BAC assert that, at Brussels airport, the cost of these various services is not borne by the competent public authorities, in this case the Federal State, from which they seem to deduce that Charleroi airport is receiving State aid.

(268) In this respect, it should be noted that Belgian airports do not all come under the same public authority, as regional airports come under the region in which they are situated, whilst Brussels airport is the responsibility of the Federal State <sup>(93)</sup>. The responsibility of each authority for the airports entrusted to it was clearly set out when the management of airports (excluding Brussels airport) was regionalised through the cooperation agreement between the Belgian State, acting for the Société nationale des voies aériennes (S.N.V.A.) <sup>(94)</sup>, and the regions <sup>(95)</sup>. This agreement unequivocally states that 'from the date when said Act enters into force, the regions shall be completely responsible for the activities transferred to them. From that date, they shall be authorised to adopt all appropriate measures, for which they shall therefore assume complete responsibility'.

(269) Charleroi airport is therefore governed by the regulations of Wallonia, whilst Brussels airport is regulated by the Federal State. In this case, under its regulatory power, the Region has chosen to finance part of the cost of certain services. The fact that identical services are, in one case, borne by a public authority and, in another case, borne by the operator does not, however, have any impact on their qualification as economic or non-economic activities.

(270) In the Flemish Region, for that matter, some of the services in question are directly provided by the regional administration and are therefore borne directly by the region. This is particularly the case with all the costs of airport safety and security services at Anvers and Ostend airports, regardless of the volume of traffic at these airports.

(ii) Fire protection services

(271) With specific regard to the fire protection services, Brussels Airlines asserts that other undertakings based in Wallonia and subject to the Seveso Directive <sup>(96)</sup> must bear the cost of their fire protection service, such as Total, which is based in Feluy, and that, at Brussels Airport, these services are not financed by the Flemish Region/Federal State.

(272) According to Belgium, this comparison with undertakings subject to obligations under the Seveso Directive is irrelevant as it is clear from the wording of that Directive that Member States are required to ensure that undertakings falling within its scope <sup>(97)</sup> themselves take measures to prevent fire. By contrast, the obligation to organise fire protection services at airports is imposed directly on Member States by an international convention adopted by the International Civil Aviation Organisation.

<sup>(93)</sup> Article 6(1)(X)(7°) of the Institutional Reform Act (Belgian Official Gazette, 15 August 1980, p. 9434).

<sup>(94)</sup> Now Belgocontrol.

<sup>(95)</sup> Belgian Official Gazette, 9 March 1990, p. 4439.

<sup>(96)</sup> Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (OJ L 10, 14.1.1997, p. 13), known as the Seveso Directive.

<sup>(97)</sup> Which is not the case with airports.

(273) Furthermore, both the European Commission and the General Court have confirmed that fire protection services are public authority activities that may be excluded from the scope of Article 107(1) TFEU.

(iii) Ground traffic and airport site safety services

(274) Brussels Airlines also questions the qualification as non-economic activities of the maintenance services that correspond in this case to ground traffic and airport site safety. In this respect, Brussels Airlines simply stresses that such services form part of the management of an airport and are therefore economic activities.

(275) The fact that the management of an airport constitutes an economic activity is already well-established. However, certain activities are excluded from the scope of Article 107(1) TFEU because they fall within the public policy remit or they are by nature non-economic, even if, as highlighted by Brussels Airlines, they are essential to the management of an airport. It is therefore clear, for example, that the management of an airport (economic activity) implies providing a customs service to check the identity of passengers, although it should be noted that such a service is one of the tasks traditionally reserved to the State and is therefore a non-economic activity. Consequently, the fact that ground traffic and airport site safety services are essential to the management of an airport is not sufficient to deprive them of their non-economic nature.

(276) As noted by the Commission in its aforementioned decision on Leipzig/Halle airport: 'in the present case certain costs fall within the public policy remit. These costs relate to security and police functions, fire and public safety measures, operational safety, German Weather Service and German Air Traffic Control' <sup>(98)</sup>. In its comments following the 2012 decision extending the formal investigation procedure, Belgium reiterated that it is clear from this same decision that 'operational safety activities' cover everything needed in terms of ground traffic and airport site safety, namely power supply, runway lighting, apron lighting, etc. It is precisely the maintenance of these various functions that is the issue here.

(iv) General safety and security services

(277) Lastly, Brussels Airlines questions the qualification of general safety and security services as 'non-economic'. In this case, it would seem that Brussels Airlines has included flight tracking and recording, flight planning and marshalling services among safety services.

(278) Brussels Airlines more specifically questions whether flight tracking and recording, flight planning and marshalling services are covered by Regulation (EC) No 2320/2002 of the European Parliament and of the Council <sup>(99)</sup>, which means 'the combination of measures and human and natural resources intended to safeguard civil aviation against acts of unlawful interference'.

(279) However, the Walloon authorities have never regarded flight tracking and recording, flight planning and marshalling services as activities connected with airport security. They consider, in fact, that these activities are essential to the safety of an airport and refer, in this respect, to the explanations provided in their reply to the decision opening the formal investigation procedure.

(280) With regard to BAC's comment that airlines operating out of Brussels airport must pay a fee for the flight tracking, recording and planning services provided by Belgocontrol, this again is an argument based on the source of financing of a service, which is not sufficient to qualify said service as non-economic.

(281) Belgium also observes that the provision of certain services by Belgocontrol, free of charge, within regional airports was decided in the aforementioned 1989 cooperation agreement, which stipulated that 'the regions may have recourse, free of charge, to the assistance provided by the central services of the [S.N.V.A.] in terms of

<sup>(98)</sup> Recital 182.

<sup>(99)</sup> Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ L 355, 30.12.2002, p. 1).

applying the international standards and recommendations on civil aviation' <sup>(100)</sup>. This free provision is limited to the level of activity of the Walloon airports in 1989, with all services exceeding this level of activity being covered by Wallonia.

(282) It is clear from both the 2005 aviation guidelines and the EU regulations on air navigation services that these services are non-economic activities, which are therefore excluded from the scope of Article 107(1) TFEU. This is actually one of the ways of regionalising the management of airports other than Brussels airport.

(283) According to Belgium, it follows from the above that none of the comments made by Brussels Airlines and BAC calls into question the fact that fire protection, ground traffic and airport site safety, security, flight tracking and recording, flight planning and marshalling services constitute non-economic activities.

5.1.1.3. *Comments from Belgium following the comments from third parties received after the publication of the new aviation guidelines*

(284) Belgium has particularly made comments on the impact on competition of the measures granted to BSCA following the comments from third parties received after the publication of the new Aviation Guidelines.

(285) The third parties (BAC and Brussels Airlines) are of the opinion that the aid has enabled BSCA to apply 'artificially low' fees and that there is therefore a significant difference between the fees of BSCA and those of other airports. This practice has allegedly resulted in the reduced volume of passengers at Brussels airport.

(286) Belgium disputes certain figures provided by Brussels Airlines. For example, as regards the comparison of the fees charged by BAC and BSCA, Belgium stresses that 'Brussels Airlines includes fees that do not apply to airlines but to ground handling services'. The table provided by Brussels Airlines allegedly does not include similar costs charged by BSCA. The same applies to other costs imposed by the Federal State.

(287) Belgium raises the same concerns about the tables comparing the various airports. Accordingly, in the 'passenger charges or fee' column for Marseille Provence airport, Brussels Airlines includes a fee of EUR 13,47, which actually corresponds, in Belgium's opinion, to a 'security charge imposed by the State and not to a passenger fee within the meaning of airport fees'.

(288) As regards the lack of any impact on trade, Belgium refers the Commission to its comments of 23 May 2012 and to its communication of 12 December 2012 on the differences between Brussels airport and Charleroi airport.

(289) In terms of the negative impact on airlines based at Brussels airport, Belgium highlights a number of points:

— Brussels Airlines has allegedly withdrawn certain destinations such as Palermo, Cracow and Seville. This statement is true, but it fails to take into account that these destinations have subsequently been reintroduced in 2014.

— Although BAC states that flights to Nador and Tangier (Morocco) from Brussels airport have been reduced due to Jetairfly serving the same destinations from Charleroi airport, Belgium points out that the airline Air Arabia also flies to these destinations from Brussels airport.

— With regard to flights to Istanbul, Belgium highlights that Brussels airport has increased the frequency of flights to this destination following the transfer of the airline Pegasus to Charleroi airport, which serves Turkey.

— Lastly, Belgium stresses that Charleroi airport has also seen the frequency of certain flights reduce or certain destinations be withdrawn due to the transfer of certain flights by airlines to Brussels airport. For example, Charleroi airport has lost three flights per week to Casablanca, to the benefit of Brussels airport, due to these flights being transferred by the airline Air Arabia to Brussels airport.

<sup>(100)</sup> Article 5.1.

- (290) Belgium notes that Ryanair has recently established a base at Brussels airport, which proves that the high level of fees has not prevented it from going ahead with this new development. However, Belgium reasserts that competition between Charleroi airport and Brussels airport is limited, and to very specific segments, i.e. charter and low-cost.
- (291) Moreover, Belgium disputes that only BSCA's commercial strategy in terms of its fees can explain the success of Charleroi airport. In its view, this claim ignores reality, which has seen the emergence of an entirely new low-cost market meeting a new demand. In this respect, Wallonia points out that, some years ago, 40 % of passengers at Charleroi airport were flying for the first time, which proves that they have not been 'stolen' from Brussels airport.

#### 5.1.2. *Compatibility of the aid granted to BSCA*

##### 5.1.2.1. *Comments from Belgium on the compatibility of the measures granted to BSCA, assessed on the basis of the aviation guidelines*

- (292) According to Belgium <sup>(101)</sup>, if, somehow, the Commission were to consider that BSCA has benefited from aid, this aid should be qualified as operating aid, which can be authorised under the aviation guidelines. The conditions to be met in order for such aid to be authorised, as indicated in paragraph 137 of the aviation guidelines, are contribution to a well-defined objective of common interest, need for State intervention, appropriateness of State aid as a policy instrument, existence of incentive effect, proportionality of the aid amount and absence of negative effects on competition.
- (a) Contribution to an objective of common interest
- (293) Airport development in the Walloon Region formed part of a comprehensive economic and social development strategy of the regions concerned, which was implemented in 1989. Wallonia has supplied various documents and studies confirming the pursuit of this objective.
- (294) In addition, as highlighted by the studies ordered by the Region and BSCA in 2000 and 2001, Brussels airport was at saturation point at that time and Charleroi airport was therefore in a position to contribute to the objective of tackling congestion.
- (295) Furthermore, it is clear from the various studies conducted at the request of the Region and BSCA that real demand existed for Charleroi airport in the low-cost segments. This demand has been confirmed in practice by its success, and it was therefore justified to develop Charleroi airport given the density of its catchment area, which is heavily populated and located at the centre of Europe.
- (296) The development of Charleroi airport has proven that this was not a case of financing unprofitable activities, as the airport became profitable in 2004. BSCA's business plan drawn up in 2001 forecast a return to profitability in 2005, i.e. a year later, which is testament to the prudent and reasonable nature of this plan.
- (297) According to Belgium, if the parallel development of passenger traffic at Brussels airport and Charleroi airport is examined, it can be concluded that any impact from Charleroi on Brussels has been marginal. The brake on development at Brussels airport was caused by the failure of Sabena in November 2001 and not by the concomitant development of Charleroi airport. As a reminder, a study carried out by BSCA in 2010 showed that 40 % of these passengers were flying for the first time, which proves that a significant part of the passenger volume has not been 'stolen' from Brussels airport. In addition, another significant part of the passenger volume consists of *city trippers*, who decide to take short-haul flights that they would not have taken in the absence of attractive fares. Until recently Brussels airport had seen little or no development in the low-cost segment. Accordingly, easyJet launched its first destinations from Brussels airport during 2007.

<sup>(101)</sup> Annex 15 to the letter from Belgium of 24 February 2014.

(b) Need for State intervention

- (298) Any aid that may be identified by the Commission was certainly necessary to meet this objective of economic and regional development.

(c) Appropriateness of State aid

- (299) Funding the costs of the general interest tasks entrusted by the Region to BSCA was the most appropriate way of achieving the aforementioned objective of common interest. There were no other policy instruments or aid instruments that could have achieved this objective.

(d) Incentive effect

- (300) An incentive effect also exists because, in the absence of this funding, it would not have been possible to develop the airport's activities or achieve this volume level, which has resulted in improved mobility of European citizens and economic and regional development due to the airport's activities. Belgium refers the Commission to the number of passengers handled by BSCA over the period in question. As a reminder, during that period Charleroi airport was a category D airport with no possibility of distorting competition. The funding is also in line with the objectives of the aviation guidelines, namely ensuring the long-term profitability of regional airports.

(e) Proportionality of the aid amount

- (301) Lastly, the aid amount is proportional. As a reminder, the compensation granted for the general interest tasks, as stipulated in Article 25 of the schedule of conditions annexed to the concession agreement between the Region and BSCA, is capped so that, if this cap is exceeded, which is the case with the part of the compensation for fire protection and ground traffic safety services, the costs must be covered by BSCA. Any aid granted in terms of the provision of services by SOWAER involves a marginal amount.
- (302) Given the limited amount of the aid in the context of this compensation for the services of general interest that may be called into question by the Commission and also the objective of these services, it must be considered that this proportionality condition is met.

(f) Absence of negative effects on competition

- (303) As regards the absence or avoidance of negative effects on competition, the Commission must refer back to the time when the public financing was granted in order to assess this condition. It cannot be considered that, at that time, there was any undue impact on competition. As proven to the Commission, Charleroi airport has not been developed at the expense of other airports. Its activities stem from the creation of a new market in a specific segment that was not being developed at all or only to a very limited extent at Brussels airport.
- (304) For the record, two studies carried out by independent experts, Roland Berger International Management Consultant and GTM, revealed the imminent saturation of Brussels airport and the lack of any overlap in terms of customers between the two airports. At the time the airlines operating at Brussels airport had no interest in Charleroi airport, whilst Ryanair, the main user of Charleroi airport, had no plans to base itself at the main airports.
- (305) Furthermore, the Region's framework agreement of 20 July 2000, as extended by the decision of 8 November 2000, contained the objective of 'implementing a policy allowing efficient collaboration with the managers of Brussels airport' <sup>(102)</sup>.
- (306) In addition, Charleroi airport was at a disadvantage due to the regulatory constraints on its opening hours. In 2000 the airport could open between 07:00 and 22:00. These hours were slightly altered to 06:30 and 23:00 in order to accommodate the aircraft based at the airport.

<sup>(102)</sup> Note approved by the Walloon Government on 8 November 2000, p. 2.



- (307) Furthermore, in 2000 Charleroi airport had a very poor image, as confirmed by the GTM and Roland Berger studies. The infrastructure was cramped, limited and little-used. The airport offered only one scheduled service and a number of charter flights in the summer. It cannot be considered that at the time Charleroi airport was in a position to compete with Brussels airport.
- (308) Lastly, Brussels airport was at an advantage in terms of infrastructure (several terminals, several runways, etc.) and accessibility due to its location close to the capital and the rail link that Charleroi airport lacked.

5.1.2.2. *Comments from Belgium on the compatibility of the provision of infrastructure, assessed on the basis of Article 106(2) TFEU*

- (309) These comments concern the compatibility:
- of the provision of infrastructure, assessed on the basis of the 2005 aviation guidelines (the latter having been replaced by the 2014 aviation guidelines),
  - of the financing of part of the costs of the services of general interest, assessed on the basis of Article 106(2) TFEU.
- (310) With regard to the compatibility of the financing of part of the costs of the services of general interest, assessed on the basis of Article 106(2) TFEU, Belgium submits that this financing complies:
- with Article 106(2) TFEU for the period prior to 19 December 2005,
  - with the Commission Decision of 28 November 2005 for the period from 19 December 2005 to 31 January 2012,
  - with the Framework of 20 December 2011 for the period after 31 January 2012.
- (311) According to Belgium, if the Commission considered that the criteria of the *Altmark* judgment were not all met, then it would be necessary to authorise the compensation of services of general interest based on the Decision of 28 November 2005 <sup>(103)</sup>.
- (312) With regard to the measures granted prior to 19 December 2005, i.e. before the Decision of 28 November 2005 entered into force, their compatibility is directly based on Article 106(2) TFEU. It is clear from the Commission's decision-making practice <sup>(104)</sup> that the conditions of Article 106(2) TFEU are combined with those of the Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest <sup>(105)</sup>. The measures granted prior to 19 December 2005 can therefore be assessed for compatibility together with those granted subsequently in accordance with Article 106(2) TFEU, using the same basic criteria as set out by the Decision of 28 November 2005.
- (313) With regard to the measures granted since 19 December 2005, they fall within the scope of the Decision of 28 November 2005 where they correspond to public service compensation granted to undertakings with an average annual turnover before tax of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million <sup>(106)</sup>. However, at no time has BSCA had an annual turnover in excess of

<sup>(103)</sup> Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

<sup>(104)</sup> Commission Decision of 28 October 2009 on the financing of public hospitals in the IRIS network in the Brussels-Capital Region, State aid case NN 54/2009, obtained from the *Europa* website.

<sup>(105)</sup> See footnote 103.

<sup>(106)</sup> Commission Staff Working Document, frequently asked questions in relation with Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation (SEC(2007) 1516 final, p. 6).

EUR 100 million. Furthermore, according to Belgium, it is evident that the compensation for any services of general interest that may be qualified as economic by the Commission would be far from reaching the threshold of EUR 30 million. As a result, this compensation clearly falls within the scope of the Decision of 28 November 2005.

(314) Based on the Decision of 28 November 2005, measures falling within its scope are compatible where they meet the following criteria.

(a) Mandate

(315) Belgium considers that it proved the existence of public service obligations when it 'established' that the first criterion of the *Altmark* judgment was met (see Section 5.1.1.1(c)(ii)). Moreover, according to Belgium, the parameters for calculating the compensation and the methods used to prevent any overcompensation were explained when Belgium proved that the third and fourth criteria of the *Altmark* judgment were met.

(b) Compensation

(316) Belgium notes that Wallonia's intervention has been capped since 2006 with regard to the fire protection and ground traffic and airport site safety services and since 2010 with regard to the security, navigation office and marshalling services. The cost accounting system put in place by BSCA enables compliance with this criterion to be proven.

(c) Accounting separation

(317) According to Belgium, accounting separation is guaranteed by the application of Article 25 of the schedule of conditions, which provides that the 'concession-holder shall keep a separate operating account for the Services. This account may be subject at any time to on-the-spot checks by the concession authority'. This is also confirmed by the document in Annex 8.

(d) Checks for overcompensation

(318) Wallonia has the right to check, at any time, BSCA's accounts for the services of general interest, under Article 25 of the schedule of conditions. Accordingly, every year the Walloon administration conducts an on-the-spot check to examine the evidence underlying the declaration of claim submitted by BSCA in order to obtain the compensation for the services of general interest.

(e) Conclusion

(319) It follows from the above that the financing of the services of general interest that may be qualified as economic by the Commission can be declared compatible with the internal market based on the Decision of 28 November 2005.

## 5.2. Comments from Belgium on the measures granted to Ryanair

(320) Following the 2002 opening decision and the 2012 extension decision, Belgium submitted comments aimed at proving that the measures granted to Ryanair, as examined in the present decision, do not constitute State aid.

## 5.3. Comments from Belgium on the limitation period

(321) According to the comments submitted by Belgium following the adoption of the 2012 extension decision, even if the financing of the services of general interest is regarded as constituting State aid, this benefits from the limitation period laid down by Article 15 of Council Regulation (EC) No 659/1999<sup>(107)</sup> (hereinafter 'Procedural Regulation').

<sup>(107)</sup> 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).

- (322) Under this provision, the limitation period begins on the day on which the unlawful aid is awarded to the beneficiary. In accordance with EU regulations <sup>(108)</sup> and the Commission's decision-making practice <sup>(109)</sup>, the Commission must assess a measure according to the rules applicable at the moment the aid is awarded, 'that is, the moment of the legally binding act on the basis of which the beneficiary acquires the right to receive the aid'. EU case-law confirms that the date of award of the aid corresponds to the date of the 'legally binding act by which the competent [national] authorities undertake to grant aid' <sup>(110)</sup>. The legal act becomes binding on the date when, under national law, the State is obliged to meet its commitment based on the act in question. Prior to that, there is simply a declaration of intention <sup>(111)</sup>.
- (323) It follows from the above that the date when the compensation for the services of general interest provided by BSCA was granted is 9 July 1991, i.e. the date of the concession agreement and schedule of conditions forming the legal basis of this compensation binding the Region. Since that date, notwithstanding the adoption of various provisions without any impact on the principle of compulsory reimbursement by the Region of this expenditure, Wallonia has been responsible for paying this compensation. Only a few non-economic services set out in Amendment No 6 of 15 January 2008 are apparently not covered by this limitation period. The starting point of the 10-year limitation period is therefore 9 July 1991.
- (324) No Commission measure regarding the compensation received for the services of general interest provided by BSCA, as required by Article 15 of the Procedural Regulation, interrupted the 10-year limitation period, which therefore expired in July 2001. Despite this compensation not being formalised in the agreement for the 2000-2001 period, the parties, i.e. Wallonia and BSCA, always intended to maintain this compensation for an indefinite period. This intention was confirmed by the funding of these costs for said period and was stipulated in the 2002 amendment, such that the starting point of the limitation period has not been called into question.
- (325) Only the Commission letter of 24 April 2002, which in particular contains questions on BSCA's financing and might therefore indirectly concern the funding of the costs of the services of general interest, could have interrupted the limitation period. Detailed explanations were provided by the Walloon authorities following this request, but the Commission did not at any time question the legality of this financing.
- (326) It follows from the above that, even if the compensation paid for the services of general interest is regarded as State aid, which it is not, the Commission's powers to recover the aid are limited under Article 15 of the Procedural Regulation.

#### 5.4. Comments from Belgium on the infringement of legitimate expectations

- (327) Following the 2012 extension decision, Belgium submitted comments on the application of the principle of legitimate expectations to the subsidy paid by the Region for certain services associated with the airport activities.
- (328) In accordance with the case-law of the Court of Justice on State aid, the Commission is required to take into consideration on its own initiative the exceptional circumstances that provide justification, pursuant to Article 14(1) of the Procedural Regulation, for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law, such as respect for the legitimate expectation of beneficiaries.
- (329) As summarised by Advocate General Philippe Léger, the infringement of this principle is recognised when the three following conditions are satisfied: 'First of all, there must be an act or conduct on the part of the Community administration capable of having given rise to such an expectation ... Next, the person concerned must not be able to foresee the change to the pattern of conduct previously adopted by the Community administration ... Lastly, the Community interest which the contested measure seeks to achieve must not justify the infringement of the legitimate expectation of the party concerned'.

<sup>(108)</sup> See recital 10 of 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).

<sup>(109)</sup> Decision of the Commission of 1 August 2006 on the Guidelines on closure of assistance (2000-2006) from the Structural Funds, COM (2006) 3424 final, not published, obtained from the *Europa* website.

<sup>(110)</sup> Judgment of 14 January 2004 in Case T-109/01 *Fleuren Compost BV v Commission of the European Communities* [2004] ECR II-127, ECLI:EU:T:2004:4, paragraph 74.

<sup>(111)</sup> Judgment of 15 February 2001 in Case C-99/98 *Republic of Austria v Commission of the European Communities* [2001] ECR I-1101, ECLI:EU:C:2001:94, paragraphs 34, 35 and 38.

- (330) According to Belgium, particularly as regards the subsidy paid by the Region for certain services associated with the airport activities, the three conditions cited in the preceding recital are satisfied.
- (331) The Commission examined the subsidy paid by the Region for certain services associated with the airport activities during the first investigation and did not raise any objections in this respect in its 2004 decision. In that decision, the Commission expressly stated that it 'does not dispute the legitimate possibility of the Walloon authorities continuing to bear the cost of the fire and maintenance services' <sup>(112)</sup>. The maintenance services provided by BSCA at that time were defined as follows: 'the concession-holder must provide, in the context of the service concession, maintenance for the land, buildings, equipment and structures included in the concession and placed at its disposal, so that they are always suitable for the use for which they are intended'. In the same respect, in recital 352 of the same decision, the Commission stated that 'Some of the financial burdens of these airports, whether they are private or public, are, however, often covered by public service compensation relating to safety or security tasks, or by other contributions to the costs of activities that would not be economically viable in themselves but that are necessary to the operation of these platforms. This may be the case with air traffic control, police or fire fighting services, etc.'
- (332) Belgium also stresses that the annulment by the General Court in no way related to this aspect of the 2004 decision.
- (333) It therefore concludes that the three conditions set out in recital 329 are satisfied.
- (334) Firstly, the decision made in 2004 by the Commission and the lack of censure by the General Court on this point have 'previously created a situation which could give rise to such an expectation'. According to Belgium, BSCA has received precise assurances that the funding of the costs of the services of general interest was not likely to constitute State aid, given the lack of any complaint on this point in the 2004 decision. This legitimate expectation is further reinforced by the settled decision-making practice of the Commission on this issue, in particular the distinction between economic activities and non-economic activities, as reiterated in particular in the decision on Leipzig/Halle airport.
- (335) Secondly, BSCA was not 'able to foresee the change to the pattern of conduct previously adopted by the Community administration'. According to Belgium, there was nothing to indicate to BSCA that the Commission was going to re-examine, in 2012, a measure on which it had not expressed any reservations in 2004, and which the General Court did not question in 2008.
- (336) Thirdly, the Community interest does not prevail over that of BSCA 'in seeing the situation maintained that it might legitimately have assumed to be a stable one'. According to Belgium, BSCA would suffer considerable harm from a Commission decision ordering recovery of the subsidies received by BSCA in return for providing the services of general interest.
- (337) In conclusion, Belgium considers that this financial compensation, which is vital to ensure the safety and security of the airport site and activities, has been maintained and extended since the 2004 decision, particularly due to the legitimate expectation arising from the Commission's position that the financing of the services of general interest did not constitute State aid within the meaning of Article 107 TFEU. Given the legitimate expectation created by the Commission in the mind of BSCA, even if the Commission were to consider that the subsidies in question constitute State aid, it could not order their recovery, pursuant to Article 15 of the Procedural Regulation.

## 6. ASSESSMENT OF THE MEASURES

- (338) 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, insofar as it affects trade between Member States, be incompatible with the internal market.

<sup>(112)</sup> Recital 214 of the 2004 decision.

- (339) A measure is therefore qualified as State aid where all the following conditions are met: (1) the beneficiary or beneficiaries is or are undertakings within the meaning of Article 107(1) TFEU; (2) the measure provides a selective advantage to its beneficiary; (3) the measure is financed by State resources and is imputable to the State; and (4) the measure distorts or threatens to distort competition and may affect trade between Member States.
- (340) In this chapter, the Commission assesses whether the measures described in Chapter 3 may constitute aid to BSCA and/or Ryanair, and then considers whether the aid identified is compatible with the internal market and whether the limitation period and principle of legitimate expectations apply.

### 6.1. Existence of State aid granted to BSCA

#### 6.1.1. Definition of undertaking within the meaning of Article 107 TFEU

- (341) Under Article 107(1) TFEU, in order to be regarded as State aid, a measure must favour ‘certain undertakings or the production of certain goods’.
- (342) The Court of Justice 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<sup>(113)</sup>. Moreover, the Court has consistently held that an economic activity is any activity consisting in offering goods and services on a given market.<sup>(114)</sup>
- (343) In its *ADP* judgment, the Court of First Instance concluded that the operation of an airport, which consists in providing airport facilities to airlines, is an economic activity.
- (344) In its *Leipzig-Halle Airport* judgment<sup>(115)</sup>, the Court confirmed that the operation of an airport in return for payment constitutes an economic activity, from which the activity consisting in the construction of airport infrastructure cannot be dissociated<sup>(116)</sup>. Where an airport operator engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) TFEU and therefore falls within the scope of the TFEU rules on State aid<sup>(117)</sup>. The Court also confirmed that, unlike their effects, the regional, economic or transport policy objectives pursued by the construction or extension of airport infrastructure were not relevant when determining whether an economic activity existed.
- (345) The question of whether there is a market for given services can depend on how those services are organised in the Member State concerned<sup>(118)</sup>. The State aid rules apply only where a given activity is carried out in a commercial environment. The economic nature of given services can therefore vary from one Member State to another. In addition, the qualification of a given service can alter over time depending on policy choices or economic developments.

<sup>(113)</sup> Judgment of 12 September 2000 in Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, ECLI:EU:C:2000:428.

<sup>(114)</sup> Judgment of 16 June 1987 in Case 118/85 *Commission of the European Communities v Italian Republic* [1987] ECR 2599, ECLI:EU:C:1987:283, paragraph 7; judgment of 18 June 1998 in Case C-35/96 *Commission of the European Communities v Italian Republic* [1998] ECR I-3851, ECLI:EU:C:1998:303, paragraph 36; judgment of 12 September 2000 in Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, ECLI:EU:C:2000:428, paragraph 75.

<sup>(115)</sup> Judgment in *Leipzig-Halle*, paragraph 102 et seq.

<sup>(116)</sup> Judgment of 24 March 2011 in Joined Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v European Commission* ECLI:EU:T:2011:117 and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt v European Commission* (hereinafter ‘*Leipzig-Halle* judgment’) [2011] ECR I-1311, paragraphs 93, 95, 100 and 119. See also *ADP* judgment, confirmed by the judgment of the Court of Justice of 24 October 2002 in Case C-82/01P *Aéroports de Paris v Commission of the European Communities* [2002] ECR I-9297, ECLI:EU:C:2002:617, and by judgment of 17 December 2008 in Case T-196/04 *Ryanair Ltd v Commission of the European Communities* [2008] ECR II-3643, ECLI:EU:T:2008:585, paragraph 88.

<sup>(117)</sup> Judgment of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* [1993] ECR I-637, ECLI:EU:C:1993:63.

<sup>(118)</sup> *Idem*.

- (346) As a result, prior to the ADP judgment, the Commission's consistent practice was to consider that the activity of developing and managing airport infrastructure did not constitute an economic activity falling within the scope of Article 107(1) TFEU <sup>(119)</sup>. Following the ADP judgment, the Commission decided that, due to the gradual liberalisation of the market, this activity had become an economic activity. This is also clarified by the aviation guidelines <sup>(120)</sup> in points 28 and 29: 'from the date of the judgment in *'Aéroports de Paris'* (12 December 2000), the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control. Conversely, due to the uncertainty that existed prior to the judgment in *'Aéroports de Paris'*, 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'.
- (347) It should therefore be determined whether the measures granted to BSCA for the operation and construction of airport infrastructure were granted before or after 12 December 2000, which was the date of the ADP judgment.
- (348) In addition, even after the ADP judgment, as highlighted by points 34 and 35 of the aviation guidelines, not all the activities of an airport operator are necessarily regarded as economic in nature. The Court of Justice has therefore confirmed that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not economic in nature <sup>(121)</sup>. At an airport, activities such as air traffic control, police, customs, firefighting, measures designed to protect civil aviation from acts of unlawful interference, and investment in the infrastructure and equipment needed for such activities are regarded, as a general rule, as not being economic in nature.
- (349) In conclusion, the measures granted to BSCA after 12 December 2000 must be identified and those measures granted for activities normally falling under State responsibility in the exercise of its official powers as a public authority must be excluded.

6.1.1.1. *Land and infrastructure of Charleroi airport placed at the disposal of BSCA, including infrastructure constructed under the investment programme, and provision of certain services, particularly major repairs, in return for a concession fee*

- (350) In this section, the Commission examines:

- whether the measure, including new infrastructure constructed under the investment programme being placed at the disposal of BSCA, was granted before the ADP judgment,
- which investments and which services provided by SOWAER must be excluded from the examination due to being non-economic in nature.

- (a) Was the measure, including new infrastructure constructed under the investment programme being placed at the disposal of BSCA, granted before the ADP judgment?

- (351) As highlighted in recital 344 et seq., the construction of airport infrastructure cannot in principle be dissociated from the economic activity of operating the airport platform.
- (352) With regard to the construction of infrastructure at Charleroi airport, which was included in the multiannual investment programme, the Belgian authorities consider, however, that this investment programme was decided prior to 12 December 2000, which was the date of the ADP judgment. Belgium's arguments, set out in Section 5.1.1.1(a)(i), essentially aim to refute the scope and accuracy of the preliminary arguments given by the

<sup>(119)</sup> ADP judgment.

<sup>(120)</sup> See footnote 8.

<sup>(121)</sup> Judgment of 10 January 1994 in Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43, ECLI:EU:C:1994:7, paragraph 30, and judgment of 26 March 2009 in Case C-113/07 *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)* [2009] ECR I-2207, ECLI:EU:C:2009:191, paragraph 71.

Commission in the 2012 extension decision, according to which the framework agreement of 20 July 2000 and the decision of the Walloon Government of 8 November 2000 (hereinafter the '2000 decisions') do not impose any commitment on the Region with regard to a third party and are not irrevocable, firm and definitive in nature.

- (353) However, the Commission takes the view, for the reasons given below, that the decision to place the infrastructure at BSCA's disposal, including new infrastructure decided and constructed under the investment programme, and to provide certain services in return for a fee did not stem from the 2000 decisions, but from the 2002 agreement between SOWAER and BSCA.
- (354) The relevant criterion for the date at which a possible aid measure is deemed to have been granted is the date of the legally binding act by which public authorities undertake to award the measure at stake to its beneficiary <sup>(122)</sup>.
- (355) In the present case, the Commission takes the view that:
- the beneficiary of the possible aid measure is BSCA,
  - the public authorities having granted the aid measure are the Region and/or SOWAER. As indicated in recital 39 of this decision and acknowledged by Belgium <sup>(123)</sup>, SOWAER is the vehicle created by the Region and placed under its exclusive control to develop Wallonia's airport infrastructure and place this infrastructure at the disposal of the airport management companies in question. SOWAER, like the Region, is capable of granting State aid.
- (356) Prior to the 2002 SOWAER/BSCA agreement, BSCA did not benefit from any commitment on the part of the Region or SOWAER with regard to implementing the investment programme.
- (357) Belgium in fact recognises that no formal letter granting the aid was sent to BSCA. However, according to Belgium, although the Region was itself the beneficiary of the 2000 decisions, these created a commitment on the part of the Walloon Government. Belgium takes the view that the fact that this commitment was unilateral was not peculiar to this case. In its opinion, any financial measure, regardless of its beneficiaries, is always decided through a unilateral administrative act of the granting authority, which controls the application, amendment or withdrawal of said act.
- (358) The Commission notes that the 2000 decisions were not published or notified to BSCA. At any time before the 2002 SOWAER/BSCA agreement was signed, the Region could have altered the investment programme, by adopting a new unilateral decision or even totally abandoning this programme, without such a decision infringing BSCA's rights.
- (359) Furthermore, as indicated in the 2012 extension decision, this investment programme contained uncertainties about the financing mechanism and amounts. The latter could have been altered in line with changing needs. Accordingly, the new North terminal needed to be modular and its construction 'had to be gradual and tailored to the development of the airport's actual activities and resulting operational needs'. In addition, the financing mechanism envisaged at the time — i.e. involving the Société Régionale Wallonne du Transport — was ultimately abandoned in favour of financing through SOWAER, a new instrument that received its financial resources only when it was created on 1 July 2001 and in the amount of EUR 75 000 000 only.
- (360) On the other hand, given that the investment programme was included in the 2002 SOWAER/BSCA agreement, SOWAER was under an obligation towards BSCA: it had to place the land and infrastructure at BSCA's disposal, including the infrastructure to be constructed in accordance with the investment programme, and to provide certain services, in return for a concession fee, otherwise it would fail to comply with its contractual obligations.

<sup>(122)</sup> Footnote 29 of the aviation guidelines. See also judgment of 12 December 1996 in Case T-358/94 *Compagnie Nationale Air France v Commission* [1996] ECR II-2109, ECLI:EU:T:1996:194, paragraph 79, judgment of 14 January 2004 in Case T-109/01 *Fleuren Compost BV v Commission* [2004] ECR II-127, ECLI:EU:T:2004:4, paragraph 74, judgment of 2 December 2008 in Joined Cases T-362/05 and T-363/05 *Nuova Agricast v Commission* [2008] ECR II-297, ECLI:EU:T:2008:541, paragraph 80, and judgment of 30 November 2009 in Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* [2009] ECR II-4315, ECLI:EU:T:2009:474, paragraph 321.

<sup>(123)</sup> See recital 228 of this decision.

- (361) The Commission also takes the view that SOWAER's commitment to implement an investment programme and to provide certain services must be examined together with BSCA's commitment to pay a concession fee. It is impossible to determine whether the Region's plans to place the infrastructure at BSCA's disposal, including new infrastructure constructed in accordance with the investment programme, and to provide certain services constitute aid until the amount of the fee to be paid by BSCA in return is known.
- (362) The Commission concludes that the measure consisting in placing the infrastructure at BSCA's disposal, including new infrastructure which SOWAER undertook to construct, and in providing certain services in return for a fee was granted by the 2002 SOWAER/BSCA agreement. It therefore postdates the ADP judgment.
- (363) Moreover, it should be recalled that the investment programme included in the 2002 SOWAER/BSCA agreement was significantly amended by the decision of the Walloon Government of 3 April 2003. In this decision of 3 April 2003, the Walloon Government officially noted a revision to the investment programme<sup>(124)</sup>, whereby the amount of the investment increased from EUR 93 million to almost EUR 151 million, i.e. an increase of EUR 57,8 million, including EUR 33 million for the new terminal. The Commission takes the view that this revision of the investment programme constitutes a substantial change and therefore a new measure potentially constituting new State aid granted to BSCA, in addition to the potential aid already granted through the 2002 SOWAER/BSCA agreement. Given that it stems from a decision of 3 April 2003, this measure constitutes a new measure, adopted after the ADP judgment and therefore subject to the applicable rules on State aid.
- (b) Investments and services provided by SOWAER that must be excluded from the analysis due to being non-economic in nature
- (364) As highlighted by points 34 and 35 of the aviation guidelines, not all the activities of an airport operator are necessarily economic in nature. The Court of Justice has therefore confirmed that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not economic in nature<sup>(125)</sup>. Such activities include, in particular, security, air traffic control, police and customs<sup>(126)</sup>.
- (365) The Commission takes the view that investments and major repairs involving assets associated with air navigation (relating to the control tower, for example), aircraft firefighting, security (defined as combating acts of unlawful interference), police and customs may be non-economic in nature. Given that, in the present case, air navigation, aircraft firefighting, security, police and customs services are not organised according to a market logic, the Commission considers that the investments and major repairs involving assets associated with these services are not economic in nature. In particular, the fencing of the part of the airport site that is accessed through police checkpoints and the part of the site where the aircraft are located may be regarded as a non-economic activity insofar as it concerns security.
- (366) The Commission also considers as non-economic those costs associated with investments in and maintenance of buildings and equipment used for both economic activities and non-economic activities, in a proportion corresponding to their use for a non-economic activity. In particular, 7 % of the cost of investments made in the new terminal may be regarded as non-economic in nature, because 7 % of the terminal surface area is occupied by police and customs services, passenger and baggage search officials, and officials from the Walloon Public Service responsible for site safety.
- (367) However, the Commission regards as economic those investments and major repairs involving the Category III ILS<sup>(127)</sup> and runway lighting. These costs are not associated with a public policy remit, but are inherent in the commercial operation of the infrastructure, which involves placing this infrastructure at the disposal of airlines under satisfactory safety conditions. In particular, ensuring ground traffic safety (including during landings and

<sup>(124)</sup> See footnote 37.

<sup>(125)</sup> See footnote 121.

<sup>(126)</sup> Point 35 of the aviation guidelines.

<sup>(127)</sup> Radio navigation system providing landing assistance during bad weather.



take-offs) forms an integral part of the airport's commercial operation and is therefore economic in nature. In the recent Commission decision on Marseille airport <sup>(128)</sup>, operational safety was also excluded from the scope of 'non-economic activities'.

- (368) The Commission also takes the view that investments in fire detection in passenger car parks are economic in nature. These costs are not associated with a public policy remit, but are inherent in the commercial operation of the passenger car park.
- (369) Moreover, as highlighted by point 36 of the aviation guidelines, the Commission must check that the funding of non-economic activities is strictly limited to compensating the costs to which they give rise and may not be used for economic activities <sup>(129)</sup>. Otherwise their funding cannot escape the State aid rules.
- (370) SOWAER is directly responsible for the investments and major repairs. These costs are not therefore financed through aid paid to BSCA, which the latter could use for economic activities.
- (371) Lastly, as highlighted by point 37 of the aviation guidelines, the Commission must check that the funding of non-economic activities does not lead to undue discrimination between airports. Otherwise their funding cannot escape the State aid rules.
- (372) As clarified by Belgium, SOWAER carries out the investments and major repairs without discriminating between the airports for which it is responsible, namely the airports in the Walloon region.
- (373) As highlighted by recital 26 of this decision, the Belgian regions have been given the necessary powers to equip and operate public airports situated within their territory, except for Brussels National Airport. Given this legal framework, the Commission takes the view that the relevant level for assessing the existence of discrimination in terms of the financing of the investments and services provided by SOWAER is the region, and not the Federal State. As SOWAER carries out the investments and major repairs without discriminating between the two main Walloon airports (Liège and Charleroi), the Commission concludes that there is no undue discrimination between the airports.
- (374) The financing of the non-economic activities described in recital 365 cannot therefore be qualified as State aid and is consequently excluded from the subsequent analysis.

#### 6.1.1.2. *Subsidy paid by the Region for certain services associated with the airport activities*

- (375) As indicated in Section 5.1.1.1(c)(i), Belgium considers that the tasks for which the Region pays a subsidy fall within the public policy remit and do not therefore constitute an economic activity.
- (376) In order to determine whether the subsidy relates to non-economic activities and cannot therefore be qualified as State aid, the same examination as described in Section 6.1.1.1(b) must be made.

##### (a) Fire protection and security

- (377) As indicated in recital 365, the Commission takes the view that, in the present case, the activities associated with aircraft fire protection and security <sup>(130)</sup> do not constitute economic activities.

<sup>(128)</sup> 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) (OJ L 260, 27.9.2016, p. 1).

<sup>(129)</sup> Judgment of 18 March 1997 in Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547, ECLI:EU:C:1997:160; Commission Decision N309/2002 of 19 March 2003, and Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.

<sup>(130)</sup> In accordance with Regulation (EC) No 2320/2002, "aviation security" shall mean the combination of measures and human and natural resources intended to safeguard civil aviation against acts of unlawful interference'. The common basic standards on aviation security measures are based on the recommendations of European Civil Aviation Conference (ECAC) Document 30 and are laid down in the Annex to Regulation (EC) No 2320/2002.

(i) Application of point 36 of the aviation guidelines

- (378) As highlighted by point 36 of the aviation guidelines, even where an activity is regarded as non-economic, the Commission must check that the funding of non-economic activities is strictly limited to compensating the costs to which they give rise and may not be used for economic activities <sup>(131)</sup>. Otherwise their funding cannot escape the State aid rules.

1. Fire protection

- (379) As regards fire protection, the Commission indicates that, under Article 25 of the schedule of conditions annexed to the 1991 Region/BSCA agreement, in order for the Region to fund the fire and maintenance services, BSCA must keep a separate operating account that may at any time be analysed and checked by the concession authority.
- (380) Moreover, under Article 3.2.3 of the Region/BSCA agreement, as amended by Amendment No 3 of 29 March 2002, the costs inherent in the fire and maintenance services are reimbursed in 12 instalments. The twelfth instalment is paid after the Minister receives and approves a report, based on BSCA's annual accounts, providing justification for the costs incurred and presented in the same format as required for the provisional budget, i.e. based on the headings defined by Article 25 of the schedule of conditions.
- (381) Lastly, for the period after 10 March 2006, Article 25.7 of the schedule of conditions, introduced by Amendment No 5 of 10 March 2006, provides that the amount of the compensation for the fire protection and ground traffic and airport site safety services may not exceed the actual costs incurred by BSCA and that any overcompensation of the costs will result in budgetary compensation through the budget entry for the following year.
- (382) The Commission takes the view that these provisions are sufficient to conclude that, since Amendment No 3 of 2002 to the Region/BSCA agreement, the compensation paid by the Region for the fire protection costs has been proportionate and has not been used to subsidise economic activities.

2. Security

- (383) Security was added to the activities for which BSCA receives compensation through Amendment No 6 of 15 January 2008. The security tasks are defined as 'the combination of measures and human and natural resources intended to safeguard civil aviation against acts of unlawful interference' <sup>(132)</sup>. The security services include 'screening, remote surveillance, security rounds and patrols, access control and issue of visitor badges' <sup>(133)</sup>.
- (384) Article 25.7 of the schedule of conditions, as amended by Amendment No 6 of 15 January 2008, provides that 'the amount of the compensation intended to cover the costs incurred in providing the services may not exceed the actual costs incurred by the concession-holder in this context, after deducting any fees collected from users to cover these services. Any overcompensation of these costs will result in budgetary compensation through the budget entry for the following year'.
- (385) The Commission takes the view that these provisions are sufficient to conclude that the compensation paid for the security costs has been proportionate and has not been used to subsidise economic activities.

(ii) Application of point 37 of the aviation guidelines

- (386) As highlighted by point 37 of the aviation guidelines, the Commission must check that the funding of non-economic activities does not lead to undue discrimination between airports. Otherwise their funding cannot escape the State aid rules.

<sup>(131)</sup> See footnote 129.

<sup>(132)</sup> Annex forming an integral part of Amendment No 6 to the Region/BSCA agreement.

<sup>(133)</sup> Article 25.2 of the schedule of conditions, as amended by Amendment No 6 of 15 January 2008 to the Region/BSCA agreement.

- (387) As clarified by Belgium, the non-economic activities of the two main Walloon airports (Liège and Charleroi) are funded in a non-discriminatory manner by the Region.
- (388) As highlighted by recital 26 of this decision, the Belgian regions have been given the necessary powers to equip and operate public airports situated within their territory, except for Brussels National Airport. Given this legal framework, the Commission takes the view that the relevant level for assessing the existence of discrimination in terms of the financing of certain non-economic services associated with the airport activities is the region, and not the Federal State. As the non-economic activities of the two main Walloon airports (Liège and Charleroi) are funded in a non-discriminatory manner by the Region, the Commission concludes that there is no undue discrimination between the airports.
- (389) The compensation paid for BSCA's activities associated with fire protection and security cannot therefore be qualified as State aid and is consequently excluded from the subsequent analysis.

(b) Maintenance/ground traffic safety

- (390) In this section, the Commission examines whether the following services may escape the applicable State aid rules due to their non-economic nature:
- the 'maintenance services', as defined by Articles 12 and 19 of the schedule of conditions annexed to the Region/BSCA agreement;
  - the 'ground traffic safety services', as defined by Article 25 of the schedule of conditions amended by Amendment No 5 of 10 March 2006.
- (391) As indicated in recital 71, the maintenance service is defined by Articles 12 and 19 of the schedule of conditions as 'technical maintenance services for buildings, runways, surrounding areas, vehicle fleet, etc.'<sup>(134)</sup>, and as 'maintenance of land, buildings and building facilities, and equipment forming part of the concession or placed at the disposal of the concession, such that they are always fit for their intended purpose'<sup>(135)</sup>.
- (392) As indicated in recitals 73 and 74, Amendment No 5 of 10 March 2006 amended Article 3.2.2 of the Region/BSCA agreement and Article 25 of the schedule of conditions. As a result of these amendments, the Region pays compensation to BSCA for the costs of the fire protection and ground traffic and airport site safety services. Article 25 of the schedule of conditions, as amended, provides that 'the ground traffic and airport site safety services include routine maintenance of the airport site, technical maintenance services for buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance and any other services ensuring the safety of ground traffic, airport site and infrastructures, except for commercial areas of the airport zone'.
- (393) The Commission points out that the definition of 'ground traffic and airport site safety services', for which BSCA receives compensation from 10 March 2006, substantially overlaps with the definition of 'maintenance services', for which BSCA received compensation before 10 March 2006. In order to determine whether these services constitute economic services, it will examine these together.
- (394) The Commission takes the view that these services, whether they involve routine maintenance of the airport site, maintenance of buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance or any other services ensuring the safety of ground traffic, airport site and infrastructures, do not fall within the public policy remit. These services differ in particular from the security services. They are inherent in

<sup>(134)</sup> See footnote 50.

<sup>(135)</sup> See footnote 52.

the commercial operation of the airport, which involves ensuring that the airport site, including its runways, is sufficiently well-maintained to enable the landing and take-off of aircraft under satisfactory safety conditions. No public policy remit is associated with this type of service.

- (395) According to Belgium (see recital 237), when the Commission made its decision on 23 July 2008 on Leipzig/Halle airport, it recognised that operational safety services were non-economic activities <sup>(136)</sup>. It is clear from the list of operational safety infrastructures provided by the German authorities that these infrastructures are essential for ground traffic safety, i.e.: uninterruptible power supply for aprons, transformer stations, runway lighting, apron lighting, etc. According to Belgium, this position taken by the Commission was confirmed by the General Court in the judgment delivered on 24 March 2011 <sup>(137)</sup> following an action for annulment brought against the aforementioned Commission decision.
- (396) The Commission disputes that it can be concluded from recitals 182 and 183 of the decision on Leipzig/Halle airport that the Commission has in the past taken the view that tasks comparable to maintenance and traffic safety, as defined in the Region/BSCA agreement, fall within the public policy remit, for the following reasons.
- (397) Firstly, the maintenance and traffic safety costs defined in the Region/BSCA agreement are much broader than the operational safety investment costs referred to in the decision on Leipzig/Halle airport. The latter consist of the uninterruptible power supply for the aprons, transformer station, high voltage cables and runway lighting. The maintenance and traffic safety costs defined in the Region/BSCA agreement 'include routine maintenance of the airport site, technical maintenance services for buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance and any other services ensuring the safety of ground traffic, airport site and infrastructures, except for commercial areas of the airport zone'.
- (398) Secondly, the Commission points out that, contrary to Belgium's argument, the Commission did not conclude that the operational safety tasks referred to in the Leipzig/Halle decision constitute tasks falling within the public policy remit. Recital 182 of that decision states that 'the Commission can conclude that in the present case certain costs fall within the public policy remit' (emphasis added). In recital 183 of the same decision, the Commission considers that 'to the extent that they fall within the public policy remit', the measures may not amount to State aid (emphasis added). It indicates that 'in the present case independently [of] whether the Commission was to accept the approach advanced by the German authorities that none of the costs should be considered as State aid, the final assessment of the measure would not change' (emphasis added). As a result, in those recitals the Commission neither confirmed nor contradicted Germany's position that certain tasks, including operational safety tasks, fell within the public policy remit, but instead indicated that it did not need to take a position, given that, assuming that the measure did constitute aid, this would be authorised.
- (399) Thirdly, the Commission points out that, in the General Court's judgment on the Commission decision on Leipzig/Halle airport, contrary to Belgium's argument, the Court did not confirm this alleged Commission position in paragraph 225 of its judgment. The Court in fact reproduced recitals 182 and 183 of the Commission decision in order to recall the latter's position and concluded that the Commission had considered that it did not have to reach a definitive conclusion on this question (namely if it were to accept the German authorities' argument that none of the costs should be considered as State aid).
- (400) The Commission therefore concludes that the 'maintenance services', as defined by Articles 12 and 19 of the schedule of conditions annexed to the Region/BSCA agreement, and the 'ground traffic safety services', as defined by Article 25 of the schedule of conditions amended by Amendment No 5 of 10 March 2006, constitute economic services. Their funding does not therefore escape the applicable State aid rules.

<sup>(136)</sup> See footnote 89.

<sup>(137)</sup> See footnote 90.

(c) Flight tracking and recording, provisional flight planning and marshalling

(401) In this section, the Commission examines whether the following services, the provision of which was entrusted to BSCA and for which BSCA receives compensation under Amendment No 6 of 15 January 2008, may escape the applicable State aid rules due to their non-economic nature:

— flight tracking and recording <sup>(138)</sup> and flight planning <sup>(139)</sup>,

— marshalling <sup>(140)</sup>.

(402) According to Belgium (see recital 240), flight tracking and recording, provisional flight planning and marshalling services are essential parts of civil aviation safety and therefore fall within the public policy remit, given that they are fundamental components in the safety of an airport.

(403) The Commission takes the view that the services covered by this compensation are activities inseparable from the economic activity of the airport operator BSCA. These services cannot be included within the security services intended to combat acts of unlawful interference or within any activity falling within the public policy remit.

(404) The Commission therefore concludes that flight tracking and recording, flight planning and marshalling constitute economic services. Their funding does not therefore escape the applicable State aid rules.

6.1.1.3. *Capital increase subscribed by SOWAER*

(405) As the capital increase, which was covered by the formal investigation procedure, was subscribed by SOWAER to the benefit of BSCA in 2002, i.e. after the ADP judgment <sup>(141)</sup>, it falls under the Commission's control of State aid (see recital 346).

6.1.2. *Selective advantage*

(406) In order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions. The presence of an economic advantage can be ruled out where the measures in question constitute economic operations carried out by public bodies or undertakings under normal market conditions <sup>(142)</sup>. In this case it must be determined whether, in similar circumstances, a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have taken part in the same operations as the entity granting the measure (hereinafter 'the market economy operator test'). The presence of an economic advantage can also be ruled out where the measures in question constitute financial compensation granted to the undertakings concerned in order to enable them to operate a service of general economic interest, provided that such compensation satisfies all the conditions set out in the *Altmark* judgment <sup>(143)</sup>. The Commission will now proceed to analyse the measures concerned in turn, in the light of the conditions of the *Altmark* judgment and the market economy operator test.

<sup>(138)</sup> Flight tracking and recording involves adding information on flights (number of passengers, aircraft registration, name of pilot, type of aircraft, nature of flight, origin, weight of aircraft, etc.) to the database of the Walloon administration.

<sup>(139)</sup> Flight planning involves communications, flight plans, slots, radio announcements and management of aircraft parking stands.

<sup>(140)</sup> Marshalling consists of two tasks: (i) marshalling on stand, which is carried out by the area coordinator when an aircraft arrives, and (ii) follow me marshalling, which involves guiding the aircraft with a vehicle. This service is used only for pilots who are unfamiliar with the airport (business aviation) or for Category D large aircraft.

<sup>(141)</sup> See footnote 85.

<sup>(142)</sup> Judgment of 11 July 1996 in Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, ECLI:EU:C:1996:285, paragraph 60; judgment of 29 April 1999 in Case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, ECLI:EU:C:1999:210, paragraph 41.

<sup>(143)</sup> See footnote 92.

### 6.1.2.1. Application of the Altmark judgment conditions

- (407) It is firstly necessary to examine Belgium's argument, set out in Section 5.1.1.1(c)(ii), according to which the subsidy for certain services associated with the airport activities — assuming that some of these services are economic in nature — allegedly does not constitute an advantage for BSCA under the *Altmark* judgment <sup>(144)</sup>.
- (408) As established in Section 6.1.1, the Commission considers that some of the services for which the subsidy is paid are not economic in nature (for example, firefighting and security services) and will exclude from its analysis the part of the subsidy compensating for the costs of those services.
- (409) However, the Commission considers that other services for which the subsidy is paid are economic in nature, such as maintenance and repair of infrastructures operated commercially, and even marshalling.
- (410) The Commission takes the view that Belgium is committing a manifest error of assessment in qualifying these services as services of general economic interest. As recalled by paragraph 47 of the 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 <sup>(145)</sup>, generally speaking, a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. In paragraph 50 of said Communication, the Commission also considers that the services to be classified as services of general economic interest must be addressed to citizens or be in the interest of society as a whole. In the present case, the economic services identified are not supplied in the interest of citizens, but only to enable BSCA to provide an airport service. They are indissociable from the economic activity of operating the airport.
- (411) Furthermore, BSCA was not chosen in a procedure meeting the requirements of the fourth *Altmark* condition.
- (412) In addition, Belgium has not provided any evidence that the amount of the subsidy was determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately equipped, would have incurred in order to meet the necessary public service requirements. Belgium's arguments are actually insufficient for the following reasons:
- Belgium indicates that the ratios mentioned in the Communication referred to above in recital 410 demonstrate BSCA's efficient management (see recital 253), without, however, indicating the nature and value of those ratios.
  - Belgium adds that this sound management enabled private investors to be attracted in 2009 during BSCA's partial privatisation. However, the Commission stresses that, although investors did decide to participate in BSCA's capital (while obtaining a right of veto over important decisions), this may have been due to the existence of the aid, allowing them to expect that BSCA would attract a significant volume of traffic and therefore generate high profits, rather than due to sound management. It can also be pointed out in this regard that private investors may take holdings in mismanaged companies that they hope to turn around once they have or share control of the company in question, as is the case with BSCA's private investor who has obtained a right of veto over important decisions.
  - It also cannot be concluded, as Belgium has done, that the airport is well run simply due to the fact that the turnover or traffic at Charleroi airport is on the increase (see recital 254). This increase in turnover and traffic may stem from the aid, which enables BSCA to offer very favourable conditions to airlines and thus attract traffic.
  - Lastly, Belgium's argument that 'it is clear from the financing mechanism put in place that, by definition, the compensation paid to BSCA is less than the market price of all the services entrusted to it, insofar as this compensation was capped in 2006 for the fire and ground traffic and airport site safety services and in 2010 for the security services' (see recital 255), also does not prove that BSCA is efficiently managed, but only that there may be no overcompensation.

<sup>(144)</sup> See footnote 92.

<sup>(145)</sup> OJ C 8, 11.1.2012, p. 4.

- (413) In conclusion, at least the first and fourth conditions of the *Altmark* judgment are not satisfied. The Commission cannot therefore rule out, under the *Altmark* judgment, that the Region's subsidy for the services associated with the airport activities constitutes an advantage.

6.1.2.2. *Application of the market economy operator test*

- (414) As regards identifying the entity granting the measure, the Commission considers that the actions of (i) the Region, as owner of the airport zone land, on the one hand, and (ii) SOWAER, a company under the exclusive control of the Region, as concession-holder of the airport zone land, owner of the infrastructures built on the airport zone land, and holder of the tasks delegated by the Region, on the other hand, must be assessed together where they involve the same activity and the same airport. Under these circumstances, SOWAER appears to be an intermediary of the Region in this context. Consequently, in order to determine whether or not the measures defined in Section 3.1 give BSCA an economic advantage, the Commission will consider that the entity granting the measure is the group consisting of the Region and SOWAER (hereinafter 'Region-SOWAER').

- (415) As a result, the Commission considers that it must examine together the commitments of the Region-SOWAER where they alter the economics of the concession (provision of the infrastructures, including development of the investment programme and funding of the major repairs, concession fee, subsidy for certain services associated with the airport activities where these services are economic in nature) and where they are virtually simultaneous and linked.

- (416) The Commission will therefore apply the market economy operator test to the following four sets of measures, considered in turn:

- the 2002 SOWAER/BSCA agreement and the amendment of 29 March 2002 to the Region/BSCA agreement (hereinafter 'the 2002 agreements'),
- the decision of the Walloon Government of 3 April 2003 to build a terminal with a larger capacity than originally planned (3 million passengers instead of 2 million) and to provide for larger capacity car parks (hereinafter 'the 2003 investment decision'),
- the service agreement of 4 April 2006 between SOWAER and BSCA and the amendment of 10 March 2006 to the Region/BSCA agreement (hereinafter 'the 2006 agreements'),
- the amendment of 15 January 2008 to the Region/BSCA agreement (hereinafter 'the 2008 amendment').

- (417) The Commission will also apply the market economy operator test to BSCA's capital increase subscribed by SOWAER in December 2002.

- (418) If any of these measures constitutes an advantage, the Commission will examine whether that advantage is selective.

- (a) Application of the market economy operator test to the measures involving the provision of the infrastructure, including new investments and major repairs, and the granting of a subsidy for certain services associated with the airport activities

- (i) 2002 agreements

1. Application of the market economy operator test

- (a) General principles applicable to the four measures

- (419) As highlighted by point 51 of the aviation guidelines, the analysis of conformity with the market economy operator test should be based on sound *ex ante* profitability prospects for the entity granting the financing <sup>(146)</sup>.

<sup>(146)</sup> 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).

- (420) The Commission notes that the Region did not supply any business plan proving the expected return for the Region and/or SOWAER from the scheduled investments when the binding decisions were made on each investment. The absence of a business plan suggests that the Region and/or SOWAER were not acting according to a market economy operator logic when they adopted the measures granted to BSCA.
- (421) The Commission also notes that the reports supplied in support of the Walloon Government's decisions justify the need for these investments through the positive impact of the airport's development on the economy and employment situation in Charleroi and its region <sup>(147)</sup>. However, the Commission points out that it is settled case-law that regional development considerations cannot be taken into account when applying the market economy operator test <sup>(148)</sup>.
- (422) Despite no business plan being supplied by the Region and/or SOWAER, the Commission has examined whether, for the group consisting of the Region-SOWAER, the net present value of each set of measures identified in recital 416 is positive. If the net present value of a measure is positive, this means that the measure in question is profitable for the operator concerned.
- (423) The net present value has been calculated by totalling the discounted cash flows (revenue minus expenditure), aggregated for the Region-SOWAER, expected from each set of measures at the time when it was granted.
- (424) The discount rate used to calculate the net present value has been determined by establishing the cost of capital for the entity having granted the measure at the time when it was granted. The cost of capital for an entity depends on its financing structure, particularly in terms of equity and debt. In the present case, most of the expenditure associated with the project undertaken by the Region-SOWAER group is covered by the investments funded by SOWAER. That is why the Commission has decided to calculate the cost of capital for the entity granting the measure by using the cost of capital given by the structure of SOWAER's balance sheet, which is the financing structure chosen by the Region-SOWAER group, and its conditions of access to capital markets.

(b) Application of the market economy operator test to the 2002 agreements

- (425) Under the 2002 agreements, the Region-SOWAER decided to place the land and infrastructure of Charleroi airport at BSCA's disposal, in return for a concession fee, while undertaking to develop this infrastructure in accordance with the investment programme annexed to the 2002 SOWAER/BSCA agreement, and to carry out the major repairs and maintenance as well as pay BSCA a subsidy for certain services associated with the airport activities.
- (426) The counterfactual scenario would have consisted in the Region-SOWAER not signing the 2002 agreements and therefore not committing to further significant investments or granting the 'fire-maintenance' subsidy. The Commission has assumed that, in this counterfactual scenario without any aid, the airport would probably have continued to operate, but to a much lesser extent, given the need for the investments stipulated by the 2002 agreements in order to significantly increase traffic at the airport. This counterfactual scenario would have led to a slightly positive net present value, which is impossible to estimate with any degree of reliability, particularly as it would be very difficult to estimate the expected traffic in the absence of the 2002 agreements and the concession fees obtained from BSCA by the Region-SOWAER. In its net present value calculations, the Commission has therefore assumed that the net present value of the counterfactual scenario is zero. If, on the basis of this assumption, the net present value of the 2002 agreements is negative, this would definitely be the case if the net present value of the counterfactual scenario were assumed to be positive. This assumption is therefore favourable to the Region-SOWAER and to BSCA.

<sup>(147)</sup> See note of 8 November 2000 from the minister with responsibility for the economy in the Walloon Government.

<sup>(148)</sup> Judgment of 21 January 1999 in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission of the European Communities* [1999] ECR II-17, ECLI:EU:T:1999:7, paragraph 120.



- (i) Costs and revenue taken into account in calculating the net present value of the 2002 measure
- (427) In order to calculate the net present value of the 2002 agreements for the Region-SOWAER, the Commission has determined the costs and revenue of the Region-SOWAER that could have been anticipated due to these agreements, by including:
- for the period from 2002 to 2015:
    - the estimated cost of the economic investments (see Table 13) and services to be provided by SOWAER, and also the part of the subsidy paid by the Region for certain services associated with the airport activities, which is paid for economic services,
    - the expected revenue from the concession fee payable by BSCA to SOWAER,
  - for the period from 2016 to 2040:
    - the value of the cash flows expected from the project after 2015. The value of the project's cash flows after 2015 has been estimated using the perpetuity growth method with a growth rate of 2 %, reflecting the expected rate of inflation over the period <sup>(149)</sup>.
- (428) These figures are based on the forecasts available to the Region and SOWAER in 2002, particularly with regard to traffic and costs. The Commission has not therefore taken account of any cost drifts in the investment programme that could not have been anticipated at the time of the decision to commit to the programme in April 2002 (for example, increase in building costs and cost drifts associated with soil stability problems that were unknown when the investment programme was prepared).
- (429) In calculating the net present value, the Commission has also not taken account of the value of the land and infrastructure, either when calculating the scenario in which the 2002 agreements were adopted or when calculating the counterfactual scenario. The net present value calculation is therefore based on the future cash flows expected in 2002.
- (430) Lastly, the Commission has not taken account of any capital gains or dividends received by SOWAER from its holding in BSCA's capital. The Court of Justice has in fact stated that <sup>(150)</sup>, 'in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions. In examining that question, it is for the national court to determine what is normal remuneration for the services in question'. The Commission takes the view that, in the present case, the provision of infrastructure at a price below market price constitutes an advantage for BSCA, even if SOWAER expects to recover its loss through the growth in its capital or the dividends that it will receive. The Commission also notes the effects on competition of an approach in which any capital gains and dividends are taken into account. In extreme cases, this scenario would result in the acceptance that a public authority could demand a zero concession fee from an airport in which it was a shareholder (as said authority could expect dividends and/or an increase in the value of its shares), without this constituting aid. This would enable the airport in question to offer very low charges to airlines, thus distorting competition, particularly in relation to private airports.
- (431) The following table indicates the cost of the economic investments taken into account by the Commission in calculating the net present value of the 2002 measure.

In order to produce this table, the Commission started with the investment programme planned for Charleroi airport, which was annexed to the SOWAER/BSCA agreement of 15 April 2002. Although annexed to the SOWAER/BSCA agreement of 15 April 2002, this programme does not identify the investments remaining to be made on the date of 15 April 2002, but all the investments that should have been made from 1 January 2001 or that remained to be made. In order to identify the investments remaining to be made on the date of

<sup>(149)</sup> The 2 % growth rate is in fact used in the successive agreements between the Region/SOWAER and BSCA, for example for the growth rate of the variable fee cap.

<sup>(150)</sup> Judgment of 11 July 1996 in Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, ECLI:EU:C:1996:285, paragraphs 60 and 61.

15 April 2002, the Commission transferred to 2002 the investments planned in 2001 and 2002 <sup>(151)</sup> and then deducted from this sum those investments already made on 15 April 2002 <sup>(152)</sup>.

Table 13

**Cost of the investments remaining to be made as at 15 April 2002**

	<i>(EUR million)</i>			
	2002	2003	2004	2002 + 2003 + 2004
Compulsory purchase (balance of 1st phase)	0,55	0,00	0,00	0,55
Purchase of new land	3,59	0,00	0,00	3,59
Balance of new land	0,00	0,00	0,94	0,94
SABCA renovation	1,39	0,00	0,00	1,39
Deferral, accrual and other	1,12	0,00	0,00	1,12
Sub-Total	6,64	0,00	0,94	7,59
Renovation of technical and administrative premises	1,55	0,00	0,00	1,55
Fencing of airport site	0,27	0,00	0,00	0,27
Approach and taxiway lighting	0,42	0,00	0,00	0,42
Repair of drains	0,27	0,00	0,00	0,27
Extension of aviation fuel station	0,27	0,00	0,00	0,27
Waste removal	0,12	0,00	0,00	0,12
Repair of south taxiway	0,50	0,00	0,00	0,50
Cemetery car park	0,03	0,00	0,00	0,03
Fire detection in the underground passenger car park	0,17	0,00	0,00	0,17
Sewage system and treatment	5,18	0,00	0,00	5,18
Power and telecoms equipment	2,01	0,00	0,00	2,01
Technical tunnel	0,74	0,45	0,00	1,19

<sup>(151)</sup> As indicated in the investment programme planned for Charleroi airport, annexed to the SOWAER/BSCA agreement of 15 April 2002.

<sup>(152)</sup> As indicated by BSCA.

	(EUR million)			
	2002	2003	2004	2002 + 2003 + 2004
Service road	0,00	0,00	0,82	0,82
Onsite backfill	6,20	1,86	0,62	8,68
Runway extension	9,92	2,48	0,00	12,39
North taxiway and runway exit	2,48	3,72	1,02	7,21
Aircraft parking and slab resurfacing	4,96	2,48	0,00	7,44
Navigation aid	0,00	0,50	3,07	3,57
Assistance hangar fuel	0,25	1,61	0,00	1,86
Control tower	0,00	0,25	0,25	0,50
Cargo + office buildings	0,00	0,25	2,13	2,38
Sub-Total	35,33	13,58	7,91	56,82
New terminal	12,64	12,39	2,97	28,01
TOTAL	54,62	25,98	11,82	92,42

The Commission then kept only the part of these investments that it regarded as being associated with the economic activities. The following were therefore excluded:

- fencing of the part of the airport site that is accessed through police checkpoints and the part of the site where the aircraft are located (see explanations in recital 365),
- control tower (see explanations in recital 365),
- 7 % of the cost of the investments associated with the new terminal (see explanations in recital 366).

The Commission ended up with the following investment plan:

Table 14

**Cost of the investments in economic activities taken into account by the Commission in calculating the net present value of the 2002 measure**

	(EUR million)				
	Economic part (%)	2002	2003	2004	2002 + 2003 + 2004
Compulsory purchase (balance of 1st phase)	100	0,55	0,00	0,00	0,55
Purchase of new land	100	3,59	0,00	0,00	3,59

		(EUR million)			
	Economic part (%)	2002	2003	2004	2002 + 2003 + 2004
Balance of new land	100	0,00	0,00	0,94	0,94
SABCA renovation	100	1,39	0,00	0,00	1,39
Deferral, accrual and other	100	1,12	0,00	0,00	1,12
Sub-Total		6,64	0,00	0,94	7,59
Renovation of technical and administrative premises	100	1,55	0,00	0,00	1,55
Fencing of airport site	0	0,00	0,00	0,00	0,00
Approach and taxiway lighting	100	0,42	0,00	0,00	0,42
Repair of drains	100	0,27	0,00	0,00	0,27
Extension of aviation fuel station	100	0,27	0,00	0,00	0,27
Waste removal	100	0,12	0,00	0,00	0,12
Repair of south taxiway	100	0,50	0,00	0,00	0,50
Cemetery car park	100	0,03	0,00	0,00	0,03
Fire detection in the underground passenger car park	100	0,17	0,00	0,00	0,17
Sewage system and treatment	100	5,18	0,00	0,00	5,18
Power and telecoms equipment	100	2,01	0,00	0,00	2,01
Technical tunnel	100	0,74	0,45	0,00	1,19
Service road	100	0,00	0,00	0,82	0,82
Onsite backfill	100	6,20	1,86	0,62	8,68
Runway extension	100	9,92	2,48	0,00	12,39

(EUR million)					
	Economic part (%)	2002	2003	2004	2002 + 2003 + 2004
North taxiway and runway exit	100	2,48	3,72	1,02	7,21
Aircraft parking and slab resurfacing	100	4,96	2,48	0,00	7,44
Navigation aid	100	0,00	0,50	3,07	3,57
Assistance hangar fuel	100	0,25	1,61	0,00	1,86
Control tower	0	0,00	0,00	0,00	0,00
Cargo + office buildings	100	0,00	0,25	2,13	2,38
Sub-Total		35,06	13,34	7,66	56,06
New terminal	93	11,76	11,53	2,77	26,05
TOTAL		53,46	24,86	11,37	89,69

According to the Commission's calculations, the investments initially planned in economic activities amounted to EUR 89 690 000, i.e. 97 % of the investments initially planned.

- (432) SOWAER's maintenance and operating costs attributable to the economic activities of Charleroi airport, as stipulated by the Region/SOWAER <sup>(153)</sup>, should be added to these investments. Bearing in mind that 97 % of the investments initially planned were for economic activities <sup>(154)</sup>, the Commission has multiplied by 0,97 the maintenance costs and operating costs indicated on page 10 of the SOWAER business plan annexed to the Region's decision of 23 May 2001. With regard to the operating costs, the Commission considers that, based on the information provided by the Region, 29 % of the costs for Charleroi and Liège airports are attributable to Charleroi.

Table 15

**Sum of SOWAER's maintenance costs (A) and operating costs (B) attributable to the economic activities of Charleroi airport**

(EUR million)														
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
A	0,84	0,84	0,84	1,56	1,56	1,56	1,56	1,56	2,41	2,41	2,41	2,41	2,41	2,41
B	0,47	0,48	0,49	0,50	0,51	0,52	0,53	0,54	0,55	0,56	0,57	0,58	0,60	0,61
A+B	1,31	1,32	1,33	2,06	2,07	2,08	2,09	2,10	2,96	2,97	2,98	2,99	3,00	3,01

<sup>(153)</sup> See page 10 of the SOWAER business plan annexed to the Region's decision of 23 May 2001.

<sup>(154)</sup> See end of recital 431.

- (433) The part of the 'fire-maintenance' subsidy attributable to the economic activities should also be added. The Commission estimates that 10 % of the expenditure compensated by the 'fire-maintenance' subsidy, as indicated in the 2002 BSCA business plan, is economic in nature.

Table 16

**Part of the 'fire-maintenance' subsidy compensating for economic activities**

*(EUR million)*

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
0,33	0,34	0,35	0,39	0,40	0,44	0,44	0,48	0,49	0,50	0,51	0,52	0,53	0,54

- (434) In order to determine the outgoing cash flows to be taken into account in calculating the net present value of the 2002 measure, the Commission therefore added together the final rows of Table 14, Table 15 and Table 16.

Table 17

**Outgoing cash flows up to 2015 taken into account by the Commission in calculating the net present value of the 2002 measure**

*(EUR million)*

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
55,10	26,53	13,05	2,45	2,47	2,52	2,53	2,58	3,44	3,46	3,48	3,50	3,52	3,54

- (435) In order to calculate the net present value of the project, the anticipated revenue needs to be determined. This anticipated revenue consists of the variable part of the BSCA concession fee, as set by Article 11.1 of the 2002 SOWAER/BSCA agreement, i.e. 35 % of BSCA's aviation revenue, with a cap changing over time. Given the aviation revenue forecasts, the cap on this variable fee could be expected to apply up to 2015. This cap was set at EUR 883 689 in 2002, which was to be increased by 2 % per year up to 2006. It was then to be increased to EUR 2 651 067 in 2007, which was subsequently also increased by 2 % per year. The 2002 SOWAER/BSCA agreement stipulated that these amounts would be reviewed from 2015. The Commission has assumed that the cap would be removed from 2015 (if the Commission had assumed that the cap would be maintained after 2015, this would have resulted in a net present value lower than the one calculated).

Table 18

**Incoming cash flows up to 2015 taken into account by the Commission in calculating the net present value of the 2002 measure**

*(EUR million)*

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
0,88	0,90	0,92	0,94	0,96	2,65	2,70	2,76	2,81	2,87	2,93	2,99	3,05	3,11

- (436) The Commission has calculated the net cash flows (incoming less outgoing) taken into account by the Commission in calculating the net present value of the 2002 measure by deducting the final row of Table 18 from the final row of Table 17.

Table 19

**Net cash flows (incoming less outgoing) up to 2015 taken into account by the Commission in calculating the net present value of the 2002 measure**

(EUR million)													
2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
- 54,21	- 25,63	- 12,13	- 1,52	- 1,51	0,13	0,17	0,18	- 0,63	- 0,59	- 0,56	- 0,52	- 0,48	- 0,44

(ii) Discount rate taken into account in calculating the net present value of the 2002 measure

(437) As explained in recital 424, in order to determine the discount rate, the Commission has estimated the weighted average cost of capital for SOWAER at the time when the measure was granted. This estimate has been produced using the following figures and assumptions:

- a debt/equity ratio of 30 % for SOWAER <sup>(155)</sup> and therefore a proportion of debt financing ( $r_D$ ) of 23 %,
- a pre-tax cost of debt ( $k_D$ ) equal to the weighted average pre-tax cost of debt for SOWAER in 2002, i.e. between 4,9 % and 5,5 %,
- a risk premium ( $\Delta k$ ) of 5,51 % <sup>(156)</sup>,
- a beta <sup>(157)</sup> between 0,91 and 1,23 <sup>(158)</sup>,
- with regard to the cost of equity, a pre-tax cost of capital invested without risk ( $r_f$ ) between 5,16 % and 5,37 % <sup>(159)</sup>,
- a tax rate ( $t$ ) of 40,2 %.

Based on these figures and assumptions, the Commission can calculate the weighted average cost of capital (C) using the following conventional formula:

$$C = (1 - r_D) \times k_E + r_D \times k_D$$

Where the cost of capital ( $k_E$ ) is given by the capital asset pricing model (CAPM) according to the formula:

$$k_E = r_f + \beta \times \Delta k$$

Based on this formula and the above assumptions, the Commission estimates that a discount rate of 9 % is reasonable.

(iii) Result of the net present value calculation

(438) The net cash flows indicated in Table 19 discounted at the rate of 9 % result in a net present value of EUR - 83,7 million.

<sup>(155)</sup> This stems from an *ex post* analysis based on the SOWAER balance sheet for 2002. The average debt/equity ratio for airlines is 35 % according to Damodaran: 'Risk Premiums for Other Markets' 2001 (<http://pages.stern.nyu.edu/~ADAMODAR/>).

<sup>(156)</sup> Source: Damodaran: 'Risk Premiums for Other Markets' 2001 (<http://pages.stern.nyu.edu/~ADAMODAR/>).

<sup>(157)</sup> The beta coefficient is a key factor in the capital asset pricing model. It measures the relative cost-effectiveness of an asset compared to the market.

<sup>(158)</sup> See footnote 156.

<sup>(159)</sup> Interest rate on 10-year Belgian bonds in April 2002.

- (439) In order to calculate the net present value over the entire term of the concession, a terminal value needs to be allocated to the project in 2015. This is carried out by assuming, from 2015, a cash flow equal to the average cash flow for 2013-2015 increasing by 2 % per year. If it is assumed that the cap on the variable part of the concession fee will be removed from 2016, the values to be taken into account are the cap-free cash flows in 2013-2015. Based on these assumptions, the Commission has calculated that the terminal value of the project in 2015 could be put at EUR 8,07 million.
- (440) The net present value of the 2002 measure is therefore EUR – 75,63 million. As this net present value is negative, the Commission concludes that the 2002 agreements do not pass the market economy operator test and therefore give an advantage to BSCA over its competitors.

## 2. Selectivity

- (441) Under the 2002 agreements, the Region-SOWAER decided to place the land and infrastructure of Charleroi airport at BSCA's disposal, while undertaking to develop this infrastructure in accordance with the investment programme annexed to the 2002 SOWAER/BSCA agreement, and to carry out the major repairs and maintenance as well as pay BSCA a subsidy for certain services associated with the airport activities, in return for a concession fee that was lower than what a market economy operator would have required.
- (442) The Commission notes that the measure was granted to BSCA only.
- (443) Admittedly, according to Belgium <sup>(160)</sup>, there was no discrimination within the Region with regard to the subsidy for certain services associated with the airport activities <sup>(161)</sup>. Furthermore, according to Belgium, security and safety services within the Walloon Region are provided by the latter.
- (444) However, the Commission would make the following comments.
- (445) Firstly, as the advantage was gained due to the concession fee being lower than what a private operator would have required for the provision of the infrastructure, services and subsidy, it should be examined whether the measure gave BSCA a selective advantage. In this context, the sole fact that the subsidy was paid in a non-discriminatory manner by the Region to other airports that it managed is not sufficient. It would need to be proven that the Region granted the same measure to other airports that it managed, while accepting a fee lower than the market fee under the same conditions as those granted to BSCA. Belgium has not proven this situation.
- (446) Even assuming that Belgium were able to prove this situation, the Commission notes that, in any event, such a measure would still give a selective advantage to BSCA as this measure would benefit a given economic sector (namely the airport management sector) and would not therefore be a general measure <sup>(162)</sup>. In particular, managers of other modes of transport would not benefit from such an advantage.
- (447) The Commission therefore concludes that the measure gives a selective advantage to BSCA.

## (ii) 2003 investment decision

### 1. Application of the market economy operator test

- (448) The Region could have kept to the 2002 programme. There is therefore a counterfactual scenario to the April 2003 decision, which consists in keeping to the investment programme annexed to the SOWAER/BSCA agreement. The costs of the 2003 investment decision for the Region-SOWAER therefore correspond to the costs over and above those stipulated in the 2002 'investment programme'.

<sup>(160)</sup> Note from Belgium entitled 'Wallonia's response to the request for information of 14 February 2014' (question 13), received by the Commission on 7 February 2014.

<sup>(161)</sup> Belgium refers to these services as 'non-economic services'.

<sup>(162)</sup> Judgment of 2 July 1974 Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, ECLI:EU:C:1974:71.



- (449) In order to determine whether a market operator would have made the 2003 investment decision, it should be examined whether the net present value of the 2003 measure is positive.
- (450) The differences between the 2003 and 2002 plans concern both the investment forecasts and the expected number of passengers.
- (451) As regards the investments, the Commission notes a difference in the 'new terminal' and 'car park' items, in terms of both the amounts and dates of the investments. The investments in the car park and terminal were respectively increased in 2002 in the initial investment plan and in 2004 in the 2003 investment plan. The Commission therefore finds that there was a two-year gap between the two plans in terms of investments. Furthermore, based on the information provided by Belgium, the Commission estimates that the economic part of the car park and terminal investments is 93 %. The amount of additional investment resulting from the 2003 measure is therefore shown by the following comparison:

Table 20

**Amount of additional investment with a two-year gap resulting from the 2003 measure**

	<i>(EUR million)</i>				
	2003	2004	2005	2006	2007
New terminal	1,6	14	17	9,4	—
Car park	0,8	6	6	5	1,2
Total	2,4	20	23	14,4	1,2
Economic part	2,23	18,60	21,39	13,39	1,12
	2001	2002	2003	2004	2005
Investments according to the 2001/2002 plan	0,23	11,53	11,53	2,77	0,00
Amount of additional investment (with a two-year gap)	2,00	7,07	9,86	10,63	1,12

- (452) With regard to passenger traffic, the Commission notes a divergence between the number of passengers for 2003 anticipated in 2002 (1,47 million) and in 2003 (1,7 million). The Commission therefore considers that it was anticipated that the additional investment would lead to 16 % more passengers (1,7/1,47) over the entire period. This increase in passengers would not, however, lead to increased revenue for the 2003-2015 period given that it was anticipated that the cap on the variable concession fee would have already been reached prior to this period. However, this increase in traffic does have an impact on revenue from 2016 and therefore on the airport's terminal value in 2015.
- (453) As explained in recital 424, in order to determine the discount rate, the Commission has estimated the weighted average cost of capital for SOWAER at the time when the measure was granted. This estimate has been produced using the following figures and assumptions:

— a debt/equity ratio of 30 % for SOWAER <sup>(163)</sup> and therefore a proportion of debt financing ( $r_D$ ) of 23 %,

<sup>(163)</sup> See footnote 155.

- a pre-tax cost of debt ( $k_D$ ) equal to the weighted average pre-tax cost of debt for SOWAER in 2002, i.e. between 4,9 % and 5,5 %,
- a risk premium ( $\Delta k$ ) of 5,64 % <sup>(164)</sup>,
- a beta between 0,91 and 1,25 <sup>(164)</sup>,
- with regard to the cost of equity, a pre-tax cost of capital invested without risk ( $r_f$ ) between 4,3 % and 4,7 % <sup>(165)</sup>,
- a tax rate ( $t$ ) of 33,99 %.

Based on these figures and assumptions, the Commission can calculate the weighted average cost of capital (C) using the following conventional formula:

$$C = (1 - r_D) \times k_E + r_D \times k_D$$

Where the cost of capital ( $k_E$ ) is given by the capital asset pricing model (CAPM) according to the formula:

$$k_E = r_f + \beta \times \Delta k$$

Based on this formula and the above assumptions, the Commission estimates that a discount rate of 9,5 % is reasonable.

- (454) Bearing in mind the investments over the 2003-2007 period and the anticipated revenue in the form of the terminal value in 2015, the calculation of the net present value based on a weighted average cost of capital of 9,5 % results in a value of EUR – 19,81 million. The 2003 investment decision, like that in 2002, therefore does not pass the market economy operator test.

## 2. Selectivity

- (455) The Commission notes that the measure was granted to BSCA only. The Commission therefore concludes that the measure gives a selective advantage to BSCA.

### (iii) 2006 agreements

- (456) The 2006 agreements:

- amended the scope of the services for which BSCA receives a subsidy from the Region and introduced a cap on this subsidy,
- amended the methods of calculating the variable part of the concession fee, while maintaining the cap at the level set by the 2002 SOWAER/BSCA agreement.

- (457) With regard to the expected costs of the 2006 measures, while introducing a cap on the subsidy granted by the Region, the 2006 measures, including from an *ex ante* perspective, limited the increase in the subsidy and thus reduced the costs of the Region/SOWAER group compared to the previous situation.

- (458) With regard to the expected revenue from the 2006 measures, it should be noted that, according to Belgium, it was decided to amend the methods of calculating the variable part of the concession fee so that the airport management companies (and therefore BSCA), which had just won the right to set the level of airport charges,

<sup>(164)</sup> See footnote 156.

<sup>(165)</sup> Interest rate on 10-year Belgian bonds in April 2003.

could not reduce the fee payable to SOWAER (given that this fee previously depended on the airport charges). According to Belgium, SOWAER and BSCA wanted to ensure that the 2006 agreements did not alter the financial balance created by the 2002 agreements. That is why:

- the cap on the measures was not changed,
- a safeguard clause was introduced, stipulating ‘that, in the event of exceptional circumstances or changes in the law ..., which are beyond the control of the parties and which may significantly alter the economics of the agreement to the detriment of one of the parties ..., the parties will equitably determine the amendments to be made to the agreement in order to re-establish the balance of their reciprocal undertakings while safeguarding their respective interests, in consultation with the Walloon Region’.

(459) The Commission takes the view that it was in fact reasonable for SOWAER to negotiate with BSCA an amendment to the methods of calculating the variable part of the concession fee, so that BSCA could not alter the variable amount of the concession fee by reducing the airport charges <sup>(166)</sup>. In addition, the Commission notes that, in the absence of cargo, the cap introduced by the 2006 measures was reached at 637 689 passengers in 2006 and at 1 737 378 passengers in 2007, whereas Charleroi airport already had 2 170 000 passengers in 2006. Therefore, keeping the cap on the variable part of the concession fee at the same level should have enabled the level of SOWAER’s revenue to be maintained. In the event of exceptional circumstances leading to a fall in the variable amount of the concession fee, SOWAER could renegotiate with BSCA so as to determine the amendments to be made in order to re-establish the balance of their reciprocal undertakings. The 2006 measures should not therefore have a priori reduced the revenue of the Region/SOWAER group.

(460) The 2006 measures should therefore have a priori limited the costs of the Region/SOWAER group (see recital 457), while maintaining its revenue (see recital 459). The Commission therefore concludes that these measures pass the market economy operator test. As a result, they do not constitute State aid. This measure is therefore excluded from the subsequent analysis.

(iv) 2008 amendment to the Region/BSCA agreement

(461) The amendment to the Region/BSCA agreement of 15 January 2008 introduced the Region’s commitment to fund new economic services (marshalling etc.) through the subsidy for certain services associated with the airport activities. These activities had previously been carried out directly by the Region.

(462) According to Belgium, this transfer of responsibility was in the interests of the Region/SOWAER group, even though it undertook to fund the associated costs, because it was expecting the costs to fall given that these services were going to be provided by BSCA instead of being provided directly by the Region.

(463) In support of its position, Belgium cites the explanatory memorandum of the draft decree <sup>(167)</sup> that transferred responsibility to BSCA for the security and safety tasks, as well as a report from the Walloon Parliament of 6 December 2007 on this same decree.

(464) The explanatory memorandum of this draft decree sets out the objectives in transferring the security and safety tasks to the companies managing Walloon airports, namely:

- generating economies of scale,
- ensuring the profitability of the investments granted by the Region,
- making the management companies responsible for managing and financing the performance of operational tasks,
- optimising the taxation of the services provided by these subsidiaries.

<sup>(166)</sup> While increasing, for example, the handling charges in order to maintain its total revenue.

<sup>(167)</sup> Decree of 19 December 2007 amending the Decree of 23 June 1994 on the creation and operation of airports and aerodromes located in the Walloon Region.

- (465) As regards the last point, Belgium has clarified that this involved recovering the VAT on the services provided by the subcontractor BSCA Security (for the security task), which the Region could not have recovered otherwise from BSCA.
- (466) Belgium also cites a report <sup>(168)</sup> from the Walloon Parliament on the draft decree, in which the Minister for Housing, Transport and Regional Development of the Walloon Region indicates that:
- the total potential saving from coordinated management <sup>(169)</sup> for the Walloon budget up to 2015 is between EUR 12 million (constant policy scenario) and EUR 32 million (scenario involving the recruitment of new officials instead of subcontracting),
  - with regard to VAT, the new structures will enable VAT to be recovered (i.e. 21 % of EUR 7 million each year).
- (467) Lastly, according to Belgium, the services associated with security checks vary significantly from one time of day to another and from one season to another depending on the number of passengers frequenting the airport. When these tasks were the Region's responsibility, the latter had to ensure a constant presence, even when only a limited service was required, because it was forced to do so by the staff regulations of officials. By contrast, the working hours of employees of BSCA and its subcontractor BSCA Security can be adjusted according to the airport's activity level.
- (468) The Commission takes the view that a reasonable market economy operator might have asked BSCA to relieve it of these activities by compensating BSCA for the costs incurred (instead of continuing to carry out these activities itself), since it could expect a reduction in these costs. The information provided by Belgium is sufficient to prove that such a reduction in costs could be expected from the measure. The Commission therefore concludes that the measure passes the market economy operator test and, as a result, does not constitute State aid. This measure is therefore excluded from the subsequent analysis.
- (b) Application of the market economy operator test to the capital increase subscribed by SOWAER in December 2002
- (469) On 3 December 2002 SOWAER contributed the sum of EUR 3 808 660 to purchase 6 143 shares in BSCA, representing 49,23 % of BSCA's capital, i.e. a price of EUR 620 per share.
- (470) The consultancy firm Deloitte & Touche, in its analysis of the 2002 business plan, asserted that the Region/SOWAER had acted as a prudent investor, given that the funds invested in BSCA were expected to produce a return on investment in the order of 27 % in view of BSCA's expected results for the 2001-2010 period <sup>(170)</sup>.
- (471) According to the Commission's calculations based on the BSCA 2001 business plan, the net present value of BSCA, after the capital injection, was EUR 65,6 million. Given the total number of shares following the capital injection, this net present value corresponds to a price per share of EUR 5 287, which is significantly higher than the price paid of EUR 620 per share.
- (472) These points therefore suggest that the capital increase subscribed by SOWAER in December 2002 passes the market economy operator test. However, the Commission does not consider itself in a position to rule out the possibility that this capital increase conferred an economic advantage on BSCA. The Commission points out that this capital increase was carried out shortly after the 2002 agreements were concluded and that, in addition, BSCA's losses, which necessitated the capital injection, were linked to the basic structure of the system defined by

<sup>(168)</sup> Report presented on behalf of the Planning, Transport, Energy and Housing Committee of the Walloon Parliament by Mr E. Stoffels on 6 December 2007 on the draft decree amending the Decree of 23 June 1994 on the creation and operation of airports and aerodromes located in the Walloon Region.

<sup>(169)</sup> Coordinated management means giving airport operators total control over customer handling, including security and safety tasks.

<sup>(170)</sup> According to the Deloitte & Touche report, 'it is clear from this analysis that the average annual profitability of the funds invested on the basis of the amended business plan and over an estimated period of 10 years is 27 %, and that 'this rate of return must be compared to a rate for the market risk for this type of activity of 15 % per year'.

the 2002 agreements. Those agreements therefore conferred an advantage on BSCA. As a result, the Commission cannot rule out that the 2002 capital injection may also have conferred an economic advantage on BSCA. If such an advantage exists, it was conferred only on BSCA and is therefore selective.

#### 6.1.3. Use of State resources and imputability of the measures to the State

(473) In this section, the Commission examines whether the 2002 agreements, the 2002 capital increase and the 2003 investment decision are measures granted through State resources. To that end, the Commission will determine (i) whether the resources of the Region and SOWAER are State resources and (ii) whether SOWAER's decisions on the measures are imputable to the public authorities.

##### 6.1.3.1. State resources

(474) The resources available to the Region as a local authority <sup>(171)</sup> constitute State resources.

(475) As SOWAER wholly belongs to the Region and is under its exclusive control, its resources for carrying out the tasks assigned to it by the Region constitute State resources.

(476) Consequently, the measures granted to BSCA have been granted through State resources.

##### 6.1.3.2. Imputability of the measures to the State

(477) As the Region is a local authority <sup>(172)</sup>, its decisions are imputable to the State.

(478) As regards the decisions made by SOWAER, the Commission takes the view that, based in particular on the *Stardust* judgment <sup>(173)</sup>, the imputability of those decisions can be established through the following points:

#### (a) General points

- As stipulated by the recital to the 2002 SOWAER/BSCA agreement, SOWAER is a 'specialised company acting, by delegation, on behalf of the Walloon Region'.
- SOWAER is wholly owned by the Region and is under its exclusive control.
- The Board of Directors consists solely of representatives of the Region.
- SOWAER has particularly been entrusted by the Region with implementing, on its behalf and under its control, the investment programmes approved by the Walloon Government.
- As clarified by Belgium <sup>(174)</sup>, the Walloon Government, as the sole shareholder in SOWAER, approves the investment programme and monitors its implementation.
- SOWAER manages, on behalf of the Region, the financial holdings in the airport management companies (including BSCA) in order to ensure public participation in those companies and that their strategy complies with the guidelines set out by the Walloon Government.

#### (b) Points specific to the measures examined

##### (i) 2002 SOWAER/BSCA agreement

(479) In a decision of 23 May 2001, the Walloon Government approved SOWAER's financial plan. This financial plan includes an investment programme for Charleroi airport. It was this programme that was annexed to the 2002 SOWAER/BSCA agreement.

<sup>(171)</sup> Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais (T-267/08) and Communauté d'agglomération du Douaisis (T-279/08) v European Commission* [2011] ECR II-1999, ECLI:EU:T:2011:209, paragraph 108.

<sup>(172)</sup> *Idem*.

<sup>(173)</sup> Judgment of 16 May 2002 in Case C-482/99 *French Republic v Commission of the European Communities (Stardust Marine)* [2002] ECR I-4397, ECLI:EU:C:2002:294.

<sup>(174)</sup> Note from Belgium of 21 September 2011 (question 2).

(480) The amount of the fee remaining to be paid by BSCA for the provision of the infrastructure and certain services depends on the subsidy paid by the Region to BSCA to cover the fixed fee.

(ii) 2003 investment decision

(481) In a decision of 3 April 2003, the Walloon Government officially noted the 2003 investment programme.

(iii) Capital increase subscribed by SOWAER in 2002

(482) In its decision of 23 May 2001 on the SOWAER financial plan, the Region confirmed the principle of successive capital injections in the companies managing the Walloon airports <sup>(175)</sup>. At that time the SOWAER financial plan suggested 'a capital investment in BSCA in the amount of +/- BEF 60 million ... followed by, spread over three years, three times 30 million (capital of 600 million with SOWAER holding 25 %, i.e. 150 million)', i.e. a capital injection of EUR 3,718 million spread over three years.

(483) The Commission concludes from the above that the 2002 agreements, the 2002 capital increase and the 2003 investment decision constitute measures imputable to the State.

#### 6.1.4. *Distortion of competition and effect on trade*

(484) As the manager of Charleroi airport, BSCA is in competition with the managers of other airport platforms serving the same catchment area. The Commission notes in particular that Brussels airport is 69 km away by road, Liège 78 km, Lille-Lesquin 121 km and Maastricht-Aachen airport 126 km <sup>(176)</sup>. These airports that are in competition with Charleroi airport are located in Belgium or other Member States.

(485) BSCA's website confirms this international dimension of Charleroi airport, which 'is located 45 minutes from the centre of Brussels, to the south of the Netherlands, to the north-west of France and Luxemburg, and to the west of Germany, 2 hours by road from major cities such as Cologne, Paris and Amsterdam'. Its catchment area contains '5 million potential passengers who are less than 1 hour away by road and more than 15 million who are less than 2 hours away'. <sup>(177)</sup>

(486) The measures granted to BSCA, insofar as they give the latter an economic advantage, encourage airlines and passengers to choose Charleroi airport — and therefore its manager BSCA — rather than airports serving the same catchment area, including airports situated in other Member States. They therefore threaten to distort competition between airport managers and affect trade between Member States.

#### 6.1.5. *Conclusion on the existence of aid granted to BSCA*

(487) In the light of the above, the Commission takes the view that the 2002 agreements and the 2003 investment decision constitute State aid granted to BSCA. The Commission cannot rule out that BSCA's capital increase subscribed by SOWAER in 2002 may also constitute State aid granted to BSCA.

## 6.2. **Existence of State aid granted to Ryanair**

(488) In order to determine whether the measures granted to Ryanair constitute State aid, the Commission will firstly examine whether the 2010 amendment is imputable to the State (Section 6.2.1). It will then examine whether the other measures granted to Ryanair give the latter an advantage (Section 6.2.2).

<sup>(175)</sup> The financial plan indicates that 'the development envisaged for BSCA and SAB will require significant capital increases (in addition to external financing) and therefore monitoring by SOWAER'.

<sup>(176)</sup> Distances indicated by the website <https://www.google.com/maps>

<sup>(177)</sup> <http://www.charleroi-airport.com/en/the-airport/location-and-catchment-area/index.html>

### 6.2.1. Imputability to the State of the 2010 amendment

(489) In this section, the Commission will examine whether the conclusion of the 2010 amendment is imputable to the State. As found by the Court of Justice in the *Stardust* judgment <sup>(178)</sup>, ‘the mere fact that a[n] ... undertaking is under State control is not sufficient for measures taken by that undertaking ... to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures’. The *Stardust* judgment also states that ‘the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken’.

(a) With regard to the capital ownership and the votes attached to shares issued by the undertaking:

(490) On 6 December 2010 when the 2010 amendment to the contract with Ryanair was concluded, BSCA’s capital was owned as follows:

- 22,56 % by SOWAER, a company wholly owned by the Region and under its exclusive control,
- 27,65 % by Sogepa (‘Société Wallonne de Gestion et de Participation’), a company wholly owned by the Region and under its exclusive control, which is the Region’s financial arm for assistance given to restructuring businesses,
- 19,16 % by Sambrinvest, a venture capital company 50 % owned by the Region and under the joint control of the Region and private shareholders <sup>(179)</sup>,
- 2,32 % by Igretec (‘Intercommunale pour la Gestion et la Réalisation d’Etudes Techniques et Economiques’),
- 27,65 % by Belgian Airports, a wholly private company consisting of the Italian group SAVE and the Belgian company Holding Communal SA.

As SOWAER and Sogepa held over half of BSCA’s shares and were themselves wholly owned by the Region, the public authorities owned the majority of BSCA’s capital and held the majority of the votes attached to those shares.

(b) With regard to the possibility of appointing over half of the members of the Board of Directors:

(491) When the amendment was concluded on 6 December 2010, BSCA’s Articles of Association applicable at the time stipulated as follows <sup>(180)</sup>:

‘The Board of Directors of BSCA shall consist of a maximum of 19 members:

- (i) 12 directors appointed on the proposal of category A shareholders <sup>(181)</sup>;
- (ii) 4 directors appointed on the proposal of category C shareholders <sup>(182)</sup>;
- (iii) 3 independent directors, with 2 appointed on the proposal of category A shareholders, whose candidatures must have been approved in advance by the Region, and 1 independent director appointed on the proposal of category C shareholders ...

With regard to the 12 directors referred to in point (i), two shall be proposed by Sambrinvest, one by Igretec and two by Sogepa ...

Candidates proposed by category A shareholders shall always be approved in advance by the Walloon Region, except, however, for those proposed by Igretec, Sambrinvest and Sogepa’.

<sup>(178)</sup> See footnote 174.

<sup>(179)</sup> See note from Belgium of 13 May 2014 (answer to question 1).

<sup>(180)</sup> Article 11 of BSCA’s Articles of Association dated 10 December 2009.

<sup>(181)</sup> Article 5 of the Articles of Association stipulates that ‘Category A shareholders may be only the Walloon Region, or any specialised companies formed by the latter, the limited company Sambrinvest, Sogepa or Igretec’.

<sup>(182)</sup> Article 5 of the Articles of Association stipulates that ‘Category C shareholders may be only Belgian Airports and entities to which Belgian Airports may freely transfer its shares’.

- (492) The majority of directors (12 out of 19) were therefore appointed:
- either with the Region's approval (9 directors, including 7 appointed by category A shareholders and 2 independent directors),
  - or on the proposal of entities under the Region's exclusive control (3 directors appointed on the proposal of Igretec and Sogepa).
- (493) Even excluding the two independent directors, the majority of directors (10) were appointed either with the Region's approval (7) or on the proposal of entities under the Region's exclusive control (3).
- (494) The three criteria laid down by the Transparency Directive were therefore met at the time when the 2010 amendment was concluded. However, these criteria only allow the dominant influence of the public authorities to be presumed. As indicated by Article 2 of the Transparency Directive, the rules in force should also be examined to determine whether the public authorities had a dominant influence.
- (c) With regard to the rules in force determining whether the public authorities had a dominant influence:
- (495) Article 4.2.3 of the June 2009 shareholders' agreement between SOWAER, Sogepa, Sambrinvest and Igretec, on the one hand, and Belgian Airports (Save), on the other hand, as reflected by Article 16 of BSCA's Articles of Association in force at the time when the 2010 amendment was concluded, stipulates that category C directors, appointed on the proposal of Belgian Airports, have a right of veto over certain categories of decision:
- '... Decisions shall be taken by the Board of Directors by a simple majority of votes, except for decisions concerning the following matters, which shall also require the agreement of all category C directors:
- (i) any amendment to the Business Plan;
  - (ii) the adoption of new business plans on the expiry of the Business Plan 2009-2012 and any amendment to such plans;
  - (iii) any decision deviating from the current business plan without formally amending it;
  - (iv) the adoption of the Company's annual budget (particularly with regard to developments, investments, projects, studies, equipment, indirect and staff costs) and any amendment to the budget exceeding EUR 100 000;
  - (v) the proposal to amend the dividend policy, to be submitted to the general meeting;
  - (vi) the approval of any contract or agreement between the Company and the Walloon Region or any company directly or indirectly controlled by the latter;
  - (vii) the relationship between the Company and Ryanair;
  - (viii) the appointment and removal of the Chief Executive Officer;
  - (ix) any company decision concerning or involving facts stated in a complaint submitted by Belgian Airports to SOWAER in accordance with the Share Sale Agreement;
  - (x) any decision concerning the relationship between BSCA and BSCA Security in terms of security; and
  - (xi) ... the conclusion, amendment of terms, termination or abandonment of any joint venture or strategic collaboration other than with the Shareholders of Save or associated companies'.
- (496) The Commission concludes that, at the time when the 2010 amendment was concluded, no major decision on the management of BSCA's affairs could have been taken without the approval of Belgian Airports. BSCA was therefore under the joint control of its private and public shareholders and, as a result, was not under the dominant influence of the public shareholders alone.



- (497) In this respect, it should be noted that Belgian Airports' right of veto covered the relationship between BSCA and Ryanair (see point (iv) of recital 495). Without the approval of Belgian Airports, BSCA was therefore unable to implement any instructions from the public authorities on the conclusion of the 2010 amendment.
- (498) Moreover, an examination of the minutes of the Board of Directors' meetings on the conclusion of the 2010 amendment, particularly the minutes of the meetings of 25 February and 29 April 2010, does not reveal the existence of any such instructions.
- (499) During its meeting on 25 February 2010, BSCA's Board of Directors unanimously approved the proposed agreement with Ryanair.
- (500) The Commission therefore concludes that BSCA's decision to conclude the 2010 amendment to the contract with Ryanair is not imputable to the State.

#### 6.2.2. *Application of the market economy operator test*

- (501) In order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions <sup>(183)</sup>.
- (502) In order to determine whether (i) the 2001 agreements, (ii) the Ministerial Order of 11 June 2004 and the BSCA letter of 24 June 2004, (iii) the 2005 amendment and (iv) the sale by BSCA of its shares in Promocyt have given an advantage to Ryanair, the Commission has examined whether, in adopting these measures, the entity having granted them acted as a market economy operator.

##### 6.2.2.1. *Determination of the entity having granted the measures*

- (503) In paragraph 102 of its judgment of 17 December 2008 on the 2004 decision, the General Court concluded that 'the Commission's refusal to examine together the advantages granted by the Walloon Region and by BSCA and to apply the private investor principle to the measures adopted by the Walloon Region in spite of the economic links binding those two entities is vitiated by an error in law'.
- (504) In order to apply the market economy operator test to (i) the 2001 agreements, (ii) the Ministerial Order of 11 June 2004 and the BSCA letter of 24 June 2004, (iii) the 2005 amendment and (iv) the sale by BSCA of its shares in Promocyt, the Commission will therefore consider, given the economic and functional links between the Region/SOWAER and BSCA at the time when these measures were granted <sup>(184)</sup>, that the entity having granted the measures is the group consisting of the Region, SOWAER and BSCA (hereinafter 'Region-SOWAER-BSCA').
- (505) Consequently, the two 2001 contracts must be regarded as a single measure (hereinafter 'the 2001 contracts'). Likewise, the Ministerial Order of 11 June 2004 and the BSCA letter of 24 June 2004 (hereinafter 'the 2004 provisional commercial framework') must be regarded as a single measure.
- (506) Furthermore, in order to apply the market economy operator test, the cash flows between the three entities will be ignored and their accounts will be consolidated.

##### 6.2.2.2. *Application of the market economy operator test*

- (507) In order to determine whether the measures defined in Section 3.2 pass the market economy operator test, the Commission has examined, in accordance with point 53 of the aviation guidelines <sup>(185)</sup>, if:

(a) the price charged for the airport services corresponds to the market price; or

<sup>(183)</sup> See, in particular, judgment of 29 April 1999 in Case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, ECLI:EU:C:1999:210, paragraph 41.

<sup>(184)</sup> In particular, BSCA was a public undertaking at the time when these measures were granted.

<sup>(185)</sup> See footnote 8.

- (b) it can be demonstrated through an *ex ante* analysis that the agreements with Ryanair were intended to lead to a positive incremental profit contribution for the group consisting of the Region-SOWAER-BSCA.
- (a) Comparison of the prices charged for airport services at Charleroi with the market price
- (508) The Commission has strong doubts that, at the present time, an appropriate benchmark can be identified to establish a true 'market price' for services provided by airport managers.
- (509) The application of the market economy operator test using an average price observed in other similar markets may prove conclusive where a market price can be reasonably identified or deduced from other market indicators. However, this method may not be as relevant in the case of airport services. The revenue and cost structure tends to differ significantly from airport to airport. These costs and revenues depend on the airport's state of development, number of airlines operating from/to the airport, available capacity in terms of passenger traffic, state of the infrastructure, the regulatory burden, which may vary from Member State to Member State, and historical debts and obligations of the airport <sup>(186)</sup>.
- (510) Moreover, the liberalisation of the air transport market complicates any comparative analysis. As the present case amply demonstrates, commercial arrangements between airports and airlines are not necessarily based on a list of public prices for individual services. These commercial relationships vary widely. They include the sharing of risks in terms of traffic and of correlative commercial and financial responsibilities, the generalised use of incentive mechanisms (for example, in the form of discounts connected with the number of links or passengers carried), and variations in the distribution of risk over the term of contracts. As a result, it is difficult to compare transactions based on a price per rotation or per passenger.
- (511) Ryanair argues that the market economy operator principle can be applied based on a comparison with the commercial arrangements of other European airports. Ryanair cites a study by Oxera from 2 October 2011, which proposes Glasgow Prestwick and Liverpool John Lennon airports as comparators.
- (512) However, the Commission has strong doubts that these two benchmarks are relevant for assessing the situation of Charleroi airport, given that the revenue structure of Glasgow Prestwick airport is heavily based on cargo, which does not exist at Charleroi. Moreover, both airports have apparently received public funding in recent years.
- (513) In addition, as indicated above, the transactions to be analysed consist of several 'prices', i.e. in particular the various airport charges, the price of ground handling services and, for certain measures, the contributions to Promocyt for marketing activities. Each of these transactions therefore leads to a complex set of cash flows between the airport manager and the airline and its subsidiaries.
- (514) Accordingly, a comparison between just the airport charges invoiced by BSCA to Ryanair and the airport charges invoiced at the comparison airports would not provide any useful indication as to compliance with the market economy operator principle. At the very least, in order to validly compare the transactions covered by this assessment, it would be necessary to identify, for the airports in the comparison sample, a set of comparable transactions, which must particularly include equivalent marketing services and equivalent ground handling services. Identifying such a sample of comparable transactions would prove impossible, given that the transactions covered by this assessment are so complex and specific, and all the more so as the prices of ground handling services and marketing services are rarely made public and would be difficult to obtain in order to form a basis for comparison.
- (515) Lastly, assuming that it could be established, based on a valid comparative analysis, that the 'prices' applied in the various transactions covered by this assessment were equivalent to or higher than the 'market prices' established using the sample of comparison transactions, the Commission could not, however, conclude that those transactions corresponded to the market price if it proved that, on their conclusion, the airport manager may have expected them to lead to incremental costs higher than the incremental revenues. A market economy operator would not in fact be interested in offering goods or services at the 'market price' if this led to an incremental loss.

<sup>(186)</sup> See the 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), recitals 88 and 89.

(516) The Commission considers it appropriate to reiterate in the context of this analysis that, following the adoption of the aviation guidelines, both Belgium and the interested parties were invited to submit comments on the application of those guidelines to the present case. In the event, neither Belgium nor the interested parties, except for Ryanair, disputed in substance the Commission's approach according to which, where an appropriate benchmark cannot be identified to establish a true market price for the services provided by airports to airlines, the most relevant criterion for assessing the arrangements concluded between these two parties is an *ex ante* incremental profitability analysis.

(b) *Ex ante* analysis of the profitability of measures

(517) In the light of the above, the Commission considers that the approach generally recommended in the aviation guidelines for applying the market economy operator test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to the present case. This approach is justified by the fact that an airport manager may have an objective interest in concluding a transaction with an airline where it may reasonably expect this transaction to improve its profits (or reduce its losses) compared to a counterfactual situation in which this transaction is not concluded <sup>(187)</sup>, regardless of any comparison with the conditions offered to airlines by other airport managers, or even with the conditions offered by the same airport manager to other airlines.

(518) As stated by point 63 of the aviation guidelines, 'The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline ..., it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound medium-term prospects' <sup>(188)</sup>.

(519) The Commission stresses that the criterion indicated in point 63 of the aviation guidelines reflects the logic of the market economy operator test, but that this criterion, which refers to the arrangements concluded between specific airports and airlines rather than to a general business plan as is usually the case when applying the market economy operator test, has only recently been introduced. Consequently, the Commission admits that it may be difficult for Member States and the operators concerned to provide documents dating from the moment when the measure was granted and precisely meeting the requirements in point 63 of the aviation guidelines, where these arrangements were concluded some years previously. The Commission will take these considerations into account when applying the market economy operator test to the agreements with Ryanair.

(520) According to point 64 of the aviation guidelines, 'In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport should be taken into account ... In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test' (the footnotes have not been reproduced).

(521) Furthermore, according to point 66 of said guidelines, 'When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term' <sup>(189)</sup>.

(522) The Commission has therefore applied the market economy operator test to the following measures, in line with the principles set out above:

(i) 2001 contracts

(523) In order to determine whether the 2001 contracts contributed, from an *ex ante* point of view, to the profitability of the entity having granted the aid, in accordance with point 63 of the aviation guidelines, the Commission has

<sup>(187)</sup> In other words, if the incremental profitability expected from this transaction is positive.

<sup>(188)</sup> The footnotes have not been reproduced.

<sup>(189)</sup> Point 66.

assessed whether the net present value (hereinafter 'NPV') of the 2001 contracts was positive for the entity Region-SOWAER-BSCA. The counterfactual scenario is a situation in which the 2001 contracts would not have been concluded and the entity Region-SOWAER-BSCA would have chosen to waive the revenue generated by the additional traffic resulting from the contracts in question, and not to bear the costs created by this same traffic.

#### Recreation of an incremental business plan

- (524) Prior to the 2001 agreements, BSCA drew up a business plan. However, on the one hand, this business plan covered not only the revenue received from the traffic generated by Ryanair, but also the revenue received from the traffic generated by other airlines. On the other hand, it identified the revenue and costs of BSCA only, whereas, in order to apply the market economy operator test, it should be considered that the entity that concluded the 2001 contracts with Ryanair was the entity Region-SOWAER-BSCA. This business plan can therefore be used as a source of information, but must be reworked so that it can be used to apply the market economy operator test.
- (525) The Commission has therefore recreated what would have been a business plan produced by the entity Region-SOWAER-BSCA in order to assess the expected profitability of these contracts, with only the revenue and costs of the incremental economic activities associated with these contracts being included. To this end, the Commission started with BSCA's general business plan (i.e. covering all the airport's activities and not just the specific effect of the 2001 contracts), as available prior to the conclusion of the 2001 contracts. Using this general business plan, the Commission constructed an incremental business plan including only the incremental economic activities (i.e. taking into account only the revenue and costs associated with Ryanair's traffic), by isolating the incremental traffic, costs and revenue to be expected from the contracts with Ryanair on their conclusion<sup>(190)</sup>. The Commission then created a business plan for the entity Region-SOWAER-BSCA by adding the incremental costs and revenue of the Region and SOWAER associated with these contracts and by neutralising the internal flows within the entity Region-SOWAER-BSCA.

#### Expected incremental costs

##### Expected incremental investment costs

- (526) In order to determine whether part of the investment costs should be taken into account in the expected incremental investment costs due to the 2001 contracts, the Commission examined, in accordance with point 64 of the aviation guidelines, whether the investment programme for Charleroi airport was decided in connection with the 2001 contracts or independently from those agreements.
- (527) The Commission found that, at the end of the 1990s, i.e. before the 2001 contracts were signed, the Region wanted to develop the airport in order to boost economic activity within its territory. Accordingly, in its regional policy declaration approved on 15 July 1999, the Walloon Parliament recognised that the regional airports constituted important centres of economic development and job creation for the Walloon Region<sup>(191)</sup>. In a note of 8 November 2000 to the Walloon Government (this note was intended to inform the Walloon Government with a view to a decision approving the investment programme), the minister with responsibility for the economy stressed that it was vital, 'in order to allow the airport to play its role as a regional economic lever, to equip it with a complete infrastructure in the context of its comprehensive development'.
- (528) According to Belgium, at the end of the 1990s (and therefore before the 2001 agreements), due to technical constraints associated with the existing infrastructure<sup>(192)</sup>, it was clear that a new terminal needed to be built in the northern part of the site. Land had already been compulsorily purchased by the intercommunal body Igretec, which was responsible for creating the 'Aéropôle' airport business park. The Region had itself compulsorily purchased further land during the 1990s, and in 1999 Igretec transferred to the Region the land that it had purchased. It was on this land that the new passenger terminal was built.

<sup>(190)</sup> With regard to the incremental operating costs (staff, other purchases), the Commission used the total cost figures from the business plans and a regression allowing the way in which these cost items develop in line with traffic to be assessed.

<sup>(191)</sup> Source: note of the Walloon Government annexed to the minutes of the Walloon Government meeting of 8 November 2000.

<sup>(192)</sup> See footnote 22.

- (529) During a session on 20 July 2000, the Region approved the outlines of a framework agreement on a multiannual investment programme for Charleroi airport, referring in particular to the 'concept of a new passenger terminal', with a total budget of EUR 113 740 000. On 8 November 2000 the Region adopted a decision implementing its decision of 20 July 2000, amending the assumptions of the multiannual investment programme. Although these decisions did not legally bind the Region, they show that the Region had laid the foundations of the investment programme well before the 2001 contracts were signed.
- (530) The decision of 8 November 2000 was particularly based on a note from the minister with responsibility for the economy, which referred to two studies ordered by the Region and carried out at the end of the 1990s/beginning of the 2000s:
- a study conducted by the International Air Transport Association (hereinafter 'IATA'): this study identified three options for developing passenger traffic at Charleroi airport, based on assumptions of growth in the number of passengers for scheduled, charter and business flights,
  - a study conducted by Tractebel, which was completed in April 2000: the aim of this study was to establish an infrastructure development plan based on the commercial assumptions ('high scenario') of the IATA study.

The summary of these studies presented by the minister to the Walloon Government refers to general traffic assumptions, which are not presented as being connected with a particular company or future contract.

- (531) On 31 July 2001 a 'strategic guidance note', accompanying the 2001 BSCA business plan, was presented to BSCA's Board of Directors. This note indicated that BSCA should target low-cost airlines and possibly airlines from eastern countries. It stressed that it was vital for BSCA to attract new airlines (over and above Ryanair) and that Charleroi airport should position itself as a potential destination for the new bases to be opened by low-cost airlines in the future.
- (532) The 2001 BSCA business plan also confirms that the investments and in particular the construction of the new terminal were envisaged not only in terms of meeting the needs of Ryanair, but also meeting the needs of all airlines that Charleroi airport could attract. In fact, according to this business plan, the number of departing passengers carried by Ryanair was expected to grow only from 360 000 to 700 000 passengers by 2015 (see table presented in recital 536). This growth was mainly expected to occur in 2001-2003, i.e. before the opening of the new terminal, which was planned at the time for 2005. The Region and BSCA therefore expected that the increase in traffic facilitated by these investments would stem from airlines other than Ryanair.
- (533) The Region and BSCA did not therefore make the investments with a view to specifically increasing the number of Ryanair passengers, but to enable the significant traffic potential, which was not specifically linked to one airline, to be realised. The Commission therefore concludes that these investments cannot be specifically attributed to Ryanair. As a result, it is not relevant to attribute incremental investment costs to the 2001 contracts.

#### Expected incremental operating costs

- (534) The expected incremental operating costs due to the 2001 contracts are equal to the expected operating costs directly attributable to Ryanair, to which the Commission has added part of the expected indirect operating costs in proportion to the number of Ryanair passengers compared to the total number of passengers. The Commission stresses that if, in this case, the net present value of the 2001 contracts is positive, this would be even more true if the expected incremental operating costs had been determined using a linear regression, as proposed in the study submitted for Ryanair by Oxera.

#### Expected incremental revenue

- (535) Contrary to Ryanair's opinion, the Commission analysis has excluded any residual value of the contract with Ryanair, because the long-term effect of advertising on total traffic at Charleroi is undocumented and difficult to measure.

Net present value of the 2001 contracts

(536) The results of the net present value calculation are presented in Table 21. They reveal a positive incremental contribution by Ryanair for all the years concerned.

Table 21

**Expected cash flows due to the 2001 measure**

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of Ryanair departing passengers	360 000	600 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000	700 000
Total number of departing passengers	384 400	627 800	732 800	797 800	867 800	931 034	1 078 275	1 208 523	1 333 779	1 459 042	1 524 314	1 565 343	1 608 418	1 653 642	1 701 120
Revenue per departing passenger															
Passenger fee	7,00	7,00	7,00	7,00	7,00	7,50	7,50	8,00	8,00	8,00	8,00	8,00	8,00	8,00	8,00
Boarding fee	1,00	1,00	1,00	1,00	1,00	1,13	1,13	1,13	1,13	1,13	1,30	1,30	1,30	1,30	1,30
Fuel	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]	[0,3-0,7]
Duty free shop	[3-4]	[3-4]	[3-4]	[3-4]	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Other shops	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]
Horeca	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]
Car park	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]	[2-4]
Handling	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]
Sales commission	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]
Total	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]	[14-17]



- (537) As Ryanair's incremental contribution is positive for all the years concerned, the net present value of the contract will necessarily be positive, regardless of the weighted average cost of capital in question.
- (538) By way of illustration, however, the Commission has calculated the NPV based on an average cost of between 8,7 % and 9 %. The discount rate used to calculate the NPV of contracts is the weighted average cost of capital of the entity granting the aid at the moment when the aid is granted. In the present case, the revenue and costs associated with the contract with Ryanair affect the accounts of BSCA. The Commission has therefore chosen to use BSCA's capital cost as the discount rate. The calculation of the weighted average capital cost for BSCA is based on a number of assumptions:
- financing solely through equity,
  - a risk premium of 5,51 % <sup>(193)</sup>,
  - a beta of 0,69 <sup>(193)</sup>,
  - a pre-tax cost of capital invested without risk between 4,9 % and 5,2 %,
  - a tax rate of 40,2 %.
- (539) Therefore, as an illustration, based on an average rate between 8,7 % and 9 %, i.e. 8,85 %, the Commission has concluded that the net present value was positive at EUR 19,5 million.

Table 22

**Net present value (NPV) of the 2001 measure**

<i>(EUR million)</i>	
	Discount rate of 8,85 %
NPV	19,5

This positive NPV and the positive contributions for all the years concerned show that the 2001 contracts could be expected to increase the profitability of the Region-SOWAER-BSCA.

- (540) With regard to the Region's undertaking to compensate Ryanair for the losses that the airline might incur due to a possible change in the level of airport charges or opening hours during the years 2001 to 2016, the Commission notes that this compensation may not exceed the loss directly incurred by Ryanair due to the change. As a result, if the Region were to pay compensation to Ryanair under this provision, Ryanair would not be in a more favourable situation than it would have been if the Region had respected its undertaking. This provision does not therefore give Ryanair an additional advantage.
- (541) Furthermore, in accordance with point 66 of the aviation guidelines, these agreements form part of an overall strategy expected to lead the airport to profitability at least in the long term. BSCA's strategy was to develop traffic at Charleroi airport with the specific aim of increasing its revenue and thereby better covering its fixed costs and becoming profitable. To that end, BSCA decided to focus on the niche market of short- and medium-haul point-to-point flights, and in particular on low-cost flights. BSCA based this strategy on studies commissioned from outside consultants at the end of the 1990s. According to some of these studies <sup>(194)</sup>, Charleroi airport enjoyed comparative advantages in terms of developing in this segment, particularly its low costs. Accordingly, a BSCA 'strategic guidance note' of 31 July 2001 indicated that BSCA's objective was to reach 2,5 to 3 million passengers <sup>(195)</sup> by 2010, which, according to this note, 'does not seem unrealistic given the establishment of Ryanair's base and the growth in air transport'. The 2001 agreements therefore formed part of this strategy to grow traffic and revenue.

<sup>(193)</sup> See footnote 156.

<sup>(194)</sup> IATA, Roland Berger International, study commissioned by Grands Travaux de Marseille.

<sup>(195)</sup> Including both departing and arriving passengers.



- (542) As the market economy operator test is satisfied, the 2001 contracts do not constitute State aid.
- (ii) 2004 provisional commercial framework
- (543) In order to determine whether the 2004 commercial framework contributed, from an *ex ante* point of view, to the profitability of the entity having granted the aid, in accordance with point 63 of the aviation guidelines, the Commission has assessed whether the NPV of the 2004 commercial framework was positive for the entity Region-SOWAER-BSCA. The counterfactual scenario to the decision to adopt the 2004 commercial framework is having no contract with Ryanair and therefore waiving the incremental revenue and costs associated with Ryanair's traffic.
- (544) On 22 January 2004, prior to the conclusion of the 2004 provisional commercial framework, BSCA updated its business plan. According to Belgium, the business plan of 22 January 2004 was prepared in the wake of the 2004 decision with a view to confirming the new proposal to be made to Ryanair <sup>(196)</sup>. However, on the one hand, this business plan covers not only the revenue received from the traffic generated by Ryanair, but also the revenue received from the traffic generated by other airlines. On the other hand, it identifies the revenue and costs of BSCA only, whereas, in order to apply the market economy operator test, it should be considered that the entity that concluded the 2004 provisional commercial framework with Ryanair was the entity Region-SOWAER-BSCA.
- (545) The Commission has therefore recreated a business plan for the entity Region-SOWAER-BSCA, which contains only the revenue and costs of the economic activities associated with the 2004 commercial framework. To this end, the Commission started with BSCA's general business plan of 22 January 2004 and applied the same methodology as that used for the 2001 contracts and described in recital 525.
- (546) In order to determine the incremental costs attributable to the 2004 provisional commercial framework, the Commission in particular examined whether the Region, SOWAER or BSCA were expected to make certain investments due to the 2004 commercial framework. As a reminder, the 2004 commercial framework was put in place in order to fill the legal vacuum left by the annulment of the 2001 contracts following the Commission's 2004 decision. Under this commercial framework, the group consisting of the Region-SOWAER-BSCA was not required to make new investments. The investments under the 2002 SOWAER/BSCA agreement and the 2003 investment programme had already been decided and the work had started. In addition, as indicated in recital 533, the investment programme included in the 2002 SOWAER/BSCA agreement would probably have been adopted even in the absence of the contracts with Ryanair. The same is true for the 2003 revision of the investment programme, which formed part of the same logic to develop the airport with, if possible, a diverse customer base in terms of airlines. The Commission therefore concludes that it is not relevant to attribute incremental investment costs to the 2004 provisional commercial framework.
- (547) Based on those assumptions, the Commission has determined that the relevant cash flows for analysing the profitability of the 2004 commercial framework are as follows:

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<sup>(196)</sup> Response from Belgium sent on 18 March 2014 to the Commission (answer to question 10).

Table 23

## Expected cash flows due to the 2004 measure

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of Ryanair departing passengers	1 033 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941	1 223 941
Total number of departing passengers	1 099 944	1 292 535	1 295 174	1 346 381	1 397 587	1 448 794	1 500 000	1 500 000	1 500 000	1 500 000	1 500 000	1 500 000
Revenue per departing passenger												
Passenger fee	7,00	7,00	7,50	7,50	8,00	8,00	8,00	8,00	8,00	8,00	8,00	8,00
Boarding fee	1,00	1,00	1,13	1,13	1,13	1,13	1,13	1,30	1,30	1,30	1,30	1,30
Handling	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]	[1-1,3]
Fuel	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]
Commercial concessions	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]	[5-9]
Total	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]
Costs per departing passenger												
Promotional contribution	4,00	4,00	4,00	4,00	4,00	4,00	4,00	4,00	4,00	4,00	4,00	4,00
Other goods and services	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]
Wages and social security contributions	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]
Sub-Total	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]
Launch costs	0,34	0,18	0,04	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]
Total revenue per Ryanair departing passenger	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]	[14-20]
Total cost per Ryanair departing passenger	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]	[9,5-11,5]
Incremental contribution per Ryanair passenger	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]	[3-9]
Total incremental contribution of Ryanair (EUR million)	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]	[3-11]

- (548) These flows reveal a positive incremental contribution by Ryanair for all the years concerned. Accordingly, the commercial framework necessarily has a positive net present value, regardless of the weighted average cost of capital chosen.
- (549) However, by way of illustration, in order to calculate the NPV of the 2004 measure, the Commission has determined the discount rate to be used. This rate is the weighted average cost of capital of the entity granting the aid at the moment when the aid is granted. As indicated in recital 538, the Commission has used BSCA's weighted average cost of capital. Based on the following assumptions, the Commission has estimated that this rate was 9,7 %:
- financing solely through equity,
  - a risk premium of 5,72 % <sup>(197)</sup>,
  - a beta of 0,95 <sup>(197)</sup>,
  - a pre-tax cost of capital invested without risk between 4,2 % and 4,4 %.
- (550) The following table gives the result of the net present value calculation for the 2004 commercial framework, based on a discount rate of 9,7 %.

Table 24

**Net present value (NPV) of the 2004 measure**

<i>(EUR million)</i>	
	Discount rate of 9,7 %
NPV	53

This positive NPV confirms that the 2004 commercial framework could be expected to increase the profitability of the Region-SOWAER-BSCA.

- (551) Point 66 of the aviation guidelines states that agreements must form part of an overall strategy expected to lead the airport to profitability at least in the long term. In this respect, during its meeting on 15 April 2004, BSCA's Board of Directors took note of the proposals made to Ryanair and instructed 'the Chief Executive Officer to validate the BSCA business plan and measure any consequences of these proposals'. 'The overall analysis must also confirm, in all respects, that the sustainability and future of the airport are not in any way jeopardised and that BSCA has sufficient room for manoeuvre in the long term in order to pursue its development'. During its next meeting on 6 May 2004, the Board of Directors noted that 'the proposals recently discussed in Dublin with Ryanair representatives may, given the airport's foreseeable development, ensure that Charleroi keeps the Ryanair operations under the conditions of the original business plan ...'. As the original business plan was itself part of a long-term development strategy, the Commission therefore concludes that the 2004 commercial framework fell within the same strategy.
- (552) As the market economy operator test is satisfied, the 2004 commercial framework does not constitute State aid.
- (iii) 2005 contract
- (553) In order to determine whether the 2005 contract contributed, from an *ex ante* point of view, to the profitability of the entity having granted the aid, in accordance with point 63 of the aviation guidelines, the Commission has assessed whether the NPV of the 2005 contract was positive for the entity Region-SOWAER-BSCA. The counterfactual scenario is no longer having any agreement with Ryanair after the expiry, in March 2006, of the BSCA letter to Ryanair of 24 June 2004.

<sup>(197)</sup> See footnote 156.

- (554) In order to calculate the NPV, the Commission has recreated a business plan for the entity Region-SOWAER-BSCA, which contains only the revenue and costs of the economic activities associated with the 2005 contract. To this end, the Commission started with BSCA's general business plan of 24 January 2004, which, according to Belgium, is the business plan prepared in the wake of the 2004 decision with a view to confirming the new proposal to be made to Ryanair, and which led to the proposal sent to Ryanair on 9 December 2005 <sup>(198)</sup>. The Commission then applied the same methodology as that used for the 2001 contracts and described in recital 525.
- (555) In order to determine the incremental costs attributable to the 2005 contract, the Commission in particular examined whether the Region, SOWAER or BSCA were expected to make certain investments due to the 2005 contract. Under this contract, the group consisting of the Region-SOWAER-BSCA was not required to make new investments. The investments under the 2002 SOWAER/BSCA agreement and the 2003 investment programme had already been decided and the work had started. In addition, as indicated in recital 533, the investment programme included in the 2002 SOWAER/BSCA agreement would probably have been adopted even in the absence of the contracts with Ryanair. The same is true for the 2003 revision of the investment programme, which formed part of the same logic to develop the airport with, if possible, a diverse customer base in terms of airlines. The Commission therefore concludes that it is not relevant to attribute incremental investment costs to the 2005 contract.
- (556) Based on those assumptions, the Commission has determined that the relevant cash flows for analysing the profitability of the 2005 measure are as follows:

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<sup>(198)</sup> See footnote 198.

Table 25

## Expected cash flows due to the 2005 measure

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of Ryanair departing passengers	1 155 498	1 258 976	1 499 999	1 749 999	1 749 999	1 749 999	1 749 999	1 749 999	1 749 999	1 749 999
Total number of departing passengers	1 226 732	1 381 415	1 644 635	1 894 635	1 894 635	1 894 635	1 894 635	1 894 635	1 894 635	1 894 635
Revenue per departing passenger										
Passenger fee	2,33	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Landing fee	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]	[1-1,2]
Commercial concessions	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]	[6-10]
Handling	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]	[3-6]
Fuel	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]	[0,05-0,15]
Infrastructure access charge	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]	[0-0,5]
Total	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]	[12-17]
Costs per departing passenger										
Promotional contribution	0,92	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Duty free shop purchases										
Environment fund										
Other goods and services	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]	[1,5-2,5]
Wages and social security contributions	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]	[4-5]

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Launch costs	0,05									
Sub-Total	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]
Fixed costs per passenger	[0-0,1]	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Total costs per departing passenger	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]	[5,5-7,5]
Total incremental contribution per Ryanair departing passenger before investment (EUR)	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Total incremental contribution of Ryanair before investment (EUR million)	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]	[6-17]

- (557) These flows reveal a positive incremental contribution by Ryanair for all the years concerned. Accordingly, the 2005 contract necessarily has a positive net present value, regardless of the weighted average cost of capital chosen.
- (558) However, by way of illustration, in order to calculate the NPV of the 2005 measure, the Commission has determined the discount rate to be used. This rate is the weighted average cost of capital of the entity granting the aid at the moment when the aid is granted. As indicated in recital 538, the Commission has used BSCA's weighted average cost of capital. Based on the following assumptions, the Commission has estimated that this rate was 9,3 %:
- financing solely through equity,
  - a risk premium of 5,74 % <sup>(199)</sup>,
  - a beta of 0,97 <sup>(199)</sup>,
  - a pre-tax cost of capital invested without risk between 3,5 % and 3,9 %.
- (559) The following table gives the result of the net present value calculation for the 2005 contract, based on a discount rate of 9,3 %.

Table 26

**Net present value (NPV) of the 2005 measure**

<i>(EUR million)</i>	
	Discount rate of 9,3 %
NPV	80,6

This positive NPV shows that the 2005 contract could be expected to increase the profitability of the Region-SOWAER-BSCA.

- (560) As regards the condition stipulated by point 66 of the aviation guidelines, according to which the agreement must form part of an overall strategy expected to lead the airport to profitability, a note of 8 December 2005, intended to present BSCA's commercial proposal to Ryanair to BSCA's Board of Directors, indicates that the proposal is based on a business plan for 2006-2015. The Board of Directors is asked to ensure that this plan results in an acceptable level of profitability that is sufficient to absorb the fluctuations expected in the future due to budget forecasts (a footnote indicates that the business plan has been prepared using approximate estimates of costs and revenues). BSCA points out that the charges applied for ground handling services 'must cover the costs and ensure a reasonable profit margin'. Later on in the note, BSCA states that the 'costs associated with ground handling services and their control represent the key to the proposal made to Ryanair. A significant part of these costs is fixed or semi-variable and the cost per passenger is therefore linked to the volume of passengers handled. A minimum number of rotations is specified in the commercial proposal (with Ryanair) and failure to meet this minimum would undoubtedly lead to a loss in the ground handling services for BSCA. Penalties are specified in order to overcome this loss'. The Commission concludes from this information that, although BSCA's commercial proposal to Ryanair entailed certain risks in the eyes of BSCA — particularly the risk that the level of profitability would be insufficient if Ryanair's traffic was less than expected — this proposal was, however, based on a development strategy through which BSCA intended, due to the traffic provided by Ryanair, to reduce its costs per passenger and thus ensure a sufficient profit margin.
- (561) As the market economy operator test is satisfied, the 2005 contract does not constitute State aid.

<sup>(199)</sup> See footnote 156.



(iv) Sale of BSCA shares in Promocyt to Ryanair

- (562) On 31 March 2010 BSCA sold its 50 % holding in Promocyt to Ryanair. BSCA sold the shares at their book value (i.e. EUR 100 per share) for a total amount of EUR 31 100. All BSCA's risks and obligations as a Promocyt shareholder were transferred to Ryanair.
- (563) At the time of this sale, Promocyt's cash resources totalled EUR 261 073 (balance of the assets, having deducted the capital and statutory reserve) <sup>(200)</sup>. BSCA therefore sold its shares in Promocyt to Ryanair for an amount that was EUR 99 436 less than half of Promocyt's cash resources at the time of the sale.
- (564) However, Belgium stresses that there was a tax dispute ongoing at the time of the sale. BSCA would have had to assume half of this liability if it had retained its shares in Promocyt. That is why, according to Belgium, BSCA decided to sell its shares at their book value.
- (565) Belgium sent a memorandum on 24 February 2010 to BSCA's Finance Director, for the attention of the Board of Directors, recommending that it approve the sale by BSCA of its shares in Promocyt at their book value. This memorandum highlighted that Promocyt had ceased its activities on the conclusion in 2005 of the new contract with Ryanair. Following the opening of an investigation and then legal proceedings in relation to the aforementioned dispute, it had been decided to leave Promocyt dormant at that time. Subsequently, given the lack of development in the legal case, BSCA and Ryanair had decided to wind up Promocyt. According to the memorandum, BSCA therefore proposed to Ryanair to split the net assets, which at the time were worth approximately EUR 350 000. Ryanair indicated that it would prefer to 'empty' the net assets through some final marketing operations. Given the existence of the legal proceedings, BSCA was opposed to resuming marketing operations. In order to break the deadlock, BSCA proposed to Ryanair that it would sell the latter its shares at their book value, i.e. EUR 31 100, based on a signed agreement, with BSCA's immediate resignation as a director of Promocyt. The memorandum indicated that BSCA's auditors and legal advisers had given their agreement, 'aware, as we all are, that this undoubtedly is the only way out'. The author of the memorandum recommended that the Board of Directors approve the sale, which it did unanimously.
- (566) The Commission considers that Belgium has provided sufficient information concerning the existence and extent of the dispute, having sent the Commission the tax correction notices <sup>(201)</sup>.
- (567) As a result, the Commission takes the view that BSCA acted as a market economy operator by opposing the resumption of marketing operations and by proposing to sell to Ryanair its shares at their book value in order to break the deadlock. The measure does not therefore constitute State aid.

(v) 2010 amendment

- (568) In Section 6.2.1, the Commission showed that, when the 2010 amendment was concluded, BSCA's resources were not public resources and that, in addition, BSCA's decision to conclude the 2010 amendment was not imputable to the State.
- (569) However, if it were to be considered that this Commission conclusion is not founded, that the 2010 amendment was in fact granted through State resources, and that the decision to grant the 2010 amendment was imputable to the State, it should be examined whether the 2010 amendment gave an advantage to Ryanair.
- (570) In this case, it would be relevant to consider that the entity granting the measure is the Region-SOWAER-BSCA. It should therefore be examined whether the Region-SOWAER-BSCA acted as market economy operators by concluding the 2010 amendment.

<sup>(200)</sup> See footnote 76.

<sup>(201)</sup> The tax correction notices were sent to the Commission by Belgium on 22 July 2014. They were received by Promocyt after the sale. They concern the 2003, 2004, 2005 and 2006 financial years and involve a total amount of approximately EUR 15 million.

(571) The 2010 amendment stipulates:

- a general exemption from the fee for passengers with reduced mobility (hereinafter 'PRM'), under which Ryanair will pay [10-30] euro cents per passenger for the year from 1 February 2009 to 31 January 2010; moreover, the terms of indexation of the PRM fee provide for a reduction in this fee proportional to the increase in traffic generated by Ryanair <sup>(202)</sup>;
- a reduction of [10-50] euro cents per Ryanair passenger in the ground handling fee.

(572) According to Belgium, this amendment was the result of negotiations between BSCA and Ryanair following the reduction for BSCA in the costs of ground handling services due to the introduction by Ryanair of new procedures, such as charges for hold baggage (which considerably reduced the number of bags to be checked in) and compulsory online check-in of bags. According to Belgium, BSCA decided to share with Ryanair the benefit of this cost reduction in return for Ryanair's commitment to base four additional aircraft at Charleroi airport.

(573) The signature of the amendment of 6 December 2010 stemmed from the following circumstances:

- Ryanair introduced new procedures, such as compulsory online check-in and charges for hold baggage, thus reducing the number of bags to be checked in and allowing BSCA to make savings.
- In May 2009 BSCA discussed with Ryanair a possible increase in the number of aircraft and a reduction in the ground handling fee following Ryanair's introduction of the new procedures.
- On 30 November 2009 Ryanair wrote to BSCA <sup>(203)</sup> proposing to conclude an agreement on a reduction in the ground handling fee of [10-50] euro cents, corresponding to half the savings made by BSCA following Ryanair's introduction of the new procedures. Ryanair also indicated that it did not want to pay anything for PRMs. In addition, Ryanair confirmed its desire to expand at Charleroi.
- On 2 December 2009 the Chairman of BSCA wrote to Ryanair stating that, before examining whether Ryanair could be allocated new slots, he would submit, to BSCA's Board of Directors, Ryanair's request for a reduction in the ground handling fee.
- According to Belgium, this resulted in an oral agreement on the expansion and cost reduction (Belgium indicates that there was no written contract at this stage, given the need to submit the matter to the Board of Directors and the ongoing discussions on PRMs).
- On 8 January 2010 BSCA's Finance Director presented the Board of Directors with an internal note and financial documents aimed at proving the merits of accommodating four additional aircraft under the agreed conditions (i.e. a reduction of [10-50] euro cents per passenger for handling). These documents consisted of:
  - a projected income statement showing the impact on BSCA's results of Ryanair basing four additional aircraft at Charleroi;
  - a spreadsheet enabling BSCA to determine its room for negotiation in granting an additional discount to Ryanair on the ground handling fee, while ensuring a sufficient level of profitability for the ground handling services and increased revenue from non-aviation activities (Duty Free Shop, Horeca, car parks, bus, etc.).
- On 24 February 2010 Ryanair finally agreed to pay a PRM fee of [10-30] euro cents per departing passenger, subject to this sum being reduced in subsequent years in proportion to the growth in Ryanair's traffic at Charleroi.

<sup>(202)</sup> See footnote 74.

<sup>(203)</sup> Letter from Ryanair to BSCA of 30 November 2009, provided by Belgium on 22 July 2014.

- On 29 April 2010 the draft amendment was discussed by BSCA's Board of Directors. The Chief Executive Officer of BSCA indicated that the amendment was already being applied (arrival of four aircraft for the summer 2010 season).
- On 6 December 2010 BSCA and Ryanair endorsed the 2010 amendment, which was already being applied.

1. With regard to the reduction of [10-50] euro cents in the ground handling fee, granted by BSCA

- (574) Firstly, the Commission stresses that this reduction represented only half of the savings made by BSCA due to the procedures introduced by Ryanair. The Commission also notes that Ryanair knew <sup>(204)</sup> the extent of the savings made by BSCA, which made the negotiations more difficult for BSCA.
- (575) Secondly, the Commission admits that it was even more difficult for BSCA to refuse this reduction given that Ryanair was planning to base four additional aircraft at Charleroi. Knowing that the Ryanair traffic accounted for 3 289 725 passengers in 2009 and assuming that half of those passengers were departing passengers, the reduction of [10-50] euro cents per departing passenger represented a loss of revenue for BSCA of EUR [500 000-2 000 000], i.e. well below the increase in the EBIT <sup>(205)</sup> of EUR [3-7] million that could be expected from the four additional aircraft according to BSCA's calculations <sup>(206)</sup>.

2. With regard to the reduction of the PRM fee to [10-30] euro cents, granted to Ryanair

- (576) Belgium maintains that Regulation (EC) No 1107/2006 of the European Parliament and of the Council <sup>(207)</sup> provides for the possibility (and not the obligation) of applying a PRM fee to recover the costs generated for airports <sup>(208)</sup>. According to Belgium, it was extremely difficult for BSCA to impose this fee on airlines. BSCA tried to obtain a contribution from Ryanair towards the cost of organising the PRM service, but Ryanair always refused to pay the fee envisaged by BSCA, because it disputed the amount for a number of reasons <sup>(209)</sup>. According to Belgium, the 2010 amendment finally enabled an agreement to be reached with Ryanair on the payment of a PRM fee, albeit at a lower amount than the standard fee, but at least not zero.
- (577) The Commission notes that Ryanair did not pay the PRM fee before 2010 and that BSCA seemed incapable of imposing the payment of this fee on Ryanair. An agreement in this respect, albeit for a reduced amount, therefore improved BSCA's profitability.
- (578) The Commission also notes that a reduction to [10-30] euro cents per departing passenger represented a loss of revenue for BSCA of approximately EUR [100 000-300 000] <sup>(210)</sup>. Added to the reduction of [10-50] euro cents per departing passenger in the ground handling fee, BSCA's total loss of revenue amounted to approximately EUR [0,6-2,3] million, i.e. well below the increase in the EBIT <sup>(211)</sup> of EUR [3-7] million that could be expected from the four additional aircraft according to BSCA's calculations <sup>(212)</sup>.

<sup>(204)</sup> See Ryanair letter of 30 November 2009.

<sup>(205)</sup> Earnings before interest and taxes.

<sup>(206)</sup> See projected income statement presented to BSCA's Board of Directors.

<sup>(207)</sup> Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1).

<sup>(208)</sup> Article 8(3) of Regulation (EC) No 1107/2006 states that 'The managing body of an airport may, on a non-discriminatory basis, levy a specific charge on airport users for the purpose of funding this assistance'.

<sup>(209)</sup> These reasons are fourfold:

- The number of PRMs on board is limited to four for Ryanair (based on the authorisations issued by the Irish safety authorities for the type of aircraft operated), whereas other airlines operating at Charleroi airport have not set a maximum number of PRMs per flight.
- Ryanair requires the presence of a PRM on board to be notified 48 hours in advance, failing which the service is not provided. Other airlines do not impose any such requirement, which means that responsibility must be assumed by BSCA, despite the failure to provide advance notice, and leads to additional costs for BSCA.
- Ryanair's meeting of arrival and departure times allows this service to be organised more efficiently.
- The clear procedure generally applied by Ryanair for PRMs (they are asked to arrive at the airport at least 1 hour and 40 minutes before the flight departs) allows this service to be optimised for BSCA and therefore reduces the costs compared to other airlines.

<sup>(210)</sup> Knowing that the Ryanair traffic accounted for 3 289 725 passengers in 2009 and assuming that half of those passengers were departing passengers.

<sup>(211)</sup> See footnote 209.

<sup>(212)</sup> See footnote 210.

- (579) With regard to the condition stipulated by point 66 of the aviation guidelines, according to which the agreement must form part of an overall strategy expected to lead the airport to profitability, the 2010 amendment appears to be a relatively limited adjustment to the 2005 agreement — and not a reworking of that agreement — that was itself based on a development strategy through which BSCA, due to the traffic provided by Ryanair, expected to increase its aviation and non-aviation revenue, while reducing its costs per passenger, thus ensuring a sufficient profit margin in the more or less long term.
- (580) If it were to be considered that the 2010 amendment was granted through State resources and that the decision to grant the 2010 amendment was imputable to the State, then it should be concluded that the Region-SOWAER-BSCA acted as market economy operators in concluding the 2010 amendment and that the latter does not constitute State aid.

### 6.2.3. *Conclusion on the existence of State aid granted to Ryanair*

(581) The Commission concludes that:

- the 2010 amendment was not granted through State resources and that the decision to grant the 2010 amendment was not imputable to the State,
- (i) the 2001 agreements, (ii) the Ministerial Order of 11 June 2004 and the BSCA letter of 24 June 2004, (iii) the 2005 amendment and (iv) the sale by BSCA of its shares in Promocyt satisfy the market economy operator test.

The measures granted to Ryanair do not therefore constitute State aid.

## 6.3. **Compatibility with the internal market of the aid granted to BSCA**

- (582) As concluded in recital 487, the 2002 agreements and the 2003 investment decision constitute State aid granted to BSCA. This aid stems from the fact that the 2002 agreements and the 2003 investment decision provide for a concession fee that it is too low with regard to the infrastructure placed at BSCA's disposal by the Region-SOWAER, the services provided and the subsidies granted. This situation will apply until the expiry of the property sub-concession granted to BSCA, i.e. 2040. This aid therefore enables BSCA to reduce its operating costs, in this case the concession fee. It consequently constitutes operating aid, which has been received since 2002 and will continue to be received until 2040 unless corrective measures are adopted to alter the methods for calculating the concession fee. It should also be noted, in order to rule out the argument that this aid may constitute investment aid, that it is SOWAER, and not BSCA, that is responsible for implementing and financing the investment programme annexed to the SOWAER/BSCA agreement and that SOWAER owns the buildings and infrastructure in which these investments are made. The aid identified by the Commission does not therefore lessen the investment costs that BSCA should normally incur and does not therefore constitute investment aid, but rather operating aid.
- (583) The aim of this section is to determine whether this operating aid granted to BSCA may be compatible with the internal market. Furthermore, as concluded in recital 487, the Commission cannot rule out that BSCA's capital increase subscribed by SOWAER in 2002 may also constitute State aid granted to BSCA. As this involves a capital increase, if this measure does constitute aid, it is also operating aid. The Commission will therefore include this capital increase in its compatibility analysis, based on the assumption that it does constitute aid.

### 6.3.1. *Compatibility on the basis of Article 106(2) TFEU.*

- (584) According to Belgium (see Section 5.1.2.2), the subsidy paid by the Region for certain services associated with the airport activities, assuming that the Commission considers that this constitutes aid, is in any event compatible with the internal market on the basis of Article 106(2) TFEU.
- (585) In recital 410, the Commission set out the reasons why it considers that the economic services for which the Region pays a subsidy cannot be qualified as services of general economic interest.

(586) Moreover, the Commission considers that the compatibility of the measure resulting from the 2002 agreements should be examined as a whole (namely, the concession fee below market price, given the subsidies paid by the Region to BSCA), and not just the compatibility of the Region's subsidy.

(587) The Commission concludes that the measures granted to BSCA cannot be regarded as compatible with the internal market on the basis of Article 106(2) TFEU or on the basis of the decisions and frameworks based on Article 106(2) TFEU.

#### 6.3.2. *Compatibility on the basis of Article 107(3) TFEU.*

(588) In accordance with Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.

(589) Under point 172 of the aviation guidelines, which came into force on 4 April 2014, the Commission 'will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period'.

(590) According to certain parties, the application of the aviation guidelines to aid granted before said guidelines entered into force would be contrary to the general principles of law (see Section 4.1.2(b)).

(591) In this respect, the Commission stresses that the Court of Justice observed, in its *Vizcaya* judgment<sup>(213)</sup>:

- that the application of new rules to aid that was implemented without having been notified does not count as application to a previous situation but to a current situation,
- that the effective application of Union rules means that the Commission must be able, at any time, to adapt its assessment to the needs of this policy, and
- that a Member State not having notified an aid scheme to the Commission cannot reasonably expect this scheme to be assessed according to the rules applicable at the time of its adoption.

The Court therefore concludes that, in the case in question, the Commission did not breach the principle of non-retroactivity or the principle of legal certainty by applying new rules when assessing the compatibility of aid implemented without having been notified.

(592) The Commission observes that, as in the *Vizcaya* case, the aid granted to BSCA was implemented without having been notified. It takes the view that the application of point 172 of the aviation guidelines to the measures in question is not contrary to the general principles of law.

(593) Under point 137 of the aviation guidelines, 'Operating aid granted before the beginning of the transitional period (including aid paid before 4 April 2014) may be declared compatible to the full extent of uncovered operating costs provided that the conditions in section 5.1.2 are met, with the exception of points 115, 119, 121, 122, 123, 126 to 130, 132, 133 and 134. In particular, when assessing the compatibility of operating aid granted before 4 April 2014, the Commission will take account of the distortions of competition'.

(594) In order to encourage the aviation sector to develop, the aviation guidelines therefore distinguish between aid granted before the beginning of the transitional period (including aid paid before 4 April 2014) and aid granted subsequently.

<sup>(213)</sup> Judgment of 9 June 2011 in Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and others v European Commission* [2011] ECR I-83\*, ECLI:EU:C:2011:372.

(595) The conditions set out in Section 5.1.2 of the aviation guidelines are as follows:

- contribution to a well-defined objective of common interest,
- need for State intervention,
- appropriateness of State aid as a policy instrument,
- existence of incentive effect,
- proportionality of the aid amount (aid limited to the minimum necessary),
- avoidance of undue negative effects on competition and trade.

(596) The Commission will therefore examine whether the aid granted to BSCA, namely the 2002 agreements, the investment decision and the BSCA capital increase subscribed by SOWAER (on the basis hereinafter that the latter measure constitutes State aid), meet each of these conditions.

#### 6.3.2.1. *Contribution to a well-defined objective of common interest*

(597) Point 113 of the aviation guidelines cites the following objectives of common interest:

- '(a) increases the mobility of Union citizens and the connectivity of the regions by establishing access points for intra-Union flights; or
- (b) combats air traffic congestion at major Union hub airports; or
- (c) facilitates regional development'.

(598) In the present case, the aid was granted to facilitate regional development. The reports supplied in support of the Walloon Government's decisions justify the need for these investments aimed at developing the airport through the positive impact of the airport's development on the economy and employment situation in Charleroi and its region <sup>(214)</sup>. Faced with the problem of restructuring the former industrial basin of the Charleroi region, the airport site is identified in those reports as a new centre for development encompassing research and development, cutting-edge sectors and opening up of the European economy. The note from the minister to the government states: 'In its regional policy declaration approved on 15 July 1999, the Walloon Parliament recognised that the regional airports constitute important centres of economic development and job creation for the Walloon Region, which should be taken into account as much in economic and environmental terms as in terms of transport. The main objectives are to:

- provide specific support to the development of economic activities that preferably dovetail with the airport activities ... so that the public mission of infrastructure building is taken over by employment-generating private initiative,
- work towards the strategic integration of airport activities with other passenger and goods transport systems,
- ...
- step up environmental protection and the fight against noise pollution.

... It is therefore vital, in order to allow the airport to play its role as a regional economic lever, to equip it with a complete infrastructure in the context of a comprehensive development plan'.

(599) The aforementioned note also summarises the results of several studies carried out in order to guide the Walloon airport development policy. The study carried out by Tractebel provides an assessment of the economic benefits and new jobs resulting from targets of 1 million and 2 million passengers. This reveals that 1 million passengers would generate 6 364 jobs and that 2 million passengers would generate 8 090 jobs.

<sup>(214)</sup> See, for example, the note to the Walloon Government annexed to the Decision of 8 November 2000, page 9 et seq.

- (600) Assuming that the capital increase subscribed by SOWAER does constitute aid, this capital increase was intended to enable BSCA to avoid possible bankruptcy, so that it could continue operating and thus achieve the objective of common interest described in the previous recital.
- (601) Based on the information currently available, the Commission finds that the aid effectively facilitated the development of the Charleroi region, by enabling a modest airport to transform into a major regional airport with nearly 7 million passengers per year, thus creating significant economic activity both within and around the airport. In terms of jobs, according to a study by the Banque nationale de Belgique based on 2009 figures, Charleroi airport has enabled the direct creation of 1 323 full-time equivalent jobs and the indirect creation of 1 525 full-time equivalent jobs.
- (602) The Commission considers that the aid has contributed to a well-defined objective of common interest, namely the economic development of Charleroi and its region.
- (603) However, it must be verified, in accordance with point 114 of the aviation guidelines, that the aid has not encouraged the duplication of unprofitable airports.
- (604) In this case, the Commission considers that the prospects for use of the airport, as established by the studies carried out in 2000-2001 <sup>(215)</sup>, i.e. just before the measures were adopted, were sufficient to justify these investments. It is in fact clear from these studies that demand existed for Charleroi airport, particularly in the low-cost segment, in which Brussels airport was not active at the time. The development of Charleroi airport and the profitability of its manager BSCA confirm a posteriori the existence of these development prospects. Accordingly, at the end of 2013 BSCA had a pre-tax operating profit of EUR 14,86 million, i.e. more than the amount of State aid that it received in that year (the aid amounts are indicated in Table 34).
- (605) Undoubtedly, as indicated in recital 484 and developed in recital 626, the catchment area of Charleroi airport substantially overlaps with the catchment area of Brussels airport. As proven in recitals 627 to 641, the aid significantly distorted competition by affecting the growth in the number of passengers at Brussels airport in the short- and medium-haul point-to-point segment. Brussels airport therefore has spare capacity (according to Brussels Airport Company, manager of Brussels airport, this airport has a capacity of 28 million passengers).
- (606) However, despite the aid granted to BSCA in 2002 and 2003, traffic at Brussels airport has always remained in excess of 14 million passengers, i.e. half of its theoretical capacity. Since 2002 <sup>(216)</sup>, this traffic has been growing (except in 2009), even though this growth has been modest compared with that of Charleroi airport.

Table 27

### Development in the number of passengers at Brussels and Charleroi airports

	(million)											
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Brussels	14,4	15,2	15,6	16,1	16,7	17,8	18,5	17	17,1	18,8	18,9	19,1
Charleroi	1,3	1,8	2,0	1,9	2,2	2,5	3,0	3,9	5,2	5,9	6,5	6,8

Sources: brusselsairport.be and charleroi-airport.com

<sup>(215)</sup> Tractebel strategic development study on Charleroi airport completed in April 2000. Roland Berger study in July 2000 on the development of an airport strategy for Wallonia. Study commissioned by Grands Travaux de Marseille on the potential development of Charleroi airport.

<sup>(216)</sup> Following the failure of Sabena at the end of 2001, traffic at Brussels airport fell from 19,7 million in 2001 to 14,4 million in 2002.

The EBIT <sup>(217)</sup> of BAC has been positive at least since 2006 [...].

- (607) The Commission therefore finds that, although the aid granted to BSCA has affected growth in passenger traffic at Brussels airport and, due to the existence of economies of scale, has reduced BAC's profitability, it has not, however, led to a duplication of unprofitable airports. This is particularly explained by the high population density <sup>(218)</sup> and high demand for air services <sup>(219)</sup> in the catchment areas of Charleroi and Brussels airports, which enable both airports to be profitable.

#### 6.3.2.2. *Need for State intervention*

- (608) As stipulated in points 116 and 118 of the aviation guidelines, 'State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver ... Under current market conditions, the need for public funding to finance operating costs will, due to high fixed costs, vary according to the size of an airport and will normally be proportionately greater for smaller airports.' The Commission considers that airports with between 1 and 3 million passengers per year 'should, on average, be able to cover the majority of their operating costs' and that airports with more than 3 million passengers per year 'are usually profitable at operating level and should be able to cover their operating costs'.
- (609) However, the Commission notes that point 119 of the aviation guidelines, according to which 'Therefore, the Commission considers that in order to be eligible for operating aid, the annual traffic of the airport must not exceed 3 million passengers <sup>(220)</sup>', does not apply to aid granted before 4 April 2014.
- (610) At the time when the measures were decided in 2002 and 2003, traffic at Charleroi airport was between 1 and 2 million passengers. BSCA's 2002 business plan forecast that traffic would exceed 3 million passengers in 2011.
- (611) BSCA's 2002 business plan forecast that, even with the aid, BSCA would not become profitable until 2005 (BSCA in fact became profitable in 2004). Accordingly, if the concession fee had been set at market price, the Region and SOWAER could have expected BSCA to accumulate operating losses, at least during the initial years, and to find itself in financial difficulty, which would have threatened the operation and development of Charleroi airport, and therefore the achievement of the economic development objective of the aid. Likewise, in the absence of the 2002 capital increase, BSCA would have faced financial difficulties likely to compromise the operation and development of Charleroi airport. Moreover, in the absence of aid, BSCA would have had to demand much higher airport charges from Ryanair and other airlines, in order to ensure its own financial balance. In this scenario, it is possible that Ryanair, BSCA's main customer, would have decided to transfer its base from Charleroi to another airport, or to significantly reduce its activities at Charleroi, which would also have compromised the airport's development and the benefits expected by the Region in terms of economic development.
- (612) Based on the 2002 business plan, the Commission takes the view that the 2002 and 2003 aid was necessary.

<sup>(217)</sup> See footnote 209.

<sup>(218)</sup> The catchment areas of both airports include the Brussels-Capital Region, which has 1,2 million inhabitants and a population density of 7 250 inhabitants per km<sup>2</sup>. The population density of Belgium (which obviously does not correspond exactly to the catchment areas of the two airports) is one of the highest in the world at 364 inhabitants per km<sup>2</sup>.

<sup>(219)</sup> The catchment areas of both airports include the Brussels-Capital Region. This is the seat of European institutions, international organisations and multinational companies, thus creating strong demand for air services. In addition, the Gross Domestic Product per capita in Belgium (which obviously does not correspond exactly to the catchment areas of the two airports), expressed in purchasing power standards, is 20 % higher than the European Union average (source: Eurostat).

<sup>(220)</sup> Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.



### 6.3.2.3. Appropriateness of State aid as a policy instrument

- (613) Point 120 of the aviation guidelines states that ‘The Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible with the internal market if other less distortive policy instruments or aid instruments allow the same objective to be reached’.
- (614) In the spirit of points 121 to 123 of the aviation guidelines — and although those points do not formally apply to the present case — we can examine whether there would be a policy instrument allowing the same objective to be achieved, which would better encourage efficient management of the airport. Instruments that establish *ex ante* the aid amount covering the expected funding gap are examples of instruments encouraging efficient management of an airport.
- (615) The concession fee paid by BSCA is established *ex ante* and therefore encourages BSCA to manage the airport efficiently. While it is true, however, that the subsidy paid by the Region for services depends on the costs incurred and is not a fixed sum established *ex ante*, the part of this subsidy for economic services is relatively small. Likewise, the 2002 capital increase is a one-off intervention, which is not therefore a fixed sum established *ex ante*. However, it does involve a relatively limited amount compared to the aid amounts resulting from the 2002 agreements and the 2003 investment decision. The Commission therefore concludes that the aid granted to BSCA encourages the latter to manage the airport efficiently and constitutes an appropriate policy instrument.

### 6.3.2.4. Existence of incentive effect

- (616) Point 124 of the aviation guidelines states that ‘Operating aid has an incentive effect if it is likely that, in the absence of the operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced’.
- (617) The aid granted to BSCA has enabled Charleroi airport to be modernised and its capacity to be increased, while maintaining BSCA’s operating costs at a level allowing it to offer and maintain conditions attractive to the airlines using the airport, particularly Ryanair, without experiencing any major financial difficulties. As indicated in recital 611, in the absence of aid, BSCA would have had to demand much higher airport charges from Ryanair and other airlines. In this scenario, it is possible that Ryanair, BSCA’s main customer, would have decided to transfer its base from Charleroi to another airport, or to significantly reduce its activities at Charleroi.
- (618) The Commission therefore concludes that, in the absence of aid, the level of economic activity of Charleroi airport would probably have been significantly reduced. The Commission therefore takes the view that the aid has had an incentive effect.

### 6.3.2.5. Proportionality of the aid amount (aid limited to the minimum necessary)

- (619) Point 125 of the aviation guidelines states that ‘In order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place’.
- (620) In order to determine whether the aid is proportionate, it must be examined whether BSCA’s business plan (incorporating the aid) allowed BSCA to expect a profit not exceeding a reasonable profit.
- (621) BSCA’s 2002 business plan forecast a return on equity over the period 2002-2015 of 8,3 % and a return on capital employed of 9,6 %. Given that, in order to apply the market economy operator test, the Commission estimated that a rate of return on equity of 9 % could have been expected in 2002 <sup>(221)</sup>, it concludes that the profit expected *ex ante* did not exceed a reasonable level. Insofar as the aid was intended to allow BSCA to cover these costs and achieve a profit not exceeding a reasonable level, the 2002 and 2003 aid may be regarded as proportionate.

<sup>(221)</sup> More specifically, a discount rate of 9 % was used (see recital 437). This was based on a weighted average cost of capital of 9 %, which was itself based on a rate of return on equity of 9 %, given that SOWAER had no debts.

6.3.2.6. *Avoidance of undue negative effects on competition and trade*

- (622) Point 137 of the aviation guidelines underlines the importance of assessing the effects of the aid in terms of distortions of competition for aid granted before 4 April 2014. It states that 'In particular, when assessing the compatibility of operating aid granted before 4 April 2014, the Commission will take account of the distortions of competition'.
- (623) Furthermore, point 131 of the aviation guidelines states that 'When assessing the compatibility of operating aid the Commission will take account of the distortions of competition and the effects on trade. Where an airport is located in the same catchment area as another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airports located in that catchment area.'
- (a) Identification of the catchment area and competing airports
- (624) According to Belgium, the catchment area of Charleroi airport is two hours by road from the airport and contains 15 million people who could be customers of low-cost airlines. This area includes Belgium, northern France, southern Netherlands, northern Luxembourg and the far west of Germany.
- (625) There are several airports close to Charleroi with catchment areas that overlap with Charleroi's: Liege (49 minutes by road and 78 km away, although it should be noted that Liège airport focuses on cargo), Lille (1 hour 12 minutes, 121 km) and particularly Brussels (46 minutes, 69 km <sup>(222)</sup> <sup>(223)</sup>).
- (626) The catchment area of Charleroi airport substantially overlaps with the catchment area of Brussels airport. The area of overlap notably includes the Brussels-Capital Region, which is the most densely populated area within the area of overlap, with 1.2 million inhabitants. Although Charleroi airport is further away from Brussels than Brussels airport, the journey time by road from the centre of Brussels to Charleroi is only around 30 minutes longer than the journey time to Brussels airport.

Table 28

**Distances and journey times between the centre of Brussels and the airports of Charleroi and Brussels**

From the centre of Brussels to ...	Charleroi	Brussels
Distance	46 km	12 km
Car	45 min.	16 min.
Bus	45 min.	18 min.
Train	50 min. (via Charleroi Sud)	17 min.

Source: Commission decision on Ryanair/Aer Lingus of 27 February 2013

<sup>(222)</sup> In comparison, the distance between Frankfurt Hahn airport and the main Frankfurt airport is 120 km.

<sup>(223)</sup> Times and distances indicated by the website <https://www.google.com/maps>

(b) Analysis of the distortions of competition caused by the aid

(627) The distortions of competition caused by the aid may stem from the fact that:

- BSCA attracts to Charleroi airlines that this airport would not have been able to attract without the aid and that would have been likely to base their resources (aircraft, crew) at other airports, particularly the closest ones such as Brussels airport,
- the aid may influence the behaviour of certain passengers who, given their origin and destination requirements, are able to choose between a service from or to Charleroi and a service from or to Brussels. These passengers may in fact be attracted by the low fares offered by the airlines operating from Charleroi (fares which may have been higher in the absence of aid being granted to BSCA) to the detriment of airlines operating from Brussels.

(i) Examination of the substitutability of the service offers of Charleroi and Brussels airports

(628) According to Belgium, as regards the absence or avoidance of negative effects on competition, the Commission must refer back to the time when the public financing was granted in order to assess whether this condition is met. Still according to Belgium, the development of Charleroi airport stems from the creation of a new market in a specific segment that was not being developed at all or only to a very limited extent at Brussels airport at the time when the aid was granted, i.e. the low-cost segment. Moreover, two studies carried out by independent experts, Roland Berger International Management Consultant and GTM, revealed the imminent saturation of Brussels airport and the lack of any overlap in terms of customers between the two airports. At the time the airlines operating at Brussels airport had no interest in Charleroi airport, whilst Ryanair, the main user of Charleroi airport, had no plans to base itself at the main airports. In 2000 Charleroi airport had a very poor image, as confirmed by the GTM and Roland Berger International Management Consultant studies. The infrastructure was cramped, limited and little-used. The airport offered only one scheduled service and a number of charter flights in the summer. As a result, according to Belgium, it could not have been considered at the time that Charleroi airport was in a position to compete with Brussels airport. Lastly, Brussels airport was at an advantage in terms of infrastructure (several terminals, several runways, etc.) and accessibility due to its location close to the capital and the rail link that Charleroi airport lacked.

(629) With regard to these observations by Belgium, the Commission would make the following comments:

- Even if, for the purposes of the compatibility analysis, the aid's effects in terms of distortions of competition must be examined in relation to the time when the aid was granted, the aid's effects in the short and long term should, however, be taken into account, such as they could have been predicted at the time when the aid was granted. At that time, it could have been predicted that the aid would enable BSCA to offer very favourable rates for the services that it would be in a position to provide, in particular as a result of the investments made by SOWAER, with these investments having the effect of considerably increasing the capacity of Charleroi airport. In this respect, it may be recalled that the 2002 business plan forecast a significant increase in traffic at Charleroi airport, from 1,2 million passengers in 2002 to nearly 3 million passengers in 2010. It was therefore clear at the time when the aid was granted to BSCA that this aid would enable BSCA to grow strongly and that it could not be ruled out that this growth would partly occur to the detriment of competing airports, particularly Brussels airport.
- Belgium indicates that, at the time when the Roland Berger International Management Consultant and GTM studies were carried out, Brussels airport was close to saturation. However, the Commission notes that, at the time when the measures were granted, i.e. in April 2002 and April 2003, the airline Sabena had gone bankrupt and traffic at Brussels airport was already being significantly affected by this bankruptcy, falling from 19,7 million passengers in 2001 to 14,4 million passengers in 2002. At the time when the measures were granted, Brussels airport was therefore not close to saturation.

(630) As regards the question of the substitutability of the service offers of Charleroi and Brussels airports, the Commission recognises that the two airports are not entirely substitutable:

- Due to Charleroi's relative distance from the heart of the Brussels conurbation and its low-cost profile (given both its infrastructure and also the airlines using it and the services that it offers), Charleroi airport does not constitute an alternative to Brussels airport for certain categories of passengers (particularly time-sensitive business travellers).
- Charleroi airport has a 'point-to-point' profile limited to short-haul flights, which prevents it from being a viable alternative to Brussels airport for airlines such as Brussels Airlines, which operates long-haul flights and/or relies on a 'hub-and-spoke' model, whereby a 'hub' airport feeds a long-haul network with transit passengers carried to the hub via a short- and medium-haul network.
- Brussels airport is unlikely to constitute a credible alternative to Charleroi airport for certain categories of price-sensitive passengers.

(631) Nonetheless, the offers of the two airports partly overlap. Whilst it is true that this overlap was limited at the time when the aid was granted, it still existed. Moreover, it could have been predicted that, due to the aid, competition would increase between the offers of the two airports. Accordingly, Charleroi airport offers flights that may be of interest to some of Brussels airport's short- and medium-haul customers. The following figures show the development in the number of links operated from Charleroi airport, including those where a link from Brussels airport was offered to the same destination.

Table 29

**Links from Charleroi airport, including those where the same destination is served from Brussels airport**

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of links from Charleroi airport	7	9	11	17	14	26	33	52	67	84	91	97	102
of which links where the same destination is served from Brussels airport	5	5	7	9	9	16	21	32	38	53	60	63	63

Source: Annex 11 to the letter from Belgium sent on 7 February 2014

(632) The number of equivalent links offered by Charleroi airport and Brussels airport has therefore significantly increased (from 5 in 2002 to 63 in 2013), thus exerting considerable competitive pressure on Brussels airport.

(ii) Examination of the effects of the aid

(633) According to the Brussels airport manager (BAC), given this significant overlap between the links operated from Charleroi airport and the destinations served from Brussels airport, the aid, which enables BSCA to offer particularly attractive rates to airlines, allegedly has a considerable impact on Brussels airport. The distortion of competition is apparently particularly severe in terms of short-haul flights, because the fee has a greater relative impact on the price of such flights than on the price of long-haul flights.

(634) Table 30 shows the development in the number of passengers taking short-haul flights from and to Charleroi and Brussels airports (Charleroi and Brussels airports are not in competition for long-haul flights as these are not offered at Charleroi).

Table 30

**Development in the number of passengers (in millions) taking short-haul flights from and to Brussels (BRU) and Charleroi (CRL) airports**

	BRU		CRL		BRU + CRL	
	Market for short-haul flights from and to BRU (number of passengers - million)	Annual change (%)	Market for short-haul flights from and to CRL (number of passengers - million)	Annual change (%)	Market for short-haul flights from and to BRU and CRL (number of passengers - million)	Annual change (%)
2004	11,8		2,0		13,8	
2005	12,2	4	1,9	- 5	14,1	2
2006	12,5	3	2,2	16	14,7	4
2007	13,4	8	2,4	9	15,8	7
2008	13,2	- 1	2,9	21	16,1	2
2009	11,7	- 11	3,9	35	15,6	- 3
2010	11,3	- 3	5,2	33	16,5	6
2011	12,2	7	5,9	14	18,1	9
2012	12,1	- 1	6,5	10	18,6	3
2013	12,4	3	6,8	4	19,2	3

Source: BAC comments — 8 May 2014

(635) The table in recital 634 shows that, whereas in 2004 traffic in the short-haul segment at Charleroi was only 17 % of the same traffic at Brussels, in 2013 the figure was nearly 55 %. Growth at Charleroi airport was particularly strong in the years 2008 to 2010, whereas the short-haul traffic at Brussels airport fell over the same period. This considerable development of Charleroi airport in the years 2008 to 2010 is partly explained by the opening of the new terminal in 2008, financed by SOWAER, for which this decision has determined that BSCA did not pay market price.

(636) According to BAC, this situation has resulted in the loss of 2,5 million passengers, which represents an annual loss of revenue of EUR 50 million. BAC estimates that, out of the 4 million additional passengers at Charleroi airport in 2011 compared to 2005, it is likely that only 1,5 million are new customers, with the remaining 2,5 million being passengers who in other circumstances would have come to or remained at Brussels airport.

## (iii) Conclusion

(637) The Commission finds that:

- Charleroi and Brussels airports are in competition for certain point-to-point short- and medium-haul flights and for certain users,
- Brussels airport is not congested,
- the aid has enabled BSCA to offer particularly attractive rates to airlines for its airport services. The Commission takes the view that, without this aid, BSCA would definitely not have been in a position to get Ryanair to base a large number of flights at Charleroi airport. The development of Charleroi airport has been boosted by the Region's decision to invest significantly in the airport and thus increase its capacity: the airport has therefore gone from a theoretical capacity of 1 million passengers before the investments made through the 2002 and 2003 measures to a theoretical capacity of 3 million passengers after the investments (we note that the actual capacity is in fact higher, as proven by the traffic figures for Charleroi airport, given that it is generally possible to exceed the nominal capacity of a terminal by reducing the level of passenger comfort and/or making certain changes that do not require massive investment).

(638) The Commission therefore concludes that the aid has considerably distorted competition to the detriment of those airports competing with Charleroi airport, primarily Brussels airport. With regard to the 2002 capital increase, if this does constitute aid, it has contributed to these distortions insofar as it has enabled BSCA to avoid financial difficulties and proceed with the development of Charleroi airport. However, this contribution to the distortions of competition is modest, insofar as this involves a one-off intervention of a limited amount compared to the aid amounts resulting from the other measures covered by this examination. Moreover, it occurred at the start of the airport development phase, when the airport's traffic was still relatively modest compared to that of Brussels airport.

(639) The Commission notes that traffic at Charleroi airport has increased more than fivefold since the aid was granted <sup>(224)</sup> (this growth is much higher than the average growth of airports), whereas traffic at Brussels airport in the point-to-point short- and medium-haul segment has stagnated since 2004. This confirms a posteriori that part of the growth at Charleroi airport has occurred to the detriment of growth at Brussels airport. The Commission also notes that the competitive impact of Charleroi airport has been especially significant since 2008 due to the increase in its capacity, which was particularly enabled by the investments made by SOWAER.

(640) The Commission further notes that, since the beginning of 2014, Ryanair has been operating from Brussels airport, which is developing in the low-cost segment. Vueling was already operating from this airport. Competition between the two airports may therefore increase further in the future, as they are both likely to attract the same airlines and the same customer segments.

(641) Based on this information, the Commission concludes that the aid has significantly distorted competition by reducing BSCA's operating costs through abnormally low concession fees. These distortions were certainly limited in the initial years after the measures in question were granted, i.e. in 2002 and 2003, given that the investments had not been made in full at that stage and that Charleroi airport's traffic was still limited, but they have increased subsequently and are now very significant.

6.3.2.7. *Conclusion on the compatibility of the aid granted to BSCA on the basis of Article 107(3) TFEU*

(642) The Commission concludes that the aid granted to BSCA has contributed to regional economic development, but that it has had significant and increasing effects on the airports competing with Charleroi airport, and particularly on Brussels airport.

<sup>(224)</sup> See Table 4: Annual traffic statistics for Charleroi airport.

- (643) The Commission notes that, if the aid had been granted after the aviation guidelines entered into force, i.e. after 4 April 2014, it could not have been declared compatible with the internal market. Point 119 of the aviation guidelines in fact states that 'in order to be eligible for operating aid, the annual traffic of the airport must not exceed 3 million passengers'.
- (644) This aid was granted before 4 April 2014 and point 119 of the aviation guidelines does not therefore apply. However, according to the aviation guidelines, the Commission must assess the unlawful operating aid granted to airports by taking account of the distortions of competition caused by this aid <sup>(225)</sup>. According to the Commission, this requirement means that it must give an opinion on the aid in question in the light, on the one hand, of its positive effects in terms of the objective of common interest pursued and, on the other hand, of its negative effects on competition and trade. In the present case, it has been established that the aid has had a significant positive effect on the economic development of Charleroi and its region, which may be recognised as an objective of common interest justifying operating aid, while also having negative effects, which have increased over time and become very significant.
- (645) In this instance, given that the negative effects of the aid, which were initially limited, have constantly increased over time until they have become too significant, the Commission takes the view that the Region-SOWAER should have, from a certain date, required BSCA to pay a concession fee in line with the level that would have been determined when the measures in question were granted, in 2002 and 2003, if the Region-SOWAER had acted towards BSCA as a market economy operator placing its infrastructure at BSCA's disposal with a view to profitability. BSCA would therefore have benefited from operating aid in the form of an extra low concession fee up to the date in question, on a transitional basis, and not beyond.
- (646) The Commission takes the view that, in order to reduce the negative effects of the aid on competition and trade to an acceptable level, so that the aid is compatible with the internal market, this approach must be implemented a posteriori, in the form of (i) the recovery from BSCA of the aid amounts received after the date in question, and (ii) an adjustment to the methods for calculating the concession fee for the period after the adoption of this decision up to the expiry of the concession from which BSCA benefits, such that, over this period, BSCA pays the Region-SOWAER a concession fee in line with the level that would have been determined when the measures in question were granted, in 2002 and 2003, if the Region-SOWAER had acted towards BSCA as a market economy operator.
- (647) As the date in question must be determined by weighing up the positive effects on regional economic development and the negative effects on competition, it cannot be determined solely by applying a method of economic analysis, but necessarily requires the Commission to use its wide margin of discretion in terms of the compatibility of State aid with the internal market.
- (648) In this respect, the Commission notes that the entry into force of the aviation guidelines on 4 April 2014 is an important turning point in terms of public support for airports as, according to the aviation guidelines, from that date Member States may no longer grant new operating aid to airports with more than 3 million passengers. The aim of said provision is clearly to limit, from 4 April 2014, the negative effects of operating aid granted to airports. The Commission takes the view that this date also forms an appropriate benchmark in the present case, and that it can be regarded as the moment from which BSCA should have ceased to pay an extra low concession fee under the 2002 and 2003 measures. With regard to the 2002 capital increase, in the light of the findings made in recital 638 and due to the fact that this measure was granted before 4 April 2014, the Commission takes the view that, if this measure does constitute State aid, it is compatible with the internal market.
- (649) In conclusion, the Commission takes the view that:
- the measures granted by Belgium to BSCA under the 2002 agreements and the 2003 investment decision constitute State aid compatible with the internal market on the basis of Article 107(3)(c) TFEU up to 3 April 2014 and State aid incompatible with the internal market from 4 April 2014,

<sup>(225)</sup> See points 131 and 137 of the aviation guidelines.

- assuming that it does constitute State aid within the meaning of Article 107(1) TFEU, the capital increase in BSCA subscribed on 3 December 2002 by SOWAER is State aid compatible with the internal market on the basis of Article 107(3)(c) TFEU.

#### 6.4. Applicability of the limitation period to the aid granted to BSCA

- (650) Article 15 of the Procedural Regulation stipulates that the recovery of State aid shall be subject to a limitation period of 10 years. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary.
- (651) According to Belgium, the subsidy paid by the Region to BSCA for certain services associated with the airport activities benefits from the limitation period stipulated by Article 15 of the Procedural Regulation. Belgium asserts that this subsidy was granted on 9 July 1991, which was the date of conclusion of the Region/BSCA agreement and annexed schedule of conditions. According to Belgium, since that date, notwithstanding the adoption of various provisions without any impact on the principle of compulsory compensation payable by the Region for these costs, the Region has been responsible for paying this subsidy. Only a few non-economic services set out in Amendment No 6 of 15 January 2008 are apparently not covered by this limitation period.
- (652) First of all, the Commission notes that it considered in recital 415 that it must examine the subsidy for certain services associated with the airport activities in conjunction with the other economics of the concession (provision of the infrastructure and concession fee).
- (653) Even if the subsidy paid by the Region for certain services associated with the airport activities may be examined separately from the SOWAER/BSCA agreement, the Commission refutes, however, the assessment according to which the measure granting this subsidy has not been substantially amended. On the contrary, the Commission takes the view that each of the following three amendments has substantially amended the measure:

##### 6.4.1. Amendment No 3 of 29 March 2002

- (654) The Commission notes that, under Article 25 of the schedule of conditions annexed to the Region/BSCA agreement of 9 July 1991, the Region was to cover the cost of the fire and maintenance services for a transitional period only.
- (655) This transitional period was extended until 1 January 2000 under Amendment No 2 to the schedule of conditions annexed to the agreement.
- (656) For the years 2000 and 2001, subsidies for the 'fire and maintenance' costs were paid by the Region to BSCA on legal bases other than the Region/BSCA agreement <sup>(226)</sup>, with the acts in question not committing the Region to pay the subsidies to BSCA beyond the years 2000 and 2001.
- (657) As regards the year 2002, Belgium states that, although the Region had always planned to continue granting compensation for these costs, the creation of SOWAER and the introduction of a new legal framework led to a delay in formalising the extension of this compensation. According to Belgium, the continuation of this payment was confirmed in a letter of 5 July 2001 sent by BSCA to the Walloon transport and facilities administration, detailing the main lines of the BSCA 2002 budget covering the costs of these services, following a telephone conversation during which, according to Belgium, the Region had confirmed that it would pay for these services for 2002.

<sup>(226)</sup> For the year 2000: Decree of 16 December 1999 containing the general expenditure budget of the Walloon Region for the budget year 2000, and Order of 27 September 2000 of the Walloon Government granting an operating subsidy to BSCA intended to cover the costs of the fire and maintenance services at Charleroi airport for the year 2000.  
For the year 2001: Decree of 14 December 2000 containing the general expenditure budget of the Walloon Region for the budget year 2001, and Order of 4 October 2001 of the Walloon Government granting an operating subsidy to BSCA intended to cover the costs of the fire and maintenance services at Charleroi airport for the year 2001.



- (658) As indicated in recitals 71 and 72, Amendment No 3 of 29 March 2002 to the Region/BSCA agreement amended Article 3.2 of this agreement and provided that the Walloon Region would reimburse the costs (expenses and investments) inherent in the fire and maintenance services. Amendment No 3 also amended Article 25 of the schedule of conditions and provided that the concession-holder would present the concession authority with the budget for the fire and maintenance services and that it would keep a separate operating account that could at any time be analysed and checked by the concession authority.
- (659) The Commission takes the view that Amendment No 3 of 29 March 2002 to the Region/BSCA agreement substantially affected the measure. Amendment No 3 in fact introduced a written undertaking on the part of the Region to cover the costs associated with the fire and maintenance services, when there was no longer any written undertaking on the part of the Region with regard to the costs incurred by BSCA from 1 January 2002.
- (660) Moreover, Amendment No 3 amended Article 3.2 of the Region/BSCA agreement and provided that the Region would reimburse the costs (expenses and investments) inherent in the fire and maintenance services. It also amended Article 25 of the schedule of conditions and provided that the concession-holder would present the concession authority with the budget for the fire and maintenance services and that it would keep a separate operating account that could at any time be analysed and checked by the concession authority. In this respect, the Commission stresses that Amendment No 3 stipulated that this operating account would include the investment costs and/or investment depreciation costs, even though this had not previously been the case.
- (661) Based on these points, the Commission takes the view that the subsidy paid by the Region to BSCA for certain services associated with the airport activities was introduced, or in any event substantially amended, by Amendment No 3 of 29 March 2002 to the Region/BSCA agreement.

#### 6.4.2. Amendment No 5 of 10 March 2006 to the Region/BSCA agreement

- (662) Through the following provisions, Amendment No 5 of 10 March 2006 to the Region/BSCA agreement substantially amended Amendment No 3:
- Under Article 3.2.2 of the Region/BSCA agreement, as amended by Amendment No 5, the costs incurred by BSCA for ‘the fire protection and ground traffic and airport site safety services’ were to be compensated by the Region, whereas previously the Region had compensated the costs incurred by BSCA for the ‘fire and maintenance’ services. According to Belgium, this new wording aimed to define more precisely the costs assumed by the Region, but did not substantially alter the scope of the services covered. However, the Commission notes that, even if the change in wording of the services for which BSCA receives compensation is ignored, the details of the costs covered under Article 25 of the schedule of conditions, as amended by Amendment No 5, differ in that they include certain costs that were not previously mentioned, namely ‘the ground traffic and airport site safety services include routine maintenance of the airport site, ... minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance and any other services ensuring the safety of ground traffic, airport site and infrastructures, except for commercial areas of the airport zone’.
  - The subsidy was capped, whereas it had not been previously. This cap applied from the initial entry into force of Amendment No 5 and therefore had an impact on the amount of the subsidy paid by the Region to BSCA from the first year.
  - The amount of the subsidy had to be revised before July 2009 <sup>(227)</sup>.

<sup>(227)</sup> In the end, this revision did not take place until 2013. However, the introduction of a revision date still significantly amended the measure.

- (663) Based on these points, the Commission takes the view that the measure was substantially affected by the adoption of Amendment No 5 of 10 March 2006 to the Region/BSCA agreement.

#### 6.4.3. Amendment No 6 of 15 January 2008 to the Region/BSCA agreement

- (664) Amendment No 6 of 15 January 2008 to the Region/BSCA agreement substantially amended Amendment No 5 by significantly extending the scope of the services for which the Region paid a subsidy to BSCA, as those services subsequently included flight tracking and recording, provisional flight planning, marshalling and security. As set out in Section 6.1.1, the Commission takes the view that these services, except for the security services, constitute economic services.

#### 6.4.4. Conclusion

- (665) The Commission therefore concludes that the subsidy paid by the Region to BSCA for certain services associated with the airport activities cannot be regarded as a measure having been continuously in force and not having been substantially amended since 1991. The payment of this subsidy is based on several new measures applicable in succession. Those examined in this decision are: (a) Amendment No 3 of 29 March 2002 to the Region/BSCA agreement; (b) Amendment No 5 of 10 March 2006 to the Region/BSCA agreement; and (c) Amendment No 6 of 15 January 2008 to the Region/BSCA agreement.
- (666) Measures (a) to (c) cannot benefit from the 10-year limitation period as there were less than 10 years between the date when they were granted and 20 April 2011, which was the date when the Commission sent its first request for information to Belgium on the subject of the aid granted to BSCA. As stipulated by Article 15 of the Procedural Regulation, any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. The Commission therefore concludes that the limitation period laid down by Article 15 of the Procedural Regulation does not apply to the aid granted to BSCA and examined in this decision.

### 6.5. Applicability of the principle of legitimate expectations to the subsidy paid by the Region for certain services associated with the airport activities

- (667) Article 14(1) of the Procedural Regulation stipulates that 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. In particular, the Commission cannot require recovery of aid that, although granted within the 10-year period defined in Article 15(1) of the Procedural Regulation, may be covered by the existence of a legitimate expectation — in the mind of the beneficiary of the aid — resulting from acts or positions taken by the Commission in the past.
- (668) As indicated in Section 5.4 of this decision, Belgium maintains that recovery of the subsidy paid by the Region for certain services associated with the airport activities would be contrary to the principle of legitimate expectations.
- (669) However, the Court of Justice has ruled that the beneficiary of unlawful aid may not in principle invoke a legitimate expectation <sup>(228)</sup>. The beneficiary should in fact have checked that the aid granted had been notified to and approved by the Commission. In this respect, the Commission notes that the aid granted to BSCA was not notified to the Commission.

#### 6.5.1. Absence of precise assurances

- (670) Moreover, as clarified by the Court of Justice <sup>(229)</sup>, a person may not plead infringement of the principle of legitimate expectations 'unless he has been given precise assurances by the administration'.

<sup>(228)</sup> Judgment of 20 September 1990 in Case C-5/89 *Commission of the European Communities v Federal Republic of Germany* [1990] ECR I-3437, ECLI:EU:C:1990:320, paragraph 14; judgment of 14 January 1997 in Case C-169/95 *Kingdom of Spain v Commission of the European Communities* [1997] ECR I-135, ECLI:EU:C:1997:10, paragraph 51; judgment of 15 December 2005 in Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1* [2005] ECR I-11137, ECLI:EU:C:2005:774, paragraph 104.

<sup>(229)</sup> Judgment of 22 June 2006 in Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities* [2006] ECR I-5479, ECLI:EU:C:2006:416, paragraph 147.

- (671) Belgium maintains that, given the lack of a complaint by the Commission in its 2004 decision, BSCA did receive precise assurances that the subsidy was not likely to constitute State aid. Belgium in particular relies on recital 214 of the 2004 decision, in which the Commission stated that it 'does not dispute the legitimate possibility of the Walloon authorities continuing to bear the cost of the fire and maintenance services'. It indicates that this legitimate expectation has been reinforced by the settled decision-making practice of the Commission on the distinction between economic activities and non-economic activities, as reiterated in the Commission decision on Leipzig/Halle airport.
- (672) The Commission takes the view that the lack of a complaint about the aid granted to BSCA in its 2004 decision cannot constitute a 'precise assurance'. The Commission notes that neither the 2002 opening decision nor the 2004 final decision concerned the measures granted to BSCA. As regards recital 214 of the 2004 decision, the Commission stresses that this recital must be read in context. It would appear that, in said context, the recital in question cannot be regarded as approving the measure with regard to the State aid rules, but only as explaining the reason why it is not the conformity of this measure with the State aid rules that is being examined by the Commission, but rather the uncertainty about the funding by the Region of certain services within the BSCA business plan, for the purposes of applying the market economy operator test to the 2001 contracts.
- (673) As stated in recitals 397 to 399 of this decision, the Commission disputes that it can be concluded from recitals 182 and 183 of the decision on Leipzig/Halle airport that the Commission has in the past taken the view that tasks comparable to maintenance and traffic safety, as defined in the Region/BSCA agreement, fall within the public policy remit.

#### 6.5.2. *Foreseeability of the change to the pattern of conduct*

- (674) As stated by the Court of Justice <sup>(230)</sup>, 'if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted <sup>(231)</sup>'.
- (675) According to Belgium, there was nothing to indicate to BSCA that the Commission was going to re-examine, in 2012, a measure on which it had not expressed any reservations in 2004, and which the General Court did not question in 2008.
- (676) The Commission refutes having adopted a position on the measures granted to BSCA by adopting the 2004 decision. As a result, the 2012 decision does not constitute a change to its pattern of conduct.
- (677) The Commission also refutes that the present decision constitutes a change to its decision-making practice concerning the distinction between economic activities and non-economic activities. As regards the decision on Leipzig/Halle airport cited by Belgium to prove the alleged change to the Commission's pattern of conduct, the Commission refutes that it can be concluded from that decision that it has in the past taken the view that tasks comparable to maintenance and traffic safety fall within the public policy remit (see recitals 397 to 399).
- (678) In conclusion, the Commission takes the view that recovery of the unlawful and incompatible aid granted to BSCA is not contrary to the principle of legitimate expectations.

## 7. CONCLUSION AND QUANTIFICATION OF THE AID TO BE RECOVERED FROM BSCA

### 7.1. Aid unlawfully granted to BSCA

- (679) The Commission finds that, by adopting the 2002 agreements and the 2003 investment decision, Belgium unlawfully granted aid to BSCA in breach of Article 108(3) TFEU. This aid consists of the difference between the fee that a market economy operator would have required (hereinafter 'the market price fee') and the fees actually paid by BSCA to the Region-SOWAER.

<sup>(230)</sup> *Idem.*

<sup>(231)</sup> Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission* [1987] ECR 1155, paragraph 44.

- (680) The market price fee is the fee that BSCA should have paid so that each of the two measures (the 2002 agreements and the 2003 investment decision) has a zero net present value for the Region-SOWAER. The Commission has determined the market price fee in line with the reasoning given in Section 6.1.2.2, which has shown that the 2002 agreements and the 2003 investment decision resulted in a concession fee below what a market economy operator guided by profitability prospects would have required.
- (681) The Commission has taken into account that, on the signature of the 2002 SOWAER/BSCA agreement, a prudent operator would not have required BSCA to pay a fee reflecting the investments that SOWAER undertook to make under that agreement until the investments had been made and BSCA was earning the expected revenue from those investments. A prudent operator would have agreed to the fee increasing only when the new investments could be used by the airport manager. Otherwise, the airport manager might experience cash flow difficulties during the years when it was not yet able to earn operating revenue from the new infrastructure. The Commission also finds that the 2002 SOWAER/BSCA agreement provided for an increase in the concession fee in 2007, i.e. two years after the planned commissioning of the new terminal (2005). Consequently, the Commission takes the view that a prudent operator would have agreed to BSCA paying the fee set by the 2002 SOWAER/BSCA agreement up to two years after the end of the year of commissioning of the new terminal (i.e. in 2007), but would have required BSCA to pay a market price fee after that date, i.e. a fee allowing the entity Region-SOWAER to achieve a zero net present value over the whole period.

(682) Table 31 shows:

(a) the variable concession fees expected from BSCA under the provisions in force at the time when the 2002 measure was granted <sup>(232)</sup>;

(b) the additional concession fee, conceived as an annual fixed amount indexed at a rate of 2 % per year reflecting inflation <sup>(233)</sup>, which BSCA should have paid from 2007 so that the concession fees payable by BSCA correspond to the market price concession fee in return for the 2002 agreements <sup>(234)</sup>;

(c) the additional concession fee, conceived as an annual fixed amount indexed at a rate of 2 % per year reflecting inflation, which BSCA should have paid from 2008 so that the concession fees payable by BSCA correspond to the market price concession fee in return for the 2003 investment decision <sup>(235)</sup>;

(a + b + c) represents the expected market price concession fees: their amounts are such that the net present value of the 2002 agreements and the 2003 investment decision is zero.

Table 31

**Expected market price concession fees**

(EUR)

	(a) Concession fees expected from BSCA at the time when the 2002 measure was granted	(b) Concession fees to be added to (a) so that the NPV of the 2002 measure equals 0	(c) Concession fees to be added so that the NPV of the 2003 investment decision equals 0	(a + b + c) Market price concession fees
2002	883 689	0	0	883 689
2003	901 363	0	0	901 363

<sup>(232)</sup> These fees correspond to the variable part of the concession fee, as the fixed part to be paid by BSCA is compensated by a payment from the Region to BSCA.

<sup>(233)</sup> 2 % is the inflation target of the European Central Bank.

<sup>(234)</sup> These additional concession fees have been calculated by assuming that they increased by 2 % per year.

<sup>(235)</sup> *Idem.*

(EUR)

	(a) Concession fees expected from BSCA at the time when the 2002 measure was granted	(b) Concession fees to be added to (a) so that the NPV of the 2002 measure equals 0	(c) Concession fees to be added so that the NPV of the 2003 investment decision equals 0	(a + b + c) Market price concession fees
2004	919 390	0	0	919 390
2005	937 778	0	0	937 778
2006	956 533	0	0	956 533
2007	2 651 067	8 301 157	0	10 952 224
2008	2 704 088	8 467 180	2 391 141	13 562 409
2009	2 758 170	8 636 524	2 438 964	13 833 658
2010	2 813 334	8 809 254	2 487 743	14 110 331
2011	2 869 600	8 985 440	2 537 498	14 392 538
2012	2 926 992	9 165 148	2 588 248	14 680 388
2013	2 985 532	9 348 451	2 640 013	14 973 996
2014	3 045 243	9 535 420	2 692 814	15 273 477
2015	3 106 148	9 726 129	2 746 670	15 578 947

(683) As the work was delayed and the terminal was finally commissioned in 2007, the Commission takes the view that BSCA should have paid a market price fee from the end of 2009, i.e. from 1 January 2010. The Commission has decided that the two-year delay in the work should be covered by the Region and SOWAER, and not by BSCA, as those entities were responsible for making the investments. As a result, the Commission has taken the view that BSCA should have paid the market price concession fee from the end of 2009 only, without, however, this concession fee being increased as it should have been from the end of 2007, as stipulated by the 2002 SOWAER/BSCA agreement.

(684) It is the variable fees actually payable by BSCA (to which fees (b) and (c) shown in Table 31 should be added) that must be used to determine the market price concession fees that BSCA should have paid and that it shall pay in the future. It turns out that, even though traffic has proven to be much higher than predicted in 2002, the fees actually payable (shown in column (a) of Table 32) correspond to the expected variable concession fees (shown in column (a) of Table 31) due to the cap on the variable concession fee stipulated in 2002.

(685) Table 32 shows the elements making up the market price concession fee:

Table 32

**Market price concession fees taking into account the delay in the work <sup>(1)</sup>**

(EUR)

	(a) Concession fees expected from BSCA at the time when the 2002 measure was granted	(b) Concession fees to be added to (a) so that the NPV of the 2002 measure equals 0	(c) Concession fees to be added so that the NPV of the 2003 investment decision equals 0	(a + b + c) Market price concession fees
2002	883 689	0	0	883 689
2003	901 363	0	0	901 363
2004	919 390	0	0	919 390
2005	937 778	0	0	937 778
2006	956 533	0	0	956 533
2007	2 651 067	0	0	2 651 067
2008	2 704 088	0	0	2 704 088
2009	2 758 170	0	0	2 758 170
2010	2 813 334	8 809 254	2 487 743	14 110 331
2011	2 869 600	8 985 440	2 537 498	14 392 538
2012	2 926 992	9 165 148	2 588 248	14 680 388
2013	2 985 532	9 348 451	2 640 013	14 973 996
2014	3 045 243	9 535 420	2 692 814	15 273 477
2015	3 106 148	9 726 129	2 746 670	15 578 947

<sup>(1)</sup> The table is based on the assumption that traffic at Charleroi airport will be such that the variable concession fee (a) will continue to be capped in 2014 and 2015 under the applicable provisions. If this does not prove to be the case, the amounts indicated in column (a) for 2014 and 2015 should be replaced by the amounts payable by BSCA under the variable concession fee. This does not affect columns (b) and (c).

(686) More generally, beyond 2013, for example for year (2013 + n), the market price concession fee will be: (a) + (9 348 451 + 2 640 013) × (1,02)<sup>n</sup>, i.e. (a) + 11 988 464 × (1,02)<sup>n</sup>, where (a) is the variable part of the concession fee payable by BSCA for the year (2013 + n). As explained at the end of recital 685, for the years 2014 and 2015, part (a) will probably be capped. In these calculations of the net present value and market price concession fee for the 2002 and 2003 measures, the Commission has assumed that there will be no cap after 2015. From 2016, part (a) of the market price concession fee will therefore be 35 % of the aviation revenue.

(687) Based on the assumptions and methods described above and if the concession fee paid by BSCA remains unchanged, the Commission concludes that, due to the 2002 agreements and the 2003 investment decision, BSCA has received and will receive up to 31 December 2015 the aid amounts (excluding interest) corresponding to the sum of columns (b) and (c) in Table 32. These aid amounts are indicated in the following table:

Table 33

**Aid amounts received by BSCA up to 31 December 2015 — excluding interest — if the BSCA concession fee remains unchanged up to 31 December 2015**

(EUR)

	Aid associated with the 2002 measure (excluding interest)	Aid associated with the 2003 measure (excluding interest)	Total aid (excluding interest)
2002	0	0	0
2003	0	0	0
2004	0	0	0
2005	0	0	0
2006	0	0	0
2007	0	0	0
2008	0	0	0
2009	0	0	0
2010	8 809 254	2 487 743	11 296 997
2011	8 985 440	2 537 498	11 522 938
2012	9 165 148	2 588 248	11 753 396
2013	9 348 451	2 640 013	11 988 464
2014	9 535 420	2 692 814	12 228 234
2015	9 726 129	2 746 670	12 472 799
Total	55 569 842	15 692 986	71 262 828

(688) As at 1 October 2014, date of this decision, BSCA has received, due to the 2002 agreements and the 2003 investment decision, the following aid amounts <sup>(236)</sup> (excluding interest):

Table 34

**Aid amounts received by BSCA up to 30 September 2014 — excluding interest**

(EUR)

	Aid associated with the 2002 measure (excluding interest) received as at 30 September 2014	Aid associated with the 2003 measure (excluding interest) received as at 30 September 2014	Total aid (excluding interest) received as at 30 September 2014
2002	0	0	0
2003	0	0	0
2004	0	0	0
2005	0	0	0
2006	0	0	0
2007	0	0	0
2008	0	0	0
2009	0	0	0
2010	8 809 254	2 487 743	11 296 997
2011	8 985 440	2 537 498	11 522 938
2012	9 165 148	2 588 248	11 753 396
2013	9 348 451	2 640 013	11 988 464
30.9.2014	7 131 972	2 014 077	9 146 049
Total	43 440 265	12 267 579	55 707 844

**7.2. Aid to be recovered**

(689) Given the conclusions in Section 6.3.2 on the compatibility of the aid granted to BSCA, only the difference between the market price fee — calculated according to the methods described in recitals 680 to 683 — and the fee paid by BSCA since 4 April 2014 constitutes aid to be recovered.

(690) As the period from 4 April to 1 October 2014 consists of 180 days, the aid to be recovered (excluding interest) on the date of 1 October 2014 is  $(180/365) \times \text{EUR } 12\,228\,234$ , i.e. EUR 6 030 362.

<sup>(236)</sup> These amounts are the same as those in the previous table up to 2013 inclusive. For 2014, a ratio of  $(273/365)$  has been applied, as the period from 1 January to 30 September consists of 273 days.



(691) In addition, until the concession fee payable by BSCA is increased to the level of the market price fee, BSCA will continue to receive unlawful and incompatible aid, the amounts of which shall be recovered.

(692) If the concession fee paid by BSCA is increased during 2014 to the level of the market price concession fee indicated in Table 32, the aid amount to be recovered — excluding interest — will be calculated according to the following formula:

Where N is the number of days between 4 April 2014 and the date on which the concession fee paid by BSCA is increased to the level of the market price concession fee,

Aid amount to be recovered (excluding interest) =  $(N/365) \times$  aid amount for 2014

=  $(N/365) \times$  EUR 12 228 234

(693) If the concession fee paid by BSCA is increased during 2015 to the level of the market price concession fee indicated in Table 32, the aid amount to be recovered — excluding interest — will be calculated according to the following formula:

Where N' is the number of days between 1 January 2015 and the date on which the concession fee paid by BSCA is increased to the level of the market price concession fee,

Aid amount to be recovered (excluding interest)

= aid amount to be recovered for 2014 (excluding interest) + aid amount to be recovered for 2015 (excluding interest)

=  $((\text{number of days from 4 April to 31 December 2014})/365) \times$  aid amount for 2014 +  $(N'/365) \times$  aid amount for 2015

=  $(272/365) \times$  12 228 234 +  $(N'/365) \times$  12 472 799

= EUR 9 112 547 + N'  $\times$  EUR 34 172

(694) The Belgian authorities must recover the amount calculated in accordance with the formulas given in recitals 692 and 693 within four months of the date of notification of this decision.

(695) The Belgian authorities must add recovery interest to the amount to be recovered, which shall be calculated from the date on which the aid in question was at the disposal of the undertakings, namely on each effective date of granting of the aid, until the date of its effective recovery<sup>(237)</sup>, in accordance with Chapter V of Commission Regulation (EC) No 794/2004<sup>(238)</sup>. The Commission considers that the date of disposal of the aid corresponds to the payment dates of the fees below market price, as set by the SOWAER/BSCA agreements in force at the time of the payments in question.

(696) This decision is without prejudice to the recovery of any other State aid granted to BSCA that is not covered by this decision.

(697) In a letter of 7 May 2014, Belgium accepted that, in this case and given the undertaking made by the Commission services to provide it as soon as possible with a Dutch translation of the decision, the Commission could exceptionally notify the decision in French under Article 297 TFEU. Belgium accepted that only the French version of the decision would be authentic and that the decision would take effect on its notification in French,

<sup>(237)</sup> See Article 14(2) of Regulation (EC) No 659/1999 (op. cit.).

<sup>(238)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

HAS ADOPTED THIS DECISION:

#### *Article 1*

1. The aid measures granted to Ryanair Ltd (hereinafter 'Ryanair'), namely the undertaking of the Walloon Government to Ryanair of 6 November 2001, the contract between BSCA and Ryanair of 2 December 2001, the Promocy agreement of 12 December 2001, the contract between Promocy and Leading Verge of 31 January 2002, the Ministerial Order of 11 June 2004, the letter from BSCA to Ryanair of 24 June 2004, the commercial agreement between BSCA and Ryanair of 9 December 2005, the amendment of 6 December 2010 to the contract between BSCA and Ryanair, and the sale of BSCA's shares in Promocy on 31 March 2010, do not constitute State aid to Ryanair under Article 107(1) of the Treaty on the Functioning of the European Union.

2. The aid measures granted to Brussels South Charleroi Airport (hereinafter 'BSCA'), consisting of the agreement between the Société wallonne des aéroports (hereinafter 'SOWAER') and BSCA of 4 April 2006, Amendment No 5 to the agreement between the Walloon Region and BSCA of 10 March 2006, and Amendment No 6 to the agreement between the Walloon Region and BSCA of 15 January 2008, do not constitute State aid to BSCA under Article 107(1) of the Treaty on the Functioning of the European Union.

#### *Article 2*

1. The aid measures unlawfully granted by Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, to BSCA under the sub-concession agreement of 15 April 2002 between SOWAER and BSCA and Amendment No 3 of 29 March 2002 to the agreement between the Walloon Region and BSCA, and also under the investment decision of the Walloon Region of 3 April 2003, constitute State aid compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union up to 3 April 2014.

2. Assuming that it does constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, the capital increase in BSCA subscribed on 3 December 2002 by SOWAER is State aid compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

#### *Article 3*

The aid measures unlawfully granted by Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, to BSCA under the sub-concession agreement of 15 April 2002 between SOWAER and BSCA and Amendment No 3 of 29 March 2002 to the agreement between the Walloon Region and BSCA, and also under the investment decision of the Walloon Region of 3 April 2003, constitute State aid incompatible with the internal market on the basis of Article 107(1) of said Treaty from 4 April 2014.

#### *Article 4*

1. Belgium shall put an end to the aid measures referred to in Article 3 by increasing the concession fee payable by BSCA at least to the level of the market price concession fee and by recovering from the beneficiary the aid amounts received under the aid measures referred to in Article 3 as from 4 April 2014.

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

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

4. Belgium shall cancel all pending payments with regard to the aid measures referred to in Article 3 from the date of adoption of this decision.

*Article 5*

1. The recovery of the aid referred to in Article 3 shall be immediate and effective.
2. Belgium shall ensure that this decision is implemented within four months of the date of its notification.

*Article 6*

1. Belgium shall submit the following information to the Commission within two months of the notification of this decision:
  - (a) the dates on which BSCA has paid the concession fees in 2014 and the calculation of the recovery interest;
  - (b) a detailed description of the measures already adopted and planned for the purpose of complying with this decision;
  - (c) the documents proving that the beneficiary has been ordered to repay the aid.
2. Belgium shall keep the Commission informed of the progress of the national measures adopted pursuant to this decision until the recovery of the aid referred to in Article 3 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this decision. It shall also provide detailed information on the aid amounts and interest already recovered from the beneficiary.

*Article 7*

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 1 October 2014.

*For the Commission*  
Joaquín ALMUNIA  
Vice-President

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## ANNEX

**Information on amounts received, to be recovered and already recovered**

Identity of the beneficiary	Total amount of the aid received (*)	Total amount of the aid to be recovered (*) (Principal)	Total amount already repaid (*)	
			Principal	Interest

(\*) EUR Million