Reports of Cases

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

11 July 2019*

(Action for annulment — State aid — Measures implemented by France in favour of Marseille Provence Airport and airlines using the airport — Decision declaring the aid compatible with the internal market — Investment subsidies — Differentiation between airport charges applicable to national and international flights — Reduced airport charges to encourage flights from the new Marseille Provence terminal 2 — Lack of individual concern — No substantial effect on the competitive position — Inadmissibility)

In Case T-894/16,

Société Air France, established in Tremblay-en-France (France), represented by R. Sermier, lawyer,

applicant,

v

European Commission, represented by S. Noë, C. Giolito and C. Georgieva-Kecsmar, acting as Agents,

defendant,

supported by

Aéroport Marseille Provence SA, established in Marignane (France), represented by A. Lepièce, lawyer,

and by

Ryanair DAC, formerly Ryanair Ltd, established in Dublin (Ireland),

and

Airport Marketing Services Ltd, established in Dublin,

represented by E. Vahida and I.-G. Metaxas-Maranghidis, lawyers,

interveners,

ACTION under Article 263 TFEU for the annulment of 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 (OJ 2016 L 260, p. 1),

* Language of the case: French.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

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

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 January 2019,

gives the following

Judgment

Background to the dispute

1 Marseille Provence Airport is situated in the department of Bouches-du-Rhône in France. It is one of the largest airports in the country. In 2012, it handled over 8 million passengers. In 2004, with a view to revitalising its traffic and redirecting its development towards European destinations, it decided to set up, next to the main terminal ('Terminal mp1'), a new terminal for 'low-cost' flights ('Terminal mp2'). Work began in December 2005 and Terminal mp2 started operating in September 2006.

2 On 27 March 2007, the Commission received a complaint, dated 15 March 2007 and lodged by the applicant, Air France, about unlawful aid granted by the Conseil général des Bouches-du-Rhône (Departmental Council of Bouches-du-Rhône, France) to Marseille Provence Airport, and also about unlawful aid granted by the airport to Ryanair DAC, formerly Ryanair Ltd, and other airlines. Those advantages allegedly involved, in particular, reduced airport charges to encourage flights from Terminal mp2.

3 On 27 November 2009, Air France lodged a complaint with the Commission about unlawful aid granted by several French regional and local airports, including Marseille Provence Airport.

4 On 7 May 2008, the Conseil d'État (Council of State, France) annulled the approved passenger charges applicable to Terminal mp2 as from 1 June 2006, as well as those applicable from 1 January 2007, owing to the accounting information used to calculate the charge not providing sufficient justification.

5 Following the annulment of the approved passenger charges applicable to Terminal mp2 as from 1 June 2006, as well as those applicable from 1 January 2007, the direction générale de l'aviation civile, rattachée au ministère de l'Écologie, du Développement durable et de l'Énergie (Directorate-General for Civil Aviation, part of the Ministry of Ecology, Sustainable Development and Energy) commissioned an audit firm to carry out a study, delivered in November 2008, on the methods for allocating costs and revenues and on the charges at Terminal mp1 and Terminal mp2. Based on that audit, the Marseille Provence Chamber of Commerce and Industry ('the CCIMP') decided on new passenger charges that were applicable retroactively.

6 By decision of 13 July 2011, addressed to the French Republic, the Commission initiated the procedure laid down in Article 108(2) TFEU and invited interested parties to submit their comments on the measures in question ('the opening decision').

7 The Commission received comments from the French Republic, the CCIMP, the applicant, Ryanair and Airport Marketing Services Ltd ('AMS'), a wholly owned subsidiary of Ryanair.

8 On 20 February 2014, the Commission adopted Decision (EU) 2016/1698 concerning measures SA.22932 (11/C) (ex NN 37/07) implemented by France in favour of Marseille Provence Airport and airlines using the airport (OJ 2016 L 260, p. 1) ('the contested decision).

9 In the contested decision, the Commission considered inter alia that Marseille Provence Airport had benefited from investment aid that was compatible with the internal market. It noted that Terminal mp2 and the aircraft parking area adjacent to it were not reserved for a particular airline. It considered that that terminal was therefore open to any company wishing to use it on condition that that company offer a limited level of service. It found that that terminal had launched a call for expressions of interest in using that airport and that, since it was not being operated to full capacity, that terminal was available to any interested airline. Moreover, it noted that the airlines also paid charges covering at least the incremental costs generated by each agreement.

10 In addition, the Commission examined the passenger charges applicable to Terminal mp2. In particular, it found that, in order to determine the profitability of the simplified-service terminal and the corresponding charges, a prudent operator would take into account all the aeronautical and non-aeronautical revenues, as well as the elasticity of traffic demand in relation to the aeronautical charges in question. It considered that 'the difference between the passenger charge level and the cost of the passenger function, which [was] covered by the non-aeronautical revenue, [did] not therefore constitute an advantage granted to airlines, but [was] the result of the operator's underlying optimisation, which, on the contrary, is aimed at ensuring the profitability of the investment project' (recital 369 of the contested decision). It concluded that the decision setting the charges for that terminal satisfied the market economy operator test.

11 Finally, the Commission examined the agreement to purchase advertising space concluded on 19 May 2006 by CCIMP and AMS ('the AMS agreement'). That agreement was concluded for a term of 5 years, renewable once for the same period, without prior publicity or competitive tendering. The objective of that agreement was to publicise Marseille as a destination in order to attract high passenger numbers.

12 Based on the profitability study produced by the French Republic on the financial margins generated by Ryanair flights over the 2007-2021 period, which the CCIMP apparently used to make the decision on the AMS agreement, the Commission found that the average costs of that agreement per passenger of that airline made it possible to establish the profitability of the construction plan for Terminal mp2 as a whole. It concluded that, at any time, the charges applied to the airlines, taking into account the various reductions and the costs of that agreement, covered at least the additional costs associated with the use of Marseille Provence Airport by that airline.

Procedure and forms of order sought

13 By application lodged at the Court Registry on 19 December 2016, the applicant brought the present action.

14 By document lodged at the Court Registry on 23 March 2017, Aéroport Marseille Provence SA applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

15 By documents lodged at the Court Registry on 26 March 2017, Ryanair and AMS applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

16 By order of 29 May 2017, the President of the Sixth Chamber of the General Court granted those applications for leave to intervene. The interveners lodged their statements in intervention and the main parties lodged their observations thereon within the periods prescribed.

17 On a proposal from the Sixth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to assign the case to a Chamber sitting in extended composition.

18 Acting on a proposal from the Judge-Rapporteur, the General Court (Sixth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, invited the parties to answer certain questions. The parties complied with those requests within the prescribed periods.

19 The parties presented oral argument at the hearing on 10 January 2019.

20 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

21 The Commission, supported by the interveners, contends that the Court should:

– dismiss the action as inadmissible and, in any event, as unfounded;

– order the applicant to pay the costs.

Law

22 The Commission, supported by the interveners, maintains that the action is inadmissible on the ground, in essence, that the applicant does not have standing to bring proceedings. In particular, it submits that the applicant is not directly and individually concerned by the measures at issue and that it has not explained why the contested decision affects it by reason of certain attributes which are specific to it or by reason of circumstances in which it was differentiated from all other persons.

23 The applicant maintains that, contrary to what the Commission claims, its situation should distinguish it individually just as in the case of the addressee of the contested measure. With reference to the case-law, it considers that the admissibility of the action of a third party in relation to the beneficiary of the aid presupposes that the former is in competition with the latter and that the aid is capable of causing substantial harm to the market position of that third party. It also invokes judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140) and claims that the Court implicitly confirmed in that ruling that competitor airlines were entitled to challenge a Commission decision declaring valid a State aid measure of which the applicant was a beneficiary.

24 In that regard, it must be noted that the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to bring an action for annulment against an EU act not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to that person. Secondly, they may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.

25 In the present case, the contested decision is addressed solely to the French Republic and concerns individual aid within the meaning of Article 1(e) of Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9). Therefore, since the contested decision is a measure of individual scope, it cannot constitute a regulatory act, within the meaning of the fourth paragraph of Article 263 TFEU, which covers all acts of general application apart from legislative acts (see judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T-57/11, EU:T:2014:1021, paragraph 23 and the case-law cited). It follows that, since the

applicant is not the addressee of the contested decision, its action is admissible only if the applicant is directly and individually concerned by that decision (judgment of 22 June 2016, *Whirlpool Europe* v *Commission*, T-118/13, EU:T:2016:365, paragraph 41).

26 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually in the same way as the addressee of such a decision (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 223, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 15).

27 In the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary stage of the procedure for reviewing aid initiated under Article 108(3) TFEU of that article, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 108(2) TFEU. It is only at the latter stage, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 30 and the case-law cited).

28 Where an undertaking calls into question the merits of a decision appraising aid taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as concerned within the meaning of Article 108(2) TFEU cannot suffice to render the action admissible. It must go on to demonstrate that it has a particular status within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17) (see, to that effect, order of 10 November 2015, *Compagnia Trasporti Pubblici and Others* v *Commission*, T-187/15, not published, EU:T:2015:846, paragraph 18). That applies in particular where its market position is substantially affected by the aid to which the decision at issue relates (judgment of 22 June 2016, *Whirlpool Europe* v *Commission*, T-118/13, EU:T:2016:365, paragraph 44).

29 In that regard, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure initiated pursuant to Article 108(2) TFEU in respect of an individual aid have been recognised as individually concerned by the Commission decision closing that procedure, provided that their position on the market has been substantially affected by the aid which was the subject of the decision of which annulment was sought. An undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but, as has already been held, must additionally show, in the light of its participation in the procedure and the magnitude of the harm to its position on the market, that its factual circumstances distinguish it in a similar way to the undertaking in receipt of aid (see order of 7 March 2013, *UOP* v *Commission*, T-198/09, not published, EU:T:2013:105, paragraphs 25 and 26 and the case-law cited; see also, to that effect, judgment of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 25, and order of 27 May 2004, *Deutsche Post and DHL* v *Commission*, T-358/02, EU:T:2004:159, paragraphs 33 and 34).

30 In addition, it should be recalled that the conditions governing admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application (order of 15 December 2010, *Albertini and Others and Donnelly* v *Parliament*, T-219/09 and T-326/09, EU:T:2010:519, paragraph 39, and judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T-57/11, EU:T:2014:1021, paragraph 34).

31 In the present case, it must be noted that the applicant contests some of the measures examined by the Commission in the contested decision. First, the investment subsidy for the construction of Terminal mp2 is called into question, and, secondly, the passenger charges specific to that terminal and the

AMS agreement which, taken together, constitute State aid in favour of the latter are disputed. It is therefore necessary to examine the applicant's standing to bring proceedings in so far as concerns, first, the investment subsidy and, secondly, those charges and that agreement.

The investment subsidy

32 The Commission considers that there is no competition between the applicant and Marseille Provence Airport, the beneficiary of the aid, as regards the investment subsidy granted to the CCIMP for construction of Terminal mp2. In particular, it claims that it analysed separately that subsidy granted to the CCIMP and the alleged operating aid granted to airlines by the CCIMP. It maintains that the applicant should have demonstrated in the present case that that grant was in fact transferred by the CCIMP to Ryanair. However, that is not the case, since the decision to grant the same subsidy did not impose any obligation on the CCIMP to give that airline access to preferential conditions.

33 For the sake of completeness, the Commission claims that, in the absence of any competitive relationship between the airport which is the beneficiary of the aid and the applicant, the latter has no interest in bringing proceedings. In particular, the annulment of the contested decision in so far as concerns the investment subsidy would be of no benefit to it.

34 The applicant submits that Ryanair was the real recipient of the investment subsidy granted to the CCIMP. It claims that the opening decision makes clear the indissociable link between the investment subsidies granted to the CCIMP and Ryanair, in so far as that subsidy allowed Marseilles Provence Airport to grant artificially low prices to one of its direct competitors. In particular, it refers to paragraphs 90, 91 and 275 of that decision in order to establish the existence of an indissociable link between that subsidy received by the CCIMP for the creation of Terminal mp2 and the advantage received by Ryanair as a user of that terminal. It submits that those paragraphs set out the mechanism by which the CCIMP transferred the economic benefit of that subsidy to Ryanair and clearly explains the close link between the subsidy in question and the economic advantage enjoyed by Ryanair. According to the applicant, it is sufficient to establish a competitive relationship with Ryanair in relation to that airport for the action to be declared admissible.

35 In that regard, it must be noted that the investment subsidy for the construction of Terminal mp2 was granted solely to the CCIMP, which, moreover, the parties do not dispute. It must also be pointed out that, in the contested decision, Ryanair was not named as a beneficiary of the investment aid. As is stated a number of times in that decision, the CCIMP was considered by the Commission to be the sole beneficiary of that subsidy.

36 More specifically, the Commission examined the conditions relating to the existence of an economic activity and an undertaking in the present case only in relation to the CCIMP. In particular, under point 6.1. of the contested decision, it found that the CCIMP operated Marseilles Provence Airport and invoiced the costs to the users of that infrastructure.

37 Likewise, under point 6.1.3. of the contested decision, the existence of a selective advantage was only assessed in respect of the CCIMP. The Commission considered in that regard that 'the investment subsidies benefited the CCIMP alone, and no other airport operators or other undertakings in other sectors'.

38 In addition, the criterion of an effect on competition and intra-Community trade was assessed only in relation to the CCIMP. The Commission found in that regard that 'as the operator of Marseille Provence Airport, the CCIMP [was] in competition with other airport platforms serving the same catchment area within 100 km or 60 minutes'. It also added that there was 'competition between the airport operators responsible for operating those airports and, consequently, aid granted to the CCIMP [could] reinforce its position on that market'.

39 In the light of the foregoing, it is necessary to examine whether, as the applicant has claimed, and in the light of the facts put forward in the proceedings, Ryanair benefited indirectly from the investment subsidy for the construction of Terminal mp2.

40 In that regard, in the first place, and contrary to what the applicant maintains, it does not follow from the opening decision that there was an indissociable link between the investment subsidies granted to the CCIMP and Ryanair. More specifically, as regards paragraphs 90 and 91 of that decision, the Commission referred merely to the report prepared by an audit firm without drawing its own conclusions. Moreover, in paragraph 275 of that decision, it did not find that the airlines using Terminal mp2 were also beneficiaries of the investment subsidy granted to the CCIMP, but simply examined the effect of any incompatibility of the investment aid and the question whether the passenger charges applied by the CCIMP constituted aid.

41 In addition, it follows from the opening decision that Ryanair was not given any priority regarding access to and use of Terminal mp2. That terminal was open to any interested airline without being reserved for one or more particular airlines. In that regard, paragraph 31 of that decision refers to the preamble to the rules governing the use of Terminal mp2, published on the internet on 18 July 2006, which provide, inter alia, that 'the use of [that terminal], is, in principle, open to all airlines undertaking to observe the general conditions of use of that terminal defined by [its provisions]'. That element is also reiterated in recital 291 of the contested decision, in which the Commission considered that 'according to the information submitted by [the French Republic] and particularly the rules governing use of [the terminal in question], … all potential users (airlines) have access to the new infrastructure in an equal and non-discriminatory manner.

42 In the second place, it is apparent from the case file that, following the call for projects launched in 2004 by the CCMP aimed at the airlines, the applicant submitted an application file for Terminal mp2. In particular, it was interested in the route from Marseilles Provence Airport to Paris-Orly Airport (France) and proposed 19 flights per day from Monday to Friday, with 14 flights on Saturdays and 18 flights on Sundays. However, the negotiations between the applicant and the operator of that airport subsequently failed, inter alia on account of the restriction of that terminal's traffic to point-to-point flights and the fact that that terminal was set to handle only national and intra-EU flights. It should also be noted that, the total volume of the proposals made by the airlines did not exceed the planned capacity and no selection was therefore necessary. Thus, each airline having expressed an interest had access to the terminal in question. Accordingly, not only was use of that terminal not reserved for a particular airline, specifically Ryanair, but the applicant could also have had access to it if the negotiations with the operator of that airport had been finalised.

43 In the third place, contrary to what the applicant claims, the solution adopted by the Court in the judgment of 10 May 2006, *Air One* v *Commission* (T-395/04, EU:T:2006:123), cannot be applied in the present case. That judgment concerns the Commission's failure to adopt a decision in respect of the preliminary stage of the procedure for reviewing aid and, by the action brought in the case giving rise to that judgment, the applicant sought protection of its procedural rights. The Court therefore examined the question whether the applicant in that case could be regarded as a party concerned within the meaning of Article 88(2) TEC (now Article 108(2) TFEU) (judgment of 10 May 2006, *Air One* v *Commission*, T-395/04, EU:T:2006:123, paragraph 34). By contrast, in the present case, the contested decision was adopted at the end of the formal investigation procedure and the applicant does not seek to safeguard its procedural rights but disputes the merits of that decision.

44 In the light of the foregoing, the applicant cannot validly claim that Ryanair was the indirect beneficiary of the investment subsidy for the construction of Terminal mp2. It follows that, without a competitive relationship between the CCIMP and the applicant, the latter is not entitled to claim that it is individually concerned by the contested decision in so far as concerns the investment subsidy.

Consequently, in so far as concerns that aid, the present action is inadmissible and it is not necessary to examine the argument raised for the sake of completeness by the Commission, alleging the applicant's lack of interest in bringing proceedings.

The passenger charges specific to that terminal and the AMS agreement

45 The Commission maintains that the applicant's situation is no different to that of other airlines using Marseille Provence Airport and that, consequently, the alleged aid to the airlines does not concern it individually. It acknowledges that the applicant is in competition with Ryanair and adds that, according to the case-law, the existence of such a relationship with the beneficiary of aid is not in itself sufficient for it to be regarded as individually concerned. In that regard, it notes that the applicant is only one of many competitors of Ryanair and that, although that airline serves 29 of the 41 destinations proposed at Terminal mp2, it was only in head-to-head competition with Ryanair with regard to very limited destinations of modest economic significance.

46 In addition, when questioned at the hearing, the Commission maintained that the Court should analyse the effect of passenger charges specific to Terminal mp2 and the AMS agreement on the European global market for air transport and, alternatively, in the context of the routes from and to Marseille Provence Airport.

47 The applicant submits, in essence, that it is in competition with Ryanair and that the measures enjoyed by the latter at Marseille Provence Airport, namely the passenger charges specific to Terminal mp2 and the AMS agreement, affect it specifically.

48 In particular, the applicant claims that, alongside Ryanair, it is one of the main users of Marseilles Provence Airport and that those two airlines were in direct competition in 2017 concerning three destinations from that airport, namely Brest (France), Nantes (France) and Ibiza (Spain). In that regard, when questioned at the hearing, it submitted that, as regards passenger air transport, in the decision-making practice of the competition authorities, each route, that is to say each 'origin and destination' pair, constituted a relevant market.

49 In the reply, the applicant noted that, concerning the routes for which it was in head-to-head competition with Ryanair, between 2014 and 2016, the volume of the latter's traffic was between 360 000 and 660 000 seats per year, while the number of passengers transported by it was between 530 000 and 660 000 passengers per year. At the hearing, it stated that in 2018 it had transported 2.6 million passengers to or from Marseille (France) and that approximately 400 000 passengers had been transported on direct flights from Marseille Provence Airport to Lille Airport (France), Lyon Airport (France) and, to a lesser extent, Brest Airport, that is to say the destinations also offered by Ryanair from Marseille Provence Airport.

50 As regards the routes from or to Marseilles Provence Airport, the applicant claims that, at the time of the facts, there were only four 'low-cost' airlines which used Terminal mp2 and that Ryanair served 29 of the 41 destinations offered from that terminal. It maintains that Ryanair paid artificially low charges and that, by contrast, it and its subsidiary HOP! paid increased charges compared with their actual cost. It considers that that situation allowed Ryanair to offer lower prices than those offered by HOP! for flights taking place on the same date to the same destination. In that regard, it provides a table showing that a ticket for a flight on 4 July 2017 to Brest was offered by Ryanair at EUR 63.94 and by HOP! at EUR 105.25 and a ticket for a flight on 3 July 2017 to Nantes was offered by Ryanair at EUR 30.28 and by HOP! at EUR 50.51.

51 Furthermore, the applicant notes that, between 2013 and 2015, it had to close routes from Marseilles Provence Airport to Rome Airport (Italy), to Düsseldorf Airport (Germany) and to Bordeaux Airport (France) on account of direct competition with Ryanair. In addition, it maintains that, on account of

that competition, in 2016 it limited its operations on the seasonal route between Marseille and Brest to 6 weeks in July and August. It claims, using a diagram, that, with the exception of the routes from Marseille Provence Airport to the airports of Paris (France) and Amsterdam (Netherlands), its point-to-point activity decreased by more than 50% between 2013 and 2017.

52 The applicant maintains that the option given to Ryanair to offer artificially low transport prices from Terminal mp2, by virtue of subsidies received by Marseille Provence Airport to finance its development and operating aid received by Ryanair, constitutes a distortion of competition resulting in its position at the airport in question being jeopardised.

53 It must therefore be examined whether the evidence adduced by the applicant can establish that it was individually concerned by the measures taken by the airport operator concerning the passenger charges specific to Terminal mp2 and by the AMS agreement.

54 First, as regards the relevant market for which it is necessary to analyse the effect of the measures at issue, it must be held that, even though, first, those measures only concern Terminal mp2 and, secondly, within Marseilles Provence Airport, the applicant and Ryanair use Terminals mp1 and mp2, in general, the destinations served by the various airlines using that airport are not in principle reserved for one or the other of those two terminals. Consequently and contrary to what the Commission, primarily, and the applicant claim (paragraphs 46 and 48 above), the effect of the measures at issue must be examined in the light of all the routes operated from and to that airport, irrespective of the terminal used.

55 Next, as follows from the case-law cited in paragraph 29 above, the applicant must demonstrate that its competitive position on the relevant market is substantially affected by the measures forming the subject matter of the contested decision.

56 Finally, it must be noted that, when considering whether an application is admissible, it is not for the Court to make a definitive finding on the competitive relationship between the applicant and Ryanair. It is for the applicant alone to indicate adequately why the measures forming the subject matter of the contested decision are liable to adversely affect its legitimate interests by seriously jeopardising its position on the market in question (see, to that effect, order of 21 January 2011, *Vtesse Networks* v *Commission*, T-54/07, not published, EU:T:2011:15, paragraph 98).

57 In that regard, it must be held that, as regards the condition of the applicant's position on the relevant market being significantly affected, the parties do not dispute that Ryanair and the applicant are competitor airlines. However, even supposing that they are the main users of Marseilles Provence Airport, the applicant has not adduced evidence to permit the conclusion that its competitive position was substantially affected on that market by the passenger charges specific to Terminal mp2 or by the AMS agreement.

58 First, it follows from the 2016-2018 schedule of Marseille Provence Airport that 36 airlines, including Ryanair, Air France et HOP!, operate routes from and to that airport, namely Germanwings, Aegean Airlines, HOP!, Air Canada, Air France, Air Algérie, Royal Air Maroc, Alitalia, British Airways, Nouvelair, Aer Lingus, Eurowings, Ryanair, Iberia, Meridiana, Air Malta, Lufthansa, El Al Israel Airlines, Mistral Air, Air Madagascar, Pegasus Airlines, XL Airways France, Tassili Airlines, Brussels Airlines, Twin Jet, TUIfly, Turkish Airlines, TAP Portugal, Air Transat, TunisAir, EasyJet, Air Austral, Volotea, Vueling Airlines, Air Corsica and Aigle Azur.

59 Moreover, it is apparent from the 2016-2018 schedule of Marseilles Provence Airport that the applicant and HOP! are not the only airlines to be in 'head-to-head competition' with Ryanair, that is to say, operating non-stop direct flights. Indeed, it is in head-to-head competition with 11 other airlines, namely Air Malta, Alitalia, British Airways, Brussels Airlines, EasyJet, Iberia, Royal Air Maroc, TAP Portugal, TUIfly, Volotea and Vueling Airlines.

60 Secondly, as is apparent from the comparative table of routes of the group of airlines to which the applicant and Ryanair belong from and to Marseilles Provence Airport, in 2016, the year in which the present action was brought, that group, including the applicant and HOP!, was in head-to-head competition with Ryanair on three routes, namely Marseille-Brest, Marseille-Nantes and Marseille-Lille. Furthermore, the parties do not dispute that the applicant was in direct competition with Ryanair on those three routes.

61 However, the applicant, which was not the only airline in competition with Ryanair on three routes, has failed to show that, as regards passenger charges specific to Terminal mp2 and the AMS agreement, it was in a situation which distinguished it from the other competitors concerned. In particular, Royal Air Maroc was a competitor of Ryanair for flights to Marrakech (Morocco), Oujda, (Morocco) and Rabat (Morocco), and Vueling Airlines for flights to Málaga (Spain), Palma de Mallorca (Spain) and Rome. Consequently, the latter two airlines were in the same competitive situation with Ryanair as the applicant. Moreover, the group of airlines including Vueling Airlines, British Airways and Iberia were in head-to-head competition with Ryanair on five routes, namely London (United Kingdom), Madrid (Spain), Málaga, Palma de Mallorca and Rome, which is two more than the number of routes served by the group of airlines which includes the applicant.

62 Thirdly, as regards the economic importance of the routes on which Ryanair and the applicant were in head-to-head competition, it is apparent from the case file that the Marseille-Nantes route was operated by the applicant up to three times a day. As regards the Marseille-Brest route, in 2016 the applicant limited its operations to 6 weeks in July and August. Apart from the applicant, Ryanair was in head-to-head competition with other companies in respect of other routes with cities larger than Nantes and Brest. In that regard, as the Commission found, concerning London, Ryanair was in competition with British Airways, which offered three flights per day to London Heathrow Airport (United Kingdom) and EasyJet, which offered three flights per day to London Gatwick Airport (United Kingdom) and three flights per week to London Luton Airport (United Kingdom).

63 Fourthly, the applicant's argument that significant distortion of competition and, in essence, a substantial effect on its competitive position on the relevant market by the passenger charges specific to Terminal mp2 and the AMS agreement would be established by comparing the prices offered by HOP! and Ryanair for flights from Marseilles Provence Airport to Brest and Nantes must be rejected. While that price comparison, made by the applicant on 29 March 2017, shows that the prices offered by Ryanair were far cheaper than those offered by the applicant and its subsidiary, the price comparison submitted by the Commission for the dates of 27 July 2017 and 31 July 2017 show the opposite. In any event, assuming that the prices charged by Ryanair are lower overall than those charged by the applicant for those routes, that would not in itself prove significant distortion of competition on account of the level of airport charges set by the operator of that airport and that agreement. As the Commission maintains, a price difference could be due to other factors, such as higher or lower operating costs of each airline concerned.

64 Fifthly, the table submitted by the applicant, without indicating any source, which illustrates the development of its point-to-point activity from Marseilles Provence Airport and shows a decrease of over 50% between 2013 and 2017, does not establish that the applicant's competitive position on the relevant market was substantially affected by the passenger charges specific to Terminal mp2 and the AMS agreement. First, the applicant has not specified what evidence regarding point-to-point transport activity it relied on in creating the table. Next, as the applicant itself acknowledges, it did not take into account, in its estimates, data relating to apparently significant routes, namely Marseille-Paris and Marseille-Amsterdam. Finally, it has not submitted any specific information regarding the impact of its head-to-head competition with Ryanair during the selected period on the decrease in its point-to-point activity.

65 In that regard, since, in the present case, the relevant market has an unconcentrated structure, characterised by the presence of a large number of operators, it cannot simply be presumed that the decrease in the applicant's point-to-point activity between 2013 and 2017, as shown in the abovementioned table, is due exclusively to the passenger charges specific to Terminal mp2 and to the AMS agreement, given its competition with Ryanair on that market. It is true that the applicant cannot be required to show that that decrease is exclusively due to those measures. However, it was incumbent on the applicant at least to adduce evidence seeking to show that, in view of its head-to-head competition with Ryanair on the Marseille-Brest, Marseille-Nantes and Marseille-Lille routes, those measures had consequences for its competitive position on that market, which it has not done.

66 In that regard, according to the case-law, a significant decline in turnover, appreciable financial losses, a significant reduction in market share and the loss of an opportunity to make a profit may be possible indications of a substantial effect on a competitive position on the market of the competitor concerned (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 53). In the present case, the applicant has not submitted precise and detailed figures establishing that the market share allegedly taken by Ryanair on the relevant market was the consequence of passenger charges specific to Terminal mp2 and of the AMS agreement. The same finding applies to the applicant's argument that, on account of its competition with Ryanair, it was obliged to close the Marseille-Rome, Marseille-Düsseldorf and Marseille-Bordeaux routes between 2013 and 2015. The applicant has not produced any specific evidence capable of establishing that the closure of the abovementioned routes was due to its direct competition with Ryanair.

67 Moreover, it should be noted in that regard that, at the hearing, Aéroport Marseille Provence maintained, without being contradicted by the applicant, that, as regards the Marseille-Lille and Marseille-Nantes routes in particular, there was no reduction in traffic, but on the contrary the applicant increased the number of passengers carried after Ryanair's arrival on those routes.

68 In those circumstances, the applicant's claim that its competitive position on the relevant market was affected by the passenger charges specific to Terminal mp2 and the AMS agreement is not substantiated and does not permit a finding that it was individually affected. In particular, even if such measures can lead, as the applicant claims, to restriction of its activity on that market, it follows from all the foregoing that it has not adduced sufficient evidence to establish that its situation differs from that of the other operators in competition with Ryanair on that market, such as to affect it in the same way as the addressee of those measures.

69 In the light of the foregoing, assuming that the applicant's competitive position on the relevant market is directly affected, in view of its head-to-head competition with Ryanair, by the passenger charges specific to Terminal mp2 and the AMS agreement, it has not established that it was substantially affected. Accordingly, the applicant is not individually concerned by those measures within the meaning of the applicable case-law.

70 The other arguments put forward by the applicant do not invalidate that conclusion.

71 In the first place, the applicant submits that it was actively involved in the procedure at the end of which the Commission adopted the contested decision. It claims in that regard that it lodged two successive complaints concerning the State aid measures implemented by Marseilles Provence Airport indicating the negative consequences of the measures in question on its position as a user of that airport. It infers from this that it played an extremely active part in the procedure before the decision was adopted.

72 However, the mere fact that an applicant has participated in the administrative procedure does not permit the inference that it has standing to bring proceedings (order of 7 March 2013, *UOP* v *Commission*, T-198/09, not published, EU:T:2013:105, paragraph 27, and judgment of 22 June 2016,

Whirlpool Europe v *Commission*, T-118/13, EU:T:2016:365, paragraph 55) even if it played an important part in the procedure, inter alia by lodging the complaint which led to the contested decision (see, to that effect, judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraphs 94 and 95).

73 In the second place, the applicant refers to an interview with Ryanair's CEO in which he claims to be in 'competition' with it. The personal opinions of a director of an airline which is the beneficiary of aid cannot suffice to establish a substantial effect on the position of its competitors on the market concerned. Moreover, it does not follow from that interview that that CEO attributed a particular competitive position in relation to Ryanair to the applicant. In particular, that CEO maintains that it has 'ever more competitors' and that 'carriers like [it], Alitalia and Lufthansa are going to have to follow [the trend towards low-cost services]'. Accordingly, that CEO regards the applicant as one competitor of its airline among others.

74 In the third place, the applicant submits a market study which it carried out in September 2017. That study measured the HHI (Herfindahl-Hirschman Index), which, according to the applicant, is commonly considered to be a measure of the intensity of competition on a market. As regards Ryanair's competition with the applicant, the study considers that, on account of a large number of common routes, Ryanair's growth directly affects the group of airlines which includes the applicant. According to the same study, in 2016, Ryanair was in competition with that group on 10 routes between French cities and 37 routes between a French city and a European city located outside France.

75 The market study in question, although it makes it possible to establish that there is a competitive relationship between the applicant and Ryanair, does not show in any way that the applicant's competitive position on the relevant market is substantially affected by the passenger charges specific to Terminal mp2 and the AMS agreement. First, the fact that, according to that study, 'very often Ryanair is not the only player on the routes on [which] it operates [and therefore] subsidies paid may affect competition' is a general statement which does not distinguish the applicant's position from that of Ryanair's other competitors on that market. Secondly, the statement in the report that 'on account of a large number of common routes, Ryanair's growth directly affects [the group of airlines including the applicant]' can show that the applicant is directly affected by Ryanair's competition but does not show that it is substantially affected by the abovementioned measures, within the meaning of the relevant case-law.

76 In the fourth place, the applicant refers to the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140), in which, in its view, the Court acknowledged the admissibility of applications made inter alia by the airlines British Airways and Scandinavian Airlines System Denmark-Norway-Sweden against a Commission decision declaring, after the formal investigation procedure, aid granted to it by the French authorities to be compatible with the internal market.

77 In the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140), the Court, without expressly examining the admissibility of the action, which moreover had not been raised by the Commission, annulled the decision against which the action was directed in the case giving rise to that judgment. That decision concerned the validity of a measure concerning a capital increase of several billion French francs in respect of the applicant, along with a plan to restructure that airline with a view to regaining its financial viability.

78 However, the present case relates to passenger charges specific to Terminal mp2 and the AMS agreement. Accordingly, it is distinct from the case giving rise to the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140), both with regard to the respective purposes of the contested measures and their scope. That judgment concerns in general a very large capital injection for an airline in order to ensure its viability overall in the air

transport sector, while the present case relates exclusively to the activity of competitor airlines in a specific airport. Consequently, the fact that admissibility was implicitly accepted in relation to the structural aid in the case that gave rise to that judgment, which dates from 1998, does not preclude a different assessment of the substantial effect on the applicant's competitive position on the relevant market by the passenger charges specific to Terminal mp2 and the AMS agreement.

79 That conclusion cannot be called into question by the applicant's argument that, in the event that the present action were to be declared inadmissible, the Court would apply a different standard of admissibility in both cases, which would undermine the right to an effective remedy, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

80 It suffices to note that, in accordance with the case-law, the conditions governing admissibility of an action for annulment cannot be set aside on the basis of the applicant's interpretation of the right to effective judicial protection. In relation specifically to the subject matter of these proceedings, it has been held that an individual who is not directly and individually concerned by a Commission decision relating to State aid and whose interests consequently could not be affected by the State measure covered by that decision cannot invoke the right to judicial protection in relation to that decision (judgment of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraphs 64 and 65). However, it follows from the information set out above that it is precisely one of those two conditions which is not satisfied in the present case, since the applicant has not established that it was individually concerned by the contested decision. In view of the fact that the present case and the case giving rise to the judgment of 25 June 1998, *British Airways and Others* v *Commission* (T-371/94 and T-394/94, EU:T:1998:140) do not relate to identical or even similar measures, the applicant is not justified in claiming that dismissal of the present action as inadmissible would adversely affect its right to effective judicial protection.

81 It follows from all the foregoing that the applicant has failed to show that it was individually affected vis-à-vis Ryanair's other competitors on the relevant market both concerning passenger charges specific to Terminal mp2 and the AMS agreement.

82 In those circumstances, the present action must be dismissed as inadmissible.

Costs

83 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

84 Moreover, under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in Article 138(1) and (2) to bear its own costs. In the present case, the interveners, which intervened in support of the Commission, must bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders Société Air France to bear its own costs and those incurred by the European Commission;**

3. **Orders Ryanair DAC and Airport Marketing Services Ltd and Aéroport Marseille Provence SA to bear their own costs.**

Berardis Papasavvas Spielmann

Csehi Spineanu-Matei

Delivered in open court in Luxembourg on 11 July 2019.

E. Artemiou
Registrar

G. Berardis
President

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