Reports of Cases

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

13 May 2020*

(State aid — Aviation sector — Aid granted by Italy in favour of Sardinian airports — Decision declaring the aid partly compatible and partly incompatible with the internal market — Imputability to the State — Beneficiaries — Advantage for co-contracting airlines — Market economy operator principle — Effect on trade between Member States — Adverse effect on competition — Recovery — Legitimate expectations — Obligation to state reasons)

In Case T-8/18,

easyJet Airline Co. Ltd, established in Luton (United Kingdom), represented by P. Willis, Solicitor, and J. Rivas Andrés, lawyer,

applicant,

v

European Commission, represented by L. Armati and S. Noë, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA 33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1),

THE GENERAL COURT (First Chamber, Extended Composition),

composed of S. Papasavvas, President, J. Svenningsen (Rapporteur), V. Valančius, Z. Csehi and P. Nihoul, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 2 October 2019,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

A. The measures at issue

1 The island of Sardinia (Italy) has five airports, including Alghero, Cagliari-Elmas and Olbia airports.

2 Alghero airport is operated by So.Ge.A.AL SpA ('SOGEAAL'), whose capital was entirely subscribed by local public bodies and the majority of whose shares is held by the Regione autonoma della Sardegna (Autonomous Region of Sardinia, Italy; 'the Autonomous Region'), including indirectly through Società Finanziaria Industriale Regione Sardegna (SFIRS). Cagliari-Elmas airport for its part is operated by So.G.Aer SpA ('SOGAER'), a company the majority of whose shares is owned by the chamber of commerce of Cagliari, while Olbia airport is operated by GEASAR SpA ('GEASAR'), a company registered in Olbia, the majority of whose shares is owned by a private company, Meridiana SpA.

1. The provisions adopted by the Autonomous Region

(a) Article 3 of Law No 10/2010

3 On 13 April 2010, the Autonomous Region adopted legge regionale n. 10 — Misure per lo sviluppo del trasporto aereo (Regional Law No 10 — Measures for the development of air transport) (*Bollettino ufficiale della Regione Autonoma della Sardegna* No 12, of 16 April 2010) ('Law No 10/2010').

4 Article 3 of Law No 10/2010, entitled 'Incentives to seasonal adjustments of the island's air routes' (Incentivi alla destagionalizzazione dei collegamenti aerei isolani), reads as follows:

'1. Expenditure of [EUR] 19 700 000 for the year 2010 and of [EUR] 24 500 000 for each of the years 2011 to 2013 shall be authorised to finance the island's airports with a view to strengthening and developing air transport as a service of general economic interest, including seasonal adjustments of air routes, in accordance with Communication from the Commission 2005/C 312/01 — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports.

2. The criteria, nature and duration of the transport offer, together with the guidelines for the drafting of plans of activities by the airport management companies, which must take into account the measures relating to territorial continuity referred to in Article 2, shall be defined by decision of the Regional Executive to be adopted on the proposal of the Member of the Regional Executive responsible for transport, in agreement with the Members of the Regional Executive responsible for planning, the budget, credit and regional development, tourism, handicrafts and trade, agriculture and agricultural and livestock reform, cultural heritage, information, recreation and sport.

3. The decision referred to in paragraph 2 and the plans of activities, including those already defined by the airport management companies on the date of entry into force of the present Law, together with the corresponding measures and contracts, shall be financed if they are drawn up in accordance with the criteria, nature and duration of the transport offer and with the guidelines referred to in paragraph 2 and shall first be submitted for a binding opinion to the competent committee.'

(b) The measures implementing Law No 10/2010

5 In accordance with Article 3(2) of Law No 10/2010, the Executive of the Autonomous Region adopted several acts implementing the measures provided for in Article 3 of that law ('the implementing measures'), in particular deliberazione della Giunta regionale n. 29/36 (Regional Council Decision No 29/36), of 29 July 2010 ('Regional Decision No 29/36'), deliberazione della Giunta regionale n. 43/37 (Regional Council Decision No 43/37), of 6 December 2010 ('Regional Decision No 43/37'), and deliberazione della Giunta regionale n. 52/117 (Regional Council Decision No 52/117), of 23 December 2011 ('Regional Decision No 52/117') (together with Article 3 of Law No 10/2010, 'the measures at issue').

6 Those implementing measures define, in essence, three types of 'activities' for which airport operators could receive compensation from the Autonomous Region for the years 2010 to 2013, namely:

– increase of air traffic by airlines ('activity 1');

– promotion of the island of Sardinia as a touristic destination by airlines ('activity 2');

– further promotional activities entrusted by airport operators to third service providers other than airlines on behalf of the Autonomous Region, ('activity 3').

7 Regional Decision No 29/36, on the one hand, specified that, in the implementation of Article 3 of Law No 10/2010, the objective of reducing the seasonality of air routes involved increasing the frequency of flights during the mid-season and the winter season and opening up new air routes. On the other hand, that decision stated that the ultimate objective pursued by the measures provided for in Article 3 of Law No 10/2010 for the promotion of a regional air transport policy was the strengthening of economic, social and territorial cohesion, as well as the development of the local economies, tourism and culture of the island of Sardinia.

8 In that regard, Regional Decision No 29/36 defined the criteria, nature and duration of the transport services for which compensation could be provided during the period 2010-2013 as well as guidelines for the development and evaluation of the 'plans of activities' drawn up by the airport operators.

9 Specifically, in order to receive financing provided for by Law No 10/2010, an airport operator had to submit for approval to the Autonomous Region a detailed plan of activities. That plan had to identify which of the activities, of those numbered 1 to 3, the airport operator intended to implement in order to attain the objectives of Law No 10/2010. That plan was to be achieved through specific agreements between the airport operator and airlines.

10 Where an airport operator wished to receive financing for activity 1, the plan of activities which it submitted to the Autonomous Region had to identify the 'routes of strategic interest' (domestic and international) and define the targets per year concerning flight frequency, new routes and number of passengers.

11 According to the Italian authorities, the operation of those routes of strategic interest thus constituted the service of general economic interest which the airlines provided in exchange for compensation.

12 A plan of activity implementing activity 2 had to define specific marketing and advertising activities aimed at increasing the number of passengers and at promoting the catchment area of the airport.

13 Regional Decision No 29/36 provided that the plans of activities had to be backed up by forecasts of the prospects for the profitability of the activities they identified.

14 According to Regional Decision No 29/36, the plans of activities had to respect certain principles:

– the routes of strategic interest established by the plans could not overlap with routes already operated under a public service obligation;

– the financing for each of the subsidised routes had to decrease over time;

– the financial agreement concluded with the airlines was to include a plan for promotion of the territory.

15 If the Autonomous Region noticed inconsistencies between, on the one hand, the plans of activities submitted by the airport operators and, on the other hand, the provisions of Law No 10/2010 and its implementing measures, it could require that changes be made to those plans of activities.

16 After having approved the various plans of activities submitted to it by the airport operators, the Autonomous Region distributed among the airport operators the financial resources available for each of the years 2010 to 2013.

17 The amount of that compensation was calculated on the basis of the difference between, on the one hand, the estimated costs borne by airlines for flying the strategic routes and meeting stated annual passenger targets and, on the other hand, the actual or presumed revenues from the sale of passenger tickets.

18 Where the total compensation requested by the airport operators exceeded the amount provided for by Law No 10/2010, Regional Decision No 29/36 laid down preferential award criteria.

19 Finally, the implementing measures provided that airport operators were to monitor the performance of airlines. In particular, they required that the specific agreements concluded between airport operators and airlines provide for the imposition of penalties on airlines for non-fulfilment of the pre-defined targets, inter alia in terms of frequency of flights and number of passengers.

2. Implementation of the measures at issue

20 The applicant, easyJet Airline Co. Ltd, is a licensed airline registered in England and Wales (United Kingdom) which operates a network of short-haul routes to and from airports within the European Union, including Alghero, Cagliari-Elmas and Olbia airports.

(a) Implementation of Law No 10/2010 with regard to Olbia airport

21 The operator of Olbia airport published on its website a call for expressions of interest with a view to concluding marketing and advertising contracts.

22 In response to that call for expressions of interest, the applicant submitted a business plan for the development of air routes to and from Olbia and a marketing and advertising programme. The airline invited GEASAR to participate in the investment required to implement the marketing and advertising programme.

23 GEASAR examined the applicant's business plan and prepared its own business plan, which indicated that participation in the investment as proposed by the applicant would be profitable for the airport operator.

24 GEASAR submitted to the Autonomous Region plans of activities for 2010 and for the three-year period 2011-2013, together with corresponding funding applications. The Autonomous Region approved those plans of activities and determined the amounts that had to be granted to GEASAR for 2010 and for the 2011-2013 period by Regional Decisions No 43/37 and No 52/117.

25 GEASAR and the applicant then concluded three contracts under which the applicant undertook, for remuneration, on the one hand, to maintain or provide point-to-point connections between Olbia and the European airports of Bristol (United Kingdom), Basle (Switzerland), Geneva (Switzerland), London Gatwick (United Kingdom), Milan Malpensa (Italy), Berlin-Schönefeld (Germany), Lyon (France), Paris-Orly (France) and Madrid-Barajas (Spain) and to achieve passenger targets and, on the other hand, to implement a marketing and advertising programme to promote the island of Sardinia.

26 The first of those contracts was signed on 17 March 2011 and covered the period between 28 March 2010 and 27 March 2011. The second of those contracts was signed on 25 January 2012 and covered the period from 27 March 2011 to 30 March 2013. A last contract with GEASAR was signed on 1 March 2013 and covered the period from 27 March 2013 to 30 March 2014.

(b) Implementation of Law No 10/2010 with regard to Cagliari-Elmas airport

27 SOGAER, the operator of Cagliari-Elmas airport, published on its website a notice inviting airlines to submit to it business plans for air routes to and from that airport and for the conclusion of marketing contracts to promote the island of Sardinia.

28 The applicant submitted to SOGAER a three-year business plan for the development of air routes to and from Cagliari and a marketing and advertising programme. An economic impact study, drafted by an external consultant, concluded, in support of that plan, that an investment in marketing activities, as envisaged in that plan, would be profitable for the applicant. That study also considered that that investment would develop the economy of the island of Sardinia and would be profitable for SOGAER.

29 SOGAER submitted to the Autonomous Region plans of activities for 2010 and for the three-year period 2011-2013, together with corresponding funding applications. Those plans were approved and the amounts allocated to SOGAER for 2010 and for the period 2011-2013 were determined by Regional Decisions No 43/37 and No 52/117, respectively.

30 The applicant and SOGAER concluded a contract, numbered 25/2011, covering the period from 29 March 2010 to 28 March 2013 (‘contract No 25/2011’). The applicant undertook, first, to maintain or provide point-to-point flights between Cagliari-Elmas and London-Stansted (United Kingdom), Geneva, Basle and Berlin-Schönefeld and to achieve passenger targets, and, secondly, to provide marketing and advertising activities. Those services corresponded to activities 1 and 2.

31 Article 5 of that agreement specified that that contract was subject to the maintenance and renewal of the financing of SOGAER by the Autonomous Region.

(c) Implementation of Law No 10/2010 with regard to Alghero airport

32 With regard to Alghero airport, contracts concluded between SOGEAAL and Ryanair Ltd — already in 2003 and since extended — were the subject of a complaint lodged by an Italian airline. This led to the opening by the European Commission, on 12 September 2007, of the formal investigation procedure provided for in Article 108(2) TFEU in relation to alleged State aid granted to and by Alghero airport in favour of Ryanair and other air carriers (OJ 2008 C 12, p. 7). On 27 June 2012, that procedure was extended to include further measures taken by Italy which were not the subject of the original complaint (OJ 2013 C 40, p. 15), such as ‘all measures granted to Ryanair and its subsidiary AMS, as

well as to the other airlines using the airport from 2000 … in particular … includ[ing] grants of financial contributions granted directly from SOGEAAL or transited through it by means of several airport services agreement[s] and marketing services agreements entered upon with Ryanair and other air carriers as from 2000'.

33 That procedure led to the adoption by the Commission of Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL SpA. and various air carriers operating at Alghero airport (OJ 2015 L 250, p. 38; 'the Alghero decision'), in which the Commission inter alia found, applying the market economy operator principle, that the measures implemented by the Autonomous Region — in particular the contracts that SOGEAAL, which is controlled by the Autonomous Region, concluded with certain airlines — and relating to the promotion or start-up of new air routes to and from Alghero airport and to marketing and advertising activities did not constitute aid within the meaning of Article 107(1) TFEU.

34 For the period from 2010 to 2013, however, the applicant did not conclude any contract with SOGEAAL covered by the aid scheme established by Law No 10/2010.

B. The contested decision

35 On 30 November 2011, the Italian Republic, in accordance with Article 108(3) TFEU, notified the Commission of Law No 10/2010, which was examined in accordance with Chapter III of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

36 By letter dated 23 January 2013, the Commission informed the Italian Republic of its decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU ('the opening decision') concerning the notified scheme ('the aid scheme at issue'). By the publication of that decision in the *Official Journal of the European Union* on 30 May 2013 (OJ 2013 C 152, p. 30), the Commission invited interested parties to submit their comments on the purported aid scheme.

37 The Italian authorities and interested parties, including the applicant and the operators of Alghero, Cagliari-Elmas and Olbia airports, submitted written comments. The Commission forwarded the comments of the interested parties to the Italian authorities, which were able to submit their comments thereon.

38 By letters dated 24 February 2014, the Commission informed interested parties of the adoption, on 20 February 2014, of a Commission communication entitled 'Guidelines on State aid to airports and airlines' (OJ 2014 C 99, p. 3; 'the 2014 Guidelines'), and of the fact that those guidelines would become applicable to the case at hand from the moment of their publication in the Official Journal. On 15 April 2014, a notice was published in the Official Journal inviting Member States and interested parties to submit comments on the application of the 2014 Guidelines to this case within one month of their publication date (OJ 2014 C 113, p. 30). On 4 July 2014, the applicant submitted its comments.

39 On 25 March 2015, the Commission requested that the applicant submit certain documents to it. On 31 March 2015, the applicant sent those documents to the Commission and at the same time submitted additional comments.

40 On 1 and 14 May 2015, the applicant and a consulting firm acting on its behalf sent further additional comments to the Commission.

41 Following a meeting with the Commission services, the applicant provided further comments on 1 June 2015. Invited to make any submissions in that regard, the Italian authorities submitted comments to the Commission on 17 September 2015.

42 On 29 July 2016, the Commission adopted Decision (EU) 2017/1861 on State aid SA 33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1; 'the contested decision'), the operative part of which reads as follows:

'Article 1

1. The scheme that Italy established by … Law [No 10/2010] does not involve State aid within the meaning of Article 107(1) [TFEU] in favour of SOGEAAL …, SOGAER … and GEASAR …

2. The scheme that Italy established by Law No 10/2010 constitutes State aid within the meaning of Article 107(1) of the Treaty in favour of Ryanair/AMS, [the applicant], Air Berlin, Meridiana, Alitalia, Air Italy, Volotea, Wizzair, Norwegian, JET2.COM, Niki, Tourparade, Germanwings, Air Baltic and Vueling, in so far as it relates to the operations of those airlines at Cagliari-Elmas airport and Olbia airport.

3. The State aid referred to in paragraph 2 has been put into effect by Italy in breach of Article 108(3) [TFEU].

4. The State aid referred to in paragraph 2 is incompatible with the internal market.

Article 2

1. Italy shall recover the State aid referred to in Article 1(2) from the beneficiaries.

2. Taking into account that Ryanair and AMS constitute a single economic unit for the purpose of the present decision they shall be jointly liable for repayment of the State aid received by either of them.

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

…

5. Italy shall cancel all outstanding payments of the aid referred to in Article 1(2) with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(2) shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within 4 months following the date of its notification of this Decision.

Article 4

1. Within 2 months following notification of this Decision, Italy shall submit the following information:

– the list of beneficiaries that have received aid under the scheme referred to in Article 1(2) and the total amount of aid received by each of them under the scheme,

– the total amount (principal and recovery interests) to be recovered from each beneficiary,

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

– documents demonstrating that the beneficiaries have been ordered to repay the aid.

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

Article 5

This Decision is addressed to the Italian Republic.'

43 With regard to the scope of the contested decision, the Commission stated, in recitals 344 to 346 of that decision, that the decision should not cover the aid measures already subject to the separate investigation referred to in paragraph 32 above. While not all of the payments by SOGEAAL for activities corresponding to areas of activities 1 and 2 provided for under Law No 10/2010 by the implementing measures had been made under contracts examined in the separate investigation relating exclusively to Alghero airport, the Commission considered that the large majority of those payments had been assessed in that other case. Moreover, the Commission pointed out that 'it [was] not straightforward in all cases to make a clear distinction given that the financial relationship between SOGEAAL and a given airline in the relevant period [could] be governed by various contracts only some of which [were] considered in [that other case]'. The Commission therefore considered that it was appropriate to exclude from the scope of the contested decision all agreements with airlines concluded by SOGEAAL under the aid scheme at issue or, in other words, the element of the measures at issue relating to Alghero airport.

44 Finally, the Commission considered in the contested decision that the procedure initiated in the present case did not relate to possible aid granted by the airport operators to service providers other than airlines and corresponding to activity 3. Thus, in recital 346 of the contested decision, it considered that it could not take a view on that issue.

45 On 1 August 2016, the Italian authorities sent the applicant a non-confidential version of the contested decision, inviting the applicant to indicate which data ought to be omitted from the version to be published in the *Official Journal*, that publication taking place on 18 October 2017.

II. Procedure and forms of order sought by the parties

46 By application lodged at the Court Registry on 11 January 2018, the applicant brought the present action.

47 Following a double exchange of pleadings and on a proposal by the Judge-Rapporteur, the Court decided to open the oral stage of the procedure. In view of that, the applicant and the Commission were requested to provide documents and to respond in writing to questions made by the Court by way of measures of organisation of procedure and to take a position on the possibility of joining the present case with the case *Volotea* v *Commission* (T-607/17), a joinder with which the Court ultimately decided not to proceed for issues relating to the confidentiality of certain information. They complied with those requests within the periods prescribed.

48 On 19 June 2019, the Court, during its plenum, decided, on a proposal from the First Chamber and the Vice-President, pursuant to Article 28 of its Rules of Procedure, to refer the case to the First Chamber sitting in extended composition of five judges.

49 The parties presented oral argument and answered questions put by the Court at the hearing on 2 October 2019, at the end of which the oral part of the procedure was closed.

50 By order of 7 November 2019, the Court decided to reopen the oral part of the procedure. On 12 November 2019, it requested the Commission to provide certain documents, which it did within the period prescribed. The applicant then had the opportunity to submit its comments on those documents on 20 December 2019, whereby it however noted that those documents had not been submitted in the language of the case, but in Italian. Invited to indicate to the Court whether it was intending, by those comments, to request the Court to order the Commission to submit those documents in the language of the case in accordance with Article 46 of the Rules of Procedure, the applicant however responded, on 29 January 2020, that it was not seeking such a rectification. In those circumstances, the Court, on 4 February 2020, closed the oral part of the procedure.

51 In response to a request from the Commission to be able to submit comments on those of the applicant of 20 December 2019, the Court, by order of 25 February 2020, decided to reopen the oral part of the procedure and, following the Commission's lodging of those comments within the period prescribed, the oral part of the procedure was, once again, closed.

52 The applicant claims that the Court should:

– annul the contested decision in its entirety and, in any event, as far as the purportedly unlawful State aid paid to the applicant is concerned;

– order the Commission to pay the costs.

53 The Commission claims that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

III. Law

A. Admissibility

54 In its defence, the Commission pleads that the action is inadmissible in so far as it seeks the annulment, first, of Article 1(1) of the contested decision and, second, of Article 1(2) of that decision, in that that latter provision concerns airlines other than the applicant.

55 While accepting that the applicant is entitled to bring an action for annulment of the contested decision in so far as it concerns the applicant and, on that basis, to challenge the various passages of the decision supporting the disputed operative part, in particular those relating to Article 1(2) of that decision, such as those in Section 7.2.1, the Commission nevertheless disputes the possibility for the applicant to have that decision annulled in its entirety. In its view, the applicant has not explained the reasons why it wishes to have that decision annulled for the benefit of other entities, such as competing airlines.

56 Moreover, according to the Commission, the applicant cannot directly bring proceedings for annulment against the finding, in Article 1(1) of the contested decision, that the airports had not received State aid. That finding is supported by the considerations set out in Section 7.2.2 of the contested decision, which are not of direct and individual concern to the applicant as an airline.

57 The applicant, relying in particular on paragraph 31 of the judgment of 17 September 1992, *NBV and NVB* v *Commission* (T-138/89, EU:T:1992:95), is of the view that it is entitled to challenge, in addition to the operative part, the grounds constituting the necessary support for that part. In the present case, it is clear that the finding of the existence of aid at the level of the airlines, such as the applicant, regarded as the actual beneficiaries of the aid scheme at issue, depended on the inseparable finding of the absence of aid elements at the level of the airport operators, which were described by the Commission as mere 'intermediaries' which passed on the financial benefits distributed by the Autonomous Region. Thus, the applicant is entitled to challenge that latter finding in order to show that it was not the actual beneficiary of those measures and that, consequently, the Commission was not justified in requiring it to reimburse the Autonomous Region.

58 In addition, the applicant maintains that it may seek the annulment of the contested decision in its entirety, thus including passages in which it is not designated by name, recalling that, in any event, it has put forward a claim, in the alternative, for annulment of that decision to the extent that it alone was concerned.

59 In that regard, it must be recalled that, under the terms of the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

60 Since the contested decision is addressed solely to the Italian Republic, it should be recalled that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it 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. 107, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 41).

61 In the field of State aid, the Court of Justice has stated that an undertaking cannot, as a general rule, contest a decision of the Commission which prohibits a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraph 33 and the case-law cited, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 43).

62 However, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (see judgment of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 71 and the case-law cited; judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 44).

63 Thus, the actual recipients of individual aid granted under an aid scheme of which the Commission has ordered the recovery are, accordingly, individually concerned within the meaning of the fourth paragraph of Article 263 TFEU (judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 53, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 45; see also, to that effect, judgment of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraphs 34 and 35).

64 In addition to the undertakings in receipt of aid, competing undertakings have been recognised as individually concerned by a Commission decision terminating the procedure opened on the basis of Article 108(2) TFEU where they have played an active role in that procedure, provided that their position on the market was substantially affected by the aid which is the subject of the decision at issue (judgments of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 25; of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 55; and of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 98).

65 In the case at hand, the operative part of the contested decision refers both to the Italian Republic and to the airport operators and airlines. Since the claims for annulment are directed both against that decision in its entirety and to the extent that it concerns the applicant, it is appropriate to determine the extent to which the applicant may bring an action for annulment against that decision.

66 In that regard, the applicant is referred to, in Article 1(2) of the contested decision, as a beneficiary of the aid scheme at issue. In addition, pursuant to Article 2 of that decision, it is required to repay the Italian authorities the amounts it received under the aid scheme at issue.

67 In those circumstances, the action, to the extent that it seeks the annulment of those two provisions in respect of the applicant, is admissible in the light of the fourth paragraph of Article 263 TFEU and, in that action, the applicant may raise, in support of its claim for annulment of those two provisions, any plea such as to demonstrate that it was not the beneficiary of the aid scheme at issue, including, in that context, arguments seeking to demonstrate that the airport operators were the actual beneficiaries of the aid scheme at issue and not airlines, such as the applicant.

68 In that action, however, the Court has before it only aspects of the decision concerning the applicant. Those aspects concerning persons other than the addressee therefore do not form part of the matter to be tried by the judicature (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 53). Thus, in the present action, the Court can rule on the legality of Article 1(2) and Article 2 of the contested decision only to the extent that those provisions concern the applicant. Accordingly, to the extent that they seek the annulment of those provisions as regards other airlines referred to in those provisions, the claims for annulment are inadmissible on the ground of the applicant's lack of standing.

69 Moreover, contrary to what the applicant claims, it cannot bring an action for annulment directly against Article 1(1) of the contested decision. That provision concerns only the airport operators, in respect of which the Commission considered the aid scheme at issue not to constitute State aid. Given that, as an airline, the applicant is not competing with those airport operators, it does not have standing to bring an action for annulment against Article 1(1) of the contested decision.

70 In those circumstances, the claims for annulment must be declared admissible only in so far as they seek annulment of the contested decision to the extent that it concerns the applicant and, for the remainder, be rejected as inadmissible.

B. The claims for annulment

71 In support of the action, the applicant puts forward six pleas for the annulment of the contested decision, alleging:

– first, a manifest error of assessment as regards the classification of the payments by airport operators to the applicant as 'State resources', the grant of which was imputable to the Italian State;

– second, a manifest error of assessment as regards the receipt of an advantage by the airlines;

– third, a manifest error of assessment as regards whether the measures at issue distort or threaten to distort competition and affect trade between Member States;

– fourth, a manifest error of assessment as regards the absence of possibility of declaring the measures at issue compatible with the internal market under Article 107(3) TFEU;

– fifth, infringement of the principle of legitimate expectations as regards the order to recover the aid from the applicant;

– sixth, insufficient reasoning and contradictory reasoning in the contested decision.

1. First plea in law: manifest error of assessment as regards the classification of the payments by airport operators to the applicant as State resources, the grant of which was imputable to the Italian State

72 In the first plea, the applicant disputes the Commission's analysis — contained, in its view, in recitals 355 to 361 of the contested decision — that (i) the Autonomous Region had control over the airport operators, meaning that the decisions of SOGAER and GEASAR to grant funds to the airlines mobilised State resources and were imputable to the Italian State, and that (ii) the airport operators acted as intermediaries of the Autonomous Region, in the sense that their behaviour was determined by Law No 10/2010 and the plans of activities approved by the Autonomous Region, meaning that their decisions to grant contractually the funds in question to the airlines were ultimately imputable to the Italian State.

73 The Commission contends that the plea should be rejected as unfounded.

74 It is appropriate to examine the two parts comprising the first plea in succession.

(a) First part of the first plea: existence of control by the Autonomous Region over the airport operators

75 Referring to recitals 55 and 58 of the contested decision, the applicant first claims, in the application, that, to the extent that the Commission's finding that the funds that were paid to the applicant by the operators of Cagliari-Elmas and Olbia airports were State aid on the ground that the two airports concerned were under the control of the Italian State, in this instance the Autonomous Region, that finding is incorrect and affects the legality of the contested decision. Those operators cannot, in its view, be regarded as public undertakings. Thus, their decisions, inter alia to conclude contracts with the applicant, are not imputable to the Italian State in the same way that their financial resources used to remunerate the applicant cannot be regarded as State resources.

76 The Commission contends that that part of the plea should be rejected, stating that, contrary to what the applicant claims, it did not rely in the contested decision on the fact that the airport operators were owned by the State to conclude that the payments made by the airport operators to co-contracting airlines mobilised State resources and were imputable to the Italian State. Thus, the applicant is mistaken as to the content of recitals 52 to 58 of the contested decision and as to the fact that, in the part of the contested decision addressing that matter, namely Section 7.2.1.2 thereof, the Commission drew that conclusion solely from the finding that those operators were implementing the aid scheme at issue drawn up by the Autonomous Region. In reality, the question of whether or not the airport operators were owned by the public authority played no part in that assessment, especially since the aid scheme was established without distinction for the benefit of all Sardinian airports, regardless of whether the shares in their respective capital structures were held by public or private operators.

77 In that regard, it should be recalled that, under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, declared incompatible with the internal market. Thus, categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 17 and the case-law cited).

78 As regards the first condition requiring intervention by the State or through State resources for advantages to be capable of being categorised as State aid within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State (see judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24 and the case-law cited, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited), those two subconditions being cumulative (see, to that effect, judgments of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraphs 48 and 63 and the case-law cited, and of 5 April 2006, *Deutsche Bahn* v *Commission*, T-351/02, EU:T:2006:104, paragraph 103 and the case-law cited).

79 In the case at hand, the Commission indeed found, in recital 52 of the contested decision, that the operators of Alghero, Cagliari-Elmas and Olbia airports were limited liability companies; that the former two were publicly held and that the latter was controlled by an air carrier.

80 However, it has to be stated that, contrary to what the applicant maintains, the Commission did not rely, in the contested decision, on one of those elements relating to the capital structure, public or private, of the operators of Cagliari-Elmas and Olbia airports to impute to the Autonomous Region the funds received by the applicant from those operators in the light of the conditions, laid down in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), according to which funds granted by a public undertaking, coming in principle under the term 'State resources', may be imputable to the State.

81 In the relevant section of the contested decision, more specifically in recitals 355 to 361 under the heading '7.2.1.2 State resources and imputability to the State', the Commission, in order to arrive at the conclusion that the funds received by the airlines came from Italian State resources, in this case the Autonomous Region, and were attributable to the Autonomous Region, relied primarily on the description of the mechanism established by that autonomous region, a mechanism by which that State entity provided financing to the airport operators which requested that financing, on the condition that they submit to it for approval plans of activities in which those operators had to set out in detail the manner in which they intended to use those funds, inter alia to remunerate co-contracting airlines.

82 In those conditions, in so far as it is based on an erroneous premiss, namely that the Commission imputed to the Italian State the funds received by the applicant from the operators of Cagliari-Elmas and Olbia airports by relying on the fact that those operators were owned by the public authorities, the first part of the first plea can only be rejected as unfounded.

83 In the reply, the applicant nevertheless claims that, even if the Commission had not imputed the aid at issue to the Italian State based on the fact that Cagliari-Elmas and Olbia airports were controlled by the State, the contested decision is marred by an inconsistency, since, although they were covered by the aid scheme at issue established by Law No 10/2010, the aid given to the operator of Alghero airport was treated differently on the ground that it was owned by the Autonomous Region. In particular, the applicant criticises the Commission for the fact that, in the decision concerning Alghero airport, it did not examine whether the operator of that airport had acted in that situation as an intermediary of the Autonomous Region.

84 In that regard, when asked to respond in writing to a question of the Court on that point, the Commission explained that the large majority of payments made by the operator of Alghero airport under the aid scheme at issue concerned agreements concluded with airlines before the adoption of that scheme and which had already been assessed in the Alghero decision. In its response, it also noted, referring to recital 345 of the contested decision, that, owing to the difficulty in distinguishing financial movements under agreements prior to the aid scheme at issue from those actually made under that scheme, it had decided to exclude from the scope of the contested decision all agreements concluded between the operator of Alghero airport and the airlines operating from that airport.

85 Thus, it is apparent that, in the contested decision, the Commission did not formally examine the payments made by the operator of Alghero airport to the co-contracting airlines out of the funds which had been granted to that operator by the Autonomous Region under the aid scheme at issue. Moreover, in the Alghero decision, the Commission did indeed examine the payments made by that airport operator, owned by the Autonomous Region, in the light of the private investor test. However, those payments were for the most part linked to contracts concluded before the Autonomous Region adopted the aid scheme in question, which provided for a mechanism for that region to monitor the funds it granted to the airport operators.

86 It follows that the line of argument of the applicant relating to an alleged inconsistent approach on the part of the Commission must be rejected.

87 In any event, the applicant cannot, by its line of argument, indirectly call into question the legality of the Alghero decision on the ground that the Commission allegedly failed, in that decision, to examine the payments made to the co-contracting airlines by the operator of Alghero airport out of the funds that had been allocated to it by the Autonomous Region under the aid scheme at issue. Irrespective of the matter of the applicant's standing to bring proceedings against that decision in its capacity as airline, it must be held that, in the absence of an action brought under Article 263 TFEU within the periods prescribed, the Alghero decision has become final.

88 Moreover, regarding the legality of the contested decision to the extent that it fails to examine the payments made, out of the funds provided under the aid scheme at issue, by the operator of Alghero airport to the airlines with which it had concluded commercial contracts, it must be held that the applicant, as an airline, is active on the air transport market and not on that of airport services and infrastructure. In those conditions, not being in competition with the operator of Alghero airport, the applicant does not have standing to bring proceedings against this part of the contested decision.

89 Finally, and for the sake of completeness, the reasons why the Commission made a different assessment of the situation at issue in an earlier decision, in this case in the Alghero decision, cannot, in any event, affect the legality of the contested decision (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 95, and of 16 January 2018, *EDF* v *Commission*, T-747/15, EU:T:2018:6, paragraph 238).

90 In the light of all the foregoing considerations, the first part of the first plea must be rejected.

(b) Second part of the first plea: role of airport operators as intermediaries

91 In the second part of the first plea, the applicant disputes both (i) the State origin of the money used by the airport operators to remunerate it under the contracts that those operators had concluded with it, and (ii) the imputability to the Autonomous Region of the payments made by the airport operators in performance of the contracts relating to air traffic targets and provision of marketing services that they had concluded with airlines such as the applicant.

92 So far as concerns the State origin of the funds at issue, it should be recalled that intervention by the State or through State resources need not necessarily be a measure adopted by the central power of the State concerned. It can equally be effected by an authority situated below the national level, such as the Autonomous Region. Indeed, a measure adopted by a regional authority and not the central power is likely to constitute State aid if the conditions laid down by Article 107(1) TFEU are satisfied (judgments of 14 October 1987, *Germany* v *Commission*, 248/84, EU:C:1987:437, paragraph 17, and of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 55). In other words, measures adopted by infra-State entities (decentralised, federated, regional or other) of the Member States, whatever their status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 107(1) TFEU, if the conditions of that provision are satisfied (see judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission*, T-92/00 and T-103/00, EU:T:2002:61, paragraph 57, and of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 108).

93 In the present case, in relation to the aid scheme at issue, it is not disputed that the Autonomous Region made funds available to the airport operators over a number of years in order that they take steps to promote Sardinia as a touristic destination, which involved both meeting targets for the island's air services to and from its various airports and providing marketing services. The applicant does not dispute that those funds, originating from the Autonomous Region and paid first to the airport operators, are State resources or that the decision to grant such funds to those airport operators was imputable to the Italian State. The question arises, however, as to whether, as the applicant submits, the amounts it received from those airport operators in performance of the contracts it had concluded with them were or remained 'State resources' and were imputable to the Italian State for the purposes of Article 107(1) TFEU.

(1) Mobilisation of State resources

94 In that respect, it is clear both from the mechanism put in place by the Autonomous Region by means of the aid scheme at issue and from its implementation in practice that the funds transferred by that region to the airport operators were those used by the airport operators to remunerate co-contracting companies.

95 First, it must be noted that the aid scheme at issue provided for a sort of clearance mechanism. In particular, Regional Decision No 29/36 prescribed that selected airport operators were to receive an advance of 20% on the funds due for the reference year, followed by a second tranche payment of 60% which was staged and conditional on presenting quarterly reports, and, finally, a last tranche of

20% on presentation of documents enabling the Autonomous Region to verify that the activity had been implemented correctly, that targets had been met and that the costs incurred were genuine. That verification mechanism was therefore intended to prevent each airport operator from obtaining reimbursement of amounts other than those incurred by it to remunerate the co-contracting airlines, such as the applicant, and which are subject to the recovery obligation laid down in Article 2 of the contested decision. The existence of that mechanism also confirms that those airlines' services were financed by that region, since the amounts advanced by the airport operators in remuneration of the co-contracting airlines corresponded to the funds they received at the end of the process from the Autonomous Region.

96 Second, as is apparent from recitals 242 to 246 and 313, 314 and 317 of the contested decision, setting out the comments they had submitted in the context of the administrative procedure before the Commission, the operators of Olbia and Cagliara-Elmas airports themselves explained that they had, in fact, advanced the amounts corresponding to the payment of the co-contracting airlines providing the services requested by the Autonomous Region to promote tourism in Sardinia and that they had, next, presented the Autonomous Region with their accounting reports setting out the costs actually incurred in order to obtain reimbursement by that region. In that context, the operator of Cagliari-Elmas airport even claimed that the Autonomous Region had required it to demonstrate that the airlines providing the services had received the regional contributions in full and that it was therefore merely an intermediary which had passed on to them the amounts received from the Autonomous Region. In addition, the Italian Republic itself claimed, as is apparent from recital 340 of the contested decision, that the operator of Olbia airport had transferred to the applicant the full amount of the contributions which that operator had received from the Autonomous Region.

97 It is therefore clear that the funds used by the airport operators to remunerate the applicant under the contracts those operators had concluded with the applicant originated from the Autonomous Region's budget and thus constituted State resources within the meaning of Article 107(1) TFEU. Moreover, if, in certain cases, they had to bear cash advance costs, including via SFIRS, on the amounts subsequently reimbursed by the Autonomous Region, that in no way detracts from the fact that, according to their own statements and in accordance with what was prescribed by the aid scheme at issue, the airport operators used the entirety of the funds that had been granted to them by that autonomous region to remunerate the co-contracting airlines, such as the applicant, which are exclusively subject to the repayment obligation laid down in Article 2 of the contested decision.

98 It is therefore appropriate to reject the line of argument of the applicant according to which, once the funds were transferred from the Autonomous Region to the airport operators, it was not certain that they would be used to remunerate it. Similarly, the circumstance, alleged by the applicant, that the arrangements for transferring the funds received by the airport operators to airlines were not mentioned in Law No 10/2010 is irrelevant, given that the system established by the aid scheme at issue consisted in financing the activities undertaken by the airport operators by means of contracts concluded with airlines, which was ultimately borne out in the facts and amounted to transferring funds to those airlines via the airport operators.

99 Apart from the statements of the Italian Government and of the airport operators themselves during the administrative procedure preceding the adoption of the contested decision and the tables contained in the contested decision, the correspondence between the funds provided by the Autonomous Region to the airport operators and those used by those operators to remunerate the co-contracting airlines is corroborated, in the particular case of the applicant, by the very content of the agreements it signed with the operators of Cagliari-Elmas and Olmas airports.

100 The preamble of contract No 25/2011, concluded with SOGAER, expressly stated that the Autonomous Region had decided to increase its marketing investments in the transport and tourism industries; that, to that end, it was providing SOGAER on an annual basis with an amount which that airport operator had to spend to achieve that objective, and that, in the light of the Autonomous

Region's commitment, SOGAER had published an advertisement on its website for investment in marketing activities designed to promote tourist attractions in the south of Sardinia. Regarding the contract concluded on 17 March 2011 between the applicant and GEASAR it stated that, in order to expand its aviation activities, the applicant had developed a marketing and advertising programme to promote the region of Sardinia which was to be carried out with the financial participation of the parties interested in developing tourism on the island, in this case, primarily — if not exclusively — the Autonomous Region.

101 In addition, contract No 25/2011 contained a termination clause in the event of withdrawal or revocation of the financing granted by the Autonomous Region, confirming the intermediary financial role, as found by the Commission in the contested decision, of the airport operators which, according to their own statements during the administrative procedure, in particular that of the operator of Cagliari-Elmas airport, merely selected airlines capable of meeting stated annual targets for frequency and passenger volume on strategic routes to and from the airports concerned.

102 The applicant argues that, as is moreover stated in recital 74 of the contested decision, Regional Decision No 29/36 expressly provided that the plans of activities had to indicate the level of own resources invested by each airport operator as well as the contribution of any other private investors benefiting from the air traffic increase, such as those active in the tourism, commercial, agriculture and culture sectors.

103 However, as the Commission argues, that argument is ineffective. First, when questioned on that point, the applicant was unable to explain which other private investor would be associated with the budget initiative taken by the Autonomous Region to promote the island of Sardinia as a touristic destination through the financing of activities undertaken via the airport operators.

104 Second and in any event, assuming that the services provided by the airport operators were — partially and albeit, in any case, marginally — co-financed by other investors, including those operators themselves, that would in no way eliminate the State origin of the funds used by those airport operators to remunerate the airlines under the aid scheme at issue, which funds are the only ones those airlines are obliged to reimburse to the Italian State in performance of the contested decision. Furthermore, if one were to follow the reasoning of the applicant, it would suffice for a Member State to apply for co-financing of its measures by private-sector actors to remove them from the scope of Article 107(1) TFEU.

105 The applicant further claims, regarding the funds that had been granted by the Autonomous Region to the airport operators in performance of the aid scheme at issue, that those operators used them for the sole purpose of increasing their profits, but did not administer them in the public interest. According to the applicant's argument, having been granted to those operators, those funds, which were of public origin and fungible in nature, were paid without distinction into the operators' funds and thus became private funds, used for purely profit-making purposes.

106 It must be recalled in that regard that, in State aid matters, the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 107 TFEU. That article does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (see judgment of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 84 and 85 and the case-law cited; judgment of 26 November 2015, *Spain* v *Commission*, T-461/13, EU:T:2015:891, paragraph 39).

107 Given that, when examining a measure, the Commission can find it necessary to examine whether an advantage can be considered to be granted indirectly to operators other than the immediate recipient of the transfer of State resources (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 61 and 62), it must be held that, as long as it can be determined, as in the present case, that an advantage originating from State resources has been

transferred by the immediate recipient to a final beneficiary, it is irrelevant that that transfer was made by the immediate recipient in accordance with commercial principles or, on the contrary, that that transfer met an objective of general interest.

108 That is supported by the case-law holding that an advantage granted directly to certain natural or legal persons can constitute an indirect advantage, hence State aid, for other legal persons who are undertakings (see, to that effect, judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraphs 22 to 35; of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 38 and 60 to 66; of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 127; and of 15 June 2010, *Mediaset* v *Commission*, T-177/07, EU:T:2010:233). Indeed, in the cases which gave rise to those judgments, the transfer of an advantage by natural or legal persons who were immediate recipients of State resources, formed part of a commercial relationship, confirming that the existence of an underlying commercial reason for the transfer is of no relevance to the assessment under Article 107(1) TFEU of the flows taken by the State origin resources to reach the final beneficiary.

109 As for the circumstance, put forward by the applicant, that the Autonomous Region had not been designated as a public organ or body with the sole mission of administering the funds at issue, it is also irrelevant to the classification of the payments at issue, made to the applicant, as 'State resources' within the meaning of Article 107(1) TFEU.

110 It has indeed already been held that the concept of intervention through State resources was intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid (see, to that effect, judgments of 22 March 1977, *Steinike and Weinlig*, 78/76, EU:C:1977:52, paragraph 21; of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 19; and of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 26). The Court of Justice has thus justified the inclusion of advantages granted through distinct State bodies within the scope of Article 107(1) TFEU by the necessity of safeguarding the effectiveness of the rules relating to 'aid granted by a … State' defined in Articles 107 to 109 TFEU, preventing Member States from being able to circumvent the rules on State aid merely through the creation of autonomous institutions charged with allocating aid (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23).

111 However, it cannot be inferred from that case-law that only those advantages distributed directly by the State, that is to say, without an intermediary, and those granted through bodies, vested with prerogatives of public authority or missions of general interest and established or appointed to administer the aid, would fall within the scope of the prohibition laid down in Article 107(1) TFEU. On the contrary, as has already been recalled above, even an advantage granted directly to certain natural or legal persons may constitute an indirect advantage, hence State aid, for other legal persons who are undertakings (see paragraph 108 above), and without the requirement that the advantages at issue have been channelled through a structure specifically appointed or established by that State to administer the aid.

112 So far as concerns the applicant's reference to the judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 50), and of 15 January 2013, *Aiscat* v *Commission* (T-182/10, EU:T:2013:9, paragraph 104), it should be pointed out that those cases involved situations where the issue was determining whether the funds collected by private undertakings acting under a concession or a monopoly could constitute State resources within the meaning of Article 107(1) TFEU, even though they had never been formally credited to the accounts of the Member States concerned.

113 In the context of those cases, the expression 'State resources' has been broadened such that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Thus, it has been held that, even if sums are not permanently held by the State budget, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 50, and of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 37).

114 Similarly, in the case that gave rise to the judgment of 19 December 2013, *Association Vent De Colère ! and Others* (C-262/12, EU:C:2013:851), also cited by the applicant, the question arose as to whether a mechanism, financed by final consumers, for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price could fall within the scope of Article 107(1) TFEU. More specifically, the question arose as to the categorisation as State resources of funds collected by a body specifically appointed to administer those funds, when they were not necessarily channelled in their entirety through that body. The Court of Justice found, in paragraph 33 of that judgment, that the entirety of those funds remained under public control, justifying their being categorised as 'State resources'.

115 Thus, even if they concern cases in which the funds at issue, unlike those in the present case, did not emanate directly from the State budget or had not been channelled through the State budget, those judgments confirm, as regards the condition in Article 107(1) TFEU relating to the existence of an advantage granted directly or indirectly through State resources, that the decisive criterion is the degree of State control exerted over the grant of the advantage, in particular over the channel through which that advantage is transmitted (judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 50; of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 37; and of 19 December 2013, *Association Vent De Colère ! and Others*, C-262/12, EU:C:2013:851, paragraph 33), and that that is so even where the grant of that advantage does not involve a formal transfer of State resources (see judgment of 19 December 2013, *Association Vent De Colère ! and Others*, C-262/12, EU:C:2013:851, paragraph 19 and the case-law cited).

116 However, in view of the line of argument of the applicant relating to the judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248), of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), and of 19 December 2013, *Association Vent De Colère ! and Others* (C-262/12, EU:C:2013:851), which deals with both the subcondition of 'State resources' and that of imputability to the State, it should also be determined whether, in the case at hand, the amounts paid by the airport operators to airlines, such as the applicant, originating from the Italian State budget, in this case that of the Autonomous Region, could still be categorised as 'State resources' and, moreover, whether the payments made by the airport operators to the co-contracting airlines in performance of contracts could be imputed to the Italian State, or to the Autonomous Region in this case.

(2) Imputability to the Autonomous Region of the payments made by airport operators to airlines

117 In that regard, to the extent that the degree of State control over the grant of an advantage enables an assessment of whether it can be regarded as mobilising 'State resources', it is appropriate, in order to confirm the condition relating to the imputability of the measure concerned to the State, laid down in Article 107(1) TFEU, also to take into account that degree of control in the examination of whether the public authorities must be regarded as having been involved in the adoption of that measure (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 52, and of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 49 and the case-law cited), involvement which may be inferred from a set of indicators

arising from the circumstances of the case and the context in which that measure was taken and, in particular the compass of that measure, its content and the conditions which it contains (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 52 to 56, and of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraphs 31 to 33).

118 In the case at hand, the Commission found, in the contested decision, that the funds made available to the airport operators by the Autonomous Region had to be and were actually used in accordance with the instructions prescribed by that region, in this case as remuneration for services provided by the airlines, namely the opening of new air routes, the increase in frequencies and extension of the operation periods of existing routes, the meeting of passenger volume targets and the provision of marketing services.

119 From the outset, it is appropriate to reject the argument of the applicant that the Commission had recognised, in point 75 of the opening decision, that Law No 10/2010 did not impose an obligation on the airport operators to pass on a certain share of the compensation to co-contracting airlines, preventing it from being able subsequently to conclude the contrary in the contested decision. The purpose of the formal investigation procedure being to deepen the examination of the measure notified by the Member State, it is in the very spirit and objective of that deepening of the examination of the measure that the Commission may, at the end of that procedure, reach conclusions different from those, preliminary in nature, which it had set out in the decision to initiate the formal investigation procedure so as to justify that opening of the procedure (see, to that effect, judgment of 4 March 2009, *Italy* v *Commission*, T-424/05, not published, EU:T:2009:49, paragraph 69).

120 As regards, next, the applicant's taking issue with the Commission's findings in recitals 357 to 359 of the contested decision that the behaviour of the airport operators was determined by the Autonomous Region by means of Law No 10/2010 and the plans of activities, which had to be approved by the Region before entering into force, it must be stated that Law No 10/2010 does indeed mention the airport operators as formally being the beneficiaries of the payments prescribed by that law.

121 However, Article 3(2) of Law No 10/2010 expressly provided that the criteria, nature and duration of the transport offer and the guidelines for the drafting of plans of activities by the airport operators had to be adopted by decision of the Regional Executive, whilst Article 3(3) of that law provided, also expressly, that the plans of activities drawn up by the airport operators had to be accompanied by the corresponding measures and contracts and that they would be financed only if they were drawn up in accordance with the criteria, nature and duration of the transport offer and with the guidelines adopted by the Regional Executive and only if they had first been submitted to the competent committee for a binding opinion.

122 Contrary to what the applicant submits, in particular its argument that Law No 10/2010 does not in any way set out any specific guidelines or binding instructions that should be followed by the airport operators in respect of the use of the funds that the Autonomous Region had to grant them under the measures at issue, it is apparent from the mechanism put in place by Law No 10/2010 that the provisions of that law must necessarily be read in conjunction with the texts whose adoption by the Regional Executive was prescribed by that law and on which the payments by the Autonomous Region to the airport operators at issue in this case depended. Those texts, in particular Regional Decision No 29/36, expressly provided that the airport operators had to submit their plans of activities to the Autonomous Region for approval and that those plans, in order to be eligible for the financing provided by that autonomous region, had to be drafted in accordance with the criteria, nature and duration of the transport offer and with the guidelines adopted by the Regional Executive.

123 In addition, the mechanism for reimbursement of the costs paid by the airport operators was such as to enable the Autonomous Region to monitor the airport operators' initiatives, since only those established in accordance with its guidelines and justified by the submission of relevant contractual and accounting documents could give rise to the financing provided for under the aid scheme at issue. In that regard, the applicant claims that, in the system put in place by the Autonomous Region, the airport operators were monitored only once they had already obtained 80% of the financing provided for. However, it must be held that, besides the fact that the plans of activities were submitted prior to the approval process by the Autonomous Region, the airport operators also had to provide quarterly reports for the purpose of payment of 60% of the aid and they were not able to receive the final tranche of the payment, of 20%, until they had proved that they had complied with the Autonomous Region's instructions.

124 On that point, the absence of precise arrangements for allocating the funds obtained by each of the airport operators is irrelevant, since, in any event, first, those operators contracted with the airlines only with the guarantee of the Autonomous Region that they would receive the corresponding funds from the latter and that, second, the applicant remains unable to explain which contract concluded in that context would not have given rise to financing from the Autonomous Region owing to the depletion of the budget initially set by the Autonomous Region.

125 The Autonomous Region's control over the content and scope of the airport operators' initiatives is corroborated by the operators themselves. Indeed, as is apparent from recital 237 of the contested decision, GEASAR stated that it had negotiated the proposals for marketing activities, with the airlines that had responded to the call for expressions of interest which that airport operator had published on its website, taking into account the tourism marketing plan drawn up by the Autonomous Region among its planning instruments. SOGAER, for its part, maintained, as is apparent from recital 313 of the contested decision, that, under the aid scheme at issue, that region was providing compensation which was merely channelled through the airport operator 'as part of a plan decided, financed and monitored by the [Autonomous] Region'.

126 It is true, as the applicant asserts, that Law No 10/2010 did not mention the specific actions that had to be offered by the airport operators in the plans of activities, nor did it identify which airlines were to be solicited. The applicant infers that the general principles established in Regional Decision No 29/36 and to be complied with in the preparation of the plans of activities could not be considered 'detailed specifications' for the transfer of specific funds to airlines.

127 On that point, it should be noted that, in actuality, the initiative of submitting plans of activities to the Autonomous Region in order to request the funds provided for under the aid scheme at issue and selecting the co-contracting airlines formally lay with the airport operators, in particular since, as the applicant notes, Law No 10/2010 and its implementing measures did not mention by name airlines with which they necessarily had to enter into commercial relations. That being said, once the airport operators had taken the decision to participate in the financing programme put in place by the Autonomous Region by means of the aid scheme at issue, their discretion in defining their operating plans and in selecting co-contracting service providers was significantly reduced by the criteria and guidelines established by the Autonomous Region.

128 In particular, the reference in Article 3(3) of Law No 10/2010 to contracts having to be provided by the airport operators and the reference in Regional Decision No 29/36 to the situations in which the plans of activities are carried out by airlines confirm, contrary to the applicant's assertions, that the Autonomous Region induced the airport operators to use airlines, since they are the sole entities capable of engaging with airlines on the opening or maintenance of air routes, their frequencies and passenger targets, and that that region decided which air routes would be deemed eligible. Furthermore, as regards marketing activities, the Autonomous Region drew a distinction between those offered by airlines, confirming the airport operators' necessary use of such companies, and those offered by service providers other than airlines, which, as the Commission notes, are not at issue in the

present case and whose existence, in any event, is not liable to affect the question of whether the funds received by the applicant originated from the budget of the Autonomous Region and were imputable to it.

129 By closely monitoring, at the upstream level, the plans of activities submitted by the airport operators, in particular the air routes concerned and the marketing services envisaged, as well as, at the downstream level, the amounts committed by the airport operators in remuneration of those services offered by the airlines in the context of promoting the island of Sardinia as a touristic destination, the Autonomous Region assumed sufficient control, over the contractual behaviours of the airport operators that decided to request the financing measures provided for under the aid scheme at issue, to the point that those behaviours could be considered imputable to it.

130 Moreover, in Decisions No 300 and No 322 of the Autonomous Region, of 16 June 2014 and 13 June 2013, respectively, fixing the definitive annual amounts, the Autonomous Region took the view that 'the intervention referred to in [Law No 10/2010] [was] achieved through the airport operators, which [had] the role of intermediaries and operational precursors of the transfer of resources to airlines, according to the route determined by the Autonomous Region, such as is laid down by the aforementioned [Law No 10/2020] and the implementing measures' (*che l'intervento di cui alla LR. n. 10/2010 si realizza attraverso le societa di gestione aeroportuale, che fungono da tramiti operativi e da soggetti anticipatori del trasferimento di risorse a favore dei vettori, secondo il percorso dalla Regione stessa disegnato con la sopraccitata legge regionale n. 10/2010 e con e delibere di attuazione della stessa*) and that 'the airlines should be regarded as the actual and sole recipients of the flows of financial resources under [Law No 10/2010]' (*che i vettori debbano considerarsi i reali ed unici destinatari dei flussi delle risorse di cui alla predetta legge regionale*).

131 In addition, as the Commission notes, the preamble of contract No 25/2011 demonstrates, in a clear manner, the extent of the control exercised by the Autonomous Region, since it actually states that it was 'in line with the directives issued by the [Autonomous] Region, [that SOGAER] ha[d] drawn up a Plan of Activities in which, the strategy and the actions which [had to be] pursued in order to reach the objectives of traffic development [were] described' and that 'such plan has been approved by the Regional Council Committee as per art.3, para. 3 [of Law No 10/2010]'.

132 In the light of all those factors, the line of argument of the applicant regarding the airport operators' alleged decision-making autonomy in defining their contractual relationships with co-contracting airlines under the aid scheme at issue must be rejected as unfounded.

133 The circumstance, alleged by the applicant, that certain plans of activities submitted by the airport operators included a detailed calculation of the balance between the compensation that was to be paid to third parties — the airlines in this case — and the expected economic benefits of the services provided by the airlines does not prove that they acted to maximise their investments. The compensation in question, which is subject to the repayment obligation laid down in Article 2 of the contested decision, did not constitute an investment by those airport operators of their own funds, but only an investment ultimately made on behalf of the Autonomous Region, which was acting with a view to the economic development of Sardinia, inter alia by increasing the frequency of air routes to the island and the number of passengers.

134 In that regard, it is true that the airport operators had an interest in participating, as intermediaries, in the implementation of the aid scheme at issue, since the effect of the airlines' performance of their obligations regarding air route frequency and passenger volume targets as well as their providing marketing services was to increase the number of persons using the airports concerned and, necessarily, the revenues of the airport operators from aeronautical and non-aeronautical services. However, that does not take away from the fact that the contractual price prescribed for those services from the airlines and which is subject to the repayment obligation under Article 2 of the contested decision was borne financially by the Autonomous Region and not by the airport operators.

In that regard, it does not matter that, for certain contracts not providing for a cancellation clause such as that contained in contract No 25/2011, certain airport operators may have had to pay a residual amount to certain airlines where they could not obtain reimbursement in full of amounts advanced on account of the adoption, in the course of performance of those contracts, of the decision of the Autonomous Region to suspend the implementation of the aid scheme at issue. First, the vast majority of the contracts were financed by the Autonomous Region. Second and in any event, those residual amounts were not part of the amounts calculated by the Commission as constituting an advantage for the airlines.

135 Likewise, it must be pointed out, contrary to what the applicant moreover claims, that Article 3(3) of Law No 10/2010 made express reference to the production by the airport operators of contracts whereas Regional Decision No 29/36 referred to the production of quarterly reports and documents relating to the activities. Consequently, the Commission was entitled to find, in the contested decision, that the Autonomous Region could verify conformity with its requirements, such as are set in Law No 10/2020 and its implementing measures, of the service contracts concluded with airlines by the airport operators and which had to be provided by the latter to the Autonomous Region as a minimum to obtain the final tranche of financing.

136 With regard to the obligation for the airport operators, as laid down inter alia in Regional Decision No 29/36, to put in place, as regards the business plans drawn up by the airlines, a system of penalties intended to prevent them from failing to fulfil their obligations towards the airport operators, in particular in terms of observance of air route frequencies, passenger numbers and number of seats offered, it must be held that, contrary to what the applicant claims, the insertion by the airport operators of those clauses into the contracts concluded with the airlines did not reflect the existence of a commercial risk against which those operators sought to guard in order to protect their investments. Indeed, the investments in question, as the airport operators themselves confirmed, were made only with a view to obtaining the subsequent reimbursement of them in full by the Autonomous Region.

137 Thus, the insertion of the penalty clauses into the contracts concluded with the partner airlines is explained above all by the airport operators' concern about complying with their obligations, as are set out in Regional Decision No 29/36, so as to ensure that they would actually obtain the financing requested from the Autonomous Region which they had advanced in performance of those contracts. From the point of view of the Autonomous Region's interest and as the Commission submits, the obligation imposed on the airport operators to include a penalty mechanism sought to protect public investment, by ensuring that the funds granted would be used correctly and give rise to the expected services so as to promote tourism in Sardinia. The same is true for the monitoring mechanism, in terms of the provision by the airport operators to the Autonomous Region of both quarterly reports and all the accounting and contractual supporting documents in order to obtain the final tranches of the financing payments offered by that region.

138 In the light of all the foregoing considerations, the Commission did not err in law or, in particular, commit a manifest error of assessment, in finding, in recitals 355 to 361 of the contested decision, that the airport operators could be considered as intermediaries between the Autonomous Region and the airlines, having transferred in full the funds received from the Autonomous Region and therefore acted in accordance with the instructions received from that region through the plans of activities approved by that region.

139 In those circumstances, the Commission did not err in law in holding that the payments made by the airport operators to the airlines as part of activities 1 and 2 corresponded to State resources and were imputable to the Italian State.

140 Accordingly, it is appropriate to reject the second part of the first plea and, in consequence, the first plea in its entirety as unfounded.

2. Second plea: manifest error of assessment as regards the receipt of an advantage by the airlines

141 Under the second plea, the applicant puts forward, in essence, four parts by which it seeks to challenge the contested decision, in so far as the Commission wrongly concluded, first, that the aid scheme at issue constituted an 'aid scheme' within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 249, p. 9); second, that the Autonomous Region had not acted in accordance with the market economy investor principle; third, that there was also no scope for the application of the market economy investor principle to the financial relationship between the airport operators and airlines and, fourth, that the airport operators had not received any undue advantage from the Autonomous Region pursuant to Law No 10/2010.

142 It is appropriate to examine, in the first place, the first part of the second plea, then, together, the second and third parts thereof, before assessing the fourth and last part of that plea.

(a) First part of the second plea: infringement of the definition of 'aid scheme' set out in Article 1(d) of Regulation 2015/1589

143 In the first part of the second plea, the applicant challenges the Commission's categorisation of the measures at issue as an 'aid scheme' in that it is based on an misapplication of the definition set out in the first hypothesis covered by Article 1(d) of Regulation 2015/1589 as meaning 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner'. According to the applicant, the Commission could not, in the present case, take into account the measures implementing Law No 10/2010 as components of the scheme, since it would be tantamount to allowing the Commission to circumvent the problem relating to the fact that that law required further implementing measures in order to be put into effect. Thus, under Article 1(d) of Regulation 2015/1589, the Commission cannot take into account implementing measures adopted by the Member State concerned and, in particular, the conclusion in recital 349 of the contested decision is therefore erroneous.

144 According to the applicant, the failure to fulfil the condition concerning the absence of 'further implementing measures being required' was all the more serious in the present case, since the Italian Republic, subsequent to the notification of the measures at issue, continued to adopt implementing measures such as Regional Law No 15 of 7 August 2012, Decision No 649 of 2 October 2012 and Decision No 4/34 of 5 February 2014, which are referred to in recitals 40 and 41 of the contested decision and were not examined by the Commission as components of the aid scheme at issue.

145 Furthermore, the applicant asserts that, contrary to the requirements of Article 1(d) of Regulation 2015/1589, Law No 10/2010 does not define the airlines as potential beneficiaries of individual aid 'in a general and abstract manner', since neither that law nor the implementing measures actually mention the term 'airline'. Only Regional Decision No 29/36 mentions beneficiaries of the financing, namely, the Sardinian airports of Alghero, Cagliari-Elmas, Olbia, Oristano and Tortoli, confirming that those were the only beneficiaries of the measures at issue.

146 The applicant concludes that, since the Commission was not assessing an aid scheme adopted by the Autonomous Region, it should have examined the measures at issue in the light of the private investor test. In any event, the Commission was wrong to conclude in the contested decision that the existence of an aid scheme — disputed by the applicant — prevented it from examining the contracts between the airports and the airlines individually, including in the light of the private investor test. Indeed, the application of the private investor test has been examined in a number of cases calling into question

aid schemes, such as the Italian 'Prodi' legislation establishing a special administration procedure for large companies in difficulties in the cases giving rise to the judgments of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579), and of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313).

147 The Commission contends that the first part of the second plea should be rejected as unfounded, taking the view that the applicant is mistaken as to the definition of an aid scheme. It is essential that, under such a scheme, the beneficiaries be defined in a general and abstract manner. However, once that is no longer the case, it is only because, according to the Commission, the actual application of that scheme is then taking place. In the present case, the aid scheme consisted of both Law No 10/2010 and the various implementing measures. The Commission acknowledges that, in certain exceptional cases, an aid scheme could be analysed in the light of the private investor in a market economy test. That would be so where the State owned and controlled all the beneficiaries of such a scheme. However, that is clearly not the situation in the present case, especially as the aid scheme at issue expressly pursues public policy objectives.

148 In that regard, it should be recalled that, in the wording of Article 1(d) of Regulation 2015/1589, 'aid scheme' is to be understood, inter alia, as 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner'. The Commission having agreed, in response to a question from the Court, that the second definition of the concept of aid scheme, such as is set out in that provision, was not applicable in the case at hand, it must be determined whether the aid scheme at issue actually constituted an aid scheme within the meaning of the first hypothesis covered by Article 1(d) of Article 2015/1589.

149 Regarding that definition, the Court has already held, first, that, if individual aid awards are made without further implementing measures being adopted, the essential elements of the aid scheme in question must necessarily emerge from the provisions identified as being the basis for the scheme. Second, where the national authorities apply that scheme, they cannot have any margin of discretion as regards the determination of the essential elements of the aid in question and whether it should be awarded. For the existence of such implementing measures to be precluded, the national authorities' power should be limited to the technical application of the provisions that allegedly constitute the scheme in question, if necessary after verifying that the applicants meet the pre-conditions for benefiting from that scheme. Third, it follows from Article 1(d) of Regulation 2015/1589 that the acts on which the aid scheme is based must define the beneficiaries in a general and abstract manner, even if the aid granted to them remains indefinite (judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission*, T-131/16 and T-263/16, under appeal, EU:T:2019:91, paragraphs 86 to 88).

150 Moreover, it should be recalled that the categorisation, as an aid scheme, of a set of measures adopted by the public authorities of a Member State has the consequence that, including in order to reduce the administrative burden of that institution, the Commission may confine itself to examining the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid — in this case, at the national level — that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited).

151 In the case at hand, the Commission found, in recital 349 of the contested decision, that the notified measures constituted an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589 on the ground that, 'on the basis of the legal framework described in Section 2 of [the contested

decision] without further implementing measures being required in addition to those already described, individual aid awards can be made to undertakings (such as airlines) defined within Law [No] 10/2010 in a general and abstract manner (i.e. no individual companies are designated)'.

152 The legal framework in question is that which appears, under the section entitled '2.3 Legal framework' of the contested decision, and which features the following elements: Article 3 of Law No 10/2010; Regional Decree No 122/347 of 17 May 2010, stating that the amounts defined by Law No 10/2010 are at the charge of the regional budget; Regional Decisions No 29/36, No 43/37 and No 52/117; Regional Law No 1 of 19 January 2011, which reduced the contributions granted from the Autonomous Region to the airport operators to EUR 21 100 000 for 2011 and EUR 21 500 000 for 2012 and 2013, respectively; Regional Law No 12 of 30 June 2011, establishing a mechanism of financial advances to be operated through the constitution of an ad hoc financial fund inside SFIRS and as amended by Regional Law No 15 of 7 August 2012 and implemented by Decision No 694 of 2 October 2012, as well as, last, Decision No 4/34 of 5 February 2014, modifying the allocation of the regional contributions for the year 2013 to take into account the reduction of the regional contributions decided in the context of the budget of the Autonomous Region pursuant to Law No 10/2010 and the effective costs sustained by the airport operators.

153 In that regard, first of all, as the applicant asserts, the Commission did include, in the legal framework it considers to constitute the aid scheme at issue, texts adopted by the Autonomous Region subsequent to the notification by the Italian Republic of the measure which is the subject of the contested decision.

154 However, it may specifically occur that, during the course of the formal investigation procedure, the Commission comes into possession of new elements or its analysis evolves in relation to the decision to initiate that procedure. Thus, in the event that the Commission were to realise, after the adoption of a decision to initiate the formal investigation procedure, that that decision is based either on incomplete facts or on an incorrect legal classification of those facts, it ought to be able to alter its position by adopting a correction decision (judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 71). Such a decision would not however be justified if there were no substantial change to the investigation framework defined in the decision to initiate the formal procedure and the issues of fact and law on which the Commission's reasoning was based were essentially the same (judgment of 2 July 2015, *France and Orange* v *Commission*, T-425/04 RENV and T-444/04 RENV, EU:T:2015:450, paragraph 134).

155 In the case at hand, first, at the date of adoption of the contested decision and at the dates on which the interested parties — including the applicant — lodged their comments during the administrative procedure, the measures mentioned by the applicant and not relied on in the opening decision, namely, Regional Law No 15 of 7 August 2012, Decision No 694 of 2 October 2012 and Decision No 4/34 of 5 February 2014, had already been adopted and were in force. Second and more importantly, it is apparent from recital 67 of the contested decision that, throughout the period of implementation of the aid scheme at issue, the Autonomous Region progressively reduced the amounts originally committed to financing that scheme. The texts referred to by the applicant are precisely those by which those amounts were modified, without the thrust of the mechanism having been altered. The Commission could therefore take those texts into account in the contested decision, even though they came after the Italian Republic's notification of the aid scheme at issue.

156 Next, contrary to what the applicant claims, the Commission could take into account the implementing provisions of Law No 10/2010 adopted by the Autonomous Region as components of the aid scheme at issue. Indeed, the wording of Article 1(d) of Regulation 2015/1589 does not rule out the possibility of categorising a set of general provisions and their implementing provisions as an aid scheme. On the contrary, that provision relates to the absence of requirement, for the purposes of granting aid to individual beneficiaries, of adopting 'further' implementing measures.

157 In the case at hand, however, the grant of the funding by the Autonomous Region was not dependent on the adoption by that region of implementing measures 'further' to those already adopted and listed in Section 2.3 of the contested decision.

158 In that regard, contrary to what the applicant suggests, the adoption of plans of activities and the conclusion of individual contracts between the airport operators and the airlines did not constitute implementing provisions 'further' to the aid scheme, but already fell within the individualised implementation of that scheme, namely, the individual grant of aid, as a first step to the immediate recipients, the airport operators, then, as a second step, to the final beneficiaries, the airlines.

159 It must be stated that the texts taken into account by the Commission as components of the aid scheme at issue defined the essential elements of the aid scheme in question and allowed for the grant of individual aid without further implementing measures being taken, provided that the conditions set by those texts were met, which involved, inter alia, first, approval by the Autonomous Region of the plans of activities of the airport operators defining the measures for promoting the Sardinian Region as a touristic destination and, second, for the purposes of paying the airport operators amounts advanced by them in performance of the contracts they had concluded, in view of that, with the airlines, providing the Autonomous Region with those contracts and with accounting documents justifying the expenses incurred.

160 It follows also from the provisions identified by the Commission as constituting the aid scheme at issue that, where the national authorities, namely, the executive of the Autonomous Region, applied that scheme, they did not have a margin of discretion in determining the essential elements of the aid in question and as to whether it was appropriate to grant it. Indeed, it appears that the annual budgets were initially provided for in Law No 10/2010, that they were adjusted during the course of the implementation of the mechanism at issue and that the implementing provisions, in particular Regional Decision No 29/36, prescribed criteria for allocating funds between the airport operators where the amounts claimed by them exceeded the overall amount provided, with the understanding that, in practice, the Autonomous Region did not have to apply those criteria and reimbursed, on their request, nearly all of the amounts incurred by the airport operators.

161 Thus, at the stages, first, of the adoption of the plans of activities by the airport operators, second, of the conclusion of the agreements between them and the airlines, third, of the submission, by those operators, of the funding applications and, fourth, of reimbursement of the advances by the Autonomous Region, the executive of that region merely effected a technical application of the provisions constituting the scheme at issue, where appropriate after verifying that the applicants met the conditions for benefiting from it.

162 Last, as Article 1(d) of Regulation 2015/1589 provides, the acts on which the aid scheme at issue is based defined the immediate beneficiaries in a general and abstract manner, while not determining what the aid that would be granted individually to them would be.

163 As for the co-contracting airlines, which were regarded by the Commission as final and, therefore, real beneficiaries of the aid measures at issue, first and generally, the absence of formal identification of that type of beneficiary is not in itself an obstacle to the categorisation of the mechanism as an 'aid scheme', since, depending on the case, it would render that notion ineffective by compelling the Commission to examine a potentially high number of individual real beneficiaries, including in situations such as those in the cases giving rise to the judgments of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2002:467, paragraphs 22 to 35); of 13 June 2002, *Netherlands* v *Commission* (C-382/99, EU:C:2002:363); of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* (T-445/05, EU:T:2009:50); and of 15 June 2010, *Mediaset* v *Commission* (T-177/07, EU:T:2010:233), even though the grant of aid to them was made in the framework of a general mechanism.

164 That is supported by the fact that, even where no legal act establishing such an aid scheme is identified, the Commission may rely on a set of circumstances which taken as a whole indicate the de facto existence of an aid scheme (see, to that effect, judgment of 13 April 1994, *Germany and Pleuger Worthington* v *Commission*, C-324/90 and C-342/90, EU:C:1994:129, paragraphs 14 and 15). Accordingly, in the case at hand, even though the airlines were not formally designated as beneficiaries of the aid scheme at issue, the Commission could rely on the set of elements of the mechanism put in place, formally in favour of the airport operators, to conclude that there actually was an aid scheme in favour of the airlines as the actual and final beneficiaries of that mechanism.

165 Second and in any event, it must be stated that, contrary to what the applicant claims, while Law No 10/2010 does not mention the airlines' intervention in the financing system provided for, it made reference, however, to the production of contracts — in the case at hand, concluded with those airlines — whereas Regional Decision No 29/36 made express reference to the necessity for the airport operators to lay down a system of penalties where the plans of activities had been established by the airlines. Thus, the aid scheme at issue identified the airlines in a general and abstract manner as stakeholders in the financing system put in place by the Autonomous Region. Moreover, notwithstanding the designation, in Regional Decision No 29/36, of the airport operators as the beneficiaries of the measures adopted, the Autonomous Region itself acknowledged, in the abovementioned Decisions No 300 and No 322, that the airlines were to be regarded as the actual beneficiaries of those measures.

166 In the light of all the foregoing considerations, the Commission could rightly categorise the set of provisions referred to in recitals 35 to 41 of the contested decision as constituting an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589.

167 Furthermore, contrary to what the applicant claims, the Commission did not, in the contested decision, justify its refusal to apply the market economy operator principle to the case at hand on the ground that such a principle could not apply in the case of an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589. For the remainder, the arguments put forward by the applicant in connection with that principle will be examined under the second part of the second plea.

168 The first part of the second plea must therefore be rejected as unfounded.

(b) Second and third parts of the second plea: application of the market economy operator principle at the level of the Autonomous Region and at the level of the airport operators

169 In the second and third parts of the second plea, the applicant claims that the Commission erred in law in refusing to apply the market economy operator principle both at the level of the Autonomous Region and at the level of the airport operators. The Commission for its part contends that the two parts should be rejected as unfounded.

170 It is appropriate to examine the third part and the second part of the second plea in succession.

(1) Third part of the second plea: application of the private investor principle to the contractual relationship between the airport operators and the airlines

171 In the third part of the second plea, the applicant argues that the Commission should have examined whether the private investor test was capable of being applied not only at the level of the Autonomous Region's decision to distribute funds to the airport operators, but also at the level of those airport operators' decisions to remunerate airlines for the services they provided to them under the agreements concluded between them, in particular for Olbia and Cagliari-Elmas airports.

172 As a preliminary point, it should be noted that, in the contested decision, the Commission justified the inapplicability of the market economy operator principle at the level of the transactions between the airport operators and the airlines, on the ground, in essence, that the measures examined constituted an aid scheme established by a public authority for public policy reasons, covering several airports, only one of which was owned by the Autonomous Region, and not an individual agreement between an airport and an airline. In addition, for the Commission, it was clear that the airport operators had not been acting as market economy operators when entering into the various contracts with the airlines. They were merely implementing the aid scheme at issue devised by the Autonomous Region to increase air transport for the general benefit of the territory of the island of Sardinia.

173 In that regard, the applicant is of the view that the Commission could not exclude the application of the private investor test on the ground that the airport operators allegedly had to implement a general aid scheme, thereby ruling out the possibility that they could have acted as market economy operators.

174 So far as concerns the argument of the applicant relating to the application of the market economy operator principle in the light of the airport operators' autonomy in using the funds provided by the Autonomous Region and in defining their contractual relations with the airlines, it is appropriate to reject it for the reasons already set out above addressing the second part of the first plea.

175 Next, it must be stated that, as the applicant acknowledges, neither of the two airport operators concerned in the case at hand, namely, those of Cagliari-Elmas and of Olbia, is in any event owned by the Autonomous Region. As the Commission rightly maintains, to be able to envisage the application of the market economy operator principle to a financial transaction between two undertakings so as to know whether, in the light of Article 107(1) TFEU, read in conjunction with Article 345 TFEU (see, to that effect, judgments of 21 March 1990, *Belgium* v *Commission*, C-142/87, EU:C:1990:125, paragraph 29; of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraph 20; and of 12 December 1996, *Air France* v *Commission*, T-358/94, EU:T:1996:194, paragraph 70), that transaction meets an economic rationality precluding it from giving rise to the grant by the former undertaking of an advantage to the latter, it will still be necessary that the former undertaking be owned by the State and that the State can be deemed to be acting like an investor expecting a medium- to long-term economic return on its investment.

176 In those conditions, irrespective of the establishment of business plans by the airlines and/or *ex ante* analysis of the profitability of the investments made by the airport operators, as is invoked by the applicant, it appears that, first, those operators were not owned by the Autonomous Region and that, second and in any event, they merely used the money made available to them by the Autonomous Region to acquire services in accordance with the latter's instructions.

177 It follows that, as the Commission rightly found in the contested decision, the airport operators were essentially limited to implementing the aid scheme at issue. Given, moreover, that those operators were not State-owned, the transactions between the airlines and the airport operators had not been intended to be examined in the light of the market economy operator test, even though those transactions were made using State resources, those of the Autonomous Region in the case at hand.

178 That finding is not called into question by the fact — assuming it were established — that the airport operators remunerated the airlines also from their own funds. First, the applicant fails to demonstrate which amounts the airport operators paid from their own funds without obtaining or requesting the subsequent reimbursement thereof of the Autonomous Region under the aid scheme at issue, even though the Commission maintains, without the applicant providing evidence to the contrary, that the airport operators used their own funds only to a very limited extent and only in order to meet their residual contractual commitments following the Autonomous Region's suspension of the aid scheme at issue. Second, it must be recalled that, in any event, those alleged own investments of the airport

operators do not fall under the repayment obligation laid down in Article 2 of the contested decision and do not reflect an assumption of significant commercial risk in connection with the use of funds originating from the Autonomous Region.

179 Moreover, as the Commission maintains, the airlines were selected only in order for the airport operators to receive regional financing to pay for their services. However, as the Commission stressed during the hearing in particular, it is unlikely that, without financing from the Autonomous Region, airport operators would have enough funds at their disposal — tens of millions of euros in the case at hand — to undertake such significant acquisitions, from airlines, as obligations of opening air links and attaining passenger traffic objectives as well as marketing services. Thus, even if, as the applicant maintains, the airport operators were able, on account of the positive effects of the services provided by the airlines under the aid scheme at issue, to benefit from indirect effects of increase of their airport and non-airport resources, that does not support the conclusion that the contracts they concluded with those airlines under the aid scheme at issue could be examined in the light of the private investor test.

180 As far as the operator of Alghero airport is concerned, contrary to what the applicant claims and as has already been found, the Commission did not examine the measures implemented in favour of that airport under the aid scheme at issue either in the contested decision or in the Alghero decision. Moreover, the circumstance that, as regards marketing contracts concluded by the operator of Alghero airport, analogous to those at issue in the case at hand, the Commission arrived at the conclusion that some came under the private investor principle, since those agreements were considered profitable for that airport, that conclusion is not such as to demonstrate the applicability in the present case of the private investor principle at the level of the operators of Cagliari-Elmas and Olbia airports. First, the operator of Alghero airport is owned by the Autonomous Region, which is not the case with Cagliari-Elmas and Olbia airports. Second, in the Alghero decision, the Commission took a position on the financial movements between the Autonomous Region, the operator of Alghero airport and its co-contracting airlines, not in respect of the movements made under the aid scheme at issue, but only in respect of those resulting from contracts prior to that aid scheme.

181 In view of those findings, the applicant is wrong to assert that the Alghero decision confirms that the Commission could not examine the measures at issue as an aid scheme even though, for one of the beneficiary airports, it allegedly examined — which is not the case — the funding it had obtained from the Autonomous Region as an individual measure and ultimately concluded that it did not constitute aid in certain cases.

182 In the light of the foregoing, the third part of the second plea must be rejected as unfounded.

(2) Second part of the second plea: application of the market economy operator principle to the decisions of the Autonomous Region

183 With regard to the application at the level of the Autonomous Region of the market economy operator principle, which is the subject of the second part of the second plea, the applicant first of all criticises the Commission for ruling out the applicability of the private investor test on the ground that, during the formal investigation procedure, the Member State concerned did not rely on that test to demonstrate the compatibility of its measure with the internal market. According to the applicant, the Commission is required to examine the application of that principle, which may lead to the conclusion that the contested measure does not constitute State aid, even where the principle is not relied on by the Member State concerned. In particular, in footnote 112 of the contested decision, the Commission was mistaken as to the scope of the case-law arising from the judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraph 104), in particular because, in that judgment, the Court of Justice merely recalled the obligation for the Commission to examine the application of that principle

when it is relied on by the Member State concerned but did not rule on the opposite situation, such as that in the present case, in which the Member State at issue does not rely on that principle in support of its measure.

184 The Commission for its part considers itself to have correctly applied the case-law, since the Italian Republic did not rely on the market economy operator principle nor did it appear that that principle could be applicable in a case in which the Autonomous Region pursued general public policy objectives of an economic nature, consisting in attracting more tourists, which cannot be part of a private investor's objective. Indeed, the expected return of the measures at issue consisted not in an increase in dividends, capital gains or any other form of financial gain, but only in a stimulation of the economic development of the island of Sardinia, including the creation of jobs.

185 In that regard, as the applicant has rightly recalled, the market economy operator test is not an exception which applies only if a Member State so requests. Where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid. Consequently, where it appears that the market economy operator principle could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that principle are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the transaction in question (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 103 and 104).

186 However, in the case at hand, the Commission did not rely entirely on the absence of invocation by the Italian Republic of the market economy operator principle to explain its assessment on the impossibility of justifying the aid scheme at issue in the light of that principle.

187 Indeed, in recitals 380 to 388 of the contested decision, the Commission noted, first of all, that the Italian Republic had not suggested applying the market economy operator principle at the level of the Autonomous Region; that there was nothing to suggest that the Autonomous Region had acted in accordance with that principle when it had established the aid scheme at issue and that it was clear that it had sought, by implementing that scheme, to achieve public policy objectives, in particular the strengthening of the regional economy by attracting more tourists, rather than make profits in its capacity as owner. Then, the Commission examined the applicability of that principle at the level of the airport operators and of the Autonomous Region to conclude that that was not the case in the situation at hand.

188 Accordingly, the complaint of the applicant, relating to an alleged failure by the Commission to examine the applicability of the market economy operator principle, must be rejected as unfounded.

189 Next, the applicant argues that the Commission's finding, in recital 380 of the contested decision, that the Autonomous Region did not act as a private investor in a market economy, is incorrect, since, according to the Commission, that regional authority sought to achieve public policy objectives, in particular the strengthening of the regional economy by attracting more tourists, rather than make a profit in its capacity as owner of the airport.

190 However, in the case at hand, given that the Autonomous Region does not own Cagliari-Elmas and Olbia airports — at issue only in the case of the applicant — that region cannot be deemed to have acted as an investor. It appears on the contrary that the Autonomous Region put in place the aid scheme at issue solely with a view to the economic development of the island of Sardinia.

191 In those conditions, the Commission was right to conclude, inter alia in recitals 380 to 384 of the contested decision, that it was not required to analyse whether, by the financing forming the subject matter of the contested decision, the Autonomous Region had made an investment comparable to

that of a private investor. Therefore, it was entitled to consider the *ex ante* analyses of the economic profitability of the service agreements concluded between the airport operators and the applicant irrelevant, since, in the case at hand, the Autonomous Region, acting exclusively as a public authority, could not expect dividends, capital gains or any other form of profit comparable to that which a private investor would obtain. On that point, contrary to what the applicant maintains, on account of the adoption of public policy measures, any increase in the tax resources of a public entity, such as the Autonomous Region, cannot be equated — or even compared — with the gains expected by a private investor from his investments.

192 Moreover, the Commission rightly highlighted that the agreement concluded between SOGAER and the applicant did indeed provide for an increase in the revenues of the operator of Cagliari-Elmas airport of the order of EUR 3 million, but that that was not in favour of the Autonomous Region, since SOGAER was not owned by the Autonomous Region. It stated that, on the other hand, the expected effect on tourism was, for its part, estimated at EUR 47 million or, combined with other indirect and induced effects, EUR 139 million. As the Commission maintains, that advantage which the Autonomous Region could expect and obtain as a public authority is neither comparable with nor of the same nature as a financial advantage expected by an operator from one of his investments. At issue here are macroeconomic benefits expected from public intervention in the context of an economic policy, which does not fall within the market economy operator principle but within the principles of rationalisation of public spending.

193 Accordingly, it is appropriate to reject the line of argument of the applicant seeking to deem the Autonomous Region, in the context of the aid scheme at issue adopted in the framework of a general economic policy, to have acted as an investor justifying the application of the market economy investor principle.

194 The applicant further submits that, in order to assess properly the measures at issue in the light of the private investor test, the Commission should have examined whether the Autonomous Region had really needed to seek to increase passenger air traffic by means of marketing agreements between airports and airlines and whether, when it sought to meet that need as the operator of Alghero and Cagliari airports, it paid a market price as any other economic operator would have done, in particular to develop its aviation sector, but also to ensure greater air connectivity, the promotion of the island as a touristic destination, seasonal adjustments, and an increase in its revenues through increased airport receipts. Moreover, the services provided by the airlines, including in the area of marketing, constituted actual services, separate from activities relating to the operation of air routes.

195 In that regard, the Court notes that, in recital 377 of the contested decision, the Commission found that the payments made by the Autonomous Region via the airport operators to airlines in the context of both activity 1 and activity 2 had to be considered as subsidies to the airlines for operating more flights to and from the island of Sardinia.

196 It should also be noted that, given that the Autonomous Region does not own all the airports on the island of Sardinia, which are the only entities capable of contractually agreeing on the use of the airport infrastructure that they manage, in particular the opening of new air routes, the Autonomous Region could not, as a public authority, acquire that type of services directly from the airlines. Furthermore, the operator of Cagliari-Elmas airport confirmed, as is apparent from recitals 312 and 314 of the contested decision, that, first, the Autonomous Region, by means of the aid scheme at issue, requested a service consisting in selecting airlines capable of meeting stated annual targets for frequency and passenger volume on strategic routes to and from Cagliari-Elmas airport and that, second, that service was provided by co-contracting airlines chosen by the airport operators.

197 It is apparent also from the aid scheme at issue that the objective of the marketing services provided by the airlines was to promote the island of Sardinia as a touristic destination.

198 Accordingly, while it cannot be accepted that, in adopting the aid scheme at issue, the Autonomous Region acted as an investor, it must nevertheless be found, as the applicant maintains — albeit in the alternative — in its reply to one of the written questions put to it by the Court, that that region acted as a service acquirer, particularly in respect of marketing services.

199 First, the amounts received by the applicant corresponded to the provision of services in response to an order from the Autonomous Region for which the airport operators acted only as intermediary between the contract awarder and the providers of those services. Second, as the applicant maintains, the airlines provided services, both in terms of commitments as regards air routes and volume of passenger traffic as well as marketing, which can be offered to airport operators in the air transport sector.

200 In that regard, a State measure in favour of an undertaking cannot be excluded as a matter of principle from the concept of State aid in the sense contemplated in Article 107 TFEU merely because the parties undertake reciprocal commitments (see, to that effect, judgment of 28 January 1999, *BAI* v *Commission*, T-14/96, EU:T:1999:12, paragraph 71).

201 Regarding in particular the acquisition of services through the exercise of public authority, that must in principle be done in compliance with the public procurement rules laid down by secondary EU law. In that case, the fact that such a tender procedure is conducted, before a public authority of a Member State makes a purchase, is normally considered sufficient to rule out the possibility that the Member State is seeking to grant an advantage to the chosen service provider that it would not have otherwise obtained under normal market conditions (see, to that effect, judgment of 5 August 2003, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, T-116/01 and T-118/01, EU:T:2003:217, paragraph 118).

202 In the case at hand, the acquisition of the services in question was not made by the Autonomous Region itself, which, as public authority, would have been subject to the same EU public procurement rules. That acquisition was actually made via other operators not subject in that situation to those rules: the airport operators in this case, which were responsible for obtaining on the market the services desired by the Autonomous Region and which the latter financed.

203 In such a situation, the mere fact that a Member State purchases services which, as the applicant maintains, were allegedly offered on market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private operator would have accepted, or, in other words, a normal commercial transaction. In that type of situation, it is necessary, first, that the State had an actual need for those services and, second, that the acquisition of those services have been made by means of an open, transparent and non-discriminatory procedure such as to ensure equal treatment between the providers offering the services in question and guarantee that the services at issue are acquired at market price, which price ensures that, when those services are acquired, the public authorities do not confer an advantage on the provider chosen (see, to that effect, judgment of 5 August 2003, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, T-116/01 and T-118/01, EU:T:2003:217, paragraphs 112 to 120; see also, by analogy, judgments of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 93 and 94, and of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 32).

204 In the case at hand, the Commission took the view, in recital 386 of the contested decision, that the financing provided by the aid scheme at issue did not constitute remuneration for goods or services fulfilling genuine needs of the Autonomous Region and that an open and transparent tender procedure had not been followed in providing financial support to the airlines concerned.

205 In that regard, contrary to what the Commission found, the Autonomous Region, as a public authority pursuing economic policy objectives, was entitled to consider that it had a need to promote the island of Sardinia as a touristic destination in order to contribute to the economic development of the island.

206 However, first, as the Commission maintains, the unprecedented volume of the marketing services funded under the aid scheme at issue is liable to cast into doubt the fact that those services met, in a proportionate manner and in accordance with the principles of rationalisation of public spending, the genuine needs of the Autonomous Region with a view to pursuing its objectives of economic development of the island of Sardinia.

207 Second and in any event, the Commission has specified, in its defence, that the contested decision addressed the matter of the organisation of calls for tenders with a view to the conclusion of agreements by the airport operators because the organisation of such calls for tenders could have proved the existence of market conditions and, consequently, the absence of any advantage within the meaning of Article 107(1) TFEU.

208 In that regard, however, it must be held, as the Commission maintains, that, with a view to acquiring the air traffic increase and marketing services, neither the Autonomous Region nor the airport operators, acting as intermediaries, organised open and transparent tender procedures such as to guarantee observance of the principle of equal treatment between providers and the acquisition of those services, by the Autonomous Region and by means of State resources made available to the airport operators, at market prices.

209 It is indeed common ground that the airport operators published on their respective websites calls for expressions of interest in the context of which those airlines interested in opening or seasonally adjusting certain of their air routes — other than those already subject to public service obligations — and supplying marketing services could offer their services to the airport operators.

210 However, those calls for expressions of interest cannot be regarded as equivalent to tender procedures. When requested by the Court to produce those calls for expressions of interest as well as the bids it had submitted to the operators of Cagliari-Elmas and Olbia airports, the applicant failed to produce them, explaining that it had not kept those documents. The Commission has not been able to produce those calls for expressions of interest, either. Moreover, it is not apparent from the file that precise criteria for selecting co-contracting airlines had been laid down. On the contrary, it appears that all those that had submitted bids were invited to enter into contracts with the airport operators concerned and that, in terms of pricing of the services offered, the fares applied by the airlines were divergent. Even though they came across as rough and rounded financial assessments, the airlines' financing requirements nevertheless gave rise to almost full reimbursements, by the Autonomous Region, to the operators that had advanced payments in respect of those services.

211 In those circumstances, the Commission was entitled, in Section 7.2.1.3 of the contested decision, entitled 'Economic advantage', to find that the payments received by co-contracting airlines, such as the applicant, could not be regarded as true consideration for the marketing services provided.

212 On that point, the applicant further disputes recitals 362 to 374 of the contested decision, maintaining that the Commission was not entitled to take the view that the airlines, including the applicant, would in any event have advertised their own air destinations and that, consequently, the measures at issue were used to meet costs which the airlines would otherwise have had to bear. Indeed, without the agreements concluded between the applicant and Olbia and Cagliari-Elmas airports, the applicant would not necessarily have reserved among the best priority advertising space on its website for those destinations. In particular, the applicant claims that the airport operators benefited from real services from which they obtained a material profit, as evidenced by the fact that, prior to their conclusion, the contracts they had concluded with the airlines had given rise to market research and that the airport operators also financed those contracts through their own funds. Lastly, the price paid by the

airport operators to the airlines was the market price for marketing services of that type and, in that regard, the applicant recalls that, 'where a practice is objectively justified on commercial grounds, the fact that it also furthers a political aim does not mean to say that it constitutes State aid for the purposes of Article [107 TFEU]' (judgment of 29 February 1996, *Belgium* v *Commission*, C-56/93, EU:C:1996:64, paragraph 79).

213 In that regard, apart from the fact that the co-contracting airlines were not selected following a procedure such as to ensure that the Autonomous Region, through the airport operators, remunerated them at market price, it must be pointed out that, when requested by the Court to produce supporting documents in that regard, the applicant submitted advertising and contractual material confirming that, as the Commission itself held in recital 368 of the contested decision, the promotion of certain cities and regions served by the applicant is usually intrinsically linked, on its website, to the promotion of the flights it itself operates. When questioned at the hearing, the applicant moreover confirmed that it was still promoting Sardinian destinations on its website, even without contractual commitments to that effect undertaken with the airport operators.

214 The Commission was therefore right to note, in the contested decision, that the marketing services in the context of activity 2 were purchased by the airport operators at issue — in this case with the funds made available to them by the Autonomous Region — to promote the operation of the air route or routes offered by the co-contracting airlines and for the opening or maintenance of which they were remunerated under activity 1.

215 In those circumstances, the Commission was entitled to conclude that the airlines were remunerated by the Autonomous Region in order to promote their own services as airlines (see, to that effect, judgments of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-53/16, not published, EU:T:2018:943, paragraph 271; of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-165/16, not published, EU:T:2018:952, paragraph 167; of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-165/15, not published, EU:T:2018:953, paragraph 230; and of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission*, T-111/15, not published, EU:T:2018:954, paragraph 232), as that involved marketing and advertising costs which the airlines at issue, including the applicant, had in principle to bear. Ultimately, achieving the air frequency and passenger volume objectives, which were the subject of activity 1, had the effect, just like the provision of marketing services under activity 2, of increasing the applicant's economic activity.

216 In addition, it must also be stated that, as the Commission has argued, without the significant funding provided by the Autonomous Region, the airport operators would not necessarily, in their expansion strategies, have concluded agreements or of such a volume — or could not have done so financially — meaning that, contrary to what the applicant claims, the Commission was not required to find that only the part of the payments made by the airport operators allegedly higher than market prices should have been regarded as State aid.

217 The lack of inclination on the part of the airport operators to conclude the contracts at issue without funding from the Autonomous Region is borne out by the fact, first, that, following the suspension of the aid scheme at issue, the applicant concluded only a limited number of agreements with the operator of Olbia airport and those were agreements relating only to marketing whereas the operator of Cagliari-Elmas airport did not make use of its services and, second, that it is not established that the applicant had concluded such contracts before the adoption of the aid scheme at issue. Indeed, when asked by the Court to indicate whether it had concluded analogous agreements prior to the aid scheme at issue and subsequent to the suspension of that scheme, the applicant confirmed the existence of agreements predating the aid scheme at issue, but did not adduce evidence of those contracts. Moreover, it did indeed adduce evidence of the conclusion of analogous contracts subsequent to the suspension of the aid scheme at issue, relating, in the case at hand, to the periods from June to December 2015, March to December 2017 and October 2018 to March 2019,

respectively. However, while it had received, under the aid scheme at issue, remuneration of EUR 750 000 for the period from March 2010 to March 2011, EUR 750 000 for the period from summer 2011 to winter 2011/2012 and EUR 1 million for the period from summer 2012 to winter 2012/2013, the applicant ultimately received, under the three contracts subsequent to the aid scheme at issue, only EUR 65 000, EUR 165 000 and EUR 132 800, amounts significantly lower than those claimed under the contracts covered by the aid scheme at issue.

218 In those circumstances, the Commission was entitled to conclude, in recital 388 of the contested decision, that the financing provided by the Autonomous Region to airlines, such as the applicant, through the airport operators for the financing of activities 1 and 2 under the aid scheme at issue had conferred an economic advantage on the airlines concerned, in this case remuneration which they would not have obtained under normal market conditions.

219 In the light of all the foregoing considerations, the second part of the second plea must be rejected as unfounded.

(c) Fourth part of the second plea: receipt of undue advantages by the airport operators from the Autonomous Region pursuant to Law No 10/2010

220 In support of the fourth part of the second plea, the applicant claims that, in recitals 398 to 406 of the contested decision, the Commission wrongly concluded that the airport operators had not benefited from any advantage, even of an indirect nature, on the ground that they were mere intermediaries transferring aid from the Autonomous Region to the airlines. First, the airport operators were explicitly designated as the exclusive beneficiaries of the measures at issue. Secondly, they had discretion in the use of the funds that were allocated to them and in the choice of their service providers, which shows that they did not act as mere intermediaries. Thirdly, given that the Commission itself acknowledged in the contested decision that the purpose and effect of the measures at issue was to increase air traffic at the airports concerned, it is clear that the revenues of those airports, from both aeronautical and other services, rose on account of that increase in air traffic. Contrary to what the Commission found in recital 403 of the contested decision, it cannot be argued that those effects were secondary, in that 'the scheme ha[d] not been designed in such a way as to channel its secondary effects towards the airport operators' and that, on the contrary, it was designed to benefit the tourism sector as a whole. According to the applicant, the main expected effect, namely the air traffic increase, was indissociable from the benefit derived by the airport operators from the attainment of that objective.

221 The Commission contends, primarily, that the fourth part of the second plea is inadmissible in that it is directed against Article 1(1) of the contested decision, which exclusively concerns airport operators with which the applicant is not in a competitive relationship. In that regard, it submits that the finding that the airlines in question benefited from a State aid scheme was not based on the conclusion that the airport operators had not received State aid. In any event, since the applicant does not dispute that the airport operators passed on all the funds received from the Autonomous Region under the aid scheme at issue, the Commission's conclusion that those operators acted as mere intermediaries and were not the actual beneficiaries of those measures remains valid. At most, those operators benefited from an increase in air traffic and in the number of passengers only in the same way as all the other economic operators in other sectors, such as car rental companies, hotels, restaurants, service stations, caterers and retailers.

222 In that regard, it should be noted that, by the fourth part of the second plea, the applicant criticises the Commission for not considering, in Article 1(1) of the contested decision and in recitals 394 to 406 falling within Section 7.2.2 thereof, the airport operators to be beneficiaries of the aid scheme at issue.

223 In the present case, the applicant, as an airline, is active on the air transport market and not on the market for airport services and infrastructure. Consequently, and as has been stated in paragraphs 59 to 70 above, the applicant is not affected in its competitive position by the finding that the airport operators were not the beneficiaries of the aid scheme at issue such that it does not have standing to bring an action for annulment against Article 1(1) of the contested decision and that, to that extent, there is no need to examine the fourth part of the second plea.

224 Thus, to that extent, the fourth part of the second plea must be rejected as inadmissible.

225 Next, and in any event, it must be held that, given that the airport operators passed on to the airlines the entirety of the funds they received from the Autonomous Region to remunerate them under the service contracts eligible for the aid scheme at issue, they did not receive an advantage within the meaning of Article 107(1) TFEU. That is supported by the fact that, without such funding, they would not have used such contracts or, at the very least, not to such an extent, with the understanding that the applicant has not proved that the operators of Cagliari-Elmas and Olbia airports had concluded agreements with it concerning marketing services or frequencies for air routes or passenger targets before the adoption of the aid scheme at issue and that, following the suspension of that scheme, the agreements that were concluded concerned far lesser services and remunerations than those contractually agreed due to the funding obtained under the aid scheme at issue. Ultimately, as the Commission has observed, the purchase of those services was less a commercial need on the part of the airport operators than the decision of the latter to assist in implementing the aid scheme established by the Autonomous Region. Thus, the applicant cannot maintain that, by the aid scheme at issue, the Autonomous Region alleviated costs which the operators of Cagliari-Elmas and Olbia airports would normally have had to bear.

226 It is true that the co-contracting airlines' performance of the services desired and funded by the Autonomous Region had the effect of increasing air traffic and the volume of passengers to and from the airports concerned, entailing an increase in the airport and non-airport resources of their operators. However, as the Commission contends, that is a secondary effect of the aid scheme at issue from which the entire Sardinian tourism sector benefited, including, moreover, the applicant, which, to some extent, also obtained such a secondary advantage in an increase in sales of the services offered on board its aircraft. Nevertheless, the immediate advantage forming the subject matter of the aid scheme at issue and which was not obtained under normal market conditions still consisted of the payments made to the airlines.

227 In those circumstances, the fourth part of the second plea must be rejected, as must, accordingly, the second plea in its entirety as unfounded.

3. Third plea: manifest error of assessment of fact and of law as regards whether the measures at issue distort or threaten to distort competition and affect trade between Member States

228 In the third plea, the applicant disputes that the measures at issue distorted or threatened to distort competition on the air transport market to and from the airports of the island of Sardinia, at the very least Olbia and Cagliari-Elmas airports, in particular because, as regards the air routes operated by the applicant and after the conclusion of marketing agreements between it and the operators of those airports, no other airline operated those commercial air routes. In that regard, the Commission failed to take adequate account of the arguments put forward by the applicant in its comments of 30 July 2013. Moreover, given that those airport operators selected the co-contracting airlines at the end of tender procedures, the Commission erred in law in finding that the measures at issue had an adverse effect on competition for access to the air routes in question. Each European airline was able to submit a bid in those calls for tenders, and therefore, as the Commission held in a case concerning a motorway project in central Greece, that selection process ruled out the possibility of the measures at issue having an adverse effect on intra-EU trade and on competition.

229 The Commission contends that the third plea should be rejected as unfounded, arguing that a finding that competition has been affected is made whenever the beneficiary of an aid measure competes with undertakings on markets open to competition, which is the situation in the present case, since the airlines in question, active on the particularly competitive airline market, received financial compensation.

230 As a preliminary point, it should be recalled that, for the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid at issue has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see, to that effect, judgments of 15 December 2005, *Italy* v *Commission*, C-66/02, EU:C:2005:768, paragraph 111, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 134).

231 In particular, if aid granted by a Member State strengthens the position of an undertaking as compared with that of other undertakings competing in trade within the Union, the latter undertakings must be regarded as affected by that aid (see judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 52 and the case-law cited).

232 Moreover, in the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the reasons for the decision, whether, by reason of the high amounts or percentages of aid, the nature of the investments for which aid is granted or other terms of the scheme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgments of 14 October 1987, *Germany* v *Commission*, 248/84, EU:C:1987:437, paragraph 18, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63).

233 In the contested decision, in recitals 390 to 392 thereof, the Commission sufficiently explained that airlines, receiving the payments made by airport operators under the aid scheme at issue, were active in a sector characterised by intense competition between operators from different Member States, and therefore were participating in trade within the European Union.

234 Contrary to what the applicant maintains, such reasons are in themselves sufficient in terms of the Commission's obligation to state reasons (see, to that effect, judgments of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraphs 88 and 89, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 114 and 121).

235 Furthermore, the Commission did not misconstrue the concept of State aid, as referred to in Article 107(1) TFEU, in holding that the clear cross-border nature of the activities in question, namely passenger air transport services, implied that the aid scheme at issue was liable to distort competition and affect trade between Member States by strengthening the position on the market of the airlines that benefited from that scheme. Air carriers such as the applicant are in competition on the air market at European level, such that the grant of the aid to the airlines, such as the applicant, which concluded contracts with the operators of Cagliari-Elmas and Olbia airports, strengthens the competitive position of those beneficiary undertakings as compared with that of other competing airlines at European level, regardless of whether or not they operate direct air routes to the island of Sardinia.

236 In any event, first, as the applicant has acknowledged, it is in competition, on its air routes to and from Sardinian airports, with European airlines transporting passengers to and from the same continental airports via connecting flights at other airports. Those airlines, with regard to those connecting routes, competing with the applicant's direct routes, were not beneficiaries of the aid scheme at issue which covered only direct (point-to-point) routes, at least not as regards those flight segments operated beyond the connecting airport, such that the competitive position of beneficiaries such as the applicant was necessarily strengthened compared with that of such non-beneficiary airlines.

237 As for the applicant's argument that certain airlines, in particular scheduled airlines, were not beneficiaries of the aid scheme at issue solely because they had not submitted offers of cooperation in the context of the calls for expressions of interest published by the airport operators, it cannot succeed, either. The effect on trade between Member States within the meaning of Article 107(1) TFEU cannot depend in the case at hand on whether all the airlines benefited or were able to benefit from the measure at issue. In any event, even assuming that all European airlines operating direct flights to and from Sardinian airports could have benefited from the aid scheme at issue — which has not been established in the present case — that circumstance, concerning the selectivity of the measures at issue — which, as was confirmed at the hearing, is not disputed by the applicant — would have had no effect on the Commission's finding that trade between Member States was affected by that scheme inasmuch as it strengthens the competitive position of those airlines compared with their competitors on the European market that do not serve the island of Sardinia.

238 In the light of the foregoing, the third plea must be rejected as unfounded.

4. Fourth plea: manifest error of assessment as regards the absence of possibility of declaring the measures at issue compatible with the internal market under Article 107(3) TFEU

239 In support of the fourth plea, the applicant claims that the Commission's conclusion that the measures at issue could not be declared compatible with the internal market is incorrect, in so far as the decision is based on the failure to comply with some of the conditions laid down in Communication from the Commission 2005/C 312/01 — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1; 'the 2005 Guidelines').

240 The Commission contends that the fourth plea should be rejected as unfounded.

241 In that regard, according to Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may inter alia be regarded as compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, a condition which must be assessed in accordance with the criteria of necessity and proportionality (judgment of 26 February 2015, *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 80).

242 However, it is settled case-law that the general principle laid down in Article 107(1) TFEU is that State aid is prohibited and that derogations from that principle, as referred to in paragraph 3 of that Article 107, must be construed narrowly (judgments of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 20; of 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, EU:C:2006:130, paragraph 79; and of 26 February 2015, *Orange* v *Commission*, T-385/12, not published, EU:T:2015:117, paragraph 81).

243 In addition, according to equally settled case-law, in the application of Article 107(3)(c) TFEU, the Commission has a wide discretion, the exercise of which involves economic and social assessments. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to state reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of

assessment in regard to the facts or misuse of powers (judgments of 26 September 2002, *Spain* v *Commission*, C-351/98, EU:C:2002:530, paragraph 74; of 29 April 2004, *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraph 83; and of 15 December 2016, *Abertis Telecom Terrestre and Telecom Castilla-La Mancha* v *Commission*, T-37/15 and T-38/15, not published, EU:T:2016:743, paragraph 160).

244 As is apparent in particular from point 24 of the 2005 Guidelines, the purpose of those guidelines is to specify the cases in which public financing of airports and airlines constitutes State aid and, where it does constitute aid, the conditions under which it may be declared compatible with the internal market in accordance with Article 107(3)(c) TFEU.

245 In that regard, as the Commission found in recitals 412 to 414 of the contested decision, the aid scheme at issue, assuming it could be regarded as providing aid for launching new air routes, did fall within the scope of the 2005 Guidelines. In accordance with what point 174 of the 2014 Guidelines provides, aid notified prior to the entry into force of those latter guidelines could in principle be examined, after 4 April 2014, in the light of those guidelines. However, the aid, whether notified or not, implemented, as in the case at hand, before the Commission ruled on the measures notified by the Italian Republic and, consequently, proving unlawful in view of the standstill obligation referred to in Article 108(3) TFEU, must be examined in the light of the 2005 Guidelines.

246 With regard to point 79 of the 2005 Guidelines, relevant to the case at hand, it is worded as follows:

‘In view of the above objectives and the significant difficulties which can result from launching a new route, the Commission may approve such aid if it fulfils the following conditions:

…

(d) Long-term viability and degressiveness: the [new] route receiving the aid must ultimately prove profitable, i.e. it must at least cover its costs, without public funding. For this reason start-up aid must be degressive and of limited duration.

(e) Compensation for additional start-up costs: the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running. Examples of such costs are the marketing and advertising costs incurred at the outset for publicising the new link; they may include the installation costs incurred by the airline at the regional airport in question in order to launch the route, provided the airport falls within category C or D and aid has not already been received in respect of the same costs. Conversely, aid cannot be granted in relation to standard operating costs such as hire or depreciation of aircraft, fuel, crew salaries, airport charges or catering costs. The remaining eligible costs must correspond to real costs obtained in normal market conditions.

(f) Intensity and duration: degressive aid may be granted for a maximum period of three years. The amount of aid in any one year may not exceed 50% of total eligible costs for that year and total aid may not exceed an average of 30% of eligible costs.

For routes from disadvantaged regions, i.e. the outermost regions, the regions referred to in Article 87(3)(a) [of the EC Treaty], and sparsely populated regions, degressive aid may be granted for a maximum period of five years. The amount of aid in any one year may not exceed 50% of total eligible costs for that year and total aid may not exceed an average of 40% of eligible costs. If the aid is granted for five years, it may be maintained at 50% of total eligible costs for the initial three years.

In any event, the period during which start-up aid is granted to an airline must be substantially less than the period during which the airline undertakes to operate from the airport in question, as indicated in the business plan required in [point] 79(i). Furthermore, the aid should be stopped once the objectives in terms of passengers have been reached or when the line breaks even, even if this is achieved before the end of the period initially foreseen.

…

(h) Non-discriminatory allocation: any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services. The notification must in particular include the description of the route as well as the objective criteria in terms of the amount and the duration of the aid. The rules and principles relating to public procurement and concessions must be respected where applicable.

…'

247 In the contested decision, in recitals 410 to 421 thereof, the Commission found that the financial compensation provided by the airport operators to the airlines under the aid scheme at issue could not be considered compatible with the internal market, since the compatibility criteria mentioned in point 79 of the 2005 Guidelines were not fulfilled.

248 By its fourth plea, the applicant seeks to demonstrate that, in its individual case, the aid it received, comprising amounts that the operators of Cagliari-Elmas and Olbia airports paid it in performance of the contracts concluded with it, met the conditions laid down in point 79 of the 2005 Guidelines and that, failing that, it could still be declared compatible with the internal market under point 81 of those guidelines or, separate from those guidelines, as tourism development aid in the spirit of Article 107(3)(c) TFEU.

249 In that regard, it must be held, however, as the Commission contends, that the arguments put forward by the applicant are not such as to invalidate its finding, in the contested decision, that the aid scheme at issue did not satisfy the criteria set out in point 79 of the 2005 Guidelines, which are cumulative, meaning that non-compliance with one of them was sufficient to rule out the possibility of aid being categorised as 'start-up aid' compatible with the internal market under those guidelines.

250 First of all, it must be noted that, as is apparent from recital 410 of the contested decision, the Italian Republic itself maintained that the aid scheme at issue had not been conceived as a scheme to support start-up routes and that it did not fulfil the conditions set out in point 79 of the 2005 Guidelines.

251 Furthermore, as regards the condition laid down in point 79(d) of the 2005 Guidelines, even assuming, as the applicant maintains, that the commercial agreements between the airport operators and the airlines were concluded from the point of view of economic profitability, evaluated by means of an *ex ante* analysis of the viability and profitability of the operating plans submitted by the airlines and of the economic analyses drawn up by the airport operators, the aid scheme at issue did not put in place a system of aid degressive over time for each of the air routes subject to the contracts concluded between the airport operators and the airlines and which, in any event, are not all 'new' within the meaning of those guidelines. In particular, each airline received global amounts corresponding to periods of activity, but, in actual fact, the funding was not individualised per route concerned on departure from and arrival at each airport concerned.

252 In its particular case, the applicant does not dispute that the aid it received for all the air routes it provides from Olbia airport was not degressive in respect of that airport, since, under the aid scheme at issue, it received from the operator of that airport remuneration that actually increased over time, increasing from EUR 750 000 for the period from March 2010 to March 2011 and from EUR 750 000

for the period from summer 2011 to winter 2011/2012 to an amount of EUR 1 million for the period from summer 2012 to winter 2012/2013. So far as concerns Cagliari-Elmas airport, it did indeed receive, as it states, effectively degressive remunerations, namely an amount of EUR 800 000 for the period from March 2010 to March 2011, EUR 700 000 for the period from March 2011 to March 2012 and EUR 600 000 for the period from March 2012 to March 2013. However, it is not apparent from the aid scheme at issue or from the documents produced by the applicant that the air routes that in general were the subject of those amounts were profitable without the funding in question, or that the aid could be individualised for each of those routes so as to find, for each of them, that the aid corresponding to the route in question was degressive.

253 As regards the mechanism, put in place by the Autonomous Region, for monitoring the payments made under the aid scheme at issue, it does not appear, contrary to what the applicant claims, that it guaranteed, in the light of the criterion laid down in point 79(e) of the 2005 Guidelines, that the public funding provided was necessary to cover part of the start-up costs of the air routes concerned, that it represented only the actual costs incurred by the airport operators and that it involved only those costs. That is even less the case given that the aid provided to each airline was not broken down for each of the air routes operated to and from each of the Sardinian airports concerned.

254 In that regard, it is irrelevant that the airline operators allegedly had to bear — and to an unknown extent — additional costs out of their own funds or that the applicant would not have opened or maintained the air routes concerned without the financial support received from the operators of Cagliari-Elmas and Olbia airports. Furthermore, the aid scheme at issue and the agreements concluded between the airport operators and the airlines do not specify, for the air routes concerned, what the additional start-up costs for each of them were.

255 Similarly, regarding the condition laid down in point 79(f) of the 2005 Guidelines, it is clearly not satisfied since it is evident that the aid scheme at issue and the agreements concluded between the airport operators and the airlines do not identify eligible costs. In the absence of any mention of eligible costs, it is impossible to assess observance of the condition of maximum funding of 50% of the amount of eligible costs per year, with an average maximum of 30% of funding. On the contrary, it is apparent from the file that the Autonomous Region reimbursed, on request, payments made by the airport operators to the airlines and that those were fixed at flat-rate amounts, often rounded, without further clarity and, in any event, not broken down according to each of the air routes concerned.

256 So far as concerns the applicant's claim that, Sardinia being a disadvantaged economic region of the European Union within the meaning of the second subparagraph of point 79(f) of the 2005 Guidelines, it must be held, as the Commission notes, that that region does not fulfil the conditions laid down in the Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13).

257 With regard to the condition laid down in point 79(h) of the 2005 Guidelines and concerning the non-discriminatory allocation of start-up aid, it is necessary, for the reasons already set out above in support of rejecting the second part of the second plea, to reject the applicant's argument that the airport operators organised a procedure guaranteeing competition between airlines, ensuring transparency, sufficient advertising, the absence of discrimination and the selection of the most economically advantageous tenders.

258 Thus, it is clear that the aid scheme at issue, including as regards the aid individually received by the applicant, did not fulfil the criteria set out in point 79 of the 2005 Guidelines.

259 In those circumstances, having regard to the Commission's discretion in the matter as well as the need to interpret strictly the exceptions to the principle that State aid is prohibited, the Commission was entitled, despite the request made to that effect by the Italian Republic during the administrative procedure, to decide that there was no longer any need to derogate from the criteria set out in the

2005 Guidelines under point 81 of those guidelines, according to which the Commission may 'carry out a case-by-case assessment of aid or a scheme which fails to fully comply with these criteria [of point 79], but the end result of which would be comparable'. In any event, since the aid scheme at issue does not comply with the majority of the criteria set out in point 79 of the 2005 Guidelines, it cannot be regarded as resulting in a situation comparable to aid which complies with those requirements.

260 As regards the applicant's claim that it expected the aid scheme at issue to be authorised, independently of the 2005 Guidelines, under Article 107(3)(c) TFEU, in so far as it was intended to promote tourism in Sardinia and the commercial activities of Sardinian airport operators, first, the Italian Republic did not request those derogations during the administrative procedure, which are to be strictly applied. Second, assuming that the applicant is referring specifically to the derogation concerning aid to facilitate the development of certain economic activities or of certain economic areas, the aid scheme at issue, by virtue of the level of the funding it provided, was unlikely not to affect trading conditions to an extent contrary to the common interest.

261 It follows from all the foregoing considerations that the fourth plea must be rejected as unfounded.

5. Fifth plea: infringement of the principle of legitimate expectations as regards the order to recover the aid from the applicant

262 In the fifth plea, the applicant claims that the Commission infringed the principle of legitimate expectations by requiring, in Article 2 of the contested decision, the Italian authorities to recover from the applicant the amounts which the latter had received in performance of the contracts between it and the airport operators and which derived from the funds received by those operators from the budget of the Autonomous Region. A diligent operator who concluded such agreements with private operators, such as airport operators, in normal conditions of competition would have had no reason to doubt the commercial nature of those agreements and, consequently, could neither have reasonably suspected that, in that context, those operators were not managing their own funds nor have anticipated that it might subsequently be regarded as a beneficiary of the alleged State aid.

263 In particular, such an operator would not necessarily have been aware that the funds used by those airport operators to remunerate it were, at least in part, funds which had been paid to them by the Autonomous Region under the measures at issue. A diligent operator would therefore not have considered it necessary to ascertain the origin of those funds and their possible incompatibility with the internal market under Article 107(3) TFEU. Moreover, the organisation of calls for tenders by airport operators as well as the application of market or above market rates for airport charges and the existence of penalty clauses in the service contracts, concluded with supporting business plans and studies, could only strengthen the applicant's confidence that its economic relationships with each of the airport operators concerned in the present case were of a purely commercial and non-State nature. In any event, according to the applicant, a prudent operator in the air transport sector could not anticipate, in the light of the Commission's relevant practice, that the commercial agreement would not be examined, as individual aid, in the light of the private investor test, but would on the contrary be regarded, as in the present case, as an individual case of application of an aid scheme.

264 The Commission contends that the fifth plea should be rejected as unfounded, noting that the applicant does not rely on any specific assurance given to it by the Commission during the examination of the aid scheme at issue. In any event, it considers that a diligent operator concluding the agreements in question in the present case should have known that the airport operators were financed by the Autonomous Region within the framework of Law No 10/2010, in particular since the preamble to the agreement concluded between the applicant and SOGAER stated very clearly that the agreement was concluded within the framework established by Law No 10/2010, even though that law had not been notified by the Italian State on the date that agreement was concluded.

265 In that regard, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where an EU institution has caused him or her to have justified expectations. Moreover, a breach of this principle cannot be invoked in the absence of specific assurances provided to the party by the administration (see judgment of 24 November 2005, *Germany* v *Commission*, C-506/03, not published, EU:C:2005:715, paragraph 58 and the case-law cited). Similarly, if a prudent and alert economic operator could have foreseen the adoption of an EU measure likely to affect his interests, he cannot plead that principle if the measure is adopted (see judgments of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission*, 265/85, EU:C:1987:121, paragraph 44 and the case-law cited, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 147 and the case-law cited).

266 In view of the fundamental role played by the notification obligation to render effective the review of State aid by the Commission, which is mandatory, the recipients of aid may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for in Article 108 TFEU and a diligent business operator must normally be in a position to confirm that that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission or, as is the case here, without awaiting the Commission decision closing the procedure, so that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have, in principle, a legitimate expectation that its grant is lawful (see, to that effect, judgment of 27 September 2012, *Producteurs de légumes de France* v *Commission*, T-328/09, not published, EU:T:2012:498, paragraphs 20 and 21 and the case-law cited).

267 In the case at hand, as the Commission maintains, at no point did it give assurances to the applicant as to the compatibility of the aid scheme at issue with the internal market, especially since the Italian Republic implemented that scheme without waiting for the Commission to give a decision on it under Article 108 TFEU, thereby indicating the unlawfulness of that scheme.

268 Regarding the applicant's alleged legitimate expectation as to the strictly commercial nature of its contractual relations with the operators of Cagliari-Elmas and Olbia airports, which the applicant argues was not such as to raise suspicions as to the State origin of the conduct and funds used by those operators, it must be held, first, that the State origin of the funds obtained by the airport operators does not appear to have been concealed in the calls for expressions of interest published by them on their websites and, second and in any event, that the contract between the applicant and the operator of Cagliari-Elmas airport explained, in particularly explicit terms, that the Autonomous Region was financing the performance of that contract.

269 Thus, even if the contracts concluded by the applicant with the operator of Olbia airport did not mention the Autonomous Region and referred only to the 'financial participation of the subjects interested in the tourism development of the Island', the applicant cannot reasonably maintain that it believed it was concluding a contract with a mere private operator.

270 In addition, Law No 10/2010 having been published in the *Bollettino ufficiale della Regione autonoma della Sardegna*, the applicant, as a prudent operator active on the Italian air transport market, could not disregard its existence (see, by analogy, judgment of 20 November 2008, *Heuschen & Schrouff Oriëntal Foods Trading* v *Commission*, C-38/07 P, EU:C:2008:641, paragraph 61) or, consequently, the financing mechanisms it provided for and the risk, first, that they might be regarded as an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589 and, second, that airlines would be regarded as the actual beneficiaries of that scheme. Moreover, point 79(h) of the 2005 Guidelines, relied on by the applicant, explicitly raises the possibility of a public entity granting aid to an airline 'via an airport'.

271 Regarding the application of the private investor test, since the Autonomous Region does not have a shareholding in the airports at issue in the present case, and does not control them, the applicant could not have a legitimate expectation that that principle would be applied in this case, nor could it not speculate on the fact that the application of that principle would necessarily lead to the conclusion that it did not receive an advantage originating from a State resource.

272 In the light of the foregoing, the fifth plea must be rejected as unfounded.

6. Sixth plea: insufficient reasoning and contradictory reasoning in the contested decision

273 By the sixth plea, the applicant criticises the Commission both for insufficient reasoning and contradictory reasoning in the contested decision.

274 The Commission contends that the sixth plea should be rejected as unfounded.

275 According to settled case-law, the statement of reasons for an act must be appropriate to it and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the act in question in such a way as to enable, first, the persons concerned to understand its basis and, if appropriate, to challenge its validity before the Court and, second, the Court to ascertain whether it is well founded, without it, however, being necessary for the institution to go into all the relevant facts and points of law, since the question whether the statement of reasons satisfies Article 296 TFEU is assessed taking into account both the wording of that act and its legal and factual context (see, to that effect, judgments of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 73, and of 14 December 2005, *Regione autonoma della Sardegna* v *Commission*, T-200/04, not published, EU:T:2005:460, paragraph 63 and the case-law cited).

276 Moreover, in a plea based on a failure to state reasons or a lack of adequate reasons, objections and arguments which aim to challenge the merits of the contested decision are misplaced and irrelevant (see judgment of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 59 and the case-law cited).

277 In the case at hand, the applicant submits first of all that the Commission has not sufficiently explained the reasons why it considered, in recitals 357 to 361 of the contested decision, that the airport operators acted merely as intermediaries of the Autonomous Region and that, consequently, the flows of funds between those operators and the airlines should be regarded not as the commercial performance of the contracts between those entities, but as involving State resources. In particular, the Commission did not examine in detail the situation specific to each airport, in particular the position of the State in the companies operating each of the airports concerned, in order to support its conclusions concerning whether or not those airports were controlled by the public authorities. Nor did the Commission explain how GEASAR, though a privately owned operator, failed to act independently of the State. Similarly, it failed to explain how the State exercised control over the decisions adopted by the operators of Olbia and Cagliari-Elmas airports and in what respect the approval mechanism provided for by the implementing measures was a sufficient reason to reach that conclusion.

278 In that regard, it must be held that, in the contested decision, the Commission explained, in particular in recitals 355 to 362 of that decision, the reasons why it found that the airport operators had acted as intermediaries between the Autonomous Region and the airlines. The applicant moreover understood the reasoning in question, since it has put forward a detailed plea, in this case the first plea, calling into question the Commission's reasoning regarding the assessment of that intermediary role, including in the light of the fact that the Autonomous Region did not own Cagliari-Elmas and Olbia

airports. In actuality, under cover of its allegation of a breach of the obligation to state reasons, the applicant is merely reiterating the fact that it does not share the Commission's substantive analysis in the contested decision.

279 The applicant further complains that the Commission failed to explain why the measures at issue did not fulfil genuine needs of the Autonomous Region, even though the Commission had, on the contrary, examined such a question at length in its previous decisions concerning marketing agreements, such as those concluded in the present case between the applicant and the airport operators.

280 In that regard, it must be held that the Commission did explain the reasons why the aid scheme at issue did not fulfil genuine needs of the Autonomous Region, even if, in so doing, it reached an incorrect conclusion, noted by the Court in its examination of the second part of the second plea. Furthermore, it explained why it considered that the aid scheme at issue could not escape categorisation as State aid in accordance with the market economy operator principle.

281 In the light of the foregoing, the sixth plea must be rejected as unfounded and, consequently, the action must be dismissed in its entirety.

IV. Costs

282 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders easyJet Airline Co. Ltd to pay the costs.

Papasavvas Svenningsen Valančius

Csehi Nihoul

Delivered in open court in Luxembourg on 13 May 2020.

E. Coulon
Registrar

S. Papasavvas
President

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