Reports of Cases

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

8 February 2023*

[Text rectified by order of 13 July 2023]

(State aid – Aviation sector – Measures implemented by Romania in favour of Timișoara Airport – Measures implemented by Timișoara Airport in favour of Wizz Air and airlines using that airport – Decision finding, in part, that there was no State aid in favour of Timișoara Airport and airlines using that airport – Airport charges – Action for annulment – Regulatory act – Individual concern – Substantial effect on competitive position – Direct concern – Interest in bringing proceedings – Admissibility – Article 107(1) TFEU – Selective nature – Advantage – Private operator test)

In Case T-522/20,

Carpatair SA, established in Timișoara (Romania), represented by J. Rivas Andrés and A. Manzaneque Valverde, lawyers,

applicant,

v

European Commission, represented by F. Tomat and C. Georgieva, acting as Agents,

defendant,

supported by

Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.), established in Budapest (Hungary), represented by E. Vahida, S. Rating and I.-G. Metaxas-Maranghidis, lawyers,

and by

[As rectified by order of 13 July 2023] Societatea Națională 'Aeroportul Internațional Timișoara – Traian Vuia' SA (AITTV), established in Ghiroda (Romania), represented by V. Power and R. Hourihan, Solicitors,

interveners,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

* Language of the case: English.

composed, at the time of the deliberations, of S. Papasavvas, President, J. Svenningsen, M. Jaeger, C. Mac Eochaidh and T. Pynnä (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 12 September 2022,

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Carpatair SA, seeks the annulment of Commission Decision (EU) 2021/1428 of 24 February 2020 on the State Aid SA.31662 – C/2011 (ex NN/2011) implemented by Romania for Timișoara International Airport – Wizz Air (OJ 2021 L 308, p. 1; 'the contested decision'), in so far as it concludes that certain measures do not constitute State aid within the meaning of Article 107(1) TFEU.

Background to the dispute

2 [As rectified by order of 13 July 2023] Timișoara International Airport ('the airport') is located in the west of Romania, 50 kilometres (km) from Arad Airport (Romania), which has very limited traffic. The airport is operated by the second intervener, Societatea Națională 'Aeroportul Internațional Timișoara – Traian Vuia' SA (AITTV), a joint stock company in which the Romanian State holds 80% of the shares.

3 The applicant, Carpatair SA, is a Romanian regional airline. In 2000, it set up its hub at the airport, from which it operated a hub-and-spoke network. Between 2007 and 2009, the airport's activity was centred on the operations of the applicant, which provided full-service flights to approximately 32 domestic and European destinations.

4 In preparation for the increase in traffic that was expected to result from Romania's accession to the European Union in 2007, and in order to meet the security requirements for acceding to the Schengen area, AITTV received financing from the Romanian State for the construction of a terminal for non-Schengen flights and for security equipment.

5 Furthermore, in 2008, as part of a strategy intended to attract low-cost airlines and increase the overall profitability of the airport, AITTV signed agreements with the first intervener, Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.) ('Wizz Air'), a Hungarian low-cost airline, determining the principles of their cooperation as well as the terms and conditions for the use of the airport infrastructure and services by Wizz Air ('the 2008 agreements'). On 25 June 2010, two of those agreements were amended by way of a new discount scheme agreed between Wizz Air and AITTV, covering the period up to 6 February 2011 ('the 2010 amendment agreements'). Wizz Air began operating flights from the airport in October 2008.

6 On 30 September 2010, the applicant submitted a complaint to the European Commission regarding alleged unlawful State aid provided by the Romanian authorities at the airport in favour of Wizz Air.

7 On 24 May 2011, the Commission notified Romania of its decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU ('the opening decision') concerning the annual operating financing granted to AITTV in 2007, 2008 and 2009, the discounts and rebates on airport charges granted under the Aeronautical Information Publications ('AIPs') of 2007, 2008 and 2010, the 2008 agreements and the non-collection of airport charges invoiced to Wizz Air for the period from October 2009 to February 2010. By the publication of that decision in the *Official Journal of the European Union* on 13 September 2011 (OJ 2011 C 270, p. 11), the Commission invited interested parties to submit their comments on that measure.

8 In the opening decision, the Commission stated its preliminary view that it could not exclude the possibility that the discounts and rebates provided for by the 2007, 2008 and 2010 AIPs and the 2008 agreements involved State aid which was incompatible with the internal market.

9 The Romanian authorities and interested parties, including AITTV, the applicant and Wizz Air, submitted written comments. The Commission forwarded the comments of the interested parties to the Romanian authorities, which had the opportunity to submit their own comments thereon.

10 By letters sent between 2011 and 2018, the Commission requested additional information from the Romanian authorities, which complied with those requests.

11 By letters sent between 2011 and 2018, the applicant provided additional information.

12 By letters sent in 2011 and 2016, AITTV submitted additional information.

13 On 14 March 2014, the Commission informed the Romanian authorities and the interested parties of the adoption of the Guidelines on State aid to airports and airlines (OJ 2014 C 99, p. 3; 'the 2014 guidelines') and invited them to submit their comments. The Commission received comments from the applicant, Wizz Air and AITTV.

14 On 11 February and 3 July 2015, Wizz Air provided additional information.

15 As from 2014, the applicant ceased its operations at the airport and underwent a judicial reorganisation procedure. Its main base of operations is now located at Arad Airport, from which it offers, inter alia, charter flights. It no longer offers scheduled flights.

16 On 24 February 2020, the Commission adopted the contested decision.

Contested decision

17 In the contested decision, the Commission examined whether there was State aid within the meaning of Article 107(1) TFEU as regards, first, the annual financing granted to AITTV from 2007 to 2009 (see recitals 38, 39 and 171 to 235 of the contested decision), secondly, the airport charges published in the 2007, 2008 and 2010 AIPs (see recitals 40 to 49 and 267 to 299 of the contested decision), thirdly, the 2008 agreements and the 2010 amendment agreements ('the third measure') (see recitals 50 to 76 and 300 to 440 of the contested decision), and, fourthly, the non-collection of the airport charges invoiced to Wizz Air for the period from October 2009 to February 2010 (see recitals 77, 78 and 441 to 443 of the contested decision). Moreover, having

found that some of the financing granted to AITTV constituted State aid, the Commission examined whether that financing was compatible with the internal market (see recitals 236 to 266 of the contested decision).

18 As regards the airport charges in the 2007, 2008 and 2010 AIPs, the Commission concluded that the base rate, the rebates and the discounts on those charges set out in the AIPs in question were not selective since they were applicable in a non-discriminatory manner. The Commission therefore concluded that that measure did not constitute State aid within the meaning of Article 107(1) TFEU.

19 As regards the third measure, the Commission noted that it was expected to be incrementally profitable for AITTV. Consequently, it found that a prudent private operator in a market economy would have entered into such agreements. Moreover, that measure was part of an overall strategy and long-term effort towards the overall profitability of the airport. The Commission therefore concluded that those agreements had not conferred an economic advantage on Wizz Air which it would not have obtained under normal market conditions, and that they did not constitute State aid.

20 The operative part of the contested decision is worded as follows:

'Article 1

1. The public financing that Romania has provided in the period 2007-2009 to [AITTV] for the non-Schengen terminal development, the improvement of the taxiway and the extension of the apron and the lighting equipment amounting to RON 29 194 600 constitute State aid within the meaning of Article 107(1) [TFEU]. It was implemented in breach of Article 108(3) [TFEU].

2. The State aid referred to in paragraph 1 is compatible with the internal market within the meaning of Article 107(3)(c) [TFEU].

Article 2

The public financing of the access road and the development of the parking area in 2007 and for the security equipment in 2008, the airport charges in the 2007 AIP, 2008 AIP and 2010 AIP and the 2008 Agreements with Wizz Air (including the 2010 Amendment Agreements) do not constitute State aid within the meaning of Article 107(1) [TFEU].

Article 3

This decision is addressed to Romania.'

Forms of order sought

21 The applicant claims that the Court should:

– annul the contested decision in so far as it does not conclude that the 2010 AIP ('the second measure') and the third measure (together, 'the measures at issue') constitute State aid granted to Wizz Air which is unlawful and incompatible with the internal market;

– order the Commission to pay the costs.

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

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

Admissibility

23 Without formally raising an objection of inadmissibility under Article 130 of the Rules of Procedure of the General Court, the Commission, supported by AITTV, contends that the action is inadmissible on the ground, first, that the applicant does not have standing to bring an action for annulment of the contested decision and, secondly, that it does not have a vested and present interest in the annulment of the contested decision.

24 The applicant disputes the Commission's argument.

Interest in bringing proceedings

25 The Commission contends that the applicant has no vested and present interest in the annulment of the contested decision. It argues that the measures at issue do not negatively affect the applicant's current air transport services, which are different in nature from that of the services provided by Wizz Air in the years covered by the Commission's investigation (and indeed at present). Regarding the applicant's alleged intention to resume its operations at the airport, the Commission maintains that, apart from the fact that it is not supported by any evidence, it is not liable to demonstrate the existence of an interest in bringing proceedings.

26 Furthermore, according to the Commission, the present action is not capable of directly benefiting the applicant. It contends that a positive outcome for the applicant in the present action would have no effect either on the action for damages or on the action for recovery of the aid brought by the applicant before the Romanian courts. It argues that if the EU Courts were to annul the contested decision as regards the measures at issue, the Commission would have to re-examine those measures, including their compatibility with the internal market. Since the Commission has exclusive competence as regards the assessment of the compatibility of aid measures, no national court could autonomously conclude that a measure was incompatible with the internal market and order recovery of the aid.

27 According to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55 and the case-law cited).

28 Furthermore, an interest in bringing an action for annulment must be vested and present and is to be assessed as at the date on which the action is brought (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 29 and the case-law cited).

29 It should also be borne in mind that, in principle, a party retains its interest in continuing an action for annulment where that action may constitute the basis of an action for damages (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 42 and the case-law cited).

30 The possibility of an action for damages suffices to justify such an interest in bringing proceedings, in so far as that interest is not hypothetical (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 43 and the case-law cited).

31 Moreover, an interest in bringing proceedings could arise from any action before the national courts in the context of which the possible annulment of the contested act before the EU Courts is capable of benefiting the applicant (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 44 and the case-law cited).

32 It is not for the EU Courts, for the purposes of determining an interest in bringing proceedings before them, to assess the likelihood that an action brought before national courts under national law is well founded and, therefore, to substitute themselves for those courts in making such an assessment. It is, by contrast, necessary, but sufficient, that, by its outcome, the action for annulment brought before the EU Courts would be capable of benefiting the party which brought it (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 56 and the case-law cited).

33 In the present case, on 28 January 2016, the applicant brought an action for damages before the Tribunalul București (Regional Court, Bucharest, Romania) against AITTV, the Romanian authorities and Wizz Air, concerning the grant of State aid to Wizz Air by means of, inter alia, the measures at issue. That action gave rise to decisions of the Tribunalul București (Regional Court, Bucharest) and of the Curtea de Apel București (Court of Appeal, Bucharest, Romania). According to the applicant, the appeal brought by it against the decision of the latter court is pending before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania).

34 In addition, following the judgment of the Tribunalul Timiș (Regional Court, Timiș, Romania) of 30 August 2011 finding that the discount provided for in point 7.3 of the second measure was unlawful State aid, which was upheld by the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania) on 14 November 2012, the applicant brought an action for recovery of the aid at issue in 2015. That action is, according to the applicant, currently pending before the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania), which decided, on 21 December 2020, to stay the proceedings until a final judgment has been given in the present case.

35 Thus, it cannot be ruled out that the possible annulment of the contested decision could affect the outcome of the proceedings pending before the Romanian courts.

36 Furthermore, as regards a second complaint submitted by the applicant, the latter maintains that the Commission informed the applicant, on 1 July 2020, of its intention not to initiate a formal investigation procedure in that second case, on the ground that the measures at issue were similar to those examined in the contested decision. The applicant also argues that the Commission's preliminary examination of that second complaint is still ongoing.

37 Accordingly, the possible annulment of the contested decision may result in the initiation of the formal investigation procedure in that second case, during which the applicant would, in principle, have the opportunity to exercise its procedural rights by submitting comments.

38 Therefore, the applicant has demonstrated to the requisite legal standard that the possible annulment of the contested decision is capable of benefiting it. It therefore has an interest in bringing an action for annulment against that decision.

Standing to bring proceedings

39 The Commission contends that the applicant has not proved that it is individually concerned by the contested decision.

40 First, the Commission argues that the applicant terminated its activities at the airport in 2013, and that its main base of operations is now located at Arad Airport. The applicant also changed its business model, and now offers charter flights. The Commission maintains that the applicant has not provided any specific information on the competitive relationship that it had with Wizz Air at the time when the action was brought.

41 Secondly, the Commission contends that, at the material time, the applicant was only one of several competitors of Wizz Air at the airport, and was in direct competition with it only in respect of a very limited number of destinations. Two other airlines, Blue Air and Malev, were also in direct competition with Wizz Air on the market for scheduled passenger flights from and to the airport.

42 Thirdly, the Commission contends that the applicant has provided no information regarding the size of the markets in question, the market shares of the applicant, Wizz Air and other potential competitors on those markets, or any change in those market shares after the measures at issue were granted. It has not, the Commission submits, produced any evidence demonstrating that the decrease in its activity on certain routes, the decline in its financial situation and the relocation of its business in 2013, or the market share allegedly taken by Wizz Air on the relevant markets, were the result of the measures at issue. In particular, the Commission argues that the applicant has not provided either the report of the judicial administrator or the judgments of the national courts to which it refers. Furthermore, other factors, including the use of small capacity aircraft, the use of a hub-and-spoke model and the financial crisis, could explain its financial difficulties.

43 Wizz Air also contends that the difficulties encountered by the applicant were not caused by the alleged aid granted to Wizz Air, but by the obsolescence of the applicant's business model in the years covered by the investigation, as highlighted by the judicial administrator in the reorganisation plan. Furthermore, it argues that the applicant itself received incentives at the airport under the second measure, such that it is not possible to establish a causal link between the alleged aid granted to Wizz Air and the deterioration in the market position of the supposedly non-incentivised applicant.

44 In its replies to the Court's questions of 11 March 2022, the Commission contends, in relation to the nature of the measures at issue, that those measures should be examined separately, including as regards admissibility. Similarly, Wizz Air contends, in its replies to those questions, that the part of the contested decision addressing the third measure is an individual measure, whereas the part of the contested decision addressing the second measure is a regulatory act. Consequently, it argues, standing to bring proceedings against that part of the contested decision must be assessed in the light of the third limb of the sentence in the fourth paragraph of Article 263 TFEU, relating to regulatory acts.

45 In that regard, the Commission contends, however, that even if, as regards the second measure, the contested decision were to be regarded as a regulatory act which does not entail implementing measures, the applicant would still have to be directly concerned by that measure, which is not the case. Similarly, Wizz Air argues that the applicant's standing to bring proceedings as regards the part of the contested decision addressing the second measure presupposes that the applicant is directly concerned, which is not the case, since the second measure was not applicable to Wizz Air. It maintains that the airport charges applicable to Wizz Air were in fact governed by the third measure.

46 In its replies to the same questions, the Commission contends, in relation to the judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission* (C-453/19 P, EU:C:2021:608), that that judgment is relevant only as regards the third measure. Both the Commission and Wizz Air maintain that the contribution made by that judgment concerning the concept of market definition has no bearing on the present case, and does not provide any basis for concluding that the action is admissible, since a causal link between the alleged aid and the effect on the applicant's market position is, in any event, necessary. They contend that, in the present case, there is no such causal link. For example, according to the Commission, the applicant's discontinuation of the Timișoara-Frankfurt (Germany) route was due to a lack of available slots at Frankfurt Airport, and not to the third measure.

47 It should be recalled, as a preliminary point, that the admissibility of an action brought by a natural or legal person against an act which is not addressed to that person, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that that person be accorded standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to that person. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (see, to that effect, judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 59 and 91, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 31).

– *Preliminary considerations regarding the nature of the measures at issue*

48 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 248, p. 9) defines the concept of 'aid scheme' as covering '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 and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

49 It is settled case-law that a decision of the Commission authorising or prohibiting an 'aid scheme' is of general application and may, accordingly, be classified as a 'regulatory act' within the meaning of the third limb of the sentence in the fourth paragraph of Article 263 TFEU (see judgment of 20 January 2022, *Deutsche Lufthansa* v *Commission*, C-594/19 P, EU:C:2022:40, paragraph 50 and the case-law cited).

50 In the present case, it is apparent from paragraph 21 above that the action concerns the measures at issue.

51 As regards the second measure, according to recital 290 of the contested decision, the system of airport charges provided for in that measure was applicable to all airlines using the airport. Those airlines are not named in the second measure.

52 It follows that the system of airport charges provided for in the second measure applied to objectively determined situations and produced legal effects with respect to categories of persons envisaged in a general and abstract manner, with the result that, assuming that that system involves State aid, it constitutes an aid scheme. Therefore, the part of the contested decision addressing the second measure is of general application and may, accordingly, be classified as a regulatory act within the meaning of the third limb of the sentence in the fourth paragraph of Article 263 TFEU.

53 By contrast, the agreements constituting the third measure, which is also the subject of the action, as the Commission noted in recital 340 of the contested decision, were individually negotiated and applied solely to the two contracting parties. Accordingly, they must be regarded as individual measures. Given that the part of the contested decision addressing those agreements does not therefore constitute a regulatory act under the third limb of the sentence in the fourth paragraph of Article 263 TFEU, since it is not an act of general application, it is for the Court to determine whether the applicant is directly and individually concerned by that part of the contested decision, within the meaning of that provision (see, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 32 and the case-law cited).

– *Whether the applicant is individually concerned as regards the third measure*

54 It is clear from settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (see, to that effect, judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 33).

55 If the applicant calls into question the merits of a decision appraising the aid taken on the basis of Article 108(3) TFEU or, as in the present case, after the formal investigation procedure, the mere fact that it may be regarded as 'concerned' within the meaning of Article 108(2) TFEU cannot suffice to render the action admissible. It must then demonstrate that it has a particular status for the purposes of the case-law referred to in paragraph 54 above. That applies in particular where the applicant's position on the market concerned is substantially affected by the aid to

which the decision at issue relates (judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 97, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37).

56 The demonstration by the applicant of a substantial adverse effect on its market position does not entail a definitive ruling on the competitive relationship between that party and the undertakings in receipt of aid, but requires only that the applicant adduce pertinent reasons to show that the Commission's decision may harm its legitimate interests by substantially affecting its position on the market in question (see, to that effect, judgments of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 28, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 57).

57 The substantial adverse effect on the applicant's competitive position on the market in question results not from a detailed analysis of the various competitive relationships on that market, allowing the extent of the adverse effect on its competitive position to be established specifically, but, in principle, from a prima facie finding that the grant of the measure covered by the Commission's decision leads to a substantial adverse effect on that position (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 58).

58 It follows that that condition may be satisfied where the applicant adduces evidence to show that the measure at issue is liable to have a substantial adverse effect on its position on the market concerned (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 38, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 59).

59 Demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in the applicant's commercial or financial performance, such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can also have an adverse effect on the competitive situation of an operator in other ways, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (see, to that effect, judgments of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraphs 34 and 35, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 61).

60 It is in the light of those principles that the Court must examine the evidence adduced by the applicant for the purpose of demonstrating that it is individually concerned by the contested decision and, in particular, that the third measure is liable to have a substantial adverse effect on its position on the market concerned.

61 In the present case, it should be noted, in the first place, that the applicant played an active role in the course of the administrative procedure. It lodged a complaint with the Commission and submitted its comments in the context of the formal investigation procedure. It is also apparent from the contested decision that it provided information to the Commission on numerous occasions.

62 However, it cannot be inferred from the mere participation of the applicant in the administrative procedure that it is individually concerned by the contested decision (see, to that effect, judgment of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 60, and order

of 26 September 2016, *Greenpeace Energy and Others* v *Commission*, T-382/15, not published, EU:T:2016:589, paragraph 39), even where, as in the present case, it has played an important part in that administrative procedure, inter alia by lodging the complaint which led to the contested decision (see, to that effect, judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraphs 94 and 95).

63 In the second place, the applicant has adduced evidence concerning the markets on which it had a competitive relationship with Wizz Air and on which it was substantially affected. Thus, the applicant and Wizz Air both operated flights from the airport between October 2008, when Wizz Air established itself at the airport, and January 2014, when the applicant ceased its operations at the airport.

64 More specifically, at the time when the opening decision was adopted in 2011, the applicant and Wizz Air were in competition on five routes from or to the airport, namely, as regards Germany, the route serving Düsseldorf (the applicant serving Düsseldorf and Wizz Air serving Dortmund, situated 70 km apart by road), and, as regards Italy, the routes serving Venice (the applicant serving Venice and Wizz Air serving Treviso, situated 41 km apart by road), Bergamo-Milan, Bologna (the applicant serving Bologna and Wizz Air serving Forli, situated 73 km apart by road) and Rome.

65 In the opening decision, the Commission had thus defined the relevant product market as the pair of cities in air transport and implicitly regarded airports in close proximity, such as Düsseldorf and Dortmund or Bologna and Forli, as substitutable, in accordance with its decision-making practice in competition matters. According to that market definition, the applicant and Wizz Air were therefore in competition on the following five markets: Düsseldorf/Timișoara, Venice/Timișoara, Bergamo-Milan/Timișoara, Bologna/Timișoara and Rome/Timișoara.

66 In addition, the applicant submits that it was in indirect competition with Wizz Air on five additional routes, defined by a 200 km catchment area. It maintains that, by serving Dortmund, Venice, Bergamo-Milan and Forli, Wizz Air was also in competition on the routes which it operated, for its part, to Frankfurt (Germany) (situated 222 km from Dortmund by road), Verona (Italy) (situated 121 km from Venice by road), Turin (Italy) (situated 185 km from Bergamo by road), Florence (Italy) (situated 109 km from Forli by road), and Ancona (Italy) (situated 166 km from Forli by road).

67 In that regard, it should be noted, with respect to the cities of Dortmund and Frankfurt, that they are situated more than 200 km apart by road, with the result that, even if the applicant's definition of the market were to apply, those cities would not, in any event, fall within the same market.

68 As regards the other four routes, the applicant does not explain why the relevant catchment area in the present case (200 km) is considerably larger than the one traditionally used by the Commission in its decision-making practice in competition matters (100 km). In addition, the applicant itself served simultaneously Turin and Bergamo, Bergamo and Verona, Verona and Venice, and Bologna and Florence, that is, pairs of cities situated within the same 200 km catchment area, even though it submits that those destinations were substitutable. That fact is capable of calling into question the relevance of the alleged 'indirect competition' between the applicant and Wizz Air in respect of those pairs.

69 It must therefore be held that the applicant and Wizz Air were in competition on five routes (specified in paragraph 65 above) from or to the airport, since the applicant has not established that Wizz Air also competed indirectly with it on five additional routes (specified in paragraph 66 above).

70 In the third place, there is evidence demonstrating a substantial effect on the applicant's position on the market. In written comments submitted to the Commission on 7 June and 8 August 2011, the applicant stated that it had suffered a loss of over EUR 9 million in 2010 and had revised its business model in order to minimise its operational losses. The Commission noted in the opening decision that, between 2008 and 2010, the applicant's passenger numbers, yields and revenues on the five routes in competition with Wizz Air had decreased significantly. As of 2014, the applicant ceased its operations at the airport and underwent a judicial reorganisation procedure.

71 In the fourth place, it is apparent from the evidence provided by the applicant that it had a particular status which distinguished it from the other airlines operating at the airport, since the latter's activity was centred on the operations of the applicant, which, in 2008, was that airport's principal operator in terms of traffic. During that year, the applicant asserts that it generated 38% of AITTV's revenues. Conversely, it maintains that, between 2000 and 2013, over 90% of the applicant's turnover was generated by its hub-and-spoke operations at the airport.

72 The applicant also had a particular status since it was the only company in direct competition with Wizz Air on five routes. According to the applicant, only two other airlines operating from the airport, Blue Air and Malev, faced direct competition from Wizz Air. It argues that that competition was limited to one destination for each of them, namely Rome and Budapest (Hungary) respectively.

73 In the fifth place, the applicant has established that the third measure was one of the causes of the adverse effect on its competitive position.

74 It is apparent from Annex A.7 to the application that, between 2008 and 2010, the applicant's net yield decreased by half in respect of the five routes in direct competition with Wizz Air.

75 As regards Germany, it is apparent from Annex A.7 to the application that, between 2008 and 2010, the applicant's net yield in respect of its route to Düsseldorf decreased by 57%.

76 As regards Italy, it is apparent from Annex A.7 to the application that, between 2008 and 2010, the applicant's net yield decreased by 52% in respect of the routes which it operated to and from Venice, Bergamo-Milan, Bologna and Rome.

77 Furthermore, it is apparent from the comments submitted to the Commission by the applicant on 7 June 2011 that it complains not only that it lost passengers to Wizz Air, but also that it was unable to take over the traffic of Alitalia and Alpi Eagles to the north of Italy following the withdrawal of those airlines from the airport in 2008, because, it argues, that traffic was taken over by Wizz Air.

78 The evidence referred to in paragraphs 75 to 77 above substantiates not only a decrease in the applicant's turnover but also the loss of an opportunity to make a profit or a less favourable development than would have been the case without the third measure as regards the route

which the applicant operated to Germany and the routes operated to Italy. In accordance with the case-law cited in paragraph 58 above, that evidence may suffice to demonstrate a substantial adverse effect on the position of a competitor on the market.

79 The applicant therefore adduced evidence concerning the markets on which it had a competitive relationship with Wizz Air and on which its position was substantially affected. It also provided evidence of a substantial effect on its position on the markets, whether in terms of a decline in its performance or of the loss of an opportunity to make a profit, and of the particular nature of its status among the airlines operating at the airport. Lastly, it has established that the third measure was one of the causes of the adverse effect on its competitive position.

80 The evidence submitted by the applicant in order to establish that the third measure was liable to have a substantial effect on its competitive position on the markets concerned is not called into question by the Commission's argument, first, that the applicant has provided no information regarding the size of the markets in question, its own market shares or those of Wizz Air, nor has it produced any evidence demonstrating that the decrease in its activity on certain routes and the decline in its financial situation were the result of the measures at issue, and, secondly, that other factors, including the use of a hub-and-spoke model and the financial crisis, could have explained its financial difficulties (see paragraph 42 above).

81 In that regard, it follows from the case-law cited in paragraph 56 above that the demonstration by the applicant of a substantial adverse effect on its market position does not entail a definitive ruling on the competitive relationship between that party and the undertakings in receipt of aid, but requires only that the applicant adduce pertinent reasons to show that the Commission's decision may harm its legitimate interests by substantially affecting its position on the market in question.

82 In particular, the applicant cannot be required to show that its financial difficulties are due exclusively to the measures at issue (see, to that effect, judgment of 11 July 2019, *Air France* v *Commission*, T-894/16, EU:T:2019:508, paragraph 65).

83 In the present case, although it is plausible that a set of factors may have contributed to the applicant's financial difficulties, the fact remains that, in the light of the evidence adduced by it in the present action, the applicant has sufficiently established that the third measure was liable to have a substantial effect on its competitive position on the markets concerned.

84 Lastly, in so far as the Commission contends that the applicant terminated its activities at the airport as of 2013, that it changed its business model and that it has not provided any specific information on the competitive relationship that it had with Wizz Air at the time when the action was brought (see paragraph 40 above), it is sufficient to note that the assessment of whether there is a substantial effect must be made in the light of the situation at the time when the measures at issue were granted and were liable to have an effect, as the Commission indeed acknowledged at the hearing.

85 Accordingly, it must be held that the third measure was liable to have a substantial effect on the applicant's competitive position on the markets concerned.

86 It follows from the foregoing considerations that the applicant has established that it is individually concerned by the contested decision as regards the third measure.

– *Whether the applicant is directly concerned as regards the measures at issue*

87 According to settled case-law, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, that the contested measure must directly affect the legal situation of the individual and, secondly, that it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited).

88 As regards specifically the rules on State aid, it should be noted that their objective is to preserve competition. Thus, in that field, the fact that a Commission decision leaves intact all the effects of the national measures which the applicant, in a complaint addressed to that institution, claimed were not compatible with that objective and placed it in an unfavourable competitive position makes it possible to conclude that the decision directly affects its legal situation, in particular its right under the State-aid provisions of the FEU Treaty not to be subject to competition distorted by the national measures concerned (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43 and the case-law cited).

89 Given that the condition of direct concern requires the contested measure to produce effects directly on the applicant's legal situation, the EU Courts must ascertain whether the applicant has adequately explained the reasons why the Commission's decision is liable to place it in an unfavourable competitive position and thus to produce effects on its legal situation (judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 47).

90 In the present case, as regards the first of the two criteria referred to in paragraph 87 above, it is apparent from the documents before the Court that the applicant carried out activities similar to those of Wizz Air and was active on the same services market and on the same geographical market as Wizz Air. In so far as Wizz Air was the alleged recipient of the measures at issue assessed in the contested decision, it must be held that the applicant has adequately explained the reasons why the contested decision was liable to place it in an unfavourable competitive position and that, therefore, that decision directly affected its legal situation, in particular its right not to be subject, on that market, to competition distorted by the measures at issue.

91 As regards the second of the two criteria referred to in paragraph 87 above, it must be held that the contested decision leaves intact all the effects of both the second measure and the third measure, in a purely automatic manner resulting from the EU rules alone and without the application of other intermediate rules.

92 It follows that the applicant is directly concerned by the contested decision, as regards both the second measure and the third measure.

93 The applicant therefore has standing to bring an action for annulment of the contested decision.

94 It follows that the action must be regarded as admissible.

Admissibility of the annexes

Admissibility of the excerpts from the judicial administrator's report

95 The applicant provided excerpts from the judicial administrator's report as an annex to its comments on AITTV's statement in intervention.

96 AITTV contends that, since the applicant provided only excerpts from that report, they are not usable. The Commission and Wizz Air contend that that document is inadmissible and should be removed from the file since, first, it is written in Romanian and not in the language of the case, without being accompanied by a translation and, secondly, it was submitted late.

97 In that regard, it should be borne in mind that, according to Article 85(1) of the Rules of Procedure, evidence produced or offered is to be submitted in the first exchange of pleadings. In the present case, although the judicial administrator's report was referred to in the application, the applicant did not provide any valid explanation as to why the excerpts from that report had been submitted late, in reply to AITTV's statement in intervention.

98 The excerpts from the judicial administrator's report must therefore be held to be inadmissible.

Admissibility of Annex Q.2

99 In Annex Q.2 to its reply to the Court's questions of 19 July 2022, the applicant provided invoices sent by AITTV to Wizz Air, bearing dates between 30 November 2010 and 31 May 2011, from which it is apparent that the discounts (from 72% to 85%) resulting from point 7.3 of the second measure applied to all airport charges, and not only to landing charges.

100 At the hearing, the Commission disputed the admissibility of those invoices and requested that they be removed from the file since, first, they were drafted in Romanian and, secondly, they had been submitted late. The Commission requested, in the alternative, that an English translation of those invoices be included in the file.

101 In that regard, it should be recalled that, under Article 46(2) of the Rules of Procedure, any material produced or annexed that is expressed in another language must be accompanied by a translation into the language of the case. Paragraph 3 of that article provides, however, that, in the case of substantial material, translations may be confined to extracts. Moreover, it is apparent from paragraph 99 of the Practice Rules for the Implementation of the Rules of Procedure of the General Court that, where material annexed to a procedural document is not accompanied by a translation into the language of the case, the Registrar is to require the party concerned to make good the irregularity if such a translation appears necessary for the purposes of the efficient conduct of the proceedings.

102 The translation of annexes to the application into the language of the case is not, therefore, a requirement that must be met as a matter of course. Consequently, the fact that those annexes were not translated may not automatically entail their inadmissibility (see, to that effect, judgments of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraphs 35

to 38; of 9 June 2021, *HIM* v *Commission*, T-235/19, EU:T:2021:343, paragraphs 84 to 89 (not published); and of 6 October 2021, *Allergan Holdings France* v *EUIPO – Dermavita Company (JUVEDERM)*, T-397/20, not published, EU:T:2021:653, paragraphs 24 to 26).

103 In the present case, first, the Commission stated at the hearing that the invoices in question were already part of its file during the administrative procedure. Secondly, the language in which those invoices are drafted corresponds to the language in which the Commission communicated with the Romanian authorities and to the authentic language in which the opening decision and the contested decision were drafted, namely Romanian. Accordingly, the view can be taken that the Commission could understand the content of the invoices in question.

104 In any event, the applicant adapted Annex Q.2 of its own accord by providing a translation of that annex into the language of the case, while noting that such a translation was not required since the evidential value of the invoices in question lay in the figures and percentages they contained, and in easily understandable terms.

105 It should also be noted that the invoices in question, which apply a discount to all the services provided by AITTV to Wizz Air, were submitted by the applicant in order to illustrate the scope of the discount provided for in point 7.3 of the second measure. That scope was the subject of one of the questions put by the Court to the parties on 19 July 2022, on the basis of Article 89 of the Rules of Procedure, which allows the Court to put questions to the parties in order to clarify certain aspects of the dispute.

106 Annex Q.2 must therefore be accepted as admissible and the Commission's request for the removal of that annex must be rejected.

Substance

107 In support of its action, the applicant relies on four pleas in law. By its first plea, it submits that the contested decision is vitiated by an error of law as regards the absence of selectivity in the second measure. The second plea alleges that the contested decision is vitiated by a manifest error of assessment, an error of law and an inadequate statement of reasons, in so far as it concludes, due to a misapplication of the private operator in a market economy test, that the third measure did not confer an undue advantage on Wizz Air. By its third plea, the applicant submits that the Commission committed a manifest error of assessment and infringed its duty of care as regards the price discrimination allegedly practised amongst air carriers at the airport by means of the measures at issue. By its fourth plea, it submits that the contested decision is vitiated by an error of law in that it disregards the State aid allegedly granted to Wizz Air by the third measure in the form of a discounted security charge.

The first plea in law, alleging an error of law as regards the selective nature of the second measure

108 Since the 2007 and 2008 AIPs preceded the arrival of Wizz Air at the airport, the applicant, by its first plea, refers only to the second measure.

109 The applicant submits that the new discount of up to 85% on airport charges, provided for in point 7.3 of the second measure, was designed to grant a selective advantage to Wizz Air, the only airline at the airport using aircraft with a maximum take-off weight ('MTOW') above 70 tonnes and which carried more than 10 000 passengers per month.

110 In the first place, the applicant maintains that the fact that other airlines benefited or could have benefited from the relevant discounts and that the second measure applied to all airlines operating at the airport does not preclude the discounts provided for in that measure from being designed to favour Wizz Air selectively, a possibility which, it argues, the Commission failed to examine.

111 In that regard, the applicant submits that the contested decision is vitiated by errors in the analysis, first, of whether the second measure differentiated between undertakings in comparable situations, and, secondly, of whether such differentiation could be justified in the light of the objectives of the reference system. It argues that the discount introduced in point 7.3 of the second measure constituted a derogation from the reference system which discriminated between the airlines using the airport, which were in a comparable situation.

112 Moreover, according to the applicant, the amount of the discounts (between 72% and 85%) was not economically justified since, as the Commission noted in recital 164 of the opening decision, there is no indication that the use of larger aircraft leads to a reduction of more than 70% in the costs of the airport. Furthermore, it argues that, at the time when the second measure was adopted, the airport's infrastructure was not capable of withstanding large aircraft. Indeed, the pavement overload attributable to Wizz Air's operations led to higher costs for the airport.

113 In the second place, the applicant submits that the Commission erred in its assessment of the selective nature of the second measure, which was de facto selective. First, it maintains that Wizz Air was the only air carrier entitled to receive such a discount on the airport charges, and was the only one that actually received it, as the Commission acknowledged in recitals 154 and 226 of the opening decision. According to the applicant, Tarom had only one aircraft above 70 tonnes MTOW, and could not generate traffic of more than 10 000 passengers per month (in 2009, Tarom's average number of departing passengers per month was 5 480).

114 Secondly, the applicant submits that the amendment of the airport charges in the second measure was an attempt by AITTV to lend greater legitimacy to the discounts also granted to Wizz Air by means of the 2010 amendment agreements.

115 For its part, the Commission, supported by AITTV, contends, in the first place, that the number of undertakings which could actually benefit from the discounts was not regarded as a decisive factor in concluding that the measure was not selective. In addition, it notes that the second measure provided not only for discounts for aircraft above 70 tonnes MTOW, but also for other discounts, including for smaller aircraft such as those operated by the applicant.

116 The Commission also contends that the applicant's argument, raised in the reply, that the contested decision is vitiated by errors in the analysis of whether the second measure differentiated between undertakings in comparable situations, and of whether such differentiation could be justified in the light of the objectives of the reference system, constitutes a new plea which, as such, is inadmissible.

117 In any event, according to the Commission, the discount provided for in point 7.3 of the second measure does not constitute a derogation from the reference system, namely the AIP taken as a whole. As regards the economic justification for that discount, it contends that this is set out in recitals 101 and 102 of the contested decision. The decision to increase traffic at the airport by reducing charges applicable to large aircraft was based on the economic rationale that the total revenue received would be higher.

118 In the second place, the Commission contends that the second measure referred to in the opening decision comprised all the discount schemes established by the 2007, 2008 and 2010 AIPs. However, it maintains that the first plea relates only to the discount provided for in point 7.3 of the second measure, that is to say, a different measure from the one examined in the contested decision, and is for that reason ineffective.

119 The Commission contends that, in any event, Wizz Air was not the only airline operating aircraft above 70 tonnes MTOW. Tarom also did so, and could have increased its use of such aircraft in order to be eligible for the discount provided for in point 7.3 of the second measure. In that regard, Wizz Air and AITTV argue that that discount was intended to incentivise other low-cost airlines to base aircraft above 70 tonnes MTOW at the airport by setting an attainable level of traffic (since the threshold of 10 000 passengers could, according to Wizz Air, be reached with less than two take-offs per day).

120 The Commission contends, lastly, that a measure can be considered to constitute de facto discrimination only if it discriminates between undertakings which are in a comparable situation in the light of the objective pursued by the reference system. However, the second measure did not, in any of its parts, discriminate between airlines which were in a comparable situation.

– *The assessment of the second measure in the contested decision*

121 The Commission examined whether there was State aid in relation to the airport charges published in the 2007, 2008 and 2010 AIPs in recitals 267 to 299 of the contested decision. It assessed the condition relating to selectivity in recitals 284 to 299 of the contested decision.

122 Thus, in recital 289 of the contested decision, the Commission stated that the relevant reference framework for examining whether the 2007, 2008 and 2010 AIPs had the effect of favouring certain airlines over others which were in a comparable factual and legal situation was that provided for by the regime applicable to the airport. In that regard, it noted, in recital 290 of the contested decision, that the system of airport charges and the discounts and rebates were applicable to all airlines using, or liable to use, the airport which met the conditions described in the 2007 AIP, 2008 AIP or 2010 AIP respectively.

123 In recital 292 of the contested decision, the Commission noted that 'the applicable discounts were on a sliding scale, with the lowest starting at 10% for 250-500 landings per year, i.e. approximately [five] landings a week' and that, 'in the period under assessment, in addition to Wizz Air, there were a number of other airlines operating at [the airport] which had in their fleet aircraft of the relevant sizes and/or sufficient frequencies and therefore [benefited or could have benefited from] the relevant discounts'.

124 In recitals 293 and 294 of the contested decision, the Commission concluded that the base rate, the rebates and the discounts set out in the 2007, 2008 and 2010 AIPs were not selective since they were applicable in a non-discriminatory manner. The Commission therefore concluded that that measure did not constitute State aid within the meaning of Article 107(1) TFEU.

– *The merits of the assessment of the second measure*

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

126 Consequently, only measures which confer an advantage selectively on certain undertakings or categories of undertakings or on certain economic sectors fall within the concept of 'aid'.

127 Nevertheless, the case-law has made it clear that even interventions which, prima facie, apply to undertakings in general may be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods (see judgment of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission*, T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraph 149 and the case-law cited).

128 De facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 101 to 107; see, also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), paragraph 121).

129 It follows from settled case-law that the assessment of the condition relating to the selectivity of the advantage requires a determination as to whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. The concept of 'State aid' does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of which they form part (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 41 and the case-law cited).

130 It is also settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 48 and the case-law cited; see also, to that effect, judgment of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission*, T-92/00 and T-103/00, EU:T:2002:61, paragraph 51 and the case-law cited).

131 Accordingly, whilst it cannot be ruled out that a measure by which a public undertaking lays down the conditions for the use of its goods or services is selective despite applying to all the undertakings using those goods or services, it is necessary, in order to determine whether that is the case, to have regard not to the nature of that measure but to its effects, by examining whether the advantage which it is supposed to procure in fact benefits only some of those undertakings as opposed to others, although, in the light of the objective pursued by the regime concerned, all of the undertakings are in a comparable factual and legal situation (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 49).

132 The determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it must, as the case may be, be examined whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 60).

133 As a preliminary point, it should be noted, first of all, that points 1 to 4 of the second measure set out the rates of the various airport charges (namely landing, lighting, parking and passenger services, including security). The charges actually invoiced could be subject to various types of reductions. Points 7.1, 7.2 and 7.3 of the second measure provided, respectively, for three non-cumulative types of reductions:

– first, rebates of 10% to 70% depending on the number of landings performed in the previous year with respect to international flights;

– second, a discount of 50% for a period of 12 months for new air carriers performing at least three flights per week with an aircraft having a capacity of at least 70 seats. For each new destination served, the discount applied was 50% for a period of six months; in addition to those discounts, AITTV also granted a reimbursement of 10% to 30% of revenue from the embarkment charge, depending on the number of embarked passengers per year;

– third, discounts of 72% to 85% for aircraft above 70 tonnes MTOW with more than 10 000 embarked passengers per month.

134 It is apparent from recitals 46 to 49 of the contested decision that the reductions described in the first and second indents above were already provided for in the 2008 AIP. Among the reductions envisaged by the second measure, those provided for in point 7.3, described in the third indent above, constituted the only novel feature in relation to the 2008 AIP.

135 Secondly, the Commission contends that the first plea is ineffective in that it relates solely to the discount provided for in point 7.3 of the second measure (namely a discount of 72% to 85% for aircraft above 70 tonnes MTOW with more than 10 000 embarked passengers per month), whereas the second measure referred to in the opening decision included all the types of reductions established by the 2007, 2008 and 2010 AIPs.

136 That argument must be rejected. It is true that, in the contested decision, the Commission examined the reductions provided for in the second measure in their entirety, without examining separately the discount provided for in point 7.3. Nonetheless, the fact remains that that latter discount is also covered by the contested decision and the applicant specifically argues that the Commission incorrectly failed to examine whether that discount, taken individually, was not selective with respect to Wizz Air.

137 Thirdly, at the hearing, the Commission also contended that point 7.3 of the second measure was not applicable to Wizz Air, since the latter had concluded agreements with the airport. In that regard, however, it should be borne in mind that, according to the contested decision, the system of airport charges and the discounts and rebates were applicable to all airlines using, or liable to use, the airport, including Wizz Air.

138 In the present case, the applicant complains, in essence, that the Commission found that the discounts provided for in point 7.3 of the second measure were not selective, on the ground that other airlines benefited or could have benefited from the relevant discounts and that the second measure applied to all airlines operating at the airport.

139 In that regard, in the first place, in recital 290 of the contested decision, the Commission noted that the system of airport charges and the discounts and rebates were applicable to all airlines using, or liable to use, the airport which met the conditions described in the 2007 AIP, 2008 AIP or 2010 AIP respectively.

140 However, the nature of the second measure, which took the form of the application of a 'general' regime, based on criteria that were, in themselves, also of a general nature, does not preclude a finding that that measure is selective. The condition relating to selectivity has a broader scope, extending to measures which, by their effects, favour certain undertakings on account of the specific features characteristic of those undertakings. Similarly, it is apparent from the case-law that the fact that the aid is not aimed at one or more specific recipients defined in advance, but is subject to a series of objective criteria pursuant to which it may be granted to an indefinite number of beneficiaries who are not initially individually identified, cannot suffice to call into question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 107(1) TFEU. Such a fact does not preclude that public intervention from having to be regarded as constituting a selective measure if, owing to the criteria governing its application, it procures an advantage for certain undertakings, to the exclusion of others (see, to that effect, judgment of 29 September 2000, *CETM* v *Commission*, T-55/99, EU:T:2000:223, paragraph 40). Thus, the general nature of the AIP did not, as such, preclude any de facto discrimination between the airlines using the airport.

141 In the second place, in recital 292 of the contested decision, the Commission noted that 'the applicable discounts were on a sliding scale, with the lowest starting at 10% for 250-500 landings per year, i.e. approximately [five] landings a week' and that, 'in the period under assessment, in addition to Wizz Air, there were a number of other airlines operating at [the airport] which had in their fleet aircraft of the relevant sizes and/or sufficient frequencies and therefore [benefited or could have benefited from] the relevant discounts'.

142 In so doing, first, the Commission examined jointly the three types of reductions provided for by the second measure, without explaining how, for the purposes of determining whether that measure was selective, such a joint assessment was relevant, given that each type of reduction met different conditions and those reductions were not cumulative. It therefore failed to examine whether the type of reduction specifically provided for in point 7.3 of the second measure, taken in isolation, favoured Wizz Air owing to the conditions governing its application, to the exclusion of the other airlines operating at the airport.

143 Secondly, the Commission did not take a position on the question whether, as regards specifically the type of reduction provided for in point 7.3 of the second measure, airlines other than Wizz Air had in their fleet aircraft of the relevant sizes and sufficient frequencies which actually enabled them to benefit from it.

144 It is true that it is apparent from the contested decision that, during the administrative procedure, Wizz Air claimed that other airlines besides it operated aircraft above 70 tonnes MTOW and could therefore benefit from the type of reduction provided for in point 7.3 of the second measure

(see recital 122 of the contested decision). In its written pleadings, the Commission contended that Tarom operated such aircraft and that it could have sought to increase its traffic at the airport in order to benefit from those reductions.

145 The fact remains that, in practice, the type of reduction provided for in point 7.3 of the second measure benefited Wizz Air alone, and that no other airline, including Tarom, reached the minimum number of embarked passengers per month as required by point 7.3.

146 As regards the argument of Wizz Air and AITTV that the aim of those reductions was to make it possible to increase traffic at the airport and thus the revenue actually received, it must be pointed out that, as is apparent from the case-law cited in paragraph 130 above, Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, with the result that those aims in relation to traffic and revenue are not relevant for the purposes of assessing the selective nature of the reductions provided for in point 7.3 of the second measure. In any event, it must be stated that the contested decision contains no evidence of those aims.

147 Thirdly, it should be noted that consideration, as relied on by the Commission, of the other two reduction measures provided for by the second measure is all the more likely to call into question the non-selective nature of the reductions provided for in point 7.3 of that measure. Those other two measures provided for reductions within brackets ranging from 10% to 70% and from 10% to 30%, whereas point 7.3 allowed for higher and markedly less progressive reductions starting at 72% and going up to 85%.

148 Consequently, it must be concluded that the Commission erred in law by failing to examine whether the discount provided for in point 7.3 of the second measure, taken individually, was intended to apply selectively, without it being necessary to examine either the allegedly belated nature or the merits of the applicant's argument that the discounts provided for in point 7.3 of the second measure constituted a derogation from the reference system established by that measure.

149 In the light of the foregoing considerations, the first plea in law must be upheld.

The second plea in law, alleging a manifest error of assessment, an error of law and an inadequate statement of reasons in so far as the contested decision concludes that the third measure did not confer an undue advantage on Wizz Air

150 The second plea in law consists of two parts. By the first part, relating to the assessment of the facts, the applicant submits that the contested decision disregarded evidence demonstrating that the conduct of AITTV was not comparable to that of a private operator in a market economy.

151 In particular, the applicant maintains that no *ex ante* analysis was carried out by AITTV in order to determine whether the 2008 agreements were capable of procuring a profitable return for AITTV or, at least, of covering Wizz Air's operating costs, even though the effect of the marketing agreement was to grant Wizz Air a discount of up to 85% on all airport charges. A prudent market operator would, the applicant argues, have carried out an *ex ante* profitability analysis before changing its commercial strategy in this way.

152 By the second part, alleging an error of law, the applicant submits that the contested decision incorrectly applies the private operator in a market economy test to the third measure. It maintains that the Commission failed to take into account the general context of the third measure and foreseeable developments, such as the costs of strengthening the pavement classification number, resulting from that measure and its consequences in the medium and long term. It argues, in particular, that the Commission erred in adopting a time frame of only three years in order to assess the profitability of the 2008 agreements.

153 For its part, the Commission contends, as a preliminary point, that the applicant does not challenge its profitability analysis of the 2010 amendment agreements, but only its profitability analysis of the 2008 agreements. In that regard, it argues that, in order to challenge successfully the application of the private operator in a market economy test in the contested decision, the applicant must demonstrate that the Commission's assessment was not merely erroneous, but also implausible.

154 As regards the first part, the Commission contends, in relation to the absence of an *ex ante* analysis, that it cannot be ruled out that a study which assesses *ex post* the expected incremental profitability of an agreement signed by an airport and an airline, but which is based on data that would have been available at the time when that agreement was signed, may be accepted.

155 As regards the second part, relating, in particular, to the time frame adopted in order to assess the profitability of the 2008 agreements, the Commission contends that it chose a time frame of three years which corresponded to the initial period of application of the marketing agreement, since, inter alia, a prudent private operator in a market economy would not have counted on the agreements being renewed once they had expired, as explained in recitals 334 to 336 of the contested decision.

156 In its reply, the applicant alleges that Wizz Air received State aid by means of the 2010 amendment agreements since, in essence, the second measure and the 2010 amendment agreements granted the same advantage to Wizz Air.

157 In that regard, the Commission contends, in the rejoinder, that the 2010 amendment agreements and the second measure do not constitute a single measure and that it assessed them separately.

– *The assessment of the third measure in the contested decision*

158 The 2008 agreements consisted of a memorandum of understanding, a marketing agreement, an operation agreement, and a ground handling agreement.

159 Under the memorandum of understanding and the marketing agreement, which were concluded for an initial period of three years, AITTV agreed, inter alia, to extend the passenger terminal in order that it could handle up to three million passengers per year by 1 January 2011, to upgrade the landing and take-off category of the runway before the end of 2009 and to make slots available in accordance with Wizz Air's request. Wizz Air agreed to conduct marketing activities for AITTV.

160 The operation agreement and the ground handling agreement, which were concluded for an initial period of one year, set the airport charges to be paid by Wizz Air, as well as discounts and exemptions from those charges. The charges were essentially the same as those set out in the 2008

AIP. On 25 June 2010, the operation agreement and the ground handling agreement were amended by the 2010 amendment agreements, that is, a new discount scheme corresponding to the one established in the second measure (see paragraph 5 above).

161 The Commission examined whether there was State aid as regards the third measure in recitals 300 to 440 of the contested decision. It assessed the condition relating to the existence of an economic advantage in recitals 322 to 415 of the contested decision in respect of the 2008 agreements, which it assessed jointly, and in recitals 416 to 439 in respect of the 2010 amendment agreements.

162 As regards the 2008 agreements, the Commission examined the question whether incremental revenues generated by the activity of Wizz Air as a result of those agreements (that is to say, aeronautical revenues from airport charges paid by Wizz Air, and non-aeronautical revenues) exceeded incremental costs (that is to say, operating, marketing and investment costs) which could be attributed to the presence of Wizz Air at the airport (see recitals 341 to 343 of the contested decision).

163 In order to do so, the Commission examined in turn *ex ante* profitability analyses, which were reconstructed *ex post* on the basis of the data available before the conclusion of the 2008 agreements, submitted by Romania on 9 December 2014 (see recitals 344 to 356 of the contested decision) and by Wizz Air on 10 February 2015 ('the 2015 Oxera report') respectively (see recitals 357 to 381 of the contested decision). It also examined a study submitted by the applicant on 10 November 2014 (see recitals 382 to 392 of the contested decision).

164 As regards the analysis submitted by Romania, the Commission noted that it had several shortcomings. In particular, it did not provide any calculation of incremental costs, but only of incremental revenues. Consequently, the Commission considered that that analysis did not demonstrate that the private operator in a market economy test had been complied with in the 2008 agreements (see recitals 355 and 356 of the contested decision).

165 As regards the 2015 Oxera report, this forecast that the 2008 agreements were expected to have a net present value ('NPV') of RON 7.6 million (approximately EUR 1.5 million). The Commission accepted most of the basic assumptions of the 2015 Oxera report. It revised some of them in order to take into account lower incremental costs, resulting in higher incremental profits, taking the view in particular that none of the investments made, particularly with regard to the passenger terminal and the runway, were caused by the presence of Wizz Air at the airport (see recitals 362 and 372 to 379 of the contested decision). Having thus recalculated the incremental costs, revenues and profits on the basis of the 2015 Oxera report, the Commission considered that that report supported the conclusion that the 2008 agreements were expected to be incrementally profitable for AITTV (see recital 381 of the contested decision).

166 As regards the study submitted by the applicant, which concluded that the 2008 agreements were not profitable, the Commission rejected most of the basic assumptions of that study, in particular the assumption that the investments for works aimed at strengthening the pavement classification number and for works carried out in the passenger terminal were incremental costs associated with Wizz Air's presence at the airport. The Commission concluded that that study could not be used as proof that the 2008 agreements did not comply with the private operator in a market economy test (see recitals 388 to 392 of the contested decision).

167 The Commission also took into account *ex post* studies carried out by Oxera and RBB, dated 27 October 2011, as supporting the results of the 2015 Oxera report. The *ex post* study carried out by Oxera found that the 2008 agreements had a positive NPV of EUR 145 249 over the three-year period envisaged by those agreements (see recital 398 of the contested decision).

168 As regards the 2010 amendment agreements, the 2015 Oxera report forecast an NPV of RON 2.3 million, that is, approximately EUR 469 852 (see recital 417 of the contested decision). The Commission also took into account the *ex post* study carried out by Oxera, which found that the 2010 amendment agreements had a positive NPV of EUR 483 147 over the nine-month period corresponding to their application (see recital 429 of the contested decision).

169 Thus, the Commission concluded, on the basis of the 2015 Oxera report as recalculated by it, and supported by the *ex post* studies by Oxera and RBB, that the third measure was expected to be incrementally profitable for AITTV. Moreover, that measure was part of an overall strategy and long-term effort towards the overall profitability of the airport. Consequently, the Commission found that a prudent private operator in a market economy would have entered into such arrangements. The Commission therefore concluded that those agreements had not conferred an economic advantage on Wizz Air which it would not have obtained under normal market conditions, and that they did not constitute State aid (see recitals 413 to 415 and 437 to 440 of the contested decision).

– *The merits of the assessment of the third measure*

170 According to the case-law, the conditions which a measure must meet in order to be treated as aid for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources, that assessment being made by applying, in principle, the private operator in a market economy test (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 91 and the case-law cited).

171 In order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator in a market economy, it is necessary to place oneself in the context of the period during which the measures at issue were taken in order to assess the economic rationality of the conduct of the Member State or of the public body, and thus to refrain from any assessment based on a later situation (judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 71, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 93).

172 In this context, it is for the Member State or the public body concerned to communicate to the Commission objective and verifiable evidence showing that its decision is based on prior economic evaluations comparable to those which, in the circumstances, a rational private operator in a situation as close as possible to that of that State or of that body would have had carried out, before adopting the measure in question, in order to determine its future profitability (see judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 97 and the case-law cited).

173 Therefore, in particular for the purposes of applying the private operator test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken (judgment of 5 June

2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105). That is especially so where, as in the present case, the Commission is seeking to determine whether there has been State aid in relation to a measure which was not notified to it and which, at the time when the Commission carries out its examination, has already been implemented by the public body concerned (judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 94).

174 Consequently, where it appears that the private operator test 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 test 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 investment in question (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 104, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 96).

175 It is the responsibility of the Member State concerned or, in this case, the public undertaking concerned to provide evidence showing that it conducted a prior economic evaluation of the profitability of the measure in question, comparable to that which a private operator would have had carried out in a similar situation (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 184).

176 Where the public undertaking provides the Commission with evidence of the required nature, the Commission must, however, conduct an overall assessment, taking into account, in addition to the information provided by that undertaking, all other relevant evidence enabling it to determine whether the measure in question is compliant with the private operator test. The public undertaking concerned thus has the opportunity in the administrative procedure to produce additional evidence which is generated after the adoption of the measure but is based on the information which was available and the developments which were foreseeable at the time of adoption (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 186).

177 The inability to make detailed, full projections cannot relieve a public investor of its task of carrying out an appropriate prior evaluation of the profitability of its investment, comparable to that which a private operator would have had carried out in a similar situation, having regard to the available and foreseeable information (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 182).

178 It is in the light of that case-law that the Court must examine the applicant's second plea in law, by which it submits inter alia that AITTV did not carry out any *ex ante* profitability analysis in respect of the 2008 agreements.

179 In that regard, in the first place, as is apparent from recital 147 of the contested decision, which is contained in Section 6.3 of that decision relating to the summary of AITTV's comments concerning the third measure, and not in the part relating to the Commission's assessment of that measure:

'[AITTV] declared having carried out calculations before concluding the 2008 Agreements. According to [AITTV], there was no legal obligation to have prepared a business plan. [AITTV] knew of no reason to retain any documentation.'

180 It must be stated, however, that the alleged calculations carried out by AITTV before the conclusion of the 2008 agreements were not communicated to the Commission and that, in the contested decision, the Commission did not rely on those calculations in order to evaluate the profitability of those agreements in the light of the private operator in a market economy test.

181 Thus, contrary to what is required in accordance with the case-law cited in paragraphs 175 and 177 above, it is in no way apparent from the contested decision that AITTV's decision to conclude the 2008 agreements with Wizz Air was based on prior economic evaluations which a private operator in a similar situation would have carried out, having regard to the available and foreseeable information.

182 Even if AITTV evaluated *ex ante* the future profitability of the 2008 agreements, it failed in any event to fulfil its obligation to communicate to the Commission appropriate evidence of a prior evaluation enabling the Commission to determine whether the attitude of that public undertaking was comparable to the attitude of a rational private operator (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 182 and 185).

183 It is true that the 2015 Oxera report refers to a 'business plan' prepared by AITTV in connection with the 2008 agreements and provided by AITTV to Oxera for the purpose of preparing that report. However, the answers given by Wizz Air and AITTV to the Court's questions of 19 July 2022 confirmed that that 'business plan' had not been prepared in 2008, but had been reconstructed *ex post* during the administrative procedure, on the basis of information which would have been available to AITTV in 2008.

184 It follows that the Commission did not have in its possession any written document prepared prior to the conclusion of the 2008 agreements when it analysed whether AITTV had acted like a private operator in a similar situation, having regard to the available and foreseeable information.

185 Moreover, it is apparent from the contested decision that the *ex ante* profitability analysis, which was reconstructed *ex post* on the basis of the data available before the conclusion of the 2008 agreements, submitted by Romania on 9 December 2014 at the Commission's request, contained shortcomings and did not make it possible to demonstrate that the private operator in a market economy test had been complied with in the 2008 agreements (see recitals 344 and 356 of the contested decision and paragraphs 163 and 164 above). Accordingly, it is unlikely that the hypothetical prior calculations referred to in recital 147 of the contested decision, which AITTV allegedly carried out before the conclusion of the 2008 agreements, would have made it possible to demonstrate satisfactory prospects of *ex ante* profitability in respect of those agreements.

186 In the second place, the Commission concluded that the 2008 agreements were profitable on the basis of the 2015 Oxera report, namely an *ex ante* profitability analysis which was reconstructed *ex post* on the basis of the data available before the conclusion of the 2008 agreements, submitted by Wizz Air on 10 February 2015 and recalculated by the Commission (see paragraphs 163 and 165 above).

187 As the Commission contends, the 2015 Oxera report, although produced almost seven years after the conclusion of the 2008 agreements, is based on data available before the conclusion of those agreements.

188 However, contrary to what the Commission asserts, the view cannot be taken, merely because that report is based on the information which was available and the developments which were foreseeable at the time when the third measure was adopted in 2008, that it amounts to an *ex ante* analysis capable of demonstrating compliance with the private operator in a market economy test.

189 It is true that, according to the case-law, it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from such a private operator. In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private operator, in a situation as close as possible to that of the State, must be regarded as being relevant (see judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraphs 29 and 30 and the case-law cited; see also, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 60).

190 However, factors arising after the measure at issue has been adopted cannot be taken into account for the purpose of applying the private operator test (see judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 32 and the case-law cited; see also, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 104, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 93 and 94).

191 In that regard, while it is true that, as follows from the case-law cited in paragraph 176 above, the public undertaking concerned has the opportunity in the administrative procedure to produce additional evidence which is generated after the adoption of the measure, such an opportunity cannot exempt that undertaking from the obligation to carry out an appropriate prior economic evaluation, based on an analysis of the available information and foreseeable developments which is appropriate having regard to the nature, complexity, size and context of the operation (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 186 and 188).

192 However, in the present case, the 2015 Oxera report, although based on data available before the conclusion of the 2008 agreements, is nonetheless a retrospective finding that those agreements were actually profitable. For that reason, in accordance with the case-law cited in paragraph 190 above, it is irrelevant for the purpose of assessing compliance with the private operator in a market economy test.

193 In the third place, the Commission also took into account, in the contested decision, *ex post* studies carried out by Oxera and RBB, dated 27 October 2011, as supporting the results of the 2015 Oxera report (see paragraphs 167 and 169 above).

194 According to the case-law, in order to determine whether the beneficiary of the measure concerned has actually obtained an advantage for the purposes of Article 107(1) TFEU, additional economic analyses provided by the Member State in the administrative procedure are capable of shedding light on the information existing at the time of the investment decision and must be taken into account by the Commission (judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 134).

195 However, in the present case, the *ex post* reconstructed evidence taken into account by the Commission, whether provided by Romania or by Wizz Air, did not supplement evidence generated before the conclusion of the 2008 agreements, which AITTV provided to the Commission. On the contrary, that was the only evidence provided to the Commission and the only evidence on which the Commission based its assessment of the 2008 agreements.

196 In the fourth and last place, in its conclusion on the economic advantage with regard to the 2008 agreements, the Commission also took into account the fact that 'there [were] indications, in particular based on the Development Plan 2006-2015[,] that the 2008 Agreements with Wizz Air were part of an overall strategy and long-term effort towards overall profitability of the airport' (see recital 414 of the contested decision and paragraph 169 above).

197 However, such vague factors, which are not substantiated in any way, cannot constitute sufficient evidence that a prior economic evaluation of profitability was carried out before the conclusion of the 2008 agreements.

198 Accordingly, it must be stated that the Commission's conclusion that a prudent private operator in a market economy would have entered into the 2008 agreements is based entirely on evidence established *ex post*, contrary to the case-law cited in paragraphs 170 to 177 above.

199 It must therefore be held that the Commission failed to state grounds in law for its conclusion that the third measure had not conferred an economic advantage on Wizz Air which it would not have obtained under normal market conditions and that it therefore did not constitute State aid.

200 Without there being any need to examine the other arguments raised by the applicant as part of the second plea in law, the present plea must therefore be upheld to the extent that it alleges an error of law in so far as the contested decision concludes that the third measure did not confer an undue advantage on Wizz Air.

201 In the light of all the foregoing considerations, the action must therefore be upheld on the basis of the first and second pleas in law, without there being any need to examine the third and fourth pleas in law.

Costs

202 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 Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the applicant. Wizz Air and AITTV are to bear their own costs in accordance with Article 138(3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **[As rectified by order of 13 July 2023] Annuls Article 2 of Commission Decision (EU) 2021/1428 of 24 February 2020 on the State Aid SA.31662 – C/2011 (ex NN/2011) implemented by Romania for Timişoara International Airport – Wizz Air in so far as it concludes that the airport charges in the Aeronautical Information Publication of 2010 and the agreements concluded between Societatea Națională 'Aeroportul Internațional Timişoara – Traian Vuia' SA (AITTV) and Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.) in 2008 (including the 2010 amendment agreements) do not constitute State aid;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Carpatair SA;**

3. **Orders Wizz Air Hungary and AITTV to bear their own costs.**

Papasavvas Svenningsen Jaeger

Mac Eochaidh Pynnä

Delivered in open court in Luxembourg on 8 February 2023.

E. Coulon President
Registrar

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