JUDGMENT OF THE COURT OF FIRST INSTANCE
(Eighth Chamber, Extended composition)

17 December 2008 *

In Case T-196/04,

Ryanair Ltd, established in Dublin (Ireland), represented initially by D. Gleeson, A. Collins SC, V. Power and D. McCann, Solicitors, and subsequently by Power and McCann, J. Swift QC, J. Holmes, Barrister, and G. Berrisch, lawyer,

applicant,

v

Commission of the European Communities, represented by N. Khan, acting as Agent,

defendant,

supported by

* Language of the case: English.

Association of European Airlines (AEA), represented by S. Völcker, F. Louis and J. Heithecker, lawyers,

intervener,

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

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber, Extended composition),

composed of M. E. Martins Ribeiro, President, D. Šváby, S. Papasavvas, N. Wahl (Rapporteur) and A. Dittrich, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, Ryanair Ltd, is Europe's original and largest low fares airline. It has pioneered in Europe the 'low cost' business model, which involves minimising costs and maximising efficiency in all areas of its business so as to offer the lowest fares in every market and thereby attract high passenger volumes.

2 Ryanair commenced its operations from Charleroi Airport (Belgium) in May 1997 by launching an air route to Dublin.

3 In 2000 negotiations took place regarding the establishment by Ryanair of its first continental base at Charleroi.

4 At the beginning of November 2001 Ryanair entered into two separate agreements ('the agreements at issue'), one with the Walloon Region, the owner of Charleroi Airport, the

other with Brussels South Charleroi Airport (BSCA), a public sector company controlled by the Walloon Region which has managed and operated that airport as a concession holder since 4 July 1991.

5 Under the first agreement, the Walloon Region, in addition to changing the airport opening hours, granted Ryanair a reduction of some 50% as compared with the regulatory level of landing charges and undertook to compensate Ryanair for any loss of profit arising directly or indirectly from any change by decree or regulation of airport charges or opening hours.

6 Under the second agreement, Ryanair undertook to base between two and four aircraft at Charleroi Airport and to operate, over a fifteen-year period, at least three rotations a day per aircraft. It also undertook, in the event of its 'substantial withdrawal' from the airport, to reimburse all or part of the payments made by BSCA (see paragraphs 7 and 9 below).

7 BSCA, for its part, undertook to contribute to the costs incurred by Ryanair in establishing its base. That contribution consisted of:

— a payment of up to EUR 250 000 for hotel costs and subsistence for Ryanair staff;

— a payment of EUR 160 000 for each new route opened up to a maximum of three routes per Charleroi-based aircraft, in other words a maximum of EUR 1 920 000;

— a payment of EUR 768 000 in respect of the cost of recruiting and training flight crew assigned to the new destinations served by Charleroi Airport;

— a payment of EUR 4 000 for the purchase of office equipment;

— provision 'at minimum or no cost' of various premises for technical or office use.

8 In addition, under that agreement, BSCA invoices Ryanair EUR 1 per passenger for the provision of ground handling services, rather than EUR 10 in accordance with the published tariff for other users.

9 Finally, BSCA and Ryanair formed a joint company, Promocy, the objective of which is to fund the promotion of both Ryanair's activities at Charleroi and Charleroi Airport. The two parties undertook to contribute in the same proportions to the Promocy operation by a contribution of EUR 62 500 to form Promocy's share capital and by an annual contribution to Promocy's budget equivalent to EUR 4 per departing passenger.

10 Those measures were not notified to the Commission.

11 In a letter dated 11 December 2002 (SG(2002) D/233141) the Commission, having received complaints and following press reports, informed the Kingdom of Belgium of its decision to initiate the procedure provided for in Article 88(2) EC in respect of these measures. Further, by publication of that decision in the *Official Journal of the European Communities* on 25 January 2003 (OJ 2003 C 18, p. 3), it invited interested parties to submit their comments on the measures concerned.

12 On 12 February 2004, having analysed the comments of the interested parties and of the Kingdom of Belgium, the Commission adopted Decision 2004/393/EC concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ 2004 L 137, p. 1) ('the contested decision').

The contested decision

13 In the contested decision, after a description of the administrative procedure followed (recitals 1 to 6), the Commission first briefly summarises the facts and assessment made in the decision to initiate the formal examination procedure (recitals 7 to 15). It then sets out the comments by interested parties (recitals 16 to 75) and the comments of the Kingdom of Belgium (recitals 76 to 136).

14 In the actual assessment of the measures at issue, the Commission evaluates, in the first place, whether there is aid within the meaning of Article 87(1) EC (recitals 137 to 250).

15 In that regard, the Commission rejects application to the Walloon Region of the principle of the private investor in a market economy (the 'private investor principle'). It takes the view, in essence, that the fixing of landing charges falls within the legislative and regulatory competence of the Walloon Region and is not an economic activity that can be assessed by reference to the private investor principle. Rather than acting within the framework of its public powers, the Walloon Region, in the Commission's view, acted in an unlawful and discriminatory manner by granting to Ryanair, for a period of 15 years and by means of a contract under private law, a reduction in the level of airport charges which was not available to other airlines. The Commission concludes that the reduction in airport charges and the guaranteed indemnity constitute an advantage within the meaning of Article 87(1) EC (recitals 139 to 160).

16 However, in spite of the difficulties in doing so, the Commission undertakes an assessment of whether the private investor test can be considered to have been satisfied in the case of the measures adopted by BSCA (recitals 161 to 170). Taking the view that the latter did not act in accordance with the private investor principle, the Commission decides that the advantages granted by BSCA to Ryanair constitute advantages within the meaning of Article 87(1) EC (recitals 161 to 238). The Commission observes in particular that, when BSCA made its decision to invest, 'it did not carry out an analysis consistent with all the hypotheses of the contract envisaged with Ryanair and Ryanair alone'. In so acting, BSCA took risks that a private investor acting in a market economy would not have taken. Those risks relate both to data essential to the business plan and to other parameters concerning relations between BSCA and the Walloon Region (recitals 184 and 185).

17 Since the other criteria for classification as aid, that is to say, those relating to specific character (recitals 239 to 242), the transfer of State resources in favour of Ryanair (recitals 243 to 246) and the impact on intra-community trade and competition (recitals 247 to 249), are, in its view, met, the Commission concludes that 'the advantages granted to Ryanair by the Walloon Region and by BSCA are State aid'.

18 The Commission notes in particular that the advantages in question, whether granted by BSCA or by the Walloon Region, were granted to Ryanair only and that they are therefore specific. It also states that those advantages, which were granted directly by the Walloon Region in the form of a 'compensation commitment' (involving commitment of regional resources where necessary) and of a reduction of landing charges (involving a loss of profit for the State), and indirectly by mobilisation of BSCA resources, involve the transfer of State resources in favour of Ryanair. Finally, it observes that those advantages, granted through the State taking responsibility for operating costs normally borne by an airline, not only distort competition on one or more routes and on a particular market segment, but also on the whole of the network served by Ryanair.

19 Secondly, the Commission examines whether that aid could be declared compatible on the basis of the exemptions provided for in the Treaty. The Commission essentially concludes that the aid granted by the Walloon Region is incompatible with the common market. The reductions granted to Ryanair are, in its opinion, discriminatory, unlawful under Belgian law and contrary to the principle of proportionality (recitals 263 to 266).

20 With regard to the aid granted by BSCA, the Commission considers that aid for the opening of new routes, where the amount does not exceed 50% of the start-up costs and the duration is less than five years, is compatible with the common market. Where those thresholds are exceeded, the Commission calls for the recovery of aid granted to Ryanair by BSCA (recitals 267 to 344).

21 Finally, the Commission sets out a summary of its policy guidelines relating to the financing of airports and air links (recitals 345 to 356).

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

'*Article 1*

The aid measures implemented by [the Kingdom of] Belgium in the contract of 6 November 2001 concluded between the Walloon Region and Ryanair, in the form of a reduction in airport landing charges that goes beyond the official tariff set in Article 3 of the Walloon Government Decree of 16 July 1998 laying down charges to be levied for the use of airports in the Walloon Region and the general discounts provided for in Article 7(1) and (2) of the said Decree, are incompatible with the common market within the meaning of Article 87(1) of the Treaty.

Article 2

The aid measures implemented by [the Kingdom of] Belgium through the contract of 2 November 2001 concluded between Brussels South Charleroi Airport (BSCA) and Ryanair, in the form of discounts on ground handling services in comparison with the official airport tariff, are incompatible with the common market within the meaning of Article 87(1) of the Treaty.

[The Kingdom of] Belgium shall determine the total aid recoverable by calculating the difference between the operating costs borne by BSCA and linked to the ground handling services provided to Ryanair and the price invoiced to the airline. So long as the two-million-passenger threshold provided for in Directive 96/67/EC remains unattained, [the Kingdom of] Belgium may deduct from this total any profits realised by BSCA on its other strictly commercial activities.

Article 3

[The Kingdom of] Belgium shall ensure that the compensation guarantees granted in the contract of 6 November 2001 by the Walloon Region in the event of losses suffered by Ryanair through the exercise by the Walloon Region of its regulatory powers are void. The Walloon Region shall have with Ryanair, as with other airline companies, all the necessary freedom in fixing airport charges, airport opening hours or other provisions of a regulatory nature.

Article 4

The other types of aid granted by BSCA, including marketing contributions, one-shot incentives and provision of office space, are declared compatible with the common market as start-up aid for new routes, subject to the following conditions:

(1) the contributions must relate to the opening of a new route and be limited in time. In view of the intra-European destinations covered, the time period must not exceed five years following the opening of a route. The contributions may not be paid for a route opened as a replacement for another route closed by Ryanair in the preceding five years. In future, aid may not be granted for a route that Ryanair has provided in replacement for another route that it served previously from another airport located in the same economic or population catchment area.

(2) The marketing contributions, currently set at EUR 4 per passenger, must be justified in a development plan compiled by Ryanair and validated by BSCA for each route concerned. The plan shall specify the costs incurred and eligible, which must relate directly to the promotion of the route with the aim of making it viable without aid after an initial period of five years. At the end of the five-year period, BSCA shall a posteriori validate the start-up costs incurred by each airline, and BSCA shall where necessary enlist the help of an independent auditor in the task.

(3) With regard to the portion of contributions already paid by BSCA, a similar exercise must be carried out to validate this aid on the same principles.

(4) The one-shot contributions paid as a lump sum when Ryanair set up at Charleroi, or whenever a route was opened, must be recovered, except for any portion that [the Kingdom of] Belgium can justify as being directly linked to the costs that were incurred by Ryanair at the Charleroi airport hub and are proportional and incentive in nature.

(5) The sum total of aid from which a new route benefits must never exceed 50% of start-up, marketing and one-shot costs aggregated for the two destinations in question, including Charleroi. In the same way, the contributions granted for a destination must not exceed 50% of the actual costs for that destination. Specific attention shall be paid in these evaluations to routes that link Charleroi to a major airport, such as those included in Categories A and B as defined in the Committee of the Regions' outlook opinion of 2 July 2003 on the capacity of regional airports and identified in the present Decision, and/or to a coordinated or fully coordinated airport within the meaning of Regulation (EEC) No 95/93.

(6) The contributions paid by BSCA that at the end of the five-year start-up period exceed the criteria laid down must be repaid by Ryanair.

(7) The contributions paid, where applicable, for the Dublin-Charleroi route under the [agreements at issue] shall be recovered.

(8) [The Kingdom of] Belgium shall set up a non-discriminatory aid scheme intended to ensure equality of treatment for airlines wishing to develop new air services departing from Charleroi Airport in accordance with the objective criteria laid down in the present Decision.

…'

Procedure and forms of order sought by the parties

23 By application lodged at the Registry of the Court of First Instance on 25 May 2004 the applicant brought the present action.

24 By document lodged at the Registry of the Court on 1 November 2004 the Association of European Airlines (AEA) sought leave to intervene in the present proceedings in support of the Commission.

25 By registered letter of 14 January 2005 to the Registry of the Court the applicant requested that, in accordance with Article 116(2) of the Court's Rules of Procedure, certain confidential information be omitted from the communication of procedural documents to the intervener and produced, for the purposes of that communication, a non-confidential version of the pleadings or documents in question.

26 By order of 20 April 2005 the President of the Fourth Chamber of the Court of First Instance granted the AEA leave to intervene and reserved the decision on the merits of the application for confidentiality. The intervener lodged its statement in intervention and the other parties lodged their observations thereon within the prescribed periods. The intervener informed the Court that it had no objections to the application for confidentiality.

27 Pursuant to Article 14 of the Rules of Procedure and on the proposal of the Fourth Chamber, the Court, having heard the parties in accordance with Article 51 of those rules, assigned the case to a chamber sitting in extended composition.

28 The composition of the Chambers of the Court of First Instance was changed and the Judge-Rapporteur was assigned to the Eighth Chamber sitting in extended composition; the present case was therefore allocated to that chamber.

29 Upon hearing the Report of the Judge-Rapporteur, the Court (Eighth Chamber, extended composition) decided to open the oral procedure and, as measures of organisation of procedure, asked the principal parties to reply in writing to a number of questions. The parties acceded to those requests within the time allowed.

30 The parties presented their oral arguments and replied to the Court's questions at the hearing on 12 March 2008.

31 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission and the intervener contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

33 The applicant relies on two pleas in law in support of its action. The first alleges an infringement of the obligation to state reasons laid down in Article 253 EC. By its

second plea, the applicant challenges the classification of the measures at issue as State aid and alleges, in that regard, an infringement of Article 87(1) EC.

34 The Court considers that the second plea in law should be examined first. In that plea the applicant complains in particular that the Commission either failed to apply or misapplied the private investor principle which is the appropriate test for determining whether measures constitute aid to all of the measures at issue and sets out several grounds of complaint. The applicant puts forward, in essence, several arguments to the effect that the Commission (i) failed, when examining the measures at issue, to take into consideration the fact that the Walloon Region and BSCA ought to be regarded as one single entity, (ii) erred by refusing to apply the private investor principle to the measures adopted by the Walloon Region and (iii) misapplied that principle to BSCA.

35 Before considering that plea, the Court will make some observations on the concept of State aid, within the meaning of Article 87(1) EC, and on the nature and scope of the review which the Court must carry out in the present case.

Preliminary Observations

36 For a measure to be classified as aid within the meaning of Article 87(1) EC, all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the

recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition (see Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 110 and case-law cited).

37 In the present case, it is clear that the only condition disputed by the applicant is whether there is an advantage.

38 In that regard, it is clear from the case-law that the expression 'aid', for the purposes of that provision, necessarily designates advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose (Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 16).

39 The Court of Justice has held, in particular, that in order to determine whether a State measure constitutes aid it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41).

40 Finally, it must be noted that since aid, as defined in the Treaty, is a legal concept and must be interpreted on the basis of objective factors, the Community judicature must, as a general rule, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraph 40).

41 On the other hand, it must be remembered that the assessment by the Commission of whether an investment satisfies the private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it consequently enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, order in Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43, and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 127 and case-law cited).

42 It is by reference to those principles that the arguments of the parties must be examined: first, whether the private investor principle applies to the measures adopted by the Walloon Region.

Whether the private investor principle applies to the measures adopted by the Walloon Region

43 The applicant essentially claims that BSCA and the Walloon Region were one single economic entity. Accordingly, the private investor principle should have been applied to them both together. According to the applicant, the agreements at issue were envisaged by the parties as one single package of financial measures. The Commission should have considered the related measures to be part of one single package when examining whether they constitute State aid.

44 The applicant further maintains that, if the reason for the dual approach adopted by the Commission was that the private investor principle could not be applied to the Walloon Region, the Commission was wrong to conclude, in order to exclude application of that principle, that the Walloon Region did not act in the present case as an economic operator but as a regulatory authority.

45 The Court will first examine whether the Walloon Region and BSCA ought to have been regarded as one single economic entity when the measures at issue were considered and, as necessary, examine whether, notwithstanding the interests of the Walloon Region and BSCA being identical, the Commission could correctly exclude application of the private investor principle to the advantages granted by the Walloon Region by taking the view that its action, in the present case, was within the ambit of its public authority powers.

The existence of a single legal entity: 'Walloon Region — BSCA'

— Arguments of the parties

46 The applicant complains that when classifying the contested measures the Commission treated the Walloon Region and BSCA as separate entities. That distinction is artificial, since the Walloon Region controls BSCA and forms with it one economic entity. That distinction also has significant consequences for the substantive analysis, since it allowed the Commission to classify as aid the advantages obtained by the Walloon Region without referring to the private investor principle.

47 The applicant states that over 95% of the capital of BSCA is held, directly or indirectly (through the Société Wallonne des Aéroports (SOWAER) and Sambrinvest (Société de Développement et de Participation du Bassin de Charleroi)), by the Walloon Region. Moreover, all the board members of BSCA are appointed by and answerable to the Walloon Region. The applicant also claims that, throughout the negotiations which preceded conclusion of the agreements at issue, the Walloon Region and BSCA acted as a parent company and its subsidiary would have.

48 In so far as Charleroi Airport is owned by the Walloon Region, the latter and BSCA should be viewed as forming one single entity as regards their 'dealings' with the airport.

49 Accordingly, the approach taken by the Commission is artificial, since it ignores the close links between BSCA and the Walloon Region. In their respective capacities as the owner and the operator of Charleroi Airport, they operate as a single economic entity. The Commission should therefore have examined together the measures which they adopted in relation to Ryanair (see Case T-137/02 *Pollmeier Malchow* v *Commission* [2004] ECR II-3541, paragraph 50, which is based on Case 170/83 *Hydrothermg Gerätebau* [1984] ECR 2999, paragraph 11, and, by analogy, Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). If the Commission had taken that path it would have had no reason to criticise BSCA's business plan.

50 The applicant maintains in that regard that the statement, in recitals 153 and 161 of the contested decision, that there was some degree of confusion in relation to the respective roles of the Walloon Region and the BSCA, indicates unity of conduct.

51 The Commission contends that those complaints are irrelevant: application of the private investor principle to the Walloon Region and BSCA together cannot affect the merits of the contested decision. When the Commission analysed the business plan, it took into consideration the agreements concluded with both the Walloon Region and BSCA. It therefore assessed the advantages flowing from the reduction in landing charges with reference to the private investor principle. The Commission states that it adequately identified the intrinsic weaknesses of the business plan. Consequently, the Walloon Region's status as the owner of the airport does not affect that analysis, in particular as regards the fact that the Walloon Region is responsible for the fire and maintenance costs and that BSCA's contributions to the environment fund are capped. Similarly, consideration of the Walloon Region and BSCA as one single entity would, in any event, have had no effect on the return anticipated in the business plan, since the reduction in landing charges brought no advantage to the Walloon Region.

52 At the rejoinder stage, the Commission placed on the file new documents from the Walloon authorities to support the finding that, even treating the Walloon Region as a private investor, the anticipated return was insufficient by reference to the private investor principle.

— Findings of the Court

53 As is clear from the file, BSCA is a public undertaking controlled by the Walloon Region. Its share capital largely consists of public capital. More specifically, and as identified by the Commission itself, at the material time the Walloon Region owned, directly or indirectly, 96.28% of BSCA shares. On 2 November 2001, a contract was entered into by BSCA and Ryanair which imposed reciprocal obligations.

54 The Walloon Region is, for its part, the owner of the Charleroi airport infrastructure. On 6 November 2001 it entered into an agreement with Ryanair, whereby it undertook to grant to Ryanair, first, a reduction in landing charges and, second, an indemnity in the event of losses which that company might suffer following any change, as a result of legislation or regulation, in the airport charges or opening hours of Charleroi airport. It must be noted that, as the Commission moreover stated in paragraph 21 of the letter inviting interested parties to submit their comments on the measures at issue (see paragraph 11 above), that agreement solely contains undertakings given by the Walloon Region to Ryanair.

55 The Commission acknowledged, both in the decision to initiate the procedure and in the contested decision, the economic and legal links binding the Walloon Region to BSCA and in particular the fact that BSCA was an entity economically dependent on the Walloon Region.

56 The Commission stated, in paragraph 80 of the letter inviting interested parties to submit their comments on the measures at issue (see paragraph 11 above), in relation to whether the private investor principle was applicable to the present case, that 'the roles of the [Walloon] Region as a public authority and of BSCA as an airport management company had been greatly confused, which made the application of that principle very difficult'. The Commission also stated in paragraph 101 of that letter that 'the dominant influence of the Walloon Region on BSCA was visible first of all in the structure of the share capital' and that 'BSCA's form of organisation, according to its articles of association of June 2001, reserve[d] control of the company to category A shareholders, namely the [Walloon] Region and its specialised companies'. Lastly, the Commission stressed the fact that 'the Walloon Region's dominant influence on BSCA [was] undeniable when account is taken of how the public authorities have designed its overall environment since its creation in 1991'.

57 The conclusion that the Walloon Region and BSCA are closely linked is also clear in the contested decision. The Commission thus stated that the financial structure of BSCA was closely connected to that of the Walloon Region (see in particular recitals 161 to 166 and recital 237 of the contested decision), in particular as regards responsibility, under the concession, for the costs of fire and maintenance services (see recitals 208 to 216 of the contested decision). The Commission also observed, in the section dealing with whether in the present case there was a transfer of State resources, that 'BSCA [was] a public undertaking over which the Walloon Region exercise[d] both control and a dominant influence, and those measures [were] attributable to it' (see recital 246 of the contested decision).

58 Notwithstanding those various observations, the Commission considered the measures in question separately according to whether they had been granted by the Walloon Region or by BSCA.

59 It is however necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy. The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context (see, to that effect, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 270), including those relating to the situation of the authority or authorities responsible for granting the measures at issue.

60 Accordingly, contrary to what is stated by the Commission, the financial links binding the Walloon Region to BSCA are not irrelevant, since it cannot a priori be excluded that the Walloon Region not only took part in the activity carried out by BSCA (see, by analogy, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 112), but also obtained financial consideration for granting the measures at issue.

61 In the present case, it must therefore be concluded that the Walloon Region and BSCA ought to have been regarded as one single entity for the purposes of application of the private investor principle. There remains the question whether the Commission was correct to refuse to apply the private investor principle to the measures adopted by the Walloon Region because of the role specifically played by the region, namely its alleged regulatory role.

Treatment of the Walloon Region as a legislative or regulatory authority and non-application of the private investor principle to the measures adopted by it

— Arguments of the parties

62 The applicant takes issue with the Commission's refusal to examine the measures granted by the Walloon Region by reference to the private investor principle. The applicant challenges the Commission's reasoning (recitals 139 to 160 of the contested decision) that the Walloon Region was not acting as an economic operator when it granted to Ryanair a reduction in landing fees and an indemnity, but was employing its public authority powers and using its legislative and regulatory competence.

63 The first argument is that such reasoning is contrary to the case-law. The applicant submits that application of the private investor principle depends on the nature of the economic activity affected by the State measures and not on the status of the body dispensing aid or the means which it employs in order to secure an economic advantage for an undertaking. The applicant adds that, while the private investor principle may not be applicable when the acts of a public authority fall within the exercise of its public powers, in particular when it imposes taxes or social charges (Case C-355/00 *Freskot*

[2003] ECR I-5263, paragraphs 55 to 58, and 80 to 87), the principle may, conversely, be applicable in a situation where public authorities levy a parafiscal charge.

64 In the present case, in the contested decision, the Commission did no more than reproduce the statutory provisions which empower the Walloon Region to determine airport charges. There is however no explanation why the Commission took the view that the Walloon Region had acted not as an airport owner, but as a regulatory authority.

65 Furthermore, the applicant points out that it argued during the administrative procedure that the Commission's interference in the pricing policy of Charleroi airport amounted to discrimination between public and private airports, contrary to Article 295 EC. In reply to that argument, the Commission stated, in recital 157 of the contested decision, that 'the Walloon Region could … have decided that the onus was on BSCA to fix a fee in exchange for services rendered to users, provided certain principles and conditions were complied with'. Yet, according to the Commission, if the Walloon Region had acted in that way, BSCA's fixing of the landing fees would have constituted a commercial activity and not the exercise of regulatory powers. It would therefore have had to be assessed with reference to the private investor principle. The applicant however claims that, in relation to the nature of the activities in question and, consequently, application of the private investor principle, such activities do not mutate from 'regulatory' to 'commercial' or 'economic' merely because they are entrusted by a regional government to a public undertaking which is owned by it and controlled by it.

66 As regards more specifically the reduction in landing charges, the applicant claims that the provision of airport facilities to air carriers is an economic activity governed by Community competition law (Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 45, and Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraphs 108 to 124). The grant of discounts on landing charges in

order to attract new customers is standard practice in the sector (State Aid NN 109/98, United Kingdom (Manchester Airport), 14 June 1999, paragraph 8).

67 The applicant notes that the Commission based its argument on the fact that Ryanair was the only company based at Charleroi to have received a reduction in landing charges and an indemnity. The Commission concluded that 'Article 87 of the Treaty [was] therefore likely to apply when a benefit arising from the granting of an exemption from the common law tariff system is not justified on objective economic grounds' (recital 140 of the contested decision).

68 In the applicant's opinion, that reasoning is erroneous for several reasons. First, the conditions offered to Ryanair were not the result of an 'exemption' granted unilaterally by the public authorities but the result of a commercial negotiation. Ryanair points out that the level of reduction which it was able to obtain (about 36%) is above the reduction margin (between 5 and 25%) which the Walloon Region can normally grant in accordance with local regulations. Secondly, the reductions granted to Ryanair were justified by clear, objective economic considerations. In order to improve its business, Charleroi airport contacted several airlines. Ryanair was ultimately the only airline willing to take the risk of establishing regular air services departing from that airport. The commitments entered into placed Ryanair in a situation which was of a different order from that of other air carriers then at Charleroi. In return for the price reduction, Ryanair undertook to increase seven-fold the total number of passengers annually carried from the airport, which at that time was about 20 000 people. Ryanair took on the risk of being the first airline to offer to carry such passenger numbers and becoming the principal occupant of that underused and little known regional airport. Given the duration of its commitment, Ryanair also gave up the option of withdrawing from Charleroi should its operations prove not to be sufficiently profitable. Thirdly, the changes made by the Walloon Region for the benefit of Ryanair were neither selective nor limited, but accessible to any third party, under non-discriminatory conditions. The agreement entered into with BSCA expressly provided that 'nothing in this contract shall prevent BSCA from trading with other air companies or accepting aircraft based

by other companies' (Article 4.2 of that agreement). In addition, the Walloon Region confirmed by a press release in July 2001 that the advantages granted to Ryanair would be available to other airlines which sought to commence similar operations.

69 As regards the indemnity offered by the Walloon Region as compensation for any changes in its legislation, the applicant claims that this also does not constitute State aid. It is rather a commercial arrangement, comparable to a 'stabilisation clause', which is common practice in the sector. It would have been unreasonable for Ryanair to commit itself for so long a period and to take on such significant commercial risks without obtaining, in return, the assurance of the Walloon Region that it would not alter the terms of the agreement unless it provided compensation for any losses. To prevent the Walloon Region entering into such commitments would amount to depriving it of the possibility of acting in the same way as other commercial operators. The applicant emphasises that the indemnity is limited in its application and in no way circumscribes the sovereignty of the Walloon Region. It is therefore solely a commercial commitment intended to ensure the stability of the proposed economic activity.

70 Secondly, the approach adopted by the Commission is inconsistent. In that regard, the applicant highlights a contradiction: the Commission, on the one hand, declared that the private investor principle was not applicable to the Walloon Region and, on the other, took into consideration the advantages granted by the Region in order to assess the viability of BSCA's business plan by reference to that principle. By attributing to the Walloon Region the advantages resulting from the reductions in landing charges and the indemnity, the Commission has managed to circumvent application of the private investor principle and the difficulties of analysis which that involves.

71 The Commission disputes those objections.

72 First, the Commission takes issue with the applicant's interpretation of the case-law. It considers that *Freskot*, paragraph 63 above, supports the contested decision. The Court held there that the contribution to a compulsory insurance scheme for farmers did not constitute a 'service' within the meaning of the Treaty, inter alia because the charge levied under that scheme '[was] essentially in the nature of a charge imposed by the legislature' because it '[was] levied by the tax authority', because '[t]he characteristics of that charge, including its rate, [were] also determined by the legislature' and because 'it [was] for the competent ministers to decide any variation of the rate'. Those considerations can be directly transposed to the present case.

73 Secondly, the Commission points out that the contested decision was the first time the private investor principle was applied by it to State aid at an airport. It maintains that the private investor principle is incompatible with its guidelines of 10 December 1994 on the application of Articles 87 EC and 88 EC and Article 61 of the Agreement on the European Economic Area (EEA) to State aid in the aviation sector (OJ 1994 C 350, p. 5), according to which public investment in airport infrastructure constitutes a general measure of economic policy. The State cannot act simultaneously as a public authority and as a private investor. The Commission considers that the distinction made between airport infrastructure and airport management is consistent with the dual approach to examining State aid in the aviation sector which distinguishes airport infrastructures from airport services.

74 Thirdly, the Commission submits that the applicant's arguments are contradictory. The Commission points out that it did not criticise the business plan for taking no account of the cost of the investment required by the Walloon Region in order to improve the airport infrastructure and deal with the increase in traffic resulting from Ryanair's establishment. That investment is substantial (EUR 93 million on investment directly

connected with the implementation of the business plan alone). It is illogical to criticise the Commission for having failed to apply the private investor principle to the Walloon Region, when the contested decision does not relate to the latter's investment in infrastructure. If those infrastructure costs were included in the assessment under the private investor principle, the shortcomings of the business plan would only be compounded.

75 The Commission asks the Court to require the applicant to withdraw its pleas concerning the analytical framework for the measures adopted by the Walloon Region or to explain why the Walloon Region, as an investor in a market economy, made the investment necessary for the implementation of the business plan, and prove that the contested decision made a manifest error of assessment in this respect.

76 Finally, the Commission takes the view that, although reference was indeed made in the application to the issue of whether the value of the airport should be taken into consideration, this was done too summarily to permit the arguments dealing with that issue in the reply to be interpreted as other than new pleas in law which are inadmissible by virtue of Article 48(2) of the Rules of Procedure.

77 As regards, more specifically, the reduction in landing charges, the Commission takes the view that the fixing of landing charges to obtain access to infrastructure falls within the exercise of public authority powers. The Kingdom of Belgium did not dispute that the granting of discounts on landing charge rates requires adoption of a legislative act. However, in this case, analysis revealed that in granting a discount to Ryanair by means of a contract the Walloon Region acted neither according to the relevant law nor within its competence.

78 Those considerations are, the Commission argues, confirmed by the inseparable link between landing charges and the environmental fund set up by the Walloon Region, to which BSCA contributes. The expansion of the airport has adverse effects on the environment, which cannot be ignored by the Walloon Region. The environmental fund is intended to meet that need. The Commission takes the view that this demonstrates that the fixing of landing charges is a regulatory activity.

79 According to the Commission, the Walloon Region circumvented the regulatory obstacles by entering into a contract which provided, for the exclusive benefit of Ryanair, a discount on airport charges. If management of the airport had been granted to a private undertaking, Ryanair would not have been able to obtain a reduction in charges comparable to that which it received.

80 The Commission takes the view that the indemnity illustrates the fact that the Walloon Region acted not as an undertaking but as a public authority, using its regulatory powers to control an economic activity. An undertaking would not have been in a position to grant such an indemnity and, in any case, would not have felt the need to do so. The indemnity has nothing to do with unilateral alteration of the agreement, which in any case is precluded, since the agreement with Ryanair made no provision for that possibility. It stems directly from the regulatory powers of the Walloon Region, which do not fall under the private investor principle, as shown by Article 2 of the agreement between Ryanair and the Walloon Region.

— Findings of the Court

81 The agreement entered into by the Walloon Region and Ryanair provides for, first, a discount on landing charges and, second, an indemnity in the event of any change in the airport opening hours or the level of airport ‘taxes’.

82 The Commission states in recital 160 of the contested decision the following:

'The Commission … concludes that the principle of private investor in a market economy is not applicable to the action of the Walloon Region, and that the reduction in airport charges and the compensation guarantee constitute an advantage within the meaning of Article 87(1) [EC]. These advantages allow Ryanair to reduce its operating costs.'

83 In reaching that conclusion, the Commission took account of the following factors:

— the fixing of airport taxes falls within the legislative and regulatory competence of the Walloon Region (recital 144 of the contested decision);

— by fixing the level of airport taxes payable by users for the use of the Walloon airports, the Walloon Region was regulating an economic activity, but was not acting as a company (recitals 145 and 158 of the contested decision);

— the 'airport charges' fixed by the Walloon Region allowed the financing of a specified transfer of resources: 65% was allotted to the airport concession holder (BSCA) and 35% to an environment fund (recitals 146 to 150 of the contested decision);

— the Walloon Region infringed the relevant national regulations by granting a reduction to Ryanair by means of a contract under private law and thereby placed itself in a situation of 'confusion of powers' (recitals 151 to 153 of the contested decision);

— the applicant's assertion that the contested decision amounts to discrimination between 'private airports' and 'public airports' is unfounded, in light of the various methods of fixing charges in Europe (recitals 154 to 159 of the contested decision).

84 Before examining the merits of those grounds, the Court notes that, for the purposes of determining whether a measure of State aid constitutes an advantage within the meaning of Article 87(1) EC, a distinction must be drawn between the obligations which the State must assume as an undertaking exercising an economic activity and its obligations as a public authority (see, to that effect, as regards the distinction which must be made between the situation where the authority granting the aid acts as a shareholder in a company and the situation in which it acts as a public authority, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22, and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 134).

85 While it is clearly necessary, when the State acts as an undertaking operating as a private investor, to analyse its conduct by reference to the private investor principle, application of that principle must be excluded in the event that the State acts as a public authority.

In the latter event, the conduct of the State can never be compared to that of an operator or private investor in a market economy.

86 The Court must therefore determine whether or not the activities concerned in the present case are economic activities.

87 It is clear from the case-law that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and *Aéroports de Paris* v *Commission*, paragraph 66 above, paragraph 107).

88 Contrary to what is stated by the Commission in recital 145 of the contested decision, it must be held that the actions of the Walloon Region were economic activities. The fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of airport infrastructure, which is an economic activity (see, to that effect, *Aéroports de Paris* v *Commission*, paragraph 66 supra, paragraphs 107 to 109, 121, 122 and 125).

89 On that point, the airport charges fixed by the Walloon Region must be regarded as remuneration for the provision of services within Charleroi airport, notwithstanding the fact, mentioned by the Commission in recital 147 of the contested decision, that a clear and direct link between the level of charges and the service rendered to users is weak.

90 Unlike the situation in *Freskot*, paragraph 63 above, the airport charges must be regarded as the consideration obtained for services rendered by the airport owner or concession holder. The Commission itself admits, in recitals 147 to 149 of the contested decision, that, both in the present case and in its practice in previous decisions, it was appropriate to regard those charges as 'fees' and not as 'taxes'

91 Accordingly, the provision of airport facilities by a public authority to airlines, and the management of those facilities, in return for payment of a fee the amount of which is freely fixed by that authority, can be described as economic activities; although such activities are carried out in the public sector, they cannot, for that reason alone, be categorised as the exercise of public authority powers. Those activities are not, by reason of their nature, their purpose or the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority (see, a contrario, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30).

92 The fact that the Walloon Region is a public authority and that it is the owner of airport facilities in public ownership does not therefore in itself mean that it cannot, in the present case, be regarded as an entity exercising an economic activity (see, to that effect, *Aéroports de Paris* v *Commission*, paragraph 66 supra, paragraph 109).

93 In that regard, the Commission acknowledged, at the hearing, that the owner of a public airport may act both as a regulator and as a private investor. In addition, the Commission stated that if BSCA had not acted as an intermediary between the Walloon Region, as owner of Charleroi airport, and Ryanair, as a customer of that airport, it would have been possible to regard the Walloon Region as a private investor in a market economy. The Commission however maintains that in the present case the Walloon Region acted only as a regulatory authority in using its regulatory and fiscal powers. The Commission points out, inter alia, that at the material time the powers of the Walloon Region in relation to setting airport charges, including aircraft landing charges, others

being irrelevant to the present case, were laid down by the decree of the Walloon Government of 16 July 1998 on the fixing of fees to be levied for the use of airports in the Walloon Region (*Moniteur belge* of 15 September 1998, p. 29 491), as amended by a decree of the Walloon Government of 22 March 2001 (*Moniteur belge* of 10 April 2001, p. 11 845). Under Article 8 of that decree, a consultative committee of users, composed of a representative of the ministry responsible for transport, two representatives of the airport concession holder, a representative of the Transport Directorate General within the Ministry of Infrastructure and Transport and a representative of the airport users, was required to give an opinion on proposed changes to the system of fees. The Commission submits that those factors indicated the exercise of the powers of a public authority.

94 The Court considers, however, that that argument cannot be accepted, since it does not affect the fact that the activity concerned in the present case, namely the setting of airport charges, is closely connected with the use and operation of Charleroi airport, which must be described as an economic activity.

95 In that regard, the Commission stated, in recital 156 of the contested decision, the following:

'An airport always fulfils a public function, which explains its general submission to certain types of regulation, even if it belongs to and/or is managed by a private company. Private airport managers can be subject to this regulation and their fee-fixing powers are often contained within the framework of national regulators' instructions because of their monopolistic position. The airports' position of strength in relation to their users can thus be controlled by the national regulators who fix fee levels that must not be exceeded ("price caps"). Asserting that a private airport is free to fix its fees without being subject to certain forms of regulation is in any case inaccurate.'

96 Accordingly, the Commission itself, while refusing to apply the private investor principle to the measures adopted by the Walloon Region because of the regulatory nature of the powers available to it, pointed out that an airport was generally subject to some form of regulation, and moreover 'even if it belongs to and/or is managed by a private company'. Consequently, the argument that there are various methods of setting airport charges is not, by itself, capable of excluding application of the private investor principle to the advantages granted by the Walloon Region.

97 Nor, moreover, can the Court accept the argument that the Walloon Region infringed the relevant national regulations in granting a discount to Ryanair by means of a contract under private law, and thus placed itself in a situation of 'confusion of powers' (recitals 151 to 153 of the contested decision).

98 When examining the measures at issue, the Commission should have differentiated between the economic activities and those activities which fell strictly under public authority powers. In addition, whether the conduct of an authority granting aid complies with national law is not a factor which should be taken into account in order to decide whether that authority acted in accordance with the private investor principle or granted an economic advantage in contravention of Article 87(1) EC. It does not follow from the fact that an activity represents in legal terms an exemption from a tariff scale laid down in a regulation that that activity must be described as non-economic.

99 The Commission's approach in the contested decision finds no support in its guidelines on the application of Articles 87 EC and 88 EC and Article 61 of the EEA agreement to State aid in the aviation sector. Those guidelines do no more than provide that 'the construction of infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid' while stating that 'the Commission may evaluate activities carried out inside

airports which could directly or indirectly benefit airlines'. Far from supporting the Commission's position, those guidelines note that the operation of airports, and the setting of associated charges, even by public bodies, constitutes an economic activity for the purposes of the application of competition law.

100 In addition, the Commission itself, by stating that 'the Walloon Region could … have decided that the onus was on BSCA to fix a fee in exchange for services rendered to users, provided certain principles and conditions were complied with' (see recital 157 of the contested decision), or by admitting that a system of promotional reductions in airport charges was not in itself contrary to Community law (recital 159 of the contested decision), recognises that the granting of a reduction in airport charges and an indemnity of the kind at issue in this case cannot be connected with public authority powers.

101 The mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator.

102 In light of all of the foregoing, it must be concluded that the Commission's refusal to examine together the advantages granted by the Walloon Region and by BSCA and to apply the private investor principle to the measures adopted by the Walloon Region in spite of the economic links binding those two entities is vitiated by an error in law.

103 Since the examination together of the measures at issue required the application of the private investor principle, not only to the measures adopted by BSCA but also to the measures adopted by the Walloon Region, it is unnecessary to consider the last part of the plea in law, namely that there was an incorrect application of the private investor principle to BSCA. It cannot be excluded that the application of that principle to the single body made up of the Walloon Region and BSCA might have led to a different conclusion.

104 The Commission's argument that a re-assessment of all of the measures at issue by reference to the private investor principle would have led to a conclusion even more unfavourable to the applicant cannot be accepted. As the applicant stated, separate examination of the measures at issue, according to whether they were granted by the Walloon Region or by BSCA, substantially affected the Commission's analysis in so far as the Commission was able to classify as State aid the measures adopted by the Walloon Region without recourse to the private investor principle. It is clear from the case-law cited in paragraph 41 above that application of the private investor principle to the overall transaction involves a complex economic examination and assessment which it is not for the Court to carry out. In that regard, it must be remembered that, in an action for annulment, the Court adjudicates on the legality of the assessments made by the Commission in the contested decision. It is not for the Court, in such an action, to reassess the wisdom of the investment and to rule on whether a private investor would have made the proposed investment at the time when the contested decision was adopted (see, to that effect, Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 170 and case-law cited).

105 Consequently, in light of the Commission's error of law, the claims of the applicant must be upheld and the contested decision must be annulled; there is no need to examine the arguments in support of the first plea in law.

Costs

106 Under Article 87(2) 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 pay the costs, in accordance with the form of order sought by the applicant.

107 In accordance with the third paragraph of Article 87(4) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber, Extended composition)

hereby:

1. **Annuls Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi;**

2. Orders the Commission to bear its own costs and to pay those of Ryanair Ltd;

3. Orders the Association of European Airlines (AEA) to bear its own costs.

Martins Ribeiro Šváby Papasavvas

Wahl Dittrich

Delivered in open court in Luxembourg on 17 December 2008.

[Signatures]