



Reports of Cases

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

25 January 2018*

(State aid — Aid granted by Belgium in favour of BSCA — Decision declaring the aid in part compatible and in part incompatible with the internal market — Legally binding act — Limitation period — Economic nature of the ILS — Proportion of economic use of the installations — Incorrect numerical data — Request for adjustment — Determination of the present values — Obligation to state reasons — Distortions of competition — Legitimate expectations)

In Case T-818/14,

Brussels South Charleroi Airport (BSCA), established in Charleroi (Belgium), represented by P. Frühling, S. Golinvaux, H. Tacheny and J. Delarue, lawyers,

applicant,

supported by

Société wallonne des aéroports SA (Sowaer), represented by A. Lepièce and H. Baeyens, lawyers,

intervener,

v

European Commission, represented by S. Noë, R. Sauer and B. Stromsky, acting as Agents,

defendant,

supported by

Brussels Airport Company SA, represented by T. Janssens, F. Hoseinian and T. Oeyen, lawyers,

and by

Brussels Airlines SA/NV, represented initially by J. Derenne, J. Blockx, D. Vallindas and D. Dauchez, and subsequently by J. Derenne and D. Vallindas, lawyers,

interveners,

APPLICATION under Article 263 TFEU for the annulment of Articles 3 to 6 of Commission Decision C(2014) 6849 final of 1 October 2014 concerning measures SA. 14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair,

* Language of the case: French.

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of I. Labucka, acting as President, M. Kancheva, L. Madise, R. Barents (Rapporteur) and J. Passer, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 6 July 2017,

gives the following

Judgment

Background to the dispute

- 1 In 1991 the Walloon Region (Belgium) set up Brussels South Charleroi Airport (BSCA) ('the applicant' or 'BSCA') to manage Brussels South Charleroi Airport ('Charleroi Airport').
- 2 Under an agreement dated 9 July 1991 ('the Region/BSCA Agreement'), the Walloon Region granted to BSCA, for a period of 50 years, a service concession for the commercial management of the public property of Charleroi Airport and a property concession covering the permanent and exclusive use of the airport zone.
- 3 The Region/BSCA Agreement determines how the costs are shared between the Walloon Region and BSCA, including the schedule of conditions annexed to the Region/BSCA Agreement.
- 4 On 20 July 2000, the Walloon Region approved the outlines of a framework agreement on a multiannual investment programme for Charleroi Airport, referring in particular to the concept of a new passenger terminal, with a total budget of EUR 113.74 million.
- 5 On 8 November 2000 the Walloon Region adopted a decision implementing its decision of 20 July 2000, amending the assumptions of the investment programme and increasing the total cost to EUR 121 million.
- 6 By decision of 23 May 2001, the Walloon Region approved the articles of association and financial plan of the Société Wallonne des Aéroports SA (Sowaer) for the years 2001 to 2004, including a total investment amount for Charleroi Airport of approximately EUR 93 million, of which EUR 28 million was intended for the new terminal.
- 7 On 1 July 2001 the Walloon Region formed Sowaer, to develop its airport infrastructure, place that infrastructure at the disposal of the airport management companies in question and keep it operational by covering the costs of major maintenance work and major repairs.
- 8 The BSCA and the Walloon Region concluded Amendment No 3 of 29 March 2002 to the Region/BSCA Agreement, whereby the Walloon Region undertook to pay BSCA a subsidy enabling the Walloon Region to assume the costs of the airport land, buildings and infrastructure being placed at the disposal of BSCA by Sowaer as well as a subsidy for the costs incurred by BSCA for the fire and maintenance services ('the 2002 measure').
- 9 On 15 April 2002 Sowaer, which on 29 March 2002 had taken over the property concession granted to BSCA in 1991, concluded a permanent and exclusive property sub-concession agreement with BSCA for the airport zone ('the 2002 agreement') under which BSCA could exclusively use the airport zone

for operating purposes until 2040. Sowaer, for its part, undertook to conduct an investment programme and to carry out any major repairs and major maintenance work on the land, buildings and infrastructure. In return for that sub-concession, BSCA undertook to pay to Sowaer an annual variable part exclusive of value added tax (VAT) equal to 35% of the airport charges collected during the current year, that amount being capped from the 2002 tax year onwards, and an annual fixed fee, exclusive of VAT, of EUR 9 371 000, which would also change over time.

- 10 On 3 April 2003 the Walloon Government officially noted a revision to the investment programme providing for an additional investment of EUR 33 million, intended to finance the building of a terminal with a capacity of three million passengers, no longer two million, and a larger car park than the one originally planned ('the 2003 measure').
- 11 On 4 April 2006, a new agreement replaced the 2002 agreement, reproducing most of its provisions and amending others, in particular the terms for calculating the concession fees payable by BSCA to Sowaer.
- 12 The Region/BSCA Agreement was amended at the same time through Amendment No 5 of 10 March 2006, which provides that the costs incurred by BSCA for the fire protection and ground traffic and airport site safety services would subsequently be compensated by the Walloon Region, noting that that compensation, which would be annually adjusted, would be capped.
- 13 The Region/BSCA Agreement was amended again, through Amendment No 6 of 15 January 2008, which entrusted to BSCA, in addition to the provision of fire protection and ground traffic and airport site safety services, the provision of services relating to flight tracking and recording, provisional flight planning, marshalling (consisting of operations essentially intended to guide aircraft to their parking areas) and security, which were previously provided by the Walloon Region. From then on the subsidy covered all the costs related to those latter services with the cap for the services referred to in paragraph 12 above being maintained.
- 14 On 1 May 1997 Charleroi Airport welcomed the airline Ryanair Ltd. From 2000 to 2013, traffic at Charleroi Airport increased from around 200 000 passengers to nearly 7 million, Ryanair's share of the total number of passengers carried amounting to over 70-80%.
- 15 On 12 February 2004 the Commission of the European Communities adopted Decision 2004/393/EC concerning advantages granted by the Walloon Region and BSCA to the airline Ryanair in connection with its establishment at Charleroi (OJ 2004 L 137, p. 1).
- 16 By judgment of 17 December 2008, *Ryanair v Commission* (T-196/04, EU:T:2008:585), the Court annulled Decision 2004/393.

Contested decision

- 17 On 1 October 2014 the Commission adopted Decision C(2014) 6849 final, concerning measures SA. 14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair ('the contested decision').
- 18 In the contested decision, the Commission recalled that Decision 2004/393 had been annulled by the Court, with the result that that annulment had had the effect of reopening the formal investigation procedure, which had been closed by Decision 2004/393.

- 19 The Commission also pointed out that, in a letter dated 23 July 2010, it had given the Kingdom of Belgium and the parties which had submitted comments in the formal investigation procedure initiated on 11 December 2002 the opportunity to submit further comments in the formal investigation procedure reopened following the judgment of 17 December 2008, *Ryanair v Commission* (T-196/04, EU:T:2008:585).
- 20 Finally, the Commission stated that, in a letter dated 21 March 2012, it had notified the Kingdom of Belgium of its decision to extend the procedure provided for in Article 108(2) TFEU and invited interested parties to submit their comments on the measures in question.
- 21 Moreover, as a preliminary point, the Commission recalled that the Court of Justice had consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or the way in which they are financed, and that an economic activity was any activity consisting in offering goods and services on a given market. Furthermore, the Commission noted that, in the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), the Court had concluded that the operation of an airport, which consisted in providing airport facilities to airlines, was an economic activity.
- 22 The Commission considered that the measures at issue had been granted to the applicant for the operation and construction of infrastructure after 12 December 2000, the date of the judgment in *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290). The Commission pointed out that, prior to that date, its consistent practice was to consider that the activity of developing and managing airport infrastructure did not constitute an economic activity falling within the scope of Article 107(1) TFEU. Following that judgment, the Commission decided that, due to the gradual liberalisation of the market, that activity had become an economic activity, with the exception of activities which were not economic in nature and normally fall under State responsibility in the exercise of its official powers as a public authority (recitals 346 to 348).
- 23 The Commission took the view that the agreement of 20 July 2000 (see paragraph 4 above) and the decision of 8 November 2000 (see paragraph 5 above) did not impose any commitment on the Walloon Region with regard to a third party and were not irrevocable, firm and definitive in nature. It recalled that the relevant criterion for the date at which a possible aid measure was deemed to have been granted was the date of the legally binding act by which public authorities undertook to award the measure at stake to its beneficiary. The Commission considered that the 2002 agreement constituted that binding act (recitals 353 and 354).
- 24 In that regard, the Commission, first, pointed out that the 2002 agreement had consisted in placing the infrastructure at the applicant's disposal and, secondly, stated that the investment programme included in the 2002 agreement had been significantly amended by the 2003 measure. Those revisions of the programme thus constituted, according to the Commission, a substantial change and therefore a new State aid granted to the applicant (recitals 362 and 363).
- 25 The Commission recalled that it was necessary, according to the case-law of the Court of Justice, to exclude activities that normally fall under State responsibility in the exercise of its official powers as a public authority, because they were not economic in nature, and pointed out that those activities include, in particular, security, air traffic control, police and customs (recital 364).
- 26 The Commission first drew a distinction between the investments and services of Sowaer which were to be regarded as being of an economic nature and those which were to be regarded as being of a non-economic nature (recitals 364 to 374), and next examined, *in concreto*, that distinction in the light of the various investments and services financed in the present case (recitals 375 to 400).
- 27 The Commission considered that all the subsidies relating to fire protection services and security services escaped classification as State aid (recitals 377 to 385).

- 28 However, it took the view that maintenance services and ground traffic safety services (routine maintenance of the airport site, maintenance for buildings, runways, surrounding areas and vehicle fleet, minor surfacing work, routine maintenance and repair of the runway and accesses, operational maintenance and servicing of the general lighting and runway lighting, mowing services, rubber removal from the runway and its markings, snow clearance and any other services ensuring the safety of ground traffic, airport site and infrastructures) were economic services (recitals 390 to 400) and that the same was true of flight tracking and recording, flight planning and marshalling (recitals 401 to 404).
- 29 The Commission found that, in similar circumstances, a private operator, having regard to the foreseeability of obtaining a return, would not have taken part in such operations. According to the Commission, in this case it was necessary to determine whether, in similar circumstances, a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have taken part in the same operations as the entity which had granted the measure. The Commission therefore applied the market economy operator test to the various investments and measures taken (recitals 406 to 472).
- 30 The Commission explained the reasons why those measures were imputable to the public authorities (recitals 473 to 483).
- 31 The Commission first examined the compatibility of the aid to Ryanair and concluded from its analysis that the measures granted to that airline did not constitute State aid (recitals 488 to 581).
- 32 The Commission, secondly, examined the compatibility with the internal market of the aid granted to the applicant. The Commission considered that the aid for Charleroi Airport had been granted to facilitate regional development and that it had had a positive impact on the economy and the employment situation in Charleroi and in the region. Although that aid had contributed to an objective of general interest, that is to say the economic development of Charleroi and the region, the Commission nevertheless considered that it had to examine whether, pursuant to point 114 of the Communication from the Commission concerning Guidelines on State aid to airports and airlines (OJ 2014 C 99, p. 3, 'the Guidelines'), that aid had not encouraged the duplication of unprofitable airports. It considered that the prospects for use of Charleroi Airport were sufficient to justify the investments and stated that, at the end of 2013, BSCA had a pre-tax operating profit of EUR 14.86 million, that is to say more than the amount of State aid received. However, it was found that that aid had significantly distorted competition by affecting the growth in the number of passengers at Brussels-National Airport (Belgium). The Commission noted that, according to point 119 of the Guidelines, in order to be eligible for operating aid, the traffic of the airport must not exceed 3 million passengers. Since that was the situation of Charleroi Airport, the Commission considered that that provision was not applicable as regards the aid granted before 4 April 2014, the date from which the Guidelines applied (point 171 of the Guidelines). The Commission therefore concluded that the measures implemented by the Kingdom of Belgium in favour of the applicant under the 2002 agreement and the 2002 and 2003 measures constituted, on the basis of Article 107(3)(c) TFEU, State aid compatible with the internal market up to 3 April 2014 and State aid incompatible with the internal market from 4 April 2014 (recitals 582 to 649).
- 33 The Commission rejected the applicability of the limitation period to the aid granted to the applicant, on the ground, in particular, that the 2002 measure had substantially amended the aid initially granted by the Region/BSCA Agreement (recitals 650 to 666).
- 34 Similarly, the Commission rejected the applicability of the principle of legitimate expectations to the subsidy paid by the Walloon Region and stated the reasons why the applicant could not rely on that principle (recitals 667 to 678).

35 Lastly, the Commission found that, by adopting the 2002 agreement and the 2002 and 2003 measures, the Kingdom of Belgium had unlawfully granted aid to the applicant in breach of Article 108(3) TFEU. The Commission considered that that aid consisted of the difference between the fee which a market economy operator would have required and the fees actually paid by the applicant to the Walloon Region-Sowaer (recital 679).

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

‘Article 1

1. The aid measures granted to Ryanair ..., namely the undertaking of the Walloon Government to Ryanair of 6 November 2001, the contract between BSCA and Ryanair of 2 December 2001, the Promocy agreement of 12 December 2001, the contract between Promocy and Leading Verge of 31 January 2002, the Ministerial Order of 11 June 2004, the letter from BSCA to Ryanair of 24 June 2004, the commercial agreement between BSCA and Ryanair of 9 December 2005, the amendment of 6 December 2010 to the contract between BSCA and Ryanair, and the sale of BSCA’s shares in Promocy on 31 March 2010, do not constitute State aid to Ryanair under Article 107(1) of the Treaty on the Functioning of the European Union.

2. The aid measures granted to [BSCA], consisting of the agreement between [Sowaer] and BSCA of 4 April 2006, Amendment No 5 to the agreement between the Walloon Region and BSCA of 10 March 2006, and Amendment No 6 to the agreement between the Walloon Region and BSCA of 15 January 2008, do not constitute State aid to BSCA under Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

1. The aid measures unlawfully granted by [the Kingdom of] Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, to BSCA under the sub-concession agreement of 15 April 2002 between Sowaer and BSCA and Amendment No 3 of 29 March 2002 to the agreement between the Walloon Region and BSCA, and also under the investment decision of the Walloon Region of 3 April 2003, constitute State aid compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union up to 3 April 2014.

2. Assuming that it does constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, the capital increase in BSCA subscribed on 3 December 2002 by Sowaer is State aid compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Article 3

The aid measures unlawfully granted by [the Kingdom of] Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, to BSCA under the sub-concession agreement of 15 April 2002 between Sowaer and BSCA and Amendment No 3 of 29 March 2002 to the agreement between the Walloon Region and BSCA, and also under the investment decision of the Walloon Region of 3 April 2003, constitute State aid incompatible with the internal market on the basis of Article 107(1) of said Treaty from 4 April 2014.

Article 4

1. [The Kingdom of] Belgium shall put an end to the aid measures referred to in Article 3 by increasing the concession fee payable by BSCA at least to the level of the market price concession fee and by recovering from the beneficiary the aid amounts received under the aid measures referred to in Article 3 as from 4 April 2014.

2. The amounts to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary to the date of their effective recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. [The Kingdom of] Belgium shall cancel all pending payments with regard to the aid measures referred to in Article 3 from the date of adoption of this decision.

Article 5

1. The recovery of the aid referred to in Article 3 shall be immediate and effective.
2. [The Kingdom of] Belgium shall ensure that this decision is implemented within four months of the date of its notification.

Article 6

1. [The Kingdom of] Belgium shall submit the following information to the Commission within two months of the notification of this decision:
 - (a) the dates on which BSCA has paid the concession fees in 2014 and the calculation of the recovery interest;
 - (b) a detailed description of the measures already adopted and planned for the purpose of complying with this decision;
 - (c) the documents proving that the beneficiary has been ordered to repay the aid.
2. [The Kingdom of] Belgium shall keep the Commission informed of the progress of the national measures adopted pursuant to this decision until the recovery of the aid referred to in Article 3 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this decision. It shall also provide detailed information on the aid amounts and interest already recovered from the beneficiary.

Article 7

This Decision is addressed to the Kingdom of Belgium.'

Procedure and forms of order sought

- 37 By application lodged at the Registry of the General Court on 19 December 2014, the applicant brought the present action.
- 38 The Commission lodged its defence at the Registry of the Court on 8 April 2015.
- 39 By documents lodged at the Registry of the Court on 3 and 15 April 2015, respectively, Brussels Airlines SA/NV ('Brussels Airlines') and Brussels Airport Company SA ('Brussels Airport') sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

- 40 By document lodged at the Registry of the Court on 1 June 2015, the applicant requested confidential treatment, vis-à-vis Brussels Airport and Brussels Airlines, of certain data and information contained in the application and the annexes thereto as well as in the defence and the annexes thereto.
- 41 On 15 June 2015 the applicant lodged a reply at the Registry of the Court and on 16 June 2015 it lodged a non-confidential version of that reply.
- 42 By letter lodged at the Registry of the Court on 16 June 2015, the applicant requested confidential treatment, vis-à-vis Brussels Airport and Brussels Airlines, of certain data and information contained in the reply and the annexes thereto.
- 43 The Commission lodged a rejoinder at the Registry of the Court on 31 July 2015.
- 44 By letter lodged at the Registry of the Court on 24 August 2015, the applicant requested confidential treatment, vis-à-vis Brussels Airport and Brussels Airlines, of certain data and information contained in the rejoinder and the annexes thereto.
- 45 By the orders of 7 September 2015, *BSCA v Commission* (T-818/14, not published, EU:T:2015:724), and of 7 September 2015, *BSCA v Commission* (T-818/14, not published, EU:T:2015:729), the President of the Ninth Chamber of the Court granted Brussels Airport and Brussels Airlines, respectively, leave to intervene in support of the form of order sought by the Commission in the present case and reserved the decision on the merits of the request for confidentiality.
- 46 By order of 28 January 2016, *BSCA v Commission* (T-818/14, not published, EU:T:2016:75), the President of the Ninth Chamber of the Court granted the request for the confidential treatment of certain information contained in the application and in the defence as well as certain data contained in several annexes and rejected the request for confidential treatment as to the remainder. Moreover, the Registrar set a time limit for the applicant to send a non-confidential version of the documents referred to in points 1 and 2 of the operative part of the order, which was served on the interveners. Finally, the costs were reserved.
- 47 By letter of 2 March 2016, the applicant lodged an application for rectification of the order referred to in paragraph 46 above.
- 48 On 5 April 2016, the Commission notified the Kingdom of Belgium of a corrigendum to the contested decision, stating that the errors detected in that decision in no way affected the conclusions which were set out therein.
- 49 By order of 11 April 2016, *BSCA v Commission* (T-818/14 REC, not published, EU:T:2016:302), the President of the Ninth Chamber of the Court rectified the order of 28 January 2016 referred to in paragraph 46 above.
- 50 By order of 13 April 2016, *BSCA v Commission* (T-818/14, not published, EU:T:2016:712), the President of the Ninth Chamber of the Court revoked the order of 28 January 2016, *BSCA v Commission* (T-818/14, not published, EU:T:2016:75) and extended the request for confidentiality to other information and data.
- 51 On 23 June 2016, the applicant lodged a statement of modification on the basis of the corrections made by the Commission to the contested decision by means of the corrigendum of 5 April 2016.
- 52 On 5 and 6 July 2016, Brussels Airlines and Brussels Airport, respectively, lodged their statements in intervention at the Registry of the Court.

- 53 On 15 September 2016, the applicant lodged at the Registry of the Court its observations on the statement in intervention, first, of Brussels Airlines and, secondly, of Brussels Airport, as well as annexes.
- 54 On 22 September 2016, the Commission lodged its observations on the applicant's statement of modification.
- 55 By decision of 6 October 2016, the present case was reassigned to another Judge-Rapporteur in the interests of the sound administration of justice.
- 56 By decision of 11 October 2016, the President of the Eighth Chamber decided not to join the present case with Case T-474/16, *Société Wallonne des Aéroports v Commission*.
- 57 On 24 November 2016, Brussels Airport and Brussels Airlines each lodged their observations on the applicant's statement of modification.
- 58 On 12 January 2017, Sowaer sought leave to intervene in support of the form of order sought by the applicant, during the oral stage of the proceedings.
- 59 By order of 9 March 2017, Sowaer was granted leave to intervene in support of the form of order sought by the applicant, during any oral stage of the proceedings.
- 60 On 5 April 2017, the Court decided to reassign the case to the Eighth Chamber (Extended Composition).
- 61 The applicant and, at the hearing, Sowaer claim that the Court should:
- annul Articles 3 to 6 of the contested decision;
 - order the Commission to pay the costs.
- 62 The Commission, Brussels Airport and Brussels Airlines contend that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.

Law

Admissibility of the tables lodged by the applicant

- 63 At the hearing, the applicant wished to lodge before the Court two tables meant to reproduce the numerical data contained in the contested decision.
- 64 The Court decided, pursuant to Article 85(3) of its Rules of Procedure, to regard those tables as inadmissible, on the ground that the applicant failed to justify the delay in submitting them.

Substance

- 65 In support of its action, the applicant relies on nine pleas in law. The first plea alleges an error of law and a manifest error of assessment by the Commission in determining the date on which the Walloon Region took the decision to provide the funding. The second plea alleges that the Commission's action

was time-barred. The third plea alleges an error of law, an error of fact and a manifest error of assessment by the Commission in its classification of the instrument landing system ('the ILS') as an economic investment, and a failure to state reasons in the classification of the ILS as an economic investment. The fourth plea alleges an error of fact and a manifest error of assessment by the Commission in its finding that 7% of the cost of the investments made in the new terminal building corresponded to non-economic use, and a failure to state reasons for the finding of that percentage. The fifth plea alleges an error of law, errors of fact, manifest errors of assessment and a failure to state reasons by the Commission in determining the net present values of the 2002 and 2003 measures, resulting in an infringement of Article 107(1) TFEU. The sixth plea alleges an error of law, errors of fact and manifest errors of assessment by the Commission in determining the net present values of the 2002 and 2003 measures and, accordingly, in calculating the additional fee to be paid by the applicant from 4 April 2014. The seventh plea alleges a failure to state reasons and an error of law by the Commission in determining the amount of the additional fee to be paid from 1 January 2016. The eighth plea alleges an error of law, an error of fact, a manifest error of assessment and a failure to state reasons by the Commission in its analysis of the market at issue and of the alleged distortions of competition between Charleroi Airport and Brussels-National Airport caused by the aid. The ninth plea alleges infringement of the principle of the protection of legitimate expectations.

The first plea in law, alleging an error of law and a manifest error of assessment by the Commission in determining the date on which the Walloon Region took the decision to provide the funding

- 66 According to the applicant, the measures of 2002 and 2003 were, in fact, measures taken in the decision of 20 July 2000, as confirmed by the decision of 8 November 2000, so that those measures predated the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290). In that regard, the applicant states that the planned investment programme for Charleroi Airport, annexed to the 2002 agreement, is identical to the investment programme adopted by the Walloon Region on 20 July 2000 and confirmed on 8 November 2000. The applicant also points out that its commercial strategy, established in July 2000, already referred, in particular, to the new terminal, the car park and the lengthening of the runway.
- 67 The applicant also claims that it was on 20 July and 8 November 2000 that the Walloon Region undertook to grant the aid. The decisions taken on those dates were binding, since they were quite specific having regard to the project concerned. The applicant adds that those decisions went far beyond an agreement in principle, which is abstract by definition, and specifically covered the charging of the investments. Those decisions cannot be regarded as mere declarations of intent, in that they provided for a commitment in principle by the Walloon Government, determined the overall amount of funding on the basis of the information available at the time and set out the attendant financial plan. The applicant adds that the measures at issue actually contained all the information necessary to be characterised as irrevocable funding commitments. The 2002 agreement merely ratified those decisions. In that regard, the applicant notes that the reference to the decisions of 20 July and 8 November 2000, in the context of Sowaer's financial plan, underlined their binding nature.
- 68 Lastly, the applicant states that the granting of the measures determined by the decisions of 20 July and 8 November 2000 was notified to it long before 12 December 2000.
- 69 The Commission contends that this plea should be rejected.
- 70 In that regard, it should first be recalled that, in the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), the Court concluded that the operation of an airport, which consists in providing airport facilities to airlines, is an economic activity (see, in particular, paragraphs 107 and 120 of that judgment).

71 Moreover, in recitals 346 and 347 of the contested decision, the Commission made the following findings:

‘(346) As a result, prior to the ... judgment [of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)], the Commission’s consistent practice was to consider that the activity of developing and managing airport infrastructure did not constitute an economic activity falling within the scope of Article 107(1) TFEU. ... Following the ... judgment [of 12 December, 2000 *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)], the Commission decided that, due to the gradual liberalisation of the market, this activity had become an economic activity. This is also clarified by the aviation guidelines ... in paragraphs 28 and 29: “from the date of the judgment [of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)], the operation and construction of airport infrastructure must be considered as falling within the ambit of State aid control. Conversely, due to the uncertainty that existed prior to the judgment [of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)], public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted before the ... judgment [of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)]”.

(347) It should therefore be determined whether the measures granted to BSCA for the operation and construction of airport infrastructure were granted before or after 12 December 2000, which was the date of the ... judgment [of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290)].’

72 In that regard, it should be borne in mind that, according to settled case-law, the criterion for determining the time of granting aid is that of the legally binding act by which the competent national authority undertakes to grant the aid to its recipient (judgment of 19 May 2015, *Diputación Foral de Bizkaia v Commission*, T-397/12, not published, EU:T:2015:291, paragraph 33; see also, to that effect, judgments of 14 January 2004, *Fleuren Compost v Commission*, T-109/01, EU:T:2004:4, paragraphs 73 and 74, and of 30 November 2009, *France and France Télécom v Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraph 321) by an unconditional and legally binding promise (see, to that effect, judgment of 15 February 2001, *Austria v Commission*, C-99/98, EU:C:2001:94, paragraph 38, and order of 5 October 2016, *Diputación Foral de Bizkaia v Commission*, C-426/15 P, not published, EU:C:2016:757, paragraph 30). That criterion necessarily implies that, on the date of the granting of the aid, the recipient of the aid can be identified.

73 Point B 12 IV of the decision of 20 July 2000, entitled ‘Conditions for the development of regional airports and associated environmental measures. Framework agreement’, is worded as follows:

‘The Government approves the outlines of the investment programme for [Charleroi] Airport and instructs the Minister responsible for airport management to present to it the multiannual physical investment programme relating thereto.’

74 It is thus clear from that decision that the Walloon Government did not make an undertaking to the applicant to grant it the aid, but, on the contrary, that the competent minister made an undertaking only to submit to the Walloon Government the implementing measures for the investment programme. Moreover, it must be stated that the applicant is not identified as a potential recipient of aid.

75 Paragraph 2 of point B 15 of the Decision of 8 November 2000, entitled ‘Implementation of the framework agreement of 20 July 2000 concerning regional airports. The Multiannual investment programme for ... Charleroi Airport’, states that the ‘multiannual physical investment programme 2000-2004’ was approved by the Walloon Government. In its 9th and 10th paragraphs, that investment programme provides, in particular, as follows:

‘... Adjustments must be made to the initial framework agreement governing the relations between the Walloon Region and BSCA, its concession holder operating the [Charleroi] airport, with the aim of increasing the efficiency of the operator present at the site.

The existing texts (concession agreement, schedule of conditions and related protocols) will therefore need to be adapted in line with the new arrangements to be made for financing the investments.’

76 That provision leaves no doubt that the specific undertakings between the Walloon Region and the applicant depended on the adaptation of the aforementioned provisions.

77 It follows that, contrary to what the applicant claims, the decisions of 20 July and 8 November 2000 did not contain binding and precise legal undertakings to the applicant on the part of the Walloon Government. Thus, as the applicant itself acknowledges in the reply, those decisions constituted an undertaking by the Walloon Government as regards its political objectives and were the result of ministerial consensus within that government. On the other hand, a mere reading of the 2002 agreement highlights the fact that it is only in that document that details concerning the infrastructure and services were set out in the form of legal obligations. In fact, that 2002 agreement is characterised by an investment programme as well as by the expenditure commitments made by the Walloon Region-Sowaer and by the concession fee which the applicant agreed to pay in return.

78 It also follows that, in the absence of binding and precise obligations in the decisions of 20 July and 8 November 2000, the applicant’s arguments concerning the alleged consistency between the table annexed to the 2002 agreement concluded between the applicant and Sowaer and the table in the decisions of 20 July and 8 November 2000, the alleged notification of the decision of 20 July 2000 before the date of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), and the negotiations which began in September 2000 between the applicant and Ryanair are irrelevant and must be rejected.

79 Lastly, it is not disputed that the infrastructures were made available to the applicant by Sowaer. However, Sowaer was not formed until 1 July 2001.

80 It follows from all the foregoing that the first plea must be rejected.

The second plea in law, alleging that the Commission’s action was time-barred

81 By its second plea, the applicant claims that the aid granted in 2000 benefits from the 10-year limitation period provided for in Article 15(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), since more than 10 years elapsed between the granting of the aid and 20 April 2011, the date of the Commission’s first request for information to the Kingdom of Belgium concerning the aid which is the subject matter of the contested decision.

82 The Commission contends that this plea should be rejected.

83 In that regard, it must be pointed out that this plea is based solely on the premiss that the aid at issue was granted by the decisions of 20 July and 8 November 2000.

84 However, in the examination of the first plea it was specifically found that the aid at issue was granted not by the decisions of 20 July and 8 November 2000, but by the 2002 agreement, that is to say there were fewer than 10 years between the granting of the aid and the sending of the Commission's first request for information to the Kingdom of Belgium, on 20 April 2011, and accordingly that premiss is incorrect.

85 It follows that the second plea must also be rejected.

The third plea in law, alleging an error of law, an error of fact and a manifest error of assessment by the Commission in its classification of the ILS as an economic investment, and a failure to state reasons in the classification of the ILS as an economic investment

86 In the first part of its third plea, the applicant complains, in essence, that the Commission committed an error of law and a manifest error of assessment in its classification of the ILS as an economic investment and failed to state reasons in the classification of the ILS as an economic investment.

87 According to the applicant, the ILS is a system enabling aircraft to approach the landing runway in poor visibility. That entire system consists essentially of three parts: the first part, namely the 'localiser', provides lateral guidance for the aircraft; the second part, namely the 'glide slope', provides vertical guidance for the aircraft; and the third part, the 'distance markers', indicates the runway approach. An ILS should therefore be regarded as essential equipment for air navigation and for the safety, security and compliance of runways and facilities. In that regard, the applicant refers to the description of that system by Belgocontrol (the Belgian air traffic control body) and by Eurocontrol. Moreover, it notes the references relating to the ILS in Commission Regulation (EC) No 2096/2005 of 20 December 2005 laying down common requirements for the provision of air navigation services (OJ 2005 L 335, p. 13), Commission Regulation (EC) No 859/2008 of 20 August 2008 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane (OJ 2008 L 254, p. 1), Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2012 L 296, p. 1) and Commission Regulation (EU) No 139/2014 of 12 February 2014 laying down requirements and administrative procedures related to aerodromes pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2014 L 44, p. 1). The applicant states that, since the provision of air navigation services is classed as a non-economic service in Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (OJ 2004 L 96, p. 10) and in the Guidelines, the ILS, as an instrument necessary for air navigation, is not of an economic nature. In the applicant's view, this is in no way altered by the fact that the installation of the ILS is not legally required.

88 In addition, the applicant complains that the Commission failed to state the reasons why the Category III ILS is not included among the equipment necessary for air navigation of a non-economic nature.

89 In the second part of this plea, the applicant claims that runway lighting was also a non-economic activity.

90 The Commission contends that this plea should be rejected.

91 It should be recalled that the Commission concluded as follows in recital 367 of the contested decision:

‘However, the Commission regards as economic those investments and major repairs involving the Category III ILS and runway lighting. These costs are not associated with a public policy remit, but are inherent in the commercial operation of the infrastructure, which involves placing this infrastructure at the disposal of airlines under satisfactory safety conditions. In particular, ensuring ground traffic safety (including during landings and take-offs) forms an integral part of the airport’s commercial operation and is therefore economic in nature. In the recent Commission decision on Marseille airport, operational safety was also excluded from the scope of “non-economic activities”’.

92 As a preliminary point, it should be noted that the applicant has not disputed the Commission’s finding that the ILS and the runway lighting were separate equipment.

93 As regards runway lighting, the applicant has — as is rightly pointed out by the Commission, which pleads that this part is inadmissible — failed to put forward any argument to the effect that it was an activity of a non-economic nature.

94 In that regard, it should be recalled that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which is applicable to the procedure before the General Court in accordance with the first paragraph of Article 53 thereof, and Article 76(d) of the Rules of Procedure, all applications must contain the subject matter of the dispute, the pleas in law and arguments relied on and a summary of the pleas relied on.

95 It is settled case-law that that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, if an action is to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the text of the application itself (order of 7 November 2013, *Arbos v Commission*, C-615/12 P, not published, EU:C:2013:742, paragraph 33; see, also, judgment of 25 October 2012, *Arbos v Commission*, T-161/06, not published, EU:T:2012:573, paragraph 23 and case-law cited).

96 However, it must be stated that the application is not, in that regard, compliant with Article 76(d) of the Rules of Procedure, in so far as the applicant merely pleaded the non-economic nature of the runway lighting operation, but did not put forward any argument to that effect. It follows that the second part of the third plea must be declared inadmissible.

97 As regards the examination of the applicant’s arguments in support of the non-economic nature of the Category III ILS, it must be borne in mind that any activity consisting in offering goods and services on a given market is an economic activity (judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617, paragraph 79), which precludes activities falling within the scope of the exercise of the powers of a public authority.

98 It is therefore necessary, in the present case, to determine whether the activity at issue is connected, by its nature, its aim and the rules to which it is subject, with the exercise of powers which are typical of those of a public authority (see, to that effect, judgment of 19 January 1994, *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 30).

99 In that regard, the control and supervision of air space are typically the activities of a public authority (see, to that effect, judgments of 19 January 1994, *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 30, and of 26 March 2009, *SELEX Sistemi Integrati v Commission*, C-113/07 P, EU:C:2009:191, paragraph 71).

- 100 It should be pointed out that the Category III ILS is, as defined by the Commission without being contradicted by the applicant, a ground approach instrument which uses a radio signal to increase the landing accuracy of an aircraft approaching a landing runway, thereby allowing a safe landing in adverse weather conditions.
- 101 As is clear from the responses of the applicant and of Sowaer, in support of the applicant at the hearing, to a question from the Court, and also from the evidence in the file, this is an instrument which is useful for air navigation at the landing stage, which may be necessary or essential for some airports, given the nature of their traffic, although it is not mandatory under the Belgian or international safety standards applicable in the air navigation sector. An airport without such equipment may find that airlines are reluctant to provide a regular service there because of the landing difficulties which may arise in adverse weather conditions.
- 102 Nevertheless, that instrument, even if it were mandatory and though it is indisputable that it contributes, like other systems, to the safety of landings, plays no part either in the control and supervision of airspace, as the applicant and the intervener in support of the applicant have acknowledged, or in the performance of any other public policy remit which might be exercised at an airport. It contributes to the delivery of the services offered by a civil airport in a competitive context to airlines within the framework of its general activity, which is an economic activity (see, to that effect, judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617, paragraph 78).
- 103 Next, it must be observed that the applicant has not disputed the Commission's argument that the absence of such equipment has the result only that, in certain meteorological conditions, the airlines using an airport will cancel their flights or redirect them to other airports possessing such equipment. Accordingly, an airport which is not equipped with a Category III ILS is in a less favourable competitive position than an airport which has installed such equipment, but that finding does not allow that equipment to escape being classified as an activity of an economic nature.
- 104 The applicant's argument that the Kingdom of Belgium, in the context of the administrative procedure preceding the contested decision, stated that it regarded the Category III ILS system as 'vital for handling airlines with aircraft based at the airport and also scheduled airlines' cannot alter that assessment.
- 105 Indeed, an activity relating to the handling of airlines with 'aircraft based at the airport and also scheduled airlines' cannot imply that such an activity falls within the exercise of the powers of a public authority.
- 106 It follows that the applicant cannot properly rely on an alleged requirement relating to air navigation necessitating the Category III ILS in order for that equipment to be covered by the exercise of the powers of a public authority and, consequently, to escape classification as a system of an economic nature.
- 107 That finding is not called into question by the other arguments relied on by the applicant.
- 108 The fact that, according to the applicant, Belgocontrol considers the Category III ILS to be navigational aid equipment and that Eurocontrol defines it as one of the three landing systems allowing a precise approach capability in terms of navigation does not imply that that equipment falls within the powers of a public authority, having regard to the findings made in paragraph 102 above.
- 109 The reference in Point 14 of Annex I to Regulation No 965/2012, according to which a 'category III operation [is a] landing operation using ILS' is concerned only with a definition for the purpose of the technical requirements laid down in that regulation. The same applies to the reference contained in

Subpart E of the Annex to Regulation No 859/2008, which replaces Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4).

- 110 Finally, although it is true that an aerodrome operator must ensure that means and procedures are established and implemented for providing safe conditions for ‘aerodrome operations in low visibility conditions’ [Annex IV to Regulation No 139/2014, part ADR.OPS.B.045, ‘Low visibility operations’, point (a)], it does not follow that the installation of a Category III ILS contributes to the exercise of the powers of a public authority, having regard to the findings made in paragraph 102 above.
- 111 The applicant further claims that, as equipment for air navigation, the Category III ILS is not of an economic nature, since, according to recital 5 of Regulation No 550/2004, ‘the provision of air traffic services, as envisaged by [the] regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules of competition’.
- 112 In that regard, it should be noted that Regulation No 550/2004 falls within the context of the provisions of Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (OJ 2004 L 96, p. 1), Article 2 of which defines various concepts. It is clear from Article 2(4) of Regulation No 549/2004 that ‘air navigation services’ include ‘air traffic services; communication, navigation and surveillance services; meteorological services for air navigation; and aeronautical information services’. Article 2(30) of Regulation No 549/2004 defines ‘navigation services’ as ‘those facilities and services that provide aircraft with positioning and timing information’. Those navigation services are thus distinguished from ‘air traffic services’, defined in Article 2(11) of Regulation No 549/2004, which include, in particular, ‘air traffic control (ATC) service’, itself defined in Article 2(1) of that regulation as aimed at preventing collisions between aircraft and expediting and maintaining an orderly flow of air traffic. Both ‘navigation services’ and ‘air traffic services’ are, as previously stated, included in ‘air navigation services’. Equipment such as the Category III ILS, which gives runway positioning information to aircraft for the purposes of their landing, clearly falls within the scope of navigation services as referred to above.
- 113 Although recital 5 of Regulation No 550/2004, relied on by the applicant, seems to indicate that ‘air navigation services’ fall within the exercise of public authority, recital 13 of that regulation, which is more specific, expressly states that ‘navigation services’, like certain other air navigation services, must be organised under market conditions whilst taking into account the special features of such services and maintaining a high level of safety. It is clear from various provisions of that regulation that it is possible for the designation of air traffic service providers or meteorological service providers not to be based on market principles, but no provision of the same nature applies to navigation services. Therefore, in spite of its generally applicable nature, the recital relied on by the applicant fails to point to any specific provision which could lead to the conclusion that the Category III ILS, as navigation services equipment, falls within the exercise of public authority and does not form part of an economic activity exercised under market conditions.
- 114 Moreover, it is settled case-law that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question (see judgment of 2 April 2009, *Tyson Parketthandel*, C-134/08, EU:C:2009:229, paragraph 16 and case-law cited) or, a fortiori, from the rules laid down in the FEU Treaty, such as from Articles 107 and 108 TFEU, concerning aid granted by States, in particular by limiting their scope by comparison with the scope deriving from the European Union judicature’s interpretation of their wording and purpose.

- 115 Lastly, the applicant refers to point 35 of the Guidelines, which states that, ‘at an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are considered in general to be of a non-economic nature’.
- 116 However, apart from the fact that point 35 of the Guidelines does not refer to ground approach equipment or facilities, the applicant has not contradicted the Commission’s observation that the fact that equipment improves safety does not mean that it is necessary to classify that equipment as non-economic.
- 117 It follows that the Commission, in classifying the Category III ILS as a system of an economic nature, did not make the error of assessment relied on by the applicant.
- 118 Finally, the applicant’s argument that the Commission did not provide an adequate statement of the reasons why the Category III ILS system was of an economic nature must also be rejected.
- 119 It must be stated that, quite apart from the fact that, according to the Commission, it is clear from recital 367 of the contested decision that ‘ensuring ground traffic safety (including during landings and take-offs) forms an integral part of the airport’s commercial operation and is therefore economic in nature’, the applicant’s own presentation of the third plea adequately confirms that it fully understood the reasons why the Commission had considered that the Category III ILS should be regarded as being of an economic nature. Recital 367 of the contested decision therefore enabled the applicant to ascertain the reasons for the contested decision and enabled the General Court to exercise its power of review over them (see, to that effect, judgment of 13 January 2004, *Thermenhotel Stoiser Franz and Others v Commission*, T-158/99, EU:T:2004:2, paragraph 94).
- 120 It follows from all the foregoing that the third plea must be rejected.

The fourth plea in law, alleging an error of fact and a manifest error of assessment by the Commission in its finding that 7% of the cost of the investments made in the new terminal building corresponded to non-economic use, and a failure to state reasons for the finding of that percentage

- 121 By the fourth plea, the applicant complains that the Commission, first, committed an error of fact and a manifest error of assessment in its finding of the percentage of the cost of the investments made for the new terminal building which corresponded to non-economic use and, secondly, failed to state reasons for the finding of that percentage.
- 122 The applicant complains, in essence, that the Commission, as regards the new airport terminal, used an incorrect method of apportionment to distinguish non-economic activities from economic activities. The applicant therefore argues that it is clear from its communication to the Commission of 8 April 2014 that the apportionment is 14.9% for premises having a non-economic use and 85.1% for premises having an economic use.
- 123 The Commission contends that this plea should be rejected.
- 124 It should be recalled that the Commission made the following finding in recital 366 of the contested decision:

‘The Commission also considers as non-economic those costs associated with investments in and maintenance of buildings and equipment used for both economic activities and non-economic activities, in a proportion corresponding to their use for a non-economic activity. In particular, 7% of

the cost of investments made in the new terminal may be regarded as non-economic in nature, because 7% of the terminal surface area is occupied by police and customs services, passenger and baggage search officials, and officials from the Walloon Public Service responsible for site safety.’

- 125 First of all, it should be noted that, although, in the area of State aid, the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judicature must refrain from reviewing the Commission’s interpretation of economic data (judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 64).
- 126 According to the case-law of the Court of Justice, not only must the European Union judicature, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 65; see also, by analogy, judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39).
- 127 However, when conducting such a review, the European Union judicature must not substitute its own economic assessment for that of the Commission. The review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 66 and case-law cited). In that regard, where, in order to determine whether a measure comes within the scope of Article 107(1) TFEU, the Commission must apply the private investor test, the application of that test requires the Commission to make a complex economic assessment (see, to that effect, judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 68).
- 128 It is in the light of those criteria, relating to the scope of the review which, according to the case-law, the European Union judicature may carry out, that it is necessary to examine the fourth to seventh pleas in the application.
- 129 It is at this point necessary to point out that the applicant has not contradicted the Commission’s statement, in its defence, that the Kingdom of Belgium had on three occasions (by letters of 24 February, 21 March and 4 April 2014) informed the Commission that the cost of the non-economic investments in the new terminal amounted to 7% of the total cost of the investment made.
- 130 In the applicant’s communication to the Commission of 8 April 2014 explaining that 14.9% of the surface area of the new terminal was intended for non-economic purposes, the applicant added to the premises occupied exclusively by the Federal Police and other services carrying out public authority or security tasks — which the applicant described as premises intended for ‘public service tasks’ and which accounted for 7% of the surface area of the terminal — 7% of the surface area occupied by the technical installations, such as those used for the heating system, 7% of the surface area for everyday pedestrian traffic use, such as stairs and corridors, which it described as ‘common airport’ premises, and 100% of the surface area in which the general public or goods were subject to the public authority or security tasks referred to above, such as those relating to passport control, which it described as ‘common public’ premises.

- 131 In that regard, it must be stated that, although, as the applicant stated in reply to a question from the Court at the hearing, passengers use the corridors for the purpose, *inter alia*, of customs controls, public authority is exercised not in those corridors but only in the premises specially assigned to those controls. Moreover, areas of traffic and cafeterias cannot, as the Commission rightly pointed out at the hearing, be regarded as premises in which the powers of a public authority are exercised.
- 132 Accordingly, it is not apparent from the examination of the circumstances of the case why the methodology used by the applicant to determine a method of apportionment might be more appropriate than the method provided on three occasions (by letters of 24 February, 21 March and 4 April 2014) by the Kingdom of Belgium and which was accepted by the Commission.
- 133 It should be noted on that point that, contrary to the applicant's claim at the hearing, the apportionment of 7% for premises having a non-economic use is not a vague or whimsical estimate by the Belgian Government, since, as is clear from the Belgian Government's reply to the Commission's questions of 11 March 2014, 'the plans ... were the basis for that calculation'.
- 134 At the hearing, the applicant also argued that Charleroi Airport was an ever-changing airport, unlike major airports such as Paris-Charles de Gaulle (France) or London-Heathrow (United Kingdom), whose passenger numbers have remained steady for 20 years, so that the proportion of the premises having a non-economic use was changing at Charleroi Airport.
- 135 However, even assuming that assertion to be true, it should be noted that the applicant has not been able to demonstrate that Charleroi Airport changed in the period between the three letters from the Belgian Government of 24 February, 21 March and 4 April 2014 and its own communication of 8 April 2014, that is to say four days after the last letter from the Belgian Government.
- 136 In those circumstances, it must be held that the Commission cannot be regarded as having committed an error of fact or a manifest error of assessment in finding, on the basis of the data which the Kingdom of Belgium itself supplied to the Commission, that 7% of the total surface area of the airport was intended for non-economic activities and in not referring to the communication of 8 April 2014 in the contested decision.
- 137 Lastly, as regards the alleged failure to state the reasons for the contested decision on that point, it should be noted that recital 366 of the contested decision clearly indicates the method of apportionment used by the Commission, which, as has been previously noted, was provided on three occasions by the Belgian Government. Moreover, even though the Commission did not refer to the applicant's communication of 8 April 2014 in recital 366 of the contested decision, it should be noted, first, that it is clear from recital 22 of the contested decision that that decision expressly refers to the Belgian authorities' note of 5 May 2014, which states that '14.9% of the surface area was used for non-economic public services as opposed to the premises used for economic activities', and, secondly, that the Commission clearly stated the reasons why the data provided by the Kingdom of Belgium on three occasions (by letters of 24 February, 21 March and 4 April 2014) were to be accepted, which necessarily enabled the applicant to understand the reasons why its own data could not be accepted and enabled the Court to exercise its power of review. Indeed, by stating that '7% of the cost of investments made in the new terminal may be regarded as non-economic in nature, because 7% of the terminal surface area is occupied by police and customs services, passenger and baggage search officials, and officials from the Walloon Public Service responsible for site safety', the Commission has, in essence, clearly stated that only the costs intrinsically and necessarily related to such services were non-economic in nature, which the applicant, moreover, fully understood, as is clear from the arguments which it put forward in support of this plea.
- 138 Therefore, the fourth plea must be rejected.

The fifth plea in law, alleging an error of law, errors of fact, manifest errors of assessment and a failure to state reasons by the Commission in determining the net present values of the 2002 and 2003 measures, resulting in an infringement of Article 107(1) TFEU

139 By its fifth plea, the applicant disputes, in essence, the Commission's application of the private investor test. According to the applicant, both the method and certain calculation factors used by the Commission are incorrect. This plea is divided into seven parts.

140 Before examining the various parts of the fifth plea, it is necessary at the outset to respond to the applicant's complaint that the 2001 study entitled 'Risk Premiums for Other Markets' was not accessible at the internet address referred to by the Commission.

141 In that regard, it is sufficient to note that, apart from the fact that that study was in any event referred to in the footnote to recital 437 of the contested decision, the fact that the corresponding internet address referred to by the Commission was not accessible does not mean that the contested decision can, in the present case, be regarded as inadequately reasoned on that point.

– *The first part, concerning the calculation of the costs of the investments remaining to be made as at 15 April 2002*

142 Table 13, entitled 'Cost of the investments remaining to be made as at 15 April 2002 (EUR million)', is set out in recital 431 of the contested decision. That table contains the following rows:

	2002	2003	2004	2002-2004
Renovation of technical and administrative premises	1.55	0.00	0.00	1.78
Extension of aviation fuel station	0.27	0.00	0.00	0.62
Cemetery car park	0.030	0.00	0.00	0.05

143 The applicant submits that the last column of the table referred to in paragraph 142 above contains errors.

144 In the defence, the Commission acknowledged that certain numerical data contained in that table were incorrect. It states, however, that, with the exception of the errors referred to by the applicant, the amounts carried over year by year and the totals in Table 13 are correct. The net present value of the 2002 measure was calculated on the basis of Table 14, entitled 'Cost of the investments in economic activities taken into account by the Commission in calculating the net present value of the 2002 measure', which contains the correct numerical data. Accordingly, in the Commission's view, the inaccuracies in Table 13 had no effect on the total investments reproduced in Table 13 and, therefore, on the calculation of the present value.

145 In its corrigendum, the Commission rectified the numerical data concerned (1.78 > 1.55, 0.62 > 0.27 and 0.05 > 0.03).

146 Although such errors are regrettable, it must be pointed out that the applicant does not dispute that the errors concerned had no effect on the calculation of the net present value of the 2002 measure, according to the method and the values used by the Commission. When questioned by the Court on that point at the hearing, the applicant was unable to indicate any effect which those errors might have had on the calculation of the net present value of the 2002 measure.

147 It follows that the first part of the fifth plea is ineffective and must therefore be rejected.

– *The second part, relating to the method of calculating the net present values*

148 According to the applicant, the Commission made errors when calculating the net present value of the cash flows at the discount rate of 9% and the net present value of the 2002 measure.

149 Whereas, for the 2002 measure, the Commission, in recital 438 of the contested decision, arrived at a net present value of EUR – 76.48 million for the cash flows at the discount rate of 9% and at a net present value of EUR – 75 million for the 2002 measure, the experts appointed by the applicant arrived at a net present value of EUR [confidential]¹ million for the cash flows at the same discount rate and at a net present value of EUR [confidential] million for that measure.

150 In the defence, the Commission acknowledged that the amount of EUR – 83.70 million was correct and that the net present value amounted to EUR [confidential] million. The difference between the amounts of EUR [confidential] million and EUR [confidential] million was the result of two factual errors which the applicant had not contested.

151 It must be borne in mind that, in recitals 437 to 439 of the contested decision, the Commission made the following findings:

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

- a debt/equity ratio of 30% for Sowaer and therefore a proportion of debt financing (r_D) of 23%;
- a pre-tax cost of debt (k_D) equal to the weighted average pre-tax cost of debt for Sowaer in 2002, i.e. between 4.9% and 5.5%;
- a risk premium (Δk) of 5.51%;
- a beta between 0.91 and 1.23;
- with regard to the cost of equity, a pre-tax cost of capital invested without risk (r_f) between 5.16% and 5.37%;
- a tax rate (t) of 40.2%.

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

$$C = (1 - r_D) * k_E + r_D * k_D$$

¹ Confidential information omitted.

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

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

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

...

(438) The net cash flows indicated in Table 19 discounted at the rate of 9% result in a net present value of EUR – 83.7 million.

(439) In order to calculate the net present value over the entire term of the concession, a terminal value needs to be allocated to the project in 2015. This is carried out by assuming, from 2015, a cash flow equal to the average cash flow for 2013-2015 increasing by 2% per year. If it is assumed that the cap on the variable part of the concession fee will be removed from 2016, the values to be taken into account are the cap-free cash flows in 2013-2015. Based on these assumptions, the Commission has calculated that the terminal value of the project in 2015 could be put at EUR 8.07 million.'

152 It is common ground that, by its corrigendum, the Commission replaced, in recital 438 of the contested decision, '– 76.48' with '– 83.7', in recital 439 of that decision, '1.48' with '8.07' and, in recital 440 of that decision, '75' with '75.63'.

153 Notwithstanding the errors made, it must be pointed out that the applicant does not dispute the Commission's assertion that the corrected numerical data were less favourable to the applicant than those which appeared in the contested decision and nor did the applicant dispute the Commission's observation that the positive net cash flows forecast for the years 2007 to 2009 were clearly insufficient to counter the negative flows of the other years, and in particular the investments of 2002 and 2003, which had led the Commission to conclude that no private investor would have made the investments at issue.

154 Next, the applicant claims that its own consultants had obtained values which were very different from those of the Commission when attempting to apply the same formula and had proposed alternative formulae which are generally used in the financial sector, thus showing that the Commission's analysis was open to criticism.

155 In that regard, the mere fact that the applicant's consultant obtained different results using the same formula or using a different formula is not sufficient to conclude that the formula which the Commission chose to use to calculate the weighted average cost of capital for Sowaer at the time when the measure was granted is manifestly erroneous (see, to that effect, judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 72).

156 The applicant's argument that the information provided by the Commission concerning the formula lacks precision is ineffective, since the Commission acknowledged that the calculations of the applicant's consultant were correct.

157 The applicant also complains that the Commission failed to state, or stated very inadequately, the reasons for choosing the formula for calculating the weighted average cost of capital for Sowaer at the time when the measure was granted as well as the factors and the values used, and failed to support the data at issue with reports from independent consultants or experts.

158 In that regard, it should be noted that it is not apparent either from the basic regulation, namely Regulation No 659/1999, or from the case-law cited by the applicant that the Commission is required to consult independent experts in order to determine the method to be used or to check its calculations and have them validated (see, to that effect, judgments of 25 June 1998, *British Airways and Others v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 72; of 16 March 2000, *Astilleros Zamacona v Commission*, T-72/98, EU:T:2000:79, paragraph 55; and of 16 March 2016, *Frucona Košice v Commission*, T-103/14, EU:T:2016:152, paragraph 177).

159 As regards the complaint that inadequate reasons were given for the contested decision, it should be noted that the formula for calculating the net present value of the 2002 measure and the data used were reproduced in recital 437 of the contested decision and that, on the basis of that information, the applicant's consultant was able to determine the errors made by the Commission in the application of that formula, which were subsequently corrected along the lines indicated by the applicant. It follows that the applicant cannot complain of a failure to state reasons in the contested decision.

160 Although the errors made by the Commission in recitals 438 to 440 to the contested decision are regrettable and made more complicated the preparation of the applicant's defence and the Court's review of the contested decision, it must nevertheless be held that it does not appear that the corrected numerical data are such as to invalidate the Commission's conclusion that, in the present case, the market economy operator test had not been satisfied.

161 Furthermore, in so far as the applicant states that it also applied the same formula as the Commission, but with different parameter values, this issue will actually be examined in the context of the examination of the following parts of the present plea, which specifically call into question the values of those parameters which were used by the Commission.

162 Therefore, the second part of the fifth plea must be rejected.

– *The third part, relating to the beta factor*

163 The applicant complains that the Commission made an error of fact and a manifest error of assessment, in that the definition of the beta factor is incorrect. In the applicant's view, the beta factor measures not the 'relative cost-effectiveness of an asset compared to the market' but the 'relative volatility of an asset compared to the market'. It adds that the beta values do not correspond to the values identified by its own consultant. According to the applicant, those approximations and inaccuracies had an impact on the calculation of the net present value of the 2002 and 2003 measures, since the beta factor was included in the calculation of the cost of capital.

164 In that regard, it is sufficient to point out that, even assuming that the Commission's definition of the beta factor is not correct, it does not appear that that error affected the calculations of the cost of capital and consequently could have influenced the Commission's conclusion that a private investor in a market economy would not have made the investments at issue. Moreover, the mere fact that the applicant's consultant identified other values for the beta factor is not sufficient to establish that a manifest error of assessment was made by the Commission in the choice of that factor.

165 The applicant's argument that it was not in a position to verify the accuracy of the data and the definition of the beta factor adopted by the Commission must be rejected, since the parties agree that it is clear from the documents before the Court that the applicant was in a position to verify the data and to rely on any error made, on the basis of the tables submitted in the administrative procedure.

166 It follows from the foregoing that the third part of the fifth plea must be rejected.

– *The fourth part, concerning the tax rate used to calculate the net present value of the 2003 measure*

- 167 According to the applicant, the Commission made, on the one hand, an error of fact, in taking a tax rate of 40.2% as a reference in order to assess the net present value of the 2003 measure, even though that rate was lowered to 33.99% as from 1 January 2003, and, on the other hand, a manifest error of assessment, in basing its calculation on that erroneous value.
- 168 In its defence, the Commission acknowledged that the tax rate of 40.2% for 2003 was incorrect, so that the range of the beta factor for that year was between 0.91 and 1.25, rather than 0.91 and 1.23.
- 169 It must be held that this part must be rejected, since, in the present case, it does not appear that the error in the tax rate for 2003 could have affected the Commission's conclusion that a private investor in a market economy would not have made the investments at issue.

– *The fifth part, concerning the estimate of the pre-tax cost of capital invested without risk used to calculate the net present value*

- 170 According to the applicant, in order to determine the net present value for 2002, the Commission made a manifest error of assessment by referring to the interest rate on Belgian 10-year bonds in order to estimate the pre-tax cost of capital invested without risk. According to the applicant, Sowaer could also have referred to the interest rate on German 10-year bonds at the end of 2002. Moreover, with respect to the 2003 measure, the Commission took into account not the relevant rate for April 2003, but a rate corresponding to April 2002.
- 171 In that regard, it should be noted that the applicant does not indicate to what extent the reference to the interest rate on German 10-year bonds could have altered the Commission's conclusion that a private investor in a market economy would not have made the investments at issue, that is to say to what extent the change in the point of reference could have resulted in a positive net present value. In fact, it has not indicated what the level of the net present value would have been in that scenario, as compared with the figures of EUR – 83.7 million in recital 438 of the contested decision or EUR – 75.63 million after calculating the total duration of the concession (until 2040) in recital 440 of that decision.
- 172 Finally, contrary to what the applicant claims, the Commission estimated the pre-tax cost of capital invested without risk on the basis of the interest rate for Belgian 10-year bonds in April 2003.
- 173 In the reply, the applicant complains that the Commission failed to take into account the deductibility of investment depreciation and interest, whereas the impact of those tax advantages on corporate profits and the profitability of the investments is essential.
- 174 In that regard, it is sufficient to point out that, by that reasoning, the applicant is actually relying on a new plea which is neither expressly nor even implicitly raised in the application, so that it must be declared inadmissible.
- 175 For the sake of completeness, it must be pointed out that the applicant has not disputed the Commission's arguments that the alternative method proposed in order to take into account tax considerations was not appropriate in a context of net structural losses and it would not be more favourable to the applicant than the method used by the Commission.
- 176 It follows from the foregoing that the fifth part of the fifth plea must be rejected.

– *The sixth part, concerning the estimate of the debt-to-equity ratio and the proportion of debt financing used to calculate the net present value*

- 177 According to the applicant, the Commission made errors in assessing Sowaer's debt-to-equity ratio at 30% on the basis of an *ex post* analysis based on the 2002 balance sheet. By carrying out an *ex post* analysis, the Commission failed to respect the principle that the assessment of compliance with the private investor test must be made *ex ante*. Next, the applicant's consultant obtained different numerical data. Lastly, the applicant states that Sowaer is neither an airline nor an airport and that the Commission wrongly made a comparison using the debt-to-equity ratio of airlines.
- 178 As regards the criticism that it carried out an *ex post* analysis, the Commission explained, without being contradicted by the applicant, that the balance sheet for 2001, had it existed, would have been too old to provide a good indication of the target ratio as determined on 15 April 2002, that is to say from an *ex ante* perspective, and that, since Sowaer was formed on 28 June 2001, its first fiscal year extended over a period of 18 months corresponding to the balance sheet for the year 2002. It follows that the applicant cannot criticise the Commission for having made a manifest error of assessment in carrying out the analysis on the basis of the balance sheet for the year 2002.
- 179 The mere fact that the applicant's consultant obtained a different debt-to-equity ratio is not sufficient to establish that the Commission made a manifest error of assessment. Moreover, in the rejoinder, the Commission, without being contradicted by the applicant, specified the differences between its own numerical data and those of the applicant's consultant, which are explained by the fact that the Commission excluded non-financial debts from its calculation, which is justified for an investment of that type.
- 180 Lastly, the applicant's argument that Sowaer does not belong to the aviation sector is ineffective, in so far as the Commission did not use the average debt-to-equity ratio of airlines to calculate the net present value of the investments at issue, but used Sowaer's actual debt-to-equity ratio. The information, in footnote 163 of the contested decision, concerning the average debt-to-equity ratio of airlines is given only as a point of comparison, which does not affect the calculation in question.
- 181 In the reply, the applicant criticises the Commission for having chosen the period 2002-2010 to determine a debt-to-equity ratio. According to the applicant, that period is far too short.
- 182 In that regard, it is sufficient to note that the applicant has not effectively contradicted the Commission's argument that that period was the only one for which numerical data were available.
- 183 It follows from all the foregoing that the sixth part of the fifth plea must be rejected.

– *The seventh part, relating to the estimate of the risk premium used to calculate the net present value*

- 184 According to the applicant, the assessment of the risk premium at 5.51% is incorrect. In the applicant's view, the Commission actually took into account a single value observed on the American market, while a detailed and publicly available study exists for the Belgian market. Consequently, the calculations made using that specific figure are not reliable.
- 185 That complaint cannot be accepted.
- 186 The Commission, without being contradicted by the applicant, has argued that, in spite of the Commission's requests, the applicant submitted no other estimate during the administrative procedure.

187 Moreover, in that the applicant complains that the Commission failed to give reasons for the contested decision on that point, it must be noted that the Commission set out, in recital 437 of the contested decision, the basis for the risk premium of 5.51%, namely the study referred to in paragraph 140 above (see footnote 164 of the contested decision).

188 It follows from all the foregoing that the seventh part of the fifth plea must be rejected as well as the fifth plea in its entirety.

The sixth plea in law, alleging an error of law, errors of fact and manifest errors of assessment by the Commission in determining the net present values of the 2002 and 2003 measures and, accordingly, in calculating the additional fee to be paid by the applicant from 4 April 2014

189 By its sixth plea, the applicant criticises the consequences of the errors of fact, the error of law and the manifest errors of assessment by the Commission in determining the net present values of the 2002 and 2003 measures for the purpose of calculating the additional fee to be paid by the applicant to Sowaer from 4 April 2014. Given that, according to the contested decision, the difference between the fee consistent with market prices and the fee to be paid by the applicant constitutes aid to be recovered, the errors noted have a significant influence on the amount of aid to be recovered.

190 In that regard, it is sufficient to note that this plea is based solely on the premiss that the fifth plea is well founded.

191 Since the fifth plea has been rejected, it is also necessary to reject the sixth plea.

The seventh plea in law, alleging a failure to state reasons and an error of law by the Commission in determining the amount of the additional fee to be paid from 1 January 2016

192 By its seventh plea, the applicant complains that the Commission failed to provide a response to its request for clarification dated 17 November 2014, concerning the calculation of the amount of the additional fee which it had to pay in order to comply with market prices from 1 January 2016. According to the applicant, it is of primary importance and reasonable to ascertain the precise amount of the aid claimed, which would take the form of an exact determination of the additional concession fee. A fortiori, nor was it possible to confer on the Kingdom of Belgium, the addressee of the contested decision, the power to determine, on a discretionary basis, the amount of aid which was declared incompatible.

193 In that regard, it must be pointed out that, if, by this plea, the applicant seeks to criticise the absence, in the contested decision, of the exact amount of the aid to be recovered, it is sufficient to observe that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount. The Commission may, therefore, legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amount of aid to be repaid (see, to that effect, judgments of 12 October 2000, *Spain v Commission*, C-480/98, EU:C:2000:559, paragraphs 25 and 26, and of 28 July 2011, *Mediaset v Commission*, C-403/10 P, not published, EU:C:2011:533, paragraphs 126 and 127).

194 Furthermore, in so far as the applicant raises the question of the level of the fee it should pay, it must be stated that the Commission, in recital 686 of the contested decision, defined the method to be followed in order to determine the amount of aid to be recovered.

195 Consequently, the seventh plea must be rejected.

The eighth plea in law, alleging an error of law, an error of fact, a manifest error of assessment and a failure to state reasons by the Commission in its analysis of the market at issue and of the alleged distortions of competition between Charleroi Airport and Brussels-National Airport caused by the aid

196 By its eighth plea, the applicant criticises the finding, in recital 605 of the contested decision, that the aid significantly distorted competition by affecting the growth in the number of passengers at Brussels-National Airport in the short- and medium-haul ‘point-to-point’ segment. In making that finding, the Commission made an error of law and a manifest error of assessment and failed to state reasons.

197 This plea is divided into two parts.

198 By the first part, the applicant complains that the Commission failed properly to analyse the relevant market. First, as regards the partial substitutability of the offers of Brussels-National Airport and Charleroi Airport, the applicant complains that the Commission referred only to the information provided by Brussels Airport, which is none other than the managing authority of Brussels-National Airport, and not that provided by the Walloon Region, in particular in its reply to the Commission’s request for information of 14 January 2014. The applicant also complains that the Commission took into account only information subsequent to 2004, thus disregarding ‘the disastrous period corresponding to the bankruptcy of Société anonyme belge d’exploitation de la navigation aérienne (Sabena), which occurred on 7 November 2001’.

199 Moreover, the applicant also argues that the Commission only considered the substitutability of the offers on the basis of the geographical situation of the two airports concerned and did not carry out an analysis relating to flight destinations. It recalls the case-law according to which, in air transport matters, the substitutability of offers must be verified by a ‘point-to-point’ analysis. Furthermore, the Commission did not examine the characteristics of the potential customers at each of the airports in order to determine whether the offers were substitutable. According to the applicant, it follows that the Commission could not lawfully conclude that the offers of the two airports were substitutable and therefore alike.

200 By the second part, the applicant complains that the Commission erred in concluding that the aid had distorted competition between Brussels-National Airport and Charleroi Airport, in particular as regards the growth, presumed to be lower, in the number of passengers at Brussels-National Airport. Moreover, while recognising that there was competition between at least five airports, the Commission merely took into account competition with Brussels-National Airport. However, the Commission should have examined the situation for each of the five airports in order to check whether the alleged effects on Brussels-National Airport were isolated or whether those effects were also borne by the other airports in the catchment area, so as to ensure that the changes in passenger numbers at Brussels-National Airport were not due to competition by one of the other airports in the same area. Indeed, changes in the growth of passenger numbers at Brussels-National Airport are explained primarily by the ‘failure of Sabena’ and the unsatisfactory ‘business plan’ of Brussels-National Airport.

201 The applicant adds in the reply that the Commission has not demonstrated that there was a causal link between the measures at issue and, first, the increase in traffic at Charleroi Airport, secondly, the reduction in traffic at Brussels-National Airport and, thirdly, the increase in traffic at Charleroi Airport and by the reduction in traffic at Brussels-National Airport. According to the applicant, the increase at Charleroi Airport does not, or at least does not only, stem from the measures at issue, but from its choice of a relevant and promising business plan, whereas the stagnation in short-haul traffic at Brussels-National Airport is explained by the choice of a conservative business plan as well as by the failure of Sabena in 2001.

202 The Commission contends that this plea should be rejected.

- 203 The two parts of the plea put forward by the applicant must be examined together.
- 204 As regards the origin of the information on the basis of which the Commission concluded that the offers were partially substitutable, it must be stated that it is apparent from recital 624 of the contested decision that the details given by the Commission in recitals 625 and 626 of the contested decision were supplied by the Kingdom of Belgium. Admittedly, the Commission indicated that the numerical data contained in the reply of 7 February 2014 corresponded to those sent by Brussels Airport. However, it does not appear that, taking into account the information provided by Brussels Airport, the Commission made a manifest error of assessment.
- 205 As regards the applicant's argument that the Commission satisfied itself with taking into consideration only information relating to the state of the market after 2004, thus disregarding the effects of the failure of Sabena in 2001, it is sufficient to note that the applicant has not disputed the Commission's argument that it was precisely in order to avoid presenting changes in traffic resulting from the failure of Sabena that it had presented the changes from 2004 onwards.
- 206 As regards the argument that the failure of Sabena contributed to reducing traffic at Brussels-National Airport, it is sufficient to point out that it is ineffective.
- 207 Indeed, the mere fact of having enjoyed an advantage from which the applicant's competitors were excluded is sufficient to conclude that its competitive position was strengthened and that competition was therefore distorted. For the same reasons, the applicant's claim that the difference between the growth of Brussels-National Airport and the growth of Charleroi Airport is explained by the development plan chosen by the latter airport cannot succeed.
- 208 As regards, on the one hand, the substitutability of the offers of Brussels-National Airport and Charleroi Airport and, on the other hand, the distortions of competition due to the aid received by the applicant, it should first be noted that it is apparent from settled case-law that, for the purpose of classifying a State measure, the Commission is not required to establish the existence of a real impact of the aid on trade between Member States and an actual distortion of competition, but is required only to examine whether that aid is capable of affecting such trade and distorting competition (see judgment of 12 December 2014, *Banco Privado Português and Massa Insolvente do Banco Privado Português v Commission*, T-487/11, EU:T:2014:1077, paragraph 62 and case-law cited).
- 209 Accordingly, in the present case, the Commission was not required to demonstrate that there was a causal relationship between the increase and the decline in traffic at the two airports concerned and the aid at issue. The fact that the competitive situation of those airports could also have been influenced by factors other than the aid at issue does not preclude the conclusion that that aid was likely to affect trade and to distort competition as provided for in Article 107(1) TFEU.
- 210 It is also clear from settled case-law that, in the context of that examination, the Commission is not required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States. Furthermore, in the case of aid granted illegally, as the applicant acknowledged at the hearing, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. If that were the case, such a requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify the aid at the planning stage (see judgment of 28 October 2015, *Hammar Nordic Plugg v Commission*, T-253/12, EU:T:2015:811, paragraph 130 (not published) and case-law cited).
- 211 It follows that, in the present case, the applicant cannot, in order to conclude that there was a distortion of competition as a result of the aid at issue, claim that the Commission was required to define the market for the services and the geographical market at issue and to establish the existence of a causal link between the aid received by the applicant and the actual effects of that aid on the

traffic at the airports concerned. In that regard, it must be borne in mind that the finding of the existence of a selective economic advantage in favour of the applicant, which is not disputed in the present case, is sufficient to establish a risk of the distortion of competition within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees v Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 168). Moreover, the capacity of aid to strengthen the recipient's competitive position is assessed by reference to the advantage given to the recipient, and it is unnecessary to take account of the operating results of its competitors (see, to that effect, judgment of 28 January 1999, *BAI v Commission*, T-14/96, EU:T:1999:12, paragraph 78).

212 Finally, even supposing that the Commission should have analysed the effects of the aid at issue on all the airports in the applicant's catchment area, it does not appear that such an analysis could have resulted in a more favourable outcome than that which the Commission reached in the contested decision.

213 It follows from all the foregoing that the eighth plea must be rejected.

The ninth plea in law, alleging infringement of the principle of the protection of legitimate expectations

214 According to the applicant, the Commission erred in law in failing to verify all the criteria for assessing the principle of the protection of legitimate expectations. First of all, it observes that the Commission, by its declarations in Decision 2004/393, its inaction of more than 10 years and its previous practice, created a legitimate expectation on the part of the applicant as to the lawfulness of the aid at issue or, at the very least, as to the impossibility of ordering its recovery. Next, the applicant argues that it could not reasonably anticipate the change to the Commission's pattern of conduct, since the subject matter of the review procedure for the measures in favour of Ryanair was so different from that of the present case and the Court made no reference to the potential unlawfulness of the measures granted to it; and the applicant adds that the Commission had opened the examination procedure in relation to it almost three and a half years earlier. Finally, the applicant observes that, in the present case, the general interest of the European Union does not prevent non-recovery of the aid at issue, since the Commission has failed to show that that general interest was sufficient to override the applicant's own interests.

215 The Commission contends that this plea should be rejected.

216 It is apparent from settled case-law that, first, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108 TFEU and, secondly, a diligent economic operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 77 and case-law cited).

217 Moreover, although recipients of unlawful aid are not to be precluded from relying on exceptional circumstances on the basis of which they had legitimately assumed that aid to be lawful, legitimate expectations on the part of the recipient will be recognised in such a case, however, only if the aid has been granted in compliance with the procedure laid down in Article 108 TFEU (judgment of 27 January 1998, *Ladbroke Racing v Commission*, T-67/94, EU:T:1998:7, paragraph 182).

- 218 In the present case, it is common ground that the aid at issue was not notified to the Commission in accordance with Article 108(3) TFEU and that the aid whose recovery is sought was granted after the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), in which it was held that the management of an airport was in principle an economic activity.
- 219 Accordingly, the applicant cannot rely on the fact that, in ordering the recovery of the aid at issue, the Commission infringed the principle of the protection of legitimate expectations.
- 220 Consequently, the ninth plea must be rejected and the action dismissed in its entirety.

The statement of modification

- 221 It should be recalled that, on 5 April 2016, the Commission notified the Kingdom of Belgium of a corrigendum to the contested decision, stating that the errors found in that decision in no way affected the conclusions which were set out in the contested decision.
- 222 On 23 June 2016, the applicant lodged a statement of modification on the basis of the corrections made by the Commission to the contested decision by means of the corrigendum of 5 April 2016.
- 223 The Commission argues that the statement of modification is inadmissible.
- 224 It must be pointed out that the statement of modification contains no new information and confines itself to repeating the arguments contained in the application and in the reply in a more direct manner, alleging that the Commission made numerous serious and substantial errors, even though, in reality, the corrigendum involves only stylistic and grammatical amendments as well as changes to certain calculations.
- 225 Moreover, even though the incorrect numerical data in the contested decision may have made it more difficult for that decision to be understood, in particular by the applicant, those errors cannot, however, call into question the lawfulness of the contested decision.
- 226 It follows that, in so far as the examination of the contested decision did not call into question the lawfulness of the contested decision and lead to the dismissal of the action, the question of the admissibility of the statement of modification has necessarily become devoid of purpose.

Costs

- 227 According to Article 135(1) of the Rules of Procedure, if equity so requires, the Court may decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing his own costs, or even that he is not to be ordered to pay any costs. Under Article 135(2) of the Rules of Procedure, the Court may order a party, even if successful, to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought, especially if he has made the opposite party incur costs which the Court holds to be unreasonable or vexatious.
- 228 In the circumstances of the present case, the Court considers that, as follows from the foregoing considerations, the Commission made numerous clerical errors which may have led the applicant to believe that it was justified in challenging the validity of the contested decision and which made it more difficult for the Court to review the contested decision.

- 229 In those circumstances, the present proceedings may be regarded as having been occasioned in part by the Commission's conduct, in that the Commission could, by the errors made, have led the applicant to have understandable uncertainties as to the lawfulness of the contested decision.
- 230 Such circumstances constitute a ground justifying a sharing between the Commission and the applicant of the costs incurred in the proceedings.
- 231 The Court considers that a fair assessment of the circumstances of the case requires that the Commission be ordered to pay, in addition to its own costs, half of the costs incurred by the applicant.
- 232 Moreover, pursuant to Article 138(3) of the Rules of Procedure, the interveners are to be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to bear its own costs and to pay half of the costs incurred by Brussels South Charleroi Airport (BSCA);**
- 3. Orders the Société wallonne des aéroports SA (Sowaer), Brussels Airport Company SA and Brussels Airlines SA/NV to bear their own costs.**

Labucka

Kancheva

Madise

Barents

Passer

Delivered in open court in Luxembourg on 25 January 2018.

[Signatures]