Reports of Cases

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

13 December 2018 *

(State aid — Agreements between the Chamber of Commerce and Industry of Nîmes-Uzès-Le Vigan and Ryanair and its subsidiary Airport Marketing Services — Airport services — Marketing services — Decision declaring the aid incompatible with the internal market and ordering its recovery — Notion of State aid — Imputability to the State — Chamber of Commerce and Industry — Advantage — Private investor test — Recovery — Article 41 of the Charter of Fundamental Rights — Right of access to the file — Right to be heard)

In Case T-53/16,

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

Airport Marketing Services Ltd, established in Dublin,

represented by G. Berrisch, E. Vahida, I.-G. Metaxas-Maranghidis, lawyers, and B. Byrne, Solicitor,

applicants,

v

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

defendant,

supported by

Council of the European Union, represented by S. Boelaert, S. Petrova and J. Kneale, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU seeking the partial annulment of Commission Decision (EU) 2016/633 of 23 July 2014 on State aid SA.33961 (2012/C) (ex 2012/NN) implemented by France in favour of Nîmes-Uzès-Le Vigan Chamber of Commerce and Industry, Veolia Transport Aéroport de Nîmes, Ryanair Limited and Airport Marketing Services Limited (OJ 2016 L 113, p. 32),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

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

Registrar: P. Cullen, Administrator,

* Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 25 October 2017,

gives the following

Judgment [1]

I. Background to the dispute

A. Measures at issue

1 The applicants, namely Ryanair DAC, formerly Ryanair Ltd, and Airport Marketing Services Ltd ('AMS'), are, the first, an airline established in Ireland which operates more than 1 800 flights daily connecting 200 destinations in 31 countries across Europe and North Africa, and, the second, a subsidiary of Ryanair which provides marketing strategy solutions, its activity consisting primarily in the sale of advertising space on Ryanair's website.

2 Nîmes-Garons Airport ('Nîmes airport'), which is owned by the French Republic, is situated in the Department of Gard in France. The airport was initially operated by the Chamber of Commerce and Industry (CCI) of Nîmes-Uzès-Le Vigan. On 1 February 2006, responsibility for the equipment, maintenance, operation and development of the civilian area of that airport was entrusted to the Syndicat mixte pour l'aménagement et le développement de l'aéroport de Nîmes-Alès-Camargue-Cévennes ('the SMAN'), which is a public body whose members include the Departmental Council of Gard, the Urban Community of Metropolitan Nîmes and the Urban Community of Grand Alès en Cévennes. The SMAN temporarily entrusted the operation of the airport in question, from 1 February 2006 to 31 December 2006, to that CCI by a public service delegation. Following a tendering procedure, the SMAN then chose to subcontract the operation of the same airport to Veolia Transport under a public service delegation agreement which took effect on 1 January 2007. Veolia Transport was succeeded by its wholly owned subsidiary, Veolia Transport Aéroport Nîmes ('VTAN'), in the performance of the agreement.

3 Ryanair began operating at Nîmes airport in June 2000. The initial operation of a single route between that airport and London Stansted airport was expanded to four routes.

4 In that regard, on 11 April 2000, the CCI of Nîmes-Uzès-Le Vigan entered into an airport services agreement with Ryanair for a term of 10 years. Under that agreement, Ryanair undertook to fly daily services between London Stansted airport and Nîmes airport ('the 2000 ASA').

5 The 2000 ASA was amended following an exchange of letters in late 2001 and in March 2004, which provided for an increase in the payments made by the CCI of Nîmes-Uzès-Le Vigan to Ryanair with a view to the development of additional routes. On 10 October 2005, a new airport services agreement was concluded by the CCI and Ryanair, for an initial term of five years, under which Ryanair undertook to operate certain routes to and from Nîmes airport. On the same day, a marketing services agreement was concluded by that CCI and AMS, which consisted of the provision of advertising services on Ryanair's website and by email, for which the CCI in question agreed to pay annual sums.

6 On 2 January 2007, VTAN entered into an airport services agreement with Ryanair under which Ryanair was to be paid a contribution per passenger under an incentive scheme for the development of traffic and a marketing services agreement with AMS for the purchase of services at a given sum.

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Those agreements were valid from 1 January 2007 to 31 October 2007. On 1 August 2007, VTAN and AMS signed an amendment to that agreement, providing for a further contribution by VTAN. On 1 November 2007, two new agreements were concluded by the same parties in order to extend the abovementioned agreements, which had expired. The payments to Ryanair and AMS were increased. Likewise, on 27 August 2008, two new agreements concluded by the same parties replaced the previous contractual framework as from 1 November 2008, for a term of one year renewable twice. The first of those agreements included, in particular, an undertaking by Ryanair to operate certain routes to and from Nîmes airport and an incentive scheme for the development of traffic. Two amendments of 25 August 2009 extended those agreements to 31 December 2011. Lastly, on 18 August 2010 and 30 November 2010, the same parties signed amendments to the second of the agreements in question which provided for an increase in the contributions to be paid by VTAN.

…

II. Procedure and forms of order sought

24 By application lodged at the Registry of the General Court on 5 February 2016, the applicants brought the present action.

25 By separate document lodged at the Court Registry on 2 March 2016, the applicants made an application for measures of organisation of procedure, by which they requested that the Commission produce certain documents.

26 The Commission submitted its observations within the prescribed period.

27 By document lodged on 26 May 2016, the Council of the European Union sought leave to intervene in the present case in support of the form of order sought by the Commission. By decision of 5 July 2017, the President of the Sixth Chamber of the Court granted that application.

28 By decision of 21 June 2017, the Court decided to refer the case to the Sixth Chamber, Extended Composition.

29 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral part of the procedure, to request the parties to submit their observations on the possible joinder of the case with Cases T-111/15 and T-165/15 for the purposes of the oral part of the procedure and to invite, by way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, the parties to answer certain questions.

30 By decision of the President of the Sixth Chamber, Extended Composition, of the Court of 28 August 2017, the parties having been heard, Cases T-111/15, T-165/15 and T-53/16 were joined for the purposes of the oral part of the procedure, pursuant to Article 68(1) of the Rules of Procedure.

31 The parties presented oral argument at the hearing on 26 October 2017.

32 The applicants claim that the Court should:

– annul Articles 1 and 4 to 6 of the contested decision;

– order the Commission to pay the costs.

33 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

…

B. The second plea in law, relating to the imputability of the agreements at issue to the French Republic

…

1. The complaint concerning the imputability to the French Republic of the decisions of the CCI of Nîmes-Uzès-Le Vigan

…

(b) The alleged contradictory reasoning

…

110 The present complaint must therefore be rejected.

2. The complaint concerning the imputability to the French Republic of the SMAN's decisions

111 The applicants claim that the Commission wrongly imputed the SMAN's decisions to the State. In this connection, they maintain that the SMAN is a group of public entities and provides airport services as co-manager of the airport. Since the SMAN was a public undertaking, the Commission was required, following the judgment of 16 May 2002, France v Commission (C-482/99, EU:C:2002:294), to verify whether the public authorities were involved in the adoption of the measures which the SMAN took in favour of the applicants. Going against that judgment, the Commission based, in recital 573 of the contested decision, its conclusion concerning the imputability to the State on the single organic criterion of ownership, or in other words, the composition of the SMAN board. In addition, in breach of the requirements of that ruling, the Commission undertook no multi-criteria examination of the involvement of public authorities in the SMAN's decisions.

112 The applicants take the view that the approach taken by the Commission in the contested decision leads to the result that the criteria of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294) cannot apply to any undertakings owned by any State, central or local, entities. However, those authorities can establish an undertaking and be its sole shareholder without that undertaking thereby becoming a public authority. That approach amounts to a systematic piercing of the corporate veil, as if public companies did not exist.

113 At the outset, it should be noted that, in its analysis of the imputability to the State of the agreements at issue, the Commission takes into account, in respect of the agreements concluded with the CCI of Nîmes-Uzès-Le Vigan, only the latter's public authority character without assigning any role to the SMAN. Consequently, the applicants' complaint is ineffective in so far as it seeks to criticise the analysis of the imputability to the State of those agreements. By contrast, in respect of the agreements concluded with VTAN, it should be noted that the Commission found, in recital 277 of the contested decision, that VTAN's commercial policy towards the applicants had been largely influenced by a framework established by the SMAN, which had led VTAN to deviate from the normal conduct of an

airport operator free to decide its commercial policy and motivated by the prospect of profits. At the end of its analysis, the Commission concluded, in recital 299 of that decision, that the agreements concluded with VTAN had to be regarded as imputable to the SMAN, and therefore to the French Republic in the broad sense.

114 Therefore, it is necessary to examine the present complaint in so far as the applicants argue that the Commission erred in not establishing that the measures taken by the SMAN in their favour, in that the influence of VTAN's commercial policy favoured them, were imputable to the French Republic in the broad sense.

115 In that regard, it is appropriate from the outset to recall the case-law according to which measures adopted by local and regional authorities or other infra-State entities fall, in the same way as measures taken by the central authority, within the ambit of Article 107(1) TFEU if the conditions laid down by that provision are satisfied (see case-law cited in paragraph 85 above).

116 In the present case, it must be noted that the Commission emphasised, in recitals 26 and 572 of the contested decision, that the SMAN was a public body which brought together three local and regional authorities, namely the Departmental Council of Gard, the Urban Community of Metropolitan Nîmes and the Urban Community of Grand Alès en Cévennes.

117 Moreover, the Commission stated, in recitals 572 and 573 of the contested decision, that decisions of local authorities had to be regarded as imputable to the State in the broad sense and that that conclusion was valid, by extension, for a group of local authorities such as the SMAN.

118 In addition, the Commission observed, in recital 573 of the contested decision, that the SMAN was managed by a board consisting solely of representatives of its member local authorities.

119 The Commission concluded from this, in recital 573 of the contested decision, that all decisions of the SMAN were imputable to the State.

120 Having regard to the case-law mentioned in paragraph 85 above, it is necessary to confirm that conclusion.

121 That conclusion is not invalidated by the applicants' argument that the SMAN is a company providing airport services and that, therefore, the Commission was required to assess the imputation to the State of the SMAN's decisions on the basis of the criteria established in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294).

122 It is necessary to stress that the Commission found in recital 277 of the contested decision that VTAN's conduct towards the applicants did not have to be considered in isolation from that of the SMAN, which is the group of public authorities acting as concession authority in terms of granting and implementing the public service delegation, and that, in particular, VTAN's commercial policy towards the applicants was largely influenced by a framework established by the SMAN.

123 Although the SMAN can exercise business activities, just like other organs of the State can, it must be observed that it constitutes a group of local authorities acting moreover, in the case at hand, as concession authority in terms of the public service delegation, and that, consequently, it was not necessary, as regards the measures adopted by it, to establish imputability to the State on the basis of the approach laid down in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294).

124 The present complaint must therefore be rejected.

3. The complaint concerning the imputability to the State of VTAN's decisions

125 The applicants state that the decisions of a private undertaking such as VTAN are generally not imputable to the State, especially in the absence of any State ownership in the undertaking concerned. In any event, the Commission did not establish that the decisions adopted by VTAN were imputable to the State. Thus, simple influence by the SMAN, by means of the public service delegation agreement, on the conduct of VTAN is not sufficient in that regard. In addition, the SMAN systematically refrained from exercising its power to influence VTAN in its negotiations with Ryanair. Moreover, according to the applicants, VTAN was free to find a substitute for Ryanair and had a broad margin to negotiate contracts with them.

126 The Commission disputes the applicants' line of argument.

127 In that regard, it should be borne in mind that, according to settled case-law, no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid. EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (see judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 23 and the case-law cited).

128 Similarly, the appointment by the State of a private entity to grant aid cannot in itself allow the measures adopted by that entity to escape the application of those rules.

129 As regards the condition that the measure must be attributable to the State, it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of that measure (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17 and the case-law cited). Therefore, it is necessary to examine whether the Commission was entitled to consider, following its analysis of State imputability, that the SMAN was involved in the conclusion of contracts entered into by VTAN with the applicants.

130 In that regard, it must be observed that the Commission identified, in recitals 278 to 299 of the contested decision, a series of indicators to support such an involvement on the part of the SMAN.

131 First, the Commission noted that the public service delegation agreement concluded between the SMAN and Veolia Transport, whose carrying out was entrusted to VTAN, was not limited to granting the latter the commercial operation of Nîmes airport, but also charged it with a development of traffic task. Thus, according to the Commission, that public service delegation agreement constrained and influenced VTAN's commercial policy towards the airlines, particularly as the development of traffic is not in itself the ultimate goal of a private airport operator entirely free to decide its commercial policy. The objective pursued by such a private operator is to maximise its profitability, which is not compatible in all circumstances with the development of traffic (recitals 278 to 281 of the contested decision). Moreover, the Commission noted that Veolia Transport's response to the invitation to tender had been influenced by the traffic development objective set by the SMAN and, more generally, by the local economic development objectives pursued by the SMAN (recitals 282 to 285 of that decision). Secondly, the Commission found that Veolia Transport's various statements during the invitation to tender process confirmed that it was aware of the fact that the commercial relationship with Ryanair was likely to harm the profitability of the operation of Nîmes airport and that it was prepared to pursue that relationship under similar conditions to those previously established by the CCI of Nîmes-Uzès-Le Vigan only in the light of the SMAN's traffic development objectives, the commitments made to the SMAN in order to win the airport operation concession, and the flat-rate contribution offered by the SMAN ensuring the concession's financial stability (recital 287 of that decision). Thirdly, in respect of that flat-rate operating subsidy, the Commission found that the profitability of VTAN's concession relied on that contribution, that its amount had been calculated based on a provisional budget which incorporated the costs and revenues associated with the

agreements at issue and that the SMAN had therefore granted VTAN a contribution that was designed to allow Ryanair's activity to continue under similar conditions to those under which that airline had offered its services from Nîmes airport when the CCI of Nîmes-Uzès-Le Vigan was operating the airport. Furthermore, the Commission stated that the adjustment of the flat-rate contribution on the basis of Ryanair's activity reduced the incentives for VTAN to adopt decisions likely to result in a reduction in Ryanair traffic (recitals 288, 289 and 291 of the same decision).

132 It must be held that the Commission proved to the requisite legal standard that, as it indicated in recitals 292 and 293 of the contested decision, the framework laid down by the SMAN through the invitation to tender process, the objectives set in the public service delegation agreement concluded between the SMAN and Veolia Transport and the flat-rate contribution had a sufficiently decisive influence on VTAN's conduct towards the applicants that the agreements in question can be regarded as imputable to the State pursuant to the case-law. On that basis, the Court endorses the Commission's conclusion set out in recital 299 of that decision according to which the causal link between the terms of that agreement, the invitation to tender process and the flat-rate contribution, on the one hand, and the agreements signed by VTAN with the applicants, on the other hand, was strong enough to prove that the SMAN was clearly involved in the measures in question, with the result that those measures must be imputable to the SMAN.

133 None of the arguments put forward by the applicants is of such a kind as to disprove that conclusion.

134 In the first place, the applicants claim that simple influence by the SMAN on VTAN's conduct, by means of the public service delegation agreement concluded between the SMAN and Veolia Transport, is not tantamount to control and imputation to the State. However, that claim gives an erroneous interpretation of the contested decision, which is based on a set of indicators to find that the SMAN exerted a decisive influence over the decisions taken by VTAN with regard to the applicants. The Commission therefore did not limit itself in the contested decision to establishing the existence of mere State influence on the conduct of an undertaking in order to conclude on the imputability to the State.

135 In the second place, the applicants assert that the SMAN systematically refrained from exercising its power to influence VTAN's conduct in negotiations with Ryanair. That argument is ineffective, however. It is apparent from recital 296 of the contested decision that the simple option that the SMAN had to become involved in those negotiations gave it a certain degree of influence and that it could have intervened if VTAN had tried to impose conditions on Ryanair that may have prompted the latter to reduce its traffic at Nîmes airport. As the Commission states, VTAN knew that the SMAN could intervene and had every reason to take that factor into consideration in its own decisions, which were already part of the framework set by the SMAN.

136 In the third place, the applicants submit that VTAN had a broad margin of manoeuvre to negotiate contracts with them. In that regard, it must be pointed out that although, in the contested decision, the Commission states that the public service delegation agreement concluded between the SMAN and Veolia Transport refers to 'total freedom' for VTAN in negotiating agreements with aviation users, it then explains that that freedom could be exercised only within the general framework laid down by that agreement and the commitments made by Veolia Transport in response to the invitation to tender, which were such as to constrain and influence VTAN's conduct to a considerable extent. Furthermore, it must be held that, notwithstanding the existence of a degree of commercial freedom enjoyed by VTAN in negotiating agreements (recitals 292 and 299 of that decision), the Commission demonstrated to the requisite legal standard, on the basis of converging indicators listed in paragraph 131 above, that that general framework had resulted in the SMAN having a sufficiently decisive influence on VTAN's commercial relationships with the applicants in order to conclude on the imputability to the State. The applicants have not adduced any evidence to show that the existence of a commercial margin of manoeuvre enjoyed by VTAN challenged that analysis of imputability conducted by the Commission.

137 In the fourth place, the applicants take the view that it is apparent from the contested decision that the French authorities confirmed VTAN's contractual autonomy. However, as the Commission rightly states, recital 92 of that decision on which the applicants rely only sets out the information from the Member State as to the procedure followed within VTAN itself for decision-making and, in that recital, it did not take a view on the influence of the SMAN on the content of the contracts entered into by VTAN.

138 In the fifth place, the applicants contend that VTAN was free to find a substitute for Ryanair and that no sanction applied to that type of decision. However, as the Commission rightly points out, that factor could not have a bearing on the question of the imputability to the State of the agreements at issue. In fact, the SMAN could well have been equally happy with another carrier chosen by VTAN. The fact remains that, by the general framework laid down by means of the invitation to tender process, the traffic development objectives set out in the public service delegation agreement concluded between the SMAN and Veolia Transport and the flat-rate contribution, the SMAN exerted a decisive influence on the conditions offered by VTAN to airlines. Moreover, as the Commission correctly points out, the possibility of replacement of Ryanair's activity referred to in recital 411 of the contested decision was envisaged only in the long term, not during the period to which that decision relates.

139 In the sixth place, the applicants claim that there was no sanction for VTAN in not following its commitments towards the SMAN, other than hypothetical damage to reputation. However, that argument is based on an incorrect reading of the contested decision. Recital 286 of that decision does not refer in any way to sanctions, but states that VTAN's conduct towards the applicants was fundamentally influenced by the traffic development objective set by the SMAN. In that context, the Commission observed in that recital that the successful tenderer's tender necessarily bound the latter for the whole term of the concession, from a legal point of view but also in other respects, and considered that an undertaking that sets objectives and makes commitments in response to an invitation to tender organised by a local authority and that subsequently acts in a manner contrary to those objectives and commitments runs the risk of its reputation being compromised among local authorities. The Commission concluded from this that Veolia Transport, which in 2007 was looking to establish itself in the airport operation market, would not have run such a risk.

140 In the seventh and last place, as regards the applicants' argument that the SMAN had at most given VTAN only assurances to cover certain losses should VTAN decide to continue a 'legacy situation' with them, it is necessary to point out that the Commission inferred, in recitals 278 to 299 of the contested decision, the imputability to the State of the agreements at issue not only from the grant of the flat-rate contribution to ensure the stability of Nîmes airport, but also from a set of elements including, in particular, traffic development commitments, which were likely to harm the profitability of that airport and would have been acceptable only if financial compensation was granted.

141 In the light of the foregoing, it is necessary to reject this complaint and, therefore, the second plea.

C. The third plea in law, alleging infringement of Article 107(1) TFEU, in that the Commission wrongly considered VTAN's resources to be State resources

142 The applicants argue that the Commission has not established that the condition that State resources are used was fulfilled. Indeed, the flat-rate contribution which the SMAN paid to VTAN remained under VTAN's control and VTAN had a discretion as to whether or not to use it and whether or not to transfer it to the applicants. VTAN's resources did not, therefore, remain under constant public control, within the meaning of the case-law.

143 In that regard, it should be recalled first of all that, for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, among other conditions, be granted directly or indirectly through State resources (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 24, and of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 16).

144 In this respect, the concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 20 and the case-law cited).

145 The Court of Justice has also held that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see judgment of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 21 and the case-law cited).

146 The fact that the resources concerned may be administered by entities separate from the public authorities is irrelevant in that respect (see, to that effect, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 35).

147 In the present case, it is common ground that State resources were transferred from the SMAN in the form of a flat-rate contribution to VTAN, which is a private company operating the airport.

148 Moreover, it should be noted that the Commission observed, in recital 300 of the contested decision, referring to recital 298 of that decision, that the financial stability of the operation of Nîmes airport relied on the flat-rate contribution granted by the SMAN, the amount of which had been determined, inter alia, according to the parameters of the commercial relationship between the CCI of Nîmes-Uzès-Le Vigan and the applicants in 2006 and therefore in order to allow Ryanair to continue its activity from Nîmes airport under the same conditions as when that CCI was operating the airport. The Commission concluded from this, in the same recital, that the advantages conferred on the applicants by those agreements had therefore been financed through that flat-rate contribution, and consequently through State resources.

149 In particular, the Commission found, in recital 288 of the contested decision, that the profitability of the concession for VTAN relied on the flat-rate subsidy paid by the SMAN, which therefore participated directly in financing the operation of Nîmes airport. The Commission explained that the existence of that subsidy, granted by the SMAN, demonstrated the latter's influence over VTAN's commercial relations with the applicants given that, without that subsidy, it was likely that no operator would have agreed to operate the airport under a concession for which the economic model was based on a traffic development objective and relations with an airline that were likely to result in a negative margin for the airport's operation. The Commission considered that the granting of the subsidy in question was therefore one of the elements that had allowed the agreements to be signed with the applicants.

150 In those circumstances, the criteria established by the case-law mentioned in paragraph 145 above are satisfied. It is apparent from the contested decision that the SMAN granted VTAN a contribution that was designed to allow Ryanair's activity to continue under similar conditions to those in force when the CCI of Nîmes-Uzès-Le Vigan was operating Nîmes airport (see also recital 289 of that decision) and that, without that contribution, VTAN would have borne the full burden of the advantages conferred on the applicants through the agreed agreements.

151 The fact that VTAN enjoyed a certain freedom when negotiating its agreements with the applicants and that there was no mechanical link between the amount of the flat-rate contribution and the parameters of the contracts negotiated does not mean that the connection between that contribution and the advantage given to the applicants has been eliminated. It must be found that, in economic terms, the flat-rate contribution in favour of VTAN made the conclusion of the agreements with the applicants possible and enabled VTAN to not have to bear the cost of the advantages conferred on the applicants through those agreements. Thus, those advantages are the result of the payment of the flat-rate contribution to VTAN (see, to that effect, judgment of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraphs 26 and 27).

152 In the light of all of the foregoing, the third plea must be dismissed.

D. The fourth plea in law, alleging infringement of Article 107(1) TFEU, in that the Commission failed to establish the existence of a selective advantage

…

2. The second part, alleging errors of assessment and failure to state reasons concerning the decision to depart, in the present case, from the comparative analysis

…

(b) (The complaints concerning the grounds relied on in the contested decision to depart, in the present case, from the comparative analysis

…

(2) The complaint alleging that the Commission erred in finding that the comparative analysis should be based on a comparison of the agreements at issue taken together with other similar transactions

…

(3) The complaint that the Commission was wrong to find that the agreements at issue generated higher incremental costs than incremental revenues

…

(4) The complaint alleging that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport and a failure to state reasons in that regard

226 The applicants assert that the Commission was wrong to find that Ryanair had failed to show that the five airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport. In that regard, they submit that the Commission did not refute the 'specific selection' of comparator airports or the detailed arguments in that study, which was supplemented by additional studies. That being so, the Commission's dismissal of the selection criteria used in that study constitutes a manifest error of assessment and a failure to state reasons. In their reply, the applicants maintain that the arguments put forward by the Commission before the General Court in order to discredit the choice of comparator airports in the study of 28 September 2012 were not mentioned in the contested decision and cannot remedy *ex post* the error of assessment or the failure to state reasons. Moreover,

the applicants argue that the Commission at no point approached a privately owned or privately operated airport in order to find out about prices charged and therefore made no attempt to find comparator airports, despite their obvious existence.

227 In that regard, in respect of the line of argument that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport, it must be observed that, as the Commission states, the failure to take into account the marketing services agreements was already sufficient to exclude the method used in that study (recital 383 of the contested decision). The application of the private investor test in the case at hand required that all the combinations of airport services agreements and corresponding marketing services agreements, which had to be regarded each time as a single transaction, be analysed jointly (see paragraphs 207 to 212 above). Accordingly, that line of argument must be rejected as ineffective.

228 In addition, the fact that the contested decision does not set out, for each of the airports selected in the study of 28 September 2012, the reasons why they could not be identified as comparables does not, by itself, allow the conclusion that there was a failure to provide a statement of reasons for the purpose of Article 296 TFEU.

229 It should be borne in mind in this regard that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that provision must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63 and the case-law cited).

230 In the present case, in recital 378 of the contested decision, the Commission recalled its doubts, as expressed in paragraph 59 of the 2014 Guidelines, that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports. Furthermore, referring to the parameters listed in paragraph 60 of those guidelines, the Commission noted, in recital 384 of that decision, that Ryanair had not shown how the airports mentioned were sufficiently comparable in terms of traffic volume and type of traffic, type and level of airport services, presence of a large city in the vicinity of the airport, number of inhabitants in the catchment area, prosperity in the surrounding area and existence of other geographical areas likely to attract passengers.

231 Admittedly, in the contested decision, the Commission does not specify in more detail the reasons why it did not accept the sample of airports chosen in the study of 28 September 2012 as a valid benchmark.

232 However, it cannot be disputed that the determination of comparator airports is based on complex technical assessments. Since the contested decision clearly disclosed the Commission's reasoning, enabling the substance of that decision to be challenged subsequently before the competent court, it would be excessive to require a specific statement of reasons for each of the technical choices or each of the figures on which that reasoning was based (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375,

paragraph 108, and of 27 April 2017, *Germanwings* v *Commission*, T-375/15, not published, EU:T:2017:289, paragraph 45; see also, by analogy, judgment of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449. paragraph 134).

233 Thus, an explanation, for each of the airports selected in the study of 28 September 2012, of the reasons why they could not be accepted was not necessary in the contested decision for the applicants to understand the reasoning followed by the Commission.

234 Accordingly, the applicants were in a position to challenge before the Court the Commission's rejection of the sample of airports selected in the study of 28 September 2012.

235 Therefore, the line of argument based on a failure to state reasons must be rejected.

236 In addition, the applicants fail to demonstrate that the Commission made a manifest error of assessment concerning the method of selecting the comparator airports. In that regard, they submit that the Commission erred in taking the view that Ryanair had not proposed a sample of comparator airports which includes airports sufficiently comparable to Nîmes airport. They assert that the study of 28 September 2012 submitted by Ryanair included a systematic comparison of the conditions laid down by the airport services agreements signed with other airports which were majority privately owned, privately operated or otherwise operating as market economy investors and which shared several features that were similar to those of Nîmes airport.

237 The Commission replies that that claim is belied by a thorough examination of the airports selected in the study of 28 September 2012.

238 In that regard, the Commission stated that, so far as concerns the issue of the establishment of reliable points of reference, (i) Bournemouth airport was owned by a majority State-owned entity and had a negative profitability in 2012, (ii) Prestwick airport was loss-making before its private owner sold it to the Scottish Government in November 2013, (iii) Maastricht airport had received substantial subsidies since 2004 and had also passed into public ownership in 2013 after it seemingly had to be rescued by the Dutch State, and (iv) Knock airport, although privately owned, had received considerable taxpayer support, namely capital grants of the order of EUR 13 million between 1997 and 2012.

239 Moreover, so far as concerns the characteristics of the airports selected in the study of 28 September 2012 for the purpose of paragraph 60 of the 2014 Guidelines, the Commission explained that, in any event, they were to a large extent dissimilar from those of Nîmes airport:

– it is apparent from the study of 28 September 2012 that the volume of total passenger traffic at the airport varied significantly from one airport to another; the differences were even more striking as regards Ryanair's passenger volumes at those airports;

– the activities of Grenoble airport are heavily concentrated on the winter season;

– Maastricht airport performs significant cargo operations;

– the closest cities to each airport are of very different sizes; thus, as for the parameter of proximity to a large city, the study of 28 September 2012 mentions the city of Nîmes and, for Knock airport, the town of Sligo (Ireland), but the distances are very different;

– concerning the parameter of the number of inhabitants in the airport catchment area, the study of 28 September 2012 refers only to the population in the largest city within a 150 kilometre radius, and not to the number of inhabitants in the catchment area of the airport;

– so far as concerns the parameter relating to the prosperity of the surrounding area, the proxies of the regions chosen in the study of 28 September 2012 did not precisely reflect the catchment areas of the airports in question, and prosperity varies substantially across regions;

– there is nothing about the parameter of the airport's hinterland in the study of 28 September 2012, either for outgoing passengers or for incoming passengers; however, having regard to the touristic attractiveness of the Mediterranean coast, Nîmes airport is an airport focusing on incoming passengers, whereas Prestwick and Bournemouth airports provide a potential market for outgoing passengers.

240 It follows that, on the basis of all those elements, the Commission was entitled to consider, without committing a manifest error of assessment, that the airports selected in the study of 28 September 2012 were not sufficiently comparable to Nîmes airport.

241 The arguments put forward by the applicants are incapable of calling that conclusion into question.

242 In the first place, as regards the argument that Bournemouth airport made profits between 2001 and 2011 without receiving subsidies, it must be stated that although it is true that that factor is relevant for considering the conduct of that airport as being that of a market economy operator, the fact remains that that airport belongs to a public entity.

243 In the second place, as regards the applicants' argument that Prestwick airport was not only under private ownership, but was also profitable between 2000 and 2008, it must be held that, although those circumstances argue in favour of market economy operator conduct, they do not call into question the clarification made by the Commission in its written pleadings and at the hearing that that airport had become loss-making and had to be sold to the Scottish Government in 2013 and, accordingly, did not constitute an appropriate benchmark for the purposes of establishing a true market price for airport services (see recital 378 of the contested decision).

244 In the third place, as regards the applicants' argument that Ryanair had operated multiple summer routes to and from Grenoble airport between 2006 and 2009 and, moreover, that that airport was operated by a private operator imposing the highest airport charges among the comparator airports, it must be observed that, although Ryanair operated routes outside the winter season, those activities did not appear to have led to the continuation of those services throughout the year. In that regard, the applicants' argument does not contradict the Commission's finding that the activity of Grenoble airport was heavily concentrated on the winter season, which distinguished it from the situation of Nîmes airport where Ryanair had operated, at the very least, a number of daily connections throughout the year, as is apparent from the contested decision.

245 In the fourth place, as for the applicants' argument that, according to the information provided by the Commission, capital grants to Knock airport amounted to only 6% of assets of the airport for the period 2002 to 2012, it must be observed that the Commission was entitled to find, without committing a manifest error of assessment, that a contribution of public funds of such a magnitude constituted a relevant factor in its assessment of the adequacy of that airport as a point of reference.

246 In the fifth place, as for the applicants' argument that four of the comparator airports were similar to Nîmes airport concerning the parameter relating to total traffic or Ryanair's traffic, the Court finds, as the Commission observes, that the figures mentioned in the study of 28 September 2012 show that the total passenger traffic of the airports and Ryanair's traffic in those airports varied significantly from one airport to another and with regard to Nîmes airport. Thus, it is apparent from that study that there are, in particular, considerable differences between the traffic at Nîmes airport and the traffic at Prestwick (for all the period concerned), Bournemouth and Knock (for the last part of the period concerned) airports.

247 Likewise, as for the applicants' argument that the study of 28 September 2012 presented, as regards the parameter relating to the prosperity of the surrounding area, data for Knock airport at a regional level for the comparison of the annual gross domestic product per inhabitant even though the estimate relating to monthly earnings was presented for Ireland as a whole, the Court finds that that argument is not capable of invalidating the Commission's findings as regards some other parameters.

248 Consequently, notwithstanding the findings made in paragraphs 242 and 243 above, it must be concluded that, in the light of all the dependable points of reference and the different parameters mentioned in recital 365 of the contested decision, the Commission did not commit a manifest error of assessment in rejecting the sample of comparator airports suggested in the study of 28 September 2012.

249 As regards the applicants' argument alleging the lack of effort on the part of the Commission to make enquiries with privately owned or privately operated airports in order to find points of comparison, it must be noted that that complaint relates to the scope of the Commission's investigation obligations when it is called upon to apply the market economy operator test to the agreements at issue.

250 In accordance with the case-law, in the context of applying the private investor test, the Commission must examine, when assessing a measure, all the relevant features of the measure and its context (see, to that effect, judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59).

251 In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent market economy operator, who is in a situation as close as possible to that of the Member State concerned, must be regarded as being relevant (see, by analogy, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 60).

252 It should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 70).

253 The information 'available' to the Commission includes that which seemed relevant to the assessment to be carried out in accordance with the case-law referred to in paragraph 251 above and which could have been obtained, upon request by the Commission, during the administrative procedure (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71).

254 In the present case, in the first place, it should be observed that, in recital 378 of the contested decision, the Commission recalled its doubts, as expressed in the 2014 Guidelines, that, at that time, an appropriate benchmark could be identified to establish a true market price for the services provided by airports. The Commission refers in particular, in paragraphs 56 to 58 of those guidelines, to the fact that the vast majority of Union airports benefit from public funding, that publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules, that public airports' charges tend therefore not to be determined with regard to market considerations, but having regard to social or regional considerations, and that even the prices charged by private airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports. Therefore, even if it cannot be excluded that a sufficient number of suitable comparator airports may be found, as the Commission explained at the hearing, it found that, in accordance with paragraph 61 of the 2014 Guidelines, the incremental profitability analysis constituted the most relevant criterion for assessing the agreements at issue.

255 In the second place, it should be noted that the Commission mentioned, in the contested decision, the difference in the cost and revenue structures between airports and the low comparability of transactions between airports as considerations justifying a departure from the comparative analysis (recitals 362 and 363 of the contested decision).

256 In the third place, it should be observed that, in the decision to initiate the procedure, the Commission called on interested parties to submit observations, whilst further indicating in that decision that the French authorities had not provided any comparator for the assessment of whether the price paid by Ryanair reflected the normal market price.

257 Thus, during the administrative procedure, Ryanair submitted the study of 28 September 2012 showing a sample of comparator airports.

258 In answer to a question from the Court at the hearing, the Commission explained that, even if the 2014 Guidelines foresaw the possibility of conducting a comparative analysis, the information in the file did not allow a useful comparative analysis to be carried out in the case at hand.

259 In the fourth place, as the Commission states, in order to assess airport service charges, it is necessary to take into consideration not only published charges, but also the wide range of bespoke discounts agreed with each airline and any marketing services agreement. In general, the latter information is confidential and not freely available to the Commission.

260 In those circumstances, the Commission did not err in choosing, in the case at hand, to carry out an incremental profitability analysis rather than a comparative analysis, without having approached, in its investigation, privately owned or privately operated airports with the aim of identifying possible airports which are sufficiently comparable to Nîmes airport and of finding a sample of comparable transactions in those airports.

261 In the light of all of the foregoing, the applicants' complaint alleging that the Commission erred in finding that the evidence provided by Ryanair failed to demonstrate that the airports selected in the study of 28 September 2012 were sufficiently comparable to Nîmes airport and a failure to state reasons in that regard must therefore be rejected.

(5) The complaint alleging that the Commission wrongfully failed to conduct a 'joint' comparative analysis

262 The applicants claim that, even if the payments to AMS for marketing services should have been deducted from the airport charges paid by Ryanair for the purpose of a comparative analysis, the Commission nevertheless committed a manifest error of assessment in failing to conduct such a 'joint' analysis. They produce a study of 2 February 2016 including an identical analysis, prepared by their economic advisers, according to which the net charges paid to Nîmes airport by Ryanair taking into account payments received by AMS under the marketing services agreements were higher than the average charges paid at the comparator airports on both a per-passenger and a per-turnaround basis.

263 In that regard, it should be recalled that, according to the case-law, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 60, and of 14 January 2004, *Fleuren Compost* v *Commission*, T-109/01, EU:T:2004:4, paragraph 49). In addition, according to the case-law, the lawfulness of a

decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (see paragraph 252 above).

264 However, the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 141).

265 In the present case, it should be recalled that, in the decision to initiate the procedure, the Commission stated that it considered at that stage that it was necessary, for the purposes of applying the private investor test, to assess the airport services agreements and the marketing services agreements jointly.

266 However, the applicants rely on a joint comparative analysis of net airport charges of marketing payments carried out by their economic advisers in the study of 2 February 2016, which was produced only for the first time before the Court. Therefore, the Commission cannot be criticised for not having taken it into account.

267 Furthermore, for the reasons explained in paragraphs 254 to 260 above, the Commission was not, in the present case, required to take other measures to obtain data in order to carry out a joint comparative analysis.

268 Consequently, the applicants' complaint alleging that the Commission wrongfully failed to conduct a 'joint' comparative analysis must be rejected.

…

3. The third part, alleging manifest errors of assessment and insufficient reasoning as regards the incremental profitability analysis …

(b) The complaint concerning the rationale underlying the decision of the operators of Nîmes airport to conclude the marketing services agreements

(c) The complaint based on the refusal to take into account the possibility that part of the marketing services may have been purchased for general interest purposes

(d) The complaint alleging the erroneous assertion that the SMAN and VTAN constitute a single entity

372 The applicants claim that the Commission wrongly considered that VTAN and the SMAN constituted a single entity for the purposes of applying the market economy operator test. In deciding that the connection of ownership was not a necessary condition, and that other economic links between those two entities were sufficient, the Commission misinterpreted the case-law and made a manifest error of assessment.

373 In that regard, it must be recalled that it has been held that it was necessary, when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, had acted as rational operators in a market economy. When assessing the measures at issue, the Commission must examine all the

relevant features of the measures and their context, including those relating to the situation of the authority or authorities responsible for granting the measures at issue (see judgment of 17 December 2008, *Ryanair* v *Commission*, T-196/04, EU:T:2008:585, paragraph 59 and the case-law cited).

374 In the present case, although there was no connection of ownership between the SMAN and VTAN, the Commission found, however, in recitals 277 to 299 of the contested decision, that the SMAN had exercised decisive influence over the decisions taken by VTAN with regard to the applicants.

375 In those circumstances, it must be held that the Commission rightly found that there were sufficiently close economic links between the SMAN and VTAN for their conduct to be assessed together in their relations with the applicants for the purposes of applying the market economy operator test (recitals 307 to 309 of the contested decision).

376 Consequently, the applicants' complaint alleging the erroneous assertion that the SMAN and VTAN constitute a single entity must be rejected.

(f) The complaint alleging refusal to take into account the wider benefits of Nîmes airport's relationship with Ryanair

…

(g) The complaint alleging the failure to verify the data submitted by Nîmes airport and to compare with a well-run airport

415 The applicants argue that the Commission wrongly failed to verify the cost data submitted by Nîmes airport and to compare that data with the data typical of a well-run airport. In the present case, the incremental operating costs incurred by Nîmes airport, as reported by the Commission in the contested decision, are, the applicants allege, significantly higher than those which it had found in other cases, and so Nîmes airport must be run very inefficiently. Thus, those costs are not market costs that an efficiently run airport would incur and they cannot be taken as a benchmark for assessing whether Ryanair had obtained an advantage that it would not have obtained from a market economy operator.

416 In that regard, it should be recalled that, according to case-law, it falls to the Commission to assess whether a rational market economy operator who is in a situation as close as possible to that of the public entity concerned might have been prompted to take the measure at issue (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 84). It is therefore necessary to take into account the structure of the actual costs and revenues of the public entity whose conduct is being compared to that of a market economy operator.

417 In the present case, it follows that, contrary to what the applicants claim, it was not for the Commission, in the case in point, to verify, when applying the market economy operator test, whether the incremental operating costs and non-aeronautical revenue of Nîmes airport corresponded to those which could be expected from an average airport or a well-run and efficient airport. Accordingly, the Commission could, without making an error, use the actual projected costs and revenues of Nîmes airport to assess whether the applicants had obtained an economic advantage.

418 For the same reasons, nor was the Commission required to take account of costs recorded in airports other than Nîmes airport.

419 Moreover, the revision that gave rise to the actual figures of costs and revenues of a public undertaking would be contrary to the precept of Article 107(1) TFEU, which does not distinguish between measures of State intervention of a public body by reference to their causes or their aims but defines them in relation to their effects (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 77).

420 Consequently, the Commission did not commit a manifest error of assessment in not ascertaining whether the costs and revenues provided by Nîmes airport corresponded to those generally associated with a well-run or efficient airport.

421 The fourth plea must therefore be rejected as unfounded.

422 The action must therefore be dismissed in its entirety and it is not necessary to rule on the applicants' application for measures of organisation of procedure in so far as it concerns measures other than those already ordered.

IV. Costs

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

424 The Commission is to bear its own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Ryanair DAC and Airport Marketing Services Ltd to bear their own costs and to pay those incurred by the European Commission;**

3. **Orders the Council of the European Union to bear its own costs.**

Berardis Papasavvas Spielmann

Csehi Spineanu-Matei

Delivered in open court in Luxembourg on 13 December 2018.

E. Coulon
Registrar

President