

COMMISSION DECISION (EU) 2015/1227

of 23 July 2014

on State aid SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia

(notified under document C(2014) 5085)

(Only the French text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof⁽¹⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those Articles⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 25 January 2007, the French authorities notified the Commission, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), of a measure benefiting the company Airport Marketing Services Limited ('AMS') — a wholly-owned subsidiary of the airline Ryanair Limited (hereinafter 'Ryanair') — in the form of a marketing services agreement signed with the latter. This measure was notified as State aid by the French authorities. As the measure had already been implemented by the French authorities, it was recorded by the Commission in the register of unlawful aid under number NN 12/07.
- (2) At the request of the French authorities, meetings were organised with the Commission on 20 February and 16 July 2007.
- (3) By letter of 26 February 2007, the Commission asked the French authorities to provide further information. As no response was received within the set time limit, a reminder was sent to the French authorities on 15 June 2007. By letter of 12 July 2007, the French authorities provided the information requested.
- (4) By letter of 28 November 2007, the Commission notified the French authorities of its decision to open the formal investigation procedure laid down in Article 108(2) TFEU.
- (5) The Commission decision to open the procedure was published in the *Official Journal of the European Union* on 15 February 2008⁽³⁾. The Commission called on interested parties to submit their comments on the measure in question.
- (6) On 18 December 2007 and 29 January 2008, the French authorities asked for an extension to the time limit set for submitting their comments on the opening decision. By letters of 4 January and 1 February 2008, the Commission agreed to extend the time limit to 28 February 2008.
- (7) The French authorities' comments were submitted to the Commission on 2 June 2008.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU is used throughout this Decision.

⁽²⁾ OJ C 41, 15.2.2008, p. 11, and OJ C 96, 31.3.2012, p. 22.

⁽³⁾ OJ C 41, 15.2.2008, p. 11.

- (8) The Commission received comments from the Chamber of Commerce and Industry of Pau-Béarn (hereinafter 'the CCIPB') on 25 February 2008 ⁽⁴⁾, from AMS ⁽⁵⁾, Ryanair and the Association of European Airlines (hereinafter 'the AEA') by letters of 14 March 2008, and from the airline Air France on 19 March 2008 ⁽⁶⁾. The Commission forwarded these comments to France by letter of 11 June 2008 and gave it the opportunity to respond to them.
- (9) By letter of 7 July 2008, the French authorities informed the Commission that they had no response to make to the comments by third parties.
- (10) At the request of the French authorities, a meeting was held on 4 November 2008 between the Commission and representatives of the CCIPB. During the meeting, the Commission informed the French authorities that it had engaged an independent consultant to help it analyse the agreements in question (hereinafter 'the consultant'). The consultant delivered his report on 30 March 2011.
- (11) By letter of 17 March 2011, the Commission asked the French authorities to provide further information. By letter of 13 April 2011, the French authorities asked for the time limit to be extended to 1 June 2011. The Commission agreed to this extension by letter of 6 May 2011. The French authorities gave their response by letter of 30 May 2011.
- (12) By letter of 11 April 2011, the Commission asked Ryanair for supplementary information, which it provided by letter of 31 August 2011. By letter of 11 October 2011, the Commission forwarded these comments to France for its response. By letter of 21 November 2011, the French authorities informed the Commission that they had no response to make to these comments.
- (13) By letter of 25 January 2012, the Commission notified France of its decision to extend the formal investigation procedure opened in 2007 to various measures granted to airlines using Pau airport and to the airport operator. The Commission decision was published in the *Official Journal of the European Union* on 31 March 2012 ⁽⁷⁾. The Commission called on interested parties to submit their comments on the measures in question.
- (14) By letter of 22 February 2012, the Commission asked the French authorities to provide further information. On 28 February 2012 the French authorities asked for an extension to the time limit set for submitting their comments on the decision of 25 January 2012 and to the time limit set in the Commission's letter of 22 February 2012. The Commission agreed to extend these time limits to 27 March 2012. By letter of 29 March 2012, the French authorities gave their response to the Commission's letter of 22 February 2012 and submitted their comments on the decision to extend the procedure.
- (15) In relation to the extension of the procedure, the Commission received comments from the CCIPB on 30 April 2012 ⁽⁸⁾, from AMS on 30 April 2012 ⁽⁹⁾, and from Ryanair on 30 April 2012 ⁽¹⁰⁾. By letter of 31 May 2012, the Commission forwarded these comments to France for its response. By letter of 13 June 2012, France indicated that it had no response to make.
- (16) By letter of 26 April 2012, the Commission asked the French authorities to provide further information. The French authorities gave their response by letter of 10 May 2012.
- (17) By letter of 10 April 2013, Ryanair forwarded to the Commission two notes prepared by the company Oxera and an analysis prepared by Professor Damien P. McLoughlin. By letter of 3 May 2013, the Commission forwarded these documents to the French authorities for their response. By letter of 7 June 2013, France indicated that it had no response to make.

⁽⁴⁾ On 14 April 2008 the Commission asked the CCIPB to provide a non-confidential version of its comments. On 16 April 2008 the CCIPB confirmed that its comments did not contain any confidential information that could not be forwarded to the French authorities.

⁽⁵⁾ On 10 April 2008 the Commission asked AMS to provide a non-confidential version of its comments. On 19 May 2008 AMS provided the Commission with the non-confidential version of its comments.

⁽⁶⁾ By letter of 13 March 2008, Air France asked for an extension to the time-limit for submitting its comments on the decision of 28 November 2007. The Commission agreed to this extension on 17 March 2008.

⁽⁷⁾ OJ C 96, 31.3.2012, p. 22.

⁽⁸⁾ On 14 May 2012 the CCIPB confirmed that its comments did not contain any confidential information that could not be forwarded to the French authorities.

⁽⁹⁾ On 1 May 2012 AMS provided the Commission with the non-confidential version of its comments.

⁽¹⁰⁾ Ryanair confirmed that its comments did not contain any confidential information.

- (18) By letter of 14 November 2013, the Commission asked France to provide further information.
- (19) By letter of 16 December 2013, the Commission forwarded the consultant's report to the French authorities for their response. France did not respond within the set time limit.
- (20) On 19 December 2013 France asked for an extension to the time limit set for responding to the information request of 14 November 2013. The Commission agreed to extend the time limit to 23 January 2014. As no response was received within this time limit, the Commission sent a reminder to France by letter of 24 January 2014 and allowed it a further period of 10 working days. France gave its response by letter of 6 February 2014.
- (21) The Commission received comments from Ryanair on 20 December 2013, 17 January 2014 and 31 January 2014. These additional comments were forwarded by letter to France on, respectively, 9 January 2014, 23 January 2014 and 4 February 2014. In its letters of 29 January 2014, 3 February 2014 and 21 May 2014, France informed the Commission that it had no response to make.
- (22) On 24 February, 13 March and 19 March 2014, following the adoption of the Guidelines on State aid to airports and airlines ⁽¹¹⁾ (hereinafter 'the new Guidelines'), the Commission called on France and the interested parties to submit their comments on the application of the new Guidelines to this case. France submitted comments on 19 March 2014.
- (23) In addition, on 15 April 2014 a notice was published in the *Official Journal of the European Union* ⁽¹²⁾ inviting Member States and interested parties to submit their comments, including in this case, in the light of the entry into force of the new Guidelines. Air France, the non-governmental organisation Transport & Environment and the CCIPB submitted comments within the set time limit. By letter of 28 May 2014, the Commission forwarded these comments to the French authorities. In its letter of 6 June 2014, France informed the Commission that it had no response to make.
- (24) By letter of 27 February 2014, the Commission asked France to provide further information. On 17 March 2014 France asked for an extension to the time limit set for responding to the information request of 27 February 2014. The Commission agreed to extend the time limit to 27 April 2014. France gave its response by letter of 25 April 2014 ⁽¹³⁾.
- (25) By letter of 16 May 2014, the Commission asked France for further information, which it provided by letter of 6 June 2014.

2. GENERAL INFORMATION ON THE AIRPORT

- (26) As indicated in the decision opening the formal investigation procedure, Pau-Pyrénées airport (hereinafter 'Pau airport') is situated in the department of Pyrénées-Atlantiques, within the Aquitaine region.
- (27) The airport was initially owned by the State, which entrusted its operation to the CCIPB through a public equipment concession granted until 31 December 2015 by an Interministerial Order of 12 March 1965 (hereinafter 'the 1965 Order'), to which terms and conditions defining, in particular, the respective obligations of the State and the CCIPB are annexed. The interministerial order and the terms and conditions of the concession have been amended on four subsequent occasions.
- (28) The CCIPB is a member of the network of chambers of commerce and industry. In France, the chambers of commerce and industry are public administrative bodies. In essence, a chamber of commerce and industry represents the general interests of commerce, industry and services within its area. The tasks and powers of the chambers of commerce and industry are laid down by law. These chambers are subject to the administrative and financial scrutiny of the State, through the Minister for Finance and Infrastructure and the Minister for Planning and Local Administration, each acting within his area of responsibility. According to Article R.712-2 of the Commercial Code, 'regional chambers of commerce and industry and local chambers of commerce and industry shall be supervised by the regional prefect, assisted by the regional public finance officer.' The supervisory authority must therefore be informed of certain important decisions specified in the regulations (regarding, for example, budget, recourse to borrowing, granting of guarantees to third parties, transfers, acquisitions or extensions of financial holdings in civil or commercial companies, etc.). Such acts may be implemented only after having been notified to the supervisory authority, which may object to them. The chambers of commerce and industry are managed by an elected assembly of representatives from undertakings within their area.

⁽¹¹⁾ OJ C 99, 4.4.2014, p. 3.

⁽¹²⁾ OJ C 113, 15.4.2014, p. 30.

⁽¹³⁾ With this letter, France also submitted a note from the CCIPB, but indicated that the French authorities did not agree with the assessment contained in the note. In any event, this note essentially reiterates the comments previously submitted directly to the Commission by the CCIPB.

- (29) Specific accounts are kept for Pau airport, which are separate from the general accounts of the CCIPB.
- (30) On 1 January 2007, pursuant to Article 28 of Act No 2004-809 of 13 August 2004 on local freedoms and responsibilities, the State transferred ownership of the airport to a group of local authorities known as the *syndicat mixte de l'aéroport Pau-Pyrénées* (hereinafter the '*syndicat mixte*'). The Regional Council of Aquitaine, the Departmental Council of Pyrénées-Atlantiques, the Urban Community of Pau Porte des Pyrénées, and 14 municipal groups are members of this *syndicat mixte*. An agreement was signed to this end between the State and the *syndicat mixte*, which entered into force on 1 March 2007. This agreement was amended on 12 August 2009.
- (31) On becoming the owner of the airport, the *syndicat mixte* replaced the State as concession authority. Pursuant to Article 28-VI-2^o of the aforementioned Act of 13 August 2004, it took over the previous agreements, and in particular the concession agreement signed with the CCIPB. The CCIPB was therefore the airport operator before ownership was transferred to the *syndicat mixte*, and has remained so since.
- (32) The airport handles both civil and military aircraft. The following table shows the total number of inbound and outbound passengers having used the airport over the 2000-2013 period.

Table 1

Traffic at Pau airport (number of passengers) over the 2000-2013 period

| Year | Total |
|------|---------|
| 2000 | 613 333 |
| 2001 | 600 084 |
| 2002 | 585 410 |
| 2003 | 682 428 |
| 2004 | 720 588 |
| 2005 | 729 409 |
| 2006 | 763 942 |
| 2007 | 763 018 |
| 2008 | 817 511 |
| 2009 | 691 037 |
| 2010 | 673 697 |
| 2011 | 641 496 |
| 2012 | 609 535 |
| 2013 | 645 577 |

Source: Information provided by France and the CCIPB website.

- (33) Ryanair began operating at Pau airport in April 2003. During the period under review (2003 to 2011), Ryanair operated routes to London, Charleroi, Bristol and Beauvais.
- (34) In 2010 Ryanair's flights accounted for approximately 16 % of the airport's passengers. Ryanair stopped flying to Pau when its contractual commitments to the airport expired on 1 April 2011.

- (35) Aside from Ryanair, the main commercial airline using Pau airport is Air France. It operates most of the flights from Pau and accounts for the bulk of the traffic at this airport (approximately 80 % of passengers).
- (36) Other airlines have used the airport during the period under review, in particular Transavia CV (hereinafter 'Transavia'), which is a subsidiary of the Air France KLM group.

3. MEASURES COVERED BY THE DECISION OPENING THE FORMAL INVESTIGATION PROCEDURE AND THE CONSULTANT'S REPORT

- (37) The measures covered by the decision opening the formal investigation procedure particularly related to the operation of the route between Pau airport and London Stansted airport. The first measure was the marketing services agreement signed by the CCIPB with AMS in 2005, and the second measure was the airport services agreement signed by the CCIPB with Ryanair on the same date. These two agreements (hereinafter 'the 2005 agreements') were signed on 30 June 2005 for a term of 5 years, with the possibility of extension for a further 5 years.

3.1. 2005 AGREEMENTS SIGNED WITH AMS AND RYANAIR

3.1.1. MARKETING SERVICES AGREEMENT SIGNED WITH AMS FOR THE PAU-LONDON STANSTED ROUTE

- (38) AMS is a Ryanair subsidiary that has an exclusive licence to offer marketing services on the Ryanair website www.ryanair.com. The web marketing services agreement signed with AMS (hereinafter 'the 2005 marketing services agreement'), notified by France, states that 'This Agreement is rooted in Ryanair's commitment to operate on a daily basis a route between Pau and London Stansted' (Article 1). The purpose of the marketing services agreement is to 'determine the conditions under which Airport Marketing Services will provide CCIPB with specific marketing services intended to promote the various tourist and business attractions in the Pau/Bearn region'. The agreement stipulates that 'The primary tool for the provision of marketing services under this Agreement is the website www.ryanair.com which allows for direct targeting of the potential passengers of the low fares airline Ryanair' (Article 1.1).
- (39) The 2005 marketing services agreement defines how AMS is to provide certain advertising services on Ryanair's website⁽¹⁴⁾. This package of services involves:
- 'suitable space on the Pau destination page of www.ryanair.com for 5 (five) 150 word paragraphs within the Airport Marketing Services Top Five Things To Do section (cost of one paragraph per year as per the rate card: EUR 20 000)',
 - 'suitable space in the right hand bar on the Pau destination page of www.ryanair.com for the presence of 1 (one) link to the website designated by CCIPB (cost of one link per year as per the rate card: EUR 15 000)',
 - 'suitable space below the Top Five Things To Do section on the Pau destination page of www.ryanair.com for 7 (seven) links to the websites designated by CCIPB (cost of one link per year as per the rate card: EUR 10 000)',
 - '45 (forty five) days per year of the presence of a link to the website designated by CCIPB on the English homepage of www.ryanair.com (cost per day as per the rate card: EUR 6 000)' (Article 3).
- (40) On the basis of this agreement, the CCIPB undertook to pay EUR 437 000 per year to AMS throughout the term of the agreement.

3.1.2. AIRPORT SERVICES AGREEMENT SIGNED WITH RYANAIR FOR THE PAU-LONDON STANSTED ROUTE

- (41) The airport services agreement (hereinafter 'the 2005 airport services agreement') signed with Ryanair sets out how the infrastructure of Pau airport is to be made available to the carrier, particularly with regard to groundhandling services and the provision of private premises. This agreement concerns the London Stansted-Pau route launched in April 2003. It replaces the initial agreement signed on 28 January 2003, which was declared void by Pau Administrative Court on 3 May 2005.
- (42) The purpose of this agreement is to 'determine both the operational and financial conditions under which Ryanair will establish and operate international commercial flights to and from the Airport. Moreover, this Agreement sets forth conditions of landing, groundhandling and other services offered by the Airport to Ryanair' (Articles 1.1 and 1.2).

⁽¹⁴⁾ <http://www.ryanair.com>

- (43) According to Article 4 of the 2005 airport services agreement, Ryanair will operate daily scheduled air services on the London-Pau route and will pay the airport the charges as detailed in Articles 7.1 (regulated aeronautical charges) and 7.2 (non-regulated aeronautical charges).

3.2. CONSULTANT'S REPORT

- (44) In his report, the consultant particularly examined the nature of marketing services and the details of airport services covered by agreements signed by the CCIPB with airlines, and in particular the 2005 agreements that it signed with Ryanair and AMS⁽¹⁵⁾.

3.2.1. MARKETING SERVICES AGREEMENTS SIGNED WITH RYANAIR AND AMS

- (45) The consultant summarised all the marketing services agreements for Pau airport that were signed by the CCIPB with Ryanair and AMS between 2003 and 2008. Among these, only the 2005 agreements were covered by the opening decision.
- (46) In particular, the consultant carried out the following tasks.
- He checked to what degree the rates laid down in the marketing services agreements were consistent with the online rates published on the AMS website (<http://airportmarketingservices.com/pdfs/ratecard.pdf>). According to the consultant, the rates listed on the AMS website are consistent with the rates set in the 2005 marketing services agreement.
 - He analysed the correlation between the amounts invoiced by AMS and Ryanair's level of activity at Pau. According to the consultant, the charges for marketing services seem to develop in line with the number of flights operated.
 - He compared the services provided by AMS to the CCIPB with other web marketing services commonly offered in similar ways.
- (47) The consultant questioned whether it was in the interests of the CCIPB to sign an agreement for the purchase of such marketing services for the following reasons. Firstly, the Ryanair website is essentially a ticket sale website, and not a general travel sale website. According to the consultant, the Ryanair website therefore primarily seems to be comparable to the websites of other airlines that generally host only a limited amount of paid advertising, with airports not featuring among the advertisers. Secondly, the consultant notes that airports are not comparable to other potential advertisers on the websites of airlines such as Ryanair, given that the services provided by the airport to Ryanair passengers are by nature indissociable from the services of Ryanair itself, unlike ancillary services such as accommodation or car rental. Lastly, the consultant generally questions whether it is rational behaviour for airports to spend their own money with airlines in order to attract customers on flights to and from the airport, when these extra passengers will directly benefit the said airlines.
- (48) For these reasons, the consultant concludes that, for an airport, there is only limited commercial interest in advertising on the Ryanair website.
- (49) Furthermore, according to the consultant, assuming that such interest does exist, this cannot be measured by the airport or by Ryanair. The consultant also notes that the marketing information on the Ryanair website is fairly brief and unsophisticated, and that if the advertising had been deemed effective (either by the airport or by Ryanair), investment to improve its quality and appearance would have been made. The consultant therefore concludes that the commercial value of the marketing services is not crucially important to the parties to the agreements.
- (50) Conversely, in the consultant's opinion, the destination region could have effectively benefited from advertising services encouraging Ryanair's customers to spend more time or consume more in the region. However, as the agreement was signed between the CCIPB and Ryanair or its subsidiary, the consultant takes the view that any benefits to the region must be excluded from the analysis of the agreement.
- (51) According to the consultant, the incongruity between the highly volatile nature of the online marketing market and the AMS fixed rate card also calls into question this undertaking's true purpose. According to Ryanair, the agreement with AMS is optional and airport operators would not sign it if it had no commercial value. However, the consultant wonders about the pressure exerted by Ryanair during negotiations with the airport concerning the operation of routes, particularly when several nearby airports (for example Tarbes and Biarritz for Pau) are in competition to attract Ryanair.

⁽¹⁵⁾ In his report, the consultant examined the various marketing services agreements signed by the CCIPB with Ryanair and AMS and the agreement signed with Transavia for the period between 2002 and 2008, the airport services agreements signed between 2002 and 2005, the airport's financial results between 2002 and 2007, and the impact of the Pau-London Stansted route operated by Ryanair on the airport's accounts between 2003 and 2008. This report therefore has a wider scope than the opening decision.

- (52) According to the consultant, all these factors indicate that Ryanair's strategy underlying the signature of marketing services agreements is to obtain a subsidy from the airport to keep its prices low.

3.2.2. MARKETING SERVICES AGREEMENTS SIGNED WITH TRANSAVIA

- (53) The consultant also examined a marketing services agreement signed between the CCIPB and the airline Transavia in 2006. This agreement is not covered by the opening decision.

3.2.3. AIRPORT SERVICES AGREEMENTS

- (54) The consultant analysed a number of airport services agreements signed between the CCIPB and various airlines (namely Ryanair, Air France and Transavia) during the period between 2003 and 2005.
- (55) According to the consultant, the prices of airport services are determined as follows: regulated charges (lighting charge, landing charge, parking charge and passenger charge) are set out in a price list applicable to all the airlines. The applicable charge is updated every year using a rate that depends on negotiations within the airport's economic advisory committee. According to the consultant, the regulated charges cannot therefore differ between the airlines.
- (56) According to the consultant, non-regulated charges (for groundhandling services) vary by airline and depend on bilateral commercial negotiations.
- (57) The consultant compared the non-regulated services invoiced to Ryanair with the same services invoiced to other airlines (Air France and Transavia). This comparison is based on both the nature of the services and the price applied.
- (58) The consultant found that the groundhandling services covered by the agreements of these two airlines seem to be duly provided and that there is a real difference in the nature of the services provided to the various airlines. Air France receives a more comprehensive package of services. Ryanair benefits from a lower flat-rate charge (but for more services) than Transavia.
- (59) However, according to the consultant, who compared the flat-rate charges applied to Ryanair and Transavia and the charge applied to Air France for comparable services with a comparable joint service, Ryanair benefits from a lower charge (EUR [...] (*)) than that applied to Air France (EUR [...]) or Transavia (EUR [...]). The price paid is seemingly around [...] % of that paid by other airlines.
- (60) According to France, the comparison of airport services (non-regulated services) made by the consultant does not correctly summarise the results of the various negotiations conducted by the CCIPB. France cites a number of examples justifying this charging, in particular where Ryanair does not benefit from certain services offered to Air France.

4. MEASURES COVERED BY THE EXTENSION DECISION

- (61) The Commission took the view that the formal investigation procedure needed to be extended and that all the agreements signed by the CCIPB with AMS and Ryanair should be examined for the entire period during which Ryanair operated from Pau airport (2003 to 2011) in order to determine whether the agreements that the CCIPB signed with AMS and Ryanair constituted State aid.
- (62) The Commission also decided to extend the formal investigation procedure to the agreement that the CCIPB signed with the airline Transavia on 23 January 2006 and to various financial contributions made by public entities to the airport during the period under review, a list of which was sent to the Commission by France by letter of 30 May 2011.
- (63) These measures are detailed below in Sections 4.1 to 4.3.

(*) Business secret.

4.1. AGREEMENTS SIGNED BY THE CCIPB WITH AMS AND RYANAIR

- (64) The extension decision covers various agreements signed by the CCIPB with AMS and Ryanair between 2003 and 2011.

4.1.1. AGREEMENT OF 28 JANUARY 2003

- (65) The agreement signed on 28 January 2003 was entered into between the CCIPB and Ryanair directly (and not with AMS). This agreement contains provisions on airport services and marketing services.
- (66) Article 2 of this agreement sets out Ryanair's obligations towards the CCIPB as well as the amount of the airport charges. Article 3 of the agreement stipulates the CCIPB's obligations and indicates, in particular, that the latter must carry out the following at its own expense:
- (a) 'provide or procure the provision of airport terminal/infrastructure services for the Services as more particularly set out in Annex A attached hereto;
 - (b) perform such public relations and marketing functions as more particularly set out in Annex B attached hereto;
 - (c) pay Ryanair the sum of eighty thousand euros (EUR 80 000,00) on a "one-off" basis to launch this new route after the signature of the contract.
 - (d) In consideration of the marketing of Pau through internet links provided to CCIPB on Ryanair's website, through the advertising of low fares to and from Pau in the print media, and through other means such as radio, outdoor and television advertising as selected by Ryanair, CCIPB shall pay Ryanair the sum of eleven euros (EUR 11,00) per passenger departing from Pau Airport on the Services monthly in arrears and/or credited against payments due from Ryanair to CCIPB under the provisions of Clause 2(b) above but limited to four hundred thousand euros (EUR 400 000,00) per annum per daily rotation of the Services.
 - (e) This Agreement holds only for the Pau-London route on the minimum basis of one flight per day, and 364 days per annum. If the Pau-London route develops to the extent that there are several frequencies per day, CCIPB shall not pay any supplement. If, of a common accord, other routes develop to Germany, Belgium, Ireland or Italy, this Agreement would be replicated with the same launch payment of eighty thousand euros (EUR 80 000,00), and a maximum of four hundred thousand euros (EUR 400 000,00) per annum, calculated on the basis of eleven euros (EUR 11,00) per departing passenger. Each new route shall form the subject of a new Agreement or of an amendment to this Agreement'.
- (67) Annex A to the Agreement provides a list of the groundhandling and related services applicable to flights operated by Ryanair. Annex B contains provisions on the public relations, sales and marketing functions of the airport. The part on sales and marketing states in particular:

'Airport to provide sales support and assistance to assist Ryanair during periodic sales missions in the catchment area of the Airport, including free use of an office, phone and fax lines for the Ryanair team. Airport to monitor all opportunities for budget advertising (outdoor, newspapers, TV, radio and other) that the Airport sees in their region as a good opportunity for Ryanair'.

- (68) This agreement was declared void by Pau Administrative Court on 3 May 2005⁽¹⁶⁾ for the following reasons:

The imbalance ... identified between the reciprocal undertakings of the parties to the agreement, having regard to the vagueness of Ryanair Limited's obligations in terms of promoting abroad the town of Pau as a tourism destination and to the fact that there is no provision for a refund, even in part, of the sums paid if the objectives set out are not achieved, means that the decision in dispute is regarded as constituting financial aid to the benefit of Ryanair Limited.

The decision in dispute, which approves the agreement granting financial aid to the benefit of Ryanair Limited, is, in the absence of prior notification of the said decision to the Commission of the European Communities, unlawful and must be declared void.

⁽¹⁶⁾ Pau Administrative Court, 3 May 2005, *Air Méditerranée*. The judgment delivered by Pau Administrative Court stemmed from an action brought in September 2003 by Air Méditerranée, a charter airline operating from Tarbes airport, which is near to Pau airport. Air Méditerranée considered itself injured by what it regarded as unfair competition with its own routes between London and south-west France.

(69) Pau Administrative Court found in its judgment of 3 May 2005 that the CCIPB, which operates Pau airport, had undertaken to pay Ryanair, without any consideration, EUR 80 000 to launch its London Stansted-Pau route in 2003. The CCIPB had also undertaken to pay EUR 11 per passenger to Ryanair, up to an annual limit of EUR 400 000, as consideration for activities intended to promote the town of Pau. The court therefore concluded that the agreement constituted financial aid to the benefit of Ryanair.

(70) This 2003 agreement was therefore replaced by the two 2005 agreements covered by the decision opening the formal investigation procedure.

4.1.2. 2005 AGREEMENTS ⁽¹⁷⁾

(71) The 2005 agreements were examined by the Aquitaine Regional Audit Chamber (hereinafter 'the CRC').

(72) The CRC's final comments report on the CCIPB was discussed on 19 October 2006 and concerned the financial years from 2001 onwards. Part of this report concerns the aid granted to a low-fare airline (Chapter 3 of the report). Prior to this report, the CRC examined the marketing services agreement. In its final comments report, the CRC made the following comments in particular:

'In order to sidestep the effects of the Administrative Court's decision [concluding that the 2003 agreement with Ryanair resulted in unlawful State aid], the Chamber of Commerce and Industry has resorted to a new legal framework.'

'AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives.'

'Using the reasoning given by the administrative courts (Strasbourg Administrative Court, 24 July 2003, *Brit Air v Strasbourg and Bas-Rhin Chamber of Commerce and Industry*; Strasbourg Administrative Appeal Court, 18 December 2003, *Strasbourg and Bas-Rhin Chamber of Commerce and Industry v Brit Air*), the imbalance between the undertakings of the parties to the agreement is clear. Advertising on its website also benefits Ryanair and cannot constitute direct consideration for the financial undertakings made by the Chamber [the CCIPB].'

(73) According to the comments report, an imbalance ... has been identified between the reciprocal undertakings of the parties to the agreement.

(74) The report states that, despite the arguments put forward by AMS and Ryanair, the CRC maintains its position. It concludes as follows:

'Subject to the appraisal of the competent court, it considers that this services agreement actually constitutes financial aid to Ryanair and that it is unlawful, given that this aid has not been previously notified to the Commission.'

(75) The report also considers the effectiveness of the aid (Chapter 3.2) and its efficiency (Chapter 3.3). It states that the economic impact of the Pau-London Stansted route on the Béarn region is indisputable:

'The target of 50 000 passengers flying from London that was set in 2003 has almost been achieved in the second year of operation. According to a study conducted by the Chamber of Commerce and Industry in 2005, the economic impact of the route is apparently close to EUR 8 million per year. A panel representing the economic activities linked to tourism has been formed to measure this impact. Around 700 professionals from Béarn have been questioned about the contribution made by British customers to their turnover. The route's contribution to the total number of British tourists visiting Béarn has been assessed through a passenger survey and data from the departmental tourism committee.'

(76) With regard to the efficiency of the aid, the report states that the total cost of the route to the Chamber of Commerce and Industry in 2004, taking into account the revenue generated through this activity, is estimated at close to EUR 360 000.

(77) The CRC questions whether the CCIPB could achieve the same result in terms of the economic development of Béarn by granting less financial aid to Ryanair. In this context, the report refers to the compatibility rules set out in the 2005 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ⁽¹⁸⁾ (hereinafter the '2005 Guidelines'). The report concludes in this respect that these rules have not been observed.

⁽¹⁷⁾ These agreements were already covered by the opening decision, see Section 3.1.

⁽¹⁸⁾ OJ C 312, 9.12.2005, p. 1.

4.1.3. AGREEMENTS SIGNED BY THE AIRPORT WITH AMS AND RYANAIR AFTER 2005

- (78) According to the French authorities, the various agreements or amendments to the 2005 agreements signed by the CCIPB with AMS and Ryanair after 2005 are as follows:
- A marketing services agreement signed on 25 September 2007 for an initial term of 5 years from its date of signature, with the two parties agreeing to 'meet to discuss the possibility of the continuation of the cooperation between CCIPB and AMS' 'at least 6 months prior to the expiry of the initial term'. This promotion is linked to the operation of a Pau-Charleroi route with three flights per week per full year of operation. In return for a link to the website designated by the CCIPB on the Belgian and Dutch homepage of the Ryanair website (www.ryanair.com), the CCIPB pays AMS the sum of EUR [...] per year. The route was launched on 30 October 2007. This agreement was amended by an exchange of correspondence on 16 June 2009 increasing the promotion effort to EUR [...] from 1 January 2009 without any change to the services.
 - An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 25 September 2007 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Charleroi route for a term of 5 years.
 - An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 17 March 2008 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Bristol route for a term of 1 year.
 - A marketing services agreement signed on 31 March 2008 for a period between 16 May 2008 and 13 September 2008, with the two parties agreeing to 'meet to discuss the possibility of the continuation of the cooperation between CCIPB and AMS' 'at least 3 months prior to the expiry of the initial term'. The promotional activities covered by this agreement are linked to Ryanair's commitment to operate a Pau-Bristol route with three flights per week over the same period. In return for a link to the website designated by the CCIPB on the English homepage of www.ryanair.com for 8 days, the CCIPB pays AMS the sum of EUR [...].
 - Following discussions on 15 June 2009, the CCIPB authorised its chairman to amend the amount of the 2005 marketing services agreement by limiting it to EUR [...] for 2009, which was linked to a reduction in the number of flights planned by Ryanair for its Pau-London route to 211.
 - An amendment to the 2005 airport services agreement was made in the form of a letter from the CCIPB of 16 June 2009 accepting the application of the conditions set out in the 2005 airport services agreement to the Pau-Bristol route for the 2009 summer season.
 - A marketing services agreement signed on 16 June 2009 for a period between 1 April 2009 and 24 October 2009, which could be renewed subject to agreement 3 months before its expiry. The promotional activities covered by this agreement are linked to the operation of a Pau-Bristol route with two flights per week, which is 60 projected flights over the same period. In return for a link to the website designated by the CCIPB on the English homepage of www.ryanair.com for 9 days, the CCIPB pays AMS the sum of EUR [...]. The route was withdrawn in October 2009.
 - A marketing services agreement signed on 28 January 2010 'for an initial term starting on the date of its signature and ending one year after the date of the launch of the first service', which could be 'extended for an additional period of one year'. The promotional activities covered by this agreement are linked to a Pau-London Stansted route from 30 March 2010 with three flights per week and a minimum of 220 flights, to a Pau-Charleroi route from the same date with three flights per week and a minimum of 100 flights, and a Pau-Beauvais route from April 2010 with three flights per week and a minimum of 100 flights. In return for a link to the website designated by the CCIPB on the English, Belgian, Dutch and French homepages of www.ryanair.com for periods of 25 or 45 days, the CCIPB pays AMS the sum of EUR [...].
- (79) The services offered by AMS and their financial conditions are indicated in Article 3 of the various marketing services agreements. According to the French authorities, the amounts paid to AMS vary due to the signature of new agreements linked to new routes (Charleroi, Bristol) and changes made to the projected flight schedules, particularly for the Pau-London Stansted route. When the renewed agreements of 30 June 2005 and 25 September 2007 expired, a new agreement was signed that took into account all the routes operated from 30 March 2010.

- (80) According to the French authorities, no new airport services agreement was signed after the 2005 airport services agreement expired in April 2010. The charges invoiced to Ryanair between April 2010 and April 2011 were therefore those adopted by the economic advisory committee for the regulated charges and those stipulated by the 2005 agreement for groundhandling services, as negotiations on a new agreement had failed. The French authorities have indicated that only the marketing services were the subject of a new agreement.
- (81) According to France, the Pau-London, Pau-Charleroi and Pau-Beauvais routes covered by the airport services agreement were launched on 30 March 2010 for the first two routes and in April 2010 for the third route. The initial term therefore corresponded to the 2010/2011 winter schedule. By letter of 14 February 2011, the CCIPB noted that the agreement had not been extended for an additional period of 1 year, within the set time limits, and asked AMS to take into account the automatic expiry of the agreement on 1 April 2011.
- (82) In its letters of 30 May 2011 and 10 May 2012, France provided a summary of the sums paid to AMS (or to Ryanair for the agreement of 28 January 2003) by the CCIPB and other public entities during the period between 2003 and 2011. The total amount of these payments between 2003 and 2011 was EUR [4 000 000-6 000 000] under the agreements referred to in recitals 64 to 81. The exact sums paid by the CCIPB and other public entities to AMS (or to Ryanair) are set out in Table 2 below.

Table 2

Subsidies to AMS or Ryanair for each route operated

(thousand EUR)

| Subsidy paid to AMS or Ryanair for each route operated | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | Total |
|--|-------|-------|-------|------------|-------|-------|-------|-------|-------|----------------------|
| Pau-London | [...] | [...] | [...] | 437 | [...] | [...] | [...] | [...] | [...] | [...] |
| Pau-Charleroi | | | | | [...] | [...] | [...] | [...] | [...] | [...] |
| Pau-Bristol | | | | | | [...] | [...] | | | [...] |
| Pau-Beauvais | | | | | | | | [...] | [...] | [...] |
| Total of the payments made to AMS or Ryanair | [...] | [...] | [...] | 437 | [...] | [...] | [...] | [...] | [...] | [4 000-6 000] |

Source: Letters from France of 30 May 2011 and 10 May 2012 ⁽¹⁾.

⁽¹⁾ For 2011, in the absence of a precise breakdown by route, the Commission has distributed the total amount between the various routes in the same proportions as observed in 2010.

4.2. AGREEMENT SIGNED BY THE CCIPB WITH TRANSAVIA

- (83) The CCIPB signed an agreement with the airline Transavia on 23 January 2006. This agreement had a term of 3 years from 26 April 2006, which was the start date of the Pau-Amsterdam route, and could be renewed for an additional period of 2 years. It was tacitly renewed in April 2009, but was terminated in October 2009 following Transavia's decision to withdraw its services.
- (84) This agreement provides for payments for marketing services of EUR 250 000 for the first 2 years, with 156 outbound flights per year. If the number of flights is less than 156 per year, the payment must be proportionally adjusted. For the third year, the payment is EUR [...] per outbound passenger (with an annual limit of EUR [...]).
- (85) The agreement also provides for a renewal option for two additional years, with a payment of EUR [...] per outbound passenger for the fourth year, and EUR [...] per outbound passenger for the fifth year.
- (86) The agreement resulted in payments totalling EUR [700 000-900 000] by the CCIPB to Transavia for the marketing services provided by the latter between 26 April 2006 and 29 October 2009.

4.3. FINANCIAL CONTRIBUTIONS FROM VARIOUS PUBLIC ENTITIES TO PAU AIRPORT

- (87) In its letter of 30 May 2011, France provided the Commission with a summary of all the subsidies granted to the airport through public resources. The measures covered by the extension of the procedure are described in recitals 88 to 107. According to France, the airport does not receive any state funding or public aid intended to balance the airport's operating accounts.
- (88) In order to assess these with regard to the applicable provisions on State aid, the 'equipment' subsidies paid by the various public entities must be distinguished from the subsidies granted by the State to cover the costs arising, according to the French authorities, from sovereign tasks.

Table 3
Pau-Pyrénées Airport: Financial contributions received by the airport from various public entities during the 2000-2010 period

| Nature of Subsidy | (thousand EUR) | | | | | | | | | | | |
|--|---|----------------------------|---------------------------------------|--------------------------|-----------|------|------------|------------|------|--------------------|------|--------------|
| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | Total |
| FIATA State Subsidy (Sovereign Tasks) | | | 396 | | 11 | | 400 | 300 | | | | 1 107 |
| State Equipment Subsidy (Sovereign Investment Grant) | 166 (SSLIA premises ⁽¹⁾) | | 1 782 (2 CT Scanners + Vehicle) SSLIA | 466 (SSLIA Vehicle) | | | | | | | | 2 414 |
| Total Equipment Subsidy for Sovereign Tasks | 166 | | 2 178 | 466 | 11 | | 400 | 300 | | | | 3 521 |
| Pyrénées-Atlantiques Departmental Council (Equipment grant) | 1 326 (freight terminal) | | 91 (runway equipment) | | | | | | | 478 (taxiway work) | | 1 895 |
| Aquitaine Regional Council | 1 413 (freight terminal) | 2 164 (passenger terminal) | 232 (terminals) | | | | | | | 479 (taxiway work) | | 4 288 |
| Group of Municipalities and Pau Urban Community | 1 479 (freight and passenger terminals) | 1 683 (passenger terminal) | 643 (passenger terminal) | 5 (terminals) | | | | | | | | 3 810 |
| ERDF | | 1 559 (passenger terminal) | 1 184 (terminals) | 291 (passenger terminal) | | | | | | 653 (taxiway work) | | 3 687 |

| Nature of Subsidy | (thousand EUR) | | | | | | | | | | | Total | |
|--|----------------|--------------|--------------|----------------------------|------------|--------------|------------|------------|------------|-------------------------------------|-----------------------------------|-------|---------------|
| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | | |
| Gaz de France | | | | 38 (cogeneration plant) | | | | | | | | | 38 |
| Syndicat Mixte de l'Aéroport de Pau-Pyrénées | | | | | | | | | | 4 030 (runway and lighting re-pair) | 100 (runway and lighting re-pair) | | 4 130 |
| Total Equipment Subsidy (Excluding Sovereign Tasks) | 4 218 | 5 406 | 2 150 | 334 | | 1 610 | | | | 4 030 | 100 | | 17 848 |
| Pyrénées-Atlantiques Departmental Council (Repayment of loan capital) | 97 | 272 | 113 | 122 | 98 | 77 | | | | | | | 779 |
| Investments made | 3 470 | 8 656 | 5 781 | 1 352 | 272 | 2 744 | 260 | 315 | 416 | 5 419 | 167 | | 28 852 |

(1) Service de Sécurité et de Lutte contre l'Incendie des Aéronefs (Aircraft Fire and Safety Service).

4.3.1. 'EQUIPMENT' SUBSIDIES

- (89) During the 2000-2010 period, the airport received payments (hereinafter 'equipment subsidies') from the *syndicat mixte*, the State, various local authorities, the European Regional Development Fund ('ERDF') and Gaz de France to finance a range of investments (passenger terminal, runway repair, lighting repair, freight terminal, cogeneration plant, etc.) totalling approximately EUR 17 800 000 (see Table 3 above).
- (90) The Departmental Council of Pyrénées-Atlantiques gave the airport an 'equipment grant' of EUR 1 895 000 to finance the freight terminal, runway equipment and taxiway work. France has also indicated that, between 2000 and 2005, the Departmental Council of Pyrénées-Atlantiques paid EUR 779 000 to repay the capital of a loan. France states that this measure stemmed from an agreement on the Pau airport financing plan, signed on 5 November 1990 between the local authorities and the CCIPB. This plan, totalling a maximum of EUR 5 680 000, covered work to upgrade certain areas and lighting and also a terminal extension. According to the agreement, the local authorities' financing could take the form of either an equipment grant or repayment of loans taken out by the operator to finance investments, or a combination of both. The sum of EUR 779 000 mentioned above was used to repay the capital of a loan that the Departmental Council of Pyrénées-Atlantiques had undertaken to cover under the 1990 agreement, and which expired in 2005.
- (91) The airport received four subsidies totalling EUR 4 288 000 from Aquitaine Regional Council to finance the freight and passenger terminals and taxiway work.
- (92) The Group of Municipalities and Pau Urban Community granted EUR 3 810 000 to the airport to finance the freight and passenger terminals.
- (93) The ERDF subsidised the development of the passenger terminal and taxiway work to the tune of EUR 3 687 000.
- (94) Gaz de France also granted Pau airport EUR 38 000 to finance cogeneration equipment in 2003. When this financing was granted, Gaz de France was a public industrial and commercial body.
- (95) Lastly, the *syndicat mixte* financed a programme of investments including repairs to the runway and lighting and an extension to the car park, in the amount of EUR 4 130 000.
- (96) Table 4 below gives an overview of the various measures or, in other words, the various legal acts having resulted in the equipment subsidies described above. For these various measures, it gives the dates of granting of the equipment subsidy, nature of the investments financed and total costs of these investments, total amounts of the equipment subsidies received under these various measures, and the periods during which these amounts were paid.

Table 4

Overview of the measures having resulted in the equipment subsidies

| Date of granting of the subsidy | Public entities having granted the subsidy | Nature of the investments | Total cost of the investments (million EUR) | Total amounts of the subsidy (million EUR) | Payment period |
|---------------------------------|--|---|---|--|----------------|
| 1999-2000 | Departmental Council Regional Council Group of Municipalities and Pau Urban Community Gaz de France | Freight and passenger terminals, runway equipment, cogeneration plant | 15,3 | 11,9 | 2000-2003 |

| Date of granting of the subsidy | Public entities having granted the subsidy | Nature of the investments | Total cost of the investments (million EUR) | Total amounts of the subsidy (million EUR) | Payment period |
|---------------------------------|---|---|---|--|----------------|
| 2004 | Departmental Council Regional Council European Union (ERDF) | Taxiway work | 2,6 | 1,6 | 2005 |
| 2009 | <i>Syndicat Mixte</i> | Renovation of runway and lighting, car park extension | 5,1 ⁽¹⁾ | 4,1 | 2009-2010 |

Source: Documents produced by France.

⁽¹⁾ EUR 450 000 of this figure was for the car park extension.

4.3.2. STATE SUBSIDIES INTENDED, ACCORDING TO FRANCE, TO FINANCE SOVEREIGN TASKS — SYSTEM OF FINANCING SOVEREIGN TASKS IN FRENCH AIRPORTS

(97) Table 3 also shows the state subsidies intended, according to France, to finance sovereign tasks. These involve (see rows 1 and 2 of the table, period from 2000 to 2010):

— subsidies from the assistance fund for airports and air transport ('FIATA') totalling EUR 1 107 000;

— equipment subsidies to the tune of EUR 2 414 000.

(98) In total, between 2000 and 2010, Pau airport received subsidies of EUR 3 521 000 under this heading.

(99) According to France, these subsidies cover the cost of sovereign tasks that must be carried out by airport operators and funded by the State under French law. The tasks in question are funded from the proceeds of the airport tax and a supplementary scheme. The history and arrangements of these schemes and the types of task funded are described in recitals 100 to 108.

(100) In 1998 the Council of State ruled, in the SCARA judgment ⁽¹⁹⁾, that safety and security tasks within airports were sovereign tasks for which the State was responsible and that could not therefore be funded by airport users through fees. Following this judgment, Act No 98-1171 of 18 December 1998 on the organisation of certain air transport services and Article 136 of Act No 98-1266 of 30 December 1998 (1999 Finance Act) ⁽²⁰⁾ introduced the airport tax as from 1 July 1999. This is a specific tax in the sense that its proceeds can be used only to finance certain expenditure, in this case the costs of tasks that France regards as sovereign within airports. The aforementioned provisions also introduced a supplementary scheme to finance these tasks, described in recitals 105 to 107.

(101) This legislation, developed by regulations, precisely defines the tasks eligible for financing through the airport tax. These tasks are aircraft firefighting and rescue, wildlife hazard prevention ⁽²¹⁾, screening of hold baggage, screening of passengers and cabin baggage, access control to the restricted area ⁽²²⁾, environmental control measures ⁽²³⁾ and automated border controls through biometric identification. The reference to automated border controls through

⁽¹⁹⁾ Judgment of the Council of State of 20 May 1998 *Syndicat des Compagnies aériennes autonomes* ('SCARA').

⁽²⁰⁾ Now codified in Article 1609 *quatervicies* of the General Tax Code.

⁽²¹⁾ Wildlife hazards particularly include bird hazards, which involve collisions between aircraft and birds that may threaten the safety of persons and goods on board aircraft.

⁽²²⁾ This task may include, for example, installing and maintaining fencing around the public and restricted areas or installing video surveillance systems around the edge of the restricted area.

⁽²³⁾ This task particularly involves noise measures combined, where applicable, with aircraft flight paths, and air and water quality controls in the surroundings of airports.

biometric identification was introduced into the legislation in 2008. Otherwise, the tasks eligible for financing through the airport tax have remained the same since this scheme was introduced and correspond to the tasks identified by the SCARA judgment. Various national and European regulations clarify the obligations of airport operators in terms of carrying out these tasks. For example, with regard to aircraft firefighting and rescue, the regulations precisely define the human and physical resources to be provided depending on the characteristics of the airport.

- (102) For a given airport, airport tax is payable by any airline using the airport. It is based on the number of passengers and weight of freight and mail loaded by the airline. The rate of airport tax per passenger or tonne of freight or mail is set annually, airport by airport, according to the predicted costs of carrying out the tasks financed by the scheme.
- (103) Every year airport operators prepare an annual costs and traffic declaration. This declaration presents, for the previous year, the recorded traffic levels and costs of the safety and security tasks, and also the amounts received through the airport tax and supplementary scheme to finance these tasks. They also contain traffic, cost and income forecasts in relation to the safety and security tasks for the current year and the next 2 years. These declarations are checked by the administrative authorities, which can in particular carry out on-the-spot checks. The airport tax rate is then set on this basis through an interministerial order.
- (104) As the airport tax rate calculations are based on predicted cost and traffic data, an *ex-post* adjustment mechanism has been introduced to ensure that the proceeds from the airport tax, plus the financing provided under the supplementary scheme described in recitals 105 to 107, where applicable, do not exceed the costs actually incurred in carrying out the tasks concerned. The costs in question include the operating and staff costs incurred in carrying out these tasks, depreciation on investments made in relation to these tasks, and part of the general costs associated with these tasks⁽²⁴⁾. Operators must keep multiannual accounts showing the income from the airport tax and supplementary scheme and also the costs incurred in the tasks concerned. When a positive balance is reported, this is added to the cumulative accounts from previous years. This may result in a positive or negative balance, which is then taken into account when setting the airport tax rate for the following year. In addition, any positive balance is allocated to the financial costs payable by the operator.
- (105) Since its creation, the financing mechanism based on airport tax has had to be complemented by a supplementary scheme. Safety and security costs are not proportional to air traffic, unlike the income from airport tax. In this context, it became apparent that, at low-traffic airports, the airport tax rate would have needed to be set at a high level, deemed to be barely affordable for users, in order to balance the safety and security costs. For these airports, it was therefore stipulated that the airport tax could be set at a level below that required to cover the costs and that a supplementary financing scheme could be used to finance, as necessary, those tasks eligible for financing through airport tax.
- (106) A succession of supplementary schemes then followed. Initially the French authorities used a trust fund, known as the 'fonds d'intervention pour les aéroports et le transport aérien' (FIATA) or assistance fund for airports and air transport, which was set up at the same time as the airport tax through the same Act No 98-1266 of 30 December 1998 mentioned above. This fund, financed by a share of civil aviation tax, succeeded the 'fonds de péréquation des transports aériens' (FPTA) or air transport adjustment fund, which had initially been reserved for financing routes supporting regional development and land planning. The FIATA financing covered the same tasks as were financed by the FPTA and was extended to the tasks covered by airport tax in order to supplement the latter for small airports. In essence, the FIATA tasks were split into two distinct 'parts': an 'airport' part providing supplementary cover for safety and security tasks at small airports, and an 'air transport' part providing subsidies for routes supporting regional development and land planning. Decisions to pay the FIATA subsidies providing supplementary financing for the safety and security tasks were taken following an opinion from the FIATA committee managing the 'airport' part.
- (107) In 2005 the FIATA was abolished and, for 2 years, the corresponding financing was provided directly through the state budget according to the same operating principles, particularly an opinion from a management committee. From 2008 the State replaced this arrangement with an increase in airport tax, which means that this tax is set at a

⁽²⁴⁾ The general costs mainly stem from support functions such as human resources management, financial affairs, financial audit, purchases, non-exclusive IT systems, legal office, general services, general management, accounting functions and management control.

rate higher than what is necessary to cover the safety and security costs at certain airports. The surplus thus created is redistributed among the smallest airports in order to supplement their income from airport tax.

- (108) As indicated above, the annual declarations of airport operators, which are checked by the administrative authorities, give the predicted and recorded costs and the predicted and recorded income from both airport tax and the supplementary scheme. Likewise, the annual accounts kept by operators, based on which the balance of actual costs and income is calculated, which, if positive, results in a reduction in airport tax and an allocation to the financial costs payable by operators, include both the proceeds from airport tax and the financing received through the supplementary scheme. The declaration, checking and *ex-post* adjustment mechanism intended to prevent the payment of public resources in excess of the costs actually incurred therefore applies to both airport tax and the supplementary scheme.

5. REASONS FOR THE OPENING AND EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

5.1. DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

- (109) In the decision to open the formal investigation procedure, the Commission noted, in accordance with France's notification, that the payment based on the 2005 marketing services agreement constituted a subsidy paid to AMS by the CCIPB. Given the public nature of the CCIPB, the Commission considered that the agreement involved the use of state resources.
- (110) In terms of the existence of an economic advantage pursuant to Article 107(1) TFEU, the Commission expressed doubts as to whether the CCIPB, by signing these agreements with AMS and Ryanair, behaved as a prudent market economy operator (MEO) pursuing a global or sectoral structural policy, guided by prospects of profitability in the more or less long term.
- (111) In this context, the Commission in particular took the preliminary view, based on the available information, that the 2005 marketing services agreement, notwithstanding the services effectively provided, was signed to subsidise the Pau-London Stansted route and that it conferred an economic advantage on Ryanair, through its subsidiary AMS, that it would not have received under normal market conditions. The Commission considered that the measure in question was likely to constitute State aid, paid to AMS by the CCIPB, that was prohibited in principle under Article 107(1) TFEU. This view was based on an analysis of the information submitted by France and the circumstances under which this agreement was signed.
- (112) With regard to the 2005 airport services agreement, the Commission wondered whether an economic advantage had been conferred on Ryanair through the reduced airport charges.
- (113) Lastly, the Commission expressed doubts about the compatibility of these measures with the internal market under the 2005 Guidelines.

5.2. DECISION TO EXTEND THE FORMAL INVESTIGATION PROCEDURE

- (114) As regards the agreements signed by the CCIPB with Ryanair and AMS (the airport services and marketing services agreements), the Commission considered, in the extension decision, that the two types of services agreements signed at the same time had to be assessed together, as Ryanair and AMS formed a single beneficiary of the measures concerned. As a result, the Commission considered that, in order to determine whether these various agreements constituted State aid, the private operator in a market economy test needed to be applied on the various dates on which the agreements were signed⁽²⁵⁾, namely:

- 28 January 2003 (Pau-London Stansted route),
- 30 June 2005 (Pau-London Stansted route) and 16 June 2009 for the amendment to this agreement,
- 25 September 2007 (Pau-Charleroi route) and 16 June 2009 for the amendment to this agreement,
- March 2008 (airport services agreement dated 17 March 2008, marketing services agreement signed on 31 March 2008) (Pau-Bristol route),

⁽²⁵⁾ Except for certain agreements, the effective start date of the activities covered by the agreement was not the date of signature of the agreement. See recital 395.

- 16 June 2009 (Pau-Bristol route),
 - 28 January 2010 (Pau-London, Pau-Charleroi and Pau-Beauvais routes).
- (115) The Commission concluded, on the basis of the available information, that it could not rule out the possibility that Ryanair and AMS had benefited from State aid under the agreements examined. However, it considered that it did not have sufficient information to enable it to come to a final decision on the matter. In order to assess this issue, the Commission considered that, on the basis of the available information, the conduct of the CCIPB service managing the airport, the CCIPB and other public entities in their relations with Ryanair and AMS had to be assessed jointly.
- (116) Likewise, the Commission expressed doubts as to whether the agreement signed with Transavia satisfied the private operator in a market economy test.
- (117) As regards the compatibility of this potential aid to the airlines⁽²⁶⁾, the Commission made a distinction between the measures pre-dating the entry into force of the 2005 Guidelines and subsequent measures.
- (118) With regard to the first category, the Commission took the view that the criteria to be applied in order to assess the compatibility of the potential aid in question with the internal market were as follows.
- The measure contributes to the achievement of an objective of common interest, namely the launch of new routes, with long-term viability, to another airport in the European Union.
 - The amount of the aid is necessary and proportional to the additional costs incurred in launching new routes, and the measure has an incentive effect.
 - The measure is granted in a transparent and non-discriminatory way.
 - It provides for penalties if the airline fails to comply with its obligations.
 - It does not affect competition in a manner contrary to the common interest.
- (119) The Commission expressed doubts as to whether these criteria were met and also whether this potential operating aid was compatible with the internal market.
- (120) In terms of the compatibility of the measures post-dating the entry into force of the 2005 Guidelines, the Commission mainly referred to the criteria set out in these guidelines for start-up aid to airlines. The Commission expressed doubts as to whether these criteria were met.
- (121) With regard to the equipment subsidies to the CCIPB, the Commission wondered whether the public authorities had acted as a prudent investor in granting these subsidies. The Commission indicated that it could not therefore rule out the possibility of these subsidies constituting State aid.
- (122) As regards the compatibility of this potential aid with the internal market, the Commission referred to the criteria set out in the 2005 Guidelines on investment aid to airports. The Commission expressed doubts as to whether this potential aid was compatible with the internal market.

6. COMMENTS FROM INTERESTED PARTIES

6.1. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (123) The Commission received comments from five interested third parties:
- 6.1.1. CHAMBER OF COMMERCE AND INDUSTRY OF PAU-BÉARN (CCIPB)
 - 6.1.1.1. *Airport services agreement signed with Ryanair*
- (124) According to the CCIPB, given the objective and non-discriminatory conditions under which the airport charges are applied to Ryanair and all the other airlines using Pau airport, the airport services agreement does not contain any element of State aid.

⁽²⁶⁾ Hereinafter the term 'airlines' means the airlines and their subsidiaries, which therefore specifically includes AMS.

- (125) The CCIPB notes that Pau airport self-finances its operation through its income and takes the view that it does not receive any State aid or financing to balance its operating accounts.
- (126) As regards the airport charges applied to Ryanair, the CCIPB confirms that these stem from the application of rates applicable as much to Ryanair as to any other airline.
- (127) The CCIPB notes that there are three categories of airport charges:
- regulated airport charges,
 - non-regulated groundhandling charges,
 - state taxes.
- (128) Firstly, the CCIPB confirms that it applies the regulated airport charges (of which there are four: landing charge, parking charge, runway lighting charge and passenger charge) to airlines in an objective and non-discriminatory way. Their amount is determined by a joint committee comprising the operators and the airlines, as well as the supervisory authority.
- (129) The CCIPB indicates that it does not exempt Ryanair from parking and runway lighting charges, but that the agreement simply states that 'Ryanair will not normally have to pay' these charges. The CCIPB notes that, with regard to the parking charge, this becomes payable only after the aircraft has been parked for more than two hours at the airport, whereas Ryanair's turnaround time is normally limited to 25 minutes. The CCIPB notes that, with regard to the runway lighting charge, Ryanair's flights operate only in the daytime, which reduces the likelihood of Ryanair having to pay a lighting charge.
- (130) Secondly, with regard to the non-regulated groundhandling charges (for example, groundhandling services or aircraft docking), the CCIPB notes that the rates are commercially negotiated with each airline according to its specific situation. In practice, any purely arithmetic comparison between airlines is not necessarily relevant given that, despite the identical size of aircraft, many other criteria need to be taken into account, such as the annual volume and frequency of the airline's flights, the daytime period (off-peak or peak) during which flights are operated, additional charges for night flights, delays, de-icing operations, aircraft cleaning operations, and so on.
- (131) Thirdly, the CCIPB stresses that, with regard to state taxes (of which there are two: airport tax and civil aviation tax), these are applied in a strictly identical manner to all airlines. The CCIPB is not involved in determining their amount, which is set by the regulatory authority.

6.1.1.2. *Marketing services agreement signed with AMS*

- (132) According to the CCIPB, the sums paid by the CCIPB to AMS do not constitute State aid. The CCIPB notes that, as the concession-holder for Pau airport, it decided in line with the 2005 Guidelines to publish, in the Air & Cosmos magazine for December 2007, a call for proposals in order to find one or more airlines ready to offer new destinations in Europe from Pau in return for financial aid (eight lots were envisaged). However, by 31 January 2008, which was the deadline for receiving proposals, no offers had been made by any airlines.
- (133) Furthermore, the CCIPB considers that its decision to sign the marketing services agreement with Ryanair is not attributable to the State. According to the CCIPB, no public or administrative authorities were involved at any stage in the negotiations with Ryanair or in the conclusion of the commercial partnership with this company.
- (134) The CCIPB takes the view that chambers of commerce and industry ('CCIs') operate airport facilities 'under the rules of private law'.
- (135) According to the CCIPB, CCIs constitute 'a very specific category of public body ... whose object is to freely represent the commercial and industrial interests of their area before public authorities'. The CCIPB adds that 'the fact that they are linked to the State ... does not in itself imply any subordination'. When operating the airport and, as a result, when concluding a partnership with Ryanair, the CCIPB is therefore operating entirely independently of its supervisory authority and without any direct or indirect state intervention.

6.1.1.3. *Criterion of a private investor in a market economy*

- (136) The CCIPB indicates that it received an offer from Ryanair to operate the Pau-London Stansted route after the agreement of 28 January 2003 was declared void by Pau Administrative Court on 3 May 2005.
- (137) As regards the operational aspect of the route, the CCIPB signed with Ryanair an airport services agreement that, according to the CCIPB, did not result in any substantial difference in treatment between Ryanair and other airlines operating from Pau airport. The CCIPB adds that, in order to commercially develop the airport, it signed a web marketing services agreement with a wholly-owned subsidiary of Ryanair, namely AMS. With regard to this agreement, the CCIPB takes the view that it acted as a private investor in a market economy for five reasons, which are set out in recitals 138 to 142.
- (138) Firstly, in return for the price paid by the CCIPB, AMS would provide genuine commercial services, including numerous weblinks on the ryanair.com website, enabling internet users to be directed straight to the websites of the CCIPB, the airport, the region's infrastructure (buses, trains, taxis), the Béarn Tourism Office, and so on.
- (139) Secondly, the ryanair.com website is currently and indisputably the leading travel reservation website in Europe, and by far one of the websites most Googled by internet users. Using the ryanair.com website to advertise Pau airport represents a real opportunity for the airport and the local communities that it serves. Airports and other third parties (car rental companies, hotels, regions, etc.) are ready to pay the prices indicated in the rate card published on the AMS website. Some wholly private airports have also agreed to pay these amounts. The CCIPB stresses the added value of advertising on the ryanair.com website, citing a study by the company Planet-Work that indicated that advertising purchased on the ryanair.com website offered greater visibility, for Pau airport and its region, in terms of the number of clicks by internet users, than advertising on the voyages-sncf.com website. The CCIPB therefore concludes that, for the services provided, the prices applied by AMS and paid by the CCIPB are 'market prices'.
- (140) Thirdly, in the CCIPB's opinion, it does not seem that the one-off nature of the price paid for the services provided is a criterion for determining the existence of State aid.
- (141) Fourthly, the sums paid under the Pau-Charleroi agreement resulted in different services from those that the CCIPB received under the Pau-London agreement. Accordingly, the CCIPB has not paid twice for the same service, which helps to prove that the sums paid are not subsidies for the launch of a route. The CCIPB also asserts that, if the sum had been intended to support the route's structural operating deficit, it would have clearly been insufficient.
- (142) Fifthly, the CCIPB considers that it is very difficult for a non-profit-making public body to prove that the sum of EUR [...] paid to AMS has enabled the CCIPB to 'make a profit' of EUR [...]. However, the CCIPB is certain that, in terms of image and/or attractiveness, the link on the ryanair.com website (and the absence of short-haul destinations on this website) made this investment worthwhile.

6.1.1.4. *Distortion of competition*

- (143) The CCIPB takes the view that the sums that it paid in return for the marketing services provided by AMS do not affect competition.
- (144) The Pau destination did not spontaneously interest any airline other than Air France and, despite the airport's efforts, only Ryanair for London and Transavia for Amsterdam submitted proposals.
- (145) The CCIPB notes that the arrival of low-fare routes did not affect the Air France routes, which saw their traffic from Pau increase from 2003.

6.1.2. ASSOCIATION OF EUROPEAN AIRLINES (AEA)

- (146) The AEA considers itself to be an interested party in this case. Firstly, it has one member airline operating at Pau airport (Air France). More generally, however, the AEA, which represents the interests of European 'network' carriers, considers that it has a natural interest in monitoring the implementation of the 2005 Guidelines. According to the AEA, carriers that unlawfully benefit from certain reductions in their charges contribute to creating distortions of competition within the common market, to the detriment of other carriers that have to bear the costs of their operations.

- (147) The AEA considers that the two agreements that the CCIPB signed with Ryanair and its wholly-owned subsidiary AMS, namely (1) the airport services agreement for the London Stansted-Pau route and (2) the web marketing services agreement under which AMS receives a one-off sum of EUR 437 000 per year, raise serious concerns.
- (148) In its opinion, the fact that Ryanair is the only airport user to benefit from a special airport services agreement is a more than questionable practice. Furthermore, it considers that Ryanair should not be exempt from parking and lighting charges and that, when Ryanair's turnarounds exceed two hours, it should be subject to the same charges as other airlines.
- (149) The AEA claims that it has been broadly acknowledged by various French courts that the marketing services agreement signed with AMS created conditions that were excessively favourable to Ryanair⁽²⁷⁾. It notes that expressions such as 'imbalance' were also used by Pau Administrative Court in a May 2005 judgment, which could only conclude that this type of agreement constituted financial aid to Ryanair. The AEA does not question the practice of marketing services per se, but doubts that normal market conditions have been respected in these particular contractual arrangements.

6.1.3. RYANAIR

- (150) Ryanair argues that the terms and conditions of the 2005 airport services agreement correspond to market conditions and that the agreement does not confer any selective advantage on Ryanair and does not therefore distort competition or affect trade between Member States.
- (151) Ryanair points out that it is paying the standard airport charges and taxes applicable at Pau airport, in addition to commission on ticket sales and excess baggage. It notes that these charges are similar to those applied at other comparable airports, as well as to other airlines operating at Pau airport. To its knowledge, the CCIPB is not treating Ryanair more favourably than other airlines.
- (152) According to Ryanair, the conditional reductions in the parking and lighting charges and in the handling charges provided for in Articles 7.1.3 and 7.2 of the 2005 airport services agreement are based on objective criteria set out in the agreement, namely the absence of daytime lighting and parking or heavy handling given Ryanair's 25-minute turnaround time and 'no frills' service offered to its passengers. Ryanair notes that these exemptions also apply to other similar airlines, and that Article 3 of the 2005 airport services agreement expressly notes the CCIPB's obligation to apply the conditions granted to Ryanair to other comparable airlines⁽²⁸⁾.
- (153) Ryanair stresses that the terms and conditions offered to it are not secret and that, contrary to standard industry practice, the 2005 airport services agreement expressly authorises the CCIPB to reveal its contents to other airlines.
- (154) Ryanair maintains that it did not receive any unlawful advantage from the CCIPB under the 2005 airport services agreement and that the transparent relationship covered by the agreement lacks the selectivity that is an essential condition (although not sufficient by itself) for classifying a measure as State aid. It also asserts that the other conditions necessary for State aid to exist (effect on trade between Member States and distortions of competition, for example) are not met by the measures in question.

6.1.4. AIRPORT MARKETING SERVICES (AMS)

- (155) AMS indicates that it offers advertising space on the Ryanair website under standard market conditions at prices based on a rate card published on its own website.
- (156) AMS considers that the web marketing services (WMS) agreement with the CCIPB falls outside the scope of EU transport rules, since it is a standard commercial advertising agreement, similar to those routinely entered into with newspapers, television and radio broadcasters, outdoor media providers, and so on.

⁽²⁷⁾ The AEA refers in particular to the Council of State judgment of 27 February 2006 *Compagnie Ryanair Limited* (No 264406).

⁽²⁸⁾ Article 3 of the 2005 airport services agreement states: 'Non-exclusive agreement. This Agreement is entered into on a non-exclusive basis. The conditions granted to Ryanair according to this Agreement will also be applied to any airline with which Pau-Pyrénées Airport would decide to open a new low-fare international route. These conditions will be modulated according to the characteristics of the newly created international routes, in particular: frequency of flights, number of passengers carried, flight tariff rates'.

- (157) According to AMS, the conditions for the purchase of advertising space on the Ryanair website by the CCIPB reflect and correspond to market conditions. With regard to the value of advertising space on the Ryanair website, AMS stresses that its pricing of this space reflects the increasing commercial success of this website and its unique ability to address advertising to a highly targeted audience.
- (158) AMS argues that the Ryanair website is much more desirable as an advertising space than any other travel site of any general portal used as a benchmark by the Commission. It stresses that the Ryanair website records in excess of 300 million page views per month.
- (159) AMS claims that the CCIPB purchased advertising space under the same conditions as private customers. According to AMS, the prices set out in the web marketing services agreement were the standard prices in the AMS rate card at the time of the agreement and were the same for all customers, whether public or private. It indicates that private airport operators ([...] and [...], for example) signed agreements with AMS that were similar to the agreement entered into with the CCIPB.
- (160) AMS argues that it is irrelevant whether or not the agreement in question was needed, as raised by the Commission in the opening decision: '... the Commission wonders whether the CCIPB needs the marketing services in question and whether the marketing services agreement was not concluded solely in order to subsidise the Pau-London Stansted route' ⁽²⁹⁾.
- (161) According to AMS, this type of transaction carried out under market conditions precludes the existence of aid and there is no legal precedent for the assessment of this 'need'. However, if the Commission insists on questioning this need, AMS points out that the CCIPB is responsible for both promoting the Pau-Béarn region and operating Pau airport. It considers that advertising on the Ryanair website makes commercial sense in terms of both these objectives.
- (162) With regard to purchasing advertising space to promote the region, AMS stresses that French CCIs are in competition with each other and have to use 'territorial marketing' so that their region comes out ahead of competing regions.
- (163) AMS considers that advertising space purchased on the Ryanair website increases the visibility of Pau airport. In its opinion, the CCIPB has a direct commercial interest in taking this approach because the resulting increase in passengers attracts ancillary businesses to the airport and increases airport revenue.
- (164) AMS claims that the CCIPB is not advertising on the Ryanair website in order to subsidise the Pau-London route, rather that the space on the Ryanair website that AMS is making available to the CCIPB constitutes a valuable resource for which there is proven alternative demand, including from the private sector. It would therefore be inaccurate to describe the sale of such space as a mere pretext for the payment of subsidies.
- (165) According to AMS, the web marketing services agreement does not constitute aid because its conditions correspond to those of a standard commercial agreement and do not confer any advantage on AMS (or Ryanair). It considers that this agreement does not therefore distort competition or affect trade between Member States.

6.1.5. AIR FRANCE

- (166) From Pau airport, Air France offers around five daily flights to Paris Orly airport, three daily flights to Paris Roissy Charles de Gaulle airport, and four daily flights to Lyon airport (through a subsidiary).
- (167) Air France states that the advantages granted to Ryanair and its subsidiary AMS, from which Air France does not benefit, have the effect of significantly reducing Ryanair's operating costs. According to Air France, this not only affects the direct competition between Ryanair and Air France for flights offered to and from Pau airport, but also the competition for all intra-Community routes. Trade between Member States is therefore directly affected.

⁽²⁹⁾ Opening decision, paragraph 43.

6.1.5.1. *Airport charges*

- (168) Air France notes that, according to the 2007 price brochure published by the CCIPB, the public rate for the parking charge is set at EUR 0,16 tonne/hour. This charge applies when an aircraft is parked for at least two hours on the tarmac. Air France does not find it odd that Ryanair does not pay this charge for a 25-minute turnaround, but, when a turnaround exceeds two hours, Ryanair should be required to pay this charge.
- (169) Air France notes that, according to the 2007 price brochure published by the CCIPB, the public rate for the lighting charge is set at EUR 35,18 per aircraft movement. This charge is payable when lighting equipment is used for an 'aircraft movement', namely a landing or takeoff, both during the day and at night. Not applying this charge to Ryanair on the pretext that it operates only daytime flights does not therefore comply with the general conditions for the application of this charge.
- (170) Air France stresses that these public charges are usually reviewed over time and it considers that Ryanair — like other carriers flying to and from Pau airport — should be subject to any variations in these charges.

6.1.5.2. *Groundhandling services*

- (171) Air France indicates that the groundhandling service provided to it at Pau airport is the subject of a formal contract. Air France notes that, according to the 2005 Guidelines, 'An airport operator acting as a provider of groundhandling services may charge different rates for the groundhandling charges invoiced to airlines if these different rates reflect cost differences linked to the nature or scale of the services provided'. Air France stresses that Pau Administrative Court, in its judgment of 3 May 2005, found that an unjustified discount granted to Ryanair on the groundhandling charges constituted State aid that, due to not having been notified, should be regarded as unlawful.
- (172) Air France notes that it offers significantly more services to and from Pau airport than Ryanair. Under these circumstances, Air France believes that the charges applied by the CCIPB to Ryanair for groundhandling services should not be more advantageous than those offered to Air France.

6.1.5.3. *Marketing services agreement signed with AMS*

- (173) Air France notes that this type of agreement between the airport operator and the Ryanair subsidiary AMS seems to be a common practice for Ryanair at airports from which it decides to launch routes. Air France indicates that the French administrative courts have already rejected this type of measure where the alleged promotional services have not been provided or have been provided under conditions that are excessively favourable to Ryanair.
- (174) Air France cites the 'imbalance' highlighted by Pau Administrative Court in its judgment of 3 May 2005 between the reciprocal undertakings of the parties to the agreement signed between the CCIPB and Ryanair in 2003. Air France considers that it is questionable whether a balance exists between the obligations of the parties to the 2005 agreement with AMS. According to Air France, there is nothing to indicate that all or part of this sum may be refunded by Ryanair if either the route in question is withdrawn or the promotional objectives that may be set are not achieved.
- (175) Air France does not dispute the fact that certain 'marketing' aid may be acceptable under the Community rules. However, Air France considers it unlikely that the 'marketing services' agreement meets the conditions required to be compatible with the internal market under Article 107(3)(c) TFEU.

6.1.5.4. *Conclusion*

- (176) Air France asks for an end to the payments that, in its opinion, are undue and that Ryanair has received from Pau airport since 2005, and that the recovery of the unlawful aid received by Ryanair be ordered.

6.2. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

6.2.1. CHAMBER OF COMMERCE AND INDUSTRY OF PAU-BÉARN (CCIPB)

- (177) The CCIPB believes that the marketing services agreements and airport services agreements that it has signed with the airlines and/or their subsidiaries do not contain any element of State aid.

- (178) The CCIPB notes that the nature and purpose of these agreements are radically different and must be analysed separately. It is irrelevant that these agreements may have been signed on the same date as they each have a different purpose. The airport services agreement is intended to determine the conditions under which Pau airport makes its airport facilities available to airlines and provides them with various airport services in return for remuneration. On the other hand, the marketing services agreement is intended to define the conditions under which, in return for remuneration, an airline must promote Pau airport and the tourist and business attractions of the Pau-Béarn region on its website. The two types of agreement are not therefore intrinsically linked. In the same way, even though the terms and conditions for airport services provided by the airport and marketing services provided by an airline or one of its subsidiaries may appear in one and the same agreement, this does not mean, however, that the legal analysis of the existence of State aid must cover both these types of service where they do not 'balance out each other'.
- (179) As regards the conduct of the CCIPB and that of other public entities, the CCIPB takes the view that they should not be assessed together, at the very least in terms of the marketing services agreements (which further justifies the separate assessment of the agreements), as these agreements are negotiated and concluded by the CCIPB in a strictly independent manner, without the intervention of other public entities.

6.2.1.1. *Marketing services agreements signed by the CCIPB*

Imputability

- (180) According to the CCIPB, the payments made under the marketing services agreements are not imputable to the State because the CCIPB is fully independent of its supervisory authorities with regard to the airport's operation. The decisions to pay the sums to Ryanair and AMS, on the one hand, and to Transavia, on the other hand, for marketing services were taken by the CCIPB individually and independently, without any direct or indirect intervention by the State.

Economic advantage granted to airlines

- (181) The CCIPB considers that it has clearly acted like a prudent private investor in a market economy. In particular, AMS and Transavia have provided genuine commercial services, including links on their websites allowing internet users to be directed straight to the CCIPB's website, for which the remuneration corresponds to the market price. The CCIPB stresses in this respect the large number of visitors to the Ryanair and Transavia websites.
- (182) The CCIPB also notes that the prices applied by AMS are as set in a public rate card available on its website. These prices are therefore applied to all airport customers of AMS without distinction, including certain fully privatised British airports. For its part, Transavia provides marketing services to a private airport in Italy.
- (183) In addition, according to the CCIPB, certain French airports operated by private companies (as public service licensees) appear to have signed a marketing services agreement with AMS, including Tarbes-Lourdes-Pyrénées airport managed by the Canadian company SNC-Lavalin. The CCIPB regards this as evidence that its conduct corresponds to that of a private operator.
- (184) The CCIPB also notes that the one-off nature of the price paid for the services provided does not appear to be a criterion for determining the existence of State aid, and that the sums paid under the Pau-Charleroi agreement resulted in different services from those that the CCIPB received under the Pau-London agreement, as a result of which the CCIPB has not paid twice for the same service. The CCIPB also considers that the sums paid are insufficient to launch a route.
- (185) The CCIPB considers that, by purchasing these marketing services at the prices stated in the agreements, it has benefited from indisputable economic consideration in two respects. Firstly, the marketing services have had a favourable impact on the airport's operating revenue, in particular by encouraging an increased flow of passengers within the airport. Secondly, and furthermore, this consideration has also benefited the entire town of Pau and its region.
- (186) The CCIPB does not agree with the consultant's view that Ryanair's strategy underlying the signature of marketing services agreements is to obtain a subsidy from the airport to keep its prices low. Unlike the consultant, the CCIPB takes the view that there is significant commercial interest in purchasing such services as Pau airport is a regional airport without a natural flow of passengers in a sufficient volume to balance its operating accounts. The CCIPB indicates that, since Ryanair's arrival at the airport and the promotional efforts made on its website, Pau airport has substantially increased its traffic.

- (187) Lastly, the CCIPB indicates that it refused to renew the marketing services agreement with AMS because the new prices being negotiated were too high. This decision confirms that it was not ready to accommodate Ryanair at any cost.

Distortion of competition

- (188) According to the CCIPB, the sums paid in return for marketing services have in no way affected competition between either airlines or airports. The CCIPB stresses that it must make promotional efforts as it has extreme difficulty in attracting airlines because they prefer to operate from local airports that are more attractive in terms of leisure tourism. The CCIPB cites Biarritz-Anglet-Bayonne airport, which serves a region renowned for its beaches, and Tarbes-Lourdes airport, which benefits from the religious site at Lourdes.
- (189) The CCIPB notes that, at Pau airport, the competition from low-fare airlines has in no way affected Air France's operations, which continued to grow until 2008 when the financial crisis broke. Furthermore, the CCIPB stresses that, prior to Ryanair's arrival in 2003, no airline operated any international routes from Pau airport, and that this arrival therefore did not affect competition for existing routes.

6.2.1.2. Airport services agreements

- (190) The CCIPB points out that all the airport charges are strictly applied in identical fashion to all users and all airlines at Pau airport. The CCIPB refutes in this respect that any discriminatory practices exist.
- (191) Furthermore, the CCIPB does not agree with the consultant's view that the non-regulated charges vary from one airline to another without just cause. According to the CCIPB, the charges for non-regulated services are negotiated with each airline according to its specific situation. The CCIPB concludes from these arguments that none of the airport services agreements examined by the Commission contains any element of State aid.

6.2.1.3. Subsidies to the airport

- (192) The CCIPB takes the view that none of the 'subsidies' received by Pau airport over the 2000-2010 period and examined in the formal investigation procedure contains any element of State aid.

Sovereign task subsidies

- (193) According to the CCIPB, the subsidies of EUR 3 521 000 mentioned in Section 4.3.1 were intended to finance tasks entrusted by law to airport operators, but that normally fall under State responsibility in the exercise of its official powers as a public authority. Accordingly, these tasks are not economic in nature and the subsidies in question therefore do not fall within the scope of State aid rules.

Equipment subsidies

- (194) The CCIPB takes the view that the equipment subsidies granted by the *syndicat mixte* and local authorities do not contain any element of State aid. These sums have been used to finance investments made by the owners of the airport infrastructure in maintaining and improving that infrastructure, or, in other words, developing their own assets. These investments have therefore been made solely for the benefit of their owners. These sums have not, however, conferred any economic advantage on the CCIPB because they have not reduced the operating costs that it must normally bear as airport operator. These sums have simply 'passed through' the CCIPB given that, in its capacity as operator of the public equipment, it is responsible for carrying out this maintenance, upgrading and improvement work.
- (195) As a result, according to the CCIPB, in paying equipment subsidies, the concession authority and local authorities have acted quite naturally, in their capacity as owners of the airport infrastructure and under the public equipment concession, to ensure that work to maintain, upgrade and improve the airport public service is carried out with a view to developing their assets. These are therefore investments that are naturally the responsibility of the public equipment owner and not its operator.
- (196) The CCIPB further notes that, at the end of the concession (end of 2015), it must return this airport infrastructure to its owners, together with the investments made.

- (197) In addition, the subsidies in question have in no way distorted competition with other neighbouring airports (Tarbes-Lourdes-Pyrénées and Biarritz-Anglet-Bayonne) because these have also received similar subsidies from their concession authorities.
- (198) With regard to the sum of EUR 38 000 received from Gaz de France in 2003, the CCIPB notes that this measure is not imputable to the State, but was taken independently by Gaz de France. In addition, this decision has not conferred any economic advantage on Pau airport because Gaz de France has acted as a prudent private investor in a market economy. Gaz de France in fact suggested to the CCIPB that a cogeneration plant be installed so that the airport could make energy savings on its heating and air-conditioning and so that Gaz de France could supply the gas needed for its operation.

Compatibility based on Commission Decision 2005/842/EC

- (199) The CCIPB notes that Commission Decision 2005/842/EC⁽³⁰⁾ (hereinafter the '2005 SGEI Decision') applies to the measures in question. The CCIPB stresses that the scope of this Decision includes 'public service compensation for airports ... for which average annual traffic during the two financial years preceding that in which the service of general economic interest was assigned does not exceed 1 000 000 passengers, in the case of airports' and 'which receive annual compensation for the service in question of less than EUR 30 million' (Article 2). As a result, according to the CCIPB, which takes the view that it has been entrusted with providing an airport public service, if the subsidies paid to the airport do constitute aid, this aid is compatible and exempt from the prior notification obligation based on the 2005 SGEI Decision.

Compatibility based on the 2005 Guidelines

- (200) The CCIPB argues, in the alternative, that the subsidies received by Pau airport and the CCIPB meet the compatibility criteria laid down by the 2005 Guidelines.

6.2.2. RYANAIR

- (201) Ryanair argues that the Commission has wrongly fused AMS's and Ryanair's separate agreements with the CCIPB into a single alleged State aid case. Ryanair further states that the investigation into the relationship between AMS and Pau airport flies in the face of the commercial success of the Ryanair offering, and that AMS has a large range of customers, not just airports, and its model is increasingly being replicated on other airline websites.

6.2.2.1. Consultant's report of 30 March 2011

- (202) Ryanair disputes some of the findings in the consultant's report, in particular the following three claims⁽³¹⁾:
- (a) 'The Ryanair website therefore primarily seems to be comparable to the websites of other airlines that generally host only a limited amount of paid advertising, with airports not featuring among the advertisers.' Ryanair states that it is wrong to claim that other airlines do not offer paid advertising on their websites. It argues that this practice is increasingly widespread and that regional airports, which suffer from low demand, are increasingly seeing the websites of their low-fare airline customers as the best place to advertise. Ryanair is also an example of an airline advertising parking services, on its website, for a hub airport from which it operates.
- (b) Ryanair maintains that it is incorrect to argue that airports are not comparable to other advertisers on its website, in so far as the airport services provided to Ryanair's passengers cannot be dissociated from the services provided to passengers by Ryanair itself. Ryanair argues that potential passengers seeing an advertisement for an airport on its website will generate income for the airport whether or not they fly with Ryanair. It therefore maintains that the position of airports advertising on its website is, contrary to the Commission's opinion, similar to that of other advertisers such as hotels and car rental companies.

⁽³⁰⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

⁽³¹⁾ Decision to extend the formal investigation procedure, recital 38.

- (c) According to Ryanair, the consultant wrongly questions whether it is rational behaviour for airports to spend their own money with airlines in order to attract customers on flights to and from the airport, when these extra passengers will directly benefit said airlines. According to Ryanair, the fact that the provision of marketing services would benefit the provider of the advertising space, namely Ryanair, does not mean that it would not also benefit the airport purchasing those services. Ryanair is indifferent as to whether or not an airport advertises on its website since its load factors are similar on routes to those airports with an AMS advertising agreement to those without. Ryanair adds that regional airports generally have no entrenched market position, so advertising is a necessity. It also claims that the Commission is misguided in focusing on the benefits to the airline, since the MEO test does not require a measure to generate no benefit for a third party, including the provider of the advertising space. Ryanair stresses that the AMS marketing agreements with airports are separate from Ryanair's agreements with airports, and are not contingent upon the alleged 'benefit' that Ryanair may receive from the airport's advertising on ryanair.com.

6.2.2.2. *AMS and Ryanair as a single beneficiary*

- (203) Ryanair takes the view that the CCIPB's airport services agreement with Ryanair and its marketing agreement with AMS are separate and independent and concern different services, and that there is no link between them justifying their consideration as a single source of 'measures'. In Ryanair's view, the AMS agreements have benefited the CCIPB as the purchaser of advertising services and are not intended to improve Ryanair's load factors or performance on its routes.

6.2.2.3. *State resources and lack of imputability*

- (204) Ryanair disputes that the decisions made by the CCIPB are imputable to the State, and claims that the CCIPB's agreements with Ryanair and AMS have involved no transfer of resources from the French State.
- (205) Ryanair claims that the CCIPB is not just another facet of the French State and that imputability cannot be established solely on the basis that the CCIPB is a public undertaking and therefore under the control of the French State. Ryanair considers that the Commission must examine the role of public authorities in the CCIPB's decisions in relation to Ryanair and AMS.
- (206) In addition, Ryanair refers to the case-law of the French courts, based on which it takes the view that the chambers of commerce and industry are original entities characterised by their dual nature and that they should be categorised as 'public economic bodies'.
- (207) As regards the involvement of the State in the decision-making process, Ryanair argues that the State has to be informed only about certain types of decision, and only *ex post*.

6.2.2.4. *Business plan*

- (208) Ryanair maintains that the absence of a business plan when the 2005 agreements were signed cannot be used as evidence that the agreements did not satisfy the MEO test.

6.2.2.5. *Ryanair's comments of 10 April 2013*

- (209) On 10 April 2013 Ryanair submitted two notes prepared by the company Oxera and an analysis prepared by Professor Damien P. McLoughlin.

First Oxera note — Definition of the market benchmark in the comparative analysis for the MEO test. Ryanair state aid cases, note prepared for Ryanair by Oxera, 9 April 2013

- (210) Oxera takes the view that the Commission's approach of accepting only comparator airports in the same catchment area as the airport under investigation is flawed.
- (211) Oxera argues that market benchmark prices obtained from comparator airports are not affected by State aid granted to surrounding airports. It is therefore possible to robustly estimate a market benchmark when applying the MEO test.

- (212) In fact:
- (a) comparator analyses are widely used when applying the MEO test outside the field of State aid;
 - (b) companies influence each other's decisions only to the extent that their products are substitutable or complementary;
 - (c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face limited competition from public airports in their catchment area (less than one-third of the commercial airports in the catchment area of the comparator airports are fully state-owned, and none of the airports in the same catchment area as the comparator airports was the subject of a State aid procedure (in April 2013));
 - (d) even where the comparator airports face competition from public airports in the same catchment area, there is reason to believe that their conduct satisfies the MEO test (for example, where the private sector holds a large stake or where the airport is privately operated);
 - (e) airports that satisfy the MEO test will not set prices below the marginal cost.

Second Oxera note — Principles underlying the profitability analysis for the MEO test. Ryanair state aid cases, note prepared for Ryanair by Oxera, 9 April 2013

- (213) Oxera argues that its profitability analysis in its reports submitted to the Commission uses the principles that would be adopted by a rational private sector investor and reflects the approach taken in previous Commission decisions.
- (214) The principles underlying the profitability analysis are as follows:
- (a) the assessment is undertaken on an incremental basis;
 - (b) an *ex ante* business plan is not necessarily required;
 - (c) in the case of an uncongested airport, the single-till approach is the appropriate pricing methodology;
 - (d) only those revenues associated with the airport's economic activity should be taken into account;
 - (e) the entire term of the agreement, including any extensions, should be taken into account;
 - (f) future financial flows should be discounted in order to assess the profitability of the agreements.
- (215) The incremental profitability resulting from Ryanair agreements with airports should be assessed on the basis of internal rate of return estimates or net present value measures.

Analysis by Professor Damien P. McLoughlin — Brand building: why and how small brands should invest in marketing, note prepared for Ryanair, 10 April 2013

- (216) This document aims to set out the commercial logic underlying regional airports' decisions to purchase advertising space on ryanair.com from AMS.
- (217) There is a large number of very robust, well-known and regularly used airports. Weaker competitors have to overcome the static purchasing behaviour of consumers to grow their business. Smaller regional airports need to find a way to continuously communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their means.

(218) Advertising via AMS:

- (a) offers an opportunity to reach a significant number of people already considering a travel purchase;
- (b) entails relatively low costs (prices in line with commercial rates for online communication);
- (c) allows communication at the point of purchase;
- (d) offers the possibility of creative advertising.

6.2.2.6. *Ryanair's comments of 20 December 2013*

- (219) On 20 December 2013 Ryanair submitted comments on the payments made to AMS. Ryanair disagrees with the Commission's preliminary assessment that the payments made to AMS constitute costs for the airport, as this approach disregards the value of AMS's services to the airport. Ryanair also takes the view that, for the purpose of the MEO test, a distinction should be made between the purchase of marketing services charged at market rates and a related airport-airline agreement.
- (220) In support of its arguments, Ryanair submits an analysis comparing the prices charged by AMS with prices for comparable services offered by other travel websites⁽³²⁾. The analysis concludes that the prices charged by AMS were either lower than the average or within the mid-range of prices charged by comparator websites.
- (221) According to Ryanair, this shows that AMS's prices are in line with market prices and that the decision by a public airport to purchase AMS's services satisfies the MEO test. Ryanair also produces evidence of the services provided to airports under the AMS agreements in order to prove the value of these services to the airports.
- (222) According to Ryanair, if the Commission insists on subjecting the AMS agreements and the Ryanair airport services agreements to one and the same MEO test (an approach with which Ryanair disagrees), the value of AMS's services to the airports should not be underestimated.
- (223) In addition, Ryanair refers to the conclusions of various reports confirming that Ryanair has a strong pan-European brand capable of generating value for its advertising services.

6.2.2.7. *Ryanair's comments of 17 January 2014*

- (224) Ryanair submitted a report prepared by its economic advisor concerning the principles that it believes should be applied in an MEO profitability test encompassing both the airport services agreements concluded between Ryanair and airports and the marketing services agreements concluded between AMS and the same airports⁽³³⁾. Ryanair stresses that this does not in any way prejudice its position that the AMS agreements and the airport services agreements should be subject to separate MEO tests.
- (225) The report states that AMS-associated income should be included on the revenue side in a joint profitability analysis where AMS expenditure is included on the cost side. In order to do this, the report proposes a cash-flow-based method in which AMS expenditure is treated as additional recurrent expenditure.
- (226) The report argues that marketing activities contribute to creating and enhancing brand value, which is likely to generate business and profits not only during the term of the marketing services agreement, but also after its expiry. This is particularly the case when, due to an agreement with Ryanair, other airlines are attracted to the airport, in turn attracting commercial operators and thus increasing the airport's non-aeronautical revenue. According to Ryanair, if the Commission carries out a joint profitability analysis, these profits should be taken into account by treating the AMS expenditure as additional recurrent expenditure, with the additional profits being calculated net of the AMS payments.

⁽³²⁾ Oxera: 'Are prices set by AMS in line with the market rate?', prepared for Ryanair, 20 December 2013.

⁽³³⁾ Oxera: 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?', prepared for Ryanair, 17 January 2014.

- (227) Ryanair believes in addition that a terminal value could be included in the projected additional profits at the end of the term of the airport services agreement in order to take account of the value generated after the expiry of the agreement. The terminal value could be set based on a conservative assumption as to the probability of the agreement with Ryanair being renewed or similar terms being agreed with other airlines. Ryanair takes the view that this would enable a lower bound for the profits generated jointly by the AMS agreement and the airport services agreements to be estimated, taking into account the uncertainty of the additional profits after the expiry of the airport services agreement.
- (228) In support of this approach, the report summarises the results of studies on the effect of advertising on brand value. These studies recognise that advertising can build brand value and improve customer loyalty. In particular, according to the report, advertising on ryanair.com increases brand visibility in the case of an airport. The report adds that smaller regional airports aiming to increase their traffic can particularly build their brand value by entering into advertising agreements with AMS.
- (229) The report indicates that the cash-flow-based approach is preferable to a capitalisation approach in which the AMS expenditure would be treated as capital expenditure on an intangible asset (namely, the brand value of the airport). The marketing expenditure would be capitalised as an intangible asset and then amortised over the useful life of this asset, with a projected residual value on the planned expiry of the airport services agreement. This approach would not, however, take into account additional profits made by the airport as a result of signing the airport services agreement with Ryanair, and estimating the intangible asset value due to brand expenditure and the length of the asset's useful life would also be difficult.

6.2.3. AIRPORT MARKETING SERVICES (AMS)

- (230) AMS states that it has not benefited from State aid and that the CCIPB has acted towards it in accordance with the MEO principle.
- (231) AMS argues that the amounts payable by the CCIPB to AMS for marketing services corresponded to the market price for services having a real value to the airport.
- (232) AMS states that the following three claims made in the consultant's report, as set out in the extension decision, are flawed for the following reasons:
- (a) 'The Ryanair website seems to be comparable to those of other airlines that, as a general rule, do not host paid advertising and on which airports do not advertise' — AMS maintains that it is incorrect to claim that other airlines do not host paid advertising on their websites. According to AMS, other airlines do host such advertising, but ryanair.com was simply the first to take this approach. AMS argues that the Ryanair website is different because its popularity makes it a particularly interesting proposition for advertisers. AMS notes that, for airports, advertising on ryanair.com is especially advantageous since it uniquely targets potential passengers, increases non-aeronautical revenue and enhances the airport's international brand recognition.
- (b) 'Airports are not comparable to other potential advertisers on the websites of airlines such as Ryanair because the services provided by an airport to Ryanair passengers are by nature indissociable from the services of Ryanair itself, unlike other services such as accommodation or car rental' — AMS states that the services provided by airports to passengers (such as retail stores, car parks, restaurants, etc.) are easily dissociable from the services provided to passengers by Ryanair. AMS adds that whether or not the airport's services to passengers can be 'associated' with those provided by Ryanair does not in any way diminish the value of such advertising for the airport. According to AMS, the same reasoning applies to private airports that pay for the company's services and to Ryanair's partner hotels and car rental companies, whose services could also be described as associated (or not) with those provided by Ryanair.
- (c) 'It is not rational behaviour for airports to spend their own money with airlines in order to encourage passengers to use the flights of the said airlines to those airports, when these extra passengers will directly benefit the said airlines' — AMS argues that airports advertise on ryanair.com because they want to increase the number of inbound passengers who are generally the source of higher non-aeronautical revenue for the airports. AMS adds that airports also need to advertise in order to establish their international brand recognition, and that their approach is similar to the advertising carried out by leading multinational corporations such as Coca-Cola, McDonald's, Nike, etc. According to AMS, Ryanair is indifferent as to whether or not an airport advertises on its website since this makes no difference to the overall number of Ryanair passengers and, in any case, the fact that Ryanair may or may not also benefit from an airport's advertising on ryanair.com is commercially irrelevant to the airport.

- (233) AMS stresses that there is no reason to question the commercial logic underlying a decision by an airport to advertise on ryanair.com where the services are offered at market price. It adds that regional airports need such advertising for their survival and growth.
- (234) AMS considers that advertising on the Ryanair website increases the number of inbound passengers who are much more likely to generate non-aeronautical revenue for the airport than outbound passengers travelling abroad. It concludes that it is therefore more prudent to advertise on the Ryanair website to attract inbound passengers than to use advertising targeting local passengers in newspapers or other media.
- (235) AMS argues that the 2005 Guidelines do not apply to the relationship between an airport and a marketing services provider, and the fact that AMS's parent company is an air carrier is not sufficient to make the Guidelines applicable.

6.3. COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION OF A NOTICE INVITING MEMBER STATES AND INTERESTED THIRD PARTIES TO SUBMIT THEIR COMMENTS ON THE APPLICATION OF THE NEW GUIDELINES TO ONGOING CASES

6.3.1. AIR FRANCE

- (236) Air France questions the application of the new Guidelines to cases involving operating aid for airports, even where this aid was paid prior to the publication of the said Guidelines, for a number of reasons.
- (a) According to Air France, this retroactive application of the new Guidelines favours non-virtuous operators by legitimising conduct that did not comply with the rules applicable at the time. By contrast, this approach penalises operators who did comply with the 2005 Guidelines by refraining from claiming public funds.
- (b) Air France also maintains that the application of the new Guidelines to operating aid granted to airports before the new Guidelines entered into force is contrary to general principles of law and European case-law.
- (237) Air France claims that the new Guidelines will have the effect of favouring new operators to the detriment of incumbent operators. By allowing a new airline to pay only the incremental cost associated with its activity, they will discriminate against incumbent operators at the airport, who will be subject to higher charges.
- (238) Lastly, Air France points out that, although the condition of non-discriminatory accessibility to the infrastructure of an airport may seem easy to fulfil in theory, the situation is quite different in practice, with certain operating models being consciously disadvantaged.

6.3.2. CCIPB

- (239) The CCIPB refers to its previous comments and submits an analysis of the reasons why, if the equipment subsidies were regarded as operating aid, they would be compatible with the provisions of Section 5.1.2 of the new Guidelines, which enable the retroactive authorisation of operating aid paid to airports before the new Guidelines entered into force.

6.3.3. TRANSPORT & ENVIRONMENT (T&E)

- (240) This non-governmental organisation has made comments criticising the new Guidelines and the Commission decisions in the aviation sector to date, due to their allegedly harmful consequences for the environment.

7. COMMENTS FROM FRANCE

7.1. COMMENTS SUBMITTED BY FRANCE FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

7.1.1. 2005 AIRPORT SERVICES AGREEMENT

- (241) France notes that the 2005 airport services agreement simply sets out the airport's charges, which are public and apply in identical fashion to any carrier operating from the airport.

(242) With regard to the parking charge, the airport's rules state that this charge is payable only after the aircraft has been parked for more than two hours at the airport. As a result, according to France, given that the turnaround time of aircraft operated by Ryanair is generally limited to 25 minutes, it is normal for this airline not to be invoiced for any parking charges.

(243) Likewise, the lighting charge is payable only when the lights are used (in other words, at night or in cases of poor visibility). According to France, as Ryanair's flights operate only during the daytime, they do not need the lights to be used and the corresponding charge is not therefore payable.

7.1.2. CIVIL AVIATION TAX

(244) France provides further information on the airport tax, described in Section 4.3.2, and on the civil aviation tax.

(245) With regard to the civil aviation tax laid down by Article 302a K of the General Tax Code, this is collected by the State from carriers and is used to finance the tasks of the Directorate-General for Civil Aviation that are not funded through fees for services provided. It is based on the number of passengers and weight of freight and mail loaded on departure from France. Its intra-Community rate is set by the aforementioned article and is identical throughout the French territory. The tax rate is set by the State, which also collects the tax, with airport operators not being involved in this process.

7.1.3. AGREEMENT BETWEEN THE CCIPB AND AMS

(246) With regard to the agreement between the CCIPB and AMS, which forms the basis of the notification procedure, the French authorities note that this agreement states that AMS has an exclusive licence to offer marketing services on the travel website www.ryanair.com. France notes that this website also offers air services from numerous airports in Europe.

(247) France points out that the CCIPB has provided documentation forming part of the commercial offer of the website www.voyages-sncf.com, in which the services offered seem to be fairly close to those covered by the agreement with AMS. These services are costed at EUR [...] excluding taxes, i.e. EUR [...] including taxes, which seems to be a comparable figure to that invoiced by the Ryanair subsidiary.

(248) France takes the view that the other features of this agreement should also be taken into account, in particular:

— its 5-year term,

— the circumstances of its conclusion, in particular the absence of any prior call for competition relating to the purchase of services in the market sector,

— the charges for these marketing services, which were set in advance as a one-off payment and not after the fact using the website traffic statistics of www.ryanair.com,

— the exclusivity clauses covering the provision of ancillary services (car rental, accommodation), which allow only undertakings with which the Ryanair group has commercial agreements to provide these services.

7.2. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

(249) France did not respond to the comments submitted by interested third parties following the opening of the formal investigation procedure.

7.3. COMMENTS SUBMITTED BY FRANCE FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

7.3.1. ALLEGED AID GRANTED TO AIRLINES

(250) France takes the view that the airport services agreements and marketing services agreements must be assessed together for each period in question in order to determine whether an economic advantage exists.

- (251) France also considers that the conduct of the CCIPB as a whole, of the CCIPB as airport operator and of the State or other public authorities supervising the airport operator or involved in its financing should be assessed together, in terms of their relations with Ryanair and AMS, in order to apply the private operator in a market economy test.
- (252) However, France notes that the considerations underlying the decisions of public authorities to participate in certain financing do not solely involve airport profitability criteria but also, more widely, the economic and social benefits of the airport's activity for the region, which are not taken into account in the reasoning conducted by the private operator in a market economy.
- (253) France refers in this respect to two studies carried out in 2005 and 2011 by the CCIPB on the impact of the traffic brought by Ryanair. These studies show the significant economic benefits generated by the airline for the region.
- (254) With regard to the doubts expressed by the Commission in the extension decision on the compatibility with the internal market of possible aid measures granted by the agreement signed with Ryanair in 2003 and the 2005 agreements, France recalls that it itself notified this situation in January 2007 in order to raise its doubts and obtain a Commission decision on the regularity of the possible aid measures granted by the 2005 agreements with the Community rules on State aid. In this context, France is not in a position to prove said compatibility.
- (255) France confirms that the activities of the airlines financed by the CCIPB have an important impact on regional economic development. However, France cannot therefore conclude that this is compatible with the internal market based on Article 107(3)(c) TFEU or the rules on services of general economic interest.

7.3.2. FINANCIAL CONTRIBUTIONS TO THE AIRPORT

- (256) As regards the existence of State aid in the financial contributions to Pau airport, France takes the view that, for this airport as for most other airports of the same size, the investment decisions of contributing public authorities are based not on a direct consideration paid by the concession-holder, but on the economic and social benefits generated by the airport's activity for the region.
- (257) France also refers to the legal mechanism for financing safety and security tasks, described in Section 4.3.2. France takes the view that this mechanism precludes any overcompensation of the costs incurred by airport operators in carrying out the safety and security tasks, which are sovereign tasks of the State. As a result, according to France, the sums paid by the State to cover the safety costs (staff and equipment or vehicles for firefighting, wildlife hazard prevention, fencing) and security costs (staff and equipment for screening passengers and their baggage) do not constitute State aid.

7.4. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES FOLLOWING THE EXTENSION OF THE FORMAL INVESTIGATION PROCEDURE

- (258) France did not respond to the comments submitted by interested third parties following the extension of the formal investigation procedure.

7.5. COMMENTS FROM FRANCE ON THE APPLICATION OF THE NEW GUIDELINES TO THIS CASE

- (259) France notes that the new Guidelines are more flexible on operating aid than the previous guidelines. According to France, their retroactive application to all aid will therefore mean that previous situations at certain airports will be treated less punitively.
- (260) France notes, however, that investment aid will be assessed more harshly than before under the new Guidelines as these lay down maximum aid intensities authorised according to the size of the airport.

7.6. COMMENTS FROM FRANCE ON THE COMMENTS SUBMITTED BY INTERESTED THIRD PARTIES ON THE APPLICATION OF THE NEW GUIDELINES TO THIS CASE

- (261) France did not respond to the comments submitted by interested third parties on the application of the new Guidelines to this case.

8. ASSESSMENT

- (262) In order to assess the measures in question, a distinction should be made between the potential aid granted to airlines (Section 8.1 of this Decision) and the potential aid granted to the Pau airport operator in the form of financial contributions (Section 8.2 of this Decision).

8.1. MEASURES IN FAVOUR OF AIRLINES

8.1.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (263) Under Article 107(1) TFEU, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (264) For a measure to constitute State aid, all the following conditions must be met: (1) the measure in question is financed by state resources and is imputable to the State; (2) it confers an economic advantage; (3) this advantage is selective; (4) the measure in question distorts or threatens to distort competition and may affect trade between Member States; and (5) the beneficiary is an undertaking within the meaning of Article 107(1) TFEU, which implies that it engages in an economic activity.

8.1.1.1. *State resources in the agreements between the CCIPB and the airlines during the period under review*

- (265) The marketing services and airport services agreements were entered into between the airlines, on the one hand, and the CCIPB, on the other hand.
- (266) The chambers of commerce and industry are public bodies under French law. According to the current version of Article L.710-1 of the Commercial Code, departmental bodies or chambers that are members of the network of chambers of commerce and industry shall each, in their capacity as intermediate state authorities, function as representatives of the interests of industry, commerce and services before public or foreign authorities. They shall act as the interface between the various stakeholders concerned and shall carry out their activities without prejudice to the representation tasks conferred on professional or interprofessional organisations by the laws and regulations in force or to the tasks carried out by local authorities within the context of their administrative freedom. The network and each member departmental body or chamber shall contribute to the economic development, attractiveness and land planning of the area, and shall also support businesses and their associations by fulfilling, under the conditions laid down by decree, any public service mission and any general interest mission necessary for the fulfilment of such missions.

- (267) The same provision stipulates as follows:

To this end, each departmental body or chamber in the network may undertake, in accordance with the applicable sectoral plans, where appropriate:

- 1° general interest missions conferred on it by laws and regulations;
 - 2° support, mentoring, liaison and advisory missions with those starting up or taking over businesses and with businesses in general, in accordance with the applicable laws and regulations on competition law;
 - 3° a support and advisory mission to encourage the international development of businesses and the export of their production, in partnership with the French Agency for International Business Development;
 - 4° a mission to encourage initial or ongoing vocational training, in particular through public and private educational establishments that it sets up, manages or finances;
 - 5° a mission to set up and operate facilities, particularly port and airport facilities;
 - 6° profit-making missions conferred on it by a public entity or that may prove necessary for the fulfilment of its other missions;
 - 7° any expert assessment, consultation or research mission requested by public authorities on an issue relating to industry, commerce, services, economic development, vocational training or land planning, without prejudice to any work that it may initiate.
- (268) Article L.710-1 of the Commercial Code also states: The assembly of French chambers of commerce and industry, regional chambers of commerce and industry, local chambers of commerce and industry and inter-chamber groups

shall be public bodies supervised by the State and administered by elected managers.

- (269) This legislative provision has changed during the course of the period under review, i.e. from 2003 to 2010. However, its fundamental principles remain the same. Throughout this period, chambers of commerce and industry such as the CCIPB have remained public bodies set up by law, administered by elected managers and supervised by the State. Furthermore, as intermediate state authorities, their *raison d'être* and primary objective is (under Article L.710-1 of the Commercial Code) to fulfil the general interest missions conferred on them by law, i.e. mainly to represent the interests of industry, commerce and services before public authorities, support local businesses, and develop the attractiveness and land planning of their areas. The industrial and commercial activities of chambers of commerce and industry are ancillary to their general interest missions and are designed to help fulfil those missions.
- (270) It should also be noted that national laws lay down specific financing arrangements for chambers of commerce and industry, in particular in Article L.710-1 of the Commercial Code. The resources of chambers of commerce and industry therefore consist in particular of tax revenues (the tax to cover the costs of chambers of commerce and industry, established by Article 1600 of the General Tax Code), subsidies or even resources arising out of training and transport infrastructure operation activities. As a result, chambers of commerce and industry do not have to rely solely on their commercial revenue to cover their costs. This tends to corroborate the conclusion that the industrial and commercial activities of chambers of commerce and industry are ancillary to their general interest missions and are designed to help fulfil those missions.
- (271) France has confirmed this conclusion with regard to the CCIPB as it has stated that, as the legal representative of the interests of 13 000 local businesses, the CCI Pau Béarn is their spokesperson before local and public authorities. France has also stated that, in the context of these missions, the operation of Pau-Pyrénées airport makes total sense as the latter forms a tool for growth and development of economic activity within the area of the CCI Pau Béarn. France has therefore confirmed that CCIs have a legal general interest mission that is linked to the economic development and improved attractiveness of their areas, among other aspects. According to France, the provisions cited also indicate that the operation of airport facilities clearly falls within the scope of this mission.
- (272) France has added that CCIs regularly conduct and finance lobbying actions to improve the attractiveness of their areas and promote new facilities. It has stated that they also conduct specific actions to promote tourism through their participation in various regional and departmental structures in this area, particularly through the regional and departmental tourism committees provided for by Articles L.131-4 and L.132-3 of the Tourism Code. It has further stated that a policy of developing the attractiveness of an area requires a series of simultaneous actions to attract capital, markets, businesses, talent, students and tourists who will support local businesses and the region, with this attractiveness also having an international dimension. France has confirmed that low-fare airlines with their websites can contribute to this policy. Lastly, France has stated that the region's inhabitants are themselves demanding new routes, a diverse offer and, more specifically, 'low-fare' services so that they can more easily travel to Europe at a lower cost.
- (273) These statements unequivocally confirm that the main *raison d'être* and objective of the CCIPB are, as for all chambers of commerce and industry, to serve the interests of local businesses as a whole and to contribute to the economic development and attractiveness of the area. France's aforementioned statements also indicate that, for a chamber of commerce and industry such as the CCIPB, a commercial activity such as the operation of Pau airport is not pursued in the interests of profitability, but as a necessary counterpart to the general interest missions with which this body is invested by law. As noted above in recital 142, the CCIPB regards itself as a non-profit-making public body.
- (274) In the light of all the above, chambers of commerce and industry such as the CCIPB must be regarded as public authorities and all their decisions, just like those of the national government or local authorities, must be regarded as 'imputable to the State', within the meaning of the case-law on State aid⁽³⁴⁾, with their resources constituting state resources⁽³⁵⁾. It is irrelevant in this respect that chambers of commerce and industry are managed by persons elected by traders and business leaders and representatives, and not by officials appointed by other public authorities. In fact, even though national parliaments are elected by all citizens having the right to vote, they represent one of the constitutional powers of any democratic State and their decisions are necessarily imputable to the State.

⁽³⁴⁾ See, for example, judgments in Case C-303/88 *Italian Republic v Commission of the European Communities* [1991] ECR I-1433, paragraph 11, and in Case T-358/94 *Compagnie nationale Air France v Commission of the European Communities* [1996] ECR II-2109, paragraphs 58 to 61.

⁽³⁵⁾ See, in this respect, the Commission Decision of 14 July 2004 in Case C25/2004 — *Germany — DVB-T in Berlin-Brandenburg*, recital 20.

- (275) The situation of chambers of commerce and industry is therefore different from that of public undertakings, with regard to which the Court of Justice stated in the *Stardust Marine* ⁽³⁶⁾ judgment: ‘Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State ... Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures’.
- (276) In the case of a measure taken by a public undertaking established in order to carry out an economic activity, it must be determined whether the public authorities controlling that undertaking, for example due to the capital share that they hold in said undertaking, are involved in the measure in question. The situation of a chamber of commerce and industry is different in that such a body is itself part of the public administration or an ‘intermediate state authority’ or a ‘public body’, and therefore a public authority created by law to satisfy general interests. As a result, in order to determine whether a decision of a chamber of commerce and industry is imputable to the State, it is not necessary to determine whether another public authority (for example, the State in the strict sense or the municipality or other local authorities) has been involved in the decision in question. In reality, such a decision necessarily meets the imputability criterion.
- (277) This approach has previously been taken by the Commission in its decision-making practice. Accordingly, the Commission stated with regard to the Chamber of Commerce and Industry of Var that, due to its status as a public body under French law, it pursues its activity in a defined geographical area, is managed by elected members and has tax resources collected from undertakings registered in the Register of Trade and Companies, and therefore falls within the category of ‘public authorities’ within the meaning of Commission Directive 2000/52/EC ⁽³⁷⁾. It is not therefore necessary to determine whether the measure is imputable to the State within the meaning of the *Stardust Marine* case-law ⁽³⁸⁾.
- (278) The CCIPB has disputed that the agreements covered by the formal investigation procedure are imputable to the State as it denies that the State and local authorities are involved in its decisions. In the light of the above, this argument does not appear to stand up as the CCIPB is itself a public authority whose decisions are necessarily imputable to the State within the meaning of the case-law on State aid, regardless of the role played in its decisions by other authorities. For the same reasons, the CCIPB’s argument that supervision by the State does not imply subordination is also without merit. As already highlighted in recital 273, in its comments on the opening decision, the CCIPB presented itself as a non-profit-making public body, thus confirming the Commission’s argument that the CCIPB is a public authority and that all its decisions are imputable to the State, without the involvement of other public authorities in those decisions having to be ascertained.
- (279) Ryanair’s comments on this point are substantially similar to those of the CCIPB. Ryanair has in particular indicated that the Commission should examine the imputability criterion by assessing the involvement of ‘public authorities’ in the CCIPB’s decisions with regard to Ryanair and AMS. Ryanair has also cited a Council of State opinion that suggests that chambers of commerce and industry are independent from the State in the strict sense. According to this opinion, the fact that chambers of commerce and industry answer to the State, in so far as any public body must technically answer to a legal person, does not in itself imply any subordination. Ryanair argues in this respect that the State (in the strict sense) is involved only in certain decisions of the CCIPB, of which it is informed only after the fact. For all the reasons given above, this argument is without merit as there is no need to ascertain whether any public authorities, other than the CCIPB, are involved in the latter’s decisions.
- (280) Likewise, the CCIPB’s argument that it operates Pau airport under the rules of private law is without merit, as the measures in question were adopted by a public body and are therefore necessarily imputable to the State ⁽³⁹⁾.

⁽³⁶⁾ See judgment in Case C-482/99 French Republic v Commission of the European Communities [2002] ECR I-4397, paragraph 52.
⁽³⁷⁾ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ L 193, 29.7.2000, p. 75).

⁽³⁸⁾ See the Commission Decision of 22 June 2006 in Case N 563/2005 — France — *Aide à la compagnie Ryanair pour la ligne aérienne desservant Toulon et Londres*, recital 16.

⁽³⁹⁾ Moreover, the Commission stresses that, for the purpose of applying the rules on state aid, a distinction should not be made between the CCIPB and the specific CCIPB service operating the airport, given that the service operating Pau airport does not have its own legal personality distinct from that of the CCIPB and is simply a link in the chain of services within the CCIPB that has no decision-making autonomy other than in relation to the day-to-day operation of the airport. Accordingly, the various airport services agreements and marketing services agreements covered by the formal investigation procedure were signed by the President of the CCIPB, following authorisation from the General Assembly of the CCIPB. Furthermore, neither France nor the third parties have argued that the measures covered by the formal investigation procedure should be imputed solely to this service.

(281) In conclusion, the various agreements covered by this assessment are imputable to the State and involve the use of state resources.

8.1.1.2. ***Selective advantage for Ryanair, AMS and Transavia in the agreements signed with the CCIPB during the period under review***

(282) In order to determine whether a state measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions⁽⁴⁰⁾.

(283) In order to make this assessment, the MEO test should be applied to the measures in question. This involves determining whether a hypothetical MEO acting in place of the CCIPB and motivated by the prospect of profits would have entered into similar agreements.

(284) In order to correctly apply this test, a number of general questions should be answered first, particularly the following.

— Should a marketing services agreement and an airport services agreement that were signed at the same time be analysed separately or together⁽⁴¹⁾?

— In applying the MEO test to the marketing services agreements, should the CCIPB be regarded as having acted as Pau airport operator or as a public authority purchasing marketing services in the context of its local economic development mission, regardless of its function as airport operator?

— What benefits could a hypothetical MEO acting in place of the CCIPB have expected from the marketing services agreements?

— What, for the purposes of applying the MEO test, is the relevance of comparing the terms of the airport services agreements covered by the formal investigation procedure with the airport charges invoiced at other airports?

(285) After answering these questions, the Commission will apply the MEO test to the various measures in question.

Joint analysis of the airport services agreements and marketing services agreements

(286) In the extension decision, the Commission considered that the two types of agreement covered by the formal investigation procedure, namely the airport services agreements and the marketing services agreements, should be analysed together, for each period in question, at the time when each of the agreements was signed. This approach particularly involves each set of agreements below, entered into by the CCIPB, being treated as a single measure:

— airport services agreement signed on 30 June 2005 with Ryanair and marketing services agreement signed on the same date with AMS, with regard to the Pau-London Stansted route,

— letter from the CCIPB to Ryanair of 25 September 2007 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Charleroi route⁽⁴²⁾, and the marketing services agreement signed on the same date with AMS,

— letter from the CCIPB to Ryanair of 17 March 2008 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Bristol route, and the marketing services agreement signed on 31 March 2008 with AMS with regard to this same route,

⁽⁴⁰⁾ See, in particular, judgment of 29 April 1999 in Case C-342/96 Kingdom of Spain v Commission of the European Communities [1999] ECR I-2459, paragraph 41.

⁽⁴¹⁾ This question does not apply to the agreement signed on 23 January 2006 by the CCIPB with Transavia, which covers both airport services and marketing services, or to the agreement signed on 28 January 2003 by the CCIPB with Ryanair, which also contains provisions on both airport services and marketing services.

⁽⁴²⁾ This type of letter can be likened to an airport services agreement, as it indicates the terms for setting airport charges and for groundhandling services. It will be included hereinafter among the acts referred to as 'airport services agreements'.

- letter from the CCIPB to Ryanair of 16 June 2009 extending the terms of the airport services agreement of 30 June 2005 to the Pau-Bristol route, and the marketing services agreement signed on the same date with AMS with regard to this same route,
- marketing services agreement signed on 28 January 2010 with AMS with regard to the Pau-London, Pau-Charleroi and Pau-Beauvais routes. No airport services agreement was formally signed in parallel with this marketing services agreement. However, an 'implicit' airport services agreement can be identified. This implicit agreement stems from the general airport charges, adopted following discussions within the airport's economic advisory committee, and the charges for groundhandling services stipulated by the airport services agreement of 30 June 2005 continuing to be applied to Ryanair for the three routes described in the marketing services agreement⁽⁴³⁾. France has in fact indicated that, when the airport services agreement of 30 June 2005 expired on 30 June 2010, this was not renewed and the charges applied thereafter to Ryanair continued to be those adopted by the airport's economic advisory committee for the regulated charges and those stipulated by the agreement of 30 June 2005 for the groundhandling services.
- (287) France has stated that it agrees with the approach taken in the extension decision to analyse together the airport services agreements and marketing services agreements signed at the same time. On the other hand, certain interested third parties, particularly the CCIPB and Ryanair, question this approach as they consider that the marketing services agreements should be analysed separately.
- (288) However, the facts on record confirm that the approach taken in the extension decision, and approved by France, is well-founded. This is clear in the case of Transavia and the agreement signed with Ryanair in 2003, as the marketing services and airport services are the subject of a single agreement. For the reasons given in recitals 289 to 313, this is also valid for the other agreements signed with Ryanair and AMS.
- (289) Firstly, each marketing services agreement was signed at virtually the same time as an airport services agreement. These two types of agreement were signed on each occasion on the same date, except in the case of the marketing services agreement of 31 March 2008, which, however, was signed very shortly after (14 days) an airport services agreement for the Pau-Bristol route, which was the same route covered by the marketing services agreement.
- (290) Moreover, the two types of agreement were signed by the same parties. AMS is actually a wholly-owned subsidiary of Ryanair and its managers are senior Ryanair executives⁽⁴⁴⁾. As a result, Ryanair and AMS form a single economic entity, in the sense that AMS acts in Ryanair's interests and under its control, and AMS's profits go to Ryanair in the form of dividends or increased company value. Moreover, as will be detailed further on, the various marketing services agreements are connected with the operation of certain routes by Ryanair from Pau airport. The marketing services agreements in fact indicate that they are rooted in Ryanair's commitment to operate these routes, and they were also signed at the same time as airport services agreements between the CCIPB and Ryanair for these same routes. Consequently, the fact that the marketing services agreements were signed by the CCIPB with AMS and not Ryanair cannot prevent a marketing services agreement and an airport services agreement that were signed at the same time from being regarded as forming a single transaction, particularly for the purpose of analysing these agreements in the light of the MEO test, and in the context of this analysis, Ryanair and AMS from being regarded as forming a single economic entity.
- (291) Lastly, a number of other facts, set out in recitals 292 to 313 for each agreement, reveal additional very close links between, on the one hand, each marketing services agreement and, on the other hand, the airport services agreement signed at the same time as the latter.
- (292) Accordingly, the marketing services agreement of 30 June 2005 was signed for a term of 5 years, just like the airport services agreement signed on the same date, through which Ryanair undertook to offer a daily service between London and Pau. Moreover, the marketing services agreement establishes an explicit link between itself and the air transport services covered by the airport services agreement: 'This Agreement is rooted in Ryanair's commitment to operate on a daily basis a route between Pau and London Stansted'. This wording unequivocally shows that the marketing services agreement would very likely not exist if Ryanair were not operating the route covered by the airport services agreement.

⁽⁴³⁾ According to this marketing services agreement, Ryanair undertook to operate these three routes under the conditions stipulated by this same agreement.

⁽⁴⁴⁾ See the report of the Aquitaine Regional Audit Chamber on the CCIPB, referred to in recital 72, which concludes in particular that AMS is simply an offshoot of Ryanair, managed by two senior Ryanair executives.

- (293) The marketing services agreement of 30 June 2005 also indicates as follows in its preamble: ‘... [Airport Marketing Services Limited] is — for technical reasons — the only company with the potential to undertake the promotion of the Pau-Béarn region through the original and exclusive website www.ryanair.com with a view to ensure reservations of Ryanair tickets to Pau’. This wording tends to confirm that the primary objective of the marketing services agreement is not to promote the Pau-Béarn region in general, but, much more specifically, to maximise sales of Ryanair tickets to Pau by promoting this region.
- (294) Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting messages and links on the Pau destination page of the Ryanair website, and inserting a link to the website designated by the CCIPB on the English homepage of the same website. However, the Pau destination page of the Ryanair website is mainly targeted at people who have already decided to use or are likely to consider using Ryanair’s services to Pau. As for the website homepage, this is certainly targeted at a much wider audience, but only its English version is covered by the marketing services agreement. This further indicates that the marketing services are essentially designed to promote Ryanair’s services between Pau and London, and not equally travel to Pau and its region. If they were designed to promote Pau and its region to all tourists and business travellers likely to be interested in the region, the CCIPB would in all likelihood have asked for the link to a website of its choosing to be placed on all, or at least several versions of, the Ryanair website homepage, and not just the English version.
- (295) Lastly, the marketing services agreement of 30 June 2005 stipulates as follows: ‘If any of the material conditions of trading change substantially following the signature of this agreement, including the level of inbound passengers generated as a result of this Agreement, the Parties will in good faith undertake to amend the contract so as to reflect such a change’. The level of inbound passengers is therefore presented as a ‘material condition of trading’ of the marketing services agreement, which once again confirms that it is not so much travel to Pau and its region in general that is primarily pursued by the marketing services but, much more specifically, the maximisation of the number of passengers on Ryanair flights to Pau.
- (296) Similar elements can be found in the other marketing services agreements. The marketing services agreement of 25 September 2007 was concluded for a term of 5 years, which corresponds to the period for which the letter from the CCIPB to Ryanair of the same date extended the terms of the airport services agreement of 30 June 2005 to the Pau-Charleroi route. Moreover, the marketing services agreement indicates as follows: ‘This Agreement is rooted in Ryanair’s commitment to operate on a route between PAU and CHARLEROI with a weekly service (3 frequencies per week) subject to force Majeure per full year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of BELGIUM-originating passengers with high spending ability to PAU BEARN’.
- (297) The agreement’s preamble also states as follows: ‘... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region’. These statements tend to confirm that the primary objective of the agreement is not to promote travel to the Pau-Béarn region in general, but, much more specifically, to maximise sales of Ryanair tickets on its Charleroi-Pau route.
- (298) Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the Belgian and Dutch homepage of the Ryanair website. The marketing services are not therefore targeted at anyone who might be convinced to stay in Pau or its region, but specifically at those people who are most likely to use Ryanair’s services between Charleroi and Pau, namely inhabitants of Belgium and the Netherlands.
- (299) The marketing services agreement of 31 March 2008 was concluded for a period between 16 May and 13 September 2008, which corresponds to the period for which Ryanair undertook to operate a route to Bristol, as indicated by the following wording in said agreement: ‘This Agreement is rooted in Ryanair’s commitment to operate on a route between PAU and BRISTOL with a weekly service (3 frequencies per week), from May 16th 2008 to September 13th 2008 subject to force Majeure, for one year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of ENGLISH-originating passengers with high spending ability to PAU BEARN’⁽⁴⁵⁾.

⁽⁴⁵⁾ Original English.

- (300) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region' ⁽⁴⁶⁾. Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the English homepage of the Ryanair website.
- (301) The marketing services agreement of 16 June 2009 was concluded for a period between 1 April and 24 October 2009, which corresponds to the period for which Ryanair undertook to operate a Pau-Bristol route, as indicated by the following wording in said agreement: 'This Agreement is rooted in Ryanair's commitment to operate on a route between PAU and BRISTOL with a weekly service (2 frequencies per week), from April 1st 2009 to October 24th 2009, that is 60 projected flights for the complete 2009 schedule, subject to force Majeure, for one year of operation. CCIPB, therefore, has the potential to advertise the business and tourist attractions of the PAU BEARN and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of ENGLISH-originating passengers with high spending ability to PAU BEARN'.
- (302) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region'. Furthermore, according to the marketing services agreement, the services to be provided by AMS consist in inserting a link to the website designated by the CCIPB on the English homepage of the Ryanair website.
- (303) The marketing services agreement of 28 January 2010 stipulated that it would apply for one year from the launch of the air transport services that Ryanair had undertaken to operate from Pau to London, Charleroi and Beauvais according to Article 1 of this same agreement. This provision in itself reveals a clear link between the marketing services agreement and these air transport services. Moreover, Article 1 of the marketing services agreement stipulates as follows:

'This Agreement is rooted in Ryanair's commitment to establish and to operate routes between:

- PAU and LONDON Stansted from 30 March 2010 with three flights per week during the whole year ...
- PAU and CHARLEROI from 30 March 2010 with three flights per week for summer schedule ...
- PAU and BEAUVAIS, from April 2010, with three flights per week for summer schedule ...

CCIPB therefore, has the potential to advertise the business and tourist attractions of PAU and its region to large numbers of tourists and business travellers accessing www.ryanair.com, and to attract an increased number of inbound passengers with high spending ability' ⁽⁴⁷⁾.

- (304) The agreement's preamble also states as follows: '... [Airport Marketing Services] is the only company that has the potential to target large numbers of potential Ryanair passengers in order to promote the tourist and business attractions in the region' ⁽⁴⁸⁾. Furthermore, like the 2005 marketing services agreement, the 2010 agreement stipulates that the services to be provided by AMS consist in inserting messages and links on the Pau destination page of the Ryanair website, and inserting a link to the website designated by the CCIPB (i) on the English homepage of the Ryanair website for the route to London, (ii) on the Belgian and Dutch homepage of the Ryanair website for the route to Charleroi, and (iii) on the French homepage of the Ryanair website for the route to Beauvais. Lastly, the agreement stipulates that, if Ryanair's air transport services to London, Charleroi and Beauvais, as defined in Article 1, are not announced or launched by February 2010, the agreement will lapse without liability to either party. This provision therefore establishes an additional link between the marketing services agreement and the Ryanair services to London, Charleroi and Beauvais.

⁽⁴⁶⁾ See footnote 45.

⁽⁴⁷⁾ See footnote 45.

⁽⁴⁸⁾ See footnote 45.

- (305) These elements of the various marketing services agreements show that the marketing services stipulated in these agreements are, in terms of both their duration and their nature, closely linked to the air transport services offered by Ryanair, as defined in the marketing services agreements and covered by the corresponding airport services agreements. The marketing services agreements even indicate that they are rooted in Ryanair's commitment to operate the transport services in question. Far from being designed to generally and equally increase travel to Pau and its region by tourists and business travellers, the marketing services specifically target those persons likely to use the Ryanair transport services covered by the marketing services agreements, and therefore have the primary objective of promoting those services.
- (306) The marketing services agreements are therefore indissociable from the airport services agreements that they echo and from the air transport services that form their purpose. The facts presented in recitals 286 to 305 also indicate that, in the absence of the routes in question (and therefore the associated airport services agreements), the marketing services agreements would not have been signed. As shown in recitals 286 to 305, the marketing services agreements explicitly indicate that they are rooted in Ryanair's commitment to operate certain routes. They also provide for marketing services that are essentially intended to promote those routes.
- (307) In this respect, the CCIPB's argument that these two types of agreement should be analysed separately because they each have a different purpose is without merit. It is in fact clear from the above that the marketing services agreements form an integral part, together with the airport services agreements, of the commercial relations between Ryanair and the CCIPB with regard to the operation of those routes covered by these two types of agreement.
- (308) Furthermore, it seems that, before signing the marketing services agreements in question, the CCIPB did not organise an invitation to tender open to all companies offering this type of service⁽⁴⁹⁾, nor did it consult various potential providers in order to compare their offers. More generally, it did not consider any providers other than the airlines concerned or their subsidiaries for the marketing services in question. This confirms the close link of dependency between the marketing services agreements and the routes operated by Ryanair from Pau. If the marketing services agreements had been truly independent of the airport services agreements, the CCIPB would in all likelihood have consulted other providers in addition to AMS, particularly as it is a public body that routinely uses competitive procurement procedures.
- (309) Moreover, it also seems that the signature of all the airport services agreements was dependent upon the signature of the marketing services agreements.
- (310) Firstly, according to France, the 2005 agreements (airport services agreement and marketing services agreement of 30 June 2005), although legally independent, were, however, closely linked⁽⁵⁰⁾, and the close link between the airport services agreement signed with Ryanair and the marketing services agreement signed with AMS, a wholly-owned subsidiary of Ryanair, cannot be denied⁽⁵¹⁾. Given the significant similarities between the 2005 agreements and the agreements signed subsequently with Ryanair and AMS, France's aforementioned comments can be easily applied to these subsequent agreements.
- (311) France also indicates in its letter of 30 May 2011 that the CCIPB was induced to sign the agreements on 30 June 2005. It further points out in this letter that, following the non-renewal of the AMS agreement, Ryanair decided, without sending written notice to the CCIPB, not to renew its flights to Pau-Pyrénées airport as from the IATA 2011 summer season (April 2011). This tends to indicate that, at least in certain cases, Ryanair would not agree to operate a route and pay the airport's general charges without a marketing services agreement signed between the airport operator and AMS.
- (312) This approach was also highlighted by the CRC in its report of 5 January 2007⁽⁵²⁾.

⁽⁴⁹⁾ Except for the unsuccessful advertisement in Air & Cosmos (see recital 132).

⁽⁵⁰⁾ Letter from the French authorities of 13 July 2007.

⁽⁵¹⁾ Letter from the French authorities of 30 May 2011.

⁽⁵²⁾ The report states that this services agreement actually constitutes financial aid to Ryanair and is unlawful, given that this aid was not previously notified to the Commission. It also states that, in order to sidestep the effects of the Administrative Court's decision (concluding that the 2003 agreement with Ryanair resulted in unlawful state aid), the Chamber of Commerce and Industry resorted to a new legal framework.

- (313) It is clear from all the above that each marketing services agreement is indissociable from the underlying airport services agreement, forms a single transaction with the latter, and in all likelihood would not have been signed in the absence of the corresponding airport services agreement and the routes covered by these two agreements. Consequently, each marketing services agreement and the airport services agreement signed at the same time should be analysed as a single measure in order to determine whether this agreement constitutes State aid.

Application of the MEO test to the CCIPB with regard to the marketing services agreements

- (314) In order to apply the MEO test with regard to the marketing services agreements, the hypothetical MEO to be used for analysing the conduct of the CCIPB must be identified.
- (315) One approach would be to consider that the CCIPB signed the marketing services agreements as the airport operator⁽⁵³⁾, and therefore to compare its conduct with that of a hypothetical airport operator motivated by the prospect of profits.
- (316) Another approach would be to consider that the CCIPB acted as a public body entrusted with a general interest mission, in this case the economic development of Pau and its region, and that it purchased these marketing services in order to fulfil that mission, regardless of its capacity as the operator of Pau airport. In the context of this second approach, according to the case-law, it needs to be verified, firstly, that the services in question met the 'actual needs' of the public purchaser and, secondly, that they were purchased at a price equal to or below a 'market price'⁽⁵⁴⁾ or, in other words, that an MEO motivated by the prospect of profits and needing equivalent services (without necessarily being an airport operator) would have been prepared to accept similar conditions to those accepted by the CCIPB.
- (317) The comments of certain interested third parties tend to favour the second approach, at least implicitly. In particular, notably in its aforementioned study of 20 December 2013, Ryanair has provided information intended to show that the price of the AMS marketing services did not exceed what may be regarded as a market price for such services. Further to this argument, it has noted that airport operators cannot be distinguished from other types of AMS customer.
- (318) The CCIPB has provided information leading in the same direction and has also noted that it is responsible for developing the economic attractiveness of the area falling within its competence. Accordingly, it states that the sums paid for these marketing services have enabled the assets of Pau and its region to be promoted, with the EUR 56 000 000 that Ryanair passengers spent in 2010 during their stay having directly benefited the accommodation, catering, trade and property sectors (this amount was apparently EUR 8 000 000 in 2005, which the CCIPB claims was very low compared to the impact studies carried out by other airports). This statement suggests that, according to the CCIPB, its conduct should be analysed as that of a public purchaser acquiring the services needed to fulfil its general interest missions.
- (319) The Commission notes in this respect, firstly, that this argument contradicts the theory that the decisions of the CCIPB on the measures in question are not imputable to the State. If the CCIPB maintains that it signed these agreements to fulfil its local economic development task, then it must necessarily accept that its conduct is typically that of a local public authority.
- (320) Secondly, the Commission considers that, out of the two solutions indicated above, the second one must be rejected because it inherently ignores the indissociable nature of the airport services agreements and corresponding marketing services agreements, as found previously. This approach would essentially mean considering that the CCIPB signed the marketing services agreements without any regard to the routes offered by Ryanair from the airport that it operates, and that it would have signed these agreements even in the absence of the routes in question and the corresponding airport services agreements. For the reasons detailed in recitals 286 to 313, such an assumption is highly unlikely.
- (321) Moreover, even if this second approach were used, it would not lead to the conclusion that the marketing services agreements do not confer an economic advantage on Ryanair and AMS.

⁽⁵³⁾ Without prejudice to any public policy objectives of local economic development that the CCIPB might pursue in signing the agreements in question.

⁽⁵⁴⁾ See, for example, judgments in Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* [1999] ECR II-139, paragraphs 75-76, and in *Joined Cases T-116/01 and T-118/01 P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission of the European Communities* [2003] ECR II-2957, paragraph 117.

- (322) In fact, as noted in recital 316, in order for purchases made by a public entity not to confer an economic advantage on the seller, it is not enough for them to have been made at a price equal to or below 'market price'. They must also meet an 'actual need' of the public purchaser.
- (323) It cannot be categorically ruled out that, in fulfilling its economic development mission for Pau and its region, the CCIPB may feel the need to resort to commercial providers in order to promote the area. However, in the present case, this promotion targets the commercial activities of two clearly defined undertakings, namely Ryanair and the CCIPB itself as the operator of Pau airport. A public entity cannot consider that marketing services mainly promoting the activities of one or more clearly defined undertakings form part of this entity's specific task of promoting local economic development. It is logical for such a public entity to start from the assumption that local undertakings must carry out or finance their own marketing operations, and that its own actions are limited to the general promotion of the area and local economic fabric, without targeting specific undertakings.
- (324) Any other approach would mean considering that a public entity responsible for local economic development could, without such measures constituting State aid, purchase marketing services that mainly promote the products or services of certain locally established undertakings, on the grounds that these services encourage local economic development and that they are purchased at 'market price'. Such an approach would circumvent Article 107(1) TFEU.
- (325) As a result, it seems that the marketing services purchased by the CCIPB from AMS cannot be regarded as meeting an 'actual need' of the CCIPB as a public entity invested with a local economic development mission. This conclusion is confirmed by certain information provided by France, according to which, in particular, it is clearly not common practice for CCIs that do not operate an airport to purchase marketing services from airlines ⁽⁵⁵⁾.
- (326) Consequently, applying the second approach envisaged in recitals 316 to 321 would lead to the conclusion that the marketing services agreements confer an economic advantage on the undertakings having provided these services and on the airlines having directly benefited from the marketing services. As a result, based on this approach, the marketing services agreements signed with AMS would constitute aid to AMS as the provider of the marketing services and aid to Ryanair as the direct and main beneficiary of these services.
- (327) Furthermore, when a public entity makes purchases in the exercise of its general interest missions, it is normally expected to minimise its expenditure by organising an invitation to tender, or at the very least by consulting several providers and comparing their offers. This is particularly the case with highly individual goods or services for which there are no clear market price benchmarks, which is plainly the case with marketing services. However, in the present case, the marketing agreements were not the result of an invitation to tender. A call for proposals launched by the CCIPB did not find an airline prepared to operate from Pau airport under the envisaged conditions ⁽⁵⁶⁾. This finding confirms that the second approach is unsuitable.
- (328) This unsuitability also appears to be confirmed by the comments submitted by the CCIPB on the extension decision. It is in fact notable that, in comparing its own conduct to that of various private undertakings in order to prove that the MEO test is satisfied, the CCIPB mainly compares itself to airport operators. It therefore refers to a number of large private British airports, an Italian airport and six French airports. This approach tends to confirm the conclusion that the CCIPB signed the marketing services agreements primarily as an airport operator and not as a public authority acting in the context of its local economic development mission.
- (329) Furthermore, France has indicated that the tourism promotion of Béarn is the responsibility of the Béarn-Basque Country departmental tourism committee and that the CCIs generally conduct specific actions to promote tourism through their participation in various regional and departmental structures in this area, particularly through the regional and departmental tourism committees. However, the marketing services agreements, which, according to the CCIPB, are mainly intended to promote the tourist and business attractions of Pau and its region, were signed directly by the CCIPB, without the intervention of local structures responsible for tourism promotion. This is an additional factor that tends to confirm that the CCIPB signed the marketing services agreements primarily as an airport operator.

⁽⁵⁵⁾ This statement also tends to confirm that the marketing services in question were actually purchased by the CCIPB primarily in its capacity as airport operator, and not as a public authority responsible for regional economic development.

⁽⁵⁶⁾ See recital 132.

- (330) In order to apply the MEO test, the first approach referred to in recital 315 should therefore be used, which involves comparing the conduct of the CCIPB to a hypothetical MEO, motivated by the prospect of profits and operating Pau airport in place of the CCIPB.
- (331) This conclusion, determined for the agreements signed with Ryanair and AMS, is equally valid, for the same reasons, for the agreement signed with Transavia, particularly as, in the latter case, the airport services and marketing services were covered by one and the same agreement.

Benefits that an MEO could have expected from the marketing services agreements and price that it would have been willing to pay for those services

- (332) It is clear from all the above that, in order to apply the MEO test to the marketing services agreements in question, these agreements must be analysed together with the corresponding airport services agreements, as they form a single transaction with the latter⁽⁵⁷⁾, and that the CCIPB's conduct must be assessed in relation to the conduct of a hypothetical MEO operating Pau airport in its place.
- (333) When analysing each of the transactions in question, the benefits that this hypothetical MEO, motivated by the prospect of profits, could expect from the marketing services should be determined. This analysis should not take into account the general impact of such services on the region's tourism and economic activity. Only the effects of these services on the airport's profitability may be considered, as it is these alone that would be taken into account by the hypothetical MEO used in this analysis.
- (334) Marketing services may boost passenger traffic on the routes covered by the marketing services agreements and corresponding airport services agreements, as they are designed to promote these routes. Although this effect primarily benefits the airline, it does also benefit the airport operator. An increase in passenger traffic may lead, for the airport operator, to an increase in revenue from certain airport charges and from the provision of groundhandling services, as well as an increase in non-aeronautical revenue from car parks, restaurants and other businesses.
- (335) There can therefore be no doubt that an MEO operating Pau airport in place of the CCIPB would have taken this positive effect into account when considering entering into a marketing services agreement and the corresponding airport services agreement. The MEO would have taken into account the impact of the routes in question on its future revenues and costs by, in this context, forecasting a number of passengers using these routes that would have reflected the positive effect of the marketing services. This effect would have been assessed for the entire operating period of the routes in question, as set out in the airport services agreement and marketing services agreement.
- (336) The Commission accepted this point during the procedure as, when it invited France to reconstruct the revenue and cost forecasts that an MEO would have made before entering into marketing services agreements and airport services agreements, it proposed that France take into account the effects of the marketing services agreements on expected traffic. When an airport operator enters into an agreement for the promotion of certain routes, a fairly high load factor⁽⁵⁸⁾ may be predicted for the routes in question, which may be taken into account when assessing future revenues. In this respect, the Commission notes Ryanair's opinion that marketing services agreements do not generate only a cost for the airport operator, but also a potential benefit.
- (337) It should be determined whether a hypothetical MEO operating Pau airport in place of the CCIPB could reasonably expect and quantify benefits other than those resulting from the positive effect on passenger traffic of the routes covered by the marketing services agreement for the operating period of those routes, as set out in the marketing services agreement or airport services agreement.

⁽⁵⁷⁾ A given marketing services agreement must be analysed together with the corresponding airport services agreement as they form a single transaction. Nevertheless, there are as many separate transactions as there are 'pairs' of marketing services agreements and airport services agreements.

⁽⁵⁸⁾ The load factor is defined as the proportion of seats filled on aircraft used to operate the route in question.

- (338) Certain interested third parties support this argument, in particular Ryanair in its study of 17 January 2014. This study of 17 January 2014 is based on the theory that marketing services purchased by an airport operator, such as the CCIPB, may help to improve the airport's brand image and, as a result, sustainably increase the number of passengers using this airport, and not just the numbers on the routes covered by the marketing services agreement and airport services agreement over the operating period of these routes, as set out in these agreements. In particular, Ryanair found in its study that these marketing services may have sustainable positive effects on passenger traffic at the airport even after the marketing services agreement has expired.
- (339) It should first be noted that there is nothing in this case to suggest that, when the marketing services agreements covered by the formal investigation procedure were signed, the CCIPB ever considered, and still less quantified, any positive effects of the marketing services agreements going beyond the routes covered by these agreements or, in terms of time, going beyond the expected operating period of the routes in question. Moreover, neither France nor the CCIPB has proposed any method for estimating the possible value that a hypothetical MEO operating Pau airport in place of the CCIPB would have given to these effects when assessing whether to enter into the marketing services agreements and airport services agreements.
- (340) As indicated previously, the marketing services purchased from AMS are targeted at those people visiting the Ryanair website and, more specifically, either the Pau destination page on this website or the English homepage (for the marketing services agreements covering the Pau-London and Pau-Bristol routes), Belgian and Dutch homepage (for the agreements covering the Pau-Charleroi route) or French homepage (for the agreement covering the Pau-Beauvais route) of the website. With regard to Transavia, all the marketing services on the www.transavia.com website were focused on the Pau destination page. The marketing services in question were therefore mainly targeted at those people likely to use the routes covered by the marketing services agreement. Their positive effect on passenger traffic on other routes to Pau therefore seems to be much more hypothetical and, in any event, too uncertain to be taken into account and quantified by a prudent MEO assessing the value in signing the marketing services agreement.
- (341) Furthermore, the sustainability of these effects also seems very doubtful. It is possible that advertising Pau and its region on the Ryanair website may have encouraged people visiting this website to buy Ryanair tickets to Pau when this advertising was first posted or just after. However, it is highly unlikely that the effect of this advertising on visitors lasted or had an influence on their ticket purchases for more than a few weeks after it was posted on the Ryanair website. An advertising campaign is more likely to have a sustainable effect when the promotional activities involve one or more advertising media to which consumers are regularly exposed over a given period. For example, an advertising campaign on general television and radio stations, various websites and/or various billboards displayed outdoors or inside public places may have a sustainable effect if consumers are passively and repeatedly exposed to these media. However, promotional activities limited to certain pages of Ryanair's website alone are unlikely to have an effect that lasts much beyond the end of the promotion.
- (342) It is in fact very likely that most people do not visit Ryanair's website often enough to leave them with a lasting impression of the advertising for this region. This argument is well supported by two factors. Firstly, under the various marketing services agreements, the promotion of the Pau region on Ryanair's homepage was limited to the presence of a single link to a website designated by the CCIPB for limited and, in some cases, very brief periods (42 days per year over 5 years for the 2005 agreement, one continuous year for the 2007 agreement, 8 days for the 2008 agreement, 9 days for the 2009 agreement, and 45 days on the English homepage, 25 days on the Belgian and Dutch homepage and 25 days on the French page for the 2010 agreement). Both the nature of these promotional activities (presence of a single link with limited promotional value) and their short lifespan would have significantly limited the effect of these activities beyond the end of the promotion, particularly as these activities were limited to Ryanair's website alone and were not supported by any other media. Secondly, the other marketing activities set out in the agreements signed with AMS were only in relation to the Pau destination page of Ryanair's website. It is highly likely that most people do not visit this page very often, and only do so because they are already potentially interested in this destination.
- (343) The above findings equally apply to the 2006 agreement signed with Transavia. The marketing services set out in this agreement simply entailed inserting messages and links on the Pau destination page of the Transavia website, and emailing offers advertising the attractions of Pau as a destination to regular subscribers of the electronic magazine transavia.com.

- (344) As a result, although the marketing services may have increased passenger traffic on the routes covered by the marketing services agreements for the period of those services, it is very likely that this effect after this period or on other routes was zero or negligible.
- (345) The Ryanair studies of 17 and 31 January 2014 also indicate that the likelihood of the benefits of the marketing services agreements going beyond the routes covered by these agreements or lasting beyond the operating period of these routes, as set out in the marketing services agreements and airport services agreements, was very small and could not be quantified with a degree of reliability that would be considered sufficient by a prudent MEO.
- (346) Accordingly, for example, the study of 17 January 2014⁽⁵⁹⁾ indicates that 'future incremental profits beyond the scheduled expiry of the Airport Services agreement are inherently uncertain'⁽⁶⁰⁾. Furthermore, this study proposes two methods for the *ex ante* assessment of the positive effects of marketing services agreements: a 'cash flow' approach and a 'capitalisation' approach.
- (347) The 'cash flow' approach involves assessing the benefits of the marketing services agreements and airport services agreements in the form of future revenues generated for the airport operator by the marketing services and by the airport services agreement, minus corresponding costs. In the 'capitalisation' approach, improvement of the airport's brand image through the marketing services is treated as an intangible asset, acquired for the price set out in the marketing services agreement.
- (348) However, the study highlights the major difficulties presented by the 'capitalisation' approach and shows that the results produced by this method are unreliable. It suggests that the 'cash flow' approach would be better. In particular, the study states: 'The capitalisation approach should only take into account the proportion of marketing expenditure that is attributable to the intangible asset base of an airport. However, it may be difficult to identify the proportion of marketing expenditure that is targeted towards generating expected future revenues for the airport (i. e., an investment in the intangible asset base of the airport) as opposed to generating current revenues for the airport'⁽⁶¹⁾. It also stresses that 'In order to implement the capitalisation-based approach, it is necessary to estimate the average length of time that an airport would be able to retain a customer due to the AMS marketing campaign. In practice, it would be very difficult to estimate the average period of customer retention following an AMS campaign due to insufficient data'⁽⁶²⁾.
- (349) The study of 31 January 2014 proposes a practical application of the 'cash flow' approach. In this approach, the benefits of the marketing services agreements and airport services agreements that last even after the marketing services agreement has expired are expressed as a 'terminal value' calculated on the agreement's expiry date. This terminal value is calculated based on the incremental profits expected from the airport service and marketing services agreements in the final year of application of the airport services agreement. This method involves taking the incremental profit expected in the final year of application of the airport services agreement and projecting it into the future for the same period as the term of the airport services agreement, but adjusted by the growth rate of the air transport market in Europe and a probability factor deemed to reflect the capacity of the airport services agreement and marketing services agreement to contribute to the airport's profits beyond their expiry⁽⁶³⁾. According to the study of 31 January 2014, this capacity to produce lasting benefits depends on various factors '... including greater prominence and a stronger brand, alongside network externalities and repeat passengers'⁽⁶⁴⁾, although no details are given about these factors. Moreover, this method takes into account a discount rate that reflects capital costs.

⁽⁵⁹⁾ See Section 6.2.2.7.

⁽⁶⁰⁾ Original English.

⁽⁶¹⁾ See footnote 45.

⁽⁶²⁾ See footnote 45.

⁽⁶³⁾ See recitals 356 and 357.

⁽⁶⁴⁾ See footnote 45.

- (350) The study suggests a probability factor of [...] %, which it considers prudent. However, this very theoretical study does not provide any serious evidence for this factor, neither quantitatively nor qualitatively. It does not base itself on any facts relating to Ryanair's activities, air transport markets or airport services to substantiate this rate of [...] %. It does not establish any link between this rate and the factors that it mentions in passing (prominence, strong brand, network externalities and repeat passengers) and that are deemed to extend the benefits of the airport service and marketing services agreements after their expiry dates. Lastly, it does not in any way base itself on the specific content of the marketing services set out in the various agreements with AMS when analysing to what extent these services may influence the factors mentioned above.
- (351) Moreover, it does not prove that there is any likelihood that, on the expiry of an airport services agreement and marketing services agreement, the profits generated by these agreements for the airport operator in the final year of their application will continue in the future. Likewise, it provides no evidence that the growth rate of the air transport market in Europe is a useful indicator for measuring the impact of an airport services agreement and a marketing services agreement for a given airport.
- (352) A 'terminal value' calculated using the method suggested by Ryanair would therefore be highly unlikely to be taken into account by a prudent MEO when assessing the value of entering into an agreement.
- (353) The study of 31 January 2014 therefore shows that the 'cash flow' approach would lead only to very imprecise and unreliable results, as would the 'capitalisation' method.
- (354) Moreover, neither France nor any interested third party has provided any evidence that the method put forward by Ryanair in this study, or any other method aiming to take into account and quantify the benefits extending beyond the expiry of the airport services agreements and marketing services agreements, has been successfully used by regional airport operators comparable to Pau's operator. France has not for that matter commented on the studies of 17 and 31 January 2014 and has not therefore approved their conclusions.
- (355) Moreover, as stated above, the marketing services considered by the formal investigation procedure clearly target people likely to use the routes covered by the marketing services agreements. If these routes are not renewed on the expiry of the airport services agreement, it is unlikely that the marketing services will continue to have a positive effect on passenger traffic at the airport after the expiry date. It is very difficult for an airport operator to assess the likelihood of an airline continuing to operate a route on the expiry of the term to which it has committed itself in the airport services agreement. Low-fare airlines in particular have proven to be very dynamic in terms of launching and withdrawing routes. Therefore, when entering into a transaction such as those being examined in this formal investigation procedure, a prudent MEO could not rely on an airline being willing to extend the operation of the route in question on the expiry of the agreement.
- (356) Furthermore, it should be noted that a terminal value calculated using the method proposed by Ryanair in the study of 31 January 2014 will be positive (and therefore will have a positive effect on the projected return on the airport services agreement and marketing services agreement) only where the incremental profit expected from these agreements in the final year of application of the airport services agreement is positive. This method involves taking the incremental profit expected in the final year of application of the airport services agreement and projecting it into the future by applying two factors. The first factor is the overall growth in the European air transport market and reflects the expected growth in traffic. The second factor is a rate of [...] % that basically represents the likelihood of agreements that are now expiring encouraging the signature of similar agreements in the future, resulting in similar financial flows. As a result, if the future incremental profit expected in the final year of application of the airport services agreement is negative, the terminal value will also be negative (or at most will be zero), which indicates that the signature of agreements similar to those that are expiring will, just like those agreements, each year erode the airport's profitability.
- (357) The study of 31 January 2014 very briefly considers this scenario, by simply indicating in a footnote, without any comments or explanations, that '... no terminal value can be calculated if incremental profits net of AMS payments are negative in the last year of the period under consideration' ⁽⁶⁵⁾. However, as will be proven further on, all the agreements in this case involve projected incremental flows that have a negative net present value each year, and not just overall. As a result, for these agreements, a 'terminal value' calculated using the method proposed by Ryanair

⁽⁶⁵⁾ Study of 31 January 2014, footnote 17. Original English.

would be zero, if not negative. Taking this terminal value into account would not therefore call into question the conclusion that the various agreements involve an economic advantage.

- (358) In conclusion, it is clear from the above that the only tangible benefit that a prudent MEO would expect from a marketing services agreement, and that it would take into account and quantify when assessing the value of entering into such an agreement, together with an airport services agreement, would be that the marketing services would have a possible positive effect on the number of passengers using the routes covered by the agreements in question for the operating period of those routes, as set out in the agreements. Any other benefits would be deemed too uncertain to be taken into account and quantified, and there is nothing to suggest that they were taken into account by the CCIPB.

Relevance of comparing the terms of the airport services agreements covered by the formal investigation procedure with the airport charges invoiced at other airports

- (359) According to the new Guidelines, when applying the MEO test, aid to an airline using an airport can, in principle, be excluded where:

(a) the price charged for the airport services corresponds to the market price; or

(b) it can be demonstrated through an *ex ante* analysis, i.e. based on available information and foreseeable developments at the time when the measure was granted, that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport ⁽⁶⁶⁾.

- (360) Furthermore, according to the new Guidelines, 'When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term' ⁽⁶⁷⁾.

- (361) However, with regard to the first approach (comparison with a 'market price'), the Commission has strong doubts that, at the present time, an appropriate benchmark can be identified to establish a true market price for the services provided by airports. The Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines ⁽⁶⁸⁾.

- (362) It should be noted in this regard that, in general, the application of the MEO test based on an average price observed in other similar markets may prove helpful where a market price can be reasonably identified or deduced from other market indicators. However, this method may not be as relevant in the case of airport services. The revenue and cost structure tends to differ significantly from airport to airport. These costs and revenues depend on the airport's state of development, number of airlines operating from/to the airport, available capacity in terms of passenger traffic, state of the infrastructure, the regulatory burden, which may vary from Member State to Member State, and historical debts and obligations of the airport ⁽⁶⁹⁾.

- (363) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As the present case amply demonstrates, commercial arrangements between airports and airlines are not necessarily based on a list of public prices for individual services. These commercial relationships vary widely. They include the sharing of risks in terms of traffic and of correlative commercial and financial responsibilities, the generalised use of incentive mechanisms (for example, in the form of discounts connected with the number of links or passengers carried), and variations in the distribution of risk over the term of contracts. As a result, it is difficult to compare transactions based on a price per rotation or per passenger.

- (364) In its study of 9 April 2013, Ryanair essentially argues that the MEO test can be applied based on a comparison with the commercial arrangements of other European airports.

⁽⁶⁶⁾ New Guidelines, point 53.

⁽⁶⁷⁾ New Guidelines, point 66.

⁽⁶⁸⁾ New Guidelines, points 59 and 61.

⁽⁶⁹⁾ See the Commission Decision of 27 January 2010 on State aid C 12/2008 Slovakia — Agreement between Bratislava Airport and Ryanair, OJ L 27, 1.2.2011, recitals 88 and 89.

- (365) It should firstly be noted that, during the procedure, neither France nor any interested third party has suggested to the Commission a sample of comparison airports that may be used in this case and that are sufficiently comparable to Pau airport in terms of traffic volume, type of traffic, type and level of airport services provided, proximity of the airport to a large city, number of inhabitants in the catchment area, prosperity of the surrounding area, and different geographical areas from which passengers could be attracted ⁽⁷⁰⁾.
- (366) Even if such a sample of airports had been available, a comparative method would have been totally unworkable in this case. As proven above, the transactions to be analysed are complex packages consisting of an airport services agreement and a marketing services agreement (sometimes combined within the same legal medium). These transactions involve several 'prices', namely the various airport charges, price of the groundhandling services and price of the marketing services, some of which depend on the number of passengers and others on the number of aircraft movements, with others involving fixed amounts. Each of these transactions therefore leads to a complex set of financial flows between the airport operator and the airline and its subsidiaries, consisting of the revenue from the airport charges, revenue linked to the groundhandling services and revenue linked to the marketing services.
- (367) Accordingly, a comparison between just the airport charges invoiced by the CCIPB to the airlines concerned and the airport charges invoiced at the comparison airports would not provide any useful indication as to whether the MEO test was satisfied. At the very least, in order to validly compare the transactions covered by this assessment, it would be necessary to identify, for the airports in the comparison sample, a set of comparable transactions, which must particularly include equivalent marketing services and equivalent groundhandling services. Identifying such a sample of comparable transactions would prove impossible, given that the transactions covered by this assessment are so complex and specific, and all the more so as the prices of groundhandling services and marketing services are rarely made public and would be difficult to obtain in order to form a basis for comparison.
- (368) Lastly, assuming that it could be established, based on a valid comparative analysis, that the 'prices' applied in the various transactions covered by this assessment were equivalent to or higher than the 'market prices' established using the sample of comparison transactions, the Commission could not, however, conclude that those transactions corresponded to the market price if it proved that, on their conclusion, the airport operator may have expected them to lead to incremental costs higher than the incremental revenues. An MEO would not in fact be interested in offering goods or services at the 'market price' if this led to an incremental loss.
- (369) The Commission considers it appropriate to reiterate in the context of this analysis that, following the adoption of the new Guidelines, both France and the interested parties were invited to submit comments on the application of those guidelines to the present case (see recitals 22 and 23). In the event, neither France nor the interested parties disputed in substance the Commission's approach according to which, where an appropriate benchmark cannot be identified to establish a true market price for the services provided by airports to airlines, the most relevant criterion for assessing the arrangements concluded between these two parties is an *ex ante* incremental profitability analysis.
- (370) In the light of all the above, the Commission considers that the approach generally recommended in the new Guidelines for applying the MEO test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to the present case.
- (371) This approach is justified by the fact that an airport operator may have an objective interest in concluding a transaction with an airline where it may reasonably expect this transaction to improve its profits (or reduce its losses) compared to a counterfactual situation in which this transaction is not concluded ⁽⁷¹⁾, regardless of any comparison with the conditions offered to airlines by other airport operators, or even with the conditions offered by the same airport operator to other airlines.
- (372) On this last point, as the Commission noted in the new Guidelines, 'price differentiation is a standard business practice, as long as it complies with all relevant competition and sectoral legislation. Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the MEO test' ⁽⁷²⁾ (footnotes omitted). In this regard, it should be noted that the comments of certain third parties that basically criticise the CCIPB for not having applied its

⁽⁷⁰⁾ New Guidelines, point 60.

⁽⁷¹⁾ In other words, if the incremental profitability expected from this transaction is positive.

⁽⁷²⁾ New Guidelines, point 62.

general pricing system uniformly to all airlines are not relevant with regard to the application of the MEO test. For example, Air France's comment, summarised in recital 169, that the CCIPB should have invoiced Ryanair for the 'lighting charge' under certain circumstances is without merit. An airport operator does not necessarily confer an economic advantage on an airline by negotiating conditions with that airline that fall outside its general pricing system, or even by negotiating a different pricing system from this general system.

Joint assessment of the conduct of the airport operator and the CCIPB as a whole

- (373) In the opening decision, the Commission considered, as a preliminary observation, that the conduct of the CCIPB as a whole should be assessed together with that of the airport operator and, where applicable, with that of the State or other public authorities supervising the airport operator or involved in its financing.
- (374) France indicated its agreement to the joint assessment of the conduct of the service operating the airport, the CCIPB as a whole and other public authorities.
- (375) In applying the MEO test, the conduct of the CCIPB as a whole, and not just that of its service operating the airport, should be taken into account. The service operating the airport within the CCIPB does not in fact have its own legal personality distinct from that of the CCIPB. Furthermore, although the airport services agreements were signed with the airport, which received the airport charges paid by Ryanair and other airlines, the costs of the marketing services agreements were mainly charged to the CCIPB's general budget and were not necessarily reflected in the airport's accounts. France also indicates in this respect that the CCIPB directly covered these costs⁽⁷³⁾.
- (376) The Commission therefore takes the view that the conduct of the airport operator and the CCIPB as a whole must be assessed together, in terms of their relations with the airlines and their subsidiaries, in order to apply the private operator in a market economy test.

Conclusion on the terms for applying the market economy operator test

- (377) It is clear from all the above that, in order to apply the MEO test to the agreements in question, the Commission must analyse each marketing services agreement together with the corresponding airport services agreement, and must assess whether a hypothetical MEO, motivated by the prospect of profits and operating Pau airport in place of the CCIPB, would have entered into these transactions. To this end, the Commission must determine the incremental profitability of the agreements as it would have been assessed by the MEO at the time of their conclusion, by estimating, for the entire period of application of the agreements:
- the future incremental traffic expected from the implementation of these agreements, possibly taking into account the effects of the marketing services on the load factors of the routes covered by the agreements;
 - the future incremental revenues expected from the implementation of these agreements, including revenue from airport charges and groundhandling services, generated by the routes covered by these agreements, as well as non-aeronautical revenue from the additional traffic generated by the implementation of these agreements;
 - the future incremental costs expected from the implementation of these agreements, including operating costs and any incremental investment costs generated by the routes covered by these agreements, as well as marketing service costs.
- (378) These calculations will provide the future annual flows corresponding to the difference between incremental revenues and costs, which are to be discounted, if necessary, by a rate reflecting the cost of capital for the airport operator. A positive net present value indicates in principle that the agreements in question do not confer an economic advantage, whereas a negative net present value reveals the presence of such an advantage.

⁽⁷³⁾ France stated on this subject that the CCIPB, which is responsible for the economic development of its area among other tasks, directly covered, from its own budget and not from the airport's budget, the financial arrangements set out by the agreement signed on 30 June 2005 with AMS for the Pau-London route.

- (379) It should be noted that, in this assessment, the arguments of the CCIPB and Ryanair that the price of the marketing services purchased by the CCIPB is equivalent to or less than what may be regarded as a 'market price' for such services are without merit. A hypothetical MEO motivated by the prospect of profits would not be prepared to purchase such services, even at a price at or below 'market price', if it were predicted that, despite the positive effect of such services on passenger traffic on the routes concerned, the incremental costs generated by the agreements would exceed the incremental revenues at present value. In such a scenario, the 'market price' would be higher than the hypothetical MEO was prepared to pay, and the services in question would therefore logically be rejected.
- (380) For the same reasons, the fact that the prices set for the airport services in the airport services agreement may be equivalent to or higher than the prices invoiced by even slightly comparable airport operators for comparable services would be irrelevant in this analysis if these prices were not expected to generate sufficient incremental revenues to cover the incremental costs at present value.

Application of the market economy operator test

- (381) For the purpose of assessing the agreements in question and given the above findings, it should be noted that both the existence and the amount of aid in these agreements fall to be assessed in the light of the situation prevailing at the time they were signed⁽⁷⁴⁾ and, more specifically, in the light of the information available and developments foreseeable at that time.
- (382) In its letter of 30 May 2011, France indicated that, at the time when the 2005 agreements were signed with Ryanair and AMS, no market study or business plan assessing and economically supporting the undertakings made by the airport to Ryanair existed.
- (383) According to the information provided by France, it also seems that no market study, business plan or profitability calculation was prepared by the CCIPB before signing the other agreements covered by the formal investigation procedure, except for the 2006 agreement with Transavia, for which a business plan was prepared in December 2005 ('the Transavia business plan').
- (384) Except for the Transavia business plan, the only financial calculation provided by France is an impact study carried out for the 2003-2004 period, which estimated the financial impact of Ryanair passengers on the region at EUR 8 000 000-10 000 000. A survey conducted among the airport's passengers in January 2011, also provided by France, confirms these results and estimates the average spend per passenger on a Ryanair flight to Pau at EUR 339. However, these studies are not relevant for the purpose of applying the MEO test. This is because they concern the impact of Ryanair's activity on the regional economic fabric in general, and not just on the airport's profitability. However, it is settled case-law that regional development considerations cannot be taken into account when applying the MEO test⁽⁷⁵⁾.
- (385) According to Ryanair, the lack of a business plan when agreements such as those covered by the formal investigation procedure are signed cannot be used as evidence that the MEO test is not satisfied.
- (386) The Commission considers that the lack of a business plan is a serious indication that the agreements signed with Ryanair and AMS do not satisfy the MEO test, particularly as neither France nor the CCIPB has been able to provide, in respect of these agreements, any profitability calculation, even incomplete, that was carried out before the agreements were signed.
- (387) In general terms, France has not provided any information indicating that the airport operator analysed the risk taken with regard to the possible benefits of the agreements at the time when these were signed with Ryanair and AMS. On the contrary, according to France, the CCIPB was guided by a regional development objective. This further suggests that the agreements with Ryanair and AMS do not satisfy the MEO test.

⁽⁷⁴⁾ See, for example, judgments in Case T-318/00 *Freistaat Thüringen (Germany) v Commission of the European Communities* [2005] ECR II-4179, paragraph 125, and in Case C-124/10 P, *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraphs 85, 104 and 105.

⁽⁷⁵⁾ See judgment in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission of the European Communities* [1999] ECR II-17, paragraph 120.

- (388) As explained further on, these indications are confirmed by the Commission's assessment of the profitability analysis that a hypothetical MEO would have carried out.
- (389) During the procedure, the Commission invited France to reconstruct the profitability analysis that an MEO would have carried out before signing the agreements with Ryanair and AMS, based on the objective information known to the CCIPB when these agreements were signed and on the foreseeable developments.
- (390) In response to this invitation, France provided a reconstruction of the projected incremental costs and revenues associated with each agreement signed with Ryanair and AMS. This analysis is mainly based on *ex post* data, i.e. data observed after the agreements were signed. As a result, the method used by France involved calculating the average unit costs and revenues per passenger based on the operating costs, revenues and airport traffic observed during the period from 2003 to 2011. In its analysis of each agreement, France multiplied these data by the projected incremental traffic for each agreement, i.e. the traffic that, on the signature of the agreement, this could be expected to generate. As this analysis is mainly based on cost and revenue data observed after the various agreements were signed, and not necessarily on information foreseeable at the time when the agreements were signed, this method cannot reflect the profitability analysis that an MEO would have carried out before deciding whether to enter into these agreements.
- (391) Moreover, as regards the incremental operating costs, the method used by France is in fact based on the full unit costs, i.e. all the airport's operating costs per passenger, instead of the incremental costs, i.e. the costs per passenger specifically generated by each agreement. However, the incremental costs may differ from the full unit costs and, as a general rule, are markedly lower, given the high proportion of fixed costs at an airport. The use of full unit costs is therefore a second weakness in the method proposed by France. It also clearly reduces the profitability of certain agreements, thus penalising the airlines concerned that have signed the agreements in question.
- (392) Consequently, the Commission has carried out its own analysis by reconstructing the incremental costs and revenues of the various agreements, as an MEO would have calculated them *ex ante*, in order to apply the MEO test. The assumptions used and results of the analysis are presented in recitals 393 to 440. As regards the agreement with Transavia, the Commission has directly used the Transavia business plan in order to make its assessment.

Time frame

- (393) When assessing the value in entering into an airport services agreement and/or a marketing services agreement, an MEO would have chosen the term of the agreements in question as the time frame of its assessment. In other words, it would have assessed the incremental costs and revenues for the period of application of the agreements.
- (394) There does not seem to be any justification for choosing a longer period. On the dates when the agreements were signed, a prudent MEO would not have relied on these agreements being renewed on their expiry, whether under the same terms or under different terms, particularly as low-fare airlines such as Ryanair and Transavia were and are known to be very dynamic in terms of launching and withdrawing routes, or even increasing and reducing frequencies. The possible renewal of these agreements would therefore have been a distant future prospect that was too uncertain for an MEO to base reasonable economic decisions on this prospect.
- (395) Furthermore, it should be noted that, except for certain agreements, the effective start date of the activities covered by the agreement was not the date of signature of the agreement. In this case, it is the effective start date that has been used as the starting point, and not the date of signature ⁽⁷⁶⁾.
- (396) It should also be noted that, in applying the MEO test, the fact that Ryanair did not operate certain routes for the entire period stipulated in certain agreements has not been taken into account as this factor was not known or foreseeable at the time when the agreements were signed.
- (397) The Commission will now examine the agreements signed with Ryanair and AMS in terms of incremental traffic, revenues and costs in the light of the assumptions used, before presenting its analysis of the agreements signed with Ryanair and AMS, followed by its analysis of the agreement signed with Transavia.

⁽⁷⁶⁾ See Table 6.

Incremental traffic and number of projected rotations (agreements with Ryanair and AMS)

- (398) The analysis conducted by the Commission is based on the incremental traffic (in other words, the number of additional passengers) that an MEO operating Pau airport in place of the CCIPB could have predicted when the agreements were signed. With regard to the 2003 agreement for example, this involves determining the number of passengers that the Pau airport operator could have expected, in 2003, to use the Pau-London route operated by Ryanair, over the term of the agreement.
- (399) The projected incremental traffic has been determined based on the number of routes and frequencies stipulated in the various airport services agreements and marketing services agreements, and on the resulting number of annual rotations.
- (400) Furthermore, the Commission has taken into account the capacity of the aircraft used by Ryanair, namely the Boeing 737-800 configured with 189 seats⁽⁷⁷⁾.
- (401) The Commission started from the assumption of a load factor of 85 % per flight, which is favourable to Ryanair because 85 % is a high load factor. This is also slightly above the average load factor for flights operated by Ryanair on its network⁽⁷⁸⁾, and equal to or above the load factor proposed by France for the various agreements in its reconstruction of the profitability analyses. However, the Commission takes the view that this high load factor can be used, even if it is a favourable assumption, in order to reflect a possible beneficial effect of the marketing services on passenger traffic on the routes covered by the various agreements, and in the absence of other elements quantifying the foreseeable impact of these services on the load factor.
- (402) Where the period of application of an agreement did not coincide with full calendar years, the Commission took this into account by calculating, for each year of application of the agreement, the projected traffic in proportion to the number of days in the year when the agreement applied.
- (403) Some agreements contained indications as to the number of passengers expected on the routes covered. However, as these indications were not legally binding, they would not necessarily have been taken into account by a prudent MEO in its profitability analysis. The Commission therefore ignored them and used the assumption of an 85 % load factor for all the agreements (which is higher than these indications).
- (404) Furthermore, some agreements contained a commitment by the airline with regard to the minimum number of passengers to be carried on the routes concerned. However, an MEO would have probably banked on a number of passengers higher than the minimum guaranteed by the airline. In fact, an MEO would have probably assumed that the airline had allowed for a safety margin between the traffic level to which it was committing and the traffic that it was reasonable to expect. The Commission therefore decided to ignore these compulsory minima in its assessment.
- (405) The additional traffic calculated by the Commission is generally higher than both the binding minima and the non-binding indications contained in the various agreements.
- (406) Lastly, it should be noted that in 2009 the CCIPB and Ryanair/AMS amended the terms of the 2005 agreements by reducing the frequency of the Pau-London route, setting a projected number of flights for 2009 of 211, and reducing the annual price of the marketing services to EUR [...]. In applying the MEO test, the Commission used the same reasoning as for the other agreements, namely it worked on the basis that the incremental traffic associated with this amendment corresponded to all the routes, frequencies and flights mentioned in that amendment.

Incremental revenues (agreements signed with Ryanair and AMS)

- (407) For each transaction covered by its analysis, the Commission sought to determine the incremental revenues, i.e. the revenues generated by the transaction, as an MEO would have predicted them.
- (408) Applying the 'single-till' principle, the Commission takes the view that both aeronautical and non-aeronautical revenues should be taken into account.

⁽⁷⁷⁾ The 2003 agreement mentions two aircraft models likely to be used by Ryanair: the Boeing 737-200 and the Boeing 737-800. In its analysis, the Commission has used a favourable assumption with regard to the traffic generated by Ryanair, based on the larger capacity aircraft (Boeing 737-800).

⁽⁷⁸⁾ See <http://corporate.ryanair.com/investors/traffic-figures/>

- (409) Aeronautical revenue consist of the proceeds from the various charges to be paid by the airline to the airport operator, namely:
- the landing charge, namely an amount per rotation;
 - the passenger charge, namely an amount per rotation;
 - the charge paid for the groundhandling services, which takes the form of an amount per rotation set in the various airport services agreements.
- (410) The landing charge and passenger charge applied by the CCIPB are in principle regulated charges for access to the airport infrastructure, which are invoiced to all user airlines following a process of consultation and which are published. The various airport services agreements signed with Ryanair and Transavia stipulate that the airport's public charging system is applicable. For these various agreements, the Commission has used, as projected unit amounts of the landing charge and passenger charge, the public charges in force when the agreements were signed, plus indexation of 2 % per year. The Commission takes the view that an MEO could have predicted an inflation rate of 2 %, as this is the target rate of the European Central Bank ('ECB') for the euro area ⁽⁷⁹⁾. In fact, it was reasonable to predict that the regulated charges would increase each year in line with inflation.
- (411) The charges for groundhandling services are not regulated, but are negotiated bilaterally. In the various airport services agreements signed with Ryanair and in the agreement signed with Transavia, these charges take the form of fixed amounts per rotation, without any indexation. These amounts have therefore been used by the Commission in its analysis.
- (412) In order to calculate the proceeds from the three aforementioned airport charges that an MEO would have expected from each agreement, the Commission has used the number of planned rotations (for the landing charge and for the charge for groundhandling services) and the number of additional passengers expected (for the passenger charge), determined for each agreement, and has multiplied these by the unit charge.
- (413) The non-aeronautical revenue is in principle essentially proportional to the number of passengers. In fact, the activity of car parks, restaurants and other businesses situated in the airport depends on the number of passengers. The same is therefore true for the revenue received by the airport operator from these activities. The most reasonable approach for determining the projected incremental non-aeronautical revenue therefore involves determining an amount of non-aeronautical revenue per passenger, which is then multiplied by the projected incremental traffic.
- (414) With regard to the amount of non-aeronautical revenue per passenger, the Commission considers it likely that a reasonable MEO would have determined this, when the various agreements were signed, based on the airport's total non-aeronautical revenue per passenger over a long enough period to be representative, and immediately preceding the signature of the agreement in question ⁽⁸⁰⁾. The Commission takes the view in this respect that a period of 3 years is reasonable ⁽⁸¹⁾. The Commission also takes the view that an MEO would have projected the indexation of

⁽⁷⁹⁾ 'In the pursuit of price stability, the ECB aims at maintaining inflation rates below, but close to, 2 % over the medium term'. See: <http://www.ecb.europa.eu/mopo/intro/html/index.en.html>

⁽⁸⁰⁾ The Commission notes that the Air France traffic at Pau airport is dominated by business travellers, whereas the Ryanair and Transavia traffic is mainly leisure traffic. The non-aeronautical revenue generated by these two categories of traveller, reduced to the number of passengers, may differ, for example due to possible differences in purchasing power. However, it is difficult to assess these differences, particularly as factors other than purchasing power may have an influence. For example, business travellers are generally time-sensitive and tend to minimise their time in airports, which may therefore limit their spend. In addition, as the non-aeronautical revenue of the airport operator does not pass through the airlines, it is difficult for an airport operator to assess to what degree the average amount of non-aeronautical revenue per passenger may vary from one airline to another. In light of these factors, an MEO operating Pau airport in place of the CCIPB would in all likelihood, in its assessment of the incremental non-aeronautical revenue, use the non-aeronautical revenue per passenger observed over previous years for all the airport's traffic, without attempting to incorporate the fact that this amount per passenger may possibly vary from one airline to another.

⁽⁸¹⁾ An MEO would have chosen the period in question by taking account of several factors: the smoothing effect afforded by a relatively long period, and the disadvantages of a very long period, such as possible changes in passenger spending preferences and methods over a long period. As a result, using the average of the non-aeronautical revenue per passenger over a single year would make the amount obtained overly dependent on the specific circumstances in that year, which justifies the choice of a longer period. On the other hand, a five-year period seems too long because the behaviour of passengers in terms of non-aeronautical spending may substantially change over such a period. Consequently, a 3-year period seems to be a reasonable choice.

this amount over time in order to reflect inflation. In this respect the Commission has used a rate of 2 %⁽⁸²⁾ (applied from the year in the middle of the 3-year period).

- (415) The following table gives the airport's total non-aeronautical revenue for the period from 2000 to 2011, year by year, and, for each year, the average unit amount of non-aeronautical revenue per passenger over the previous 3 years.

Table 5

Non-aeronautical revenue

| Year | Non-aeronautical revenue | |
|------|---------------------------------|--|
| | Total amounts (thousand EUR) | Average unit amount per passenger over the previous 3 years (EUR) |
| 2000 | 726 | |
| 2001 | 730 | |
| 2002 | 953 | |
| 2003 | 1 206 | 1,34 |
| 2004 | 1 191 | 1,55 |
| 2005 | 1 206 | 1,69 |
| 2006 | 1 270 | 1,69 |
| 2007 | 1 293 | 1,66 |
| 2008 | 2 218 | 1,67 |
| 2009 | 2 097 | 2,04 |
| 2010 | 2 297 | 2,47 |
| 2011 | 2 385 | |

Incremental costs (agreements signed with Ryanair and AMS)

- (416) The incremental costs that could be expected *ex ante* from each transaction (consisting, where applicable, of an airport services agreement and a marketing services agreement) by an MEO operating the airport in place of the CCIPB fall into the following three categories:

- marketing service purchase costs,
- incremental investment costs, due to investments made as a result of the transaction,
- incremental operating costs, namely operating costs (staff, sundry purchases) that may be generated as a result of the transaction.

- (417) With regard to the costs of the marketing services agreements, the Commission has taken into account the amounts stipulated in these various agreements. The marketing services agreements generally stipulate annual or total fixed amounts. The agreement signed with Ryanair in 2003 for the Pau-London route involved a particular arrangement, namely an initial payment, with annual payments per passenger up to an annual maximum of EUR 400 000. Given

⁽⁸²⁾ See recital 410.

the traffic forecasts associated with the 2003 agreement, based on a load factor of 85 %, the MEO would seemingly have expected this maximum of EUR 400 000 to be reached. The Commission has therefore used this maximum amount as the cost of the marketing services, in addition to the initial payment defined in the agreement.

- (418) As with the traffic forecasts, the projected marketing payments do not necessarily represent the amounts actually paid, because certain events occurring after the agreements were signed may have resulted in deviations from these initial figures. This is particularly the case where the agreement was terminated early. However, these events should not be taken into account when applying the MEO test because they postdate the signature of the agreements.
- (419) With regard to incremental investment costs, it should be noted that, according to France, no investment had to be made within Pau airport due to the various agreements under review. As a result, and given that there is nothing to indicate that an MEO would have expected to have to make certain investments due to one or more of the agreements covered by the formal investigation procedure, no incremental investment cost has been taken into account in this analysis.
- (420) In the absence of a business plan for each agreement, the incremental operating costs that were foreseeable when the various agreements were signed are the most difficult category to determine. In particular, the approach used for the non-aeronautical revenue, which involved using the airport's total non-aeronautical revenue to determine the incremental non-aeronautical revenue per passenger, cannot be used for the operating costs. Such an approach would involve considering the airport's total operating costs, reduced to the number of passengers, as incremental costs. However, a significant proportion of an airport's operating costs is fixed, which means that the total operating costs per passenger are likely to be markedly higher, in most cases, than the incremental costs associated with the signature of a new agreement generating additional traffic.
- (421) In order to estimate the incremental operating costs, the Commission must use the airport operator's analysis elements, as it is unable to estimate itself how a given agreement may influence the various airport cost items.
- (422) However, the only estimate that the Commission can use is in the Transavia business plan, in which the CCIPB estimated that the agreement signed with Transavia would result in an average incremental operating cost of EUR [...] per additional passenger over the period of the Transavia business plan from 2006 to 2012⁽⁸³⁾. In the absence of anything better, the Commission considers that this figure is an acceptable basis for determining the impact of additional traffic on the airport's operating costs. The Commission has therefore used this figure in its assessment of the agreements signed with Ryanair and AMS, with indexation of 2 % per year⁽⁸⁴⁾ from 2009, which lies in the middle of the 2006-2012 reference period. Moreover, the Commission considers that this indexation is coherent with the indexation mentioned above in relation to revenues.
- (423) The Commission notes that this estimate was made by the CCIPB before signing most of the agreements with Ryanair and AMS that are covered by the formal investigation procedure, and was therefore available when those agreements were signed. The only exceptions are the agreements signed with Ryanair and AMS in 2003 and 2005. These are examined in recitals 425 and 426.
- (424) The Commission notes that the Transavia business plan was prepared for a different airline from Ryanair. However, the Commission considers that Transavia uses a 'low-fare' carrier economic model that is comparable to Ryanair's and that, as a result, the incremental operating costs projected by an MEO would in all likelihood be similar, when reduced to the number of passengers, for both airlines.

⁽⁸³⁾ The elements (incremental from the launch of the new Amsterdam-Pau route) included in this figure are explained in the business plan: 'Impact of Labour and Costs: this new route will generate marginal additional work for certain services: accounting (processing of invoices), operations (allocation of airport resources), reception (reservations, tourist services and information) and security (screening). The other services will not be affected: management, environment, quality, maintenance, development and safety. Only the assistance costs will be affected: on average over seven years, the estimated labour and costs figure per outbound passenger is EUR [...]. This amount per outbound passenger has been divided by two to arrive at the amount of EUR [...] per passenger.'

⁽⁸⁴⁾ See recital 410.

- (425) The Transavia business plan dates from 15 December 2005. It therefore postdates the signature of the 2003 and 2005 agreements with Ryanair and AMS, namely 28 January 2003 and 30 June 2005. However, the Commission considers that an MEO would not have estimated different incremental operating costs per passenger for June 2005 and December 2005, i.e. only 6 months later. It is actually highly unlikely that the cost structure of an airport operator would alter considerably over a 6-month period. The December 2005 estimate is therefore an acceptable approximation of the estimate that an MEO would have made in June 2005 in order to assess the value in signing agreements with Ryanair and AMS.
- (426) The 2003 agreement was signed nearly 3 years before the Transavia business plan was prepared. However, the airport's traffic structure and activities did not alter significantly over this 3-year period. As a result, and in the absence of a better alternative, the Commission takes the view that the average incremental operating cost of EUR [...] per passenger, with indexation of 2 % from 2009, is also appropriate for assessing the 2003 agreement.
- (427) The Commission notes that the incremental operating cost proposed by France (EUR [...] per passenger), calculated as the average of the operating costs per passenger observed over the 2003-2011 period, is markedly above the incremental cost per passenger used by the Commission, which the latter deems to be more relevant given the above findings.
- (428) For each transaction, the incremental operating cost per passenger is multiplied by the projected incremental traffic in order to determine, year by year, the total incremental operating cost associated with the agreement.

Presentation of the results for the agreements signed with Ryanair and AMS

- (429) Having therefore determined, for each agreement, all the incremental revenues and all the incremental costs that an MEO would have predicted, the Commission is in a position to determine, for each agreement and year by year over the planned term of the agreement, the discounted incremental flows (revenues less costs). These results are presented in Tables 6 to 11 below.
- (430) The Commission notes that, for all the agreements and for the amendment of 16 June 2009 to the 2005 agreement for the Pau-London route, all the annual incremental flows are negative, as indicated in the following tables, despite the assumptions favourable to Ryanair that the Commission has used, particularly with regard to the incremental traffic and incremental costs.
- (431) The Commission also notes that this conclusion would remain valid for the 2007, 2008, 2009 and 2010 agreements even if all the incremental operating costs were excluded and only the marketing service purchase costs were used as incremental costs.
- (432) Consequently, it is clear that the agreements and the amendment of 16 June 2009 to the 2005 agreement for London, signed by the CCIPB with Ryanair and AMS and covered by this investigation, each confer an economic advantage on Ryanair and/or AMS. As this advantage results from contractual provisions specific to Ryanair or AMS, it is selective.
- (433) The amendment of 16 June 2009 to the 2007 agreement for the Pau-Charleroi route, which increased the promotional cost from EUR [...] to EUR [...] per year as from 1 January 2009 without altering the services, also confers a selective advantage on Ryanair and AMS, given that the CCIPB received nothing in exchange for the additional payment of EUR [...] per year, and in particular could not expect any additional traffic from this.

Table 6

Passengers ('s' = seasonal)

| Agreement | flights/week | flights/year | Date of signature of agreement(s) | Effective start date | Effective end date originally planned |
|-------------|--------------|--------------|-----------------------------------|----------------------|---------------------------------------|
| London 2003 | 7 | 365 | 28/01/2003 | 28/01/2003 | 27/01/2008 |

| Agreement | flights/week | flights/year | Date of signature of agreement(s) | Effective start date | Effective end date originally planned |
|---|--------------|--------------|-----------------------------------|----------------------|---------------------------------------|
| London 2005 | 7 | 365 | 30/06/2005 | 30/06/2005 | 29/06/2010 |
| Charleroi 2007 | 3 | 156 | 25/09/2007 | 30/10/2007 | 24/09/2012 |
| Bristol 2008 (s) | 3 | 50 | 31/03/2008 | 16/05/2008 | 13/09/2008 |
| Bristol 2009 (s) | 2 | 58 | 16/06/2009 | 01/04/2009 | 24/10/2009 |
| 2009 amendment to the 2005 agreement for London | | 211 | 15/06/2009 | 01/01/2009 | 29/06/2010 |
| London, Charleroi (s) & Beauvais (s) 2010 | 6 | 312 | 28/01/2010 | 30/03/2010 | 29/03/2011 |

Table 7

2003 agreement for the Pau-London route

(EUR)

| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|-------------------|
| total number of inbound and outbound passengers | 108 479 | 117 275 | 117 275 | 117 275 | 117 275 | 8 796 |
| number of rotations per year | 338 | 365 | 365 | 365 | 365 | 27 |
| <i>landing charge</i> | 41 797 | 46 089 | 47 011 | 47 951 | 48 910 | 3 742 |
| <i>passenger charge</i> | 192 550 | 212 325 | 216 572 | 220 903 | 225 322 | 17 237 |
| <i>groundhandling services</i> | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| total aeronautical revenue | [100 000-299 999] | [100 000-299 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [0-99 999] |
| non-aeronautical revenue | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [0-99 999] |
| total revenues | [300 000-599 999] | [0-99 999] |
| operating costs (staff, sundry purchases, etc.) | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [0-99 999] |
| marketing costs | 450 000 | 400 000 | 400 000 | 400 000 | 400 000 | 30 000 |

(EUR)

| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|------------------|
| total costs | [600 000-999 999] | [600 000-999 999] | [600 000-999 999] | [600 000-999 999] | [600 000-999 999] | [0-99 999] |
| incremental flows (revenues less costs) | [- 100 000 to - 299 999] | [-1 to - 99 999] |

Table 8

2005 agreement for the Pau-London route

(EUR)

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|--------------------------|---------------------------------|---------------------------------|--------------------------|--------------------------|--------------------------|
| total number of inbound and outbound passengers | 58 963 | 117 275 | 117 275 | 117 275 | 117 275 | 58 311 |
| number of rotations per year | 184 | 365 | 365 | 365 | 365 | 181 |
| landing charge | 22 832 | 46 319 | 47 246 | 48 191 | 49 154 | 24 929 |
| passenger charge | 105 544 | 214 120 | 218 402 | 222 770 | 227 226 | 115 241 |
| groundhandling services | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| total aeronautical revenue | [100 000-299 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [100 000-299 999] |
| non-aeronautical revenue | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] |
| total revenues | [100 000-299 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [100 000-299 999] |
| operating costs (staff, sundry purchases, etc.) | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] |
| marketing costs | 219 714 | 437 000 | 437 000 | 437 000 | 437 000 | 217 286 |
| total costs | [300 000-599 999] | [600 000-999 999] | [600 000-999 999] | [600 000-999 999] | [600 000-999 999] | [300 000-599 999] |
| incremental flows (revenues less costs) | [-1 to - 99 999] | [- 100 000 to - 299 999] | [- 100 000 to - 299 999] | [-1 to - 99 999] | [-1 to - 99 999] | [-1 to - 99 999] |

Table 9

Amendment of 16 June 2009 to the marketing services agreement of 30 June 2005

(EUR)

| | 2009 | 2010 |
|---|--------------------------|--------------------------|
| total number of inbound and outbound passengers | 67 794 | 33 709 |
| number of rotations per year | 211 | 105 |
| <i>landing charge</i> | 29 173 | 14 795 |
| <i>passenger charge</i> | 162 706 | 82 519 |
| <i>groundhandling services</i> | [0-99 999] | [0-99 999] |
| total aeronautical revenue | [100 000-299 999] | [100 000-299 999] |
| non-aeronautical revenue | [100 000-299 999] | [0-99 999] |
| total revenues | [300 000-599 999] | [100 000-299 999] |
| operating costs (staff, sundry purchases, etc.) | [100 000-299 999] | [0-99 999] |
| marketing costs | [100 000-299 999] | [100 000-299 999] |
| total costs | [300 000-599 999] | [100 000-299 999] |
| incremental flows (revenues less costs) | [-1 to - 99 999] | [-1 to - 99 999] |

Table 10

2007 agreement for the Pau-Charleroi route

(EUR)

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| total number of inbound and outbound passengers | 13 366 | 50 123 | 50 123 | 50 123 | 50 123 | 36 757 |
| number of rotations per year | 42 | 156 | 156 | 156 | 156 | 114 |
| <i>landing charge</i> | 5 409 | 20 691 | 21 104 | 21 526 | 21 957 | 16 424 |
| <i>passenger charge</i> | 26 264 | 100 461 | 102 470 | 104 520 | 106 610 | 79 744 |
| <i>groundhandling services</i> | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| total aeronautical revenue | [0-99 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] |

(EUR)

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|--------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|
| non-aeronautical revenue | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| total revenues | [0-99 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] |
| operating costs (staff, sundry purchases, etc.) | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| marketing costs | [0-99 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [100 000-299 999] |
| total costs | [100 000-299 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] | [300 000-599 999] |
| incremental flows (revenues less costs) | [-1 to -99 999] | [-100 000 to -299 999] | [-100 000 to -299 999] | [-100 000 to -299 999] | [-100 000 to -299 999] | [-100 000 to -299 999] |

Table 11

2008 and 2009 agreements for the Pau-Bristol route and 2010 agreement for the Pau-London, Pau-Charleroi and Pau-Beauvais routes

(EUR)

| | 2008 Bristol agreement | 2009 Bristol agreement | 2010 London, Charleroi and Beauvais agreement | |
|---|------------------------|--------------------------|---|--------------------------|
| | 2008 | 2009 | 2010 | 2011 |
| total number of inbound and outbound passengers | 16 111 | 18 635 | 75 463 | 24 783 |
| number of rotations per year | 50 | 58 | 235 | 77 |
| <i>landing charge</i> | 6 933 | 8 019 | 32 472 | 10 878 |
| <i>passenger charge</i> | 37 700 | 44 725 | 181 110 | 60 669 |
| <i>groundhandling services</i> | [0-99 999] | [0-99 999] | [0-99 999] | [0-99 999] |
| total aeronautical revenue | [0-99 999] | [0-99 999] | [100 000-299 999] | [0-99 999] |
| non-aeronautical revenue | [0-99 999] | [0-99 999] | [100 000-299 999] | [0-99 999] |
| total revenues | [0-99 999] | [100 000-299 999] | [300 000-599 999] | [100 000-299 999] |
| operating costs (staff, sundry purchases, etc.) | [0-99 999] | [0-99 999] | [100 000-299 999] | [0-99 999] |

(EUR)

| | 2008 Bristol agreement | 2009 Bristol agreement | 2010 London, Charleroi and Beauvais agreement | |
|--|--------------------------|--------------------------|---|--------------------------------|
| | 2008 | 2009 | 2010 | 2011 |
| marketing costs | [100 000-299 999] | [100 000-299 999] | [1 000 000-1 499 999] | [300 000-599 999] |
| total costs | [100 000-299 999] | [100 000-299 999] | [1 000 000-1 499 999] | [300 000-599 999] |
| incremental flows (revenues less costs) | [-1 to -99 999] | [-1 to -99 999] | [- 600 000 to -999 999] | [- 100 000 to -299 999] |

Application of the market economy operator test to the agreement signed with Transavia

- (434) The Commission recalls that the CCIPB prepared a business plan before signing its agreement with Transavia for the Pau-Amsterdam route ('the Transavia business plan'). The Commission takes the view that this business plan constitutes an appropriate starting point for applying the MEO test to the agreement signed with Transavia and has no reason to question the assumptions used, except on one point, namely the time frame used in the assessment. This point will be discussed below.
- (435) The Commission notes that this business plan indicates an 'annual financial result' (similar to the incremental flows (revenues less costs) in the analysis of the agreements with Ryanair/AMS) that is negative for the period from 2006 to 2008, and then positive for the period from 2009 to 2012 (see Table 12 below).
- (436) The Transavia business plan states that it is only during the seventh year that the investment (return on investment) becomes profitable (cumulatively). In other words, the plan does not apply any discount rate to the projected annual flows in order to calculate the net present value and therefore ascertain whether, in terms of the airport's profitability, the positive flows at the end of the period in question offset the negative flows in the early period. In fact, the business plan uses the cumulative total of the flows without any discounting (see 'cumulative result' in Table 12 below), which is negative for the period from 2006 to 2011, but becomes positive in 2012⁽⁸⁵⁾.
- (437) The Commission invited France to carry out a detailed analysis, based on the objective information known to the CCIPB when the agreement with Transavia was signed, in order to ascertain whether this agreement would have been signed by an MEO motivated by the prospect of profits.
- (438) For the purpose of this analysis, France used the 'annual financial result' from the Transavia business plan, from which it deducted corporation tax for the years in which the flows were positive, and then applied a discount rate of 6,5 % to calculate the net present value. The result of this analysis is therefore a net present value of EUR [- 100 000 to - 200 000], calculated on the planned launch date of the Pau-Amsterdam route, namely 26 April 2006.
- (439) However, the Commission notes that both the Transavia business plan and France's calculation are based on a profitability estimate for the period from 2006 to 2012, whereas the agreement itself was due to apply, according to its own terms, only until 2009, without there being any automatic renewal clause. For the reasons set out in recitals 393 to 397, the projected profitability analysis must therefore be based on the period of application of the agreement as originally planned, and not on a longer period. This is particularly because, when signing an

⁽⁸⁵⁾ The Commission notes that the CCIPB comments in the business plan that, in non-cumulative terms, as soon as the marketing costs fall significantly in 2009 (fourth year), the annual result is positive. This is explained by the fact that, under the terms of the agreement, the marketing payments were EUR [...] per passenger (with an annual maximum of EUR [...]) during the third year, and were set to fall in the fourth year to EUR [...] per passenger (EUR [...] for the fifth year and EUR [...] for the sixth and seventh years). See recital 84.

agreement, a reasonable and prudent MEO cannot bank on its renewal, whether under identical terms or under different terms⁽⁸⁶⁾. The Commission notes that a net present value recalculated for the period from 2006 to 2009, based on the annual flows presented in the business plan for these years alone and using the discount rate proposed by France, would be EUR [- 300 000 to - 400 000].

- (440) Accordingly, the Commission notes that the agreement results in annual incremental flows that are all negative over the period covered by the profitability analysis (except for 2009 when the incremental flow is almost zero), which necessarily results in a negative net present value whatever discount rate may be used. The 2006 agreement with Transavia therefore confers an economic advantage on Transavia. As this is conferred on only one undertaking, it is selective.

Table 12

Adapted business plan for the Amsterdam-Pau route with Transavia

(thousand EUR)

| Pau-Amsterdam | | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|--|-------------------------------|--------|--------|--------|--------|--------|--------|--------|
| Traffic (pax) | | 22 662 | 32 542 | 40 402 | 48 724 | 55 198 | 64 368 | 64 368 |
| Revenue | Total (A) | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Costs | of which — marketing services | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| | Total (B) | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Annual financial result | (A-B) | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Cumulative result | | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Corporation tax | | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Incremental financial flow after corporation tax | | [...] | [...] | [...] | [...] | [...] | [...] | [...] |
| Net present value 2006-2009 | [-300 to - 400] | | | | | | | |

8.1.1.3. Distortion of competition

- (441) When Member State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. According to settled case-law⁽⁸⁷⁾, for a measure to distort or threaten to distort competition, it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.
- (442) Since the entry into force of the third air transport liberalisation package on 1 January 1993⁽⁸⁸⁾, nothing prevents EU air carriers from operating flights on routes within the EU and benefiting from unlimited cabotage authorisation.

⁽⁸⁶⁾ A reasonable and prudent MEO might also take into account the likelihood of the agreement being terminated early. The likelihood of such a scenario would depend on the detail of the agreement's termination clauses.

⁽⁸⁷⁾ Judgment in Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* [1998] ECR II-717.

⁽⁸⁸⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

- (443) The advantages received by Ryanair, AMS and Transavia through the various agreements and amendments covered by this investigation have strengthened their position with regard to all other EU air carriers that are actually competing or may compete with Ryanair and Transavia for the routes that they operate. As a result, they have distorted or threatened to distort competition and have affected intra-Community trade.

8.1.1.4. **Conclusion**

- (444) The various agreements and amendments signed by the CCIPB with Ryanair, AMS and Transavia and covered by the formal investigation procedure meet all the criteria in Article 107(1) TFEU and therefore all constitute State aid.

8.1.2. UNLAWFUL NATURE OF THE AID

- (445) As these measures were implemented without having been authorised by the Commission, they constitute unlawful aid.

8.1.3. COMPATIBILITY WITH THE INTERNAL MARKET

- (446) The aid in question constitutes operating aid. However, such aid can be declared compatible only under exceptional and duly justified circumstances.

- (447) Moreover, it is settled case-law⁽⁸⁹⁾ that France should have indicated on what legal basis the aid in question could have been regarded as compatible with the internal market and should have proven that the conditions of compatibility were met. The Commission therefore invited France, in the opening decision and in a request for further information, to indicate the potential legal bases for compatibility and to establish whether the applicable conditions of compatibility were met, particularly if the aid in question were to be regarded as start-up aid for the launch of new routes. However, France never argued that the measures in question constituted start-up aid compatible with the internal market, and never proposed any other bases for their possible compatibility or any grounds allowing this aid to be declared compatible with the internal market. In addition, no interested third party has attempted to prove that these measures are compatible with the internal market.

- (448) Nevertheless, the Commission considers it useful to assess to what extent this aid could be declared compatible in terms of its possible contribution to the launch of new routes or new frequencies. However, it should be stressed that this assessment is superfluous given that, in the absence of evidence provided by the Member State or interested third parties that proves the compatibility of the aid, this should be declared incompatible.

- (449) The new Guidelines state as follows with regard to such aid: 'As regards start-up aid to airlines, the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014'⁽⁹⁰⁾.

- (450) The 2005 Guidelines stipulate that 'The Commission will assess the compatibility of all aid to finance airport infrastructure, or start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty, on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*. In other cases, the Commission will carry out an assessment based on the rules applicable when the aid started to be paid'⁽⁹¹⁾.

- (451) The Commission points out that the aid in question was granted to encourage the launch of new routes, increase the frequency on existing routes or maintain routes that might otherwise have been withdrawn. It is therefore operating aid, which aims to promote outbound air traffic from a regional airport. In this respect, it should be pointed out that, according to the Commission's decision-making practice, operating aid is rarely likely to be declared compatible with the internal market as it usually distorts conditions of competition in the sectors in which it is granted.

⁽⁸⁹⁾ See judgment in Case C-364/90 Italian Republic v Commission of the European Communities [1993] ECR I-2097, paragraph 20.

⁽⁹⁰⁾ New Guidelines, point 174.

⁽⁹¹⁾ Point 85 of the 2005 Guidelines.

8.1.3.1. Measures predating the entry into force of the 2005 Guidelines

- (452) The 2003 agreement and the 2005 agreements were signed before the 2005 Guidelines were published on 9 December 2005⁽⁹²⁾. With regard to the compatibility of aid granted before this date, point 85 of the 2005 Guidelines and point 174 of the new Guidelines refer to the rules applicable at the time when the aid was granted.
- (453) Before the 2005 Guidelines were adopted, the Commission had adopted the 1994 Guidelines⁽⁹³⁾. However, these guidelines did not specifically deal with the issue of operating aid aimed at promoting outbound air traffic from regional airports. This issue in fact gradually appeared as a result of a build-up of congestion at certain large European airports and the development of low-fare airlines, which did not yet exist in 1994. Consequently, the Commission takes the view that the 1994 guidelines also cannot be applied to this case. The Commission must therefore assess the compatibility of the aid in question directly on the basis of Article 107(3)(c) TFEU.
- (454) In this respect, it should be noted that the Commission's assessment of this type of State aid has been refined over time, although some points have remained unchanged. These points stem from the general principles governing the compatibility of aid in accordance with the aforementioned provision of the Treaty.
- (455) Accordingly, in the decision on Manchester airport of June 1999⁽⁹⁴⁾, the Commission found that reductions in airport charges granted in a non-discriminatory and time-limited manner as measures aimed at promoting new routes were compatible with the rules on State aid.
- (456) Subsequently, in its decision of February 2004 on Charleroi airport⁽⁹⁵⁾, the Commission explained that 'Operational aid measures intended to help the launch of new airlines or strengthen certain frequencies may be a necessary tool for the development of small regional airports. The measures may indeed persuade the interested companies to take the risk of investing in new routes. However, in order to declare such aid compatible on the basis of Article 87(3)(c) of the Treaty, it should be determined whether this aid is necessary and in proportion to the objective sought, and whether it affects trade to an extent that is contrary to the common interest'. The Commission therefore identified certain conditions to be met in order for this operating aid to be declared compatible, in particular the following.
- The aid must contribute to the objective of Community interest of developing a regional airport through a net increase in traffic on new routes⁽⁹⁶⁾.
 - The aid must be necessary in the sense that it is not granted for a route already operated by the same or another airline or a similar route⁽⁹⁷⁾.
 - The aid must have an incentive effect in the sense that it must help to develop an activity that, after a certain period, is likely to become profitable, which implies that the aid is limited in time⁽⁹⁸⁾.
 - The aid must be proportional, i.e. the amount must be linked to the net development of traffic⁽⁹⁹⁾.
 - The aid must have been granted transparently and without discrimination and must not be combined with other types of aid.

⁽⁹²⁾ See footnote 18.

⁽⁹³⁾ Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽⁹⁴⁾ See Decision NN 109/98 of 14 June 1999 entitled 'United Kingdom, Manchester Airport'.

⁽⁹⁵⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 280). This decision was annulled by the judgment in Case T-196/04 *Ryanair Ltd v Commission of the European Communities* ('Charleroi' judgment) [2008] ECR II-3643. However, it shows how the Commission's assessment of the aid in question has developed.

⁽⁹⁶⁾ See paragraphs 283 to 297.

⁽⁹⁷⁾ See paragraphs 288 to 309.

⁽⁹⁸⁾ See paragraphs 311 to 317.

⁽⁹⁹⁾ See paragraphs 318 to 325.

- (457) The 2005 Guidelines and the new Guidelines precisely define these compatibility principles, but it remains the case that operating aid granted to airlines may be declared compatible by the Commission where it contributes to the development of smaller airports through a net increase in traffic on new routes, where the aid is necessary in the sense that it is not granted for a route already operated by the same or another airline or a similar route⁽¹⁰⁰⁾, where it is limited in time and where the route for which the aid is granted is likely to become profitable⁽¹⁰¹⁾, where the amount is linked to the net development of traffic and where the aid is granted transparently and without discrimination, and where it is not combined with any other type of aid⁽¹⁰²⁾.
- (458) In this regard, in paragraph 140 of the extension decision, the Commission stated that it would assess the compatibility of these measures in the light of all five criteria mentioned above. It should be noted that neither France nor any interested third party has disputed the application of these criteria.
- (459) In conclusion, the Commission takes the view that, in this case, the compatibility of the 2003 agreement and the 2005 agreements should be assessed in the light of the aforementioned general principles.

Contribution to the development of smaller airports through a net increase in traffic on new routes

- (460) In 2003 to 2005 the annual traffic at Pau airport was in the region of 700 000 passengers per year. The Commission takes the view that, at that time, the airport was small.
- (461) The Commission considers that, with regard to the new Pau-London Stansted route, the 2003 agreement involved the launch of a new route likely to result in a net increase in traffic. However, the 2005 agreements involved the continued operation of the same route, 2 years after its launch, without any increase in frequency. Consequently, the Commission considers that the condition relating to a net increase in traffic is not met by the 2005 agreements.

The aid is not granted for a route already operated by the same or another airline or a similar route

- (462) When the Pau-London Stansted route was launched by Ryanair in 2003, no airline was operating this route.
- (463) However, the 2005 agreements involved the same Pau-London Stansted route. This route had already been operated by Ryanair for nearly 2 years under the 2003 agreement, with the same frequency as that stipulated by the 2003 agreement. Consequently, the Commission considers that the aforementioned condition is not met with regard to the 2005 agreements.

The aid must be limited in time and involve a route likely to become profitable

- (464) The Commission notes that, despite its invitation in this respect, France has not provided any viability study for the Pau-London route covered by the 2003 and 2005 agreements, which Ryanair would have submitted to prove that the aid granted through the agreements in question was justified. Accordingly, based on the facts on record, it seems that, for the authorities that granted the aid in question, there was no clear prospect of the Pau-London route becoming viable without aid in the more or less short term. The Commission stresses in this respect that the studies submitted by the French authorities on the economic benefits of the routes operated by Ryanair analyse the impact that they might have on the region's development, but do not include projections of the future viability of these routes or other routes likely to be operated by Ryanair in the future. On the contrary, an analysis of the various agreements signed with Ryanair proves that the aid granted to the latter for these routes was set to increase over time, even after the 2003 and 2005 agreements were terminated, precisely to ensure that these routes were profitable enough for Ryanair to continue operating them.
- (465) Moreover, the Commission notes that, although these measures were limited in time, the 5-year term of each agreement was not necessary for or proportional to the costs incurred in launching a new route given that, in the aviation sector, a contractual term of under 3 years is usually sufficient⁽¹⁰³⁾.

⁽¹⁰⁰⁾ See points 71 to 75 and 79(b) and (c) of the 2005 Guidelines, and points 139, 140, 141 and 151 of the new Guidelines.

⁽¹⁰¹⁾ See point 79(b), (d) and (i) of the 2005 Guidelines, and point 147 of the new Guidelines.

⁽¹⁰²⁾ See points 79(g) and (h) and 80 of the 2005 Guidelines, and points 150, 152 and 153 of the new Guidelines.

⁽¹⁰³⁾ New Guidelines, point 147.

- (466) The Commission therefore considers that neither the 2003 agreement nor the 2005 agreements meet the condition that the measures must be limited in time and involve routes likely to become profitable.

The amount must be linked to the net development of traffic

- (467) The 2003 agreement was linked to the launch of a new daily route between Pau and London, for which the Commission estimates that an annual total number of passengers of 117 275 was feasible (see Table 7). This agreement was therefore linked to a net increase in the number of passengers, as this route did not previously exist.
- (468) However, the 2005 agreements were not linked to the launch of a new route, but involved the continued operation of the pre-existing Pau-London route, without any increase in frequency. The Commission therefore considers that the aid amounts resulting from the 2005 agreements were not linked to the net development of traffic.

The aid must have been granted transparently and without discrimination and must not be combined with other types of aid

- (469) When asked whether the aid was granted transparently and without discrimination, France simply referred to publications made by the CCIPB in 2007 and 2009, which postdate the 2003 and 2005 agreements and are therefore irrelevant to this analysis. It is clear from all the records that the 2003 and 2005 agreements were negotiated bilaterally, without any transparency, and without a process guaranteeing the absence of discrimination, such as a public invitation to tender. The aid in question does not therefore meet the condition of transparency and non-discrimination.

Conclusion

- (470) It is clear from the above that the Commission considers that the 2003 agreement and the 2005 agreements constitute unlawful aid incompatible with the internal market.

8.1.3.2. Measures postdating the entry into force of the 2005 Guidelines

- (471) The Commission applies the 2005 Guidelines to agreements signed after they entered into force.
- (472) Point 27 of the 2005 Guidelines stipulates that operating aid granted to airlines (such as start-up aid for new routes) can be declared compatible with the internal market only under exceptional circumstances and under strict conditions in underprivileged regions of Europe, i.e. regions covered by the derogation set out in Article 107(3)(a) TFEU, the most remote regions and sparsely populated areas.
- (473) As Pau airport is not situated in this type of region, this derogation does not apply.
- (474) As with the measures predating the entry into force of the 2005 Guidelines, the Commission notes that neither France nor any interested third party has proven the compatibility of these measures with the internal market, whether on the basis of the 2005 Guidelines or on any other basis.
- (475) With regard to the conditions set out in point 79(a) to (l) of the 2005 Guidelines, the Commission notes as follows in recitals 476 to 480.
- (476) Certain conditions, such as those set out in point 79(a) and (b) of the 2005 Guidelines, which concern the possession of an operating licence by the airline and the airport category, are met.
- (477) The condition set out in point 79(h) (Non-discriminatory allocation) of the 2005 Guidelines is worded as follows: 'any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services'. The Commission notes that, in this case, the agreements were directly negotiated with the airlines concerned, without any publicity. This therefore means that the aid was granted without any competitive procedure in which other potentially interested airlines could have offered to operate the routes concerned, under the same terms, in order to benefit from the start-up aid.

- (478) Nevertheless, the Commission notes that the CCIPB published notices in the Air & Cosmos magazine ⁽¹⁰⁴⁾ in 2007 and 2009 in order to invite interested airlines to develop new services in exchange for start-up aid. However, France has indicated that these approaches were unsuccessful, which led the CCIPB to negotiate directly with certain airlines. Consequently, the unlawful aid identified in this investigation does not stem from the publication of the aforementioned notices, but from bilateral negotiations. The condition set out in point 79(h) is therefore not met.
- (479) As regards the condition set out in point 79(i) (Business plan showing the viability of the route and analysis of the impact of the new route on competing routes) of the 2005 Guidelines, the Commission invited France to indicate whether such business plans had been prepared and, if so, to provide copies. Neither France nor any interested third party reported the existence of such business plans. Consequently, the condition set out in point 79(i) is not met.
- (480) The condition set out in point 79(j) (Publicity) of the 2005 Guidelines stipulates that the public authorities concerned must publish the list of subsidised routes, in each instance indicating the source of public funding, recipient company, amount of aid paid and number of passengers concerned. In this case, France has confirmed that the list of routes and companies receiving financial incentives or marketing payments has not been published each year. The condition set out in point 79(j) of the 2005 Guidelines is not therefore met.

Conclusion

- (481) The various agreements and amendments signed by the CCIPB with Ryanair, AMS and Transavia and covered by the formal investigation procedure all constitute unlawful State aid incompatible with the internal market.

8.2. MEASURES IN FAVOUR OF THE AIRPORT OPERATOR

- (482) Between 2000 and 2010 the CCIPB received equipment subsidies from a number of public authorities, totalling approximately EUR 17 800 000. It also received a subsidy of EUR 3 521 000 intended to cover the costs arising, according to the French authorities, from sovereign tasks carried out by the airport (hereinafter 'the sovereign task subsidies') ⁽¹⁰⁵⁾.

8.2.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (483) Under Article 107(1) TFEU, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (484) For a measure to constitute State aid, all the following conditions must be met: (1) the measure in question is financed by state resources and is imputable to the State; (2) it confers an economic advantage; (3) this advantage is selective; (4) the measure in question distorts or threatens to distort competition and may affect trade between Member States; and (5) the beneficiary is an undertaking within the meaning of Article 107(1) TFEU, which implies that it engages in an economic activity.
- (485) In order to determine whether the subsidies referred to in recitals 88 to 108 constitute State aid, it must first be ascertained whether their beneficiary, the operator of Pau airport, was engaged in an economic activity at the time when they were granted. The Commission will examine this question first, before assessing the sovereign task subsidies and equipment subsidies in order to determine whether they constitute State aid.

8.2.1.1. *Concepts of undertaking and economic activity*

- (486) As the Commission explained in the new Guidelines ⁽¹⁰⁶⁾, from the date of the judgment in 'Aéroports de Paris' (12 December 2000), 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 this judgment, 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 12 December 2000.

⁽¹⁰⁴⁾ See recital 132.

⁽¹⁰⁵⁾ See Table 3.

⁽¹⁰⁶⁾ Points 28 and 29.

- (487) Furthermore, as also indicated in the new Guidelines⁽¹⁰⁷⁾, not all the activities of an airport are necessarily of an economic nature. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid.
- (488) According to Table 4, the equipment subsidies granted in 2004 and 2009 were used to finance investments in the taxiway, runway, lighting and car park. This infrastructure and equipment is commercially operated by the CCIPB, which is the airport operator and which invoices the costs to users of these assets. Such investments are therefore inherent in the airport operator's commercial activity. The equipment subsidies granted in 2004 and 2009 therefore benefited economic activities. They were also granted after 12 December 2000. With regard to the concepts of undertaking and economic activity, they may therefore fall within the scope of the rules on State aid.
- (489) Conversely, the equipment subsidies granted in 1999 and 2000, referred to in Table 4 and used to finance investments in the freight and passenger terminals, runway equipment and cogeneration plant, were granted before 12 December 2000. Consequently, the Commission must not examine these measures in the context of this Decision.
- (490) The subsidies paid by the Departmental Council of Pyrénées-Atlantiques from 2000 to 2005 to repay the capital of a loan taken out by the CCIPB, in the amount of EUR 779 000⁽¹⁰⁸⁾, are covered by an agreement on the Pau airport financing plan concluded on 5 November 1990. This agreement contained an irrevocable undertaking on the part of the public authorities to repay the debt in question. As this agreement predates the judgment in 'Aéroports de Paris', the Commission must not examine the payments made under this agreement with regard to the rules on State aid.
- (491) In Section 8.2.1.2 the Commission examines to what extent the sovereign task subsidies were effectively used to finance activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority.

8.2.1.2. *Sovereign task subsidies*

- (492) As indicated in Table 3, the formal investigation procedure covers the FIATA subsidies and the subsidies used to finance various investments, namely premises and vehicles for the Aircraft Fire and Safety Service (SSLIA) and CT scanners⁽¹⁰⁹⁾. These various subsidies were granted under the general system for financing sovereign tasks in French airports, described in Section 4.3.2.
- (493) As recalled above, according to the new Guidelines and case-law, activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid. According to the new Guidelines, activities such as air traffic control, police, customs, firefighting, measures designed to protect civil aviation from acts of unlawful interference, and investment in the infrastructure and equipment needed for such activities are regarded, as a general rule, as not being economic in nature⁽¹¹⁰⁾.
- (494) The new Guidelines also stipulate that, so as not to constitute State aid, the public financing of such non-economic activities must be strictly limited to compensating the costs to which they give rise and must not lead to undue discrimination between airports. The guidelines clarify with regard to this second condition that, when it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature⁽¹¹¹⁾.

⁽¹⁰⁷⁾ Points 34 and 35.

⁽¹⁰⁸⁾ See the penultimate row of Table 3.

⁽¹⁰⁹⁾ See the first and second rows of Table 3.

⁽¹¹⁰⁾ Point 35.

⁽¹¹¹⁾ Points 36 and 37.

- (495) The activities financed by the general system for financing sovereign tasks at French airports, described in Section 4.3.2, involve the protection of civil aviation from acts of unlawful interference⁽¹¹²⁾, police tasks⁽¹¹³⁾, rescue and firefighting⁽¹¹⁴⁾, air traffic safety⁽¹¹⁵⁾, and protection of the human and natural environment⁽¹¹⁶⁾. These activities may legitimately be regarded as falling under the responsibility of the State in the exercise of its official powers as a public authority. Consequently, France may legitimately regard these tasks as 'sovereign' in nature, in other words non-economic, under the rules on State aid. It may therefore provide for public financing to compensate the costs incurred by airport operators in carrying out these tasks in so far as these are entrusted to the latter by national law and provided that this financing does not give rise to overcompensation or discrimination between airports.
- (496) It is clear from the description in Section 4.3.2 that the system laid down by French law is based on strict cost control mechanisms, both *ex ante* and *ex post*, ensuring that airport operators receive, through the airport tax and supplementary scheme, only those amounts strictly needed to cover the costs.
- (497) Moreover, this system applies to all French civil airports in terms of both the types of task giving rise to compensation and the financing mechanisms. The non-discrimination condition is therefore met. Although French law entrusts airport operators with sovereign tasks, it does not require them to finance these tasks, but rather the State. Accordingly, the compensation of the costs arising from these tasks by public funds does not reduce the costs that airport operators should normally bear under French law.
- (498) The financing received by French airport operators under this system does not therefore constitute State aid.
- (499) Accordingly, the sovereign task subsidies referred to in the second and third rows of Table 3, used to finance investments in the protection of civil aviation from acts of unlawful interference and in aircraft rescue and firefighting, do not constitute State aid.

8.2.1.3. *Equipment subsidies granted in 2004 and 2009*

- (500) It now has to be examined whether the equipment subsidies granted in 2004 and 2009 constitute State aid. These subsidies are presented in Table 13 below.

Table 13

Equipment subsidies and investments from 2004 and 2009

(million EUR)

| Entities granting the equipment subsidies | Years granted | Nature of the investments | Total amount paid | Total amount of the investment |
|---|---------------|---------------------------|-------------------|--------------------------------|
| Pyrénées-Atlantiques Departmental Council | 2004 | Taxiway work | 1,6 | 2,6 |
| Aquitaine Regional Council | | | | |
| European Union (ERDF) | | | | |

⁽¹¹²⁾ This category includes screening of hold baggage, screening of passengers and cabin baggage, and access control to the restricted area.

⁽¹¹³⁾ This category includes automated border controls through biometric identification.

⁽¹¹⁴⁾ As indicated in recital 493, these three categories are explicitly referred to in the new Guidelines as examples of non-economic activities.

⁽¹¹⁵⁾ This category includes wildlife hazard prevention.

⁽¹¹⁶⁾ This category includes environmental control measures.

(million EUR)

| Entities granting the equipment subsidies | Years granted | Nature of the investments | Total amount paid | Total amount of the investment |
|---|---------------|---|-------------------|--------------------------------|
| <i>Syndicat Mixte de l'Aéroport de Pau-Pyrénées</i> | 2009 | Renovation of runway and lighting Car park extension | 4,1 | 5,1 |
| Total | | | 5,8 | 7,7 |

State resources and imputability to the State

- (501) The Departmental Council of Pyrénées-Atlantiques granted the CCIPB subsidies financed through resources of the department of Pyrénées-Atlantiques, which is a decentralised local authority. As a reminder, the resources in question are state resources. Indeed, the resources of local authorities are regarded as state resources under Article 107 TFEU⁽¹¹⁷⁾. Furthermore, decisions taken by such authorities are imputable to the State, in the same way as measures taken by the central authority⁽¹¹⁸⁾.
- (502) The same is true for the subsidies received from Aquitaine Regional Council and the *syndicat mixte*, with the latter being a grouping of local authorities entirely controlled by those authorities.
- (503) Furthermore, the taxiway work was partly financed by the ERDF. Funding from the ERDF is regarded as constituting state resources and being imputable to the State given that this is granted under the control of the Member State concerned⁽¹¹⁹⁾.
- (504) The 2004 and 2009 equipment subsidies were therefore entirely financed through state resources and are imputable to the State, within the meaning of Article 107(1) TFEU.

Selective advantage for the airport operator

- (505) In order to ascertain whether a state measure constitutes aid, it must be determined whether the recipient undertaking received an economic advantage enabling it to avoid having to bear costs that would normally have had to be met out of its own financial resources, whether it received an advantage that it would not have received under normal market conditions⁽¹²⁰⁾, or whether the measure in question can be regarded as compensation for discharging public service obligations satisfying the conditions of the *Altmark* judgment⁽¹²¹⁾.
- (506) With regard to this last point, it should first be noted that France has not clearly indicated that, in its opinion, the Pau airport operator was entrusted with providing a genuine service of general interest. In its comments on the extension decision, France simply indicated in this respect that, in the absence of a legal basis clearly applicable at the time (before the publication of the 2005 Guidelines), the French authorities were able to legitimately consider that the financing of airport infrastructure decided at that time constituted a land planning policy measure, that this airport was on the whole performing a task of general economic interest, and that this task did not come under the rules on state aid⁽¹²²⁾.

⁽¹¹⁷⁾ Judgment in Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais* (T-267/08) and *Communauté d'agglomération du Douaisis* (T-279/08) v *European Commission* [2011] ECR II-1999, paragraph 108.

⁽¹¹⁸⁾ Judgment in Joined Cases T-127/99, T-129/99 and T-140/99 *Territorio Histórico de Álava — Diputación Foral de Álava* (T-127/99), *Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA* (T-129/99) and *Daewoo Electronics Manufacturing España, SA* (T-148/99) v *Commission of the European Communities* [2002] ECR II-1330, paragraph 142.

⁽¹¹⁹⁾ With regard to the qualification of ERDF resources as state aid, see, for example, the Commission Decision in Case N 514/06 *South Yorkshire digital region broadband project*, recital 29, and the Commission Decision in Case N 44/10, *Development of infrastructure on Krievu Sala for relocation of port activities out of the city centre*, recitals 69 to 70.

⁽¹²⁰⁾ Judgment in Case C-301/87 *French Republic v Commission of the European Communities* [1990] ECR I-307, paragraph 41.

⁽¹²¹⁾ Judgment in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht ('Altmark')* [2003] ECR I-7747.

⁽¹²²⁾ Paragraph 13(1).

- (507) France added that it considers that airports with less than one million passengers per year should as a whole be regarded as services of general economic interest, given their important role in terms of land planning, the economic and social development of their region, and the overlapping of their activities. The French authorities also take the view that these airports have only a limited impact on the internal market. They therefore consider that financing granted to these airports should not be regarded as State aid or that such financing should be declared compatible with the internal market and exempted from notification in accordance with the Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty (Article 106(2) TFEU) to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, which applied until 20 December 2011 ⁽¹²³⁾.
- (508) However, the Commission takes the view that this justification is insufficient to conclude that the Pau airport operator is responsible for operating a genuine service of general economic interest. As indicated in the new Guidelines ⁽¹²⁴⁾, the Commission considers that it is possible for the overall management of an airport, in well-justified cases, to be considered a service of general economic interest. However, the Commission considers that this can only be the case if at least part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development.
- (509) In the light of this principle, it cannot be presumed that the operation of any French airport with less than one million passengers per year is a genuine service of general economic interest. France must assess the specific situation of each airport in this category and present this analysis to the Commission if it wants to maintain the view that the operation of this airport is a service of general economic interest. It is only under these circumstances that the Commission would be in a position to ascertain, on a case-by-case basis, whether France has committed a manifest error of assessment in considering the airport in question as a service of general economic interest.
- (510) In this case, no specific analysis of this nature has been provided for Pau airport. Moreover, given the proximity of Tarbes airport, which is 50 km and less than 40 minutes away by road, it cannot be stated that, without Pau airport, part of the area potentially served by this airport would be isolated from the rest of the Union to an extent that would prejudice its social and economic development. Maintaining such a view would indicate a manifest error of assessment in this respect.
- (511) According to the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ⁽¹²⁵⁾, in order for the first *Altmark* condition to be satisfied, the public service task must be assigned by way of one or more acts that, depending on the legislation in Member States, may take the form of legislative or regulatory instruments or contracts. Moreover, the act or series of acts must at least specify the content and duration of the public service obligations, the undertaking and, where applicable, the territory concerned, the nature of any exclusive or special rights assigned to the undertaking by the authority in question, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and recovering any overcompensation. The only acts produced by France that could possibly fulfil this function are the 1965 Order ⁽¹²⁶⁾ and its subsequent amendments, in so far as they impose various obligations on the CCIPB in terms of operation (including on points such as opening times or equal treatment of users), servicing, maintenance and development, for a specified period. However, none of these acts lays down arrangements for calculating and reviewing any financial compensation mechanism.
- (512) As a result, the Commission takes the view, based on the facts on record, that the operation of Pau airport cannot be regarded as a genuine service of general economic interest.
- (513) Even assuming that this were the case, the equipment subsidies covered by this investigation would not, however, satisfy all the conditions of the *Altmark* judgment. In fact, these equipment subsidies consist of several specific subsidies paid at different times to cover investment costs that proved necessary at those times. These subsidies do not therefore stem from a compensation mechanism established in an objective and transparent manner and in advance, i.e. when the public authorities entrusted the airport's operation to the CCIPB or on the occasion of acts renewing or clarifying the terms of this operation. Accordingly, these subsidies do not satisfy the second condition of the *Altmark* judgment, which is worded as follows: 'the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings' ⁽¹²⁷⁾.

⁽¹²³⁾ Paragraph 13(3).

⁽¹²⁴⁾ Point 72.

⁽¹²⁵⁾ OJ C 8, 11.1.2012, p. 4, paragraph 52.

⁽¹²⁶⁾ See recital 27.

⁽¹²⁷⁾ See the judgment in *Altmark*, cited in footnote 121, paragraph 90.

- (514) As the equipment subsidies in question do not satisfy the conditions of the *Altmark* judgment, it must be examined, as indicated above, whether they were granted under normal market conditions.
- (515) In this respect, it should be recalled that ‘capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid’⁽¹²⁸⁾.
- (516) In order to determine whether the 2004 and 2009 equipment subsidies were granted under normal market conditions, the MEO test should be applied to them. This involves assessing whether, when these subsidies were granted, the public authorities could have expected a financial return, with this analysis excluding, as such, any expected benefits in terms of local economic development.
- (517) In this case, the Commission notes firstly that the airport is operated by the CCIPB under a concession expiring in 2015. Ownership of this airport, which initially belonged to the State, was transferred to the *syndicat mixte* on 1 January 2007. The CCIPB does not therefore own the land and infrastructure.
- (518) In its comments, the CCIPB has stated in this respect, on the subject of the equipment subsidies, that these sums correspond to investments made by the owners of the airport infrastructure in maintaining and improving that infrastructure, with these investments therefore being made solely for the benefit of the owners. The CCIPB has argued that these sums did not confer any economic advantage on the CCIPB, in its capacity as airport operator. The CCIPB has added that, as a result, in paying these equipment subsidies, the concession authority and local authorities acted quite naturally, in their capacity as owners of the airport infrastructure and under the public equipment concession, to ensure that work to maintain, upgrade and improve the airport public service was carried out with a view to developing their assets. According to the CCIPB, these were therefore investments that were naturally the responsibility of the public equipment owner and not its operator.
- (519) However, it is clear from the facts on record that, under the financial terms of the concession, it is the responsibility of the CCIPB, and not the public owner, to finance the necessary investments. Accordingly, the 1965 Order granting the concession clearly entrusts the concession-holder with the establishment, development and maintenance of the structures, buildings, facilities and equipment. France has confirmed this as it has stated that the investments needed to upgrade, renovate, maintain, extend or modernise the airport are the responsibility of the concession-holder.
- (520) France has noted in this respect that the amendment of 8 November 2001 (‘the third amendment’) to the 1965 Order did not alter the financial terms of the concession, particularly with regard to responsibility for the investments needed to maintain and renovate the airport. Moreover, it has noted that the amendment of 3 March 2010 (‘the fourth amendment’), concluded between the *syndicat mixte* and the CCIPB following the transfer of ownership in 2007, also did not alter the financial terms of the concession. Just like the previous amendments, it made the concession-holder responsible for the investments needed for its activity⁽¹²⁹⁾.
- (521) Accordingly, as proven by the examination of the 1965 Order and its amendments, as confirmed by France and contrary to the CCIPB’s suggestions, the latter is indeed responsible for making and financing investments such as those covered by the equipment subsidies in question.
- (522) Furthermore, it appears that, when granting the equipment subsidies in 2004 and 2009, the various public authorities involved could not have expected a return on their investment likely to satisfy an MEO having acted in their place. The land and infrastructure in fact belonged to the State in 2004, and to the *syndicat mixte* in 2009. However, for each of these public owners, the only revenue generated by Pau airport was a minimal state fee of FRF 100 per year up to 2010, increased to EUR 100 per year after that date. The 2004 and 2009 equipment subsidies did not result in any increase in this state fee, which was set by the 1965 Order and revised by some of its amendments. As a result, neither the State nor the *syndicat mixte*, as owners, could have expected the equipment subsidies granted respectively in 2004 and 2009 to produce a tangible return on their investment, at least until the planned expiry of the concession in 2015. Furthermore, there is nothing in the records to suggest that, in 2004 and 2009 respectively, the State or the *syndicat mixte* expected these equipment subsidies to increase the value of the

⁽¹²⁸⁾ See the judgment in *Stardust Marine*, cited in footnote 36, paragraph 69.

⁽¹²⁹⁾ The fourth amendment lays down the rules governing the ‘returnable assets’ of the concession, which comprise all the movable and immovable assets made available to the concession-holder by the concession authority. The returnable assets therefore include the land, structures, buildings, facilities, systems and intellectual works needed to operate the airport, renewed or established by the concession-holder during the term of the concession, and the movable assets needed to operate the airport, renewed or established by the concession-holder during the term of the concession. According to the fourth amendment, these assets must be returned free of charge and in perfect condition to the concession authority on the expiry of the concession agreement. The fourth amendment also stipulates that, at the end of the concession, the concession authority will pay the annual interest and amortisation for loans duly taken out by the concession-holder to equip the concession, and will reimburse to the concession-holder those advance payments that the latter may have made from its own resources or the non-depreciated value of the facilities that it has established using these same resources, if this reimbursement cannot be made through a charge against the airport’s working capital. These financial provisions, which apply from the end of the concession, do not alter the fact that the investments needed to operate the airport are the responsibility of the concession-holder at the time when these investments are made.

assets, which could in turn result in a return on the investment made by these two entities in the context of the new concession from 2016. In particular, France has not provided any information on the plans of the State or the *syndicat mixte* with regard to the financial terms of the future concession and any fees that the airport owner might be able to expect.

- (523) The public authorities having participated in the financing of the subsidies in question without, at the time when they were granted, owning the land and infrastructure, whether directly or indirectly through the *syndicat mixte*, also and in particular could not have expected a return on their investment likely to produce a profit from their investment expenditure. This observation applies to the Departmental Council of Pyrénées-Atlantiques and to the Aquitaine Regional Council, which did not own the airport at the time when they decided to contribute, in 2004, to the financing of the taxiway work.
- (524) It should also be noted that, according to France, the decision made by the public authorities to invest was not solely based on the prospect of a direct profit, and the CCIPB paid only a symbolic fee. Apparently the decision made by the authorities to invest was based on the benefit expected in the long term for the region in terms of economic and tourism development. This statement confirms that the public authorities did not expect their investment expenditure to produce any profit. The only benefit expected by the authorities, namely in terms of economic and tourism development, would not have been taken into account by an MEO acting in place of these authorities. This suggests that the MEO principle is not even applicable to the equipment subsidies in question.
- (525) In the light of the above, the 2004 and 2009 equipment subsidies do not satisfy the MEO test. These subsidies in fact reduced the investment costs that the CCIPB should have borne, without any prospect of a sufficient return on their investment for the authorities having granted these subsidies. In addition, as these advantages benefited a single undertaking, they are selective.

8.2.1.4. *Effect on intra-Community trade and competition*

- (526) As the operator of Pau airport, the CCIPB is in particular in competition with other airport platforms, and especially with airports serving the same catchment area. In this respect, the Commission notes that Tarbes-Lourdes-Pyrénées airport is 50 km from Pau airport and has also offered flights to London since 2009. Biarritz-Anglet-Bayonne airport is also less than 100 km from Pau airport, and offers flights to Charleroi, London Stansted, Manchester and other destinations in the United Kingdom. Aid granted to the CCIPB therefore risks distorting competition. As the airport service market and air transport market are open to competition within the EU, aid also risks affecting trade between Member States.
- (527) More generally it should be noted that EU airport operators are in competition with each other to attract airlines. Airlines decide on which routes to operate and their corresponding frequencies based on a range of criteria. These criteria not only include the potential customers that they can expect on these routes, but also the characteristics of the airports situated at either end of these routes.
- (528) Airlines particularly look at criteria such as type of airport services provided, population or economic activity around the airport, congestion, whether there is access by land, or even the level of charges and overall commercial conditions for use of airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition⁽¹³⁰⁾.
- (529) Consequently, airlines allocate their resources, particularly aircraft and crew, to the various routes by looking at the services offered by airport operators and the prices charged for those services, among other criteria.
- (530) It is clear from all the above that the 2004 and 2009 equipment subsidies, by conferring an economic advantage on the CCIPB, may have strengthened the latter's position in relation to other European airport operators. Consequently, these subsidies may have distorted competition and affected trade between Member States.

⁽¹³⁰⁾ New Guidelines, point 43.

8.2.1.5. *Conclusion on the existence of aid*

(531) For the reasons set out in recitals 483 to 530, the equipment subsidies granted to the CCIPB in 2004 and 2009 constitute State aid within the meaning of Article 107(1) TFEU.

8.2.2. UNLAWFUL NATURE OF THE AID

(532) The 2004 and 2009 equipment subsidies were granted without being notified.

(533) As indicated above, France has stated in its comments that it considered that airports with less than one million passengers per year should as a whole be regarded as services of general economic interest and therefore that the financing granted to them should not be regarded as State aid or that such financing should be declared compatible with the internal market and exempted from notification in accordance with the 2005 SGEI Decision.

(534) However, as set out above, the Commission takes the view, based on the facts on record, that the operation of Pau airport cannot be regarded as a genuine service of general economic interest. For this reason, the 2004 and 2009 subsidies could not have been exempted from the notification obligation laid down by Article 108(3) TFEU based on the 2005 SGEI Decision.

(535) Moreover, as indicated above, these subsidies do not stem from a compensation mechanism established in an objective and transparent manner and in advance, i.e. when the public authorities entrusted the airport's operation to the CCIPB or on the occasion of acts renewing or clarifying the terms of this operation. Accordingly, these subsidies do not satisfy the condition laid down in Article 4(d) of the 2005 SGEI Decision, according to which the act or acts entrusting the operation of a service of general economic interest must specify the parameters for calculating, controlling and reviewing the compensation. This is a second reason why the 2004 and 2009 subsidies could not have been exempted from the notification obligation laid down by Article 108(3) TFEU based on the 2005 SGEI Decision.

(536) In the light of the above, the 2004 and 2009 equipment subsidies constitute unlawful aid.

8.2.3. COMPATIBILITY WITH THE INTERNAL MARKET

(537) As explained above, the equipment subsidies granted in 2004 and 2009 reduced the investment costs that the CCIPB would normally have had to bear. They therefore constitute investment aid. Furthermore, they were granted before 4 April 2014, which was the date when the new Guidelines entered into force. According to said guidelines, the Commission will apply to unlawful investment aid to airports the rules in force at the time when the aid was granted⁽¹³¹⁾.

(538) With regard to the 2009 subsidy, the 2005 Guidelines were in force when this subsidy was granted and this is therefore the text that should be applied. However, the 2004 subsidy was granted before the 2005 Guidelines entered into force, at a time when there was no specific compatibility criterion for investment aid to airports. The Commission must therefore assess this subsidy directly on the basis of Article 107(3)(c) TFEU, taking into account its decision-making practice in this regard. It should be recalled that the Commission's decision-making practice with regard to the assessment of the compatibility of aid granted to airport operators was consolidated by the 2005 Guidelines. The Commission therefore takes the view that the compatibility of the 2004 subsidy with the internal market should be assessed in the light of the criteria set out in the 2005 Guidelines.

(539) Therefore, based on the 2005 Guidelines⁽¹³²⁾, the Commission has assessed the 2004 and 2009 equipment subsidies in terms of the following criteria:

- the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),
- the infrastructure is necessary and proportional to the objective which has been set,
- the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure,

⁽¹³¹⁾ New Guidelines, point 173.

⁽¹³²⁾ Point 61.

— all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,

— the development of trade is not affected to an extent contrary to the Union's interest.

- (540) Moreover, in addition to the need to comply with the criteria set out in recital 539, State aid to airports, like any other State aid, must be necessary and proportional to the objective that has been set in order to be declared compatible with the internal market based on Article 107(3)(c) TFEU. The Commission will therefore assess compliance with these criteria of necessity and proportionality in addition to the aforementioned criteria from the 2005 Guidelines.
- (541) The Commission notes first of all that, according to the 2005 Guidelines, costs eligible for investment aid to an airport must be limited to the investment costs of airport infrastructure properly speaking (runways, terminals, aprons, etc.) or facilities that directly support them (firefighting facilities, security or safety equipment). However, eligible costs must exclude the costs of commercial activities not directly linked to the airport's core activities, such as the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks.
- (542) The entire 2004 subsidy was used to finance taxiway work. All the investment costs of this work were eligible for investment aid under the 2005 Guidelines as the taxiway is an airport infrastructure. The 2009 subsidy was granted to help finance a series of investments in the runway and lighting and also, with regard to a small portion of the total investment costs⁽¹³³⁾, in an extension to the car park. The runway and lighting form part of the airport infrastructure. Consequently, the investments costs of this infrastructure are eligible. However, the car park costs must be excluded from the eligible costs as car parks do not form part of the airport infrastructure. The total amount of the 2009 subsidy, i.e. EUR 4 100 000, does not exceed the total amount of the eligible costs of the runway and lighting, i.e. EUR 4 700 000. As a result, the 2009 subsidy was used purely to finance eligible costs⁽¹³⁴⁾.
- (543) The 2004 and 2009 equipment subsidies (for which the total amounts are respectively EUR 1 600 000 and EUR 4 100 000) do not exceed the eligible costs calculated for these two subsidies (respectively EUR 2 600 000 and EUR 4 700 000), but do involve high aid intensities (respectively 62 % and 88 %).

8.2.3.1. *Clearly defined objective of common interest*

- (544) The 2004 equipment subsidy was used to finance taxiway work in order to upgrade this equipment to ensure a better flow of commercial traffic at peak times.
- (545) The eligible investments funded through the 2009 equipment subsidy involved runway and lighting repair work that was needed so that the aerodrome could maintain its capacity and be recertified for medium-sized aircraft with a capacity of 200 to 250 seats. The Category III lighting that was installed in 1992-1993 and the surface of the manoeuvring areas that was laid in 1990 needed, on the one hand, to be repaired in view of their age (given that the service life is usually in the order of 10 to 15 years) and, on the other hand, to be upgraded. This upgrading was necessary because the performance required by the Order on the conditions of approval and operation of aerodromes, particularly with regard to Category III precision approaches, could in the short term have led to the airport's certification being withdrawn.
- (546) As a result, neither the 2004 subsidy nor the 2009 subsidy resulted in significant increases in capacity. They essentially funded repair and upgrade work designed to keep the infrastructure in a condition to continue accommodating the type of aircraft and volume of traffic handled up to that point, and to improve the airport's operation at peak times.

⁽¹³³⁾ Less than 10 % of the total investment costs (see Table 4, *ibid.* footnote 1).

⁽¹³⁴⁾ See the Commission Decision in Case SA.38168 — Croatia — Dubrovnik Airport Development, paragraphs 10 and 28.

- (547) Pau airport handles a significant amount of business traffic, as this accounts for between 60 % and 70 % of all its traffic. This is due to the presence of numerous businesses in Pau and its surroundings. France has indicated in this respect that the Pau basin was the third main economic area in the Greater Southwest Region, behind the basins of Lacq and Oloron. Pau is home to the international and regional headquarters of a variety of large businesses and also research and production centres. The absence of an airport at Pau or a significant reduction in its capacity could harm this economic activity as business travellers generally prefer to minimise their journey time, particularly so that they can make round trips within the day. As a result, if business travellers to and from Pau had to use an airport, such as Tarbes airport, that was not in the immediate vicinity of the city, this could be regarded as a handicap by numerous businesses.
- (548) Furthermore, Pau airport handles significant tourist flows, particularly due to its proximity to the Pyrénées and their winter sports resorts. Studies conducted by the CCIPB specifically indicate that Ryanair passengers alone, who form the bulk of the tourist traffic, spent a total of EUR 8 000 000 in 2005 and EUR 56 000 000 in 2010 during their stay in the Pau region.
- (549) For all these reasons, the equipment subsidies received by the CCIPB in 2004 and 2009 contributed to the economic development of Pau and its region, given this airport's impact on tourism and economic activity in general.
- (550) These subsidies also contributed to the region's accessibility, particularly for tourists and business travellers. In this respect, it should be noted that Pau airport is 50 km from Tarbes airport and 100 km from Biarritz airport. Biarritz airport is therefore unlikely, given its distance from Pau airport, to be regarded as a viable alternative to the latter by time-sensitive travellers, particularly business travellers.
- (551) Moreover, it seems that these three airports have quite different types of traffic.
- Pau handles a large volume of business traffic, marked by the relatively high proportion of national traffic carried by Air France and regional traffic within its total traffic figures.
 - Biarritz handles a large volume of tourist traffic heading for the Atlantic coast and Spanish border, marked by considerable seasonal traffic in summer and significant 'low-fare' traffic.
 - Tarbes is primarily a niche market focused on the religious site at Lourdes, with significant international charter traffic. This is illustrated by the fact that this airport's traffic remained at around 400 000 passengers per year over the 2001-2011 period, except in 2008 when there was a peak of 678 000 passengers due to the Lourdes site celebrating an anniversary.
- (552) This information tends to indicate that these airports serve fairly different market segments and are therefore only imperfect substitutes for each other. It has also been corroborated by traffic statistics, which are presented in more detail in recitals 567 to 572 as part of the analysis of the extent of the competition distortions caused by the aid. As a result, investment aid enabling Pau airport to remain in good condition contributes to the region's accessibility to a certain extent, as it avoids passengers and airlines having to choose an imperfect substitute.
- (553) Furthermore, there is no high-speed railway line through Pau, with the closest one being in Bordeaux, which is about 1 hour 40 minutes away by road. For most of the destinations accessible by a short-haul flight from Pau, using the train as an alternative mode of transport would therefore markedly increase the journey time, making the train a very imperfect substitute. Even the closest Spanish airports are around two hours away by road and therefore, for most passengers, probably do not constitute viable alternatives to Pau airport.
- (554) As a result, it seems that, despite the existence of alternative modes of transport to flights from Pau and despite the proximity of Tarbes airport, the 2004 and 2009 equipment subsidies helped to improve the region's accessibility and also regional economic development.

8.2.3.2. *The infrastructure is necessary and proportional to the objective set*

- (555) As indicated in recital 546, the work funded by the 2004 and 2009 equipment subsidies did not significantly increase capacity, but was simply designed to keep the infrastructure in a condition to accommodate the traffic handled up to that point and to cope better with peak periods.

- (556) These investments did not therefore exceed what was necessary in order for the airport to continue accommodating, under good conditions, including in peak periods, the traffic that it had handled up to that point. These investments were therefore necessary and proportional to the objective set.

8.2.3.3. *The infrastructure has satisfactory medium-term prospects for use*

- (557) It should be noted that, between 2000 and 2009, traffic at Pau airport fluctuated between around 580 000 and 820 000 passengers per year, with a maximum of 820 000 in 2008. In the 2000-2009 period, 2002 was the only year when traffic fell below 600 000 passengers. However, even in this year, the number of passengers (580 000) was still close to this threshold. Given this fairly variable traffic, but which almost always exceeded 600 000 passengers per year, and also given the stable presence of Air France, which accounted for most of the traffic and a significant proportion of the business traffic, in both 2004 and 2009 the CCIPB could therefore rely on substantial prospects for use, which were at least equal to the airport's basic level of activity, namely around 600 000 passengers per year.
- (558) These prospects therefore justified the investments aimed at keeping the infrastructure in a condition to accommodate the traffic handled up to that point and at coping better with peak periods, without, however, significantly increasing capacity. It should be recalled in this respect that the taxiway work funded by the 2004 subsidy was designed to upgrade the infrastructure so that peak periods could be better managed. Furthermore, with regard to the runway and lighting repair work carried out in 2009, this involved like-for-like repairs as there was no increase in area, no runway extension to accommodate more efficient aircraft and no improvement in the operating minima under low-visibility conditions. The service life of this equipment is in the order of 10 to 15 years. The equipment replaced had been in use for between 16 and 19 years prior to the work. The 2009 equipment subsidy was therefore used purely to renew investments that had reached the end of their useful life.
- (559) In conclusion, the renovated infrastructure therefore had satisfactory medium-term prospects for use when the equipment subsidies were granted.

8.2.3.4. *Access to the infrastructure in an equal and non-discriminatory manner*

- (560) Pau airport can be accessed, without any particular restrictions, by any airline wanting to use it. This infrastructure can therefore be accessed in an equal and non-discriminatory manner within the meaning of the 2005 Guidelines.

8.2.3.5. *Development of trade not affected to an extent contrary to the common interest*

- (561) As indicated above, Pau airport is 50 km from Tarbes airport and 100 km from Biarritz airport. Biarritz airport is unlikely, given its distance from Pau airport, to be regarded as a viable alternative to the latter by a substantial proportion of travellers. It is therefore unlikely to have been significantly affected by the aid received by Pau airport.
- (562) By contrast, Tarbes airport is fairly close to Pau airport, given that it is 50 km away and less than 40 minutes by road. At first sight, its activity is therefore likely to have been substantially affected by the 2004 and 2009 equipment subsidies.
- (563) However, several factors temper this observation. Firstly, Pau airport is a long-standing airport that has been handling scheduled flights for many decades. The equipment subsidies under review involved one-off aid, fairly distant in time, and basically limited to the financing of work needed to keep the infrastructure in a condition to accommodate the traffic handled up to that point. They were not used to finance significant increases in capacity. As a result, the basic impact of the equipment subsidies on Tarbes airport was to keep in good condition a long-standing airport that was relatively close and that, without these subsidies, could not have continued to operate, or only under degraded conditions. These subsidies did not, however, create new capacity in competition with Tarbes airport.
- (564) Furthermore, the equipment subsidies in question were not operating aid financing a chronic operating deficit. No such operating aid has been identified in this case, which involves only investment aid.

- (565) In addition, as indicated above, Pau and Tarbes airports serve quite different market segments. The traffic at Tarbes airport is dominated by charter flights mainly bringing visitors to the religious site at Lourdes, with a significant proportion being international flights ⁽¹³⁵⁾.
- (566) Unlike Tarbes airport, Pau airport handles a large volume of business traffic, marked by the relatively high proportion of national traffic carried by Air France and regional traffic within its total traffic figures, particularly on the Pau-Paris route. As indicated in recital 547, business traffic accounts for between 60 % and 70 % of all the traffic at Pau airport, with the Pau basin being the third main economic area in the Greater Southwest Region, behind the basins of Lacq and Oloron. As a result, Pau and Tarbes airports target different market segments. Accordingly, the closure of Pau airport or a deterioration in its operating conditions would not necessarily result in traffic automatically transferring to Tarbes airport and vice versa.
- (567) If the development of traffic at Pau, Tarbes and Biarritz airports is compared, as illustrated by Table 14, this shows that there is no clear correlation between the variations in traffic at these airports:

⁽¹³⁵⁾ According to the airport's website: 'With an average of 400,000 to 450,000 passengers per year, this airport is the 2nd largest in the Midi-Pyrénées region. It mainly handles charter traffic as it is right next to the Marian City of Lourdes. More than 80 European and worldwide destinations are served each year by about 50 different airlines'. See: <http://www.tlp.aeroport.fr/gp/Presentation/117>

Table 14
Compared development of traffic at Pau, Biarritz and Tarbes airports in thousands of passengers

| Aerodrome | Type of traffic | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|-----------|--|------|------|------|------|------|------|------|-------|-------|------|-------|
| Tarbes | National traffic excluding low-fare airlines | 63 | 114 | 49 | 55 | 89 | 97 | 98 | 110 | 114 | 100 | 115 |
| | Ryanair traffic | 1 | | | | | | | 1 | 13 | 7 | 41 |
| | Other low-fare and charter airlines | 351 | 326 | 328 | 356 | 373 | 353 | 346 | 577 | 354 | 327 | 346 |
| | Total | 415 | 440 | 377 | 411 | 462 | 450 | 444 | 678 | 481 | 436 | 452 |
| | National traffic excluding low-fare airlines | 595 | 582 | 624 | 619 | 615 | 628 | 630 | 643 | 572 | 553 | 599 |
| Pau | Ryanair traffic | | | 53 | 96 | 107 | 106 | 95 | 143 | 103 | 108 | 22 |
| | Other low-fare airlines | | | | | 1 | 25 | 33 | 25 | 11 | 5 | 9 |
| | Charter airlines | 5 | 3 | 5 | 6 | 6 | 4 | 3 | 6 | 5 | 8 | 10 |
| | Total | 600 | 585 | 682 | 721 | 729 | 763 | 761 | 817 | 691 | 674 | 640 |
| | National traffic excluding low-fare airlines | 673 | 658 | 660 | 649 | 652 | 666 | 666 | 616 | 611 | 609 | 658 |
| Biarritz | Ryanair traffic | 108 | 117 | 134 | 130 | 150 | 184 | 233 | 216 | 199 | 176 | 167 |
| | Other low-fare airlines | | | | | 6 | 6 | 12 | 170 | 176 | 186 | 195 |
| | Charter airlines | 9 | 3 | 5 | 7 | 8 | 9 | 17 | 26 | 25 | 18 | 13 |
| | Total | 790 | 778 | 799 | 786 | 816 | 865 | 928 | 1 028 | 1 011 | 989 | 1 033 |

(thousand EUR)

| Years | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|-----------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Internal financing capacity | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] | [...] |

Source: Documents produced by France.

- (575) This table shows that the airport accumulated losses every year between 2003 and 2011 inclusive. These losses reached close to EUR 1 000 000 in 2009. The airport's internal financing capacity also varied between EUR [...] and EUR [...] per year over this period. In 2005, which was the year when the 2004 equipment subsidy was paid, the airport's internal financing capacity was only EUR [...], i.e. a very modest figure compared to the cost of the taxiway work (EUR 2 600 000). In 2009 and 2010, which were the years when the 2009 equipment subsidy was paid, the airport's internal financing capacity was EUR [...] and EUR [...] respectively. These two figures, even when added together, are well below the costs of the runway and lighting repairs (EUR 4 700 000). The resources generated by the airport's operation were therefore insufficient to make any significant contribution to the financing of these investments.
- (576) The figures available show that the airport's budgetary outcome after investments but before payment of the equipment subsidies was EUR [...] in 2005 (year when the taxiway work was carried out) and EUR [...] in 2009 (year when most of the runway and lighting repair work was carried out). These figures must be compared with the airport's net income after subsidies, i.e. EUR [...] in 2005 and EUR [...] in 2009. As a result, financing all or even a significant part of the investments in question from the airport's own resources would have very considerably increased its losses, which were already substantial.
- (577) Furthermore, given the long-term nature of the losses, it is unlikely that the CCIPB would have been able to finance a significant part of the investments in question by increasing its debt, which was around EUR [...] in 2005 and EUR [...] in 2009.
- (578) Accordingly, the 2004 and 2009 subsidies were necessary so that the investments that they financed could be made. In other words, they had an incentive effect because the CCIPB would not have undertaken these investments without these subsidies. Moreover, they comply with the principle of proportionality as the CCIPB could not have significantly increased its contribution to the financing of these investments.

8.2.3.7. Conclusion on the 2004 and 2009 equipment subsidies

- (579) For the reasons set out in recitals 537 to 578, the Commission considers that the 2004 and 2009 equipment subsidies are aid compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (580) This conclusion is based on the criteria set out in the 2005 Guidelines for investment aid to airports. It is without prejudice to any assessment of any future investment aid to Pau airport that the Commission may be required to make in the future based on the new Guidelines.

9. CONCLUSIONS

- (581) In the light of the above, the Commission finds that France unlawfully granted the 2004 and 2009 equipment subsidies in breach of Article 108(3) of the Treaty on the Functioning of the European Union⁽¹³⁶⁾. However, the 2004 and 2009 equipment subsidies are aid compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (582) The subsidies shown in the first two rows of Table 3, which financed sovereign tasks, do not constitute State aid.
- (583) The other subsidies shown in Table 3 were granted to the Pau airport operator before 12 December 2000. Consequently, this Decision does not concern them⁽¹³⁷⁾.

⁽¹³⁶⁾ See recital 536.

⁽¹³⁷⁾ See recitals 489 and 490.

- (584) Furthermore, the Commission finds that the various airport and marketing services agreements signed between the CCIPB and Ryanair, AMS and Transavia and covered by the formal investigation procedure involve State aid, which was granted in breach of Article 108(3) TFEU and which is incompatible with the internal market.

Recovery

- (585) According to settled case-law of the Court of Justice, when the Commission has found that aid is incompatible with the internal market, it is competent to decide that the Member State concerned must abolish or alter it⁽¹³⁸⁾.
- (586) According to Article 14 of Council Regulation (EC) No 659/1999⁽¹³⁹⁾, 'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. According to settled case-law of the Court of Justice, where aid is regarded by the Commission as incompatible with the internal market, the purpose of the obligation imposed on the State is to re-establish the previously existing situation⁽¹⁴⁰⁾. In this respect, the Court of Justice considers that the purpose is achieved when beneficiaries have repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage that they enjoyed over competitors. In this way, the situation prior to payment of the aid is restored⁽¹⁴¹⁾.
- (587) In this case, it appears that no general principle of Union law prevents recovery of the unlawful and incompatible aid identified in this Decision. In particular, neither France nor the interested third parties have presented any arguments in this respect.
- (588) France must therefore take all necessary measures to recover from Ryanair, AMS and Transavia the unlawful aid granted through the agreements in question.
- (589) The aid amounts to be recovered for each agreement and amendment must be determined as follows. Each transaction under review (consisting, where applicable, of an airport services agreement and a marketing services agreement) must be regarded as having given rise to an annual aid amount⁽¹⁴²⁾ for each year that the agreements forming the transaction applied. Each of these amounts is calculated using the negative part of the projected incremental flow (revenues less costs) at the time when the transaction was concluded, as shown in Tables 7 to 12. These amounts in fact correspond to the sums that should be deducted each year from the amount for the marketing services (or that should be added to the airport charges and groundhandling charges invoiced to the airlines) so that the net present value of the agreement is positive, in other words so that this complies with the MEO principle.
- (590) In order to take account of the effective advantage received by the airline and its subsidiaries under the agreements, the amounts referred to in the above recital may be adjusted, using evidence provided by France, according to (i) the difference between, on the one hand, the actual payments, as determined *ex post*, that were made by the airline for

⁽¹³⁸⁾ Judgment in Case 70/72 *Commission of the European Communities v Federal Republic of Germany* [1973] ECR 813, paragraph 13.

⁽¹³⁹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽¹⁴⁰⁾ Judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission of the European Communities* [1994] ECR I-4103, paragraph 75.

⁽¹⁴¹⁾ Judgment in Case C-75/97 *Kingdom of Belgium v Commission of the European Communities* [1999] ECR I-3671, paragraphs 64-65.

⁽¹⁴²⁾ As explained when assessing the existence of an economic advantage in the various agreements, the aid stems from bidirectional flows between the CCIPB and Ryanair or Ryanair/AMS. These flows have different frequencies, with some being continuous flows or having payment frequencies that cannot be precisely predicted when the agreements are signed. The same is true for payment of the airport charges. However, when assessing the existence of an economic advantage, it is the projected incremental flows that count. It is clear from the Transavia business plan and from the proposed reconstructions of the incremental business plans provided by France that the practice of a reasonable MEO would be, in the present case, to establish the projected incremental flows associated with the various agreements on an annual basis. It is therefore logical for the aid amounts resulting from the various agreements also to be established on an annual basis. These aid amounts in fact correspond to the sums that, during negotiation of the various agreements, an MEO would have asked Ryanair/AMS to pay it each year in addition to the airport charges and groundhandling charges, all else being equal (particularly the marketing payments), in order to make the agreement profitable.

the landing charge, passenger charge and groundhandling services under the airport services agreement and, on the other hand, the (*ex ante*) projected flows corresponding to these income items, as indicated in Tables 7 to 12, (ii) the difference between, on the one hand, the actual marketing payments, as determined *ex post*, that were made to the airline or its subsidiaries under the marketing services agreement and, on the other hand, the corresponding (*ex ante*) projected marketing costs, as indicated in Tables 7 to 12.

- (591) In addition, the Commission considers that the effective advantage received by the airline is limited to the effective term of the agreement in question. In effect, after the termination of each agreement, Ryanair/AMS did not receive any payments under these agreements and did not benefit from access to the airport infrastructure and groundhandling services under these agreements. Consequently, the aid amounts calculated as indicated above and associated with a given agreement are reduced to zero for the years in which the agreement ceased to apply (particularly due to early termination by mutual agreement between the parties).
- (592) As a result, the aid amounts to be recovered from Ryanair and AMS for certain agreements that did not run to term must be reduced to zero for the period from the effective expiry date of the agreement to the expiry date stipulated when the agreement was signed. This point applies to the agreements of 28 January 2003, 30 June 2005 and 25 September 2007, and to the two amendments to the last two agreements.
- (593) Table 16 gives information on the amounts to be used to calculate the amounts to be recovered. These amounts consist of the negative parts of the incremental flows (revenues less costs) established by applying the MEO test, with reductions for the Ryanair and AMS agreements for the years that these agreements did not run to term⁽¹⁴³⁾.

⁽¹⁴³⁾ With regard to the agreement on the Pau-London route of 28 January 2003, given its effective expiry on 30 June 2005, the aid amounts received under this agreement are zero for the years 2006 to 2008 inclusive. For 2005, the aid amount corresponds to the negative part of the projected incremental flow calculated for 2005, adjusted by a factor corresponding to the part of 2005 during which the agreement effectively applied. The same logic has been applied to the agreements of 30 June 2005, which effectively ceased to apply on 1 January 2009 (due to the amendment of 16 June 2009). This logic has also been applied to this same amendment of 16 June 2009, to the agreement of 25 September 2007 and to the amendment of 16 June 2009 amending the latter, all of which effectively ceased to apply on 30 March 2010, which was the date when the new agreement on the London, Charleroi and Beauvais routes came into force. However, the amounts in Table 16 may be adjusted in order to calculate the amounts to be recovered (see recital 589).

Table 16

Information on the amounts to be recovered

| Identity of the beneficiary | Agreements | Indicative amount of the aid received under the various agreements ⁽¹⁾ | | | | | | | | | | Indicative amount of the aid to be recovered (Principal) | |
|-----------------------------|---|---|-------------------|------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|--|-----------------------|
| | | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | | | |
| Ryanair | London — 28 January 2003 | [100 000-299 999] | [100 000-299 999] | [0-99 999] | | | | | | | | | [300 000-599 999] |
| Ryanair/ AMS | London — 30 June 2005 | | | [0-99 999] | [100 000-299 999] | [100 000-299 999] | [0-99 999] | | | | | | |
| | Amendment of 16 June 2009 to the agreement of 30 June 2005 (London) | | | | | | | [0-99 999] | | | | | |
| | Charleroi — 25 September 2007 | | | | [0-99 999] | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | [0-99 999] | | | | |
| | Amendment of 16 June 2009 to the agreement of 25 September 2007 (Charleroi) | | | | | | | | [0-99 999] | | | | |
| | Bristol — 17 and 31 March 2008 | | | | | | [0-99 999] | | | | | | |
| | Bristol — 16 June 2009 | | | | | | | [0-99 999] | | | | | |
| | London, Charleroi & Beauvais — 28 January 2010 | | | | | | | | [300 000-599 999] | [100 000-299 999] | | | |
| | Total (Ryanair/AMS) | | | [0-99 999] | [100 000-299 999] | [100 000-299 999] | [300 000-599 999] | [100 000-299 999] | [100 000-299 999] | [600 000-999 999] | [100 000-299 999] | [100 000-299 999] | [1 500 000-2 199 999] |
| Transavia | Amsterdam — 23 January 2006 | | | | [100 000-299 999] | [100 000-299 999] | [100 000-299 999] | | | | | | [300 000-599 999] |

⁽¹⁾ With regard to the calculation of interest, the aid is regarded as having been paid on 31 December of the year in question. See recital 597.

- (594) As explained in recital 290, the Commission considers that, for the purpose of applying the State aid rules, Ryanair and AMS form a single economic entity, and that the marketing services agreements and airport services agreements that were signed at the same time must be regarded as forming a single transaction between this entity and the CCIPB. Consequently, the Commission considers that Ryanair and AMS are jointly and severally responsible for repaying all the aid received through the agreements signed from 2005 to 2010, with an indicative principal amount of EUR [1 500 000- 2 199 999]. However, Ryanair alone is responsible for repaying the aid inherent in the agreement of 28 January 2003, with an indicative principal amount of EUR [300 000-599 999], as this single agreement was signed directly between the CCIPB and Ryanair, without AMS being involved in this transaction.
- (595) The aid effectively paid from 2006 to 2009 under the airport services agreement and marketing services agreement signed on 26 January 2006 between the CCIPB and Transavia is an indicative amount of EUR [300 000-599 999].
- (596) The French authorities must recover the amounts indicated above within 4 months of the date of notification of this Decision.
- (597) The French authorities must also add recovery interest to the aid amount, which shall be calculated from the date on which the aid in question was put at the disposal of the undertaking, namely on each effective date of granting of the aid, until the date of its effective recovery⁽¹⁴⁴⁾, in accordance with Chapter V of Commission Regulation (EC) No 794/2004⁽¹⁴⁵⁾. Given that, in this case, the flows making up this aid are complex and stem from several dates during the year, and are even continuous for certain categories of revenue, the Commission takes the view that it is acceptable, in calculating the recovery interest, to consider that the moment of payment of the aid concerned is at the year end, namely 31 December of each year in question.
- (598) In accordance with settled case-law, if a Member State encounters unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission, it may submit those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions⁽¹⁴⁶⁾ of the TFEU.
- (599) The Commission invites France to submit to it any problem encountered in implementing this Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid unlawfully granted by France to Ryanair in breach of Article 108(3) of the Treaty on the Functioning of the European Union, under the airport and marketing services agreement signed on 28 January 2003 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair for the Pau-London Stansted route, is incompatible with the internal market.
2. The following measures, which contain State aid, were unlawfully granted by France jointly to Ryanair and Airport Marketing Services in breach of Article 108(3) of the Treaty on the Functioning of the European Union and are incompatible with the internal market:
 - (a) airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services, with regard to the Pau-London Stansted route;
 - (b) amendment of 16 June 2009 to the marketing services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services, with regard to the Pau-London Stansted route;
 - (c) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 25 September 2007 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services to the Pau-Charleroi route, and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services;

⁽¹⁴⁴⁾ See Article 14(2) of Regulation (EC) No 659/1999 (op. cit.).

⁽¹⁴⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁴⁶⁾ See, for example, judgments in Case 94/87 *Commission of the European Communities v Federal Republic of Germany* [1989] ECR 175, paragraph 9, and in Case C-348/93 *Commission of the European Communities v Italian Republic* [1995] ECR I-673, paragraph 17.

- (d) amendment of 16 June 2009 to the marketing services agreement signed on 25 September 2007 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services;
 - (e) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 17 March 2008 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair to the Pau-Bristol route, and marketing services agreement signed on 31 March 2008 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the same route;
 - (f) letter from the Chamber of Commerce and Industry of Pau-Béarn to Ryanair of 16 June 2009 extending the terms of the airport services agreement signed on 30 June 2005 by the Chamber of Commerce and Industry of Pau-Béarn with Ryanair to the Pau-Bristol route, and marketing services agreement signed on the same date by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the same route;
 - (g) marketing services agreement signed on 28 January 2010 by the Chamber of Commerce and Industry of Pau-Béarn with Airport Marketing Services with regard to the Pau-London, Pau-Charleroi and Pau-Beauvais routes, and identified 'implicit' airport services agreement ⁽¹⁴⁷⁾.
3. The State aid unlawfully granted by France to Transavia in breach of Article 108(3) of the Treaty on the Functioning of the European Union, under the airport and marketing services agreement signed on 23 January 2006 by the Chamber of Commerce and Industry of Pau-Béarn with Transavia, is incompatible with the internal market.

Article 2

1. The 2004 and 2009 equipment subsidies granted by France to the Chamber of Commerce and Industry of Pau-Béarn, amounting to EUR 5 800 000, constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union and were granted by France in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
2. The aid referred to in paragraph 1 of this Article constitutes 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

1. France is required to make the beneficiaries repay the aid referred to in Article 1.
2. The amounts to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiaries 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 and Commission Regulation (EC) No 271/2008 ⁽¹⁴⁸⁾ amending Regulation (EC) No 794/2004.
4. France shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this Decision.

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. France shall ensure that this Decision is implemented within 4 months of the date of its notification.

Article 5

1. Within 2 months of notification of this Decision, France shall communicate the following information to the Commission:
- (a) aid amounts to be recovered under Article 3;
 - (b) calculation of recovery interest;

⁽¹⁴⁷⁾ See recital 286.

⁽¹⁴⁸⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (c) a detailed description of the measures already taken and planned for the purpose of complying with this Decision;
- (d) documents proving that the beneficiaries have been ordered to repay the aid.

2. France shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the aid amounts and interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 23 July 2014.

For the Commission

Joaquín ALMUNIA

Vice-President
