

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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

(notified in Number C(2004) 516)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2004/393/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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 the above Articles ⁽¹⁾, and having regard to these comments,

Whereas:

1. PROCEDURE

(1) Following information published in the Belgian press in July 2001 and the receipt of a complaint in January 2002, the Commission was informed that Belgium had granted a number of advantages to the airline Ryanair for the operation of air services at Charleroi Airport. In letters dated 21 November 2001, 13 June 2002 and 4 July 2002, and in a meeting held on 9 October 2002, Belgium transmitted information on to the Commission.

(2) In a letter dated 13 December 2002 (SG(2002) D/233141), the Commission informed Belgium of its decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of these measures. Belgium transmitted its comments on 14 February 2003 after having requested an extension until 15 February 2003 of the period for its response, which was accepted by the Commission.

(3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.

(4) The Commission received comments on the subject from interested parties. It transmitted the comments that did not contain confidential information to Belgium by a letter dated 19 March 2003, and followed by the other contributions, from which the confidential information had been removed, by letter dated 22 April 2003. On each occasion, Belgium was given the opportunity to respond to them within one month. The Commission received Belgium's observations by letters dated 16 and 27 May 2003.

(5) At the request of the Commission, three meetings were held with the Belgian authorities on 24 June 2003, 23 July 2003 and 25 July 2003. These meetings were followed by the dispatch of additional information, as requested by the Commission, on 27 August 2003.

⁽¹⁾ OJ C 18, 25.1.2003, p. 3.

⁽²⁾ See Note 1.

- (6) On 19 December 2003, Belgium sent a final letter to the Commission, containing additional information. In this letter, the Belgian authorities requested another meeting with the Commission; this meeting was held on 16 January 2004.

any specific obligation on the part of Ryanair towards the Walloon Region.

2. DESCRIPTION

2.1. BRIEF DESCRIPTION OF THE FACTS

- (7) On 6 November 2001 the Walloon Region, the owner of the Charleroi airport infrastructure, signed an agreement with Ryanair that involved a reduction of some 50 % in the amount of the landing charge compared with the amount fixed by the government and published in the *Moniteur Belge* ⁽³⁾. This reduction was granted to Ryanair on a discretionary basis by the Walloon Minister for Transport, through a private contract and not through the adoption of a statutory measure. While the landing charge is calculated according to the tonnage weight of the aircraft under the general system applicable to all, it is calculated on a different basis for Ryanair and collected for each embarking passenger ⁽⁴⁾. In addition, the Walloon Region undertook to compensate Ryanair for the losses that the company might incur because of a possible change in the level of all airport taxes or airport opening hours during the years 2001—2016 ⁽⁵⁾. These advantages were not published and were not subject to

- (8) Brussels South Charleroi Airport (BSCA) is a public sector company controlled by the Walloon Region, which has managed the airport since 1991 under a 50-year concession agreement. BSCA collects financial support from the Walloon Region in order to carry out certain tasks of general interest entrusted to it. Under this agreement, BSCA is authorised to collect air-traffic fees of up to 65 % as well as fees corresponding to any services provided ⁽⁶⁾. In a letter dated 4 July 2002, the Belgian authorities explained that the Walloon Region gives BSCA a flat 65 % of the revenue from the taxes by way of compensation: 'The elements taken into account are involvement in the welcoming, embarkation, disembarkation and transfer of passengers and their luggage and the volume of increase in overheads that cannot be allocated to a specific heading, following the rapid increase in the number of passengers to be dealt with in reception facilities that are currently not adapted'. The Belgian authorities specify that 'these activities involve a public service task and can thus be the subject of compensation, in accordance with Articles 73 and 86(2) of the EC Treaty'.

- (9) This income allows BSCA to grant Ryanair a 'share' in the expenditure connected with the opening of Ryanair's base in Charleroi (EUR 250 000 for hotel costs and Ryanair staff subsistence; EUR 160 000 for each new route opened up to a maximum of three routes for each based aircraft or a maximum of EUR 1 920 000; EUR 768 000 for participation in the cost of recruiting and training pilots and crews assigned to the new destinations served by the airport; EUR 4 000 for the purchase of office equipment; free provision of 100 m³ of office space; 100 m³ of 'engineering store'; the right of access to the training room; and a minimum or zero contribution for the use of a hangar for aircraft maintenance).

- (10) In addition, the price fixed for ground handling services for Ryanair is EUR 1 per passenger, a mere 10 % of the price publicised by BSCA for other users.

⁽³⁾ On the basis of a 1994 Parliamentary Decree, the Walloon Government issued a decree in 1998 that introduced, for Charleroi and Liège airports, a system of airport taxes (landing, passenger and parking) and reductions which were clearly established and available to all (Decree of the Walloon Government of 16 July 1998 laying down the fees to be levied for the use of airports within the Walloon Region, *Moniteur Belge* of 15 September 1998). This system was amended in March 2001 by a new Walloon Government Decree (Walloon Government Decree dated 22 March 2001 amending the Walloon Government Decree of 16 July 1998, *Moniteur Belge* of 10 April 2001). Walloon regulations state that 'the fees and subscriptions fixed in this decree shall be levied by the airport management company'. In addition, at the end of each calendar year, '35 % of the amount of the fees and subscriptions fixed by this decree and levied at each airport shall be paid into a fund for the environment of the airport concerned'.

⁽⁴⁾ The calculation, shown in detail in points 22-29 of the decision to initiate the procedure, shows a figure of approximately 50 % reduction at the present time, totalling, according to the types of aircraft, approximately EUR 104 and EUR 151 for Ryanair's Boeing 737-200 and 737-800, compared with approximately EUR 250 and EUR 390 according to the general rates for the same aircraft.

⁽⁵⁾ 'The Walloon Region undertakes to compensate Ryanair against any loss of profit arising directly from a modification of the decree or regulation, unless the exercise by the Walloon Region of its decretal or regulatory power is dictated by a regulation or directive, by an ICAO regulation, or by any international treaty or federal law'.

⁽⁶⁾ 'The concession holder is authorised to collect air-traffic fees and fees corresponding to any services that it is required to provide [...]. The concession mentioned in Article 1.1 [the service concession] is granted through a payment to the Walloon Region of an annual total of 35 % of the air-traffic fees collected by the concession holder during the previous year. The term "air-traffic fees" means the fees connected with landing, embarkation and parking [...]. The sum total of the fees mentioned in Article 18.4 [35 %] forms a fund allocated to the financial resolution of environmental problems caused by operation of the airport'. Article 18 of the 1991 Concession Agreement.

- (11) Ryanair and BSCA have formed a joint advertising and publicity company, which finances all Ryanair's publicity and marketing in relation to its activities at Charleroi. For example, the company finances part of the price of Ryanair's promotional tickets. BSCA and Ryanair contribute in the same proportions to the Promocoy operation (EUR 62 500 to put together Promocoy's authorised capital, and a 'marketing' contribution of EUR 4 per passenger to its annual budget).
- (12) In return, Ryanair undertook vis-à-vis BSCA to base a number of aircraft at Charleroi (between two and four) and to operate at least three rotations per aircraft leaving Charleroi over a 15-year period. The Irish company thus provides the airport manager with airport passenger traffic that allows it to anticipate income, either through airport taxes or through non-aeronautical activities. If Ryanair had to cease its operations at Charleroi, the company would be required to repay to BSCA the 'participation' in the expenditure connected with the opening of Ryanair's base and the 'marketing contribution'.

2.2. INITIAL ASSESSMENT BY THE COMMISSION,
APPEARING IN THE DECISION TO INITIATE THE
PROCEDURE

- (13) In its decision to initiate the procedure, the Commission considered first of all that the granting by the Walloon Region of a reduction in airport taxes to one airline company only, on all its flights for a period of fifteen years, in a bilateral agreement that was given no publicity and deviates from the stipulations of the law, amounts to granting a tax exemption to a company. This places the company in a more advantageous position than its competitors flying out of Charleroi. A compensation guarantee in favour of Ryanair in the event that the Walloon Region exercises its fiscal powers (by increasing taxes) or regulatory powers (by altering the airport opening times) allows it to operate in conditions and in a commercial environment that are quite stable and safe from any commercial risk; this constitutes a privilege that favours that airline company alone. The Commission also considered that the principle of a private investor in a market economy was not applicable to the action of the Walloon Region in the exercise of its regulatory and fiscal powers⁽⁷⁾. These

measures are specific, granted through State resources and likely to distort competition and intra-Community trade, and could thus be considered to constitute State aid.

- (14) The Commission judged that the bearing by BSCA of certain air service running costs also had the effect of putting Ryanair in a more advantageous situation than its competitors, whether they were companies operating out of Charleroi or other companies operating out of other airports and required to finance their own publicity, pilot training, employee accommodation etc. With regard to the principle of private investor in a market economy, the Commission considered that it would be difficult to apply it to this case, as the role of the Walloon Region as a public authority and that of BSCA as an airport business were strongly intertwined. It therefore seemed difficult to determine with any certainty whether BSCA had acted like a private investor by concluding the agreements with Ryanair, an action that left doubt as to whether the public authorities and the public company BSCA, controlled by them, would have granted illegal and potentially incompatible aid to the Irish company.

- (15) The Commission concluded, in the decision to initiate the procedure, that insofar as the advantages granted to Ryanair constituted State aid within the meaning of Article 87(1) of the Treaty, it doubted that this aid could be compatible with the common market on the basis of the exemptions provided for in Article 87(2) and 87(3) of the Treaty.

3. COMMENTS BY INTERESTED PARTIES

- (16) The Commission received critical comments with regard to the agreements as well as contributions from third parties who defended their validity.

3.1. SUMMARY OF COMMENTS BY INTERESTED PARTIES

- (17) The interested parties are less critical of the financial incentives granted to Ryanair than of the conditions under which they were provided (magnitude, absence of proportionality and phased reduction, unlimited duration, absence of transparency, discrimination and inequality of companies in relation to airport tax rates).

⁽⁷⁾ See Point 76 of the decision to initiate the procedure. 'The principle of private investor in a market economy cannot be applied in this case. It can only be applied within the framework of economic activity and never within the framework of the exercise of regulatory powers. A public authority may not use an argument according to which it could withdraw economic advantages in its capacity of an airport-owning business in order to justify aid adopted in the form of discriminatory exercise of its regulatory or fiscal powers'.

Almost all the interested parties stress the competitive impact of the aid on other airlines and even on other modes of transport. Some third parties have also raised factual questions (payment of 65 % of airport taxes to BSCA as a public service compensation, re-capitalisation of BSCA by the Walloon Region, making the airport infrastructure available to BSCA's benefit; bearing of safety costs by the Walloon Region; opening up the ground handling market to other operators in accordance with Directive 96/67/EC).

- (18) The interested parties, defending the validity of these agreements explain that they are consistent with current practices in the airport industry and that it is normal for airports to grant advantages to airlines that bring them passenger volumes and generate significant income. They consider that the Walloon Region and BSCA behaved as private investors in a market economy by negotiating agreements with Ryanair. The interested third parties stress that if the Commission were to conclude that it was tantamount to State aid, it would be practising discrimination between private and public airports, in breach of Article 295 of the Treaty. The Commission should not require the agreements negotiated between public airports and airlines to be made public, as this would put public airports at a competitive disadvantage in relation to private airports.

3.2. COMMENTS BY INTERESTED PARTIES CRITICAL OF THE AGREEMENTS

3.2.1. BRITANNIA

- (19) The airline Britannia considers that it is normal for airports to be able to provide marketing support and reductions according to volumes of passengers supplied by the companies, especially in the case of airports that are not yet well established. However, these advantages must remain proportional, realistic and limited in duration. Britannia is worried by the inequality created between competing airlines in this specific case. The airport taxes are unequal and unrealistic, while the low-cost companies use the runways, terminals and security facilities in the same way as the other airlines.

3.2.2. SCANDINAVIAN AIRLINES

- (20) SAS recalls that the deregulation of European airspace led to increased competition among the traditional

airlines and also allowed the creation of new companies that developed new business concepts. It is of fundamental importance that this competition complies with the regulatory framework applied transparently and without discrimination.

3.2.3. KLM ROYAL DUTCH AIRLINES

- (21) KLM explains that low fares airlines and traditional airlines offer different products and that each one of them has their 'raison d'être' at both commercial and operational level. Low fares airlines generally avoid large airports, for which the logistics can be complicated and the utilisation costs high; they choose regional platforms that allow them to operate rapid rotations at a reduced cost. These developments should not be called into question, but they should not be based on aid. According to KLM, the advantages received by Ryanair at Charleroi go well beyond what is permitted under Article 87(1) of the Treaty, and the compensation granted by Ryanair, consisting of basing a number of aircraft at Charleroi airport, changes nothing in this state of affairs.

3.2.4. AIR FRANCE

- (22) Air France considers that the reduction of Ryanair's running costs and their absorption by the Walloon Region and BSCA create a disadvantage for Ryanair's competitors who provide connections on the intra-Community market. The reduction in landing charges allows Ryanair to reduce its running costs and in fact makes it more competitive than its competitors, not only on the flights that it operates into or out of Charleroi but throughout the Ryanair network. The compensation commitment given by the Walloon Region is also regarded as an advantage that guarantees stability of operating conditions to Ryanair, while 'the practice of operating any airport platform demonstrates that the commercial and regulatory environment is never rigid. Total airport taxes can thus easily rise if the manager is forced to finance specific measures with the possible aim of accommodating other carriers wishing to establish themselves at Charleroi. In addition, the development of environmental measures can alter the conditions of operation of an airport'. Air France also draws a parallel between the situation at Charleroi and that obtaining in other Member States, especially in France.

3.2.5. AUSTRIAN AIRLINES

- (23) According to Austrian Airlines, the arrival of low fares airlines gave rise to a subsidies race between airports and regions wishing to be served by those carriers. These developments called the principle of payment for availability of infrastructures into question, at a time when it is one of the basic rules of the civil aviation world. The aid granted is not degressive; it is independent of the success realised by Ryanair on the connections that it serves and benefits one airline only, and this generates discrimination. Austrian Airlines concludes that 'cooperation' such as that observed between Ryanair and the Walloon Region leads to significant distortion of competition between airlines and is largely incompatible with the smooth operation of the internal aviation market.

3.2.6. ASSOCIATION OF RESIDENTS AND INHABITANTS OF TOWNS CLOSE TO CHARLEROI-GOSSELIES AIRPORT (ARACH)

- (24) ARACH draws the Commission's attention to the fact that it had asked the competent minister for copies of the agreements between Ryanair, the Walloon Region and BSCA in accordance with the right of access to information on the environment and that it did not obtain the information. The Association is concerned that the financial aid granted to Ryanair will lead to 'unbridled development of the airport' within an urban site, and that in these terms 'as both citizens and taxpayers, we are concerned about the questionable government aid granted to a private company as this involves improper use of the Walloon Region's budgetary resources'.

3.2.7. INTERESTED PARTY A

- (25) An interested party states that it is 'very concerned' at the subsidies granted by the local authorities, which affect the conditions of competition between various modes of transport. 'In this way, Ryanair is benefiting in particular from public subsidies for the Charleroi-London connection, while Eurostar, operated jointly by SNCB, the British Railways and SNCF, is not benefiting from them. Both means of transport are however in direct competition on the Brussels-London link. It is up to the railway operators alone to make their communications for the link, purchase the equipment and engines, pay infrastructure and tunnel tolls, etc. The equality of treatment between competitors is therefore disrupted'.

3.2.8. INTERESTED PARTY B

- (26) Interested Party B points out that the advantages granted to Ryanair reduce its cost structure and enable it to apply lower fares. These practices affect the conditions of competition, whether these companies operate out of Charleroi or Brussels National Airport at Zaventem, whatever the route served. Competition between the so-called 'low cost' airlines is not merely competition that has to be analysed on a route-by-route basis. For many travellers, the Venice or Barcelona destinations are wholly exchangeable. The interest aroused by low-cost flights amongst these passengers is not in the fact of travelling to a specific place, but rather in making a break in their day-to-day routine, whether it is to Venice or Barcelona. Competition therefore occurs on every route.

- (27) This company explains that the direct costs out of Brussels are EUR 32,14 per passenger compared with EUR 5 for Ryanair operating out of Charleroi⁽⁸⁾.

- (28) Even though the ground handling services are more limited for Ryanair than for other airlines, the interested party points out that a considerable amount of ground handling services is necessary for all companies. The fact that the ground handling market is open to competition at Brussels National airport means that assistance costs should not normally be much higher in Brussels than at Charleroi. Assistance costs are, generally speaking, higher at small airports than at large airports, insofar as the companies generally do not manage to reach the critical size for making savings of significant scale. The interested party estimates that Ryanair saved EUR 17 million in 2003 on actual ground handling costs and landing charges. It also appears that BSCA has not taken account of Council Directive 96/67/EC dated 15 October 1996 on access to the ground handling market at Community airports⁽⁹⁾: the airport should reach two million passengers a year quite soon and BSCA will need to apply the Directive to this threshold and open the ground handling market to other operators.

- (29) BSCA would have acted not as a private investor in a market economy but for political and social reasons, on

⁽⁸⁾ Direct costs per aircraft and rotation out of Brussels National, including landing charges, passenger fees and ground handling costs. On the basis of a forecast volume of 1 700 000 passengers in 2003, the difference in cost is EUR 23 million.

⁽⁹⁾ OJ L 272, 25.10.1996, p. 36. Directive last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

the instructions of the Walloon Region. The 15-year contract will probably not allow BSCA to establish itself as a profitable business and it is expected to continue to experience operational problems. The prospect of a return on investment could be undermined if Ryanair withdraws ⁽¹⁰⁾.

- (30) BSCA would obtain contributions from the Walloon Region, whether from airport tax revenue at a rate of 65 % or from the free availability of the infrastructure, while the Walloon Region paid a contribution to the Walloon Airports Company (Sowaer). In principle, each payment from the Walloon Region should be limited to compensation for the costs connected to public service obligations and incumbent on BSCA, and the situation is not very clear in this regard.
- (31) For this company, which acknowledges also that it benefited on occasion from 'marketing' advantages for the launch of new destinations but never from reductions in airport taxes or in ground handling costs, the advantages granted to Ryanair at Charleroi go well beyond the bounds of current practice. It estimates however that it took commercial risks just as important by setting itself up at Brussels National Airport at a time when competition from Sabena was very strong.
- (32) The fact that some other airport managers grant advantages to Ryanair would not be relevant in demonstrating that Charleroi Airport acted as a private investor in a market economy. The company refers to the Steinike & Weiling judgment delivered by the Court of Justice of the European Communities ⁽¹¹⁾.

3.2.9. INTERESTED PARTY C

- (33) According to Interested Party C, BSCA had not behaved like a private investor insofar as the magnitude of the

⁽¹⁰⁾ The company quotes the example of Shannon, in Ireland. Shannon granted advantages to Ryanair for a time, but they were not renewed. Ryanair decided to transfer its operations to another airport and Shannon did not receive the expected return on reasonable investment.

⁽¹¹⁾ Court Judgment of 22 March 1977 in Case 78/76, Steinike & Weinlig/Germany; ECR p. 595. 'Any breach by a Member State of an obligation under the Treaty in connection with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased'. (Ground 24).

advantages granted was different from that granted by other airports ⁽¹²⁾. The fact that Ryanair receives advantages from other airports was not relevant at all, as they could also constitute State aid.

- (34) The Interested Party draws the Commission's attention to several factors that must be taken into account in the analysis of the potential profitability to BSCA and appear to exclude medium-term profits:

— BSCA benefited from a re-capitalisation from the Walloon Region, totalling EUR 4 million, in December 2002.

— It 'benefits from exemption from half of the total of its fee due to the Walloon Region for the period 2001-2006. This advantage totals one million euros per year, which BSCA will however have to pay back from 2007 onwards'.

— The Commission should take account of the total costs relating to the Charleroi Airport expansion project, valued at EUR 95 million, and the methods of finance. If this work is not covered by BSCA, there will be a need to verify the conditions under which the Walloon Region makes the infrastructures available to BSCA. The Interested Party doubts that given the current state of its infrastructures, the airport would be in a position to cater for sufficient passengers to ensure the financial balance of BSCA.

— The Walloon Region supplies BSCA free of charge with the equipment and staff needed for all the security operations at Charleroi Airport, namely passenger and luggage control prior to embarkation, and Interested Party C adds: 'The Commission has certainly been informed that as a general rule security costs are borne by the airport users, either through a security fee payable to the airport operator or through a tax when these services are provided by the public authority'.

⁽¹²⁾ The rates imposed by Frankfurt-Hahn and London Stansted would be higher, and the reductions less, while Ryanair operates 49 destinations out of London and 15 out of Frankfurt-Hahn, compared with 9 out of Charleroi.

3.3. COMMENTS BY INTERESTED PARTIES DEFENDING
THE VALIDITY OF THE AGREEMENTS

improvement in image and in passenger numbers. TBI offers this type of contribution, especially when an operator establishes a new service or increases the frequency of certain flights on a given route.

3.3.1. TBI

(35) TBI is a company that has several airports across the world and provides various types of airport services. It owns and manages London Luton, Cardiff International, Belfast International and Stockholm Skavsta airports. It manages four other airports belonging to local regions and authorities. Finally, it supplies specialised airport services at 28 other airports.

(36) TBI states that negotiations were in progress with Ryanair for the use of Stockholm Skavsta at the time when the company was negotiating with Charleroi Airport and the agreements signed in Charleroi are similar to the arrangements concluded by TBI with Ryanair and other low-cost companies, especially in Stockholm Skavsta.

(37) TBI points out that the development of airports such as Charleroi should not be slowed down in relation to its private competitors by the simple fact that these are public airports.

— The act of granting reductions on landing charges and ground handling costs is a standard commercial practice aimed at attracting companies in a position to provide a significant volume of passengers. This volume guarantees trading income for the airport⁽¹³⁾. Without these passenger volumes, the airport would be in a constant struggle to reach break-even point.

— Airports belonging to the State should be able to pay compensation in the event of an increase in regional authority taxes, as private airports can fix them for the contractual period.

— Contributions in the form of paying for hotel costs or the costs of staff training or marketing are not unusual and should be compared to the investment made and the risk taken by the carrier basing an aircraft in a little-known airport.

— Marketing contributions are common within the framework of little-used airports. Companies that use these airports have to channel a great deal of effort into marketing their flights. This marketing process benefits the airport, which enjoys an

— It would be unfair to impose on public airports an obligation to publicise the agreements negotiated by them with airline companies, as this obligation would place them in a situation of competitive disadvantage in relation to private airports not subject to the obligation.

(38) TBI explains that regional airports were under-used for years because of the absence of competition between airlines before the opening-up of markets at European level, and since that date, because the traditional companies have become polarised around their hubs. The rise of companies such as Ryanair, operating point-to-point services from smaller airports, has reversed this trend and gives them a chance of reaching break-even point. The experiences of London Luton, 70 % of whose users are low-cost companies (Easyjet, Ryanair, Hapag Lloyd)⁽¹⁴⁾, Cardiff, used 65 % by low-cost companies (especially Bmibaby)⁽¹⁵⁾, Belfast (Easyjet, Go), and Stockholm Skavsta⁽¹⁶⁾, which became Ryanair's base in January 2003, are illustrations of this.

3.3.2. HRL MORRISON AND CO

(39) HRL Morrison and Co. is, via its subsidiary Infratil, the 67 % owner of Glasgow Prestwick, whose history it briefly retraces. When Glasgow Airport was sold by the British Airport Authority in 1992, the airport capacity was just 1 % used. In 1994, when attracting the traditional companies proved impossible, the airport decided to conclude a 15-year agreement with Ryanair for two daily rotations between Glasgow and Dublin. 114 000 passengers were carried between Ireland and Scotland in the first year. Since then, Ryanair has

⁽¹⁴⁾ The number of passengers at Luton increased from 1,9 million in 1995-1996 to 6,7 million in 2002, that is, an increase of 250 % against a background overshadowed by the attacks of 11 September 2001.

⁽¹⁵⁾ The number of passengers at Cardiff rose from 1 million in the early 1990s to 2,25 million in 2003.

⁽¹⁶⁾ Before the coming of Ryanair in 1997, there were less than 20 000 passengers at Skavsta. The number totalled 315 000 in 2002. The launch of the Ryanair base will increase this figure fourfold, taking it to 1,5 million in 2003.

⁽¹³⁾ It accounts for 55 % of TBI's income.

developed several routes there and should carry 1,7 million passengers in 2003. Thanks to Ryanair, the airport has been able to develop its commercial operations, reaching critical size and break-even point.

(40) According to Morrison, a private investor could adopt the approach taken by Charleroi Airport. It would base its offer on certain determining factors: the volume of passengers that a company could bring to the airport, its willingness to commit itself long-term by means of contracts; the specific needs of the company; the aircraft movement timetable and its consistency with airport activity (existing traffic); the terminal's needs in terms of resources, and ground handling assistance. It would calculate the profits expected under the agreement with Ryanair overall (and not under the various constituent elements taken separately). The benefits of such a transaction should be envisaged over a period of some 20 years, with the services taking off after 3-5 years. When a 15-year agreement is involved, the shareholders in Morrison consider that it could be commercially acceptable if a return on investment occurs some five years after signature of the agreement.

(41) Morrison, in essence, made the same remarks as TBI with regard to reductions in fees, contributions and financial incentives, specifying that:

— It is not unusual for airports to negotiate reductions in airport taxes and ground handling costs in exchange for volumes of passengers and a long-term commitment from Ryanair, thus preventing the company from choosing another airport ⁽¹⁷⁾;

— Airports are in a difficult situation with regard to advertising, as the only really effective way of providing it is to promote air services that leave that airport. The fact that the name of the airport does not appear in the first line is not paramount; what counts is the benefit arising from the advertising campaign, that is, the increase in passenger numbers.

(42) The best proof of the commercial character of the agreements negotiated in Charleroi would lie in the fact

⁽¹⁷⁾ Morrison recalls that, faced with an increase in the fees charged by the Irish airport manager at Shannon (Aer Rianta), Ryanair decided to transfer the greater portion of its flights to Kerry airport in Ireland. See also the Ryanair press communiqué dated 13 February 2003 on the transfer of the Frankfurt Hahn — Shannon route to Frankfurt Hahn — Kerry (www.ryanair.com).

that Morrison would be interested in acquiring a holding in BSCA, although it has not had access to BSCA's accounts.

(43) Morrison considers that the Commission would be wrong to oblige an airport to concede the same conditions to just any company without applying a distinction according to the volume of traffic generated. It would also be wrong to impose a publicity obligation on private commercial transactions, insofar as this would provide competing airports with sensitive information covered by professional secrecy.

3.3.3. RYANAIR

(44) By way of a general remark, Ryanair stresses the consequences of the Commission Decision on the survival of regional airports and the deregulation of air transport services in the next twenty years. By taking risks, the low-cost companies have succeeded in doing what the traditional companies failed to do: they made underused regional airports such as London Stansted, Glasgow Prestwick, London Luton, Belfast etc. viable. These airports are now in competition with major airports, forcing the old monopolies to lower their costs and improve efficiency. It is consumers who benefit from this situation as they have access to plane tickets at good prices. The Commission should not deprive continental secondary airports of the experiences of the United Kingdom airports, which also offer incentives.

(45) If the Commission were to conclude that this case involved State aid, it would do so:

— in violation of Article 295 of the Treaty, by introducing discrimination between public and private airports; the Commission cannot prejudge the ownership regime in Member States;

— by preventing a public airport from offering the same financial conditions as those offered by private airports, which would be unacceptable at political and legal level;

— by compelling an airport to publish all its charges when there are no legal obligations on this point, the Commission would be abusing the power that it holds under the provisions of the Treaty on State aid, whereas the Treaty provides a distinct legal

basis, Article 80, for legislating on airport fees ⁽¹⁸⁾. The proposal for a Council Directive on airport fees ⁽¹⁹⁾ rested on this legal basis.

3.3.3.1. *Relations between Ryanair and the secondary airports*

(46) After recalling what the relations with the Walloon airport were, Ryanair points out that the agreements negotiated between Ryanair, BSCA and the Walloon Region did not contain any elements of State aid, for three reasons: the principle of private investor in a market economy applies, there is no selectivity, and the agreements do not distort the competition.

(47) To attract investments in their infrastructure, secondary airports need a critical mass of passengers that can be obtained only through long-term agreements with an airline. The guaranteed volumes of passengers are different for bases or routes opened by Ryanair, as Tables 1 and 2 show.

Table 1 — Ryanair bases (volume of passengers)

Airport	Number of passengers in year preceding arrival of Ryanair	Total number of passengers (2002)	Total number of Ryanair passengers (2002)	% of Ryanair traffic (2002)
Dublin	2 600 000 (1985)	15 085 000	4 189 509	28 %
London Stansted ⁽²⁰⁾	1 047 000 (1988)	16 048 700	8 301 356	52 %
Glasgow Prestwick	10 000 (1993)	1 486 439	1 320 920	89 %
Charleroi	< 20 000 (1997)	1 271 596	1 242 087	98 %
Frankfurt-Hahn	< 20 000 (1997)	1 457 527	1 422 566	98 %

Table 2 — Ryanair routes (volume of passengers)

Airport	Total number of passengers in year preceding arrival of Ryanair	Total number of passengers (2002)	Total number of Ryanair passengers (2002)	% of Ryanair traffic (2002)
Pisa	1 065 691 (1997)	1 654 570	627 985	38 %
Milan (Bergamo)	1 061 397 (2001)	1 252 878	360 389	29 %
Pescara	114 024 (2000)	295 875	196 389	66 %
Bologna (Forli)	45 933 (2000)	150 309	112 508	75 %
Liverpool	333 000 (1987)	2 835 088	252 310	9 %
Derry	49 000 (1998)	199 543	129 298	65 %

⁽¹⁸⁾ Article 80 of the Treaty provides that provisions relating to transport apply to the air transport sector according to the following procedure: 'The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'.

⁽¹⁹⁾ COM(97) 154 final (OJ C 257, 22.8.1997, p. 2).

⁽²⁰⁾ When Ryanair began its flights from Stansted in 1989, the airport was relatively unknown and had no new terminals. Ryanair opened a base there in 1991, followed by other companies such as Go (1997) and Buzz (1997). The same situation occurred in 1992 at Glasgow Prestwick, Bristol, Cardiff and Edinburgh.

- (48) To attract companies, airports are ready to negotiate reductions, as was shown in a study requested by the Commission ⁽²¹⁾. Ryanair provided confidential information to the Commission on what the company pays at Charleroi and at 'private' airports such as Stockholm-Skavsta, Glasgow Prestwick, Frankfurt-Hahn, Ancona, Bournemouth, Liverpool or Knock, showing that the net payment provided as a benefit at Charleroi is higher than those provided at other airports ⁽²²⁾.
- (49) Before Ryanair set up at Charleroi, the airport received only 20 000 passengers per year, an average of 50 per day. Thanks to the Charleroi-Dublin route, opened on 1 May 1997, Ryanair transported 178 000 passengers in 2000. In four years, it transported more passengers between these two cities than all the traffic in existence on the Brussels-Dublin route in 1997. In 2002, the airport received over 1,25 million passengers, almost 4 000 per day, for ten destinations across Europe. The volume of traffic increased by 1,455 % between 1997 and 2002.
- (50) Ryanair has made a number of remarks on how its negotiations with the airport developed, in connection with the description given in the decision to initiate the procedure:
- During summer and autumn 2000, Ryanair commenced negotiations with other airports, either for the creation of a new Ryanair base or to add new aircraft to certain lines from summer 2001 onwards.
 - The agreements between BSCA, Ryanair and the Walloon Region were approved in February 2001. Their signature in November 2001 is merely their formalisation. The negotiations with Charleroi were conducted like all trade negotiations.
- (51) The principle of private investor in a market economy must be applied both to BSCA, which is acting as any
- airport manager would by maximising the profitability of the airport, and to the Walloon Region, the airport owner, which is acting as any airport shareholder seeking to maximise the value of the airport. The agreements were concluded under normal market conditions, as has happened with several private airports. In addition, Ryanair received more favourable conditions from London Luton.
- (52) The profits generated by the arrival of Ryanair for the owner and manager of the airport exceed those of Ryanair, guaranteeing, for example, an increase in the value of the airport (a huge investment in the form of four aircraft based permanently at Charleroi, an average of 4 000 passengers a day, over 1,5 million passengers in 2003, efficient use of the airport, substantial profits in two years, growth of the most significant kind for a European airport based on a 150-year agreement, ten destinations in four European countries, investment in the marketing of the airport, heavy financial penalties for Ryanair in the event of failure to respect the conditions laid down in the contract in relation to passenger volumes, experience in dealing with one of the most effective companies in the world and more experienced staff, increase in rental income, increase in the business value of the airport, and a more attractive airport for new investors).
- (53) The duration of the agreements (15 years) is not unusual. Ryanair has agreements lasting 10 to 20 years with almost all the airports that it uses. These durations guarantee stability of income, which makes investment in long-term infrastructures possible.

Application of the principle of private investor in a market economy

- (51) The principle of private investor in a market economy must be applied both to BSCA, which is acting as any

⁽²¹⁾ Cranfield University, Study on Competition between Airports and the Application of State Aid Rules, September 2002, available in English on the Commission's website http://europa.eu.int/comm/transport/air/rules/studies_fr.htm. See in particular Chapter 5.1.4 on the various types of discount granted by airports, as well as Chapter 4.1.3.

⁽²²⁾ This information, protected by commercial secrecy, could not be sent to Belgium for comment and is not reproduced here.

Application of the principle of private investor in a market economy to the Walloon Region

- (54) Ryanair considers that the principle of private investor in a market economy is applicable to the Walloon Region, as the measures taken by the Region were taken purely in its capacity as an economic actor and not as a regulator exercising public power prerogatives. Ryanair asks the Commission to bear in mind that the Walloon Region is acting as the airport owner. In addition, as the Walloon Region is the main shareholder in BSCA, any benefit for BSCA also benefits the airport owner.
- (55) The value of Charleroi airport has increased considerably since Ryanair set up there six years ago, especially over the last four years. As for any other airport, this value is commensurate with the volumes of

passengers transported, especially by low-cost companies⁽²³⁾. The commercial success of BSCA is demonstrated in the interest shown by businesses such as Morrison, Vinci and Aéroports de Paris in the purchase of 25 % of BSCA. As examples of this increase in value, Ryanair cites Glasgow and Copenhagen airports and those belonging to the British Airport Authority⁽²⁴⁾.

- (56) By modifying the landing charges for Ryanair, the Walloon Region would have acted as a market actor and not as a regulator or fiscal authority that raises or lowers 'tax' levels. In addition, we are not looking at 'taxes' here, but at 'fees', as the Walloon regulations term them. The 'fees' are paid entirely to BSCA and not to the Walloon Region. In general and in practice, these fees are collected by the airports (after agreement and negotiation) from the airlines. The rates published may be approved by the governments, but in essence they are determined by the airports and negotiated directly between airports and airlines.
- (57) Reductions in landing charges for the launch of new services or the strengthening of new frequencies are common in the industry, with the exception of congested hubs such as Heathrow and Charles de Gaulle.
- (58) The Commission appears to consider that it is unusual or even illegal to fix the total landing charges on a passenger basis and not according to the weight of the aircraft. Ryanair, however, has agreements with several airports based on this model.
- (59) Ryanair points out that the weights quoted in the decision to initiate the procedure are not correct. The weight of a Boeing 737-800 developed for Ryanair (the only type of aircraft now used at Charleroi) is 67 tonnes and not 78. On this basis, the amount of the reduction

is 36.7 % on average and not 50 %. If this particular agreement did not exist, Ryanair would be eligible for the system of reductions provided for in the Belgian legislation of 1998, which makes provision for reductions of 5-25 %.

- (60) With regard to the compensation guarantees or 'obligations not to do', undertaken by the Walloon Region in the event of changes to airport fees before 2015 and alteration of airport opening times, these are not matters of a 'regulatory' nature but commercial decisions essential for the establishment of a Ryanair base. These guarantees would be similar to 'stabilisation clauses' or 'comfort letters' used in the context of long-term agreements between private companies and state bodies, for example in the tunnel or pipeline sector or in the context of privatisation. It would be normal for parent companies to grant these guarantees to third parties signing contracts with their subsidiaries. It is essential for Ryanair to obtain a measure of security from a government. These guarantees would not limit the sovereignty of the Walloon Region by preventing it from changing the law: there would be no compensation for changes initiated by other parties outside the competence of the Walloon Region (at federal, European or international level). These undertakings, according to Ryanair, cannot be seen as limiting or calling into question the exercise of regulatory power.
- (61) If the Commission were to decide that the Walloon Region did not have the right to give this assurance without even considering whether a private investor in a market economy would have done so, it would be discriminating between public airports (whose fees are often fixed and controlled by a government or regulatory authority) and private airports (which are free to fix fees for the duration of a contract).

Application of the principle of private investor in a market economy to BSCA

⁽²³⁾ Ryanair cites the experience of Belfast (EasyJet), Liverpool (EasyJet), London Luton (EasyJet), Glasgow Prestwick (Ryanair), Bristol (Go), East Midlands (Go) and London Stansted (Ryanair, EasyJet and Buzz).

⁽²⁴⁾ For Glasgow, see point 52 of the decision to initiate the procedure. For Copenhagen, Ryanair explains that between 1994 and 2002 the number of passengers increased from 14,1 million to 18,7 million and the value of the airport from EUR 525 million to EUR 956 million between those two years. A 32 % increase in passenger numbers had increased the value of the airport by 82 %. The British Airport Authority airports saw their value increase from EUR 7 000 million to EUR 12 300 million, that is, an increase of 75 % between 1993 and 2002 based on an increase of 56 % in passenger numbers (from 77,1 million to 121,6 million).

- (62) Ryanair is criticising the fact that the Commission, in its decision to initiate the procedure, saw difficulty in applying the principle of private investor in a market economy to BSCA because of the complexity of its relations with the Walloon Region. The Commission will have to apply this principle by separating the various activities of BSCA from those of the Walloon Region, basing itself not on the present moment but on the duration of the contract (15 years) or even on the

duration of the BSCA concession (50 years). The fact that BSCA showed losses for the first few years is not significant, as the return on investment is realised after a few years⁽²⁵⁾. Since BSCA's projections have a reasonable foundation and indicate a reasonable return on investment within a five-year period, the Commission would not have any objective reason for concluding that State aid was present. The Commission should not be indifferent to any proof showing a posteriori that the investment decisions were the right ones.

(63) The Commission must consider the whole of the income collected by BSCA according to the 'single till' principle, that is, without making a separation between air travel revenue and income linked to BSCA's commercial activities. Once the critical mass of passengers (which generally corresponds to two million) has been reached, BSCA may expect its business revenue to offset any possible shortfall in air travel revenue.

(64) The profitability of the airport will increase thanks to a 'network effect', as there are positive external factors between an airport and the airlines; the expansion of one party provides an incentive for the other to develop⁽²⁶⁾. A second reason for the profitability of the airport is linked to the 'learning curve' and economies of scale, which also lower the airport's unit costs. Given the rapid expansion in traffic at the airport, it is probable that at this stage, the managers' attention was focused on the needs relating to handling these volumes of passengers, and not to any economies of scale.

(65) The Commission should not take account of the costs of the infrastructure in the case of airports such as Charleroi; these costs should be considered as irrecoverable or 'sunk' costs financed many years ago, sometimes under the military expenditure of a government. In addition, Ryanair recalls that the Commission's policy was generally one of considering that the financing of infrastructures does not constitute

State aid when it falls within the framework of national or European transport policy.

(66) The advantages for BSCA in having a contract with Ryanair include in particular the revenue from airport taxes, which Ryanair estimates at EUR 243 million during the period 2001-2015, and the services provided by Ryanair in relation to marketing, sold to it at much lower prices than to other partners (value of publicity, of a link with the Ryanair.com site, of promotional tickets etc).

(67) Ryanair specifies, with regard to the advantages that it receives:

— The 'one-off' incentives, estimated to total 2,5 million, are aimed at developing new geographical connections rather than at operating fewer routes at a higher frequency. They are paid on the basis of invoices and must be repaid if Ryanair withdraws. This is common practice in the airport industry (for example Waterford, Belfast, Bristol, Liverpool, Luton and Stansted) and Ryanair benefits from it at Stockholm Skavsta.

— The marketing contribution is probably a better tool for promoting an airport than a reduction in airport fees. The owner and manager of the airport both benefit from the Promocoy campaigns, which help increase passenger volumes, revenue and the value of the airport. Such campaigns are common in the airport industry⁽²⁷⁾.

— With regard to the provision of offices and the EUR 4 000 grant for office equipment, Ryanair points out that the sum of EUR 4 000 is scarcely of importance and indeed is a 'minimum' amount. Ryanair did not use the office space offered and no building work was carried out in Ryanair's favour.

⁽²⁵⁾ Stansted showed losses during the first few years, but these were subsequently offset.

⁽²⁶⁾ According to the glossary of terms used in the field of European Union competition policy, network effects appear if the value of a product increases for a user together with the number of users of the same product or compatible products. Economists then speak of an 'external network factor' as when additional consumers join the network of existing consumers, they will have a positive 'external' influence on the consumers who are already network members.

⁽²⁷⁾ Ryanair quotes the example of Morrison, which offers financial incentives to companies operating out of Prestwick for each new line opened. These incentives are valid for three years and diminish each year. In the same way as Ryanair has to justify use of funds to BSCA, Morrison requires invoices before any sum is paid. In 1997, Morrison offered £ 1 million per year for five years to the company that would take on the Glasgow-New York service discontinued by British Airways. Bristol and Cologne/Bonn airports also offer financial incentives.

3.3.3.2. *Absence of selectivity*

- (68) Ryanair recalls that the Charleroi agreements were given a measure of publicity. They were known to the industry and received press coverage in Belgium, the United Kingdom and Ireland in 2001, and were confirmed by the Walloon authorities in a press communiqué in July 2001, which indicated that the advantages granted would be available to other airlines investing in Charleroi under similar conditions. Ryanair considers that a publicity obligation would lead to discrimination between public airports and private airports (which are exempted), in contradiction of Article 295 of the Treaty. The decision taken by the Commission in the Manchester case ⁽²⁸⁾ should not be used as a base for compelling public airports to offer the same conditions to all companies, without considering their position.
- (69) The selectivity criterion would be absent in this case, for a number of reasons put forward by the company: the agreements would not be exclusive and reductions could be granted to other users, and in addition Belgian law provides for a system of reductions and the Charleroi Airport promotional documentation mentions the possibility of reductions. The airport would have taken steps with 35 airlines before and after the agreements with Ryanair, and would have additional capacity to welcome other airlines.

3.3.3.3. *Impact on competition*

- (70) Ryanair considers that the conditions of competition were not affected on the relevant market, which it defines by analogy with competition law to extend it to include rights to State aid. There would not in fact be any competition in relation to the type of products covered (charter flights and scheduled flights) and the geographical area covered (the routes served).
- (71) Contrary to the Commission's assertion, the companies operating out of Charleroi airport are not competitors of Ryanair. They are charter companies, which offer one or two flights per week from Charleroi, mostly during the summer. In addition, Ryanair supposes that these companies have not lodged a complaint. This can be explained by the fact that the agreements between the Walloon Region, BSCA and Ryanair do not have any

effect on them. In fact, they benefit more from the marketing campaign, developed by Ryanair and BSCA, which has turned Charleroi into a known airport. In addition, charter companies do not generally pay much attention to the costs linked to the use of their airports, as they operate costly and irregular services for which ground handling costs or air travel costs only form a small part of the overall travel costs or 'package'. Conversely, airport costs make up a very large part of the Ryanair ticket price.

- (72) There is a level of competition between Ryanair and the companies that operate out of other airports, but it has not been distorted because the other airports offer other competitive advantages. Ryanair's direct competitors, such as Easyjet and Virgin Express, have refused to use Charleroi airport; their competitive positions would not therefore have been affected by the Charleroi agreements.

3.3.3.4. *Compatibility of aid*

- (73) If the Commission concludes that State aid is present, it would be obliged to determine the compatibility of the measures with the common market on the basis of the relevant frameworks, on the basis of the exemption rules, or on their own merits. The socioeconomic benefits brought to the region should be analysed, and Ryanair states that it reserves the right to adopt a more detailed position if the Commission were to examine the measures for compatibility on the basis of Article 87(3) of the Treaty.
- (74) In an annex to its response ⁽²⁹⁾, Ryanair explains that the economic impact of the airport activity on the region is higher than for other airports, insofar as the passengers are not in transit. By 2005, Ryanair should be transporting about 1,95 million passengers and the number of jobs generated should be at least 1 400, including the 120 Ryanair employees ⁽³⁰⁾. By 2010, with

⁽²⁹⁾ A report by the University of Westminster titled 'The economic impact of Ryanair at Charleroi/ Brussels South Airport', and a Ryanair report titled 'Socioeconomic impact of the arrangements' were sent as Annexes 19 and 20 to Ryanair's response.

⁽³⁰⁾ As a general rule, according to Ryanair 1 100 full-time jobs would be generated by an annual volume of 1 million passengers. Ryanair's activity on its own could potentially create 2 200 jobs, which should be compared with the aims of the Walloon Region's employment policy for seven years (target of 8 500 people for expenditure of EUR 1 300 000 000).

⁽²⁸⁾ Commission Decision of 14 June 1999, United Kingdom — Manchester Airport, State Aid NN 109/98.

60 rotations, Ryanair would be in a position to create 4 235 additional jobs (2 329 direct and 290 indirect). Its activity will lead other businesses to set up in the region, with the airport opening the door to international activity. Ryanair also contributes to the development of tourist activity and income in Belgium; it encourages passengers to come back to Belgium because of its low-price ticket policy.

- (75) Ryanair recalls that the Hainaut region is one of the poorest in Belgium and falls within Article 87(3)(c) of the Treaty, and that although the aid does not fulfil a priori all of the conditions defined in the various frameworks and exemption rules, the Commission would however be required to judge each case on its individual merits ⁽³¹⁾. In particular, Ryanair is asking the Commission to assess the compatibility of aid for pilot training on the basis of Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ⁽³²⁾.

4. COMMENTS FROM BELGIUM

- (76) Belgium communicated its comments when the procedure was initiated in February 2003. In addition to remarks on the development of secondary airports and relations with Ryanair, and on the private investor behaviour of the Walloon Region, the response included a demonstration of the behaviour of BSCA as a private investor in a market economy. The company's business plan dated April 2002, together with a specialist report by the consultant Deloitte & Touche dated 2003 and intended to assess plausibility in relation to the company's results, was sent to the Commission. The report, submitted to the Commission, allowed the consultants to validate the structure and the general hypotheses that underlay the BSCA business plan. The consultants even concluded that the future results to be expected today are better than those shown in the business plan, and that 'although a first reading creates the impression that the Board of Directors, by committing the company to Ryanair, is considerably increasing activity at the expense of profitability, developments in years to come show that on the contrary, the business plan brings the results back to a positive total in 2004 and they will continue to improve, as our comments on the profitability of the investment in terms of equity funds demonstrates. [...] It can therefore be considered that the Board's decision was justified by a business plan that has so far turned out to be prudent and reliable, and that a period of negative profitability lasting three years represents a

normal transition between the differing conditions of operation' ⁽³³⁾.

- (77) In response to the comments from the interested third parties, Belgium submitted some additional elements to the Commission in May 2003. On this occasion it pointed out that thanks to the successful management of its activities and the faster than anticipated increase in commercial income, the Board of Directors of BSCA approved a 2003 budget that showed a positive result and the results for the third and fourth quarters of 2002 showed a profit of EUR [...] ^(*) and a break-even result respectively.
- (78) The Commission requested meetings with the Belgian authorities in order to clarify a number of questions still outstanding in relation to BSCA's behaviour as a private investor in a market economy, airport taxes, the environment fund, the maintenance/fire compensation and the re-capitalisation of BSCA.

- (79) The central question addressed during these meetings was the behaviour of BSCA. The Commission pointed out that the BSCA business plan sent to the Commission, together with the consultant's report, could not be used as an appropriate basis for applying the private investor principle. This plan was dated spring 2002, and therefore post-dated BSCA's investment decision to commit itself with regard to Ryanair in 2001. The 2002 plan was even less admissible as it was based on operating parameters different from those known to BSCA in 2001. In fact, it included elements that reflected the modification made to the concession conditions in 2002 ⁽³⁴⁾ and described in the decision to initiate the procedure.
- (80) The Commission therefore asked the Belgian authorities to send it the business plan produced by BSCA in 2001, together with any other useful document that would, in accordance with its practice and Court of Justice case

⁽³³⁾ The cause of the financial trend is the growth in commercial activity and the development of income linked to the new, larger and more attractive terminal from 2005 onwards, the expiry of the 'one-shot' incentives, the opportunity for BSCA to negotiate new commercial conditions with Ryanair beyond the 26 rotations provided for in the current contract, the abolition of the car park shuttle services that will cease to be necessary once the new terminal opens and will represent a saving of EUR [...] and economies of scale in operating the airport.

^(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

⁽³⁴⁾ These modifications are set out in points 60-62 of the decision to initiate the procedure.

⁽³¹⁾ Court Judgement of 17 September 1980 in Case 730/19, Philip Morris/Commission, ECR p. 2671, Ground 24.

⁽³²⁾ OJ L 10, 13.1.2001, p. 20.

law, allow it to analyse the private investor reasoning at the time of the decision to invest. This business plan, sent by Belgium, is the one used by the Commission for the financial analysis carried out with the present decision in mind.

4.1. DEVELOPMENT OF REGIONAL AIRPORTS AND RELATIONS WITH RYANAIR

- (81) As in the case of many other regional airports, Belgium indicated that the infrastructure of Charleroi Airport was being under-used and could not be made profitable. When management and operation of regional airports was transferred to the regions in 1988, the Walloon government decided to use the economic potential presented by these airports and made a number of investments aimed at developing them ⁽³⁵⁾. In a decision of 20 July 2000, it approved the guidelines of an investment programme for Charleroi valued at EUR 113 730 000 (BEF 4 588 000 000) ⁽³⁶⁾.
- (82) Belgium stresses that the provisions on State aid laid down in the Treaty do not apply to this type of funding. The Commission guidelines relating to the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aid to the aviation sector ⁽³⁷⁾ (hereinafter 'the aviation sector guidelines') indicate that 'the construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid. Infrastructure

development decisions for outside the scope of application of this communication insofar as they are aimed at meeting planning needs or implementing national environmental and transport policies'.

- (83) Belgium pointed out that according to the University of Cranfield study mentioned in (48), small regional airports cannot survive without public finance if passenger volumes are less than one million per year, and the impact of passenger volumes on the unit costs to be borne by the airports is a determining factor. Unit cost falls significantly from 500 000 passengers onwards and stabilises at around 3 million passengers. In order to attract these passenger volumes, efforts have been made to attract airlines to the Charleroi site from 1995 and 1996 onwards.
- (84) Contacts were made with low-cost companies (Virgin Express, Ryanair, Easyjet and Debonair), a large number of regional companies and some charter companies (Neckermann, Sunsnacks, Pégase, Sunair, Jet Air, Best Tours, Bosphorus), and the airport was able to develop charter flights in association with Thomas Cook, British World Airlines and Wasteels Travel as well as flights to Algeria and Yemen. However, a series of handicaps that affected the airport ⁽³⁸⁾ and a number of reasons particular to the airlines canvassed made it difficult to set up airlines departing from Charleroi ⁽³⁹⁾.

⁽³⁵⁾ In a decision dated 2 May 1989, the Walloon Government ratified the Ministry of Transport analysis according to which:

'The transfer of this area of competence is defined, for the Walloon Region, as the transfer of a deficit estimated at 130 million francs for 1989. The main aim of the Executive is therefore to do everything to ensure that Walloon airports and aerodromes reach their breakeven point quickly. To achieve this goal, several actions have to be carried out together, especially in relation to infrastructure. The development of our airports in fact passes through significant increases in our income, something that can only be achieved by welcoming new activities on their site, such as charter flights, freight transport, business flights and excellent customer service. (...) It must be noted that the basic equipment is far from sufficient for meeting the requirements linked to development of new activities (...). As for Gosselies, although it has suitable buildings and sufficient parking areas for the present, the limited length of its runway will be a disadvantage in terms of the types of activity that it can accommodate'. Annex 1 to the response from Belgium of 14 February 2003.

⁽³⁶⁾ In addition, the costs connected with altering the economic development zones around the airport, including compensation for owners of buildings, were assessed at EUR 75 350 000 (BEF 3 040 000 000) at the time.

⁽³⁷⁾ OJ C 350, 10.12.1994, p. 5.

⁽³⁸⁾ Belgium quotes: the distance between it and Brussels and the absence of rail connection; the dilapidated state of the current terminal, which is lacking in commercial attraction; the preference of charters for Zaventem; the closure of the airport at night; the presence of a Virgin Express base at Zaventem; the prestige of Zaventem; the absence of sufficient technical maintenance for the aircraft based there; the absence of sufficient work for an aircraft based there, hence the need to work in a W (Zaventem, Malaga, Charleroi, Malaga, Zaventem) or via flight ferry; the airport opening times; and the insufficient lengths of runway for flights over two hours (no ILS III).

⁽³⁹⁾ The contacts with Virgin (1997-2000) did not produce results, most notably because of the agreement currently in force and correspondence with Sabena. Easyjet was not interested because it was developing two new continental bases (Geneva and Amsterdam) in 2002, considered the absence of rail connection close to Charleroi to be a major obstacle to setting up, and considered the French market more interesting than the Belgian market. The development strategy followed by Go, approached by BSCA in 2000, was suspended in anticipation of a buyer for the company. Buzz studied the possibilities of the Charleroi-Stansted route, but withdrew from it for fear of lack of profitability. City Bird demanded that the Walloon Region acquire a share in its capital as a prerequisite for setting up at Charleroi; this was refused because of the poor financial health of the business. In 2002, BSCA canvassed some 35 airlines in the so-called 'ethnic' flight sector, the East European countries and the charter companies.

- (85) In 2001, the company Grands Travaux de Marseille (GTM), interested in a holding in BSCA, carried out a study of the development potential of the airport. The study revealed that Ryanair was the only immediately feasible option for BSCA for transforming the airport into a commercial operation that would realise profits in the short or medium term. Belgium specifies: 'Although it is true that the financial concessions requested by Ryanair were higher for BSCA than those that could be envisaged for other low-cost companies contacted, the interest shown by these other companies was low or zero, so that they could not constitute a possible alternative to the setting-up of Ryanair at Charleroi'.
- (86) Belgium stresses that the regional airports and the charter companies are 'a winning team'. On one hand, these airports are able to grant good time slots, a congestion-free environment, very rapid aircraft rotation and greatly reduced airport taxes, and can offer flexible services that are suitable for this type of airline. On the other hand, these alliances have allowed previously under-used regional airports to enjoy a truly dramatic growth⁽⁴⁰⁾. The number of new passengers generated by each new destination launched by Ryanair, on the basis of daily frequency, is increasing by about 100 000 per year. An airport therefore derives considerable benefit from the opening of a route. The opening of a base allows a critical mass of various revenue types to be realised, thus ensuring that costs are covered more quickly. Thanks to the opening of the Ryanair base, passenger numbers increased from 773 431 in 2001 to 1 271 979 in 2002. The passenger volume for 2003 has been estimated at 1 700 000. The network of multiple destinations available immediately further increases the success of the airport. Stansted, Liverpool and Luton airports incurred losses after granting fee reductions to the low-cost companies, but then enjoyed phenomenal growth because of the passenger volumes generated by these companies and showed profits.
- (87) The airports have learnt to diversify their sources of income and understood that their profitability depended mainly on the volume of passengers passing through their infrastructures. Commercial income tended to exceed income from aeronautical activities more and more, especially at the main airports. Consequently, these airports, which have become mainly commercial companies, negotiate favourable conditions on a case-by-case basis in order to attract airlines and thus increase traffic volumes. Thus, following the establishment of Ryanair, a number of sub-agents set themselves up at Charleroi⁽⁴¹⁾. The guarantee duration of the contract also made it easier to fix the profitability parameters for the construction of the new terminal, which will allow the commercial capacity of the airport to be increased by improving reception for more passengers and increasing the business surface area.
- (88) Belgium underlines the interest in having private airport managers for BSCA, such as Grands Travaux de Marseille⁽⁴²⁾ or Morrison, who have expressed an interest in acquiring 25 % of the capital: 'The fact that private partners such as Vinci and Morrison have shown an interest in acquiring a 25 % shareholding in BSCA clearly demonstrates that the agreement reached with Ryanair could have been reached with a private investor insofar as it appears that BSCA will become a profitable business in the near future'.
- (89) In terms of airport capacity, Belgium has specified that it is inaccurate to consider that the airport is saturated. At present, the remaining capacity is 25 % from a commercial viewpoint and 50 % from an operational viewpoint. The theoretical capacity of the current infrastructure is estimated at 5,5 million passengers, and in more realistic terms, it could quite reasonably cater for 2,5 million passengers; this leaves a progression margin of about 50 % in relation to the volume of passengers for 2002. BSCA considers that the new terminal will increase capacity by 100 %, thus allowing at least two new airlines to open a base at Charleroi. New users could set up at Charleroi, such as Flyco, which intends to introduce five destinations in December 2003 and is counting on 300 000 passengers in the first year of activity.

⁽⁴⁰⁾ The airports mentioned are Liverpool, Luton, Glasgow Prestwick, Frankfurt-Hahn, Paris Beauvais, etc. Liverpool airport, a subsidiary of the private group Peel Holdings, has seen three times as many passengers after its privatisation and the arrival of EasyJet in 1997. The arrival of EasyJet did not prevent the arrival of other companies such as Ryanair and Euroceltic Airways, and some charter companies. Following the inauguration of the new terminal in 2002, the airport granted numerous reductions on official prices.

⁽⁴¹⁾ The following are mentioned: a bookshop, a contract with Coca-Cola for drink distributors and another with Air Terminal Publicity, which manages advertising on behalf of the airport (February 2002); a 'Guide du Routard' clothes shop (March/April 2002); an internet terminal supplier (June 2002); a Belgian Sky Shops duty-free store (July 2002); a new cafeteria (August 2002); Budget car hire company (October 2002); a branch of Dexia Bank (November 2002); and a bureau de change (February 2003). BSCA also succeeded, in 2002, in re-negotiating its commission rates on a number of concessions (cafeteria, car hire, Brussels shuttle bus service, supplies of motor fuel).

⁽⁴²⁾ In this regard, Belgium states that contrary to what the Commission asserts in point 9 of the decision to initiate the procedure, the fact that GTM did not buy into BSCA has nothing to do with the conditions granted by BSCA to Ryanair. Two letters dated April 2001 from the Vinci Group, the group that purchased GTM, certify that the group is still interested in the possibility of buying into BSCA.

4.2. APPLICATION OF THE PRINCIPLE OF A PRIVATE INVESTOR IN A MARKET ECONOMY

4.2.1. APPLICATION OF THE PRIVATE INVESTOR PRINCIPLE TO THE WALLOON REGION

4.2.1.1. *Reduction in landing charges*

- (90) Belgium believes that it is advisable to apply the principle of private investor in a market economy to the Walloon Region because its policy 'is effectively part of the exercise of business activity and not part of the exercise of its regal powers'. Contrary to its past assertions, Belgium has now explained that airport taxes should be considered fees and not taxes; the fees are levied on users according to their levels of consumption, while the concept of tax implies equality of all the users faced with it. It would involve 'a fee that constitutes a price for the use of the airport by users in return for serviced rendered'.
- (91) During the meeting on 24 June 2003, the Commission asked to what specific service the fee related. Belgium answered that this fee did not relate to a specific service rendered but was a partial financial contribution for the use of the airport infrastructure under the terms of the Walloon Decree of 16 July 1998.
- (92) During this meeting, the Commission also asked whether the revenue from the tax is held by the Walloon Region or by BSCA. Belgium answered that it is initially held by the Walloon Region, which transfers 65 % of the revenue to BSCA. The Commission asked, seeing that the decree of 16 July 1998 stipulates that BSCA 'collects' the airport taxes, whether the word 'collect' simply means 'levy' or whether BSCA holds a right of ownership over the revenue. Belgium answered that it was a simple collection process.
- (93) However, in its letter of 27 August 2003, Belgium supplied other explanations. It explained that BSCA is the owner of the taxes from the time of their collection from the users, except for the 35 % paid to the

environment fund ⁽⁴³⁾. Belgium explains that BSCA is responsible for providing a public service concession: 'It is a concession of public services, that it, the management by a private individual of a public service at his expense, risk and peril, under the control and according to the methods determined by the licensor, in return for a payment collected by the agents at the expense of the users'. Insofar as BSCA is the entity that manages and operates the airport and supplies the services to the users, 'it is logical that it should collect and keep the fees that constitute a consideration for the services rendered to the users'.

- (94) Belgium believes that BSCA's holding of 65 % of the airport taxes does not constitute State aid from the Walloon Region in favour of BSCA, as there is no transfer of public resources from one entity to another. In support of its argument, it quotes the case law concerning PreussenElektra ⁽⁴⁴⁾.
- (95) Belgium stresses that it is up to each Member State or public authority to fix the airport taxes for the airports that fall within their competence. Some airports fix their tariff levels themselves, under the control of a regulating authority. These tariffs cannot be easily compared as they correspond to structural costs, business policy, development phases, transport policies and very different airports. Regional airports would have lower structural costs and taxes than the main airports. With regard to comparisons with other airports, Belgium considers that the assertion according to which Interested Party B has to pay charges of EUR 32 at Zaventem while Ryanair pays a mere EUR 4 for the same services is incorrect. It points out that for each passenger Ryanair pays EUR 1 for landing, EUR 1 for

⁽⁴³⁾ 'In accordance with the concession agreement dated 9 July 1991 concluded between the Walloon Region and BSCA, the right to collect the fees was transferred to the agent, so that BSCA is in fact the owner of the fees as soon as they are collected from the users, because of the services that it provides to the users on the basis of the concession, with the exception, of course, of the 35 % paid initially to the Environment Fund and then the fixed-ceiling total paid to Sowaer from 2002 onwards. This is developed more specifically in the schedule of conditions dated 9 July 1991. In fact, Article 7 provides that the agent shall collect the fees connected with air traffic, while complying with the regulatory provisions in force or to be issued by the Walloon Regional Executive. Where necessary, the collection of these fees shall, for the purpose of the present document, be considered as a transfer to the agent'.

⁽⁴⁴⁾ European Union CoJ Judgment of 13 March 2001 in Case C-379/98, PreussenElektra & Schleswig, ECR p. I-2099, Grounds 59 & 61: 'In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity. (...) In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article [87] (1) of the Treaty.'

ground handling, EUR 7 for the passenger fee and EUR 4 for the contribution to Promocoy, making a total of EUR 13.

(96) Belgium justifies the reduction granted to Ryanair on the landing tax by 'the volume of passengers that will be brought in by the company, that it, at least 27 million passengers during the contractual period of 15 years'. 'The Walloon public authorities can grant discriminatory reductions in order to attract new users such as Ryanair, which will allow a regional airport such as Charleroi to exceed one million passengers and thus reach break-even point'. It should not be forgotten that a reduction in landing taxes will raise the total tax revenue significantly thanks to Ryanair: it has increased to EUR 5,2 million, while without the Ryanair traffic, only EUR 310 000 would have been collected.

(97) Belgium considers that 'BSCA [the Walloon Region ⁽⁴⁵⁾] was confronted with a "commercial need" when granting the reductions on the landing charges, since there was a risk of substitution in relation to Ryanair, which could easily have contracted with another airport' and refers to the Van Der Kooy case law in a case relating to gas supply prices in the Netherlands ⁽⁴⁶⁾. In its judgment of 2 February 1988, the Court of Justice considered that a preferential rate granted to horticulturists did not constitute an aid measure 'if it were demonstrated that the preferential tariff was, in the context of the market in question, objectively justified by economic reasons such as the need to resist competition on the same market from other sources of energy the price of which was competitive.' The Court confirmed this case law in a judgment of 29 February 1996, according to which 'if it is commercially necessary, it is common commercial practice for an undertaking to grant a discount if it is economically maintainable' ⁽⁴⁷⁾.

(98) Public airports should not be bound by any publicity obligation when they grant reductions on landing charges while private airports, which also have recourse to this type of negotiation, are protected from any of the Commission's measures relating to State aid. Belgium quotes several examples of airports that have agreed to reduce their fees without any prior publication.

(99) Belgium asserts that Charleroi airport is ready to grant such rebates to any other airline that brings in a volume of passengers comparable to that generated by Ryanair. Moreover, the BSCA business plan was compiled on the basis of the principle of a landing tax total equal to that paid by Ryanair, namely EUR 1 per passenger for all airport users; this would be proof of the fact that the measures are not selective. Belgium submitted to the Commission the offers made by BSCA to three airlines ([...]), made with the same total of EUR 1.

(100) Belgium explained that the Walloon public authorities were preparing an amendment to the Walloon decree of 16 July 1998, 'which would allow more accurate consideration to be taken of the various objective criteria that distinguish different types of users of the Walloon airports'.

4.2.1.2. *Compensation clause for the Walloon Region*

(101) Belgium contests the Commission's statement that the principle of private investor is not applicable to the Walloon Region when it exercises its regulatory powers. It answers that 'the Commission cannot however force the Walloon Region to act according to the criteria of the private operator in a market economy, which include the conclusion of synallagmatic contracts, and at the same time deny its right to give its co-contractor the legal security that it has the right to expect'. It would be quite normal for the Walloon Region, within its specific competence, to be able to commit itself to its co-contractor to ensure a level of legal security for a contract concluded for a 15-year period.

(102) It should also be stressed that the Walloon Region did not shrink from exercising its regulatory power, either in relation to taxes or in relation to Charleroi Airport's opening hours. The compensation clause would only be effective in the context of its commercial relations with Ryanair. These clauses would not be discriminatory insofar as no real competitor carries on any activities similar to those of Ryanair at Charleroi. The Walloon Region states that it is willing to grant such a clause to any potential competitor of Ryanair wishing to operate regular flights there.

(103) During the meeting on 24 June 2003, the Commission asked whether, if a new tax were introduced (such as an environment tax), Ryanair would be required to pay it during the contractual period. Belgium explained that the Walloon Region would not introduce any new

⁽⁴⁵⁾ The Commission assumes that Belgium was referring to the Walloon Region and not to BSCA.

⁽⁴⁶⁾ Judgment of 2 February 1998 in the joined cases 67, 68 and 70/85, *Kwekerij Gebroeders van Der Kooy BV and others v. Commission*, ECR p. 219, Ground 30.

⁽⁴⁷⁾ Judgment of 29 February 1996 in Case C-56/93, *Belgium v. Commission*, ECR p. I-723, Ground 82.

airport tax on its own initiative, but that this does not preclude the introduction of new regulations by the Community or the Belgian Federal State under which Ryanair would be charged.

4.2.2. APPLICATION OF THE PRINCIPLE OF PRIVATE INVESTOR TO BSCA

4.2.2.1. *Type of advantages granted to Ryanair*

(104) The Belgian authorities' remarks on the type of advantages granted to Ryanair are joined to those formulated by the Irish company, TBI and Morrison:

- The 'one-off' incentives were granted in return for the significant risk taken by Ryanair and the investment made within the development of new destinations from a regional airport that has not yet proved its worth. BSCA would be ready to grant these incentives to other companies.
- The relatively low price for ground handling is explained by the limited and basic services and an optimal allocation of human resources. These services should continue to be rationalised in order to minimise losses on the benefits supplied to Ryanair. These transitional losses must be envisaged in the overall context of the transaction with Ryanair: they are offset by income generated by airport taxes and commercial activity.
- Following the remark by Interested Party B on the opening of the ground handling market in Charleroi, Belgium specifies that 'at present, this directive [Directive 96/67/EC] is not applicable to Charleroi Airport as that airport has not yet passed the two-million-passenger threshold. When the criteria for applying this directive are fulfilled, BSCA will of course take all the required measures to comply with it'.
- With regard to the marketing contribution, Belgium considers that there is no interest in promoting an airport as such, as passengers favour an airline rather than a specific airport infrastructure. It is the airline that is the vector for passenger flows, that provides the airport with its income on a correlative basis. Although it is true that marketing activity is centred on Ryanair flights, they contribute directly to the creation of BSCA's airport and commercial income thanks to the increase in passenger numbers

triggered by the publicity centred on the airline's operations. The image of Charleroi Airport is improving because it benefits from publicity via the Ryanair site, which is the most visited travel site in the European airport sector. Regional airports are less known to consumers and airlines and have to make a greater effort in order to create a reputation for themselves and be seen as a viable alternative to the larger main airports, which benefit from better rail and road links and a more established reputation.

4.2.2.2. *The BSCA decision-making process*

(105) On the development of negotiations with Ryanair, Belgium specified that:

- A first business plan was submitted to BSCA's Board of Directors during 2000. However, this plan was not considered to be greatly credible because of the tendency to underestimate certain charges and overestimate revenue.
- New contacts were made with Ryanair in order to re-negotiate these conditions. After three months of intensive negotiations, an agreement in principle was reached in February 2001, providing for a passenger tax increase from BEF 200 (about EUR 5) to EUR 7 ⁽⁴⁸⁾, an increase in taxes over time to take account of inflation, and the removal of the upper limit on landing tax, which originally applied only to the first 130 passengers on each flight.
- These elements were incorporated into a new business plan, which was then formally approved by the Board of Directors of BSCA before the contractual texts were signed.
- The BSCA Board of Directors includes a number of business managers experienced in the management of large private companies. Their approval of the agreement, therefore, was naturally based on a detailed examination.

(106) During the meeting on 24 June 2003, the Commission asked the Belgian authorities what was the precise date of the decision by BSCA to invest in Ryanair. In their written replies, Belgium and Ryanair pointed out that

⁽⁴⁸⁾ This agreement was laid down in an amendment to the 16 July 1998 decree made on 22 March 2001.

the date of signature of the agreements between Ryanair, BSCA and the Walloon Region (November 2001) was simply the formalisation of an agreement reached in February 2001 (Ryanair) or April 2001 (Belgium). Belgium answered that the Board of Directors of BSCA took the decision on 31 July 2001. The reports of the Board of Directors of BSCA allow the development of the negotiations to be traced.

(107) During the meeting on 30 May 2001, the Board of Directors of BSCA, which had just elected its Vice-President and a new management committee, was informed by the Walloon government representative responsible for airports that the negotiations with Ryanair were in the final stages. The agreement would soon be submitted to the Board of Directors, which wanted 'as soon as possible, to have a financial projection relating to the future operations with Ryanair' ⁽⁴⁹⁾.

(108) During its meeting on 15 June 2001, a point was made on the state of the negotiations with Ryanair. These negotiations were led by two BSCA Directors who were also members of the Walloon Prime Minister's office and that of the Walloon Transport Minister's. This meeting was, first and foremost, an opportunity for the Board of Directors to hear a presentation from the company's auditor on the tasks to be carried out by BSCA under the 1991 concession agreement. The following points were covered: fire services, with strict compliance with ICAO standards; maintenance services for buildings, runways and surrounding areas; the sale of aviation fuel; the management of hangars; the management and development of the car park service; the management of premises within the administrative buildings, cafeteria and restaurant; the management of advertising spaces; ground handling; catering; business areas; the tax-free shop; and the passenger information service. The agent must also, in the context of the private area management agreement, provide maintenance for the

land, buildings, equipment and structures included in the concession or made available, so that they are always suitable for the use for which they are intended.

(109) The meeting of 29 June 2001 was largely devoted to the negotiations with Ryanair. The Walloon government representative explained that the contract was 'still at the draft stage, but a verbal agreement has been reached between the parties'. Several questions were touched on:

— The number of based aircraft, fixed between two and four.

— The limitation of the number of flights to 26 per day, because of 'the capacity of the airport and the financial limitation of the contribution. The long-term objective is also to be able to diversify and find other companies, as it is not wished that Ryanair should be the sole client at Charleroi Airport'.

— The landing tax: '[the director] recalls that for points 1.2 and 1.4, the landing tax is fixed by the Walloon Government. The Minister may grant a preferential rate, collected by BSCA and remaining the property of the operating company. In addition, the Minister was challenged on this matter in Parliament, and he answered that for any company operating in a Walloon airport, the tax will be the same'. '[Another director] asks whether the EUR 7 in point 1.4 and the euros in point 1.2 remain the property of BSCA. [The director] replied in the affirmative'.

(110) The meeting of 10 July 2001 was also mostly given over to negotiations with Ryanair, the Walloon government representative commenting on the draft contract to the members of the Board of Directors. One director 'pointed out that there was not much left before the contract was finalised in terms of content, but that the directors had little information on which to assess the financial side of the contract. This financial side is very important because it commits the airport and therefore the responsibility of the directors'. The directors wish to obtain precise information on the possibility of Ryanair obtaining financial advantages beyond the four aircraft based there ⁽⁵⁰⁾.

⁽⁴⁹⁾ During this meeting, the question of the existence of potential State aid was addressed. '[The Walloon government representative] emphasised that the European Commission appears to admit that the regional public authority, whose legal task was to develop the activities of airports, makes a promotional effort. This involvement, which because of the composition of BSCA's shareholding will be treated as expenditure of public funds, should escape criticism by the Commission because of the purpose of the expense. Some members of the Board suggest that unofficial contact should be made with one of the representatives of the Commission to assess the Commission's views on the compatibility of the agreement signed with Ryanair in relation to State aid and competition rules. Most members believe that it is advisable to wait for the end of the negotiations, which will be conducted naturally subject to the Board's approval, and then assess the conditions that may have been obtained before approaching the Commission's departments, albeit unofficially'.

⁽⁵⁰⁾ If the number of aircraft exceeds the four provided for in the contract, the terms of the contract must be re-negotiated. Ryanair could not obtain any additional financial advantages without basing further aircraft, as the advantages cover only 26 flights per day.

(113) Moreover, Belgium has provided analytical details of BSCA's operations after 2010 which are summed up in Table 4.

Table 4

(Figures in Euros)

	2011	2012	2013	2014	2015
(pss = passengers)					
Ryanair pss.	700 000	700 000	700 000	700 000	700 000
Charter pss.	9 314	9 593	9 881	10 177	10 483
Other low-cost pss.	500 000	525 000	551 250	578 813	607 753
Other pss. (scheduled flights)	315 000	330 750	347 288	364 652	382 884
Total number of departing pss.	1 524 314	1 565 343	1 608 418	1 653 642	1 701 120
Total number of pss.	3 048 627	3 130 686	3 216 837	3 307 283	3 402 240
Operating revenues	37 602 132	39 163 998	40 830 948	42 610 535	44 510 875
Aeronautical charges	[...]	[...]	[...]	[...]	[...]
passenger tax	[...]	[...]	[...]	[...]	[...]
boarding tax	[...]	[...]	[...]	[...]	[...]
total per pss.	[...]	[...]	[...]	[...]	[...]
Total aeronautical charges	[...]	[...]	[...]	[...]	[...]
Handling	[...]	[...]	[...]	[...]	[...]
Government royalties	[...]	[...]	[...]	[...]	[...]
Sale of fuel	[...]	[...]	[...]	[...]	[...]
Tax-free shop	[...]	[...]	[...]	[...]	[...]
Car park	[...]	[...]	[...]	[...]	[...]
Sales commission	[...]	[...]	[...]	[...]	[...]
Advertising	[...]	[...]	[...]	[...]	[...]
Fire services	[...]	[...]	[...]	[...]	[...]
Promotional subsidy	[...]	[...]	[...]	[...]	[...]
Expenses	[...]	[...]	[...]	[...]	[...]
Purchase of fuel	[...]	[...]	[...]	[...]	[...]
Purchase of good in tax-free shop	[...]	[...]	[...]	[...]	[...]
Total purchases (heading 60)	[...]	[...]	[...]	[...]	[...]
Misc. goods and services	[...]	[...]	[...]	[...]	[...]
Labour cost & social security ⁽¹⁾	[...]	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]	[...]
Environment fund	[...]	[...]	[...]	[...]	[...]
Development expenses	[...]	[...]	[...]	[...]	[...]
Operating result	[...]	[...]	[...]	[...]	[...]
Capital subsidies	[...]	[...]	[...]	[...]	[...]
Financial revenue	[...]	[...]	[...]	[...]	[...]
Financial expenses	[...]	[...]	[...]	[...]	[...]
Current result	13 703 048	14 129 726	14 577 641	15 047 097	15 538 295

(Figures in Euros)

	2011	2012	2013	2014	2015
⁽¹⁾ of which handling — ticketing staff costs	[...]	[...]	[...]	[...]	[...]

(114) The Board of Directors also discussed a note on strategic guidelines submitted to it. The note sets out the objectives to be achieved for the airport in terms of passenger volume (2 500 000 to 3 000 000) by 2010 which would represent a share of the Belgian market not exceeding 10 %. It outlines a market niche strategy designed to establish a light structure offering airlines attractive financial conditions and quick rotation times and focusing on short flights, for pleasure or business, to nearby destinations. As potential users it targets low-cost airlines and East European airlines while stressing the difficulty of attracting regional airlines ⁽⁵¹⁾.

(115) The implementation of this strategy is based on the development of air traffic. Air traffic should increase to 1 400 000 passengers per year thanks to the 26 flights per day out of Charleroi; Ryanair is expected to bring in 1 million passengers from 2000 onwards. The development of Ryanair's activities should be the subject of re-negotiation and an extension of the agreement to 40 daily flights, or some 2 million passengers per year, the note specifying that '[...]'. It is estimated that with Ryanair present, it will be difficult for another low-cost company to set up a base and that [Charleroi] should make itself available as a potential destination from another base.

(116) The BSCA company auditor examined the analysis of the 2001 business plan and judged its hypotheses to be prudent, but underlined a number of problems.

'Generally speaking, the hypotheses used in compiling the business plan are prudent, especially in terms of revenue from the car park and also in terms of general expenses if one makes a comparison with what was actually spent at the end of June. However, the following points must be highlighted:

(a) The results take account of a fee for maintenance and fire operations to be paid from the Walloon Region's budget, which increases progressively over time, and of a subsidy for the maintenance and fire investment for the period 2001-2003. This revenue

must comply with the provisions of the concession agreement and with the schedule of conditions, which, as a reminder, expired on 31 December 2000 [emphasised by auditor].

(b) It is necessary to make sure that the tariffs applied to Ryanair are wholly consistent with the Walloon Government Decree of 16 July 1998, especially in relation to the discount of EUR 4 per passenger [emphasised by auditor]. [...]. An attached note, "BSCA Comments Business Plan 2001" points out that the environment fund "shall total a maximum of BEF 75 million indexed from 2003 onwards (no agreement signed to date)".

4.2.2.4. *Analysis of certain parameters underlying the 2001 business plan*

Responsibility for fire and maintenance services

(117) The Commission has pointed out that BSCA was paid financial compensation by the Walloon Region for the 'fire and maintenance' services that it performs on its behalf. The compensation is specified in the 2001 business plan in the revenue section.

(118) The Commission considered the issue of who, either BSCA or the Walloon Region, was responsible for these services, examining the agreement documents drawn up between these two parties. Article 12 of the schedule of conditions attached to the 1991 concession convention states that BSCA is responsible for providing and developing 'fire services with strict compliance with ICAO standards' and 'maintenance services for buildings, runways, surrounding areas, cartage, etc'.

(119) However, the transitional provisions (Article 25) stipulate that between 1991 and 1997, 'the conceding authority [the Walloon Region] shall bear the cost of fire and maintenance services'.

(120) Following an amendment to the concession in August 1999, the principle of BSCA's accepting responsibility has been retained, but it is once again the Walloon Region that will finance it from 1997 to end 2000: 'For a period of three years commencing on 1 January 1997, the conceding authority [the Walloon Region] shall bear the cost of fire and maintenance services as mentioned

⁽⁵¹⁾ Regional airlines have 'a strategy which is oriented towards the leading airline of the alliance to which they belong and they tout for customers which they then redirect towards the leading airline's main hub. In this context, Charleroi airport is of little interest to them'. Charter companies 'all prefer Zaventem because of the quality of the service it provides and choose Liège as an alternative because it is open day and night'.

in Articles 12 and 19 above. The parties agree to re-examine these provisions within the framework of the 2000 budget, according to the financial balance of the Concession and the forecast and budgeted developments in subsequent years in the BSCA profit and loss account'.

(121) During its meeting with the Belgian authorities on 23 July 2003, the Commission pointed out that when BSCA took the decision to conclude agreements with Ryanair in July 2001, there was nothing to assure it that the Walloon Region would continue to bear the costs of these services in years to come. On the contrary, the concession documents of the time provided that it should pay these costs⁽⁵²⁾, as was indicated by the BSCA company auditor during the Board of Directors' meeting on 15 June 2001⁽⁵³⁾. The Commission therefore asked Belgium on what basis BSCA could believe that the Walloon Region would continue bearing the costs of these services. Belgium has transmitted the legal bases for the fire and maintenance subsidies granted to BSCA for 2000 and 2001⁽⁵⁴⁾.

(122) In its latest contribution dated 19 December 2003, Belgium presented a new document relating to the fire and maintenance subsidy; this was a letter sent by BSCA to the Walloon Transport Ministry on 5 July 2001, setting out the costs budgeted by the airport for 2002 for this category of expenses. The letter is said to follow a telephone conversation between the two parties. No return letter sent by the Walloon Government to BSCA was transmitted by the Belgian authorities in confirmation of their agreement to bear these costs.

⁽⁵²⁾ Since the concessions were amended in April 2002, these costs have been borne by the Walloon Region.

⁽⁵³⁾ The auditor explains that the Walloon Region took care of the fire and maintenance service until 1997, and then for a transitional three-year period until 31 December 2000, but that it is no longer required to do so: 'In addition, the auditor indicates that had this not been done, the fire service agreement, which had expired, would have to be renewed. [The Director of BSCA and the head of the minister's office responsible for airport management] indicates that the texts are currently up to date, especially so that the fire subsidy can be paid more regularly during the year and the management company does not pay too much by way of funds before being reimbursed, as happened in the past. These texts will be supplied shortly'.

⁽⁵⁴⁾ For the 2000 subsidy: Budgetary Decree of 16 December 1999 (Moniteur Belge, 28 June 2000), Programme 54.02, Heading 31.04.22 (page 22440). For the 2001 subsidy: Budgetary Decree of 14 December 2000 (Moniteur Belge, 22 June 2001), Programme 54.02, Heading 31.04.22 (Page 21524). In addition, the Belgian authorities assured the Commission that the compensation granted did not involve any over-compensation and was calculated on the basis of the service costs in separate accounts.

(123) In the same statement, Belgium considers that the compensation paid to BSCA for maintenance and fire-fighting is consistent with Court of Justice case law in the Altmark case⁽⁵⁵⁾.

The environment fund and the infrastructure provision fee

(124) According to the Walloon Decree of 16 April 1998, still in force, 35 % of the airport taxes are allocated to an environment fund. The Commission has asked Belgium if this 35 % was in fact paid to the fund, as BSCA appears to have kept part of the revenue.

(125) During the meeting with the Commission on 24 June 2003, Belgium specified that this fund no longer existed and that the legislative provision should have been abolished. The Commission notes that it is still in force today. BSCA paid the 35 % collected into the environment fund in 2001. This contribution should have reached a ceiling of BEF 75 million (EUR 1,86 million) in 2002. Belgium points out in its contribution of 19 December 2003 that the environment fund ceiling of BEF 75 million per year, indexed at 2 %, was indicated in Sowaer's financial plan, approved by the Walloon Government on 23 May 2001 and sent to BSCA on 1 August 2001. After the amendments made to the concession contract in 2002⁽⁵⁶⁾, the environment contribution was changed into a fee payable to Sowaer for the use of infrastructure.

(126) In fact, in response to Interested Party C, who asserts that BSCA is not paying for the provision of the infrastructure, Belgium replies that this assertion is incorrect, as 'the 35 % ceiling for aeronautical fees is allocated to Sowaer under the terms of the sub-concession agreement of 15 April 2002' and that 'part of the fee payable by users of the infrastructure, that is both airlines and passengers, are allocated to

⁽⁵⁵⁾ EU CoJ Judgment of 24 July 2003 in Case C-280/00, Altmark Trans GmbH, not yet published in ECR.

⁽⁵⁶⁾ See Points 60-62 of the initiation of the procedure.

Sowaer for participation in the cost of financing the infrastructure. This assertion is therefore unjustified' ⁽⁵⁷⁾.

BSCA totalling around 60 million BEF [...] and then distributed over 3 years, 3 times 30 million (capital of 600 million and Sowaer holding 25 % or 150 million)'.

Re-capitalisation of BSCA by the Walloon Region

(127) The meeting of the BSCA Board of Directors on 31 July 2001 was alerted to the losses linked to the setting-up of the Ryanair base during the early years of the contract. Re-capitalisation of the business by the Walloon Region, to the tune of EUR 5 million, was judged necessary 'in order to avoid being in a precarious situation' ⁽⁵⁸⁾.

(128) The principle of re-capitalisation is mentioned in May 2001 in a decision by the Walloon Government ⁽⁵⁹⁾ and its annex, the financial plan of Société Wallonne des Aéroports. This plan provides for 'a shareholding in

⁽⁵⁷⁾ Still in response to Interested Party C, which believes that BSCA is benefiting from an exemption of one half of the fees payable by BSCA to Sowaer, Belgium explains that: 'The concession contracts that bind Sowaer to the operating companies of airports located in the Walloon Region provide that these companies must pay a fee for the provision of the airport infrastructure as well as for its development. Under the terms of Article 11 of the agreement for sub-concession of the land of 15 April 2002, concluded between Sowaer and BSCA, the annual total was fixed at 35 % of the airport fees fixed at a ceiling of EUR 883 689 from 2003 onwards. This total is indexed at a rate of 2 % per year [...]. The ceiling of 35 % of fees payable to Sowaer will be raised to 2 651 067 from 2007 and increased annually by 2 % from 2008, that is, shortly after the new terminal is made available to BSCA. The increase in the ceiling is justified by the fact that the new infrastructure will allow BSCA to generate higher levels of business income (shops, catering, car parks etc). The calculation made consists of tripling the sub-concession price from 2007 onwards while taking account of an annual indexation of 2 %.' 'There has been not an exemption on part of the fees payable by BSCA to Sowaer, but a gradual alteration of the fee total commensurate with the development of the infrastructure'.

⁽⁵⁸⁾ The strategic note submitted to the BSCA Board of Directors meeting on 31 July 2001 states: 'BSCA is expected to accumulate losses of 164 million over the next three years. Its equity fund at 31 December 2003 should then be reduced to 23 million francs, that is, less than 20 % of the current capital of 153 million francs. For this reason, an increase in capital of EUR 5 million should be provided in order to avoid being in a precarious position. In anticipation of the finalisation of this operation, which could take several months in view of the large number of shareholders, Sowaer could be called upon in order to obtain a capital credit line, as Sowaer has budgeted for 150 million francs intended for use in increasing the capital'.

⁽⁵⁹⁾ Decision of 23 May 2001 entitled 'Development of airports, adoption of a financial mechanism and creation of a specialist company'. It is in this decision that the Walloon Government indicates its approval of Sowaer's statutes, financial level, budget forecasts and management structure. It invites Sogepa to set up Sowaer, and provides that 'the financing of environmental measures, except for isolation, shall be examined by Sowaer in cooperation with the concessionary companies'.

(129) However, when the BSCA directors decided to conclude the agreements with Ryanair, they did not seem to have any guarantee with regard to the re-capitalisation: [Director A] 'asked whether a request to increase the capital had already been submitted to Sowaer. [Director B] answered that Sowaer is envisaging an increase in capital of up to 150 million. The increase in capital should be made in 2002. [Director C] was concerned that the Board of Directors would have to approve a plan without knowing whether the shareholder will follow; in this case, will BSCA be able to fulfil the contract? [Director B] proposes including this item on the agenda of the next Sowaer Board of Directors' meeting. [Another director] notes that the Board of Directors' was asked to approve the contract without being certain of obtaining the increase in capital from Sowaer. [...] [Director B] informed the Board that Sowaer would send a letter to BSCA confirming that the Board of Directors of Sowaer had approved the financial plan in which an increase in capital was provided for' ⁽⁶⁰⁾.

(130) On 19 December 2003, the Belgian authorities produced a letter sent on 1 August 2001 by Sowaer to BSCA, containing a copy of the decision taken on 23 May 2001 by the Walloon Government to re-capitalise the two Walloon airports, to the tune of BEF 150 million each. The letter specifies that this document was approved by Sowaer on 1 July 2001.

(131) The question of re-capitalisation of BSCA was raised by Interested Party C. In its written replies, Belgium answered that an increase in BSCA's capital of EUR 3 961 340, agreed in principle in 2001, was actually made by Sowaer on 3 December 2002.

(132) The operation was carried out in accordance with the principle of private investor in a market economy. The consultancy firm Deloitte & Touche, in its analysis of the 2002 business plan, pointed out that the Region / Sowaer had acted as a private investor, the funds

⁽⁶⁰⁾ Minutes of the BSCA Board of Directors' meeting on 31 July 2001.

invested in BSCA being required to produce a return on investment of some 27 % in view of the results expected of BSCA for the period 2001-2010 ⁽⁶¹⁾.

declared was a net profit in the region of EUR 1 500 000, compared with a projected loss of EUR 1 531 793 in the business plan ⁽⁶³⁾.

- (133) In their contribution dated 19 December 2003, the Belgian authorities indicated that on 27 November 2003, Sowaer asked Deloitte & Touche to analyse the comparison of the 2001 and 2002 business plans. They also supplied Deloitte & Touche's response of 27 November 2003, in which the expert considers that the general conclusions of his study relating to the 2002 business plan can all be extended to the 2001 business plan.

4.2.2.5. *Other comments from the Belgian authorities*

- (134) In response to the remarks on the financing of security operations, made by Interested Party C, Belgium considers that these operations constitute 'a public service obligation that is incumbent on the Member State' and that the operations 'are provided by the Walloon Region itself, without BSCA being involved in them in any way. It is up to the Member State to determine the way in which it will finance these operations, but the fact that the Walloon Region decided not to charge BSCA any security fee is based on a political choice that does not in any way constitute State aid in favour of the latter'.
- (135) Belgium shares the views of Ryanair with regard to the relevant market: the other companies that use the airport are charter companies whose transport services are distinct from those of the low-cost companies, as the Commission Decisions relating to concentrations show ⁽⁶²⁾.
- (136) The Belgian authorities state in their contribution of 19 December 2003 that the private investor attitude of BSCA is strengthened by the observation a posteriori that the results anticipated for 2003 are much higher than those anticipated in the business plan: the figure

⁽⁶¹⁾ 'It emerges from this analysis that the average annual profitability of the funds invested on the basis of the amended business plan and over an estimated period of 10 years totals [...] %', and that 'this return must be compared with a rate for the market risk for this type of activity at 15 % per year'.

⁽⁶²⁾ It quotes the Commission Decision of 5 March 2002 in Case N IV/M.2672, SAS/Spainair (OJ C 93, 18.4.2002, p. 7), and the Commission Decision of 11 August 2000 in Case N IV/M.0019, KLM/Alitalia (OJ C 96, 5.4.2000, p. 5).

5. ASSESSMENT OF THE AID

5.1. EVALUATION OF THE PRESENCE OF AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE TREATY

- (137) According to Article 87(1) of the Treaty and Article 61(1) of the EEA Agreement, any aid granted by a Member State or through State resources, in any form, is incompatible with the Treaty and the EEA Agreement insofar as it affects trade between Member States and between contracting parties and distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

5.1.1. ADVANTAGES GRANTED TO RYANAIR

- (138) In its decision to initiate the procedure, the Commission distinguished two types of advantages received by Ryanair: those granted by the Walloon Region and those granted by BSCA.

5.1.1.1. *Advantages granted by the Walloon Region*

- (139) Before addressing the specific issue of advantages granted to Ryanair in the form of reductions in landing charges, estimated at some 50 % of the general tariff but without the level itself being the problem to be addressed here, the Commission points out that it is not opposed to reductions being granted to airlines, under certain conditions. In its 'Manchester' decision, mentioned above, the Commission decided that short-term reductions, which are available and granted without exercising discrimination between airport users, do not fall within the scope of Article 87 of the Treaty as they do not lead to distortion of competition. On the other hand, the Commission specified that a reduction

⁽⁶³⁾ Note: the net loss of EUR 1 531 793 for 2003 is actual, and in accordance with the analysis presented by Deloitte & Touche on 13 February 2003, the loss anticipated in the business plan of 22 April 2002. The loss anticipated in the 2001 business plan, used both for the BSCA decision-making process and for the present analysis, totalled EUR 1 066 672 in the operating result.

or system of reductions granting preferential treatment to a specific business was likely to fall within the scope of Article 87 of the Treaty ⁽⁶⁴⁾.

Ryanair. The Walloon Region therefore acted as other airports, especially private airports, have done in Europe, and in accordance with the principle of private investor in a market economy.

(140) The Commission considers that the case at issue falls under the second hypothesis: the reduction in landing charges, like the guarantee of compensation, were granted to one company only for a period of 15 years and not to all the companies set up at Charleroi. Article 87 of the Treaty is therefore likely to apply when a benefit arising from the granting of an exemption from the common law tariff system is not justified on objective economic grounds.

(144) The Commission maintains that the act of fixing airport taxes falls within the legislative and regulatory competence of the Walloon Region and that the principle of private investor in a market economy is not applicable in these circumstances. The Walloon airport organisation falls within the following legal framework:

(141) The first question to be examined in the present case is whether an 'advantage' within the meaning of Article 87(1) of the Treaty has been granted to Ryanair. Belgium and Ryanair consider that Ryanair does not benefit from an advantage within the meaning of the State aid rules as the Walloon Region has acted as a private investor in a market economy offering a preferential but economically viable tariff.

— The Walloon Region's competence in relation to airports arises from a Belgian federal law: the Region was granted the competence in relation to equipping and operating public airports and aerodromes located within its territory by the Belgian Federal Law of 8 August 1988, which amended the special law of 8 August 1980.

(142) In point 76 of the decision to initiate the procedure, the Commission noted that the principle of private investor in a market economy could not be applied to the actions of the Walloon Region for justifying the reduction of the landing 'tax' and the compensation guarantee if the airport opening hours or landing 'tax' levels are altered. It specified that this principle can only enter into play 'in the context of carrying on an economic activity and never in the context of exercising regulatory powers' and that 'a public authority may not use the argument by which it could obtain economic benefits as the owner of an airport business for justifying aid adopted in the form of a discriminatory exercise of its regulatory or fiscal powers'.

— The Walloon Government was authorised to regulate access to the Walloon airports (Charleroi, Liège, Saint-Hubert and Spa) on the basis of a Walloon Parliament act in 1994 ⁽⁶⁵⁾. This legislative act allows the Walloon Government to transfer the operation of the Walloon airports, and authorises it 'according to the methods that it determines, to fix and collect fees (...) and, where necessary, transfer the right of collection to agents'. Thus, although the Walloon legislature provided that the right of collection could under certain conditions be entrusted to an agent, the right of fixing the fees has not been, and cannot currently be, transferred. It is held by the Walloon political and regulatory power. Neither BSCA nor the Liège-Bierset airport company may hold the right to fix the fees. They are merely 'passive' beneficiaries of part of the fee income, and hold no power in relation to their total. In particular, the portion payable to the environment fund, fixed at 35 % of the fees received, has been regularly altered by the Walloon Region in relation to whether or not it should be capped, in relation to its recipient (that is, a dedicated fund or the new BSCA public shareholder Sowaer), and finally in relation to the liquidation of the said fund and the allocation of the sums owed to it by BSCA.

(143) During the procedure, Belgium and Ryanair pointed out that the abovementioned advantages had been granted to Ryanair in the context of economic activities and not in the exercise of regal powers, in return for the commitments made and the benefits brought about by

⁽⁶⁴⁾ In its proposal on airport fees, mentioned above, the Commission stressed the application of the rules relating to State aid by pointing out that reductions or exemptions that are not justified by a difference in cost may distort competition between users. They may have a discriminatory effect (...). Because in many cases airports are still controlled directly or indirectly by the public authorities, such practices could constitute indirect State subsidies that are in contradiction with Community rules when they affect or are likely to affect competition.

⁽⁶⁵⁾ Walloon Regional Council Decree of 23 June 1994 on the creation and operation of airports and aerodromes located in the Walloon Region (Moniteur Belge, 15 July 1994).

- The Walloon Government regulated access to all Walloon airports and aerodromes in the July 1998 decree, amended by a 2001 decree. This decree fixed the level of fees to be collected from users, set up a system of landing charge reductions available to everyone according to weight of aircraft (Article 7(1) and (2)), planned for the meeting of a users' advisory committee that would deliver opinions on proposals for changes to the fee system or to fee levels ⁽⁶⁶⁾, determined the methods for collecting the fees, and provided that 'fees and subscriptions shall be brought to the attention of users by all appropriate means, in particular by display and publication in the AIP (Aeronautical Information Publication)'.
- (145) Through the applicable regulations, published in the *Moniteur Belge*, the Walloon Region is acting as a public authority that regulates access to Walloon public property and guarantees it to all, under conditions of user equality. If, as Belgium and Ryanair maintain, the Walloon Region involves itself in a sector of economic activity, its function is similar to that of a regulator. By fixing the level of the airport taxes payable by users for the use of the Walloon airports, it regulates an activity but certainly does not act as a company.
- (146) The decision to initiate the procedure defined the airport taxes established by the Walloon Region for Charleroi airport as 'taxes', and the present decision has kept this description unchanged, until now. It can be considered that they are what the Court of Justice describes as 'parafiscal charges', that is, charges characterised in that they are intended, from the moment of their collection, to finance a specified transfer of resources ⁽⁶⁷⁾. In this case, the airport charges fixed by the Walloon Region are allocated to the operation of the airport and allotted 65 % to the management company and 35 % to an environment fund. They allow the financing of a specific transfer of resources. Such methods of financing have been examined by the Court ⁽⁶⁸⁾ from the point of view of parafiscal charges.
- (147) In the case at issue, the definition of 'fees', defined as payment for a service rendered, could be accepted if a rather broad interpretation is applied. In the Walloon airport tariff system, however, the clear and direct link between the level of the charge and the service rendered to users is weak. The charges levied do not correspond to a direct payment for a service; the services corresponding to the payment are not defined precisely and the 'fees' are not fixed by direct reference to a parameter such as operating costs, but in a relatively 'abstract' manner ⁽⁶⁹⁾.
- (148) The Commission must however also take account of its practices in previous decisions relating to airport charges; on many occasions, it has ruled on this idea by describing them as fees ⁽⁷⁰⁾. Even though the aim of these decisions was not generally to distinguish between taxes and fees, and although the terminology used in them could be independent from the definition adopted in the notification proper, the Commission considers that its practice of considering these charges as fees rather than as taxes is established. The Commission also notes that the Court of Justice has not disputed this definition ⁽⁷¹⁾.
- (149) The Commission therefore considers it appropriate, beyond the description itself, to consider legally as fees the totals established by the Walloon Region for landing or parking aircraft at Charleroi, and to use the generic description of airport charges.

⁽⁶⁸⁾ Especially in its Judgment of 2 July 1974 in Case C-173/73, *Italy v. Commission*, ECR p. 709, in which it specified that 'as the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article [87], even if they are administered by institutions distinct from the public authorities' (Ground 35). Similarly, in its Judgment of 11 March 1992 in joined case C-78 to C-83/90, *Compagnie Commerciale de l'Ouest*, ECR p. I-01847, the Court confirmed that aid financed from parafiscal charges constituted aid within the meaning of Article 87 of the Treaty.

⁽⁶⁹⁾ See Walloon decree of 16 July 1998: 'A fee shall be payable for the landing of an aircraft' (Article 3.1). 'A fee shall be payable for outside parking of the aircraft' (Article 4.1). 'A fee shall be due for use of the facilities by the passengers' (Article 5).

⁽⁷⁰⁾ See in particular Commission Decisions 95/364/EC of 28 June 1995 concerning Belgium (OJ L 216, 12.9.1995, p. 8), 1999/199/EC of 10 February 1999 concerning Portugal (OJ L 69, 16.3.1999, p. 31), and 2000/521/EC of 26 July 2000 concerning Spain (OJ L 208, 18.8.2000, p. 36).

⁽⁷¹⁾ CoJ Judgment of 29 March 2001 in Case C 163/99, *Portugal v. Commission*, ECR p. I-2613, confirming Decision 1999/199/EC.

⁽⁶⁶⁾ The Commission remarks in this respect that the Walloon Government apparently did not consult the users' advisory committee when the 2001 decree altered levels of airport taxes, with the specific aim of taking account of Ryanair's arrival in Charleroi, and increased both passenger and landing taxes for all users. This consultation is not mentioned in the preamble to the 2001 decree.

⁽⁶⁷⁾ See point 167 of the Advocate-General's conclusions in the joined cases C-34/01 to C-38/01, *Enirisorse SpA v. Ministero delle Finanze* (not yet published in the Court Reports).

- (150) The Commission notes in any event that this question of terminology does not change its analysis regarding the assessment of these charges, which are established by the regional authority and for which the regional authority decides on the allocation partly to the concessionary airport and partly to the environment fund that it has created.
- (151) Article 7(3) of the Walloon decree of 16 July 1998 provided that the Walloon Minister of Transport could grant even more advantageous reductions on landing charges, on a promotional basis. If that proved necessary, it was also possible to alter the basis for calculating the airport's fees (per passenger or per tonne) by making changes to the appropriate legal framework.
- (152) Instead of that, the Walloon authorities undertook to reduce landing charges for one user only, through a contract under private law that was not intended to be made public, on a fee basis distinct from that shown in the regulations, for a period of 15 years and without creation of rights for other users. The Walloon Region also undertook to grant a guarantee of compensation if Ryanair suffered any damages through the application of its regulatory powers.
- (153) The Commission considers that the Walloon Region has placed itself in a situation of confusion of powers. Instead of acting within the framework of its public powers, it deviated from the rules that it laid down itself by making the agreement, which it eventually fulfilled, with Ryanair. The 'commercial need' to attract Ryanair to Charleroi thus made it move outside the applicable framework in relation to fixing charges in Wallonia. Belgium recognises this implicitly when it explains that the Walloon public authorities are preparing an amendment to the Walloon decree of 16 July 1998 'that will make it possible to take more accurate account of the various objective criteria that distinguish the various types of users at Walloon airports'. The principle of private investor in a market economy cannot be used as a basis for justifying this confusion of powers or the advantages granted to Ryanair.
- (154) Ryanair has pointed out that if the Commission were to decide that the Walloon Region did not have the right to grant advantages to Ryanair without even considering whether a private investor would have done it, it would have discriminated between public airports (whose fees are often fixed and controlled by a government or regulatory authority) and private airports (which are free to fix fees for the duration of a contract). It would therefore have introduced discrimination between public and private airports, at a time when 'the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.' (Article 295 of the Treaty).
- (155) Ryanair's assertion that private airports are free to fix charges while public airports' charges are fixed and controlled by a public or controlling authority is unfounded. There are many different methods of fixing airport fees or taxes in Europe, and they vary between Member States and sometimes even within the same Member State ⁽⁷²⁾. These various methods of fixing fees or taxes cannot be summarised in a dichotomy between 'public airports' and 'private airports' as Ryanair states.
- (156) An airport always fulfils a public function, which explains its general submission to certain types of regulations even if it belongs to and/or is managed by a private company. Private airport managers can be subject to this regulation and their fee-fixing powers are often contained within the framework of national regulators' instructions because of their monopolistic position. The airports' position of strength in relation to their users can thus be controlled by the national regulators who fix fee levels that must not be exceeded, known as 'price caps'. Asserting that a private airport is free to fix its fees without being subject to certain forms of regulation is in any case inaccurate.
- (157) It is also inaccurate to assert that a public airport is not 'free' to fix its airport charges. There is nothing to prevent the public airport management company from fixing the level itself, as these powers can also be covered by regulation. The Walloon Region could thus have decided that the onus was on BSCA to fix a fee in exchange for services rendered to users, provided certain principles and conditions were complied with. Contrasting between public and private airports in terms of airport charges is an inaccurate simplification of a much more complex reality.
- (158) The Commission does not discriminate in any way between public and private airports. It limits itself to examining the system chosen and freely set up by the Walloon Region, and to stating that when it fixes the airport charges (and therefore when it decides to step outside the framework), the Walloon Region acts not as a company but as a public power. The Commission simply assesses the characteristics of a method of organisation and is not therefore contradicting Article 295 of the Treaty.
- (159) The Commission makes a point of restating that in its view, the Walloon Region was completely free to

⁽⁷²⁾ For the economic regulation of airports, see for example Section 5.1.2 of the University of Cranfield report mentioned above.

establish a system of incentives relating to charges at Charleroi airport on a legal basis. The transparent system of reductions provided for in its own regulation gave it that option. From its side, the Commission had already acknowledged, for example in the 'Manchester' decision mentioned above, that an airport could introduce a system of reductions that was non-discriminatory and limited in time. The system of so-called 'promotional' reductions, instigated by the Minister for Transport, could fall within this definition. Finally, as the practices of Member States and/or airport managers are not currently harmonised in Europe with regard to airport tariffs, the Walloon Region is and will be in future completely at liberty to introduce a new public tariff that is more favourable to the airlines and encourages them to use Charleroi airport more. The Commission must however note that the Walloon Region has not used any of these legal possibilities that would have allowed the tariff offered to Ryanair to be offered to all the interested companies on a non-discriminatory basis.

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

5.1.1.2. *Advantages granted to Ryanair by BSCA*

(a) **Application of the principle of a private investor in a market economy to an airport whose financial structure relies on that of the State, the region or other local authorities**

- (161) In its decision to initiate the procedure, the Commission considered that it was difficult to apply the principle of private investor in a market economy to BSCA: 'the roles of the Region as a public authority and of BSCA as an airport business have been mixed up considerably, making it very difficult to apply this principle (note: the principle of private investor in a market economy)'.
- (162) BSCA, whose financial structure is closely linked to that of the Walloon Region, does not face all the risks that define the activity of an entrepreneur.

- (163) Firstly, BSCA has been given an exclusive right to manage an airport, through a 50-year concession that allows it to collect 65 % of airport taxes, the taxes paid by the businesses set up at the airport, the revenue from ground handling (which it fixes freely) and other revenue (sale of fuel and other services provided to users).

- (164) Secondly, BSCA does not bear all the costs, and therefore all the risks, linked to the full range of airport activities at Charleroi⁽⁷³⁾. In addition, the Walloon Region is at liberty to alter BSCA's tasks by making changes to the concession contracts with the aim of reducing financial obligations, by taking them on or passing them on to the taxpayer.

- (165) Thirdly, BSCA's status also remains unclear. It is a company that has been assigned public service tasks which are not clearly identified, without the corresponding compensation being clearly specified.

- (166) In these circumstances, the Commission cannot effectively verify whether the funding which BSCA receives for its general interest tasks do not involve any excess compensation. This income can then be used to finance business activities. It is therefore not possible to exclude the risk of cross-subsidisation between various types of activity.

- (167) However, the question of analysing BSCA's behaviour as a private investor is at the centre of the comments made by the interested parties, especially those of Ryanair and of private airport managers, who take the view that the granting of advantages to an airline in exchange for the revenue it generates reflects common business practice.

⁽⁷³⁾ A number of activities are dealt with by the Walloon Region or by the Walloon Airport Company, including construction of new infrastructure and major repairs on the Charleroi site, environmental, security and airport guarding services (including for example control of access to the embarkation area and luggage checks), insurance intended to cover the civil liability of staff responsible for police tasks, security and inspection of transport, fees paid to lawyers hired to defend the interests of the Region in relation to airports, studies and conferences on airport-related issues, the repayment of certain air traffic control payments borne by Belgocontrol, the purchase of durable furniture specific to the airport, etc. See for example the income and expenditure budget for the Walloon Region for 2003 (Organic Division 54-Transports — Programmes 02: regional airports and aerodromes), Internet site <http://mrw.wallonie.be/sg/db/Depenses/>.
 \Kubla\KU %20DO5205402.htm.

- (168) In addition, the 'Aéroports de Paris' (ADP) judgment has provided significant clarification in the airport industry, by defining the management of an airport as business activity. By analogy with the ADP judgment, it can be maintained that BSCA is a business as understood by competition law as its activities may be economic in nature⁽⁷⁴⁾, that is, the control and organisation of ground handling activities and the provision of facilities for shared use by users and service providers operating at the airport. The management of jointly used infrastructure requires organisation and coordination of all the activities carried on there. This type of economic activity is also required from private airport managers such as TBI or Morrison.
- (169) However, the Commission points out the limits of the private investor argument defined by it in point 82 of the decision to initiate the procedure. They are as follows: 'one cannot consider as consistent with the principle of private investor in a market economy any commitments made by an airport operator for which it cannot be proven that the airport activity as such will produce reasonable profits within a reasonable time. It goes without saying that any positive effects on the economy of the Region surrounding the airport cannot in any case be included in this evaluation, which is aimed at determining whether or not the intervention conceals elements of aid'. At first sight, the Commission has doubts about determining how the private investor criterion could be considered to be fully applicable in a context such as this one, in which the investments in the airport infrastructure have been financed by public funds and are not included in the profitability calculations. However, in view of the precursory nature of this case, and as this principle has been mentioned by various parties during the procedure, the Commission will examine whether the conditions for applying the said criterion have been fulfilled.
- (170) Ultimately, therefore, in line with the tenor of the Aéroports de Paris judgment and despite the difficulty in implementing it, the Commission has undertaken to assess whether the private investor criteria can be considered to have been fulfilled in BSCA's case in its contract with Ryanair.
- (b) **Comparisons between 'public' and 'private' airports**
- (171) Ryanair has supplied the Commission with certain confidential information showing that the net payment made by the airline to BSCA exceeds the payment that it makes to other private airports with which it has concluded agreements lasting 10 to 20 years. These indications therefore tend to give the impression that BSCA's action is consistent with that of private airports and therefore consistent with a private investor's action. However, whether BSCA truly acted as a private investor can only really be ascertained by considering the operational parameters of BSCA that determined its offer.
- (172) The analysis cannot be carried out on the basis of comparisons with offers made by private airport managers, for three main reasons.
- (173) The first is that the position of other airports is not necessarily the same as that of BSCA; the task of an airport manager varies from one airport to the next, especially in relation to the regulations laid down. The same applies to their operating costs and income and to their geographical location and stage of development (number of passengers, number of airlines, available capacity, etc.).
- (174) The second, as certain interested parties have indicated, is that comparisons with other airports can be distorted by the fact that even if private, airports can receive public funding of various kinds, especially to allow them to attract airlines. Therefore Knock airport, which Ryanair quotes as an example of a private airport that offers it better conditions than those at Charleroi, receives marketing subsidies from the Irish Government. These subsidies allow it to reduce the level of airport taxes that Ryanair, and to a lesser extent British Airways, are required to pay⁽⁷⁵⁾.
- (175) Thirdly, when Ryanair chooses to set up at airports managed by a private company, it is not impossible for it to receive money from the surrounding local authorities. Thus, at Stockholm-Skavsta airport, managed by TBI and quoted on several occasions as an 'example' during the investigation into the present case, it became apparent that Ryanair was receiving a marketing package lasting 10 years and worth 55

⁽⁷⁴⁾ See Ground 107 of the Judgment of the Court of First Instance of the European Communities of 12 December 2000 in Case T-128/98, Aéroports de Paris vs. Commission, ECR p. II-3929: 'It must first be noted that, under Community competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (...) and that any activity consisting in offering goods and services on a given market is an economic activity'.

⁽⁷⁵⁾ See the report, mentioned above, from the University of Cranfield, pages 5-24 and 5-25. See also the Irish Transport Minister's report: www.gov.ie/tec/aviation/reports/knockairport.htm.

million Swedish crowns from the Nyköping Regional Government. These arrangements were declared illegal, on the basis of failure to comply with rules relating to public contracts, by a Swedish court in September 2003 ⁽⁷⁶⁾.

(176) The Commission considers that it is appropriate to take account of the presence or absence of public money within the contracting airport or within the framework of a parallel contract, and of the granting or non-granting of an advantage to the airline company in question following the granting of funds by the public authorities. In this regard, for example, significant funds granted following the undisputed compensation paid for public service tasks and then reinvested in a business contract with an airline would, especially if there was no separation in the accounts and because of the risk of over-compensation or abuse of compensation, be considered as potential aid.

(177) On this basis, the Commission considers that the 'public/private airport' dichotomy is largely artificial, as a private airport can thus receive various types of public finance that enables it to grant 'advantages' to airlines. The Commission cannot therefore refer to the 'examples' of private airports mentioned by the parties. It will therefore study the private investor actions of BSCA in relation to the restrictions applied to Charleroi airport, and not in relation to other airports whose situation and methods of operation and finance are quite different.

(c) Application of the principle over time

(178) Determining whether BSCA has acted as a private investor in a market economy on the basis of its current results, that is, on the basis of analyses that post-date the investment decision taken in 2001, is not possible. To find out whether the company has acted like a prudent private investor in a market economy, it will be necessary, in accordance with court case law, to place oneself back in the context of the period during which the financial support measures were taken. The Commission must, in effect, refrain from making any

assessment based on a later date in order to understand the economic rationality of BSCA's actions ⁽⁷⁷⁾. It is all the more important to refer back to the context of BSCA's investment decision of 2001, given that from 2002 onwards BSCA's responsibilities changed and the concession conditions under which it operated were altered. Its current cost and income structure is not the one that existed when the decision to invest was taken in 2001 ⁽⁷⁸⁾. For this reason, the Commission cannot base its assessment on the 2002 business plan or on the 2003 study by Deloitte & Touche to analyse BSCA's action as a prudent investor.

(179) Ryanair has suggested that the Commission should apply the principle of private investor in a market economy on the basis not of the present moment, but of the duration of the contract (15 years), or even on the duration of the BSCA concession (50 years). Although an analysis of the present moment is effectively invalid, the Commission cannot take 50 years as a reference period when the contract lasts for 15 years and no other element can justify such a period. The Commission notes in addition that BSCA compiled its principal financial projections and requested validations from outside consultants for a ten-year period. The Commission will therefore base its analysis on the period 2001-2010 as the subject of the main studies of BSCA and its advisers. It notes however that a number of working statements relating to the business plan provided for BSCA run for a total period of 15 years, ending in 2015, in accordance with the contractual period; it does not therefore have to extrapolate these projections to obtain information for a longer period. It is not in fact claiming to substitute its

⁽⁷⁷⁾ CoJ Judgment of 16 May 2002, 'Stardust Marine' in Case C-482/99, France v Commission, ECR, p. I-4397: 'In order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' (Ground 71). See also the Commission Communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3) where the Commission notes that it is out of the question for the Commission to use its knowledge of facts after the event to decide that the provision of public resources constituted State aid, for the sole reason that the rate of return finally obtained is too low. Only projects for which the Commission considers that there were no objective reasons or good faith for reasonably expecting an appropriate rate of return in a comparable private business at the moment when the decision to invest/finance was taken can be treated as State aid (point 28).

⁽⁷⁸⁾ See Points 60, 61 and 62 of the decision to initiate the procedure, relating to the changes made to the 1991 concession on 29 March and 15 April 2002, that is, after the date of signature of the agreements with Ryanair in November 2001.

⁽⁷⁶⁾ See http://www.nykoping.se/templates_new/Page_end.asp?id=5911.

judgment for that of the investor, whether in relation to the period chosen for establishing the financial projections or to the basic hypotheses accepted for putting together these projections. As it has had the opportunity of explaining in the past, the Commission understands that any business investment decision presupposes a considerable element of discretion⁽⁷⁹⁾. The Commission will in particular be using the data for 15 years in order to understand the overall economy of the contract at the time, the discounted cash flows and the internal return on the operation.

- (180) The Commission will check whether BSCA has in fact acted as a private investor in a market economy by referring to the elements provided in the minutes of the meetings of the company's Board of Directors, analysing the validity of the business plan compiled in 2001, and taking account of BSCA's conditions of operation, tasks and obligations under Walloon regulations and the concession documents in force at that time.

Analysis of BSCA actions

- (181) The Commission notes that the Board of Directors of BSCA examined the terms of the contract with Ryanair in considerable detail during at least four meetings (15 and 29 June, 10 and 31 July 2001). On several occasions it heard reports from persons acquainted with the negotiations (the legal adviser for the Walloon minister responsible for airport operations and the two negotiators who were both members of the Board of Directors and members of the two Walloon ministers' private offices).
- (182) The members of the Board of Directors took the decision to conclude an agreement with Ryanair on 31 July 2001, assessing its financial consequences for BSCA. Although the financial elements were presented to them

at a relatively late stage⁽⁸⁰⁾, on 31 July 2001, they were able to rely on financial projections that they also discussed. BSCA also made an undertaking based on a clearly and coherently expressed strategy in a note with guidelines submitted to the directors.

- (183) As a private investor would have done, BSCA compiled a business plan for the period 2001-2010 showing the profits and costs linked to the setting-up of Ryanair. This plan, the most important aspects of which are shown in Table 3, was examined by the Commission, which was able to verify that unless specified otherwise in recitals 185 and following, it clearly represented the full range of costs and revenue linked to the increase in BSCA's activity. Forecasts of revenue, based on expected passenger volumes and operating costs linked to the 'change of scale' caused by the arrival of Ryanair and to the opening of a new terminal in 2005, were also compiled. It should be noted that the BSCA auditor, who examined the 2001 business plan in detail, remarked that 'generally speaking, the hypotheses accepted for the compilation of the business plan are prudent, especially in terms of revenue from the car park and also in terms of general expenses, if one makes a comparison with what was actually spent at the end of June'.
- (184) Although the Board of Directors of BSCA discussed the terms of the contract with Ryanair, and evaluated its long-term economic consequences on BSCA through the compilation of the 2001-2010 business plan and committed the company on the basis of a strategy that seems clear and coherent, the Commission definitively concludes that BSCA did not however behave as a private investor in a market economy. When it made its decision to invest, it did not carry out an analysis consistent with all the hypotheses of the contract envisaged with Ryanair and Ryanair alone. Neither did it take account of a number of parameters likely to call into question any potential for long-term profitability. In doing this, it took risks that a private investor acting in a market economy would not have taken.

- (185) These risks also relate to data essential to the business plan and to other parameters concerning relations between BSCA and the Walloon Region. The first set of parameters obtained from the Commission's

⁽⁷⁹⁾ See point 29 of the abovementioned Commission communication on undertakings in the manufacturing sector, as well as its point 27 where it states that the Commission does not claim, and never has claimed, to substitute its judgement for that of the investor. All requests for additional resources clearly lead the public undertakings and public authorities to evaluate the risk and the probable result of the project, just as private businesses and private capital providers also would. For its part, the Commission knows that in order to carry out this risk analysis, public undertakings must, in the same way as private ones would, apply profitability criteria, which because of the nature of the problem suggests a significant scope for discretion for the investor. Within this significant scope, the exercise of the investor's freedom to evaluate the situation must not be considered as involving State aid.

⁽⁸⁰⁾ On 30 May 2001, the Board of Directors wished 'to be in possession of a financial projection relating to future operations with Ryanair as soon as possible'. On 10 July 2001, a director indicated to the Board that the directors knew only a few of the elements needed for assessing the contract in financial terms, and stressed the importance of this given that the directors had been made responsible. The business plan was not submitted to them or discussed until 31 July 2001.

examination of the business plan shows that hypotheses that are favourable, or in some cases independent of the action taken in collaboration with Ryanair, were taken into account by BSCA in the compilation of its business plan. The second set related principally to the costs of fire and maintenance services and to the environment fund, which were not properly understood. By doing this, BSCA overestimated its future profit by a total of EUR 33-56 million over the period 2001-2011, according to the hypotheses chosen. A private investor would never have taken such a risk, as this total is, in the best possible scenario, practically equal to the profits forecast by BSCA over a period of 10 years (EUR 35 million).

BSCA's financial position before signing the contract with Ryanair

- (186) The Commission deems it important to view the planned contract with Ryanair in the context of BSCA's prior activity and its financial position at the time. In the preceding years, BSCA exercised prudent management without particular risk. Consequently, in the period 1997 to 1999 its activity was well below that which the contract should make possible. Traffic at the airport was 210 000 to 235 000 passengers a year representing a total revenue of EUR 5,9 to 6,9 million a year. This activity produced a positive net result, which was weak but nevertheless stable, amounting to about EUR 136 000 in 1997, EUR 12 000 in 1998 and EUR 168 000 in 1999. The situation continued in 2000, the last financial year closed before the contract was signed with Ryanair. In that year, 255 000 passengers transited through the airport, revenue was EUR 7,3 million and net profit about EUR 117 000.
- (187) From a financial viewpoint, BSCA's position was healthy, with virtually no financial debt and with equity capital that remained broadly positive throughout the period, varying between EUR 4,3 and 4,6 million with a total balance to be financed ranging in that period between EUR 6,3 and 9,5 million a year.

Business hypotheses used in the business plan

- (188) The Commission considers the following hypotheses adopted in the business plan as incorrect because they forecast, first, additional profitability following the arrival of regular airlines, which the contract concluded with Ryanair cannot automatically or even indirectly generate, and, second, containment of marketing costs contractually agreed with Ryanair.

(a) Additional margins resulting from the increase in traffic from regular airlines

- (189) The business plan presented by BSCA covers all its activities, whether or not generated by the contract with Ryanair. The Commission does not consider this objectionable as such because, for instance, in 2001, the first year of the plan, 360 000 departing passengers of the total of 384 400, i.e. nearly 94 %, were carried by Ryanair. Accordingly, it is reasonable to regard virtually all of the costs and business income of the plan as linked with this activity.
- (190) However, the airport currently receives a small number of other passengers coming from regular airlines other than low-cost airlines (16 600 in 2001) and charter companies (7 800 in the same year), i.e. about 25 000 in total. While the business plan indicates a virtually stable number of charter passengers, it forecasts, as shown in Tables 3 and 4, a significant rise in passengers from regular airlines, with 20 000 departing passengers in 2002 and 25 000 in 2003. However, this upward trend has to date not materialised, on the contrary because BSCA's annual management report for 2002 indicates a total number of only 25 800 passengers, of whom 12 900 were departing passengers, coming from airlines other than Ryanair, whether charter or regular airlines.
- (191) The business plan forecasts a steady rise in traffic from regular airlines, with a threshold of 40 000 departing passengers in 2004, 60 000 in 2005, 150 000 in 2006 and 300 000 and up from 2010.
- (192) However, the business plan does not provide any precise justification. Reference has been made to the note on strategic guidelines submitted to the meeting of the BSCA Board of Directors of 31 July 2001. This note does indicate possibilities for developing the airport beyond Ryanair, focusing on other low-cost airlines such as Easyjet and Virgin, the latter being presented as a mixed airline halfway between low-cost airlines and conventional airlines. The other regular airlines mentioned would come from North Africa or from the countries of Eastern Europe acceding to the European Union. Nevertheless, it is pointed out in the same note that Charleroi airport is of little interest to regional airlines and that 'only saturation at Zaventem could lead them to review their position, which should not be hoped for before 2005-2010 (or even later if Sabena were to substantially reduce its activities).'

- (193) In the same note, BSCA also points out that Ryanair, because of its importance at the airport, 'will always be given priority in planning flights'. It specifies that 'this is why airlines should be attracted for the off-peak hours so as to optimise the work of handling and check-in teams. In order to bring this about, there should be no hesitation to grant major reductions in the rates charged for these services which for BSCA constitute a fixed cost.'
- (194) However, the hypotheses of the business plan connect this traffic with a high variable cost margin of EUR 23 per departing passenger in 2002-2003, also expected to rise, reaching EUR 27 in 2007, nearly EUR 30 in 2011 and over EUR 32 in 2015. This margin includes revenue from handling charges of EUR [...] to EUR [...] a year per passenger, airport charges from EUR [...] to EUR [...], revenue from car park charges for passengers' vehicles (about EUR [...]) and a margin on fuel supplied to these aircraft (about EUR [...]).
- (195) In view of the above, the Commission considers that planning for such a significant increase in traffic from regular airlines and linking it with such a high margin per passenger was not based on any degree of certainty when the business plan was drawn up in seeking to justify the contract with Ryanair. This additional traffic, apart from this uncertainty, was also completely unconnected with the contract and could not serve to show its profitability in an analysis which a prudent and well-informed investor would have made of it.
- (196) Moreover, the Commission considers that a well-informed investor would not have taken the risk of anticipating such a high margin for ground-handling services even though the passenger volume substantially exceeds the annual number of two million a year at this stage of the business plan. In this connection, the mandatory implementation of Directive 96/67/EC, referred to above, could not make it possible to anticipate such commercial activity and profitability except by taking the risk of knowingly disregarding the requirements and the likely consequences of implementing this Directive, in particular with increased competition in a domain that would prove so profitable.
- (197) Similarly, a private investor would not have signed a contract for which the 15-year term and the expected volumes it should generate would mean either that he could not comply with it because of the need for accounting transparency of ground handling services or that the market would effectively be closed to other operators.
- (198) Moreover, with regard to costs, these increases in volumes handled (100 000 passengers more each year between 2006 and 2010, i.e. a total of 500 000) generate, for instance, a rise in labour cost for handling/ticketing services of only 2,5 % a year, i.e. a simple salary increase. According to these hypotheses, the staff in place in 2006, or even in 2002, would be able to cope with 1,5 to 2 times more passengers in 2010. In view of the extra workload indicated in connection with these new airlines, the propounded argument of better use of staff during off-peak hours seems inadequate to justify a price for this service that is 12 times higher on average.
- (199) Similarly, the increase in costs relating to other items of expenditure bears no relation to these specific traffic increases. For instance, according to the hypotheses adduced in the plan, miscellaneous goods and services, car park charges and wages and salaries have been indexed to take account of the increase in factor costs, except for specific years such as 2005 for which other fluctuations have been taken into account, upward and downward, to include the opening of the new terminal.
- (200) Finally, the Commission notes that a number of these traffic increases are based on implementation of a major investment programme including the construction of a new terminal in 2005, lengthening of the runway, work on aircraft parking areas, acquisition of new land, etc. This programme had been budgeted at BEF 3,75 billion, i.e. about EUR 93 million, in Sowaer's financial plan which was accepted by the Walloon Government on 23 May 2001. These traffic increases, if they ever materialise, would therefore ensue from various sources other than the signing of the contract with Ryanair alone. For this purpose, new public investment would be essential to be able to receive the new passengers.
- (b) Failure to take account of the promotional cost of EUR 4 per passenger for low-cost airlines except for Ryanair's first 700 000 passengers
- (201) The business plan includes the marketing contribution of EUR 4 per departing passenger only for the 700 000 first low-cost passengers allocated to Ryanair. Nevertheless, between 2004 and 2010 the number of low-cost passengers expected rises to 1 150 000 Ryanair passengers. From 2013 it would exceed 1 250 000 passengers. Furthermore, the minutes of the BSCA

Board of Directors meeting of 31 July 2001 indicates the objective of 2 000 000 Ryanair passengers (i.e. 1 million departing passengers). The strategic information note presented at the meeting, mentioned in recital 192, states that it would be 'illusory to hope that another airline would establish a base at Gosselies'.

(202) Consequently, it seems unrealistic to assume that these passengers would not come from flights operated by Ryanair. This means that these costs ought to be taken into account for all Ryanair passengers within the limit of the 26 contractual flight rotations⁽⁸¹⁾ which would have a negative impact on the result ranging from EUR 200 000 in 2004, for 50 000 passengers, to EUR 1 800 000 in 2010, for 450 000 passengers, totalling EUR 6 620 000 for the total envisaged in the plan in 2001-2010. This level would rise beyond 2010, reaching 550 000 passengers from 2013. The marketing contribution thus omitted would therefore amount to EUR 7 320 000 for the period 2001-2015.

(203) By taking account of the impact which these two favourable business hypotheses have on the business plan (i.e. the inclusion of the margin from new regular passengers and the failure to take account of all marketing costs for all potential Ryanair passengers), the Commission notes that the level of profit expected by BSCA for 2001-2010, namely EUR 35,6 million accumulated operating result, is reduced, respectively, by EUR 26,9 and EUR 6,6 million, making EUR 33,5 million, in other words, virtually the full amount of expected profit. The accumulated operating result would reach a low point at the end of 2005, with about -EUR 5,4 million accumulated losses to be financed. The accumulated loss would continue until 2009 inclusive and the result would become positive, by EUR 2,1 million, only in 2010. In terms of net result, discounted at 6,33 %, the results for 2001-2010 would be a negative net present value (NPV) of about EUR 776 000.

(204) For the entire 15-year term of the contract with Ryanair, from 2001-2015, the accumulated operating result expected by BSCA of EUR 108,6 million is likewise overestimated on account of these two factors to the tune of EUR 78,4 and EUR 17,3 million respectively, making a total of EUR 95,7 million. The accumulated operating result would therefore reach not more than EUR 12,9 million for the term of the

contract. In discounted flows at the same rate of 6,33 %, the NPV would be slightly positive at EUR 2,7 million.

(205) The Commission specifies that this rate of 6,33 %⁽⁸²⁾ is the reference rate adopted by the Commission for the period from 1 January to 1 December 2001 and, accordingly, the rate used in the negotiation and conclusion by BSCA of the contract with Ryanair. In its calculations submitted to the Commission, BSCA itself used a rate of 4,27 %, being the rate of the 10-year state loan (OLO for 10 years). The Commission cannot accept this rate allegedly without risk, i.e. the rate for loans of a sovereign state, being applied to an undertaking. The Commission's rate represents a premium of 200 basis points on the OLO, a level which it regards as already highly favourable in view of the risk on the air transport market, in particular at the end of 2001 when the contract was signed. This risk also seems moderate in view of the amount to be financed. If one takes as a reference the EUR 5,4 million accumulated losses at the end of 2005, it is a sum exceeding the undertaking's equity capital at the time of signing the contract, i.e. about EUR 4,6 million. Finally, using a rate over 10 years, including in calculating the discounted value over 15 years, is yet another situation conducive to the analysis of the project's profitability for BSCA because of the higher rate which a longer term normally generates.

(206) The Commission also recalls that according to its notice on the method for setting the reference and discount rates⁽⁸³⁾ the reference rate is defined as a five-year interbank swap rate plus a risk premium of 75 basis points, and that this is a floor rate. Thus the Commission envisaged the use of a long-term rate, e.g. 10 years, as well as the use of a higher risk premium, up to 400 basis points or more.

(207) The Commission therefore considers that alone on the basis of the overestimate of business revenue and the underestimate of business costs to be linked directly with the contract with Ryanair, a private cautious and well-informed investor would not have signed this contract. This conclusion follows in particular from the discounted value (NPV) calculated in recitals 203 and 204 for the contract, which appears negative over 10 years and slightly positive over 15 years, in view of the associated risks, the need to finance interim losses and the undertaking's initial position characterised by prudent management but with mild profit taking. With

⁽⁸¹⁾ Depending on the aircraft used (B 737—200 or 800) and the minimum aircraft load factor of 70 % likewise indicated in BSCA's business plan, 26 flight rotations (i.e. 26 departures) would comprise between 850 000 and 1 250 000 departing passengers a year. The latter figure was adopted as the ceiling of Ryanair's activity in the analysis of the business plan made by the Commission and for calculating the maximum adjustment adopted above.

⁽⁸²⁾ For a table of rates covering several years, see the following address on the Commission's Internet site: http://europa.eu.int/comm/competition/state_aid/others/reference_rates.html

⁽⁸³⁾ OJ C 273, 9.9.1997, p. 3.

regard to the questions already raised concerning the applicability of the private investor principle, the Commission therefore notes in any case that the scrutiny of the specific criteria which justified BSCA's intervention in its contract with the Ryanair company shows that the criterion of the private investor is not met in this case. However, it is not only business hypotheses that were adduced to improve BSCA's results in the framework of the contract with Ryanair; two other hypotheses were also used, concerning relations between BSCA and the Walloon Region.

Costs of fire and maintenance services

- (208) BSCA has not taken account of the fact that, on the basis of the concession agreements with the Walloon Region in force at the time, it was responsible for financing the costs of fire and maintenance services. The 1991 concession agreements, amended in 1999, provided that BSCA had primary responsibility for bearing these costs.
- (209) While these costs were covered by the budget of the Walloon Region between 1991 and 1997 on the basis of the 'transitional' provisions of the 1991 concession and subsequently between 1997 and 2000 on the basis of an amendment to the 1999 concession, it had been agreed to 're-examine these provisions in the framework of the 2000 budget in the light of the financial equilibrium of the concession and the trend that was expected and budgeted for in the following years on BSCA's profit and loss account'. The Belgian authorities have supplied the Walloon Region's budget decisions of 16 December 1999 and 14 December 2000 showing that the Region bore these costs for 2000 and 2001 but made not commitment beyond this date.
- (210) The letter of 5 July 2001 which BSCA sent to the Walloon Minister of Transport, transmitted by the Belgian authorities, concerning the 2002 budget for fire and maintenance services does not provide any convincing indications regarding the attitude of the Walloon Government as Belgium has not provided any response on the part of the Walloon Government showing that it might in the course of 2001 possibly have agreed to cover these costs for BSCA.
- (211) As the provisions of the concession were not reviewed before the spring of 2002, BSCA was in a 'legal vacuum' with regard to the heading 'fire and maintenance services' at the time when it made its commitment towards Ryanair in 2001. The financial consequences of this 'legal vacuum' for BSCA can be quantified, on the basis of the 2001 business plan, at over EUR 28 million (EUR 28 159 047) ⁽⁸⁴⁾. This amount is particularly high as BSCA had, beyond the perpetuation of previous payments, already anticipated a rise in the future level of compensation by the Walloon Region for this purpose, amounting to EUR 5,6 million for the period 2002-2010.
- (212) On 15 June 2001, BSCA's statutory auditor drew the attention of the members of the Board to this legal vacuum ('Moreover, the statutory auditor observes that if this has not yet been done, it is necessary to renew the fire services agreement which has expired') and again stressed this in his analysis of BSCA's accounts for 2001 ('The results take account of a payment for operating fire and maintenance services earmarked on the Walloon Region's budget by an amount gradually rising over time and also a subsidy for fire and maintenance investment for the period from 2001 to 2003. This revenue is subject to compliance with the provisions of the concession agreement and the specifications which lapsed on 31 December 2000').
- (213) A well-informed investor would not have taken the risk to make a commitment vis-à-vis Ryanair without having first clarified the situation as to the fire and maintenance services. The amounts involved were too high to be disregarded. The sum of EUR 28 159 047 for 2002—2010 must be related to BSCA's operating result accumulated over this period to grasp the scope of the risk, i.e. EUR 35 591 420. For this period, fire and maintenance costs amount to about 79 % of BSCA's expected result on the basis of the 2001 business plan.
- (214) In this regard, the Commission does not dispute the legitimate possibility of the Walloon authorities continuing to bear the cost of fire and maintenance service. However, it notes that this has not been anticipated in such a way that the beneficiary undertaking, BSCA, could be assured that the Walloon Region would continue to cover these costs even though the concession agreements, amended in 1999, left these costs in principle to be borne by BSCA.

⁽⁸⁴⁾ The EUR 28 159 047 correspond, in the business plan mentioned above, to the sum of the 'fire and maintenance services' subsidies for 2002-2010 as the Commission takes account of the fact that the Walloon Region had in its budgetary decision of December 2000 undertaken to finance the costs of 2001 and that BSCA could count on this sum. However, it had no assurance beyond 2001.

(215) While maintaining its position on the fundamental attitude which a well-informed investor would have had, the Commission can nevertheless give consideration to the fact that a part of these costs are fixed costs and would have had to be borne in any case, even if doubt remains as to whether they would have been borne by BSCA or the Walloon Region. Examining this point, the Commission has in fact concluded that the corresponding cost is not fixed but has increased on account of the activity:

— the corresponding fire and maintenance subsidy was EUR [...] million in 1997, EUR [...] million in 1998 and EUR [...] million in 1999; if one takes this original sum of EUR 1,6 million a year as a fixed cost for BSCA, or for the Walloon Region, only the amount in excess, i.e. the difference between this amount and the data indicated in the business plan, could be regarded as additional cost connected with the development of the activity following the signing of the contract with Ryanair;

— accordingly, EUR 1,6 million a year would be deducted for each of the nine years of the period 2002-2010, i.e. EUR 14,4 million, from the EUR 28,1 million mentioned in recital 211, which would however leave an extra cost, connected with the Ryanair contract and for which BSCA had no certainty at all, amounting to about EUR 13,7 millions. The same calculation made for 2002-2015 would represent a EUR 22,2 million risk for BSCA.

(216) Only the specific relationship between BSCA and the Walloon Region could enable BSCA to anticipate these points; a well-informed investor would not have taken such risks without formal guarantee.

Environment fund

(217) Apart from the question of fire and maintenance services, a well-informed investor in BSCA's position would not have underestimated a second parameter laid down by law, namely that of the amounts to be transferred to the environment fund, i.e. 35 % of airport tax.

(218) BSCA's business plan for 2001 indicates the payment of 35 % of airport tax to this Fund for 2001 and 2002. However, between 2003 and 2010 there is a ceiling indicated in the business plan, and the amount no longer corresponds to 35 % of tax. Belgium has explained that the ceiling for BSCA's contribution to the Fund had been fixed at BEF 75 million (EUR 1,86 million) and that this could be checked in Sowaer's

financial plan transmitted to BSCA on 1 August 2001, after which it had been indexed by 2 % a year. This ceiling is in fact specified in a note appended to the BSCA company auditor's conclusions in 2001, recalling the hypothesis adopted: the environment fund 'would have a ceiling of BEF 75 million indexed from 2003 (no agreement signed to date)'. The approval of Sowaer's financial plan by the Walloon Government on 23 May 2001 ('[it] agrees on ... the financial plan') cannot as such be regarded as an actual change to legislation as the company concerned, Sowaer, had not yet been made responsible for collecting this payment, which would be the case only in 2002. According to the Commission's calculation, the effect of this ceiling in relation to the amount provided for in the Decree of the Walloon Government is tantamount to savings of nearly BEF 9 millions (EUR 8 968 784) for the years 2001-2010. For the period 2001-2015, the effect of the ceiling is nearly EUR 23,4 million.

(219) A private investor operating in a market economy could not have envisaged, in a business plan covering ten years, to keep a part of the tax due under the law in an environment fund. He would not have appropriated the sum of nearly EUR 9 million for the period 2001-2010, which is the equivalent of about 25 % of the accumulated operating result over the same period (EUR 35 591 420), without first obtaining a guarantee that this ceiling would be formalised by a legal document and that he would thus be able to count on it.

(220) It is only since the amendments were made to the concession contract in 2002, i.e. after signing the contract with Ryanair, that BSCA is entitled to pay a 'ceiling' of 35 % of airport tax to the Société Wallonne des Aéroports. This amount with a ceiling of EUR 883 689 from 2003, indexed by 2 %, and rising to EUR 2 651 067 in 2007, indexed by 2 %, should be paid by BSCA to Sowaer as a fee for making the infrastructure available. It should be noted that this effective ceiling is different from that taken into account in the business plan and in fact alleviates the burden on BSCA to the tune of EUR 1 million a year in the first years, after which the burden increases, proportionally improving the results reported by BSCA from 2003. In this respect, contrary to what the Belgian authorities alleged in their letter of 19 December 2003, the different impact of the ceiling between the business plan of 2001 and that of 2002, confirmed by the facts, does generate a significant advantage for BSCA. The figures provided by the Belgian authorities on 27 August 2003 in fact show that the second ceiling, recorded in the 2002 business plan, produces an advantage for BSCA of EUR 2 964 000 in relation to the 2001 business plan which was therefore not based on validated data in this regard. The Walloon Government, moreover, decided in June 2003 that the sums which BSCA had to pay into the Fund, i.e. about EUR 2,8 million, would be paid to Sowaer, after deducting EUR 250 000 in costs for managing the Fund.

(221) At this juncture of the analysis, the Commission concludes that a private investor would not have committed himself by entering into a contract with Ryanair for a period of 15 years, first, because of the risk of having to pay — at least partly — the costs of fire and maintenance services and, second, because of the sums he would have to pay into the environment fund. Such an investor would in fact not have accepted running the risk of incurring possible expenditure amounting to EUR 22,7 million for 2001-2010, corresponding to more than 60 % of the accumulated operating result of the undertaking over a 10-year period (EUR 35,6 million), without obtaining guarantees in this respect.

Conclusion on the validity of the business plan

(222) Correction of the hypotheses adopted in the business plan would have the following consequences. It should be noted that this concerns a pro-forma profit and loss account of a private investor (i.e. without any knowledge of possible advantages to be granted by the Walloon Region not formalised by agreements) who is a prudent investor (having used homogeneous hypotheses regarding costs and revenue, derived solely from the contract to be analysed) at the time of signing the contract with Ryanair, but that this will in fact never be BSCA's situation.

(223) Over the basic period 2001-2010, the presented result of EUR 35,5 million is encumbered at least by the following uncertainties, amounting to more than EUR 56,2 million, of which:

(a) EUR 33,5 million relating purely to the business and cost hypotheses of the business plan, i.e.:

— EUR 26,9 million as additional margin resulting from volume and unit margin hypotheses assumed with regard to future traffic increases from regular airlines;

— EUR 6,6 million from the limitation of marketing contributions to a certain non-contractual level;

(b) EUR 22,7 million relating to hypotheses resulting from the relationship between BSCA and the Walloon authorities, i.e.:

— EUR 13,7 million for the continued refund of the costs of fire and maintenance services by the Walloon Region beyond 2001 in respect of the part exceeding EUR 1,6 million annually, being

the fixed cost traditionally regarded as necessary for operating the airport, which could thus be excluded from the evaluation of the contract with Ryanair;

— EUR 9 million for capping airport charges payable into the environment fund.

(224) For the whole period 2001-2015 covered by the contract with Ryanair, the presented result of EUR 108,6 million is encumbered with the same uncertainties, amounting to at least EUR 141.3 million, of which:

(a) EUR 95,7 million relating purely to the business and cost hypotheses of the business plan, namely:

— EUR 78,4 million concerning the additional margin resulting from the volume and unit margin hypotheses assumed for traffic increase expected from regular airlines;

— EUR 17,3 million concerning the limitation of marketing contributions to a particular non-contractual level;

(b) EUR 45,6 million concerning the hypotheses resulting from the relationship between BSCA and the Walloon authorities, namely:

— EUR 22,2 million for the continued refund of the costs of fire and maintenance services by the Walloon Region beyond 2001 in respect of the part exceeding the EUR 1,6 million annually, being the fixed cost traditionally regarded as necessary for operating the airport, which could therefore be excluded from the evaluation of the contract with Ryanair;

— EUR 23,4 million for capping airport charges payable into the environment fund.

(225) The Commission draws attention to the fact that in all of these hypothetical cases, the accumulated operating result of BSCA for 2001-2010 or 2001-2015 remains negative. Consequently, there is no need to calculate the actual value of the flow of the result thus generated in order to determine actual profitability. Only the hypothesis of obviating only the most exaggeratedly

optimistic business hypotheses, referred to in point (a) of recitals 223 and 224, produces an apparent profitability over 15 years, even though it is very weak as calculated previously. It has already given the Commission cause for establishing that the weakness of this prospective profit is not representative of the behaviour which a private investor would have adopted.

(226) The Commission maintains that a well-informed investor would also have taken account in his business plan, at least as an unknown quantity, of the risks associated with his relations with the Walloon authorities referred to in point (b) of recitals 223 and 224.

(227) Accordingly, the Commission considers that in the case of BSCA and its contract with Ryanair the extent and nature of the associated risks, derived from the analysis of the business plan, with regard to expected profits could not reflect the reasoning of a private investor operating in a market economy. The latter would in fact have sought formal guarantees from the Walloon Region regarding the continuity, or even increase, of the fire and maintenance compensation covering a period of 10 or indeed 15 years. He would have sought similar guarantees regarding the capping of his contribution to the environment fund over the same period. Above all, he would have made a careful comparison of the expected revenue from and costs of the contract and would have excluded proceeds from other business activities from his expected profits associated with the contract with Ryanair.

(228) With regard to the statement made by the Belgian authorities in December 2003 that the result for 2003 expected by BSCA, and announced at a press conference on 15 November 2003, is tantamount to a EUR 1 500 000 profit — the data for which remain to be substantiated and should be certified by the company's auditors — as against a planned loss of EUR 1 066 000 mentioned in the 2001 business plan⁽⁸⁵⁾, the Commission notes first of all that these are data obtained a posteriori which cannot serve to clarify BSCA's decision at the time when the facts took place in July 2001. The Commission notes in particular that various items in the accounts, placed at the Walloon Region's discretion, improve the 2003 result compared with that expected in the 2001 business plan:

— for instance, the additional capping of the environment fund via Sowaer generates additional

savings of EUR 1 030 000 between the cost included in the 2001 business plan (EUR 1 934 313) and the costs that would be borne by BSCA following the sub-concession contract signed in April 2002, indicated as EUR 901 363 in the 2002 business plan;

— similarly, the fire and maintenance subsidy eventually granted for 2003 by a Walloon Government Decree of 6 February 2003 amounts to EUR 4 288 000 compared with EUR 2 914 900 included in the 2001 business plan submitted to the Commission; here, again, a profit of EUR 1 370 000 will be entered in the 2003 accounts because of this change in hypothesis;

— all other things being equal, the EUR 1 500 000 profit announced by BSCA for 2003 should be reduced by these two additional savings corresponding, on the one hand, to lower billing by Sowaer and, on the other hand, higher compensation by the Walloon Region. These two actions are tantamount to a total bonus of EUR 2 400 000 for BSCA in 2003. Deducting their impact from the result announced to quantify BSCA's economic performance comparable to the hypotheses of the 2001 business plan, one obtains a loss of EUR 900 000, which is slightly less than the EUR 1 066 000 of the business plan but does not amount to the decisive improvement of the situation alleged by the Belgian authorities.

(229) With regard to the confirmation requested and obtained from Deloitte & Touche as to the conformity of the analysis of the 2001 and 2002 business plans, the Commission cannot completely validate the statements made by the Belgian authorities and its expert:

— the Commission notes first of all that the Deloitte & Touche document is a simple letter of half a page dated on the same day when Sowaer requested this analysis, i.e. 27 November 2003, which is why it cannot truly be considered a full analysis of the 2001 plan;

— while this letter points to a number of significant differences between the two business plans, e.g. the handling charge for airlines other than Ryanair — which is much lower in the 2002 plan than in that of 2001 — and personnel costs, it merely states that they affect the expected results, which were more favourable in the 2001 business plan.

⁽⁸⁵⁾ And a planned loss of EUR 1 531 000 in the 2002 business plan after the signing of the contract with Ryanair.

- however, the Commission notes that the Belgian authorities had themselves recognised that the difference between the two business plans in the level of the ground handling charge, for instance — with a reduction of about EUR 15 to EUR 10 per passenger of the unit charge for passengers of regular airlines by 2010 — would lead to a drop in revenue of over EUR 5 million in 2001-2010. This is in fact representative of the Commission's criticism of the margin generated by airlines other than Ryanair in the plan;
- however, the expert says nothing on the impact of the various hypotheses on relations between BSCA, Sowaer and the Walloon Region referred to above, in spite of the fact that they are quite substantial. The Commission recalls that BSCA's auditor did state his views on these points at the time of the approval of the contract;
- finally, the Commission notes that the consultant did not express a view, either in his initial report of February 2003 or in the additions of 15 July and 27 November 2003 transmitted to the Commission, on the underlying business hypotheses of the business plan. In particular, the relevance of taking into account passengers of regular airlines, their continuous increase in the plan and unit revenue have not been discussed by Deloitte & Touche and have been neither confirmed nor contested. This point is of particular importance as the initial report, the consultant's most detailed one, is confined to covering the period up to 2005 for which the revenue expected from regular airlines, highly profitable, remains limited. The document of 15 July 2003 consists only of profit and loss accounts completing the period covered up to 2010, i.e. exactly the period in which revenue from regular airlines becomes essential for the success of the business plan, excluding all comments on this point or another business plan.

Capital increase

- (230) Moreover, the Commission considers that a prudent investor who found himself in BSCA's position would not have taken the decision to commit himself vis-à-vis Ryanair without prior assurance about the company's recapitalisation.
- (231) It should be noted for the record that even in the most favourable hypothesis adopted in BSCA's business plan the establishment of Ryanair at Charleroi would entail losses for BSCA in the first years. The aggregated amount of these interim losses would be nearly EUR 4 million by the end of 2003-2004 and comes close to the airline's equity capital of EUR 4,6 million at the end

of 2000. These losses should therefore be contained through a EUR 5 million capital increase to preserve the company's financial equilibrium. However, BSCA's investment decision of 31 July 2001 was taken without the Board of Directors having any certainty about recapitalisation by the Société Wallonne des Aéroports. At that date, the Board could only hope that Sowaer would send a letter to BSCA confirming that Sowaer had approved a financial plan in which provision was made for a capital increase. The fact is that the Directors were concerned about this: ([Director C] 'expressed concern that the Board should approve a plan without knowing whether the shareholder would follow it up'; '[another Director] noted that the Board was being asked to approve this contract without having any certainty of obtaining a capital increase from Sowaer')⁽⁸⁶⁾. This letter was sent to BSCA on 1 August 2001.

- (232) In connection with the analysis of private investor behaviour of BSCA and in response to the questions raised by the interested party C, the Commission notes that BSCA's recapitalisation by the Société Wallonne des Aéroports did eventually take place in December 2002. Belgium has explained that the BSCA recapitalisation decision was taken by the Société Wallonne des Aéroports in accordance with the principle of the private investor operating in a market economy on the basis of BSCA's business plan of April 2002. Deloitte & Touche consultants deemed this a reasonable decision⁽⁸⁷⁾.
- (233) However, the Commission notes that while Sowaer's financial plan, approved by the Walloon Government on 23 May 2001, does make provision for the recapitalisation of the two companies managing, respectively, Liège airport (SAB) and Charleroi airport (BSCA), the ways in which this decision was implemented was quite different.

- (234) In both cases, provision had been made⁽⁸⁸⁾ for an initial contribution from Sowaer of BEF 60 million (about EUR 1,49 million) and subsequently its participation in other capital increases, spread over three years and amounting to three times BEF 30

⁽⁸⁶⁾ Minutes of the meeting of the BSCA Board of Directors of 31 July 2001.

⁽⁸⁷⁾ If this decision had been taken in May 2001, however, the Commission would have had reasons to doubt that the recapitalisation was in accordance with the principle of a private investor operating in a market economy. In May 2001, neither the Walloon Region nor Sowaer (in the process of being set up) could a priori evaluate return on investment by recapitalising BSCA. At the time, BSCA's Board of Directors had not really discussed the terms of the contract with Ryanair and did not have at its disposal the financial forecasts relating to the contract which it only obtained on 31 July 2001.

⁽⁸⁸⁾ Page 9 of Sowaer's financial plan appended to the Walloon Government's decision.

million (i.e. about three times EUR 0,74 million). Overall this would give each airport a capital injection of BEF 150 million (about EUR 3,72 million), i.e. 25 % of a total capital increase reaching BEF 600 million with the massive participation of other investors.

(235) An examination of Sowaer's accounts for 2002 shows that this rule laid down in its financial plan approved by the Walloon Government was not applied in the same way to SAB and BSCA and has in fact not been followed up for BSCA:

— for SAB, Sowaer's accounts for 2002 indicate the acquisition of 50 shares for the sum of EUR 1 408 486 and a capital increase of EUR 2 353 829,90 in cash paid up by 25 %, which is consistent with the spirit of the financial plan;

— for BSCA, however, the same 2002 accounts of Sowaer indicate the acquisition of 6 143 shares for the sum of EUR 3 808 660. BSCA's accounts for the same period confirm this transaction, recording a total capital increase on 3 December 2002 of EUR 3 942 million in cash contribution, i.e. approximately EUR 3 809 million for Sowaer, and the balance, namely about EUR 133 000, for the minority shareholders. BSCA's accounts also show that the full amount of the subscribed capital has been paid up. Sowaer therefore anticipated the capital contribution to BSCA.

(236) Accordingly, the Commission concludes that Sowaer's financial plan as approved by the Walloon Government was subsequently adapted to the actual needs of BSCA resulting not only from its traditional activity, which it has shown to be sound and characterised by clearly positive equity capital, and its capital investment needs, but especially its interim financing requirements caused by the contract signed in the meantime with Ryanair.

Conclusion

(237) The analysis conducted by the Commission shows that BSCA's financial structure is based on that of the Walloon Region, and that without the implicit guarantee and assurance that the Region procures for its public sector companies (bearing of certain expenses, abandonment of certain income, re-capitalisation, etc.)

and because of the commercial hazards inherent in the business plan, BSCA would never have committed itself to Ryanair. Although in theory it acts as a business in the airport industry, BSCA was not in the situation of a company that had to calculate its risks and investment decisions and did not make its decision according to the effective profitability that it could reasonably have expected.

(238) The Commission concludes, in view of the foregoing, that the advantages granted by BSCA to Ryanair are therefore advantages within the meaning of Article 87(1) of the Treaty, which allow it to reduce the airline's running costs.

5.1.2. SPECIFIC CHARACTER

(239) Article 87(1) of the Treaty requires that a measure, in order to be defined as State aid, favour 'certain undertakings or the production of certain goods'. In the case at issue, the Commission notes that the advantages in question, whether those granted by BSCA or those granted by the Walloon Region, were granted to Ryanair only.

(240) Ryanair and Belgium have pointed out that no other company operated under conditions similar to those applied to Ryanair and that there could not therefore be discrimination between Ryanair and any other airline. Belgium has also asserted on numerous occasions that the measures taken in relation to Ryanair had been publicised and that it had committed itself to providing similar advantages to any other company generating a volume of passengers similar to that generated by Ryanair.

(241) The Commission states that neither BSCA nor the Walloon Region have set up any systems based on objective criteria that allow discrimination to be banned between airlines set up or wishing to set up at Charleroi, on the basis for example of the volume of passengers that each airline is able to provide. It also points out that the 'publicity' measures taken by the Walloon Region and by BSCA had nothing of an official nature and were not in any case likely to create rights for other users. Therefore, any reduction in landing charges or guarantee of compensation from the Walloon Region was not 'automatically' available to other users.

Although the industry was familiar with the agreements, the press reported the events and the Walloon Region published a number of communiqués, the precise terms of the contract between Ryanair and BSCA were covered by a publicity and confidentiality clause⁽⁸⁹⁾. The contracts were not available to the interested parties at the time, as the ARACH association has testified.

agreement being a reduction in BSCA's resources and those of the environment fund. It finally decided, when the fund was effectively capped in April 2002, to apply another, differentiated regime aimed at limiting BSCA's costs until 2006 and increasing them slightly afterwards. Finally, it decided to replace the funds with Sowaer and transfer the resources of the funds still payable to BSCA to Sowaer.

(242) The Commission notes that the arguments linked to publicity and non-discrimination are not in any case likely to call into question the objective fact that the measures granted were not offered to other companies in a transparent way and were in fact offered only to Ryanair. They are specific in light of Article 87(1) of the Treaty.

(245) All this clearly shows that we are not dealing here with a fund that would automatically receive resources independently of the public authority, something that led the Court not to conclude in the *PreussenElektra* ruling that State resources were present. On the contrary, the Commission considers in the case at issue that the Walloon Region had a permanent option, which it used on several occasions, of defining, using and allocating the revenue from airport fees in a discretionary way between several participants such as BSCA, the environment fund and even Ryanair, and to exert a direct influence on their methods of operation. It therefore considers that the airport fees are in fact State resources.

5.1.3. STATE RESOURCES

(243) The Commission refers to the analysis it presented in points 97-111 of the decision to initiate the procedure with regard to the transfer of State resources in favour of Ryanair. This analysis, especially with regard to the imputation of the measures taken by BSCA to the Walloon Region, has not been questioned by the interested parties or by Belgium. On the other hand, the Belgian authorities have disputed the concept of 'State resources' in relation to the airport charges received by BSCA in accordance (according to them) with the abovementioned *PreussenElektra* case law.

(246) The Commission concludes that the advantages to Ryanair were granted directly by the Walloon Region in the form of a compensation commitment (involving mobilisation of regional resources where necessary) and of a reduction of landing charges (involving a loss of profit for the State), and indirectly by mobilisation of BSCA resources. In fact, although BSCA is an undertaking within the meaning of competition law and its activities are economic in nature, it is a public undertaking over which the Walloon Region exercises both control and a dominant influence, and these measures are imputable to it within the meaning of the *Stardust Marine* case law mentioned above. Points 97-111 of the decision to initiate the procedure remain valid in full in this regard following the formal examination.

(244) The Commission disputes this analysis and considers that the conclusions of this Court judgment are not applicable to the present case. In fact, as it has already explained, the fixing of airport landing and parking fees is a public prerogative in Belgium, delegated to the regions by the Federal State. It is thus the Walloon Region that has, in its jurisdiction, fixed the fees by decree and provided for the allocation of 35 % of the fees to a fund pertaining to each airport. It then decided, according to the Belgian authorities themselves, to impose a ceiling for the fund when Sowaer's financial plan was approved. The Walloon Region then signed an agreement with Ryanair, the consequence of that

5.1.4. IMPACT ON INTRA-COMMUNITY TRADE AND COMPETITION

⁽⁸⁹⁾ Provision 5.1 of the BSCA-Ryanair contract: 'No party shall make a public announcement or any other communication concerning the matters dealt with under the present contract or its annexes until the other parties have received a draft of the proposed disclosure or of the communication to be made and until the parties have issued their prior written consent, unless the publication or production of documents is required by law or by an international, Community or federal court, in which case the other parties shall be informed beforehand of the steps taken by the court'.

(247) Neither the interested parties nor Belgium has opposed the Commission's assessment in point 112 of the decision to initiate the procedure, with regard to the impact on trade between Member States, an assessment that the Commission maintains. On the other hand, Belgium and Ryanair have opposed the Commission's assessment with regard to the impact on competition. They have in effect maintained that the measures did

not have a competitive impact on the relevant market (low-cost sector) and the geographical market (routes) concerned.

compatible with Article 87(2) and 87(3) of the Treaty and Article 61 of the EEA Agreement.

(248) The Commission points out that the analysis of the impact on competition in the State aid sector is not the one applied when the Commission examines an alliance or concentration between airlines ⁽⁹⁰⁾. Extending the definition of the relevant geographical market, which is governed by competition law, to the aid sector would involve ignoring specific nature of these two separate areas of Community economic law.

5.2. LEGAL BASIS OF THE ASSESSMENT

(251) The Commission explained in its decision to initiate the procedure that it doubted whether the aid could be declared compatible on the basis of the exemptions provided for in the Treaty and that no exemption seemed applicable in this case.

(249) In the aid sector, the advantage granted through the bearing by the State of operating costs normally borne by an airline does not only distort competition on one or more routes and on a particular market segment. The advantage gained by the airline strengthens its economic position on its network as a whole in relation to competing companies, whether these are traditional, low-cost, charter or regional companies. In 2003, Ryanair flights operated on over 100 routes in 13 countries and Ryanair was in competition with a great many airlines, the number of which is not limited to companies that made comments in the context of the present procedure. The Commission points out that the supply of air transport services is a sector in which competition in Europe has been lively since the entry into force of the 'third package', the third stage of air transport liberalisation, on 1 January 1993 ⁽⁹¹⁾.

(252) None of the provisions of Article 87(2) of the Treaty can be applied since the aid in question is not of a social nature, nor is it intended to make good any damage caused by natural disasters or other exceptional events. Nor does it constitute aid granted to the economy of certain areas in Eastern Germany.

(253) Article 87(3) of the Treaty draws up a list of types of aid that can be declared compatible with the common market.

(254) Points (a) and (c) of the said paragraph allow for exemptions in favour of aid intended for promoting or facilitating the development of certain areas. In its guidelines on State aid for the regions ⁽⁹²⁾, the criteria required to be fulfilled in order for aid to be granted could be declared compatible. The aim of these guidelines is to reconcile the aim of the regional development with respect for competition by fixing limits for the granting of regional aid to businesses. These limits are designed so as to provide real help for regional development in the long term, especially in the poorest regions, by ensuring that aid given to businesses does not exceed the amount strictly necessary and proportionate for ensuring the development. The guidelines should prevent regions or states from being sucked into an 'aid spiral' under cover of regional development, or into a 'race for subsidies' granted to businesses in order to attract them into a territory at any cost at the expense of competing businesses. Unlimited competition between regions in the granting of subsidies to business would not promote the long-term development of the European regions, and would be in contradiction with the structural policy of the Community.

5.1.5. CONCLUSION

(250) As the criteria for State aid are met in this case, the Commission concludes that the advantages granted to Ryanair by the Walloon Region and by BSCA are State aid within the meaning of Article 87(1) of the Treaty. There is a need to examine whether these measures are

⁽⁹⁰⁾ See in particular the Judgment of the Court of First Instance of 15 June 2000 in Case T-298/97, Alzetta Mauro, ECR, p. II-2319, Grounds 80 & 81.

⁽⁹¹⁾ 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 air routes (OJ L 240, 24.8.1992, p. 8) (as last amended by Council and Parliament Regulation (EC) No 1882/2003) and Council Regulation (EEC) No 2409 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

⁽⁹²⁾ OJ L 74, 10.3.1998, p. 9.

- (255) The Commission does not deny that aid granted to Ryanair could have a regional socio-economic impact in Wallonia, as could any aid granted by the public authorities with the aim of encouraging a business's economic activity. However, this aid is not in line with the rules that the Commission has now been applying for several years.
- (256) First of all, most of the aid granted to Ryanair is operating aid within the meaning of the guidelines and not aid to initial investments in fixed capital⁽⁹³⁾. This type of operating aid is in principle prohibited, except in the poorest regions of Europe under exceptional circumstances and strict conditions⁽⁹⁴⁾. Although Hainaut is normally eligible for the transitional aid under objective 1, this involves only the possibility of applying Community funding such as the structural funds⁽⁹⁵⁾.
- (257) Within the State aid framework, however, the town of Charleroi, on which Gosselies, the place of BSCA's establishment, depends, is eligible for regional aid under Article 87(3)(c) of the Treaty, which allows only initial investment aid⁽⁹⁶⁾. This clearly excludes operating aid, which is provided for only under Article 87(3)(a) of the Treaty. Moreover, the aid granted to Ryanair is individual and ad hoc aid, outside of any scheme, and the Commission normally pursues a policy of strict limitation in relation to such aid⁽⁹⁷⁾, even though, in principle, it would be possible on the basis of the Court's Hytasa⁽⁹⁸⁾ judgment to consider that ad hoc aid might be compatible as regional aid. In this case,
- however, the Commission excludes the presence of a purely regional purpose connected to an investment: we are looking at aid for the development of airborne activities. It therefore concludes that the above-mentioned aid cannot be declared compatible with the common market because of its effect on the development of certain regions.
- (258) Subparagraphs (b) and (d) of Article 87(3) of the Treaty are not applicable as the aid is not intended to promote a major project of common European interest or to remedy a serious disturbance in the economy of a Member State or to promote culture or conservation of national heritage.
- (259) The exemption provided for in Article 87(3)(c) of the Treaty on aid intended to facilitate the development of certain economic activities, can be applied. In the case at issue, reference should be made to the rules laid down by the Commission for assessing State aid with a horizontal aim, in conjunction with the guidelines in the aviation sector. The Commission notes that the aim of the aid is not research and development⁽⁹⁹⁾, environmental protection⁽¹⁰⁰⁾, rescue and restructuring of companies⁽¹⁰¹⁾, small and medium businesses⁽¹⁰²⁾ or capital investment⁽¹⁰³⁾.
- (260) Ryanair has argued that the aid intended for pilot training had to be examined on the basis of Regulation (EC) No 68/2001, considering that this aid was similar to that for 'general' training. Belgium has not pleaded this basis of compatibility. The Commission notes that the single flat-rate contribution of EUR 768 000 for participation in recruitment and training of pilots and crews assigned to the new destinations served by the airport was not granted in accordance with the conditions laid down in Regulation (EC) No 68/2001: the costs borne are not limited to acceptable costs as
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- ⁽⁹³⁾ In the guidelines on State aid for the regions, operating aid means aid intended to reduce the undertaking's current expenditure (point 4.15), while initial investment aid relates to an investment in fixed capital relating to the creation of a new establishment, the extension of an existing establishment, or the commencement of an activity that involves a fundamental change in the product or procedure provided by an existing establishment (point 4.4).
- ⁽⁹⁴⁾ See point 4.15 and following of the guidelines on State aid for the regions.
- ⁽⁹⁵⁾ Commission Decision 1999/502/EC of 1 July 1999 drawing up the list of regions covered by Objective 1 of the Structural Funds for the period 2000-2006 (OJ L 194, 27.7.1999, p. 53).
- ⁽⁹⁶⁾ See State Aid 799/1999 — Belgium: Regional aid maps for Belgium.
- ⁽⁹⁷⁾ See guidelines on State aid for the regions which indicate that individual ad hoc aid granted to a single undertaking or aid limited to one sector of activity may have a significant effect on competition in the market concerned, while its effect on regional development is likely to be too limited [...]. In consequence, the exemptions in question will in principle only be granted in favour of multi-sector aid schemes open to everyone in all the sectors concerned in a given region.
- ⁽⁹⁸⁾ Court Judgment of 14 September 1994 in joined cases C-278, C-279 and C-280/92, Spain v Commission, ECR, p. I-4103.
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- ⁽⁹⁹⁾ Community Framework on State Aid for research and development (OJ C 45, 17.2.1996, p. 5), modified (OJ C 48, 13.2.1998, p. 2) and extended (OJ C 111, 8.5.2002, p. 3).
- ⁽¹⁰⁰⁾ Community Framework on State Aid for environmental protection (OJ C 37, 3.2.2001, p. 3).
- ⁽¹⁰¹⁾ Community Guidelines on State Aid for the rescue and restructuring of companies in difficulty (OJ C 288, 9.10.1999, p. 2) and the guidelines in the aviation sector.
- ⁽¹⁰²⁾ Community Regulation (EC) No 70/2001 dated 12 January 2001 concerning application of Articles 87 and 88 of the EC State Aid Treaty for small/medium businesses (OJ L 10, 13.1.2001, p. 33).
- ⁽¹⁰³⁾ Commission Communication — State Aid and capital investment (OJ C 235, 21.8.2001, p. 3).

provided for in Article 4(7) of the said Regulation ⁽¹⁰⁴⁾ as they include the recruitment of pilots; as a single fixed contribution is involved, the costs are not backed up by supporting documentation, or transparent, or broken down into categories, and the intensity of the aid in relation to admissible costs is not defined. This aid is not therefore compatible on the basis of Regulation (EC) No 68/2001. Neither is it compatible on the basis of Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment ⁽¹⁰⁵⁾.

considered, in view of the role played by this aid in the development of regional airports ⁽¹⁰⁸⁾.

5.3. EVALUATION OF COMPATIBILITY OF THE AID IN THE LIGHT OF ARTICLE 87(3)(C) OF THE TREATY

5.3.1. REDUCTIONS IN AIRPORT CHARGES AND COMPENSATION GUARANTEES GRANTED BY THE WALLOON REGION IN THE EVENT OF ALTERATION OF THEIR LEVEL OR OF AIRPORT OPENING TIMES

(261) Ryanair has also quoted Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid ⁽¹⁰⁶⁾ for the EUR 4 000 relating to office equipment. The Commission points out that this Regulation does not apply to aid granted to businesses in the transport sector; as Ryanair is an air transport business, it is not eligible to receive this exemption.

(263) A number of interested parties are concerned at the presence of discriminatory discounts applied to airport charges. Although for small airports the airport tax total need not necessarily reflect the full cost of using the airport infrastructure ⁽¹⁰⁹⁾, the charges, including the discounts, must be established according to objective criteria, preferably after consultation with the user companies, taking care to ensure transparency and user equality, and according to rules from which they can benefit ⁽¹¹⁰⁾. The small airports should also be able to keep the room for manoeuvre necessary for adapting both charges and opening hours for the airlines.

(264) The Commission notes that there are no current Community rules that govern airport fee tariff policy.

(262) The exemption in Article 87(3)(c) of the Treaty cannot therefore be applied on the basis of the existing horizontal aid frameworks or on the basis of the aviation sector guidelines established some ten years ago in 1994 ⁽¹⁰⁷⁾. The Commission considers however, in view of economic trends in the air transport and airport sectors, triggered by the complete opening-up of air transport services at European level in 1997, that the exemption in Article 87(3)(c) of the Treaty must also be

⁽¹⁰⁸⁾ The Commission has already had an opportunity in the past to apply Article 87(3)(c) directly in order to take account of the economic development of certain sectors, by defining the conditions applicable to the granting of aid in individual decisions. See for example the Commission Communication sent to the Member States and other interested parties on the subject of State aid, No 376/01 (Italy), Aid scheme in favour of installations with cables (OJ C 172, 18.7.2002, p. 2), points 44-49. In the same way, Advocate General Jacobs points out, in point 38 of his conclusions of 18 September 2003 (not yet published in Recueil) in Case C-91/01, Italy v Commission, that 'the Commission's power of assessment cannot be limited definitively by the adoption of such texts' (note: guidelines or other forms of 'soft law').

⁽¹⁰⁹⁾ Reflecting all the costs of the small airports at tax level means imposing a charge that is often very heavy on a small number of users, thus deterring them from setting up at secondary airports. The abovementioned Commission Proposal on airport fees, which suggested that the fees reflect the real cost of the airport activity, also took account of the specific nature of the small airports, which cannot do without government aid (see point 32). In addition, the Commission notes that some Member States in Europe apply a system of financial equalisation between airports, in which the largest airports often subsidise the smallest. Requiring that the small airports' fees reflect their full total costs would cause unnecessary disruption to their method of organisation.

⁽¹¹⁰⁾ On the problem of airport taxes in Europe, see for example 'Airport charges in Europe', Airport Council International Europe, 8 May 2003.

⁽¹⁰⁴⁾ These costs are staff costs relating to trainers, travelling expenses for trainers and persons involved in the training, ongoing expenses (materials and supplies), depreciation on instruments and equipment in proportion to their exclusive use for the training project in question, the cost of consultancy services relating to training activities, and staff costs of participants in the training project, within certain limits.

⁽¹⁰⁵⁾ OJ L 337, 13.12.2002, p. 3. Job creation aid does not fall within the scope of this regulation when aid is granted in the transport sector (Article 1). The only aid covered by the regulation in the transport sector is aid for recruiting disadvantaged and disabled workers and aid intended to cover additional costs connected with the employment of disadvantaged workers. The aid measure mentioned does not have this aim, nor does it satisfy the other criteria in the regulation.

⁽¹⁰⁶⁾ OJ L 10, 13.1.2001, p. 30.

⁽¹⁰⁷⁾ See point 115 fourth indent of the decision to initiate the procedure.

The Member States are therefore free to decide on airport fee levels by defining a public tariff adapted to suit individual circumstances; the Walloon Region could have done this, and could still do it in future. They cannot however set up discriminatory practices, either directly or indirectly, for example through selection of aircraft used. Neither can they deviate from the clearly established rules that they themselves fixed beforehand.

(265) The Commission points out that it is not opposed to the granting of reductions to airlines to encourage them to launch new routes or increase flight frequency in order to stimulate passenger numbers, under certain conditions. In its 'Manchester' decision, it decided that limited duration discounts, made available and granted without exercising discrimination between airport users, were not within the scope of Article 87 of the Treaty as they did not lead to distortion of competition. It explained on that occasion that a reduction or system of reductions that granted preferential treatment to a specific business was likely to fall within the scope of Article 87 of the Treaty and would therefore constitute aid.

(266) As has already pointed out, the Commission believes that on the basis of the rules drawn up in the Manchester case, the Walloon Region had the opportunity of granting discounts to Ryanair provided they were granted without discrimination and on a limited time basis. Belgium did not make use of this possibility, which is however provided for in the Walloon Region decree that regulates these charges, and chose to grant assistance to one company only and therefore in a discriminatory and non-transparent manner, and for a period of 15 years, which does not constitute a limited period as envisaged in the Manchester decision. The payment of such aid in favour of Ryanair only, in conflict with the national legal basis, was neither necessary nor in proportion to the airport development aim sought, when other legal resources existed. Under these circumstances, the Commission considers that the reductions already granted to Ryanair on airport charges, like the future compensation guarantees from the Walloon Region, are not likely to be considered as aid compatible with the common market.

5.3.2. REDUCTION OF GROUND HANDLING TARIFFS GRANTED BY BSCA

(267) Ground handling activities constitute a commercial activity, which in some airports is open to competition

under the terms of Directive 96/67/EC. As the Commission stressed in its decision to initiate the procedure, reductions on ground handling charges, granted by an airport manager to an airline, do not create a shock⁽¹¹¹⁾. However, they may have a shocking effect when the service provider company operates at a loss over a long term and these losses are potentially covered by public funds paid to the manager, for example in his capacity as airport authority or provider of a service of general economic interest⁽¹¹²⁾. For BSCA, the services received in relation to compensation for fire and maintenance costs could, for example, fall within this category.

(268) When an airport provides an airline with such services at a loss, it must be able to prove that these losses are justified and have been offset by anticipated revenue from other commercial activities. These losses must not in any circumstances be offset by revenue collected by the airport as an airport authority or a manager of a service of general economic interest. This suggests that the tasks required to be performed by an airport as an airport authority, general economic interest service manager or commercial service provider, are properly defined, as are the financial flows relating to them.

(269) With regard to Charleroi Airport, the specific tariff granted to Ryanair for ground handling services is not supported in any way by a clear analysis of the costs that it generates for BSCA. On the contrary, the partial elements produced by the business plan analysis seems to indicate that the ground handling activities do not cover its costs.

⁽¹¹¹⁾ Point 85 of the decision to initiate the procedure: 'With regard to ground handling tariffs, the Commission believes that economies of scale could be applied when an airport user makes significant use of a company's assistance services. It comes as no great shock that the tariff applied to some companies will be lower than the general tariff, insofar as the service requested by these companies will be less than for other clients'.

⁽¹¹²⁾ Directive 96/67/EC expressly envisaged the risk of cross-subsidies, by requiring separation in accounts between ground handling activities and other airport activities. Its Article 4 stipulates:

'1. The airport manager, user or service provider that provides ground handling services must apply strict separation in accounts according to current business practice, between activities linked to the supply of these services and their other activities.

2. The reality of this separation in accounts must be checked by an independent auditor nominated by the Member State.

The State shall also check that there has been no financial flow between the activity of the manager as an airport authority and its ground handling activities'.

- (270) A comparison of the labour cost of handling and ticketing services and revenue from ground-handling services as specified in the business plan provides an approximative margin on the services. It is a rough comparison as it does not incorporate other service costs apart from personnel (consumables, specific services, maintenance of equipment, etc.); on the other hand, it does take into account personnel engaged in registering and receiving passengers. Nevertheless, it can be concluded from the comparison that this margin is negative until 2006 (between EUR 650 000 and EUR 1 370 000, depending on the year), with a per-passenger labour cost falling from EUR 4,42 to EUR 2,73, still well above the amount of EUR 1 and subsequently EUR 1,13 billed to Ryanair.
- (271) The activity would produce a profit only from 2007 thanks to the approximately 50 000 additional passengers each year (i.e. 300 000 in 2010) from regular airlines, for whom handling and ticketing services would be billed at about EUR 14 per passenger on average. According to the business plan, the 1 150 000 low-cost passengers would in 2010 generate a total revenue for such services of EUR 1,5 million and the 300 000 regular passengers alone EUR 4,5 million.
- (272) Without this additional contribution expected from regular airlines, incorporated in the business plan and starting at EUR 100 000 from 2003 rising to attain about EUR 1 700 000 in 2007 and close to EUR 4 million in 2010, the margin thus calculated for ground-handling services would still remain negative. One may well wonder whether a regular airline would accept to pay at Charleroi a price comparable to the one it would have to pay at a major airport, knowing moreover that it pays 12 times more than another airline operating at Charleroi. According to Belgium, the relevant companies are in particular airlines operating flights to and from Africa involving very large volumes of luggage to be handled and accordingly a heavy burden in terms of ground handling.
- (273) Similarly, the information at the Commission's disposal suggests that ground handling, apart from refuelling, for a Boeing 737 — on the basis of 20 daily flight rotations with 100 to 200 seats, which are all elements consistent with Ryanair's operations at Charleroi — would amount to EUR 800 to EUR 1 200 per aircraft at a regional airport, a figure which is already 20 % lower than that at a larger airport. This would entail a cost per passenger of EUR 6 to EUR 8, which is in fact consistent with BSCA practice for other airlines. There is therefore a very clear presumption of blatant dumping by BSCA with regard to ground-handling services taken in isolation.
- (274) In addition, the ground handling activity is wide open to competition in the main airports, and Charleroi should follow this trend swiftly if its success continues; indeed, Community regulations provide for liberalisation measures for airports handling more than two million passengers per year, the hypothesis of the business plan from 2006 to 2007. In this regard, the Commission points out that Directive 96/67/EC aims to guarantee fair and effective competition⁽¹¹³⁾ and that the rules laid down for the smooth operation of airport infrastructures must observe the principles of objectivity, transparency and non-discrimination⁽¹¹⁴⁾. In response to a reference for a preliminary ruling, the Court considered in its Judgment of 16 October 2003⁽¹¹⁵⁾ that with regard to the payment collected in return for access to airport facilities, Directive 96/67/EC 'does not prevent the fee from being determined in such a way that the managing body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit'. The Belgian authorities confirmed themselves on 19 December 2003 that the two-million-passenger threshold should be reached by the end of 2004 or during 2005. This, especially in the light of Article 4 of Directive 96/67/EC, will involve strict separation in accounts aimed at guaranteeing non-compensation of competitive activity through any other activity at the airport. Once the threshold is reached, it will be possible for one or more independent operators to offer their services, and it is clear that the current tariff, in the region of EUR 1 per passenger for a period of 15 years, would make effective opening to competition unrealisable.
- (275) In the meantime, that is, before the two-million-passenger threshold is reached, the airport can of course compensate its various sources of profits and losses between purely commercial activities. Such would be the case, for example, between a loss on 'handling' activities and a surplus on passenger car parking. This set-off between types of commercial activity will become impossible once the two-million-passenger threshold, provided for by Directive 96/67/EC, is reached; it is already prohibited between commercial activities and activities of general economic interest. The Commission is also anxious to point out that its action to bring about actual liberalisation of ground handling services is ongoing⁽¹¹⁶⁾.

⁽¹¹³⁾ (16) of Directive 96/67/EC.

⁽¹¹⁴⁾ (25) of Directive 96/67/EC.

⁽¹¹⁵⁾ Court judgment of 16 October 2003 in Case C-363/01, Flughafen Hannover-Langenhagen GmbH vs. Deutsche Lufthansa AG (not yet published in ECR).

⁽¹¹⁶⁾ In this regard, the Commission points out the referrals made by the Court of Justice against Italy on 19 December 2002 and 12 September 2003 respectively, on the grounds that these Member States had transposed Directive 96/67/EC in an inappropriate way, leading to direct effects that hindered the arrival of new operators at principal airports in those countries.

(276) The tasks to be carried out by BSCA as an airport authority, manager of a service of general economic interest or commercial services provider, have not been clearly distinguished at Charleroi, and neither have the cash flows relating to these tasks. In these circumstances, it is impossible to exclude the possibility of cross-subsidisation between the financing of ground handling services and the financing of other non-commercial activities and therefore the presence of aid in this regard.

(277) On the contrary, there does not appear to be a need for public funding for this purpose. The recent liberalisation of the assistance sector and the need to allow it to be effectively implemented mean that when reductions granted on ground handling services are deemed to constitute State aid in favour of an airline, the Commission believes that this aid is not likely to be declared compatible with the common market. In this respect it does not appear necessary or likely to encourage the development of an airport structure within a liberalised context.

5.3.3. OTHER ALLOCATIONS INTENDED TO PROMOTE AIR SERVICES LEAVING FROM REGIONAL AIRPORTS

(278) Aid measures that allow the development and better operation of regional airport infrastructures that are currently under-used and represent a cost to the local community may be of interest at European Community level and form part of the objectives of common transport policy.

(279) 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.

(280) Generally speaking, operating aid is rarely likely to be declared compatible with the common market as it usually distorts conditions of competition in the areas where it is granted, without however being capable, because of its very nature, of reaching any of the aims laid down by the exemption provisions in the Treaty. In

fact, as it does not involve any technical or structural alteration to the business and favours only its commercial development, it only allows the business to offer artificially favourable conditions to its clients and to increase its profit margin without justification.

(281) There are however a number of exceptions to this principle and the Commission has in the past declared this type of aid compatible, provided certain conditions are met. The Commission has for example approved operational aid in the maritime sector, for the launching of short-distance routes between two or more French ports or between French and Community ports⁽¹⁷⁾. A French scheme was aimed at overcoming the financial difficulties inherent in the launching of new routes by granting degressive aid over a maximum of three years, limited to 30 % of eligible operational expenditure and capped at absolute value. After initiating the formal examination procedure, the Commission declared it compatible on the basis of Article 87(3)(c) of the Treaty, considering that the development of short-distance maritime transport formed part of the objectives of the Community transport policy. In its communication on the development of short-distance maritime transport, the Commission emphasises the role of this type of transport in encouraging a sustainable and safe form of mobility, in strengthening cohesion within the European Union, and improving the efficiency of transport in an inter-modal approach. It recognises that the short-distance maritime transport should be promoted on all levels, that is, Community, national and regional.

(282) It is therefore crucial in this case to verify whether the criteria allowing the possible compatibility of this aid, other than reductions on airport taxes and ground handling tariffs, can be met.

5.3.3.1. *Aim of the measure and presence of Community interest*

(283) The first condition for granting aid is that it fulfils its aim, that is, that it forms part of a coherent airport development policy characterised by a demonstrated willingness to develop the profitability of infrastructures that are not always profitable.

⁽¹⁷⁾ Commission Decision 2002/610/EC of 30 January 2002 on the aid regime that France plans to implement in favour of the launch of short-distance sea transport routes (OJ L 196, 25.7.2002, p. 31).

- (284) The promotion of regional development, tourism, local economy or regional image will therefore be the consequence of this coherent policy intended first and foremost to develop airport activity on a long-term basis.
- (285) While State aid for large airports or even medium-sized airports can only be justified exceptionally and with considerable difficulty, aid may on the other hand prove necessary for small airports. Without public aid the small airports, which have not reached the break-even point, could not survive. In order to continue to provide a service, they need public finance, a need the Commission has recognised, most notably in its proposal relating to airport fees ⁽¹¹⁸⁾, where it states that the smooth operation of most of these small airports, which play a role of fundamental importance in the economic and social cohesion of the Union, requires significant and regular maintenance from the State or local authorities, or financial support of the largest airports in a few cases.
- (286) There is no current definition of what constitutes a large airport, medium-sized airport or small airport. Five categories were proposed for European airports by the Committee of the Regions in its outlook opinion of 2 July 2003 on regional airport capacities ⁽¹¹⁹⁾:
- Category A represents the major airport nodes (over 25 million passengers, 4 airports), that is, some 30 % of all air traffic in Europe.
 - Category B represents the national airports (10-25 million passengers, 16 airports), that is, some 35 % of all air traffic in Europe.
 - Category C contains 15 airports (5-10 million passengers), that is, some 14 % of all air traffic in Europe.
 - Category D contains 57 airports (1-5 million passengers), that is, some 17 % of all air traffic in Europe.
 - Category E contains 67 airports (200 000 to 1 million passengers, that is, some 4 % of all air traffic in Europe.
- According to the Committee of the Regions, regional airports generally fall into categories D and E, but some category C airports can also be considered as regional airports.
- (287) Regional airports could also provide a solution to one problem of transport policy: that of saturation of major airport capacities.
- (288) The Commission, in its White paper on European transport policy for the 2010: Time to decide ⁽¹²⁰⁾, stated that faced with the increase in air traffic, airport operations should be re-examined in order to optimise use of existing capacities.
- (289) The development of regional airports is all the more interesting because, as the Commission explains, the current air transport structure is leading airlines to concentrate their activities on the large airports that they use as hubs for their intra-Community and international activities. The congestion is concentrated on the major airport hubs, with consequences in terms of pollution and air traffic management. Although congestion in the skies is already the subject of a specific plan of action, congestion on the ground is still not being given the required level of attention or commitment. However, almost half of the fifty European airports have reached or are close to reaching saturation point in terms of ground capacity.
- (290) The opinion of the Committee of the Regions, mentioned in (286) above and requested by the Commission for the development of a policy on airport capacities in Europe, explains that while
- 'the regional airports are characterised by a capacity surplus in terms of terminal surface areas and use of runways, the airport platforms and national airports often suffer from a lack of capacity for expansion. However, for as long as the major airlines hold on to their continental platform strategy of "hub and spokes", this obvious paradox will not find a solution. There are indications that some airlines are now examining the additional role played by "point-to-point" traffic.
- Regional airports still have the potential for developing "point-to-point" traffic. We have noticed it recently in low-cost airlines, but this sector is not the only one that could benefit from the routes in question. It would be a good idea for regions and airlines to work together to attain a balance between "point-to-point" and continental platforms; it would involve determining which traffic flow could take off from a regional airport without having to pass through an airport hub.'

⁽¹¹⁸⁾ COM(97) 154 final, mentioned above.

⁽¹¹⁹⁾ CDR 393/2002, end.

⁽¹²⁰⁾ COM(2001) 370, end.

- (291) Although public aid, in the form of infrastructure construction aid or operational aid, is often necessary for some small airports to survive, sustainable airport development clearly requires development of air traffic and an increase in passenger volumes. As was mentioned in the comments by the interested parties, small airports do not generally have the passenger volumes necessary for them to reach critical size and the break-even point. Only after reaching a critical size will they be able to act as genuine commercial companies and limit their recourse to public funds.
- (292) There are no absolute figures with regard to the break-even point. The Committee of the Regions evaluates it at 1,5 million passengers per year, while the above-mentioned University of Cranfield study, which sometimes puts forward a figure of 500 000 or 1 million passengers per year, shows that there are variations according to the country and the way in which the airports are organised ⁽¹²¹⁾.
- (293) Reaching this critical size and the profitability threshold is practically impossible for small airports insofar as the traditional, low-cost or charter companies have not decided to set up there, as BSCA's experience clearly shows. The traditional companies prefer the tested and well-located hubs, where rapid connections are possible, consumers are used to going and the companies have time slots that they cannot afford to lose. Like the traditional companies, which generally resort to well-known airports, low-cost companies are not always ready, without incentives in that direction, to run the risk of opening routes from unknown and untested airports.
- (294) To some extent, European regional airports are suffering as a result of years of airport and air traffic policies that concentrated the traffic on major national cities. It is not easy for them to develop in the face of the attraction offered by central airports, which in addition to their 'catchment area' and geographical situation, have benefited from many years of investment in their infrastructures and the setting-up of national companies. Some airports can take proper advantage of this when volumes of passengers are provided by airlines that fulfil the public service obligations or when aid regimes of a social nature are set up by the national authorities ⁽¹²²⁾.
- (295) Airports, especially regional airports, have an important economic role and significant social impact in Europe, as was emphasised by a study conducted in 1998 by ACI-Europe titled 'Employment and Prosperity in Europe' ⁽¹²³⁾. The Community is already encouraging the development of airports, especially regional airports, by granting finance for the development of airport infrastructures under European regional policy and by relying on loans granted by the European Investment Bank.
- (296) In order for the infrastructures concerned to be effectively used, and therefore for the public budgetary resources often granted in this respect to be paid back, the payment of aid to airlines by regional public airports can under certain conditions be a necessary means of attracting the passenger volumes that will enable them to reach the break-even point and cease depending on the public purse to survive.
- (297) In this case, the aid constitutes part of the development of the airport activities at Charleroi and of a known and coherent project. In this regard, the Commission notes that the Walloon authorities have since the late 1980s pursued a coherent policy on airports, which has included particular the specialisation of airports placed under its responsibility, the development of airport infrastructures and searches for users likely to bring in the passenger volumes necessary for sustainable development. A few years ago, Charleroi airport was in Category 'E' of European regional airports as defined by the Committee of the Regions (200 000 to 1 million passengers). It is currently in the next category up and is experiencing one of the highest passenger growth rates in Europe. BSCA has adopted a 'niche' strategy that does not look to offer the same services as those offered by Brussels National airport, but instead looks to specialise in clearly defined networks and in an offer of 'basic' services.

5.3.3.2. *The need for aid*

- (298) The conditions of trade could be changed by this type of aid with two distinct levels. The first level

⁽¹²¹⁾ Pages 5.33 and 6.11 of the abovementioned report.

⁽¹²²⁾ See Page 5-27 of the abovementioned University of Cranfield study, which considers: 'To some extent, subsidisation of air services within the PSO framework can be interpreted as an indirect subsidy to an airport. With regard to some remote airports in Scotland and Ireland, they are almost exclusively reliant on subsidised PSO air services'.

⁽¹²³⁾ While airports directly create 1 100 jobs for every million passengers processed in a year, the overall impact (including direct and induced jobs) is assessed at some 2 200 jobs or double that total. These are economic engines, 'strategic catalysts' that act as a magnet for many other economic activities.

corresponds to the impact on trade on the air transport services market. Aid paid to an airline will create distortion in the skies over Europe, whether or not these companies operate out of the same airports, insofar as they reduce their running costs.

(299) The second level corresponds to a distortion of trade at airport services market level. Aid could lead indirectly to distortion between central and regional airports. Subsidies could encourage a company to relocate from one airport to another and transfer a route from a main airport to a secondary airport. This relocation is however unlikely in that the cost of such a transfer could be very heavy and pose a financial hazard for an airline. Moreover, companies are sensitive to the type of airport services on offer, which correspond to clearly defined commercial strategies: main airports and secondary airports do not offer the same type of airport services to airlines, as the former offer full services, while the services offered by the latter are generally more basic.

(300) The opening of a route operating out of a regional airport could attract passengers who initially travelled out of a main airport. Diversion of traffic could then follow, with a resultant diversion of income related to airport activity. This type of distortion, however, has to be put in perspective. Secondary airports present inconveniences for passengers in comparison with main airports (distance from main cities, problem of connections between main cities and secondary airports, absence of airline connections) and there is not therefore an automatic 'drain' towards the secondary airports. In addition, it appears that when an airline sets up at a secondary airport, the passenger traffic will not necessarily be diverted from the main airport to the secondary airport. On the contrary, it appears that this could be a factor in stimulating the market for both airports. In this regard, the appearance of Ryanair on the Charleroi/Brussels-Dublin route in 1997 is informative. The total regular traffic, that is, from Brussels National and Charleroi to Dublin, doubled in volume very quickly and has continued growing for the past seven years. According to the figures supplied by Ryanair, the traditional companies operating out of the main airport (Aer Lingus and Sabena until 2001) have not lost passengers following the arrival of Ryanair; they reduced their prices under the competitive pressure from the Irish company, and this stimulated the market and created an additional demand for transport services.

(301) Distortions on the airport services market may appear between regional airports, and this type of distortion is

must more critical. The number of small airports looking to develop is significant in Europe, while the number of airlines currently willing to run the risk of opening new routes is relatively small. The airlines concerned are therefore in a favourable position in comparison with the regional airports, and could easily place them in a competition situation. Ryanair has taken advantage of competition between airports just a few kilometres, as was the case in France where it played on the possibility of rivalry between the airports at Pau and Tarbes, about 30 kilometres apart. It can also do this between airports located in separate Member States.

(302) Regional airports are not always managed as companies, but as public infrastructures that fulfil functions related to transport policy, regional planning or local development. It is not uncommon for the public authorities to agree to grant aid, for example through an airport management company. Public funds can then be made available to companies for reasons other than sustainable airport development, such as development of regional activity, or improving tourist facilities or the image of a region. These subsidies could, if not set in a framework, reach unreasonable proportions and fail to achieve the desired objective, namely the development of regional airports on a long-term basis.

(303) The second condition is that the aid granted to the airlines should apply only to the opening of new routes or new frequencies, generating an increase in the net volume of passengers departing from the regional airport, so that part of the risk borne by the company is taken on.

(304) In principle, aid should not be paid when the route is already being operated: the risk being run by the company is less, maybe even zero, and the need for aid is not justified. Thus, when a company already operates a route from an airport, it will not be able to benefit from public aid.

(305) Also, aid must not be paid to an airline for a new route that it is operating in substitution for, and following the abandonment of, an old route that had previously benefited from start-up aid. In fact, in this regard the airport would not have any net positive effect in relation to the number of passengers arriving at its site, all other things being equal. On the other hand, the simple substitution of one route with another route, still operating from Charleroi and expected to generate at

least an equivalent number of passengers for the airport, during the period covered by the aid, would not call into question the continuation of payment of aid for the complete period.

- (306) For the future, aid could not be granted for a route provided by Ryanair in replacement for another route that it had previously served from another airport located in the same economic attraction zone or population centre. The Commission in fact considers it essential that start-up aid does not create any higher bid for a subsidy, for example through such relocations of routes following the granting of maximum aid. Such a practice would in fact run contrary to the whole objective of start-up aid, which is a development of the airport concerned in keeping with the common interest.
- (307) In addition, aid must not be intended to assist a new entrant to open connections that are already open and enter into competition with an existing operator already working on that route leaving the airport. The new arrival must rely on its strength alone, and not on public aid, to compete with an existing operator.
- (308) In this case, the aid granted to Ryanair was paid in return for the risk taken by the company in basing up to four aircraft operating at least three rotations per day for a period of 15 years; this represents at minimum an undertaking to operate 12 new routes or frequencies from Charleroi. The routes opened since the signature of the agreements with BSCA in 2001 are London, Milan, Liverpool, Rome, Carcassonne, Barcelona/Gerona, Venice, Pisa, Shannon and Glasgow. As no carrier was operating the above-mentioned routes out of Charleroi, the Walloon aid was not used to develop direct competition with an existing operator leaving from Gosselies.
- (309) The Commission also notes that Ryanair has not, in the meantime, closed any other routes that it was operating out of Charleroi, the Belgian authorities should take account of this possibility, were it to occur, by calculating the ceiling of any aid that could be allocated.
- (310) On the other hand, no necessity has been demonstrated with regard to the Charleroi-Dublin route; this route had already existed for almost four years when the 2001

agreements were signed. Its economic viability had already been demonstrated: there was therefore no need to grant operational aid for the use of this route.

5.3.3.3. *The incentive nature of the aid*

- (311) Aid must have an incentive effect: it must allow a business to develop an activity that it would not have embarked upon without public support. This activity, however, must prove itself to be profitable in the long term without aid. For this reason, aid intended for launching new connections or for increasing frequencies must be limited in time. Aid is used when a new route is launched, but it cannot maintain the route artificially: routes must be economically viable. It is also possible to stipulate that the aid must be degressive over time in order to reinforce the incentive nature of the aid. Degressive aid allows a carrier to be helped when a route is started up and then to be encouraged to rely fully on its own strengths later. Phased reduction can also depend on the size of the airport so that greater intensity of aid is reserved for initial developments at smaller-category airports and reduced when they become better known and their power to attract increases.
- (312) Marketing aid is paid for the 15-year contractual period at a rate of EUR 4 per passenger, without phased reduction, throughout the contractual period. It does not therefore constitute an incentive for the launch of a new route, but a simple undertaking to bear operational costs on a continuous basis. Its duration should therefore be shortened and associated with the effective costs of the start-up period, in the light of the practice established by the Commission in the framework of the start-up aid for maritime services. Because of the similarity to public service obligation schemes, the Commission considers that a maximum period of five years following the opening of each route would be reasonable, especially for point-to-point connections within Europe. In fact, if the route and the airport concerned truly need to make themselves known, and if start-up aid can be justified in that regard, it is also advisable to maintain the overall competition environment in the air transport industry.
- (313) The Commission notes that a period of three years was accepted in the maritime freight services industry. A maximum period of five years can be applied in the air transport industry, especially for the low-cost companies. This sector is clearly dynamic in Europe, as witnesses the exponential growth in turnover. A report

by the University of Cranfield⁽¹²⁴⁾ considers that the low-cost companies, which currently transport some 4 % of passengers in Europe, will see their share reach 12-15 % of the market in 2010. The Commission also notes, especially in view of the circumstances of this case and the comments of certain interested parties, including HRL Morrison, that a period of up to five years may be needed before initial profitability is reached. This limitation is laid down because of the need to preserve the character of start-up aid for new routes in the case in point; this would not be respected if longer periods or periods unlimited in time were allowed.

(314) The airlines themselves normally reach profitability more quickly: in this regard the actor concerned here, namely Ryanair, saw its turnover increase from less than EUR 300 million in 1999 to over EUR 840 million in 2003. In the same period, its activity increased from 5,3 to 15,7 million passengers. The company's profits followed a similar trend, increasing from about 57 to 239 million euros. It has therefore been proved that low-cost airlines reach profitability very quickly; Ryanair's management report for the third quarter of the year 2003-2004, published on 28 January 2004, shows that 73 of the 146 routes operated by the company have been profitable for less than 12 months. The Commission notes that despite this, Ryanair had managed to produce a net profit after taxation of 19-25 %, according to the quarter in question, and 28 % for the last year, basis year 2002, which ended on 31 March 2003.

(315) It is therefore clear that the routes opened by Ryanair become profitable almost immediately and very soon enjoy a declared seat occupation coefficient of some 80 %, even though a slight fall occurs afterwards. The company confirmed this itself in its management report for the first six months of 2003-2004, published on 3 November 2003; it pointed out that for the routes opened in spring 2003, for example in Sweden, the Netherlands and France, which had a seat occupation coefficient lower than the anticipated figure, it was already being planned to substitute these places served unless there was a noticeable improvement from winter 2003 onwards.

(316) The Commission is however aware that in this case, it is adopting for the first time a decision relating to aid granted to an airline for starting up a route. It believes that the incentive and proportional nature of the aid should be assessed according to the three separate parameters already mentioned, which all work together for the common interest; the general struggle against air congestion through development of the offer, which is

particularly relevant in densely populated areas, the general economic situation of the region in question and its level of development, and the development of the competition that the specified aid allows to be facilitated. In this case, the Commission takes account of the fact that the town of Charleroi is located in a province (Hainaut) that has a per capita income significantly lower than the Community average, but is also located in a large economic wealth and population area, close to both Brussels and Lille and well connected by the road network for allowing movement of travellers. The Commission also notes that the initial contract allowed subsidies for a 15-year period. It therefore considers it convenient, for this first decision and in order to adapt the management of routes in question progressively and take account of the specific situation of the airport in relation to its geographical location and very low incidence of departures, to consider the period of five years mentioned above as permissible for the payment of start-up aid.

(317) With regard to the 'one-shot' contributions, and regardless of their possible proportional nature, their flat-rate, singular nature at the opening and their absence of connection with the real costs borne by Ryanair does not, subject to the Belgian authorities' providing other demonstrations, allow the consideration that they are such as to encourage the profitable development of the routes thus aided. In any case, 'one-shot' contributions, and contributions for marketing costs, should be assessed globally in relation to the start-up costs of each new route, in order to prevent the cumulative aid total from exceeding the authorised threshold.

5.3.3.4. *Proportionality of aid*

(318) A double link of proportionality must be established between the aid and its context. Firstly, there must be a strict link between the aim of the airport development, which passes through net development of passenger traffic, and the level of aid paid to the airline. The total aid must therefore be calculated per passenger. An airline that cannot deliver the volume of passengers necessary for its development to an airport will not therefore be unduly favoured. Conversely, a company that fulfils the objective that makes development of the airport possible will reap the benefits. In BSCA's case, the 'marketing' aids are calculated per embarking passenger. There is therefore a link of proportionality between the aid and the increase in passenger traffic necessary for developing the airport activity. On the other hand, aid given as 'one-shot' incentives is not calculated per embarking passenger and does not therefore show this relation of proportionality. Its total

⁽¹²⁴⁾ 'Europe's Low Cost Airlines: An analysis of the Economics and Operating Characteristics of Europe's Charter and Low-Cost Scheduled Carriers': Air Transport Research Report 7, Cranfield.

amount, if 12 routes were opened, would be in the region of EUR 2,9 million ⁽¹²⁵⁾. Compared with the number of embarking passengers anticipated for these 12 routes, that is, about 600 000 per year ⁽¹²⁶⁾, this sum would total about EUR 4,8 per passenger over one year and about EUR 1,3 per passenger over three years. Its definitive proportional character therefore remains to be demonstrated with regard to the second criterion.

(319) The second proportionality must be assessed between the aid and the costs incurred by its beneficiary. With regard to the total of EUR 4 per passenger in relation to marketing aid, this would indicate that some 50 % of the said costs were borne, which appears high. In any case, the assessment of proportionality should be controlled and analysed by Belgium in relation to the additional marketing costs effectively incurred in promoting each airline eligible for the aid over a period of five years. Currently, the marketing costs seem to be determined a posteriori as being the use by Promocoy of the total of EUR 8 paid at a level of 50 % by BSCA and Ryanair respectively; this does not seem to be of such a nature as will guarantee proportionality. In particular, the inclusion of reduced-rate tickets in these costs, and the repayment by Promocoy to Ryanair of the difference in relation to the normal tariff, may constitute expenditure that is in principle unlimited.

(320) Therefore, covering 50 % of the start-up costs for a period of up to five years in the rapidly developing environment mentioned above is already, in the Commission's eyes, a significant duration-and-intensity coupling for start-up costs. In particular, the Commission considers that this context would make it possible only with difficulty to compile business plans for the development of each route for a period in excess of this time. The aid envisaged here should readily make the route known and represents, in the Commission's opinion, a suitable compromise between this requirement and the requirement to respect the competitive environment. In addition, during the 15-year contractual period, each new additional route could benefit from this start-up aid.

(321) With regard to the 'one-shot' incentives, if in essence some of the costs of Ryanair's setting up at Charleroi, such as ground staff training, investments made on site etc., could in theory also be eligible, while other more general costs, with an impact largely outside the scope of BSCA, such as pilot training, do not appear to present the same proportionality or indeed have an

incentive nature. At present, the fixed nature of this aid, not supported by clearly defined costs, will not allow the Commission to make a positive decision in relation to them.

(322) In both cases, it goes without saying that the Commission excludes the possibility of cumulative aid: if the start-up costs for a route relating to marketing or initial investment ('one-shot') are compatible, then common expenses cannot be taken into account at both ends of the route, regardless of where they are situated. This would have the effect of authorising start-up aid at a cumulative rate that could be higher than 50 %.

(323) With regard to intensity of aid, which the Commission limits at 50 % in this case, it points out that it does not apply to all the operating costs, net of income, for the airlines concerned. The only costs eligible for start-up aid at 50 % for a maximum period of five years are the additional start-up costs that the air operator would not have to bear once 'cruising speed' is reached and would require a public contribution in order to share the risk of non-viability linked to the start-up period. They concern, for example, the marketing and advertising costs incurred at the outset for making the link known, the start-up costs borne by Ryanair at the Charleroi site, and exceptional discounts granted on airport charges incurred in launching the route, in relation to the public tariff. Conversely, aid cannot be granted in relation to standard operation costs such as hire or depreciation of aircraft, fuel, crew salaries or catering service costs.

(324) The Commission still considers it preferable, in assessing functional aid, to ensure that the aid goes through a phased reduction in order to guarantee progressive viability of the activity being aided. The present case is somewhat different in that it is not directly linked to the profitability of each airline for the carrier, Ryanair, but to the lack of fame and attractiveness of the airport used as a support at the end of these routes, namely Charleroi. The phased reduction is therefore less necessary as the base being aided, that is, the business plan for each route, should itself contain reducing incentives: for example, advertising for the opening of an airline should be greatest in the year of opening and reduce appreciably in subsequent years. However, Belgium may provide this phased reduction around the central selected rate, in this case 50 %, without the cumulative aid exceeding the total calculated as 50 % of the eligible costs over five years.

(325) The Commission also notes that before the signature of the contract with Ryanair, Charleroi airport formed part of Airport Category E as defined by the Committee of

⁽¹²⁵⁾ This total includes EUR 250 000 for hotel costs, EUR 1 920 000 (that is, EUR 160 000 for each of the twelve lines opened), EUR 768 000 for pilot training, and EUR 4 000 for office equipment.

⁽¹²⁶⁾ Each rotation of Ryanair brings in approximately 100 000 passengers of 50 000 embarking passengers.

the Regions that is, it had the smallest volume of activity with less than one million passengers per year in general. In this regard, the Commission considers it appropriate that Charleroi airport was able to grant aid with a maximum intensity of 50 %; the common interest in development of regional airports in fact implies, in this case, a struggle against its disadvantages such as lack of knowledge. The impact of competition arising from aid does not therefore appear to the Commission to be excessive in relation to this common interest. The Commission could on the other hand consider that an airport that already processes a larger volume would not need to grant the same level of start-up aid. In fact, the opening of a new route from an airport that it already better known and better served appears to present less operational and viability-related risks than in the present case of Charleroi, and these airports should be capable of ensuring their development by paying start-up aid at a lower rate only.

5.3.3.5. *Transparency, equality of operator treatment and non-discrimination in granting of aid*

- (326) The amount of aid granted to an airline for the development of air services must be transparent. It should be calculated per embarking passenger in order to be easily identified and identifiable.
- (327) The fact that an airport is ready to grant aid that provides economic services in return, such as the launch of new routes, must be publicised in order to make it possible for the interested airlines to present themselves and win their case. The rules and principles relating to procurement contracts and concessions should therefore be respected where applicable. Some airports have, for example, used the *Official Journal of the European Union*, Series S, as a means of obtaining publicity ⁽¹²⁷⁾.
- (328) Objective criteria must be developed by an airport wishing to encourage development of air services in terms of maximum totals and periods for aid, in order to ensure quality of treatment between airlines.
- (329) Appeal procedures must be provided at Member State level in order to ensure that no discrimination is

exercised in the granting of aid and that no airline is favoured unfairly at a given airport.

- (330) Belgium has not yet set up a transparent system that allows interested transport providers to open new routes departing from Charleroi. It has not provided a system that allows equality of operator treatment in the granting of aid and the development of objective criteria for aid, while making the maximum amount and duration of aid known. Neither does it have an appeal mechanism that makes it possible to make sure that no discrimination is applied between transport operators.

5.3.3.6. *Penalties and repayment mechanisms*

- (331) Sanction mechanisms must be implemented as and when a carrier fails to respect the undertakings that it has made in relation to an airport when the aid is paid. A system for recovering aid or for seizing a guarantee initially deposited by the transport provider will allow the airport to ensure that the airline is honouring its commitments.
- (332) The contract concluded between Ryanair and BSCA indeed contains a mechanism for recovering the aid if the transport provider fails to honour its commitments. The Commission notes in this respect that the contract signed between Ryanair and BSCA contains a number of provisions in its Point II-2, 'Non-fulfilment through fault of Ryanair', which allow the airport to protect itself at least in part against the departure of the company from the hub. In fact and in essence, if Ryanair reduces its activity out of Charleroi by more than 50 % in comparison with its previous activity during the first five years, or if it reduces the number of aircraft based at Charleroi to less than two, it must repay the whole of the aid granted. This penalty will remain at 66 % of the sums received in the sixth year and reduce progressively by 6,66 % per year, therefore not disappearing completely until ten full years have elapsed.
- (333) The Commission considers that this clause, negotiated contractually between the parties, is well adapted to the objective being pursued in order to ensure sustainable development of the airport and a level of passengers that allows profitability to be reached. It therefore believes that this clause is an essential condition for declaring part of the aid as proportional and therefore compatible with the common market.

⁽¹²⁷⁾ See for example OJ S 219, 14.11.2001, p. 150993, and OJ S 240, 11.12.2002, p. 191371.

5.3.3.7. *Overlapping with other aid*

- (334) The aid granted cannot in principle be combined with other subsidies received by air carriers if it is aid of a social nature or public service compensations recently defined as aid. Neither may it, in accordance with the rules of proportionality laid down above, be combined with other aid for the same costs, including aid paid in another state. The sum total of aid from which a new route benefits must never exceed 50 % of start-up, marketing and 'one-shot' costs combined for the two destinations in question. In the same way, the contributions paid for a destination may not exceed 50 % of the costs for that destination.
- (335) In order to preserve the incentive character of start-up aid for air links over time as a development tool for regional airports only, the Commission believes it necessary to ensure that such aid cannot give any indirect advantage to large airports already largely open to international traffic and competition. Specific attention should therefore be paid to limiting eligible costs when an airline links Charleroi (in this case) with a major airport such as those in Category A and B as defined by the Committee of the Regions, and/or with a coordinated or fully coordinated airport ⁽¹²⁸⁾.
- (336) In addition, such aid cannot be granted when access to a route has been reserved for one carrier only under Article 4 of Regulation (EEC) No 2408/92, and in particular paragraph 1(d) of that article.
- (337) For its routes operating out of Charleroi, Ryanair does not benefit from subsidies in relation to social aid or public service compensation. Access to the routes operated by Ryanair out of Charleroi is not reserved for that one carrier only.

⁽¹²⁸⁾ According to the definitions and the classification shown in Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1). Regulation last amended by European Parliament and Council Regulation (EC) No 1554/2003 (OJ L 221, 4.9.2003, p. 1).

5.4. DESCRIPTION OF MEASURES REQUIRED TO BE UNDERTAKEN BY THE MEMBER STATE CONCERNED IN ORDER TO MAKE THE AID COMPATIBLE

- (338) The Commission notes that the aid paid by BSCA to Ryanair fulfils some of the conditions applicable to aid intended to promote air services operating out of regional airports, but that others have not been fulfilled and that conditions must therefore be imposed in certain cases to allow compatibility.

5.4.1. REDUCTIONS IN AIRPORT CHARGES

- (339) No measure is likely to bring about compatibility between the common market and the airport charge reductions already granted as such by the Walloon Region to Ryanair. Belgium will calculate the total aid to be recovered by taking account of the existence of the single general reduction system provided by the Walloon regulation in Article 7(1) and (2) of the 1998 decree, to which Ryanair has a right throughout the period of application of the specific tariff established by the contract with Ryanair.
- (340) In future the Walloon Region will, if it wishes to adapt its rates in order to make them more attractive, have to publish a new public tariff intended for all airlines. It will also be able, in accordance with the practice already accepted by the Commission, to set up limited period reductions that are made available and granted without discriminating between airport users.

5.4.2. GUARANTEES GRANTED BY THE WALLOON REGION WITH REGARD TO AIRPORT CHARGE LEVELS AND CHARLEROI AIRPORT OPENING TIMES

- (341) No measure is likely to bring about compatibility between the common market and the compensation guarantees for financial losses caused to Ryanair through the Walloon Region's use of its regulatory powers. Belgium shall ensure that these guarantees are void.

5.4.3. REDUCTION IN GROUND HANDLING TARIFFS GRANTED BY BSCA

- (342) In the absence of any proof that the funds used by BSCA to grant the reductions are of purely commercial

origin, the totals granted to Ryanair in that respect constitute State aid. This aid, in the context of the forthcoming liberalisation of Charleroi airport, is likely to distort competition and alter conditions of trade to an extent contrary to the common interest. Therefore, no measure is likely to bring about compatibility between the common market and the reductions on ground handling service charges granted by BSCA to Ryanair. Belgium will calculate the total aid to be recovered by calculating the difference between the operating costs borne by BSCA and linked to the ground handling services provided to Ryanair and the price invoiced to the airline. Insofar as the two-million-passenger threshold provided for in Directive 96/67/EC has not yet been reached, Belgium can deduct from this total any profit made by BSCA on its other strictly commercial activities.

5.4.4. OTHER ALLOCATIONS INTENDED TO PROMOTE AIR SERVICES OPERATING OUT OF REGIONAL AIRPORTS

(343) The other allocations granted by BSCA, including those in the form of a marketing contribution, 'one-shot' incentives and provision of office space, and in the agreements signed between the parties and covered by this decision, are deemed compatible with the common market as start-up aid for new routes, subject to the following conditions:

- All the contributions shall be limited in terms of duration. In view of the intra-European destinations covered, this duration may not exceed five years following the opening of a new route. These contributions may not be paid if the route in question is opened in place of another route closed by Ryanair within the preceding five years. In future, the aid will no longer be granted for a route provided by Ryanair as a replacement for another route previously served by it from another airport located in the same economic attraction zone or population area.
 - The 'marketing' contributions, currently established at EUR 4 per passenger, should be justified in a development plan compiled by Ryanair and validated a priori by BSCA for each route concerned. This plan shall specify the incurred costs eligible, which must relate directly to the promotion of the route with the aim of making it viable without aid after an initial period of five years. BSCA shall also validate a posteriori the start-up costs effectively incurred for each airline at the end of the five-year period; where necessary, an independent auditor shall assist BSCA in this task.
 - With regard to the portion of these contributions already paid by BSCA, a similar exercise should also be conducted to validate this aid on the same principles.
 - The 'one-shot' contributions to the opening of the route do not currently appear to correspond to the same logic and should be recovered, except for the portion that Belgium can justify as being directly linked to the costs incurred by Ryanair at the Charleroi airport platform that are proportional and incentive in nature.
 - The sum total of aid from which a new route benefits can never exceed 50 % of the cumulative start-up, marketing and 'one-shot' costs for the two destinations in question, including Charleroi. In the same way, the contributions paid for a destination may not exceed 50 % of the effective costs for that destination. Specific attention shall be paid in these evaluations to the routes that link Charleroi to a major airport, such as those within Categories A and B according to the Committee of the Regions, and/or to a coordinated or fully coordinated airport.
 - Contributions paid by BSCA that would have exceeded the criteria thus specified at the end of the five-year starting period must be repaid by Ryanair.
 - The contributions paid where necessary for the Dublin-Charleroi route, under the November 2001 contracts, shall be recovered.
 - Belgium shall set up a non-discriminatory aid regime aimed at ensuring equality of treatment for airlines wishing to develop new airline services from Charleroi airport, according to the objective criteria established by the present decision.
- (344) Insofar as these conditions are not fulfilled for a portion of the aid, whether it corresponds to a category of aid or to an aided route, or if the terms of the balance of the agreements concluded between Ryanair and BSCA are substantially altered, Belgium must recover all the corresponding aid mentioned in the previous paragraph.

5.5. SUMMARY BY THE COMMISSION ON ITS POLICY
GUIDELINES RELATING TO THE FINANCING OF AIRPORTS
AND AIR LINKS

- (345) Before formulating its conclusions, the Commission wishes to recall the general context and the limits, and to give some preliminary indications to both public and economic actors on the political consequences that it will propose, in order to clarify further the two themes of financing of airports and airline start-up costs.
- (346) The general context of this file is the opening of the skies over Europe, a subject on which the Commission has been working for over 10 years. The third air package, in force since 1993, has led to a new freedom of operation through the introduction of the Community licence, to unrestricted access to the intra-Community market since April 1997, and to freedom of tariffs. As a corollary, public service obligations have allowed the Member States that so wish to implement tools for developing their territory.
- (347) Beyond this framework, various actions aimed at this liberalisation, some of which have already been mentioned, related among other things to the allocation of slots, especially at congested airports, liberalisation of ground handling services and equality of access to computerised reservation services.
- (348) In the same way the opening of the sector, which has naturally had a major impact on the activity and actions of traditional airlines or flag carriers, has been accompanied by a strict discipline relating to State aid. The application of the principle of single aid for restructuring ('one time — last time') has thus allowed the most reactive ones move from a relatively protected way of operation to a normal economic actor behaviour pattern.
- (349) The recent developments made possible by the Open Sky judgments⁽¹²⁹⁾ of the Court of Justice will also promote consolidation of the European players and their ability to face competition from third-country airlines on a Community basis.
- (350) There have also been other major developments on the European air transport market in recent years; one of these is the emergence of new Community-size companies with promotional rates supported by a low-cost structure. Ryanair is one of the main and more successful actors in this growth segment. The Commission can but welcome this and appreciate the contribution made by these actors to the general reduction in prices in the air transport sector in Europe and to the democratisation of access to this mode of transport. As the guardian of the Treaty, it must nevertheless ensure that the rules of the internal market are complied with and, in particular, that the rules ensuring fair competition are correctly applied, for example where State aid proves to be incompatible. Without this discipline, certain air routes could be offered on a bargain basis only, rather than as a long-term service.
- (351) Similarly, airports which were often subject to purely territorial considerations and were often established initially in Europe as military airfields, have in many cases been transferred from State control to that of the regions, to public companies, or even to the private sector. However, the Commission is not aware of any case of an ex nihilo creation of a private airport without the involvement of public funds. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital.
- (352) Some of the financial burdens of these airports, whether they are private or public, are however often covered by compensations for public service relating to safety or security tasks, or by other contributions to the costs of activities which would not be economically viable in themselves but which would remain necessary for the operation of these platforms. These may concern air traffic control, police or fire fighting services, etc. Similarly, infrastructure financing and maintenance is still mainly ensured by public funds.
- (353) As mentioned above, there is currently no overall Community vision of how some of these charges can be financed by the public authorities, nor a common framework for charging for the use of airport infrastructure. The Commission wishes, however, to propose such a framework soon, for example in the form of a communication on the financing of airports, which will allow the Member States, the public authorities and public or private airport managers to place their relationship in a coherent, competitive environment at European level. In this regard, the Commission shall ensure that the practice relating to reductions in airport fees, and a clear delimitation of the charges that can be assumed by public funds and those

⁽¹²⁹⁾ Court Judgments of 5 December 2002 in Cases C-466 to C-469/98 and C-470 to C-472/98, Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium and Luxembourg respectively. ECR, p. I-9427 to 9741.

that must be borne by the airport manager from its own resources, are incorporated into that framework. It will thus show that opposing public and private airports as regards fixing of airport charges is an inaccurate simplification of a much more complex reality.

(354) The airports were also required to develop their offer, that is, the air links that they offered, whether it was to use the existing public infrastructures better or to fulfil the requirements of their business statutes. In this regard, secondary or regional airports such as Charleroi have faced a different equation from that faced by the major European hubs such as London, Paris or Frankfurt. Like other intermediate airports, they do not have any large reference airline that concentrates its operations on that airport in order to offer a maximum of correspondences to its passengers and profit from the large-scale savings that the structure would allow them. A regional airport such as Charleroi bas, in addition, to counterbalance its lack of image and awareness in relation to the larger airports.

(355) For Ryanair, the Commission notes that unlike other low-cost companies, it offers the choice of serving secondary airports almost exclusively. This option is quite specific to it and does not necessarily represent the trends of its competitors the other low-cost companies, which often serve the central airports or well-established regional airports.

(356) In this regard, the Commission notes, as it puts into practice in the present decision, that such increased use of the secondary airports is an asset in the fight against air traffic congestion at the major European hubs. A greater number of access points for intra-European flights is thus a favourable element in this matter, but the points can only develop with an initial public incentive. Transparency, non-discrimination and proportionality in relation to finance offered to airports, together with the presence of a common interest in relation to State aid granted to airlines, should allow airport activity to develop in accordance with the rules of the treaty. In this spirit, the decision accepts the principle of start-up costs for the first time in the air transport industry, while ensuring that the usual rules of State aid are complied with.

6. CONCLUSIONS

(357) The Commission notes that Belgium has unlawfully provided aid for the benefit of the airline Ryanair in violation of Article 88(3) of the Treaty. However, for the contribution that this aid can make to the launching of new air transport services and the sustainable development of a regional airport, a portion of this aid may be declared compatible with the common market, subject to the conditions set out in sections 338 to 344.

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

Article 3

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

Article 4

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

- 1) The contributions must relate to the opening of a new route and be limited in time. In view of the intra-European destinations covered, the time period must not exceed five

- years following the opening of a route. The contributions may not be paid for a route opened as a replacement for another route closed by Ryanair in the preceding five years. In future, aid may not be granted for a route that Ryanair has provided in replacement for another route that served previously from another airport located in the same economic or population catchment area.
- 2) The marketing contributions, currently set at EUR 4 per passenger, must be justified in a development plan compiled by Ryanair and validated by BSCA for each route concerned. The plan shall specify the costs incurred and eligible, which must relate directly to the promotion of the route with the aim of making it viable without aid after an initial period of five years. At the end of the five-year period, BSCA shall a posteriori validate the start-up costs incurred by each airline, and BSCA shall where necessary enlist the help of an independent auditor in the task.
 - 3) With regard to the portion of contributions already paid by BSCA, a similar exercise must be carried out to validate this aid on the same principles.
 - 4) The one-shot contributions paid as a lump sum when Ryanair set up at Charleroi, or whenever a route was opened, must be recovered, except for any portion that Belgium can justify as being directly linked to the costs that were incurred by Ryanair at the Charleroi airport hub and are proportional and incentive in nature.
 - 5) The sum total of aid from which a new route benefits must never exceed 50 % of start-up, marketing and one-shot costs aggregated for the two destinations in question, including Charleroi. In the same way, the contributions granted for a destination must not exceed 50 % of the actual costs for that destination. Specific attention shall be paid in these evaluations to routes that link Charleroi to a major airport, such as those included in Categories A and B as defined in the Committee of the Regions' outlook opinion of 2 July 2003 on the capacity of regional airports and identified in the present Decision, and/or to a coordinated or fully coordinated airport within the meaning of Regulation (EEC) No 95/93.
 - 6) The contributions paid by BSCA that at the end of the five-year start-up period exceed the criteria laid down must be repaid by Ryanair.
 - 7) The contributions paid, where applicable, for the Dublin-Charleroi route under the November 2001 contracts examined herein shall be recovered.
 - 8) Belgium shall set up a non-discriminatory aid scheme intended to ensure equality of treatment for airlines wishing to develop new air services departing from Charleroi airport in accordance with the objective criteria laid down in the present Decision.
- Article 5*
1. Belgium shall take all the necessary measures to recover from the beneficiary the aid mentioned in Articles 1 and 2 and unlawfully made available to it. The aid mentioned in Article 1 may however remain partly unrecovered, for the portion that does not exceed the ceiling, in compliance with the conditions laid down in Article 4. The recovery shall be effected immediately in accordance with the procedures of national law, insofar as they allow immediate and effective enforcement of the present Decision. The aid to be recovered shall include interest running from the date at which it was made available to the beneficiary to the date of recovery. The interest shall be calculated on the basis of the reference rate used for calculating the subsidy equivalent for regional aid. It shall be calculated on a compound basis.
 2. If the conditions laid down in Article 4 are not complied with for a portion of the aid, whether that portion corresponds to a category of aid or an aided route, or if the terms for balancing the agreements concluded between Ryanair and BSCA are substantially altered, Belgium shall be required to recover all the corresponding aid referred to in the said article.
- Article 6*
- Belgium shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with it.
- Article 7*
- This decision is addressed to the Kingdom of Belgium.
- Done at Brussels, 12 February 2004.
- For the Commission*
Loyola DE PALACIO
Vice-President of Commission
-