Provisional text

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

13 May 2020 (*)

(State aid — Aviation sector — Aid granted by Italy in favour of Sardinian airports — Decision declaring the aid partly compatible and partly incompatible with the internal market — Imputability to the State — Beneficiaries — Advantage for co-contracting airlines — Market economy operator principle — Effect on trade between Member States — Adverse effect on competition — Obligation to state reasons — Aid scheme — De minimis aid — Recovery)

In Case T−716/17,

Germanwings GmbH, established in Cologne (Germany), represented by A. Martin-Ehlers, lawyer,

applicant,

v

European Commission, represented by T. Maxian Rusche and S. Noë, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA 33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1),

THE GENERAL COURT (First Chamber, Extended Composition),

composed of S. Papasavvas, President, J. Svenningsen (Rapporteur), V. Valančius, Z. Csehi and P. Nihoul, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 October 2019,

gives the following

Judgment

Background to the dispute

The measures at issue

1 The island of Sardinia (Italy) has five airports, including Alghero, Cagliari-Elmas and Olbia airports.

2 Alghero airport is operated by So.Ge.A.AL SpA ('SOGEAAL'), whose capital was entirely subscribed by local public bodies and the majority of whose shares is held by the Regione autonoma della Sardegna (Autonomous Region of Sardinia, Italy; 'the Autonomous Region'), including indirectly through Società Finanziaria Industriale Regione Sardegna (SFIRS). Cagliari-Elmas airport for its part is operated by

So.G.Aer SpA ('SOGAER'), a company the majority of whose shares is owned by the chamber of commerce of Cagliari ('the CCIA of Cagliari'), while Olbia airport is operated by GEASAR SpA ('GEASAR'), a company registered in Olbia, the majority of whose shares is owned by a private company, Meridiana SpA.

The provisions adopted by the Autonomous Region

– *Article 3 of Law No 10/2010*

3 On 13 April 2010, the Autonomous Region adopted legge regionale n. 10 — Misure per lo sviluppo del trasporto aereo (Regional Law No 10 — Measures for the development of air transport) (*Bollettino ufficiale della Regione Autonoma della Sardegna* No 12, of 16 April 2010) ('Law No 10/2010').

4 Article 3 of Law No 10/2010, entitled 'Incentives to seasonal adjustments of the island's air routes' (Incentivi alla destagionalizzazione dei collegamenti aerei isolani), reads as follows:

'1. Expenditure of [EUR] 19 700 000 for the year 2010 and of [EUR] 24 500 000 for each of the years 2011 to 2013 shall be authorised to finance the island's airports with a view to strengthening and developing air transport as a service of general economic interest, including seasonal adjustments of air routes, in accordance with Communication from the Commission 2005/C 312/01 — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports.

2. The criteria, nature and duration of the transport offer, together with the guidelines for the drafting of plans of activities by the airport management companies, which must take into account the measures relating to territorial continuity referred to in Article 2, shall be defined by decision of the Regional Executive to be adopted on the proposal of the Member of the Regional Executive responsible for transport, in agreement with the Members of the Regional Executive responsible for planning, the budget, credit and regional development, tourism, handicrafts and trade, agriculture and agricultural and livestock reform, cultural heritage, information, recreation and sport.

3. The decision referred to in paragraph 2 and the plans of activities, including those already defined by the airport management companies on the date of entry into force of the present Law, together with the corresponding measures and contracts, shall be financed if they are drawn up in accordance with the criteria, nature and duration of the transport offer and with the guidelines referred to in paragraph 2 and shall first be submitted for a binding opinion to the competent committee.'

– *The measures implementing Law No 10/2010*

5 In accordance with Article 3(2) of Law No 10/2010, the Executive of the Autonomous Region adopted several acts implementing the measures provided for in Article 3 of that law ('the implementing measures'), in particular deliberazione della Giunta regionale n. 29/36 (Regional Council Decision No 29/36), of 29 July 2010 ('Regional Decision No 29/36'), deliberazione della Giunta regionale n. 43/37 (Regional Council Decision No 43/37), of 6 December 2010 ('Regional Decision No 43/37'), and deliberazione della Giunta regionale n. 52/117 (Regional Council Decision No 52/117), of 23 December 2011 ('Regional Decision No 52/117') (together with Article 3 of Law No 10/2010, 'the measures at issue').

6 Those implementing measures define three clusters of 'activities' for which airport operators could receive compensation from the Autonomous Region for the years 2010 to 2013, namely:

– increase in air traffic by airlines ('activity 1');

– promotion of the island of Sardinia as a touristic destination by airlines ('activity 2');

– further promotional activities entrusted by airport operators to third service providers other than airlines on behalf of the Autonomous Region (‘activity 3’).

7 Regional Decision No 29/36, on the one hand, specified that, in the implementation of Article 3 of Law No 10/2010, the objective of reducing the seasonality of air routes involved increasing the frequency of flights during the mid-season and the winter season and opening up new air routes. On the other hand, that decision stated that the ultimate objective pursued by the measures provided for in Article 3 of Law No 10/2010 for the promotion of a regional air transport policy was the strengthening of economic, social and territorial cohesion, as well as the development of the local economies, tourism and culture of the island of Sardinia.

8 In that regard, Regional Decision No 29/36 defined the criteria, nature and duration of the transport services for which compensation could be provided during the period 2010-2013 as well as guidelines for the development and evaluation of the ‘plans of activities’ drawn up by the airport operators.

9 Specifically, in order to receive financing provided for by Law No 10/2010, an airport operator had to submit for approval to the Autonomous Region a detailed plan of activities. That plan had to identify which of the activities, of activities 1 to 3 mentioned in paragraph 6 above, the airport operator intended to implement in order to attain the objectives of Law No 10/2010. That plan was to be achieved through specific agreements between the airport operator and airlines.

10 Where an airport operator wished to receive financing for activity 1, the plan of activities which it submitted to the Autonomous Region had to identify the ‘routes of strategic interest’ (domestic and international) and define the targets per year concerning flight frequency, new routes and number of passengers.

11 According to the Italian authorities, the operation of those routes of strategic interest constituted the service of general economic interest which the airlines provided in exchange for compensation.

12 A plan of activity implementing activity 2 had to define specific marketing and advertising activities aimed at increasing the number of passengers and at promoting the catchment area of the airport.

13 Regional Decision No 29/36 provided that the plans of activities had to be backed up by forecasts of the prospects for the profitability of the activities they identified.

14 According to Regional Decision No 29/36, the plans of activities had to respect certain principles:

– the routes of strategic interest established by the plans could not overlap with routes already operated under a public service obligation;

– the financing for each of the subsidised routes had to decrease over time;

– the financial agreement concluded with the airlines was to include a plan for promotion of the territory.

15 If the Autonomous Region noticed inconsistencies between, on the one hand, the plans of activities submitted by the airport operators and, on the other hand, the provisions of Law No 10/2010 and its implementing measures, it could require that changes be made to those plans of activities.

16 After having approved the various plans of activities submitted to it by the airport operators, the Autonomous Region distributed among the airport operators the financial resources available for each of the years 2010 to 2013.

17 Where the total of the contributions requested by the airport operators exceeded the amount provided for by Law No 10/2010, Regional Decision No 29/36 laid down preferential award criteria.

18 The final amounts of the annual contributions were determined a posteriori, taking into account the amounts, possibly lower than those provided for in the plans of activities, actually paid by the airport operators in implementation of the said plans. For the purposes of confirming those amounts, those operators had to submit reports specifying, in particular, the costs actually incurred for the actions undertaken and accompanied by supporting documents.

19 Moreover, the implementing measures provided that airport operators were to monitor the performance of airlines. In particular, they required that the specific agreements concluded between airport operators and airlines provide for the imposition of penalties on airlines for non-fulfilment of pre-defined targets, inter alia in terms of frequency of flights and number of passengers.

20 Finally, the Autonomous Region's contributions were paid via an ad hoc regional fund set up and managed by SFIRS, which withheld 4% of the final total amounts of those contributions. Moreover, since only a first instalment, corresponding to 20% of the funds due for a reference year, was paid a priori, airport operators could request financial advances from SFIRS, which were granted against payment of commissions and interest.

The contract at issue

21 The applicant, Germanwings GmbH, is a low-cost passenger airline, active since 2002, which operates inter alia a network of short-, medium- and long-haul routes, mainly to and from airports in the European Union, including Cagliari-Elmas airport.

22 SOGAER, the operator of Cagliari-Elmas airport, published on its website a notice inviting airlines to submit to it business plans for routes to and from that airport and for the conclusion of marketing contracts to promote the island of Sardinia.

23 SOGAER submitted to the Autonomous Region plans of activities for 2010 and for the three-year period 2011-2013, together with corresponding funding applications. Those plans were approved and the amounts allocated to SOGAER for 2010 and for the period 2011 to 2013 were determined by Regional Decisions No 43/37 and No 52/117, respectively.

24 In that context, the applicant and SOGAER concluded a contract in 2012 ('the contract at issue'). By that contract, the applicant undertook, in return for remuneration in an amount of EUR 30 000, to promote the region of Sardinia, Cagliari and its direct connections between Cagliari-Elmas and Cologne-Bonn (Germany) and between Cagliari-Elmas and Stuttgart (Germany). To that end, the applicant entrusted the organisation of a promotion campaign to a third-party service provider, at a total cost of EUR 40 000.18, the difference with the amount of EUR 30 000 originating from SOGAER having been borne by the applicant. That promotion campaign took place between 10 December 2012 and 9 January 2013.

25 On 20 December 2012, the applicant issued an invoice for an amount of EUR 30 000. SOGAER honoured that invoice by paying that amount via electronic transfer on 19 April 2013 ('the contested payment').

The contested decision

26 On 30 November 2011, the Italian Republic, in accordance with Article 108(3) TFEU, notified the Commission of Law No 10/2010, which was examined in accordance with Chapter III of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

27 By letter dated 23 January 2013, the Commission informed the Italian Republic of its decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU concerning the notified scheme ('the aid scheme at issue'). By the publication of that decision in the *Official Journal of the European Union* on 30 May 2013 (OJ 2013 C 152, p. 30), the Commission invited interested parties to submit their comments on the purported aid scheme.

28 The Italian authorities and interested parties, including the operators of the Alghero, Cagliari-Elmas and Olbia airports, submitted written comments. The applicant did not submit written comments. The Commission forwarded the comments of the interested parties to the Italian authorities, which were able to submit their own comments thereon.

29 By letters dated 24 February 2014, the Commission informed interested parties of the adoption, on 20 February 2014, of a Commission communication entitled 'Guidelines on State aid to airports and airlines' (OJ 2014 C 99, p. 3) and of the fact that those guidelines would become applicable to the case at hand from the moment of their publication in the *Official Journal*. On 15 April 2014, a notice was published in the *Official Journal* inviting Member States and interested parties to submit comments on the application of those guidelines to this case within one month of their publication date (OJ 2014 C 113, p. 30).

30 On 29 July 2016, the Commission adopted Decision (EU) 2017/1861 on State aid SA 33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1; 'the contested decision'), the operative part of which reads as follows:

'*Article 1*

1. The scheme that Italy established by … Law [No 10/2010] does not involve State aid within the meaning of Article 107(1) [TFEU] in favour of SOGEAAL …, SOGAER … and GEASAR …

2. The scheme that Italy established by Law No 10/2010 constitutes State aid within the meaning of Article 107(1) of the Treaty in favour of Ryanair/AMS, easyJet, Air Berlin, Meridiana, Alitalia, Air Italy, Volotea, Wizzair, Norwegian, JET2.COM, Niki, Tourparade, [the applicant], Air Baltic and Vueling, in so far as it relates to the operations of those airlines at Cagliari-Elmas airport and Olbia airport.

3. The State aid referred to in paragraph 2 has been put into effect by Italy in breach of Article 108(3) [TFEU].

4. The State aid referred to in paragraph 2 is incompatible with the internal market.

Article 2

1. Italy shall recover the State aid referred to in Article 1(2) from the beneficiaries.

…

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

…

5. Italy shall cancel all outstanding payments of the aid referred to in Article 1(2) with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(2) shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 4

1. Within 2 months following notification of this Decision, Italy shall submit the following information:

– the list of beneficiaries that have received aid under the scheme referred to in Article 1(2) and the total amount of aid received by each of them under the scheme,

– the total amount (principal and recovery interests) to be recovered from each beneficiary,

– a detailed description of the measures already taken and planned to comply with this Decision,

– documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request of the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Italian Republic.'

31 With regard to the scope of the contested decision, the Commission stated, in recitals 344 to 346 of that decision, that the decision should not cover the aid measures already subject to the separate investigation, concerning Alghero airport. As regards that airport, contracts concluded between SOGEAAL and Ryanair Ltd — already in 2003 and since extended — were the subject of a complaint lodged by an Italian airline. This led to the opening by the Commission, on 12 September 2007, of the formal investigation procedure provided for in Article 108(2) TFEU in relation to alleged State aid granted to and by Alghero airport in favour of Ryanair and other air carriers (OJ 2008 C 12, p. 7). On 27 June 2012, that procedure was extended to include further measures taken by Italy which were not the subject of the original complaint (OJ 2013 C 40, p. 15), such as 'all measures granted to Ryanair and its subsidiary AMS, as well as to the other airlines using [Alghero] airport from 2000 … in particular … includ[ing] grants of financial contributions granted directly from SOGEAAL or transited through it by means of several airport services agreement[s] and marketing services agreements entered upon with Ryanair and other air carriers as from 2000'.

32 That procedure led to the adoption by the Commission of Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL SpA. and various air carriers operating at Alghero airport (OJ 2015 L 250, p. 38), in which the Commission inter alia found, in application of the market economy operator principle, that the contracts that SOGEAAL, which is controlled by the Autonomous Region, concluded with certain airlines and relating to the promotion or start-up of new air routes to and from Alghero airport and to marketing and advertising activities did not constitute aid within the meaning of Article 107(1) TFEU. As regards other airlines — the applicant among them — which concluded analogous contracts with SOGEAAL, the Commission found those contracts to constitute aid, within the meaning of that provision, incompatible with the internal market.

33 For the period from 2010 to 2013, however, the applicant did not conclude any contract with SOGEAAL covered by the aid scheme established by Law No 10/2010.

34 In that regard, while not all of the payments by SOGEAAL for the services under activities 1 and 2 provided for by Law No 10/2010 had been made under contracts examined in the separate investigation relating exclusively to Alghero airport, the Commission considered that the large majority of those payments had been assessed in that other case. Moreover, the Commission pointed out that 'it [was] not straightforward in all cases to make a clear distinction given that the financial relationship between SOGEAAL and a given airline in the relevant period [could] be governed by various contracts only some of which [were] considered in [the case giving rise to Decision 2015/1584]'. The Commission therefore considered that it was appropriate to exclude from the scope of the contested decision all agreements with

airlines concluded by SOGEAAL under the aid scheme at issue in this case or, in other words, the element of the measures at issue relating to Alghero airport.

35 Finally, the Commission considered in the contested decision that the procedure initiated in the present case did not relate to possible aid granted by the airport operators to service providers other than airlines and corresponding to activity 3. Thus, in recital 346 of the contested decision, it considered that it could not take a view on that issue.

Facts subsequent to the contested decision

36 The applicant became aware of the contested decision by letter from the Autonomous Region of 4 August 2016, received on 15 August 2016. By that letter, the Autonomous Region informed the applicant of the adoption of the contested decision and invited it to indicate, on the basis of an abridged version of the contested decision annexed to that letter, which data should be omitted in the public version of that decision in the *Official Journal*, which was published on 18 October 2017.

37 By a letter of 19 August 2016, the applicant replied to the Autonomous Region, stating that it was not in a position to understand the contested decision fully, on account of the missing extracts. It nevertheless identified in that letter the elements which it considered to be confidential.

38 On 7 June 2017, the Autonomous Region adopted a recovery decision, notified to the applicant on 10 August 2017, together with a copy of a non-confidential version of the contested decision in respect of the applicant. That decision ordered the applicant to reimburse the Autonomous Region a sum of EUR 28 881, together with interest of EUR 1 678.48, namely a total amount of EUR 30 559.48.

39 Following that recovery decision, the applicant, by email of 14 August 2017, disputed before the Commission the obligation to pay the sum demanded in that decision, in that the sum constituted *de minimis* aid within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [107 and 108 TFEU] to *de minimis* aid (OJ 2006 L 379, p. 5; 'the 2006 *de minimis* Regulation'). The applicant moreover requested the Commission to provide a written confirmation on which it might rely in the national proceedings it was intending to bring against the contested decision.

40 By email of 18 August 2017, the Commission informed the applicant that it could not provide the requested confirmation, stating inter alia, first, that the contested decision did not provide for a derogation from the recovery obligation for *de minimis* aid, whether under the scheme laid down by the 2006 *de minimis* Regulation or under Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 [TFEU] to *de minimis* aid (OJ 2013 L 352, p. 1; 'the 2013 *de minimis* Regulation'), and, second, that the 'transparency condition' provided for in each of those regulations was not met.

41 By email of 23 August 2017, the applicant challenged the Commission's analysis. Thereafter, the applicant contacted by telephone the Legal Service of the Commission, which informed the applicant, in an email of 13 October 2017, that the position of the services of the Commission had not changed.

Procedure and forms of order sought by the parties

42 By application lodged at the Court Registry on 18 October 2017, the applicant brought the present action.

43 On 5 April 2018 and following a double exchange of pleadings, the written part of the procedure was closed.

44 On 16 May 2018, having heard the parties, the Court decided to suspend proceedings pending the closure of the written part of the procedure in related cases *Ryanair and Airport Marketing Services* v *Commission*

(T−833/17) and *easyJet Airline* v *Commission* (T−8/18), which took place in those cases on 21 September and 23 July 2018, respectively.

45 On 19 June 2019, the Court, during its plenum, decided, on a proposal from the First Chamber and the Vice-President, pursuant to Article 28 of its Rules of Procedure, to refer the case to the First Chamber sitting in extended composition of five judges.

46 On a proposal from the Judge-Rapporteur, the Court then decided to open the oral part of the procedure. In view of that, the applicant and the Commission were asked to produce documents and to respond in writing to questions put by the Court by way of measures of organisation of procedure. They complied with that request within the period prescribed, 3 September 2019. On 6 September 2019, the Commission subsequently submitted an additional response to those organisational measures, which was added to the file.

47 The parties presented oral argument and answered questions put by the Court at the hearing on 3 October 2019. On that occasion, the Commission specified that, contrary to what was set out in the rejoinder, which stated that the action should be dismissed as inadmissible or, in the alternative, as unfounded, it was actually claiming that the action should be dismissed as unfounded.

48 The applicant claims that the Court should:

– annul the contested decision and, in particular, Article 1(2) thereof, to the extent that the applicant is mentioned in that decision, and Article 2(1) thereof, to the extent that the recovery ordered therein pertains to the applicant;

– order the Commission to pay the costs.

49 The Commission claims that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

50 In support of the action, the applicant puts forward three pleas for the annulment of the contested decision, alleging, in essence:

– first, infringement of Article 107(1) TFEU, in that the Commission did not demonstrate the existence of aid, having failed to examine whether SOGAER had acted as a private operator in a market economy;

– second, infringement of Article 107(1) TFEU, in that the Commission did not demonstrate that the aid granted to the applicant distorted or threatened to distort competition and affected trade between Member States;

– third, an error in law on the ground that the Commission did not examine whether the contested payment constituted *de minimis* aid.

First plea in law: infringement of Article 107(1) TFEU, in that the Commission did not demonstrate the existence of aid, having failed to examine whether SOGAER had acted as a private operator in a market economy

51 In support of the first plea, which is divided into two parts, the applicant submits that the Commission did not demonstrate the existence of aid in its favour. By the first part of the first plea, the applicant argues, in

essence, that, since a distinction should be drawn between two different ‘levels’, namely, that of the Autonomous Region and that of the airport operators, the relevant level for the purposes of assessing the existence of State aid is, contrary to the approach followed in the contested decision, that of the airport operators, including SOGAER primarily.

52 By the second part, the applicant submits that an examination of the existence of State aid at the level of SOGAER would have enabled the Commission to conclude that the contested payment fell within the scope of an application of the principle of the private operator in a market economy (‘the private operator principle’).

53 The Commission contends that the first plea should be rejected as ineffective and, in any event, unfounded. In addition, the Commission raises a number of grounds for dismissal on which, in so far as they concern both parts of the first plea in law, it is appropriate to rule in the successive examination of those parts.

First part of the first plea: relevant level for assessing the existence of State aid

54 The applicant claims that, for the purposes of assessing the existence of State aid in the present case, the relevant level of analysis was the level of SOGAER, given that it was appropriate, in essence, to examine the latter’s conduct independently of the aid scheme at issue established by the Autonomous Region.

55 In the first place, the applicant stresses that the aid scheme at issue does not, in itself, contain a subsidy in its favour. Indeed, as is apparent, inter alia, from recitals 76, 78 and 86(d) of the contested decision, the Autonomous Region made its funds available to the airport operators and not to the airlines, with which it moreover had no contractual relationship. At most, that region was the source of financing of the payments made to the airlines.

56 In the second place, the airport operators decided autonomously to conclude contracts with airlines and, where appropriate, to request funds from the Autonomous Region with a view to transferring them to the airlines, given that those operators were under no obligation to seek those funds. The Autonomous Region controls neither SOGAER nor the CCIA of Cagliari, which is a public entity independent of the Autonomous Region and therefore not in a position to apply pressure to SOGAER to require it to seek funds. Moreover, any decision of the airport operators to apply for funds depended on economic considerations specific to them, especially as those operators, in order to access the funds, had to pay a ‘remuneration’ to the Autonomous Region, namely a 4% withholding tax and, where appropriate, commissions and interest, as referred to in paragraph 20 above. Thus, they sought funds from the Autonomous Region only where the expected gains from a contract with a given airline exceeded the costs corresponding to that remuneration as well as all other relevant costs.

57 In fact, according to the applicant, it is appropriate, while disregarding the aid scheme at issue, to examine SOGAER’s conduct in the light of the rules governing State aid, given that SOGAER — whose capital is 94.35% owned by the CCIA of Cagliari — constitutes a public undertaking, as was found in recital 55 of the contested decision, within the meaning of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17). SOGAER is in a situation similar to that of the operators of Pau-Béarn and Nîmes-Uzès-Le Vigan airports, also controlled by local chambers of commerce, which constitute bodies of the French State, as the Court held in its judgments of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943), and of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−165/15, EU:T:2018:953).

58 The Commission raises a plea of inadmissibility directed, in essence, against the whole of the first part of the first plea. In the alternative, the Commission contends that that first part should be rejected as unfounded.

– *Admissibility of the first part of the first plea*

59 The Commission submits that, in the reply, the applicant acknowledged that the private operator principle was not applicable to the Autonomous Region and put forward an argument based on the fact that SOGAER — and not the Autonomous Region — was the sole body providing the aid in question. That argument, which forms, in essence, the first part of the first plea, is new and, therefore, inadmissible.

60 The applicant, in response to a question from the Court, disputes that the first part is inadmissible.

61 In that regard, it should be borne in mind that the arguments which in substance are closely connected with a plea for annulment put forward in the application, cannot be regarded as new pleas for the purpose of the Rules of Procedure, although they were put forward for the first time in the reply. Such arguments constitute an amplification of a plea which has already been raised and their presentation at the reply stage is allowed by the EU Courts (see, to that effect, judgment of 28 January 1999, *BAI* v *Commission*, T−14/96, EU:T:1999:12, paragraph 66 and the case-law cited). However, the admissibility of such arguments put forward in the reply as amplifications of pleas in the application cannot be raised with the aim of compensating for a failure, arising during the initiation of the action, to comply with the requirements of Article 76(d) of the Rules of Procedure, without rendering the latter provision devoid of purpose (see, to that effect, order of 19 May 2008, *TF1* v *Commission*, T−144/04, EU:T:2008:155, paragraph 30)

62 In the present case, while is true that the applicant did not expressly state in the application that it considered SOGAER to be the 'dispensing' body of the aid in question, it did, however, challenge therein the approach adopted by the Commission in the contested decision. As early as the application, the applicant argued that the contract at issue, as opposed to the measures taken by the Autonomous Region, should have been examined in the light of the private operator principle, stating that 'the scheme provided for by [Law No 10/2010] [was] irrelevant, because it [contained], in itself, no subsidy in favour of the applicant'; that 'the [Autonomous Region] ha[d] not paid any subsidy to the applicant', that 'the subsidy [was] paid to the airlines by the airport operators, so that it [was] this contractual relationship which should have been examined for the existence of aid'; and that 'the decisive element [was] the conclusion of the marketing agreement between the airport operator on the one hand and the applicant on the other'.

63 In addition, the applicant, from the time of the application, relied on the fact that SOGAER was a public undertaking, which circumstance would have justified, in its view, examining whether that airport operator had acted as a private operator.

64 It follows that the line of argument of the applicant, according to which SOGAER is the body providing the relevant aid, is not new and that the arguments put forward in the reply under the first part of the first plea constitute an amplification of that plea as set out in the application. Accordingly, the first part of the first plea in law is admissible.

– *Merits of the first part of the first plea*

65 Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, declared incompatible with the internal market. Thus, categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition (see judgment of 13 September 2017, *ENEA*, C−329/15, EU:C:2017:671, paragraph 17 and the case-law cited).

66 As regards the first of the conditions for categorisation as State aid, it should be recalled that intervention by the State or through State resources need not necessarily be a measure adopted by the central power of the State concerned. It can equally be effected by an authority situated below the national level. Indeed, a

measure adopted by a regional authority and not the central power is likely to constitute State aid if the conditions laid down by Article 107(1) TFEU are satisfied (judgments of 14 October 1987, *Germany* v *Commission*, 248/84, EU:C:1987:437, paragraph 17, and of 6 September 2006, *Portugal* v *Commission*, C−88/03, EU:C:2006:511, paragraph 55). In other words, measures adopted by infra-State entities (decentralised, federated, regional or other) of the Member States, whatever their status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 107(1) TFEU, if the conditions laid down by that provision are satisfied (see judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commissio*n, T−92/00 and T−103/00, EU:T:2002:61, paragraph 57, and of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T−267/08 and T−279/08, EU:T:2011:209, paragraph 108).

67 Likewise as regards that first condition, it should be borne in mind that for advantages to be capable of being categorised as State aid within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State (see judgments of 16 May 2002, *France* v *Commission*, C−482/99, EU:C:2002:294, paragraph 24 and the case-law cited, and of 13 September 2017, *ENEA*, C−329/15, EU:C:2017:671, paragraph 20 and the case-law cited), those two subconditions being cumulative (see, to that effect, judgments of 28 March 2019, *Germany* v *Commission*, C−405/16 P, EU:C:2019:268, paragraphs 48 and 63 and the case-law cited, and of 5 April 2006, *Deutsche Bahn* v *Commission*, T−351/02, EU:T:2006:104, paragraph 103 and the case-law cited).

68 In the case at hand, the Commission, in recitals 355 to 361 of the contested decision, under the heading '7.2.1.2 State resources and imputability to the State', examined jointly the two subconditions relating to the use of State resources and imputability to the State. It found first of all, in recital 356 of that decision, that, as regards the aid scheme at issue, it had been financed by resources originating from the Autonomous Region and, as it had originated from a regional law, was imputable to that region and, ultimately, to the Italian State.

69 The Commission then, in recitals 357 to 360 of the contested decision, examined the financial flows from the airport operators to the airlines. In that context, it described the mechanism established by the Autonomous Region, by which that State entity provided financing to the airport operators which requested that financing, on the condition they submit to it for approval plans of activities in which those operators had to set out in detail the manner in which they intended to use those funds, inter alia to remunerate co-contracting airlines, as is apparent from the detailed presentation of the operation of the aid scheme at issue made under the heading '2.7 Mechanism and structure of the financing put in place by the Sardinian Region' in the contested decision. The Commission relied on that description in reaching the conclusion, set out in recital 360 of the contested decision, that the airport operators were to be considered as intermediaries between the Autonomous Region and the airlines, with the result that the payments received by those airlines were financed by funds originating from that region, and were imputable to the latter.

70 On the basis of that reasoning establishing a link between the Autonomous Region and the airlines, the Commission concluded, in recital 361 of the contested decision, that the payments made by the airport operators to those airlines were financed via resources of the Italian State and were imputable to that State.

71 The applicant, by its arguments in the first part of the first plea, calls into question, in essence, that reasoning. It does not dispute, as the Commission found in recital 356 of the contested decision, that the funds made available to the airport operators, over a multiannual period, for them to undertake actions to promote the Sardinian Region as a touristic destination, constituted resources of the Autonomous Region — and therefore of the Italian State — and that the decision to grant such funds to those operators was imputable to that region, and therefore to the State. It does, however, dispute the Commission's conclusion, stemming from recitals 358 to 360 of the contested decision, that those operators, including SOGAER, could be considered as intermediaries between the Autonomous Region and the airlines.

72 According to the applicant, while it is true that the contested payment was made through 'State resources' and that it was imputable to the Italian State, that does not follow from SOGAER's involvement in the aid

scheme at issue established by the Autonomous Region, but rather from the fact that SOGAER is a public undertaking controlled by a body of the Italian State, namely the CCIA of Cagliari. In other words, the Commission was wrong to conclude that the contested payment involved intervention by the Italian State through that region rather than through SOGAER. In those conditions, SOGAER constituted the relevant 'level' for the assessment of the existence of State aid.

73 In that regard, it is appropriate to find that, although the applicant does not expressly refer to the two cumulative subconditions forming the first of the conditions for categorisation as State aid, it challenges, implicitly but necessarily, both the regional State origin of the money used by the airport operators to pay the airlines under the contracts the latter had concluded with them and the imputability to the Autonomous Region of the payments made by those operators in the performance of the contracts concluded with airlines such as the applicant.

74 As regards the use of regional 'resources', it is necessary to reject the line of argument of the applicant according to which the funds of the Autonomous Region are irrelevant given that they were made available to the airport operators and not to the airlines, which received payments only from those operators.

75 It should be borne in mind that it has already been held that, when examining a measure, the Commission may have to consider whether an advantage may be regarded as indirectly granted to operators other than the immediate recipient of the transfer of State resources (see, to that effect, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 61 and 62). In that regard, the EU Courts have also accepted that an advantage granted directly to certain natural or legal persons could constitute an indirect advantage, hence State aid, for other legal persons who were undertakings (see, to that effect, judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraphs 22 to 35; of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 38 and 60 to 66; of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 127 and the case-law cited; and of 15 June 2010, *Mediaset* v *Commission*, T-177/07, EU:T:2010:233).

76 In the present case, the funds made available to the airport operators must be regarded as having been granted indirectly to the airlines, given that the mechanism established by the Autonomous Region made it possible to ensure that those funds corresponded to the remuneration paid by those operators to those airlines. In that regard, it should be noted that, although the applicant calls into question the role of intermediaries played by the airport operators, it has not disputed the existence or the operation of that mechanism.

77 That mechanism provided for a kind of clearance system. In particular, Regional Decision No 29/36 prescribed that selected airport operators were to receive an advance of 20% on the funds solicited in the reference year, followed by a second tranche payment of 60% which was staged and conditional on presenting quarterly reports, and, finally, a last tranche of 20% on presentation of documents enabling the Autonomous Region to verify that the activity had been implemented correctly, that targets had been met and that the costs incurred were genuine. That verification mechanism was therefore intended to prevent each airport operator from obtaining reimbursement of amounts other than those incurred by it to remunerate the co-contracting airlines, such as the applicant, and which are subject to the recovery obligation laid down in Article 2 of the contested decision. The existence of that mechanism also confirms that those airlines' services were financed by that region, since the amounts advanced by the airport operators in remuneration of the co-contracting airlines corresponded to the funds they received at the end of the process from the Autonomous Region.

78 Furthermore, as is apparent from recitals 242 to 246 and 313, 314 and 317 of the contested decision, setting out the comments they had submitted in the context of the administrative procedure before the Commission, the operators of Olbia and Cagliara-Elmas airports themselves explained that they had, in fact, advanced the amounts corresponding to the payment of the co-contracting airlines providing the services requested by the Autonomous Region to promote tourism in Sardinia and that they had, next,

presented the Autonomous Region with their accounting reports setting out the costs actually incurred in order to obtain reimbursement by that region. In that context, SOGAER, with which the applicant concluded the contract at issue, even claimed, as set out in recital 314 of the contested decision, that the Autonomous Region had required it to demonstrate that the airlines providing the services had received the regional contributions in full and that it was therefore merely an intermediary which had passed on to them the amounts received from the Autonomous Region. In addition, the Italian Republic itself claimed, as is apparent from recital 340 of the contested decision, that, in essence, the operator of Olbia airport had transferred to the airlines the full amount of the contributions which that operator had received from the Autonomous Region.

79 Moreover, the applicant itself stated that the payments made by the airport operators to the airlines were 'financed' by the Autonomous Region in the form of a transfer to the airport operators.

80 It is therefore clear that the funds used by the airport operators to remunerate the airlines under the contracts that they had concluded with the latter constituted State resources originating from the Autonomous Region.

81 As regards the 'imputability' to the Autonomous Region of the contracts concluded by the airport operators with the airlines, the applicant highlights in particular the fact that Law No 10/2010 does not as such contain aid in favour of the airlines and that the Autonomous Region has not concluded contracts with those airlines.

82 It should be noted that the absence of a direct legal link between the airlines and the Autonomous Region is not such as to prevent the contracts concluded by the airport operators from being imputed to the Autonomous Region. It is apparent from the case-law that the concept of intervention through State resources was intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid (see, to that effect, judgments of 22 March 1977, *Steinike and Weinlig*, 78/76, EU:C:1977:52, paragraph 21; of 17 March 1993, *Sloman Neptun*, C−72/91 and C−73/91, EU:C:1993:97, paragraph 19, and of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE*, C−677/11, EU:C:2013:348, paragraph 26). The Court of Justice has justified the inclusion of advantages granted through distinct State bodies within the scope of Article 107(1) TFEU by the necessity of safeguarding the effectiveness of the rules relating to 'aid granted by a … State' defined in Articles 107 to 109 TFEU, preventing Member States from being able to circumvent the rules on State aid merely through the creation of autonomous institutions charged with allocating aid (judgment of 16 May 2002, *France* v *Commission*, C−482/99, EU: C:2002:294, paragraph 23).

83 Although that case-law refers to advantages granted through bodies vested with the prerogatives of a public authority or entrusted with tasks in the general interest and established or appointed to administer aid, it cannot however be inferred from it that, apart from advantages distributed directly by the State, only those cases would fall within the scope of the prohibition laid down in Article 107(1) TFEU. On the contrary, as has already been recalled above, even an advantage granted directly to certain natural or legal persons can constitute an indirect advantage, hence State aid, for other legal persons who are undertakings (see judgments of 19 September 2000, *Germany* v *Commission*, C−156/98, EU:C:2000:467, paragraphs 22 to 35; of 13 June 2002, *Netherlands* v *Commission*, C−382/99, EU:C:2002:363, paragraphs 38 and 60 to 66; of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T−445/05, EU:T:2009:50, paragraph 127; and of 15 June 2010, *Mediaset* v *Commission*, T−177/07, EU:T:2010:233), and without the requirement, in those cases in which the intermediary was a natural or legal person, that the advantages at issue have been channelled through a structure specifically appointed or established by that State to administer the aid.

84 Moreover, it is apparent from the case-law that imputability of a measure to the State may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken, and in particular indicators showing, in the particular case, an involvement by the public authorities

in the adoption of that measure, having regard also to the compass of the measure, its content or the conditions which it contains (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C−482/99, EU:C:2002:294, paragraphs 52 to 56, and of 17 September 2014, *Commerz Nederland*, C−242/13, EU:C:2014:2224, paragraphs 31 to 33).

85 In the present case, while Law No 10/2010 does admittedly refer to the airport operators — and not the airlines — as being the formal beneficiaries of the payments provided for by that law, it nevertheless appears that the conduct of those operators was determined by the Autonomous Region since, pursuant to the mechanism established by that law and its implementing measures, the funds made available to them had to be and were actually used in accordance with the instructions of that region.

86 Indeed, Article 3(2) of Law No 10/2010 expressly provided that the criteria, nature and duration of the transport offer and the guidelines for the drafting of plans of activities by the airport operators had to be adopted by decision of the Regional Executive, whilst Article 3(3) of that law provided, also expressly, that the plans of activities drawn up by the airport operators had to be accompanied by the corresponding measures and contracts and that they would be financed only if they were drawn up in accordance with the criteria, nature and duration of the transport offer and with the guidelines adopted by the Regional Executive and only if they had first been submitted to the competent committee for a binding opinion.

87 Moreover, it is apparent from the mechanism put in place by Law No 10/2010 that the provisions of that law must necessarily be read in conjunction with the texts whose adoption by the Regional Executive was prescribed by that law and on which the payments by the Autonomous Region to the airport operators at issue in this case depended. Those texts, in particular Regional Decision No 29/36, expressly provided that the airport operators had to submit their plans of activities to the Autonomous Region for approval and that those plans, in order to be eligible for the financing provided by that autonomous region, had to be drafted in accordance with the criteria, nature and duration of the transport offer and with the guidelines adopted by the Regional Executive.

88 Next, the mechanism established by the Autonomous Region provided, besides the fact that the plans of activities were submitted prior to the approval process by the Autonomous Region, that the airport operators, as has already been set out in paragraph 77 above, had to provide quarterly reports for the purpose of payment of 60% of the aid and they were not able to receive the final tranche of the payment, of 20%, until they had proved that they had complied with the Autonomous Region's instructions. Thus, the checks, prior to reimbursement of the amounts advanced by the airport operators, were such as to enable that region to monitor those operators' initiatives, since only those established in accordance with its guidelines and justified by the submission of relevant contractual and accounting documents could give rise to the financing provided for under the aid scheme at issue.

89 The Autonomous Region's control over the content and scope of the airport operators' initiatives is corroborated by the operators themselves. Indeed, as is apparent from recital 237 of the contested decision, GEASAR stated that it had negotiated the proposals for marketing activities, with the airlines that had responded to the call for expressions of interest which that airport operator had published on its website, taking into account the tourism marketing plan drawn up by the Autonomous Region among its planning instruments. SOGAER, for its part, maintained, as is apparent from recital 313 of the contested decision, that, under the aid scheme at issue, that region was providing compensation which was merely channelled through the airport operator 'as part of a plan decided, financed and monitored by the [Autonomous] Region'.

90 As regards, more specifically, the conclusion of contracts with the airlines, it is true that Law No 10/2010 did not mention the specific actions that had to be offered by the airport operators in the plans of activities, nor did it identify which airlines were to be solicited. However, the reference in Article 3(3) of Law No 10/2010 to contracts having to be provided by the airport operators and the reference in Regional Decision No 29/36 to the situations in which the plans of activities are implemented by airlines confirms that the Autonomous Region induced those operators to use airlines, since they are the sole entities capable of engaging with airlines on the opening or maintenance of air routes, their frequencies and passenger

targets, and that that region decided which air routes would be deemed eligible. Furthermore, as regards marketing activities, the Autonomous Region drew a distinction between those offered by airlines, confirming the airport operators' necessary use of such companies, and those offered by service providers other than airlines, which are not at issue in the present case and whose existence, in any event, is not liable to affect the question of whether the funds received by the applicant originated from the budget of that region and were imputable to it.

91 Thus, it follows from the various provisions constituting the mechanism established by the Autonomous Region, described by the Commission as '*ex ante*' and '*ex post*' controls, that that region closely monitored, at the upstream level, the plans of activities submitted by the airport operators, in particular the air routes concerned and the marketing services envisaged, as well as, at the downstream level, the amounts committed by the airport operators in remuneration of those services offered by the airlines in the context of promoting the island of Sardinia as a touristic destination. In so doing, the Autonomous Region assumed sufficient control, over the contractual behaviours of the airport operators that decided to apply for funds under the aid scheme at issue, to the point that those behaviours could be considered imputable to it.

92 It should also be noted that the documents in the file before the Court, inter alia produced by the Commission to certify the operation of the mechanism established by the Autonomous Region, corroborate the foregoing considerations concerning both the imputability to the Autonomous Region of the contracts between the airport operators and the airlines and the regional State origin of the resources used to pay those airlines. First, as regards the contract at issue between SOGEAR and the applicant, the preamble of that contract expressly states that 'the [Autonomous] Region [had] decided to increase its investment in marketing in the transport and tourism industries'; to do so, it 'charged to SOGEAR on an annual basis an amount which the company [had to] spend in order to achieve this objective'; that, 'in the light of the will of the [Autonomous] Region, SOGEAR [had] published an advertisement on its website with a view to investing in marketing activities designed to promote the tourist attractions of southern Sardinia'; that, 'in accordance with the directives published by the [Autonomous] Region SOGEAR [had] drawn up a programme of activities describing the strategy and actions to be implemented in order to achieve the traffic development goal' and that '[that] plan of activities [had been] approved by the Committee of the Regional Council in accordance with Article 3(3) of Law [10/2010]'. In addition, the contract contained a clause which expressly stated that it was subject to the provisions of Law No 10/2010.

93 Next, as regards the plan of activities drawn up, at the upstream level, by SOGAER for the years 2011 to 2013, which was approved by the Autonomous Region in the framework of Regional Decision No 39/42, that plan effectively identifies marketing actions to be implemented by the applicant. The Commission also produced a copy of the invoice, relating to the contested payment, issued by the applicant on 20 December 2012, which SOGAER communicated, downstream, to the Autonomous Region in the context of the checks prior to the reimbursement of the amounts advanced by that airport operator.

94 Finally, in Decisions No 322 and No 300 of the Autonomous Region, of 13 June 2013 and 16 June 2014 respectively, fixing the definitive annual amount of the contributions granted to SOGAER for the years 2012 and 2013, it being understood that the amount granted to SOGAER for the year 2012 was used, inter alia, to reimburse the contested payment, the Autonomous Region explicitly stated that 'the intervention referred to in Law [No 10/2010] [was] achieved through the airport operators, which [had] the role of intermediaries and operational precursors of the transfer of resources to airlines, according to the route determined by the Autonomous Region, such as is laid down by the aforementioned [Law No 10/2010] and the implementing measures' (*che l'intervento di cui alla LR. n. 10/2010 si realizza attraverso le societa di gestione aeroportuale, che fungono da tramiti operativi e da soggetti anticipatori del trasferimento di risorse a favore dei vettori, secondo il percorso dalla Regione stessa disegnato con la sopraccitata legge regionale n. 10/2010 e con e delibere di attuazione della stessa*) and that 'the airlines should be regarded as the actual and sole recipients of the flows of financial resources under [Law No 10/2010]' (*che i vettori debbano considerarsi i reali ed unici destinatari dei flussi delle risorse di cui alla predetta legge regionale*).

95 In the light of all those factors, it is apparent both from the mechanism put in place by the Autonomous Region by means of the aid scheme at issue and from its implementation in practice that the contracts concluded by the airport operators with the airlines and the payments made to the latter in performance of those contracts involved regional State funds and were imputable to the Autonomous Region.

96 That conclusion is not called into question by the applicant's arguments, set out in paragraph 56 above, as to the fact that the airport operators — including SOGAER — were free to request or not to request funds from the Autonomous Region and that that choice was guided by economic considerations specific to them.

97 In that regard, first, although the initiative of submitting plans of activities to the Autonomous Region in order to request its funds formally lay with the airport operators, once they had taken their decision to participate in the aid scheme at issue, their discretion as to the specific measures to be taken was, as the Commission, in essence, maintains, significantly reduced by the criteria and guidelines established by that region. It is apparent from the content of the contract at issue, set out in paragraph 92 above, that the contested payment was made in the context of the aid scheme at issue.

98 Second, as regards the economic considerations specific to the airport operators, it should be recalled that the prices invoiced by the airlines for their services — marketing in particular — were borne financially by the Autonomous Region and not by those operators. The share of risk borne by those operators was thus marginal, since it concerned only the 4% withholding tax and the commissions and interest to be paid to SFIRS.

99 Furthermore, it must be noted that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 107 TFEU. That article does not distinguish between the causes or the objectives of State interventions, but defines them in relation to their effects (see judgments of 22 December 2008, *British Aggregates* v *Commission*, C−487/06 P, EU:C:2008:757, paragraphs 84 and 85 and the case-law cited, and of 26 November 2015, *Spain* v *Commission*, T−461/13, EU:T:2015:891, paragraph 39).

100 Given that, as has already been previously stated, when it examines a measure the Commission can find it necessary to examine whether an advantage can be considered to be granted indirectly to operators other than the immediate recipient of the transfer of State resources (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C−382/99, EU:C:2002:363, paragraphs 61 and 62), it must be held that, in so far as can be determined, as in the present case, an advantage originating from State resources has been transferred by the immediate recipient to a final beneficiary, it is irrelevant that that transfer was made by the immediate recipient in accordance with commercial principles or, on the contrary, that that transfer had an objective of general interest.

101 That is supported by the case-law holding that an advantage granted directly to certain natural or legal persons can constitute an indirect advantage, hence State aid, for other legal persons who are undertakings (see, to that effect, judgments of 19 September 2000, *Germany* v *Commission*, C−156/98, EU:C:2000:467, paragraphs 22 to 35; of 13 June 2002, *Netherlands* v *Commission*, C−382/99, EU:C:2002:363, paragraphs 38 and 60 to 66; of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T−445/05, EU:T:2009:50, paragraph 127; and of 15 June 2010, *Mediaset* v *Commission*, T−177/07, EU:T:2010:233). Indeed, in the cases which gave rise to those judgments, the transfer of an advantage by natural or legal persons who were immediate recipients of State resources, formed part of a commercial relationship, confirming that the existence of an underlying commercial reason for the transfer is of no relevance to the assessment under Article 107(1) TFEU of the flows taken by the State origin resources to reach the final beneficiary.

102 As regards the line of argument put forward by the applicant concerning the classification of SOGAER as a 'public undertaking' within the meaning of Directive 2006/111, it must be held to be inoperative and, in any event, unfounded. The Commission did not rely on such a classification of SOGAER to impute the

contested payment to the Italian State. On the contrary, it relied on the mechanism established by the Autonomous Region in order to arrive at the conclusion that the payments received by the airlines came from the resources of that region and were imputable to it and, accordingly, to the Italian State. In that context, the airport operators concerned, including SOGAER, were merely acting as intermediaries such that, as the Commission observes, any classification of them as public undertakings was irrelevant.

103 In those circumstances, it is also irrelevant that, in the judgments of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943), and of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−165/15, EU:T:2018:953), relied on by the applicant, the Court held that the Commission had rightly found that the two chambers of commerce in question, controlling Pau-Béarn and Nîmes-Uzès-Le Vigan airports, respectively, constituted public authorities the decisions of which were imputable to the French State. Even assuming that the CCIA of Cagliari constituted a public authority and that the situation of Cagliari-Elmas airport was comparable to that of the two airports at issue in those other cases, such that the conduct of that airport would be imputable to the CCIA of Cagliari and, therefore, to the Italian State, the fact remains that, in the present case, the conduct more specifically at issue, namely the conclusion of the contract at issue and the contested payment, is, in the light of the foregoing considerations, imputable to the Autonomous Region, Cagliari-Elmas airport having acted merely as intermediary.

104 In any event, it should be noted that, unlike the circumstances specific to the cases giving rise to the judgments of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943), and of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−165/15, EU:T:2018:953), in the present case, first, it has not been established that the CCIA of Cagliari constituted a public authority, the applicant having merely claimed, as is set out in recital 55 of the contested decision, that, under Italian law, the CCIA of Cagliari is an 'autonomous public entity'. Second, Cagliari-Elmas airport is operated by SOGAER and not by the CCIA of Cagliari, and the applicant has not sought to show that the conduct of that airport operator, while majority owned by the CCIA of Cagliari, was imputable to the latter in the light of the conditions set in the judgment of 16 May 2002, *France* v *Commission* (C−482/99, EU:C:2002:294).

105 As regards, last, the applicant's claim that the Commission seeks, in the context of the present dispute, to supplement the reasoning of the contested decision by stating that the contracts concluded between the airport operators and the airlines had the sole purpose of distributing the funds made available by the Autonomous Region, it is sufficient to point out that, with that statement, the Commission clearly refers to the role of intermediaries played by those operators, which is set out inter alia in recitals 357 to 360 and recalled in recitals 388 and 402 of the contested decision. Consequently, the applicant's claim must be rejected.

106 In the light of all the foregoing considerations, it is without committing any error of law that the Commission, in recitals 357 to 360 of the contested decision, found that the airport operators could be regarded as intermediaries between the Autonomous Region and the airlines, and concluded that the payments — including the contested payment — made by the airport operators to those airlines corresponded to resources of the Autonomous Region and were imputable to it. Therefore, the Commission not having erred in relation to the 'level' relevant to the assessment of the existence of State aid, the first part of the first plea must be rejected.

Second part of the first plea: application of the private operator principle at the level of SOGAER

107 The applicant submits that, since the airport operators constitute the relevant 'level' for analysis, the only important question is whether SOGAER, acting autonomously, proceeded in accordance with the private operator principle in making the contested payment.

108 Thus, the Commission's considerations regarding the intentions of the Autonomous Region, namely that that region was seeking to achieve public policy objectives rather than cost-effectiveness objectives, are irrelevant. Similarly, the absence of a business plan, an *ex ante* profitability analysis or any other internal

document enabling the establishment of any profitability objectives pursued by the Autonomous Region is irrelevant.

109 According to the applicant, in order to examine whether SOGAER had proceeded in accordance with the private operator principle in concluding the contract at issue, the Commission ought to have, in accordance with its decision-making practice and the approach adopted by the Court in its judgment of 17 December 2008, *Ryanair* v *Commission* (T-196/04, EU:T:2008:585), offset the costs and revenues relating to that contract. If such an offsetting exercise were to result in a negative balance, it would imply the existence of State aid.

110 There is no reason why the Commission did not carry out, in the present case, the exercise of offsetting the costs and revenues relating to the contract at issue. On that point, the applicant criticises the Commission for not having provided any justification for its conclusion, set out in recitals 386 and 387 of the contested decision, that it would not have been possible for it to assess the financial relationships between the airport operators and the airlines, even if calls for tenders had been organised to select those airlines. It also criticises the Commission for not having taken the initiative of requesting the airport operators to produce *ex ante* analyses of the profitability of the contracts concluded with the airlines.

111 As regards, more specifically, the revenues to be taken into account in the implementation of the exercise to offset the costs and revenues linked to the contract at issue, they are those resulting, for Cagliari-Elmas airport, from the air routes operated by the applicant from that airport, namely — as a simple internet search would have shown — the routes between Cagliari-Elmas and Cologne-Bonn and between Cagliari-Elmas and Stuttgart. Moreover, the Commission itself established, in recital 376 of the contested decision, a link between the marketing contracts concluded by the airport operators with the airlines and the air routes operated by the airlines from the airports concerned.

112 As regards the costs to be taken into account in that offsetting exercise, the applicant claims that the contested payment is irrelevant. In actuality, the relevant costs should include SOGAER's financing costs for obtaining the funds that made it possible to make that payment ('the financing costs'). As has already been stated in the first part of the first plea, in paragraph 56 above, the airport operators, in order to access the funds of the Autonomous Region, had to pay it 'remuneration' in the form of a 4% withholding tax and, where appropriate, commissions and interest. However, the amount of those financing costs is significantly lower than the amount of EUR 30 000 corresponding to the contested payment.

113 On the contrary, it was inappropriate to withhold the contested payment, given that it had been financed by the Autonomous Region and that that region did not form a unit with SOGAER. In that regard, the judgment of 17 December 2008, *Ryanair* v *Commission* (T-196/04, EU:T:2008:585) cannot usefully be relied on since, contrary to the situation in the present case, in which the Autonomous Region did not own SOGAER, the Walloon Region held the entirety of the shares of the airport operator of Charleroi airport (Belgium).

114 The Commission submits, principally, that the second part of the first plea is inoperative in that it calls into question only the findings, set out in recitals 385 to 387 of the contested decision, as to the practical application of the private operator principle, without disputing the finding, set out in recitals 380 to 383 of that decision, as to the 'inapplicability' of that principle on the ground that the Autonomous Region was pursuing general economic policy objectives, rather than profitability objectives in respect of the airports concerned. In the alternative, the Commission claims that the second part is unfounded.

115 Furthermore, as regards more specifically the argument that the financing costs should be regarded as relevant costs in the offsetting exercise referred to by the applicant, it is inadmissible.

– *Admissibility of the argument relating to the financing costs*

116 According to the Commission, the applicant, by its argument relating to the financing costs, submitted, at the stage of the reply, that those costs, rather than the contested payment, constitute the relevant aid. In so

doing, the applicant puts forward a new, and therefore inadmissible, plea.

117 The applicant, in response to a question from the Court on that point, explained that that argument was part of the extension of its main line of argument according to which the Commission should have examined the existence of State aid at the level of SOGAER rather than at the level of the Autonomous Region. In the alternative, the applicant added that the balance, resulting from compensation for the costs and revenue relating to the contract at issue, would be positive if both the amount of EUR 30 000 constituting the contested payment and the amount of the financing costs, which is well below EUR 30 000, were to be taken into account, thus ruling out the existence of State aid in both scenarios.

118 In that regard, it must be held that, although the applicant has, as early as the application, argued that it was necessary to ascertain whether SOGAER had acted like a private operator and to carry out an exercise to offset the costs and revenue relating to the contract at issue, which should be understood as including an analysis of the incremental profitability of the contract at issue, the applicant, at the stage of that application, had referred only to the contested payment but not to the financing costs. It was at the reply stage that the applicant, for the first time, referred to the financing costs, thus showing a development in the relevant costs to be taken into account in the analysis of incremental profitability.

119 Furthermore, the applicant has made a similar change in its line of argument under the third plea, relating to the existence of *de minimis* aid. Whereas in the application it argued that the amount of the contested payment was well below the relevant threshold of EUR 200 000, it then referred in the reply to the amount of the financing costs, significantly lower than EUR 30 000.

120 In so doing, however, the applicant has altered an essential aspect of its line of argument, since, under the guise of an argument refining the incremental profitability analysis referred to in the application, it disputes the very purpose of the aid identified in the contested decision and, *in fine*, the amount which should, where appropriate, be reimbursed pursuant to the recovery obligation imposed in Article 2 of the contested decision.

121 In the light of the foregoing, the argument relating to operating costs does not constitute an amplification, within the meaning of the case-law referred to in paragraph 61 above, of the second part of the first plea as has been presented in the application. Accordingly, that argument must be rejected as unfounded.

– *Merits of the second part of the first plea*

122 The applicant submits that the Commission should have examined whether SOGAER, in concluding the contract at issue and making the contested payment, proceeded in accordance with the private operator principle.

123 In that regard, it should be recalled at the outset that, for the reasons set out in dealing with the first part of the first plea, the applicant errs when it maintains that SOGAER constitutes the relevant level for assessing the existence of State aid.

124 In so far as it is based on an erroneous premiss, the second part of the first plea can only be rejected as unfounded. Given that the airport operators played only the role of intermediaries, the private operator principle was not intended to apply at their level, as the Commission found, in essence, in recital 387 of the contested decision. Thus, contrary to what the applicant contends, the Commission did provide reasons for its conclusion that it was not possible for it to assess the financial relationships between the airport operators and the airlines, stating, in that recital, that those operators had not acted as market economy operators as they merely implemented the aid scheme at issue devised by the Autonomous Region.

125 For the sake of completeness, it should be noted that the airport operators concerned, namely those of Cagliari-Elmas and Olbia, were not owned by the Autonomous Region, which is moreover not disputed by the applicant. Consequently, that region could not expect, as a shareholder, a more or less long-term

economic return on the funds it made available to those operators and, for that reason, too, the private operator principle was not intended to apply.

126 It follows from the foregoing that, since the transactions carried out between the airlines and the airport operators were not intended to be examined in the light of the private operator principle, the Commission was not required to examine the practical application of that principle in the applicant's case.

127 Thus, first, the Commission was not required to carry out an analysis of the incremental profitability of the contract at issue. Consequently, the alleged demonstration, put forward by the applicant in response to a question put by the Court, of the profitability of the contested payment is irrelevant. In any event, it must be held that that demonstration cannot be regarded as a valid analysis of incremental profitability. It is sufficient to note, in particular, that the applicant identifies, as relevant revenues, all the airport charges paid by the applicant to SOGAER for a period from 2011 to 2015. In so doing, it includes airport charges for almost two years prior to the launch of the promotional campaign concerned by the contract at issue and does not assess the amount of those charges that would result from an increase in the number of passengers using Cagliari-Elmas airport following that campaign. Furthermore, the applicant identifies, as relevant costs, only the contested payment, disregarding other costs of SOGAER linked, inter alia, to such an increase in the number of passengers using that airport.

128 As to the remainder, it is sufficient to find that the applicant misinterprets recital 376 of the contested decision, which does not concern the modalities of the analysis of incremental profitability. That recital concerns the separate question of whether the costs of the marketing services provided for in the contracts concluded between the airport operators and the airlines constitute costs which should normally be borne by those airlines.

129 Second, contrary to what the applicant claims, the Commission was not obliged to request the airport operators of its own motion to produce any *ex ante* analyses of the profitability of the payments made to the airlines, since those analyses were also relevant to the practical application of the private operator principle at the level of SOGAER. Moreover, as the Commission rightly notes, certain interested parties, SOGAER included, submitted comments, concerning inter alia the potential application of the private operator principle, along with the documents those parties deemed relevant, whereas the applicant did not take part in the administrative procedure.

130 In those circumstances, the Commission cannot be criticised for failing to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see, to that effect, judgment of 12 September 2019, *Achemos Grupė and Achema* v *Commission*, T−417/16, not published, EU:T:2019:597, paragraph 60).

131 Third, the argument put forward by the applicant, at the hearing, according to which the fact that it invested EUR 10 000 in excess of the amount of EUR 30 000 paid by SOGAER in the promotional campaign forming the subject matter of the contract at issue, as referred to in paragraph 24 above, suggests that SOGAER acted like a private operator is also irrelevant.

132 As to the remainder, to the extent that the applicant seeks to draw an argument from the case-law according to which the participation, concomitantly and under comparable conditions, of public bodies and private operators in a given transaction makes it possible to deduce that that transaction is carried out under conditions capable of satisfying the private operator principle (see, to that effect, judgment of 12 December 2000, *Alitalia* v *Commission*, T−296/97, EU:T:2000:289, paragraph 81 and the case-law cited), that line of argument must be rejected. In the present case, SOGAER cannot be regarded as having participated, under comparable conditions, in the same operation as the applicant, since SOGAER is not an airline. Thus, SOGAER could not expect profits similar to those which the applicant expected to make from its financial participation in that campaign, in particular those resulting from an increase in sales of tickets or of services on board its aircraft for the air routes concerned.

133 Finally, as regards the applicant's claim that the private operator principle should be applied at the level of the airport operators in so far as the contested decision itself, in particular in recitals 382 and 385 thereof, indicates that it did not apply at the level of the Autonomous Region, it must be held that the applicant misinterprets those recitals. Those recitals merely state that, in the assessment of the existence of State aid at the level of that region, the private operator principle was not applicable, since the latter sought to achieve public policy objectives rather than the return that a private operator could expect from transactions with airlines.

134 In the light of the foregoing, the second part of the first plea must be rejected as partly inadmissible and partly unfounded and, accordingly, the first plea in law must be rejected in its entirety.

Second plea: infringement of Article 107(1) TFEU, in that the Commission has not demonstrated that the aid granted to the applicant distorted or threatened to distort competition and affected trade between Member States

135 In support of the second plea, alleging that the Commission has not demonstrated that the aid from which the applicant benefited distorted or threatened to distort competition and affected trade between Member States, the applicant submits, in a first part of that plea, that the Commission should have established how the contested payment — and not the aid scheme at issue — distorted or threatened to distort competition and affected trade between Member States. In a second part of that plea, put forward in the alternative, the applicant claims that, even if the Commission could confine itself to examining that scheme, the contested decision is insufficiently reasoned as to the fact that the scheme was liable to distort competition and affect trade.

136 The Commission contends that the second plea should be rejected as partly inadmissible and partly unfounded. In particular, in so far as the applicant maintains that the contested payment constitutes individual aid, granted on an ad hoc basis rather than pursuant to an aid scheme, the first part is inadmissible.

First part of the second plea: examination of the contested payment instead of the aid scheme at issue

137 The applicant submits that, in view of the fact that, of the 16 airlines concerned, it received the lowest payment, in the amount of EUR 30 000, it cannot be accepted that the Commission put all those airlines on the same level and did not examine the contested payment in isolation. Moreover, it maintains that the Commission could not confine itself to examining the impact of the aid scheme at issue on competition and trade between Member States, since the present dispute does not concern an aid scheme.

138 The Commission submits, relying in particular on the case-law stemming from the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 63), that, in the case of an aid scheme, as in the present case, it may confine itself to examining the characteristics of the scheme in question in order to determine, in the reasons for the decision, whether, by reason of the high amounts or percentages of aid, the nature of the investments for which aid is granted or other terms of the scheme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme.

139 Furthermore, according to the Commission, in so far as the applicant claims that the contested payment constitutes ad hoc individual aid rather than individual aid granted under an aid scheme and, in so doing, challenges the categorisation of the measures at issue as an 'aid scheme', the applicant has not provided any explanation or, a fortiori, evidence supporting its position, with the result that such an argument is inadmissible. In the alternative, that argument is unfounded since the airport operators had no discretion and were limited to passing on individual aid under the aid scheme at issue.

140 In that regard, it should be noted at the outset that, in the first plea, the applicant has submitted that the Commission should have assessed the existence of State aid at the level of SOGAER rather than at the level of the Autonomous Region. That line of argument, however, has been rejected as unfounded.

141 Therefore, in so far as the line of argument of the applicant, put forward in the first part of the second plea, is based on that set out in the first part of the first plea, in that the contested payment ought to be examined in isolation given that SOGAER was the relevant level for the assessment of the existence of State aid, that line of argument is based on an erroneous premiss and must therefore be rejected as unfounded. The applicant's reference to recital 48 of the contested decision, which merely states that the airport operators had to conclude marketing agreements in order to implement activity 2, cannot refute that conclusion.

142 However, in so far as the applicant seeks, as the Commission submits, to contest the categorisation of the measures at issue as an aid scheme, it must also be examined whether that aspect of the applicant's line of argument is admissible and, if so, well founded.

143 Questioned by the Court on the admissibility of such a line of argument, the applicant considers that it explained its position on that point by maintaining, in the first plea, that, in assessing the existence of State aid, the Commission ought to have examined the contract at issue rather than the aid scheme at issue, which is irrelevant. That position is moreover consistent with recital 48 of the contested decision, which expressly refers to the marketing contracts concluded between the airport operators and the airlines. The applicant thus considers that, by its plea of inadmissibility, the Commission is seeking to reverse the burden of proof, given that it was for the Commission, account being had of the fact that SOGAER was a public undertaking, to verify whether that airport operator had acted like a market economy operator.

144 Moreover, relying on paragraph 87 of the judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T−131/16 and T−263/16, under appeal, EU:T:2019:91), the applicant adds that categorisation as an aid scheme depends, in particular, on the condition that the relevant authorities do not have discretion in determining the essential elements of the aid in question and in deciding whether it should be awarded, which is not the case in the present case since the contested decision does not in any way indicate a lack of discretion in relation to the airport operators in the implementation of the aid scheme at issue.

145 In that regard, it should be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 of that statute, and Article 76(d) of the Rules of Procedure of the General Court, each application must indicate the subject matter of the dispute, the pleas and arguments relied on as well as a summary presentation of those pleas. That presentation must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of review. According to settled case-law, in order to guarantee legal certainty and a sound administration of justice, it is necessary, for an action to be admissible, that the basic legal and factual particulars on which a case is based be indicated coherently and intelligibly in the application itself (see, to that effect, judgments of 19 April 2012, *Evropaïki Dynamiki* v *Commission*, T−49/09, not published, EU:T:2012:186, paragraph 90, and of 16 October 2013, *TF1* v *Commission*, T−275/11, not published, EU:T:2013:535, paragraph 95).

146 In the present case, it is apparent from the arguments set out in paragraph 137 above that the applicant has, in essence, confined itself to asserting refusal to accept that the Commission should put all airlines on an equal footing and that the present dispute does not concern an aid scheme. The applicant has also referred to the aid scheme at issue in the third plea, but only for the purpose of asserting that 'the dispute does not relate to the scheme of support for the airlines, but to the actual obligation of repayment' imposed by the contested decision. It must be pointed out that the applicant does not explain how the Commission erroneously found, in recital 349 of the contested decision, that the measures at issue constituted an aid scheme within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 249, p. 2020013459), especially since it refers neither to that recital nor to that provision.

147 Admittedly, it cannot be ruled out that certain of the arguments put forward in support of the first part of the first plea might be relevant in the context of a line of argument seeking to challenge the categorisation of the measures at issue as an aid scheme. Nevertheless, that cannot suffice to concede that the applicant has called that categorisation into question. Such a categorisation as an aid scheme is of a different nature from the assessment of the existence of State aid. Thus, the latter assessment consists in examining whether, in an individual case, the four cumulative criteria referred to in Article 107(1) TFEU are met. On the other hand, the categorisation as an aid scheme is intended to enable the Commission, in the context of a single administrative procedure, to carry out that examination jointly in respect of several individual aid measures, in the interests of procedural efficiency (see, to that effect, judgment of 5 October 1994, *Italy* v *Commission*, C−47/91, EU:C:1994:358, paragraph 21).

148 In the absence of any support for its line of argument seeking to challenge the categorisation of the measures at issue as an aid scheme, however, the applicant reduces the Commission and the Court to speculating about the reasoning and precise observations, both in fact and law, that could lie behind its claims. It is precisely such a situation, creating legal uncertainty and anathema to a sound administration of justice, that Article 76 of the Rules of Procedure is designed to avoid (see, to that effect, order of 19 May 2008, *TF1* v *Commission*, T−144/04, EU:T:2008:155, paragraph 57).

149 It follows that, contrary to what the applicant submits, the requirement that it support its argument does not imply a reversal of the burden of proof. Since, in the contested decision, the Commission found that Law No 10/2010 and its implementing measures constituted an aid scheme, it was for the applicant, if it wished to challenge that categorisation, to put forward an argument to that effect.

150 The foregoing analysis is not called into question by the argument of the applicant based on paragraph 87 of the judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T−131/16 and T−263/16, under appeal, EU:T:2019:91), given that the applicant cannot, when replying to a question of the Court, compensate for the absence of a sufficiently clear and precise presentation, in the text of the application itself, of a plea challenging the categorisation of the measures at issue as an aid scheme without rendering Article 76(d) of the Rules of Procedure devoid of purpose (see, to that effect and by analogy, order of 19 May 2008, *TF1* v *Commission*, T−144/04, EU:T:2008:155, paragraph 30).

151 That argument is, in any event, erroneous. The airport operators did not constitute the 'national authorities' envisaged by the requirement, which is apparent from paragraph 87 of the judgment of 14 February 2019, *Belgium and Magnetrol International* v *Commission* (T−131/16 and T−263/16, under appeal, EU:T:2019:91), according to which national authorities applying an aid scheme cannot have discretion as to the determination of the essential elements of the aid in question and the appropriateness of awarding it, since such a role fell, under Law No 10/2010 and its implementing legislation, to the Regional Executive of the Autonomous Region. Furthermore, contrary to the applicant's contention, it is apparent from the contested decision, in particular from recitals 360, 387 and 402 thereof, that the Commission found that those operators did not have discretion, since they acted as intermediaries in the implementation of the aid scheme at issue.

152 In light of the foregoing considerations, the first part of the second plea must be rejected as partly inadmissible and partly unfounded.

Second part of the second plea: inadequacy of the statement of reasons concerning the impact of the aid scheme at issue on competition and on trade between Member States

153 The applicant submits, in essence, that, even if the Commission could confine itself to examining the aid scheme at issue, the contested decision is inadequately reasoned as to the fact that that scheme was liable to distort competition and affect trade between Member States. In particular, in recitals 390 to 392 of the contested decision, the Commission was essentially limited to providing circular reasoning consisting of allegations relating to the liberalisation of the air transport sector, without explaining how the applicant

benefited from an appreciable advantage, as is required by the case-law resulting from the judgment of 14 October 1987, *Germany* v *Commission* (248/84, EU:C:1987:437, paragraph 18).

154 The Commission submits that recitals 390 to 392 of the contested decision, the findings of which are not disputed by the applicant, are sufficiently substantiated in the light of the relevant case-law, including the judgment of 14 October 1987, *Germany* v *Commission* (248/84, EU:C:1987:437).

155 In that regard, for the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid at issue has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see, to that effect, judgments of 15 December 2005, *Italy* v *Commission*, C−66/02, EU:C:2005:768, paragraph 111, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others v Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 134).

156 In particular, if aid granted by a Member State strengthens the position of an undertaking as compared with that of other undertakings competing in trade within the Union, the latter undertakings must be regarded as affected by that aid (see judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C−522/13, EU:C:2014:2262, paragraphs 51 and 52 and the case-law cited).

157 Moreover, in the case of an aid scheme, like in this case, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the reasons for the decision, whether, by reason of the high amounts or percentages of aid, the nature of the investments for which aid is granted or other terms of the scheme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgments of 14 October 1987, *Germany* v *Commission*, 248/84, EU:C:1987:437, paragraph 18, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others v Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 63).

158 In the present case, the Commission, in recitals 390 to 392 of the contested decision, explained that airlines, receiving the payments made by airport operators under the aid scheme at issue, were active in a sector characterised by intense competition between operators from different Member States, and therefore were participating in trade within the European Union. In addition, it should be noted, as is moreover apparent from the remainder of the contested decision and, in particular, from Table 15 contained in recital 427 thereof, that the amounts of the payments made to the airlines were likely to be high.

159 Having regard to the principles recalled in paragraphs 155 to 157 above, contrary to what the applicant argues, recitals 390 to 392 of the contested decision were sufficient in the light of the Commission's obligation to state reasons and the Commission did not have to explain further how the applicant, specifically, derived an appreciable advantage from the aid scheme at issue (see, to that effect, judgments of 7 March 2002, *Italy* v *Commission*, C−310/99, EU:C:2002:143, paragraphs 88 and 89, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraphs 114 and 121).

160 Accordingly, the second part of the second plea must be rejected as unfounded and, accordingly, the second plea in its entirety must be rejected.

Third plea: error on the ground that the Commission did not examine whether the contested payment constituted de minimis aid

161 By its third plea, which is subdivided into two parts, the applicant submits, in essence, that the Commission erred, first, in failing to examine of its own motion whether the contested payment constituted *de minimis* aid and, second, in finding that the 2006 *de minimis* Regulation did not apply to that payment.

162 The Commission contends that the third plea should be rejected as ineffective and, in any event, as unfounded.

First part of the third plea: the ex officio *examination of the* de minimis *nature of the contested payment*

163 The applicant submits that, in its assessment of the existence of State aid, the Commission erred in failing to verify whether the contested payment was *de minimis* in nature, since such a verification is closely linked to the examination of the criterion of the effect on trade between Member States and constitutes, consequently, a legal question which the Commission must always examine of its own motion.

164 That conclusion is not, in the applicant's view, called into question by the case-law, resulting from the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368), relied on by the Commission to argue that, in the context of an aid scheme, the examination of the possible *de minimis* nature of measures is a matter for the national authorities. In that other case, first of all, the Commission, unlike in the present case, expressly examined the question of *de minimis* aid in recital 110 of its Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws No 30/1997 and No 206/1995 (OJ 2000 L 150, p. 50), which decision was challenged in that judgment. Next, unlike the contested decision, which concerns only aid incompatible with the internal market, Decision 2000/394 contains a 'mixed' mechanism ordering the recovery of certain incompatible aid while concluding that other aid was compatible with the internal market, such that the implementation of that decision necessarily required an independent examination by the national authorities. Finally, in the present case, Article 1(2) of the operative part of the contested decision identifies the applicant by name as a beneficiary of aid and Article 2(1) of that operative part requires its recovery, thereby preventing an independent examination by the national authorities, whereas the operative part of Decision 2000/394 did not identify by name the beneficiaries of the aid the recovery of which it ordered.

165 It is also wrong, in the applicant's view, for the Commission to claim that it was not obliged to examine of its own motion whether *de minimis* aid was involved since it had not been called upon to do so by the applicant during the administrative procedure. In that regard, the judgment of 22 January 2013, *Salzgitter* v *Commission* (T-308/00 RENV, EU:T:2013:30, paragraph 121), relied on by the Commission, is irrelevant, since the passage of that judgment relied on by the Commission concerns the criterion of the selectivity of a measure and not, as in the present case, the criterion of the effect on trade. Furthermore, in the administrative procedure preceding the decision that was challenged in that judgment, the Federal Republic of Germany failed to argue that the coexistence of the tax scheme under examination by the Commission and a separate tax scheme was such as to eliminate the selectivity of some of the advantages obtained by the applicant in the case at issue. That omission, however, concerned relevant facts and therefore constitutes a factual issue, whereas, in the present case, the applicant's alleged omission concerns the *de minimis* nature of the contested payment and, therefore, a legal question which the Commission was required to examine of its own motion.

166 The Commission contends that the first part of the third plea should be rejected as unfounded.

167 In that regard, it should be borne in mind that, when examining an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question and is not required to carry out an analysis of the aid granted in each individual case on the basis of such a scheme. It is only at the stage of recovery of the aid that it is necessary to look, at the national level, at the individual situation of each undertaking concerned (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63).

168 It follows that, contrary to what the applicant claims, the Commission was not required to examine whether the contested payment was *de minimis* in nature, that examination being a matter for the Italian authorities at the stage of recovery of the aid.

169 That finding is not called into question by the three arguments put forward by the applicant aimed at limiting the scope of the case-law referred to in paragraph 167 above, by seeking to distinguish the contested decision from Decision 2000/394, which was challenged in actions giving rise to that case-law.

170 In the first place, as regards the fact that, unlike in the present case, Decision 2000/394 expressly referred, in recital 110 thereof, to the *de minimis* rules, it is sufficient to point out that the Commission did not, in that recital 110, carry out a specific examination of the *de minimis* nature of the measures at issue in that decision, but simply made, as the Commission rightly notes, a general reference to the *de minimis* rules. Consequently, the absence of an analogous recital in the contested decision cannot justify distinguishing the present case from the relevant circumstances in the case giving rise to the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368. That conclusion is all the more necessary since, as the Commission points out, *de minimis* regulations are, pursuant to Article 288 TFEU, directly applicable in all Member States.

171 Moreover, a line of reasoning of the General Court similar to the line of argument put forward by the applicant has already been rejected by the Court of Justice. In the judgment of 28 November 2008, *Hotel Cipriani and Others* v *Commission* (T−254/00, T−270/00 and T−277/00, EU:T:2008:537, paragraphs 100 to 111 and 251 and 252), the General Court held that, although it was not for the national authorities, when implementing the decision at issue in that case, to verify in each individual case whether the conditions for the application of Article 107(1) TFEU were met, those authorities should not, in that particular case, recover the individual *de minimis* aid, since Decision 2000/394 was to be interpreted, having regard to recital 110 thereof, as precluding the categorisation as aid of measures which complied with the *de minimis* rule. However, in its judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368), ruling on appeal against the judgment of 28 November 2008, *Hotel Cipriani and Others* v *Commission* (T−254/00, T−270/00 and T−277/00, EU:T:2008:537), the Court of Justice held that, in reaching that conclusion — in so far as the General Court had relied on a misinterpretation of the scope of that decision, according to which the national authorities were not required to verify in each individual case whether the advantage granted was, for its recipient, liable to distort competition and affect trade within the Union — the General Court had disregarded the Court of Justice's earlier case-law according to which, when the Commission rules in a general and abstract way on a scheme of State aids, which it declares incompatible with the internal market and orders the recovery of the amounts received under that scheme, it is for the Member State to verify the individual situation of each undertaking concerned by a recovery operation (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraphs 61 to 64 and 114 to 117).

172 In the second place, as regards the argument relating to the 'mixed' nature of the operative part of Decision 2000/394, it is sufficient to point out that, having regard to the considerations set out in paragraph 171 above, the Court of Justice, when referring to the need for individual examination by the national authorities, did not rely on that circumstance, but recalled the case-law relating to the obligations of the national authorities when implementing a Commission decision relating to an aid scheme.

173 In the third place, it is indeed true that the operative part of Decision 2000/394 does not identify by name the beneficiaries of the aid incompatible with the internal market, unlike Article 1(2) of the operative part of the contested decision, which identifies the applicant by name. However, that circumstance is irrelevant, since verification of the applicant's individual situation necessarily falls to the Italian authorities since the Commission confined itself to an analysis of the characteristics of the aid scheme at issue. In any event, it follows from a reading of the operative part of the contested decision, beyond Article 1(2) thereof, that the Commission expects the Italian authorities to carry out an individualised examination of the situation of the beneficiaries given that, in Article 4 of that operative part, it requests the Italian Republic to communicate to it, in particular, the exact list of beneficiaries, the total amount to be recovered from each beneficiary and a detailed description of the measures already taken and planned in order to comply with the contested decision.

174 On that point, it appears that the Italian authorities have notified a recovery decision to the applicant. When questioned on that point at the hearing, the applicant replied that it had not brought a national action against that decision, contrary to what it had, however, announced to the Commission in the context of their correspondence subsequent to the adoption of the contested decision. In the light of the case-law set out above, relating to the respective roles of the Commission and the national authorities, the applicant cannot use the present action to make good its lack of diligence in bringing such a national action.

175 As to the remainder, the applicant's argument challenging the relevance of the case giving rise to the judgment of 22 January 2013, *Salzgitter* v *Commission* (T−308/00 RENV, EU:T:2013:30) must be rejected. Since the examination of the individual situation of the beneficiaries of an aid scheme is a matter for the national authorities and not for the Commission, the question of whether the Commission had to examine the *de minimis* nature of the single contested payment, without being called upon to do so by the applicant, is inconsequential.

176 In the light of the foregoing, the first part of the third plea must be rejected.

Second part of the third plea: application of the de minimis *regulations*

177 The applicant relies on the *de minimis* nature of the contested payment, arguing that it satisfies the conditions of the 2006 *de minimis* Regulation.

178 In particular, as regards first of all the scope of the 2006 *de minimis* Regulation, the applicant submits that that regulation applies in this case *ratione materiae* and *ratione temporis*, rather than the 2013 *de minimis* Regulation, as the Commission suggested in its email of 18 August 2017.

179 Next, as regards the conditions to be satisfied in order for aid to be regarded as *de minimis* in nature, the applicant submits that the limit of EUR 200 000 over a period of three fiscal years, set in Article 2(2) of the 2006 *de minimis* Regulation, was not exceeded in the case at hand, having regard to the amount of EUR 30 000 of the contested payment. That finding applies all the more so in relation to the amount of the financing costs, which constitutes the relevant amount, as the applicant has argued in the context of the second plea. Moreover, the Commission incorrectly contends that it is unlikely that the limit of EUR 200 000 was not exceeded, in view of the extensive aid received by the Lufthansa group, to which the applicant belongs. In particular, according to the applicant, the aid granted to the other entities of the Lufthansa group cannot be taken into account, since the 'functional concept of an undertaking', on which the Commission relies, is not applicable, since it is not in the 2006 *de minimis* Regulation.

180 As regards the condition laid down in Article 2(4) of the 2006 d*e minimis* Regulation, requiring it to be possible to calculate precisely and in advance the 'gross grant equivalent' of aid, invoked by the Commission in its email of 18 August 2017, the applicant challenges its applicability to the contested payment.

181 In any event, the applicant disputes that it is for it to demonstrate that the conditions of the 2006 *de minimis* Regulation are satisfied in the present case. That regulation provides that the burden of proof is on the beneficiaries of aid vis-à-vis the national authorities, but does not provide for such a burden vis-à-vis the Commission.

182 The Commission submits that the second part of the third plea should be rejected as ineffective since, even assuming that the contested payment could be *de minimis* in nature, such a finding would be for the Italian authorities to make. In any event, that second part is unfounded, since the applicant has not shown that all the conditions of the 2006 *de minimis* Regulation were satisfied in the present case.

183 In that regard, it is sufficient to note that the arguments put forward in support of the second part of the third plea are ineffective. Indeed, as is apparent from the examination of the first part of the third plea, it was not for the Commission to examine whether the contested payment was *de minimis* in nature. In those conditions, those arguments, which, moreover, are essentially directed against the position taken by the

Commission in the context of email exchanges subsequent to the adoption of the contested decision, cannot be such as to call into question the legality of that decision.

184 As to the remainder, the applicant argued at the hearing that the contested payment, which was made on 19 April 2013, was not financed by funds originating from the Autonomous Region, since, as is apparent from recital 89(b) of the contested decision, the annual regional contributions allocated to SOGAER and GEASAR for 2013 had indeed been approved by that region, but they were never ultimately paid to them.

185 In that regard, it is apparent from Table 15, set out in recital 427 of the contested decision, and from tables summarising the actions undertaken by SOGAER over the period from 2010 to 2013, referred to in recital 113 of the contested decision and produced by the Commission in response to a written question from the Court, that the contract at issue must be regarded as pertaining to 2012. Consequently, the contested payment, made in the spring of 2013, was covered by the regional contribution for 2012, which was paid to SOGAER. In any event, to the extent that the applicant wishes to challenge that finding, that question falls within the examination, by the Italian authorities, of its individual situation.

186 In the light of all the foregoing considerations, the third plea must be rejected and, accordingly, the action must be dismissed in its entirety.

Costs

187 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition),

hereby:

1. Dismisses the action;

2. Orders Germanwings GmbH to pay the costs.

Papasavvas Svenningsen Valančius

Csehi Nihoul

Delivered in open court in Luxembourg on 13 May 2020.

[Signatures]

Table of contents

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* Language of the case: German.