# COMMISSION DECISION (EU) 2018/1537

## of 18 July 2017

## on state aid SA.38105 2014/C (ex 2014/NN) implemented by the Kingdom of Belgium for Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium

*(notified under document C(2017) 5023)*

**(Only the French and Dutch texts are authentic)**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the above Articles ([1]), and having regard to those comments,

Whereas:

### 1. PROCEDURE

(1) On 19 December 2013, a press release from the Belgian Government's Council of Ministers announced the approval of a draft royal decree to grant financial aid to users of the services of Brussels Airport Company (hereinafter 'BAC'), holder of the operating licence for Brussels airport.

(2) By letter of 31 December 2013, the Commission received a complaint from International Airlines Group (hereinafter 'IAG'), a group that controls various airlines, including British Airways and Iberia, concerning this project.

(3) By letter of 2 January 2014, the airline Ryanair also lodged a complaint against this draft.

(4) The Commission forwarded the complaints of IAG and Ryanair to Belgium and asked for further information in its letter of 13 January 2014. Belgium submitted its comments by letter of 5 February 2014.

(5) The Royal Decree, the draft of which was the subject of the complaints mentioned in recitals 2 and 3 was adopted on 7 January 2014.

(6) On 11 February 2014 the Commission sent a request for information to the applicant. Belgium submitted its comments by letter of 2 April 2014.

(7) By letter dated 1 October 2014, the Commission informed Belgium of its decision to initiate the procedure provided for in Article 108(2) of the TFEU regarding the measure (the 'formal investigation procedure'). The Commission invited Belgium to submit its comments and to provide any relevant information for the assessment of the measure at issue. On 16 January 2015, Belgium sent its comments to the Commission.

(8) The Commission's decision to initiate the procedure (hereinafter 'the opening decision') was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the measure in question.

(9) The Commission received comments from Ryanair, IAG, Brussels Airlines and another interested party which asked to remain anonymous. The Commission forwarded these comments to Belgium, which sent its comments on them by letters of 14 August 2015 and 3 June 2016.

(10) By letter dated 10 February 2015, the Commission sent a request for information to Belgium concerning the measure in question. Belgium responded on 12 March 2015. Belgium provided additional information by letters of 20 March and 16 May 2017.

([1]) OJ C 24, 23.1.2015, p. 10.
([2]) See footnote 1.

## 2. DESCRIPTION OF THE MEASURE

### 2.1. Preliminary considerations — general information on Brussels airport

#### 2.1.1. *Airport characteristics and traffic*

(11) Brussels airport is located twelve kilometres north-east of Brussels, in the municipality of Zaventem.

(12) In 2013, the airport handled some 19 million passengers, the estimated theoretical maximum capacity of the airport being 35 million passengers. Passenger traffic at Brussels airport since 2005 is summarised in Table 1.

*Table 1*

**Brussels airport traffic for the period 2005-2015 (commercial and non-commercial passenger traffic)** [1]

| Year | Passengers | Movements |
|---|---|---|
| 2005 | 16 179 733 (+ 3,50 %) | 253 255 (– 0,30 %) |
| 2006 | 16 707 892 (+ 3,30 %) | 254 772 (+ 0,60 %) |
| 2007 | 17 877 618 (+ 7,10 %) | 264 366 (+ 3,80 %) |
| 2008 | 18 515 730 (+ 3,40 %) | 258 795 (– 2,10 %) |
| 2009 | 16 999 154 (– 8,20 %) | 231 668 (– 10,5 %) |
| 2010 | 17 180 606 (+ 1,10 %) | 225 682 (– 2,60 %) |
| 2011 | 18 786 034 (+ 9,30 %) | 233 758 (+ 3,60 %) |
| 2012 | 18 971 332 (+ 1 %) | 223 431 (– 4 %) |
| 2013 | 19 133 222 (+ 0,90 %) | 216 678 (– 3 %) |
| 2014 | 21 933 190 (+ 14,60 %) | 231 528 (+ 6,90 %) |
| 2015 | 23 460 018 (+ 7 %) | 239 349 (+ 3,40 %) |

[1] The figures in brackets represent the change in the number of passengers or movements compared with the previous year.

(13) Brussels airport is basically open to European and international commercial traffic. Table 2 summarises the shares of European and international passenger traffic in the airport's total traffic.

*Table 2*

**Evolution of EU/non-EU commercial passenger traffic (excluding non-commercial passenger traffic) at Brussels airport for the period 2005-2015**

| | EU | Non-EU | TOTAL |
|---|---|---|---|
| 2005 | 11 089 996 (68,74 %) | 5 043 410 (31,26 %) | 16 133 406 |
| 2006 | 11 760 414 (70,56 %) | 4 906 108 (29,44 %) | 16 666 522 |

| | EU | Non-EU | TOTAL |
|---|---|---|---|
| 2007 | 12 235 290 (68,59 %) | 5 602 924 (31,41 %) | 17 838 214 |
| 2008 | 11 986 491 (64,9 %) | 6 493 416 (35,1 %) | 18 479 907 |
| 2009 | 10 730 415 (63,2 %) | 6 240 239 (36,8 %) | 16 970 654 |
| 2010 | 10 530 785 (61,4 %) | 6 618 631 (38,6 %) | 17 149 416 |
| 2011 | 11 650 291 (62,1 %) | 7 105 912 (37,9 %) | 18 756 203 |
| 2012 | 11 437 193 (60,4 %) | 7 506 495 (39,6 %) | 18 943 688 |
| 2013 | 11 661 585 (61 %) | 7 443 813 (39 %) | 19 105 398 |
| 2014 | 14 134 723 (64,5 %) | 7 770 000 (35,5 %) | 21 904 723 |
| 2015 | 15 549 806 (66,4 %) | 7 873 461 (33,6 %) | 23 423 267 |

(14) Brussels airport serves as a transport hub for various airlines, such as Brussels Airlines, its partners in the Star Alliance, and Jet Airways.

(15) Table 3 shows the traffic of the main airlines operating out of Brussels airport over the period 2012 to 2015.

*Table 3*

**Main airlines operating out of Brussels airport (2012-2015)**

| | Number of passenger departures (including transit and transfer passengers) | |
|---|---|---|
| | 2012 | 2013 |
| Brussels Airlines | 2 931 025 | 2 957 455 |
| TUI Airlines Belgium | 720 655 | 725 800 |
| Thomas Cook Airlines Belgium | 411 093 | 411 636 |
| Lufthansa | 420 072 | 410 153 |
| easyJet | 382 875 | 396 969 |

| | Number of passenger departures (including transit and transfer passengers) | |
|---|---|---|
| | 2014 | 2015 |
| Brussels Airlines | 3 351 032 | 3 750 725 |
| Ryanair | 639 335 | 908 990 |
| TUI Airlines Belgium | 813 014 | 803 200 |
| easyJet | 499 129 | 496 576 |
| Lufthansa | 413 618 | 438 253 |
| Thomas Cook Airlines Belgium | 428 737 | 423 671 |

(16) Low-cost airlines Ryanair and Vueling have been operating out of Brussels airport since February 2014. Upon its arrival at Brussels airport, Ryanair opened nine routes, from its second base in Belgium after Charleroi airport.

2.1.2. *Operation and ownership of airport infrastructure — BAC*

(17) Since 2004, Brussels airport has been managed by BAC pursuant to the Royal Decree of 27 May 2004 ([3]) (hereinafter 'the Royal Decree of 27 May 2004'). BAC also owns the airport facilities.

(18) BAC is the successor to the public limited-liability company known as Brussels International Airport Company (BIAC).

(19) BAC is a private company. 75 % of BAC shares are held by private investors: 38,99 % by a Canadian pension fund ([4]) and 36,01 % by an Australian group ([5]). The remaining shares (25 %) are held by the Belgian State. The Board of Directors is composed of 11 members, four of whom are appointed by the Belgian State, including the Chairman of the Board of Directors.

2.1.3. *Regulatory framework for the management of Brussels airport*

(20) Under Article 6(1)(X)(7) of the Special Law of 8 August 1980 on institutional reform ([6]), competence for airport facilities and operation is entrusted to the regions, with the exception of Brussels airport, which is under the jurisdiction of the Federal State.

(21) Chapter IV of the Royal Decree of 27 May 2004 sets out the operating conditions for the facilities at Brussels airport. Operation is subject to the prior granting by royal decree of an individual operating licence of indefinite duration. Article 30 of the Royal Decree of 27 May 2004 provides that the holder of an operating licence must, in particular:

> '1. maintain and develop airport facilities under financially acceptable conditions so as to ensure the safety of persons and the security of airport facilities, the continuous certification of airport facilities, sufficient capacity, taking account of growing demand and the international role of Brussels airport, and a high level of quality';

(22) The operating licence for Brussels airport was awarded to BIAC (which became BAC in 2013) by the Royal Decree of 21 June 2004 ([7]) (hereinafter 'the Royal Decree of 21 June 2004'). Article 4(4) of the Royal Decree provides that the holder of the operating licence shall ensure that '(…) security and safety on the ground are maintained, excluding general policing and aeronautical inspection tasks, and military tasks'. Article 7(1) provides that the holder of the operating licence 'shall maintain and develop the airport facilities (…) in such a way as to ensure the safety and security of persons and airport facilities (…)'.

(23) Within Brussels airport, there are 'regulated activities', the revenue of which may be collected by the holder of the airport operating licence (in this case, BAC). The revenue is controlled in accordance with a tariff control formula designed to limit changes in the revenues collected per unit of traffic for these activities ([8]). These regulated activities are as follows:

(a) aircraft landings and take-offs;

(b) aircraft parking;

(c) use by passengers of the airport facilities provided for them;

(d) supply of fuel to aircraft through centralised infrastructure;

(e) services to ensure the safety of passengers and the security of airport facilities.

([3]) The Royal Decree of 27 May 2004 on the transformation of Brussels International Airport Company into a private limited-liability company and on airport facilities (Belgian Official Gazette of 24 June 2004, p. 51750).
([4]) Ontario Teachers' Pension Plan.
([5]) MAp Airports via Macquarie European Infrastructure Fund I and Macquarie European Infrastructure Fund III.
([6]) Special Law of 8 August 1980 on institutional reform (Belgian Official Gazette, 15 August 1980, p. 9434).
([7]) Royal Decree of 21 June 2004 granting the operating licence for Brussels airport to the limited-liability company BIAC (Belgian Official Gazette, 15 July 2004, p. 55640).
([8]) Article 1(12) and Article 30(7) of the Royal Decree of 27 May 2004.

(24) Article 30(7) of the Royal Decree of 27 May 2004 provides for a tariff system, covering the coherent set of airport charges ([9]), and the tariff control formula referred to in recital 23 shall be established by the holder of the operating licence, after consultation with the organisations representing users. The tariff control formula is intended to limit changes in revenue that the licence holder may charge per unit of traffic for the regulated activities.

(25) Moreover, Article 42 of the Royal Decree of 21 June 2004 stipulates that the tariff control formula and the tariff system referred to in Article 30(7) of the Royal Decree of 27 May 2004 shall be established in such a way as to:

'1. reflect the total regulated costs on the basis of the results of the ABC cost model;

2. ensure a fair margin of return on the capital invested, with a view, in particular, to ensuring the development of airport facilities (…);

3. align the rates of the airport charges for the regulated activities with tariffs charged by the reference airports on the basis of the results of the reference tariff model'.

Article 43 of the Royal Decree of 21 June 2004 provides that the tariff system, the tariff control formula and annual changes to them are set by BAC, after consultation with airport users, for a five-year regulation period (running from 1 April of year 'n' to 31 March of year 'n + 5'). Pursuant to Article 55(1) of the Royal Decree of 21 June 2004, in the absence of notification of a substantiated disagreement of an airport user with BAC's tariff proposal, there is a tacit agreement between the parties on the tariff system and the rate control formula. If at least two unrelated airlines, each representing at least 1 % of annual movements or 1 % of annual passengers, and representing together at least 25 % of annual movements or 25 % of passengers over the last calendar year preceding the consultation of airport users, refuse the tariff control formula or the tariff system, they may lodge a reasoned appeal with the economic regulatory authority. The economic regulatory authority may then validate the tariff control formula and the tariff system, or require certain adjustments or changes to the tariff control formula and/or tariff system. The tariff control formula and tariff system shall then be presented for a decision by the Minister with responsibility for air navigation before being published in the Belgian Official Gazette. The security charge referred to in recital 26 shall be determined using the same procedure ([10]).

(26) As stated in recital 23 under point (e) of this Decision, services to ensure the safety of passengers and the security of airport facilities are among the regulated activities. In order to fund these services, BAC levies a security charge from airlines for each passenger departing from Brussels airport.

*Table 4*

**Amount of the security charge for the period 2013-2017**

| Period | Amount of security charge (per departing passenger, in EUR) |
|---|---|
| 1 January 2013 - 31 March 2013 | 6,39 |
| 1 April 2013 - 31 March 2014 | 6,62 |
| 1 April 2014 - 31 March 2015 | 6,71 |
| 1 April 2015 - 31 March 2016 | 6,73 |
| 1 April 2016 - 31 March 2017 | 6,19 |

(27) During the period in question, the security charge levied by BAC was a flat rate per departing passenger, with no distinction as to type of passenger (passenger starting their air route from Brussels airport, transfer passenger or transit passenger).

([9]) Article 35(1) of the Royal Decree of 27 May 2004.
([10]) Response of 12 March 2015 to Request for Information of 10 February 2015 (reply to question 5(b)).

### 2.2. **The Royal Decree of 7 January 2014**

(28) The measure covered by this Decision is the grant, pursuant to the Royal Decree of 7 January 2014 ([11]), (hereinafter 'the Royal Decree of 7 January 2014'), of subsidies to various airlines, from funds received by BAC from the Belgian Federal Government and redistributed in accordance with the rules laid down in that Royal Decree.

(29) Pursuant to Article 1 of the Royal Decree of 7 January 2014, an annual subsidy of EUR 19 000 000 is hereby granted to BAC to support security-related infrastructure, i.e. all activities to ensure the safety of passengers and the security of airport facilities, such as the screening of passengers and their baggage upon entering the airport's restricted area for the purpose of detecting any explosives, weapons or other dangerous items. This subsidy is granted for the 2014, 2015 and 2016 budget years. It shall be paid annually to BAC's account no later than 31 March of each year.

(30) Pursuant to Article 2(1) of the Royal Decree of 7 January 2014, BAC redistributes to users of Brussels airport ([12]) having carried more than 400 000 departing passengers between 1 January and 31 December 2012, not including transit or transfer passengers, the subsidy referred to in Article 1 of the Royal Decree, in proportion to the amount they paid for services to ensure the safety of passengers and the security of airport facilities during the previous year.

(31) Article 2(2) of the Royal Decree of 7 January 2014 states that the amount paid to each user complying with the conditions referred to in Article 2(1) of the Royal Decree 'is to be calculated annually on the basis of the number of departing passengers, including transit and transfer passengers, for the years 2013, 2014 and 2015; over and above the 400 000th passenger per year, the user is exempted, for the years 2013, 2014 and 2015, from paying for services to ensure the safety of passengers and the security of airport facilities, up to a maximum total annual amount of nineteen million euros (EUR 19 000 000)'.

(32) Article 4 of the Royal Decree of 7 January 2014 stipulates that this budget measure will be assessed in the course of 2015 so that it can be adjusted before the start of the new 2016-2021 tariff period. The tariff period referred to in this provision corresponds to the five-year tariff schedule period for airport charges at Brussels airport, as provided for in Article 43 of the Royal Decree of 21 June 2004.

(33) The Royal Decree of 7 January 2014 states that it is to take effect on 1 January 2013.

### 2.3. **Payments made pursuant to the Royal Decree of 7 January 2014**

(34) Contrary to Article 2(1) of the Royal Decree of 7 January 2014 ('… *BAC redistributes to users of Brussels airport (…) the subsidy referred to in Article 1(…)*'), Belgium made the payments due directly to the airlines, without them passing through BAC.

(35) According to Belgium, BAC expressly asked the Belgian authorities, in its letter of 8 July 2014, to pay the amounts directly to the bank accounts of the beneficiary airlines in order to facilitate the administrative implementation of the Royal Decree of 7 January 2014.

(36) On 12 September 2014, the Council of Ministers took note of BAC's wish as expressed in its letter of 8 July 2014 and approved the proposed simplification of the procedure, i.e. direct payment of the sums concerned to the accounts of the beneficiary airlines.

(37) On 22 September 2014, the airlines satisfying the criteria set out in the Royal Decree of 7 January 2014, namely Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium, received EUR 16 779 819, EUR 2 143 621 and EUR 76 560 respectively for 2013.

(38) Belgium has provided details of the calculations of these amounts, thereby clarifying the application of the Royal Decree of 7 January 2014 ([13]).

(39) Belgium first determined that only three airlines, Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium were eligible for the scheme, since no other airline had carried more than 400 000 departing passengers between 1 January and 31 December 2012, not including transit or transfer passengers.

([11]) Royal Decree of 7 January 2014 granting a subsidy to Brussels Airport Company, holder of the operating licence for Brussels airport, to support security-related infrastructure (Belgian Official Gazette, 23 April 2014, p. 34506).
([12]) In this context, the term 'users of Brussels airport' means the airlines operating flights departing from that airport.
([13]) Response of 12 March 2015 to the request for information of 10 February 2015.

(40) The amounts due to each of these three airlines in 2014 were calculated based on the number of departing passengers carried by each of them in each month of 2013, including transfer and transit passengers. For each airline, the month in which the threshold of 400 000 departing passengers since 1 January 2013 was exceeded and the safety charge in force during that month were identified. The amount of the security charge payable by each airline, month by month, for each passenger carried, over and above the first 400 000 passengers carried since 1 January 2013 was then calculated. This amount corresponds to the subsidy that would be due to the airline pursuant to the Royal Decree of 7 January 2014 in the absence of a budget ceiling.

(41) In order to abide by the budget ceiling of EUR 19 000 000 per year, cross-multiplication is then applied to the three amounts thus calculated, in order to determine the amount actually due to each airline in respect of 2013.

### 2.4. **Beneficiaries**

(42) In the opening decision, the Commission identified the airlines satisfying the criteria set out in Article 2(1) of the Royal Decree of 7 January 2014 as the sole potential beneficiaries of the measure that could constitute State aid under the formal investigation procedure.

### 2.5. **Suspension of the application of the Royal Decree of 7 January 2014**

(43) Following the opening of the formal investigation procedure, Belgium decided, as a precautionary measure and without prejudice to its position on the preliminary assessment made by the Commission in the opening decision, to suspend from 3 December 2014 the implementation of the Royal Decree of 7 January 2014. Belgium undertook not to make any payment pursuant to the Royal Decree until further notice. According to the information available to the Commission, Belgium has complied with that undertaking.

### 2.6. **The Royal Decree of 15 March 2017**

(44) On 15 March 2017, a royal decree ([14]) (hereinafter 'the Royal Decree of 15 March 2017') repealing the Royal Decree of 7 January 2014 was adopted.

(45) Furthermore, pursuant to Article 2 of the Royal Decree of 15 March 2017, the subsidies provided for by the repealed Royal Decree and levied while it was in force by the airlines concerned, namely from 1 January 2013 to 7 January 2014, must be repaid by 31 March 2017 to the Belgian federal authorities. That Article also provides that the amounts to be recovered attract interest from the date on which the subsidies were paid to the beneficiary until they are actually recovered. The interest shall be calculated in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([15]). Belgium has provided the Commission with a document showing that Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium have repaid all the subsidies received, with interest, in accordance with Article 2 of the Royal Decree of 15 March 2017.

## 3. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(46) In its opening decision, the Commission first of all examined whether there was State aid for airlines satisfying the conditions laid down in Article 2(1) of the Royal Decree of 7 January 2014. It then considered the compatibility of this possible aid. Finally, it considered whether or not this possible aid was illegal and whether it should be recovered.

(47) Regarding the existence of State aid, the Commission first analysed the activity of the beneficiaries of the measure in question. Since the users of Brussels airport to which BAC has to redistribute the subsidy are airlines, the Commission considered that their activity was of an economic nature within the meaning of Article 107(1) TFEU.

([14]) Royal Decree of 15 March 2017 repealing the Royal Decree of 7 January 2014 granting a subsidy to Brussels Airport Company, holder of the operating licence for Brussels airport, to support security-related infrastructure (Belgian Official Gazette of 24 March 2017).

([15]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1). Commission notice on current State aid recovery interest rates and reference/discount rates for 28 Member States applicable as from 1 January 2014 (published in accordance with Article 10 of Commission Regulation (EC) No 794/2004 of 21 April 2004 (OJ L 140, 30.4.2004, p. 1)) (OJ C 2, 7.1.2014, p. 7).

(48) Regarding the presence of State resources and the State's accountability for the measure, the Commission found that the subsidy was granted pursuant to a Royal Decree and funded by the Belgian budget, specifically the budget of the Federal Public Service for Mobility and Transport. In addition, pursuant to Article 2 of the Royal Decree of 7 January 2014, BAC must redistribute to users of Brussels airport that carried more than 400 000 departing passengers (passengers in transit and transfer not included) between 1 January and 31 December 2012 the subsidy referred to in Article 1 of the Royal Decree in accordance with rules laid down entirely by the Royal Decree. The Commission therefore considered that the measure for making payments to certain airlines pursuant to Article 2 of the Royal Decree was attributable to Belgium and funded out of State resources.

(49) Regarding the presence of an economic advantage for the airlines, the Commission noted that, pursuant to Article 2 of the Royal Decree of 7 January 2014, BAC was not free to maintain the charges collected from the airlines once the subsidy granted by the Royal Decree had been received, but was obliged to pass on the effects of this subsidy to certain airlines, which constitutes an economic advantage for those airlines.

(50) Moreover, the Commission has reached a preliminary conclusion that the measure is selective. It benefits only the airlines using Brussels airport which satisfy a number of conditions relating to traffic at Brussels airport in 2012. According to the Commission's preliminary analysis, the eligibility of airlines for the scheme concerned is based on discriminatory criteria unrelated to the purpose and nature of the measure, effectively favouring three airlines while excluding without good reason all other users of Brussels airport.

(51) The Commission has found on a preliminary basis that this selective advantage is likely to create distortions of competition in the internal market and affect trade between Member States, as it may allow the airlines concerned to pursue a more aggressive tariff policy and maintain or artificially increase the supply of services provided in relation to normal market conditions.

(52) The Commission came to a preliminary conclusion that the subsidy received by the beneficiary airlines constituted State aid within the meaning of Article 107(1) TFEU.

(53) The Commission also stated in its opening decision that there was no legal basis exempting Belgium from notifying this aid under Article 108(4) TFEU. In particular, the Commission noted that the subsidies in question were not covered by the General Block Exemption Regulation ([16]), to the extent that they did not fulfil the conditions laid down in Chapter I of that Regulation. The Commission therefore considered that the measure was likely to constitute unlawful aid, the Royal Decree of 7 January 2014 having entered into force without having been notified to the Commission.

(54) Finally, the Commission expressed doubts as to the compatibility of the possible aid with the internal market, in particular in the light of the Commission's Guidelines on State aid to airports and airlines of 4 April 2014 (hereinafter the 'aviation guidelines') ([17]) which do not allow for State aid to be granted to airlines for their activities departing from airports handling more than five million passengers a year that are not located in remote areas ([18]), such as Brussels airport.

## 4. **COMMENTS FROM BELGIUM ON THE OPENING DECISION**

(55) On 15 January 2015, Belgium sent the Commission its comments on the opening decision.

### 4.1. **The existence of State aid**

(56) Belgium first recalls the conditions that must all be met to classify a measure as State aid, in particular that (1) the beneficiary or beneficiaries must be undertakings within the meaning of Article 107(1) TFEU; (2) the measure must be granted through state resources and be imputable to the State; (3) the measure must confer a selective advantage on its recipient(s); and (4) the measure must distort or threaten to distort competition and must be likely to affect trade between Member States.

([16]) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).
([17]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([18]) Point 145 of the aviation guidelines.

(57) Belgium goes on to state that it does not dispute that the measure in question is imputable to the State and that it is likely to affect trade between Member States.

(58) On the other hand, Belgium considers that it is not (1) a subsidy granted to an undertaking engaged in an economic activity, or (2) a selective advantage, which are sufficient grounds to rule out the measure introduced by the Royal Decree of 7 January 2014 being classified as State aid.

(59) The arguments put forward by Belgium in support of these two conclusions are summarised in recitals 60 to 72.

4.1.1. *Notion of undertaking and economic activity*

(60) Belgium notes that, according to Article 107 of the TFEU, the definition of undertaking covers every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.

(61) It also points out that activities carried out for the exercise of the official powers of the public authorities are not regarded as 'economic'.

(62) Regarding airports, such activities include, in particular, security, air traffic control and policing.

(63) In the view of Belgium, it follows that activities related to airport security do not constitute an economic activity within the meaning competition law and that their financing does not therefore constitute State aid.

(64) In that respect, Belgium considers that it is possible for an entity to combine the exercise of powers of a public authority with the exercise of certain economic activities, and that the entity is therefore subject to the rules applicable to State aid only for its economic activities.

(65) Belgium takes the view that the financing of services relating to airport security, as laid down by the Royal Decree of 7 January 2014, does not constitute State aid, in that such activities fall within the scope of the exercise of the official powers of the public authorities.

4.1.2. *Existence of a selective advantage*

(66) Belgium further considers that the measure in question does not confer on its beneficiaries any advantage within the meaning of the State aid rules.

(67) More specifically, it makes reference to the fact that the existence of an advantage must be established by making a comparison between the situation being considered and the normal situation.

(68) Accordingly, in order to assess whether in the present case an advantage exists within the meaning of the State aid rules, in Belgium's view, a comparison should be made between the measure covered by this procedure and a comparable situation in Belgium, in order to verify whether or not the contested measure confers such an advantage to the beneficiary airlines.

(69) Belgium points out that, until the adoption of the measure in question, only Brussels airport charged its users a fee covering the security costs incurred by their use of the airport, with no public subsidy. According to Belgium, the situation of Brussels airport therefore differs from that of the other airports, located in the Walloon Region and the Flemish Region, where all costs related to airport safety and security services are borne by the regions concerned. Belgium makes reference to the Commission Decision of 1 October 2014 in the case concerning the measures implemented by Belgium in favour of Charleroi Airport and Ryanair ([19]) (hereinafter 'the Charleroi decision') and in particular recitals 269 and 270 thereof.

(70) Belgium claims that, as a result, in Belgium the market price for airport services charged to airlines appears not to include the total costs related to airport security. In that regard, it takes the view that the Commission, in the Charleroi decision, did not consider that this constituted State aid.

([19]) Commission Decision (EU) 2016/2069 of 1 October 2014 concerning measures SA.14093 (C76/2002) implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair (OJ L 325, 30.11.2016, p. 63).

4.1.3. *The threshold of 400 000 passengers per year and its impact on the selectivity of the measure*

(71) Regarding the threshold of 400 000 passengers, Belgium refers in particular to its letter of 2 April 2014, in which, before the opening of the formal investigation procedure, it put forward its arguments as to the merits of this threshold; these arguments are summarised in points 46 to 49 of the opening decision. Belgium adds to these arguments that 'the aim was to encourage airlines to expand in Brussels by compensating them for the reduced safety costs entailed by an increase in passengers'.

(72) Moreover, on the basis of the periodic assessment clause of the scheme, provided for in Article 4 of the Royal Decree of 7 January 2014, Belgium refers to a possible extension of the measure for a further three years *mutatis mutandis*, i.e. benefiting the airlines that have carried more than 400 000 departing passengers in 2015. Belgium concludes that the mechanism is an incentive in that it is likely to lead to a redistribution of the list of beneficiaries every three years, for all carriers having exceeded the threshold of 400 000 passengers over the three-year assessment period.

### 4.2. **Compatibility of the possible aid**

(73) Since Belgium considers that the measure introduced by the Royal Decree of 7 January 2014 does not constitute State aid, it does not see the relevance of indicating the legal basis on which the measure could be declared compatible with the internal market and demonstrating that the conditions for compatibility are met.

### 4.3. **Legality and recovery of the possible aid**

(74) Belgium considers that the consideration of whether or not the measure in question was notified to the European Commission in accordance with Article 108(3) TFEU is irrelevant.

(75) It therefore considers that the question as to whether the measure is subject to recovery is not relevant either.

## 5. **COMMENTS FROM INTERESTED THIRD PARTIES**

### 5.1. **Comments by Ryanair**

(76) On 13 February 2015, Ryanair sent the Commission its comments on the opening decision.

5.1.1. *Possible injunction to suspend the aid*

(77) Ryanair shares the Commission's preliminary findings regarding the existence of State aid, and calls upon the Commission to order Belgium to suspend the measure in question.

(78) According to Ryanair, the very purpose of the measure is clearly anti-competitive because this measure aims to distort competition by putting other airlines at a disadvantage, notably the low-cost airlines operating at Brussels airport.

(79) Furthermore, Ryanair considers that the beneficiaries of the measure (notably Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium) have used it to strengthen a pre-existing strategic partnership aimed at facing up to a range of efficient competitors, such as Ryanair and Vueling, at the Brussels airport hub.

5.1.2. *The structure of the measure and its status as State aid*

(80) First, Ryanair agrees with the Commission's preliminary findings regarding the arbitrary nature of the 400 000 passenger threshold, which Ryanair considers to be devoid of economic logic.

(81) Secondly, Ryanair emphasises that the eligible airlines are selected on the basis of a criterion that excludes transfer and transit passengers, while the amounts due to each beneficiary do take account of those categories of passengers. Ryanair sees this as an inconsistency, and assumes that the differences in treatment caused by the measure concerning transit and transfer passengers are logically explained by Belgium's aim to exclude non-Belgian airlines from the scope of the measure.

(82) Finally, Ryanair agrees with the Commission's preliminary analysis that the choice of 2012 as the reference year for identifying the beneficiaries of the measure is arbitrary. Ryanair notes that this is not the only year for which data were available, as BAC publishes passenger traffic data on its website every month for the previous month.

5.1.3. *Incompatibility of the aid*

(83) Ryanair considers that the aid cannot be declared compatible with the internal market in that it infringes the rules on the freedom to provide services. According to Ryanair, the aid favours the services offered by some carefully selected Belgian airlines. Ryanair points out that no major Belgian airline appears to be excluded from the list of beneficiaries, and that the Belgian Minister of Transport has himself admitted that the purpose of the measure is to support national airlines.

(84) In addition, Ryanair reports hostile statements against it, from the then Belgian government, which Ryanair claims is opposed to its establishment at Brussels airport; its aim, though this anticompetitive aid, is to discourage all new offerings of services by low-cost airlines from this airport.

5.1.4. *The financial difficulties of Brussels Airlines*

(85) Ryanair notes that Brussels Airlines has reported operating losses every year since 2009. Ryanair considers that, without the intervention of Belgium, Brussels Airlines would probably have been driven out of the market in the short or medium term. According to Ryanair, the situation was so critical that Brussels Airlines immediately included the expected aid in its 2013 annual accounts, while its entitlement to receive this amount was still uncertain.

(86) Ryanair calls upon the Commission to use 'all its powers under Council Regulation (EC) No 659/1999' ([20]), replaced by Council Regulation (EU) 2015/1589 ([21]), to request detailed and up-to-date financial information on the accounts of Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium for 2012, 2013 and 2014. Ryanair also asks the Commission to check how the aid was reflected in the beneficiaries' accounts in order to determine whether those beneficiaries are firms in difficulty within the meaning of the version of the guidelines on State aid for rescuing and restructuring that were applicable at the time.

5.2. **Comments by International Airlines Group (IAG)**

(87) On 16 February 2015, IAG sent the Commission its comments on the opening decision.

5.2.1. *Imputability of the measure to the State*

(88) According to IAG, it is clear that the measure was approved by Belgium by means of the Royal Decree of 7 January 2014, and that it is based on State resources, in particular on the budget of the 'Federal Public Service for Mobility and Transport'. IAG also emphasises that BAC's role in the management and distribution of this resource is restricted to implementing the decisions of the Belgian State, as the rules for the distribution of the funds received by BAC from the State are determined solely by the provisions of the Royal Decree. According to IAG, the fact that BAC is a private operator does not therefore call into question the presence of state resources and the imputability of the measure to the State.

5.2.2. *Existence of a selective advantage in favour of the airlines*

(89) IAG points out that the airlines that did not operate in 2012 are automatically excluded from the Royal Decree of 7 January 2014. It considers that, although the measure is presented as being of general application to all users of Brussels airport, the measure has been devised in such a way that it can apply only to a few of the airlines.

5.2.3. *Regarding transit and transfer passengers*

(90) IAG refers to one of Belgium's statements about the selectivity of the measure, namely that unlike the Brussels airport, many European airports do not exempt transit and transfer passengers and do pass their security charges on to them. IAG qualifies this statement on the basis of a number of examples of major European airports.

([20]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

([21]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

(91) Furthermore, IAG notes that following the losses posted by Brussels Airlines in recent years, Lufthansa decided to postpone its decision to acquire all the shares of Brussels Airlines until 2017, whereas this decision was initially planned in 2014. According to IAG, Lufthansa is not likely to complete the acquisition of Brussels Airlines until it has improved its balance sheet, even with public funds.

### 5.3. **Comments by Brussels Airlines**

(92) On 23 February 2015, Brussels Airlines sent the Commission its comments on the opening decision.

(93) Brussels Airlines considers that the measure in question does not constitute State aid because it concerns the funding of non-economic activities and, in any event, does not confer a selective advantage on the beneficiaries of the subsidy.

(94) Secondarily, Brussels Airlines considers that the measure is compatible with the internal market before the entry into force of the aviation guidelines.

#### 5.3.1. *Notion of undertaking and economic activity*

(95) Brussels Airlines considers that the subsidy granted by the Royal Decree of 7 January 2014 relates to non-economic activities, providing for partial financial compensation for them.

(96) In support of this analysis, Brussels Airlines refers to the decision to extend the examination procedure of 21 March 2012 in case SA.14093 (C76/2002) *Advantages granted by the Walloon Region to Brussels South Charleroi Airport and Ryanair* ([22]).

(97) According to Brussels Airlines, the airlines operating at Charleroi airport do not pay security charges at that airport and, according to the Commission's decision of 21 March 2012, this does not imply that they are receiving State aid. Brussels Airlines also notes that the Charleroi decision, which closed the formal investigation procedure extended by the decision of 21 March 2012, according to a minister from the Walloon Region, endorsed the financial compensation for security granted by the Walloon Region to Charleroi airport and, therefore, according to Brussels Airlines, to its operators.

#### 5.3.2. *Selective advantage*

(98) Brussels Airlines refers to point 44 of the opening decision, in which the Commission concluded that the measure is selective for three reasons: (1) the measure benefits only airlines and not other modes of passenger transport, (2) the measure benefits airlines operating at Brussels airport, and (3) the measure benefits airlines that satisfy certain conditions regarding traffic at Brussels airport.

(99) Referring to the first point, Brussels Airlines expresses doubts as to the selectivity of the subsidy because it is granted only to airlines. Brussels Airlines considers that there are objective reasons behind the differentiation between air traffic and other modes of passenger transport, since they do not involve as many security risks as air transport.

(100) As regards the second point, Brussels Airlines makes reference to Belgian law which provides for the distribution of aid only to airlines operating at Brussels airport. The Belgian regions are responsible for the equipment and operation of public airports and aerodromes, with the exception of Brussels airport, which is under federal jurisdiction. Accordingly, Brussels Airlines concludes that the Federal State can provide this subsidy at Brussels airport only and not at other airports.

(101) Regarding the third point, Brussels Airlines invites the Commission to refer to the Federal State which adopted the Royal Decree of 7 January 2014. However, it wishes to clarify that, in its view, a threshold related to the number of passengers is relevant in the case of a subsidy for airport security-related services because airport security costs are also related to the number of passengers.

(102) Brussels Airlines also considers that the use of 2012 as the reference year is explained by the fact that this was the latest year for which the figures were available when the Council of Ministers decided to adopt the measure. Brussels Airlines believes that the choice of a reference point is clearly still to a certain extent arbitrary. According to the analysis by Brussels Airlines, by choosing 2012 as the reference year, Belgium does not appear to have exceeded the bounds of its discretion on this point.

([22]) OJ L 325, 30.11.2016, p. 63.

(103) Brussels Airlines concludes that the measure does not confer a selective advantage.

5.3.3. *Compatibility of the aid*

(104) Brussels Airlines wishes to point out that if the Commission were nevertheless to conclude that aid existed, that aid was compatible until at least 4 April 2014, the date of entry into force of the aviation guidelines. On this point, Brussels Airlines refers to the aforementioned Charleroi decision, in which the Commission accepted that several measures granted by the Walloon Region to the operator of Charleroi airport, which subsidised the economic activity of the airport in a selective way, therefore making it unlawful State aid, were incompatible with the internal market only since the entry into force of the aviation guidelines.

(105) According to the Brussels Airlines analysis, this implies that the subsidies paid for security-related services provided before that date cannot in any case be recovered from the undertakings that received them.

5.3.4. *Conclusion*

(106) Brussels Airlines considers that the measure in question does not constitute State aid because it does not subsidise an economic activity and does not confer a selective advantage. In any event, it notes that the measure must be considered compatible with the internal market before the entry into force of the aviation guidelines.

### 5.4. **Observations of another interested party which asked to remain anonymous**

(107) On 26 February 2015, another interested party, which asked to remain anonymous (hereinafter 'the interested party which asked to remain anonymous'), sent the Commission its comments on the opening decision.

(108) Firstly, the interested party which asked to remain anonymous recalls that the programme law of 30 December 2001 ([23]) expressly provides that ([24]) airport charges collected by BAC must be non-discriminatory, transparent and cost-oriented.

(109) It further points out that the Royal Decree of 7 January 2014 cannot call into question the provisions of the programme law because the latter is of higher rank than a royal decree.

(110) The interested party which asked to remain anonymous observes that on the basis of the programme law, Belgium granted BAC the licence to operate at Brussels airport. Therefore, according to the interested party which asked to remain anonymous, Belgium should ensure compliance with the conditions attached to the licence and therefore the non-discriminatory nature of airport charges. The interested party which asked to remain anonymous considers that if BAC does not abide by these conditions, Belgium can and must take measures to remedy them.

(111) The interested party which asked to remain anonymous therefore doubts whether Belgium aimed to support the Belgian airlines concerned without prejudice to the economic schedule referred to in recital (108) and therefore wonders whether BAC should not offer all the same discount on the cost of security measures to all airlines using Brussels airport.

(112) Furthermore, the interested party which asked to remain anonymous recalls that there is a five-year agreement between BAC and the airlines with respect to the pricing system and tariff control procedures. Any change to the current agreement requires the airlines to be consulted again.

(113) The interested party which asked to remain anonymous therefore concludes that Belgium assumes that BAC must offer all the airlines a non-discriminatory discount (i.e. reduce the costs of security-related measures across the board). Any other arrangement would confer a selective advantage on some airlines and would infringe Article 15 of the Chicago Convention ([25]) and Directive 2009/12/EC of the European Parliament and of the Council ([26]).

([23]) Belgian Official Gazette of 31 December 2001.
([24]) In particular Article 158(1), (2) and (4) thereof.
([25]) Convention on International Civil Aviation, Chicago, 7 December 1944, United Nations, Treaty Series, vol. 15, No 102, Article 15.
([26]) Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p. 11).

## 6. COMMENTS BY BELGIUM ON THE OBSERVATIONS BY INTERESTED PARTIES

### 6.1. Comments on the comments by Ryanair

(114) As a preliminary remark, Belgium recalls that in its comments of 16 January 2015 and in its reply of 12 March 2015 to the request for information of 10 February 2015, it explained in detail how the contested measure did not constitute State aid.

(115) Moreover, Belgium considers that the points put forward by Ryanair are more a reflection of its commercial strategy rather than purely legal arguments.

#### 6.1.1. *Request for suspension of the aid*

(116) Belgium recalls that, in the light of the doubts expressed by the Commission in the opening decision, the Minister for Mobility decided, as a precautionary measure and without prejudice to his position on the Commission's preliminary assessment in the opening decision, to suspend the implementation of the Royal Decree of 7 January 2014.

#### 6.1.2. *The existence of State aid*

(117) Commenting on Ryanair's arguments on the existence of State aid, including the alleged arbitrariness of the threshold of 400 000 passengers per year, the allegedly bizarre character of the treatment of transfer and transit passengers for the identification of beneficiaries of the aid and the calculation of the amount of the aid, and the allegedly arbitrary use of 2012 as the reference year for the selection of aid recipients, Belgium refers the Commission to its comments dated 16 January 2015 and its reply of 12 March 2015 response to the request for information of 10 February 2015.

(118) Regarding the arguments regarding the choice of 2012 as a reference year, according to Belgium, Ryanair failed to specify that although the traffic figures for the previous month are published each month on the BAC website, these are only general statistics on the number of passengers departing, arriving, transiting or transferring, not broken down by airline.

(119) As regards the statement by the former Secretary of State for Mobility referred to by Ryanair, Belgium considers that this statement does not in any way demonstrate the existence of State aid, nor the existence of any other Belgian Government plan to counter competition from Ryanair in relation to other airlines.

#### 6.1.3. *Compatibility of the alleged aid with the internal market*

(120) In this regard, Belgium recalls that the measure does not constitute State aid because it covers services that are not of an economic nature and, secondarily, it does not confer any advantage on its beneficiaries.

(121) Belgium concludes that the question of the compatibility of alleged State aid is irrelevant in this case.

#### 6.1.4. *Regarding the request concerning the beneficiaries' financial information*

(122) In this regard, Belgium points out that the measure in question does not constitute State aid and therefore the Commission has no reason to request financial information from Brussels Airlines, TUI Airlines Belgium or Thomas Cook Airlines Belgium.

(123) In any event, Belgium considers that comments should be invited from the three airlines concerned, if appropriate.

### 6.2. Comments on the comments by IAG

(124) In its comments on AGI's comments, Belgium refers the Commission to its comments of 16 January 2015 and its reply of 12 March 2015 to the request for information of 10 February 2015, in which it considers that it has explained in detail how the measure in question did not constitute State aid.

### 6.3. **Comments on the comments by Brussels Airlines**

(125) Belgium has taken due note of the comments made by Brussels Airlines, the main conclusion of which is that the measure in question does not constitute State aid. Belgium informs the Commission that it agrees with the conclusion of Brussels Airlines in that regard.

### 6.4. **Comments on the comments by the interested party which asked to remain anonymous**

(126) Belgium refers to its comments of 16 January 2015 and its reply of 12 March 2015 to the request for information of 10 February 2015, in which it considers that it has explained in detail how the measure in question did not constitute State aid.

## 7. **ASSESSMENT**

### 7.1. **Existence of State aid**

(127) According to Article 107(1) of the TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market

(128) For a measure to be classed as State aid the following cumulative criteria therefore have to be met: (1) the beneficiaries must be undertakings within the meaning of Article 107(1) TFEU; (2) the measure must be granted through state resources and be imputable to the State; (3) the measure must confer a selective advantage on its recipients; and (4) the measure must distort or threaten to distort competition and must be likely to affect trade between Member States ([27]).

#### 7.1.1. *Notion of undertaking and economic activity*

(129) According to Article 107(1) of the TFEU, State aid rules apply only where the recipient is an 'undertaking'. The notion of undertaking covers any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed ([28]). Any activity consisting in offering goods or services on a given market is regarded as an economic activity ([29]). As the Commission pointed out in point 34 of the aviation guidelines, the question as to whether or not any entity is an undertaking is always linked to a specific activity.

(130) According to Belgium, the subsidy paid pursuant to the Royal Decree of 7 January 2014 funds services to ensure the security of passengers and airport facilities, and therefore does not support activities of an economic nature. Belgium refers to the Charleroi decision in which the Commission considered that the financing by the Walloon Region of certain activities falling within the remit of public authorities at Charleroi airport did not constitute State aid, in particular because these activities were not of an economic nature. Brussels Airlines put forward similar arguments.

(131) The Commission is not contesting Belgium's right to grant compensation to BAC for the security activities it carries out at Brussels airport, as such compensation is unlikely to be classed as State aid in favour of BAC. However, this procedure relates not to a subsidy paid to BAC, but rather a subsidy to the airlines.

(132) In this regard, it should be noted that the Royal Decree of 7 January 2014 provides for BAC to pass on the entire subsidy it receives to airlines that carried more than 400 000 departing passengers in 2012. Consequently, the subsidy provided for by the Royal Decree of 7 January 2014, benefits the airlines that transported more than 400 000 departing passengers in 2012, through the redistribution mechanism introduced by Article 2 of the Royal Decree.

(133) The subsidies received by the airlines from BAC pursuant to Article 2 of the Royal Decree of 7 January 2014 are designed to refund them part of the security charge due to BAC. The security charge is one of the airport charges through which airlines pay BAC for access to airport infrastructure and the provision of airport services.

([27]) See, for example, the judgment of the Court of Justice of 10 January 2006, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze C-222/04, ECLI:EU:C:2006:8, paragraph 129.

([28]) Judgment of the Court of Justice of 18 June 1998, Commission v Italy, C-35/96, ECLI:EU:C:1998:303, paragraph 36; judgment of 23 April 1991, Höfner and Elser, C-41/90, ECLI:CU:C:1991:161, paragraph 21; judgment of 16 November 1995, Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche, C-244/94, ECLI:EU:C:1995:392, paragraph 14, and judgment of 11 December 1997, Job Centre, C-55/96, ECLI:EU:C:1997:603, paragraph 21.

([29]) Judgments of the Court of Justice of 16 June 1987, Commission v Italy, C-118/85, ECLI:EU:C:1987:283, paragraph 7, and of 18 June 1998, Commission v Italy, C-35/96, ECLI:EU:C:1998:303, paragraph 36.

It is therefore one of the components of the price of commercial services, determined by a private operator providing these services. Moreover, the security charge is an amount charged per departing passenger carried by the airline. It is therefore clear that the subsidies in question are funding commercial passenger transport activities which, as the Commission explained in point 27 of its aviation guidelines, constitute economic activities. It is not in any case a compensation for costs that should be borne by the airlines when carrying out activities under the responsibility of the State in the exercise of its official remit as a public authority.

(134) In the Charleroi decision, the Commission examined the funding of activities under the responsibility of the State in the exercise of its official remit as a public authority, carried out by the manager of Charleroi airport. It did not examine a redistribution mechanism for airlines such as that introduced by Article 2 of the Royal Decree of 7 January 2014. Nor did it conclude that any funding received by airlines could not be classed as State aid because it funded non-economic activities. The Charleroi Decision is therefore not relevant for the purposes of analysing the measure covered by this Decision.

(135) It follows from the above that the measure examined, namely the subsidy for airlines granted by the Royal Decree of 7 January 2014, funds an economic activity, namely the commercial carriage of passengers. Its beneficiaries, which are airlines, are clearly undertakings within the meaning of Article 107(1) TFEU.

7.1.2. *State resources and imputability to the State*

(136) The subsidy is granted pursuant to a Royal Decree adopted by the Council of Ministers. Article 6 of the Royal Decree of 7 January 2014 stipulates that the Minister with responsibility for air navigation is tasked with implementing the decree.

(137) Furthermore, the subsidy is financed by resources in the Belgian State budget. Indeed, Article 3 of the Royal Decree of 7 January 2014 states that: 'The subsidy referred to in Article 1 shall be charged to the basic allocation 52.60.31.32.01, 'Aid to the aviation sector', (…) of the budget of the Federal Public Service for Mobility and Transport for budget year 2014.'.

(138) Furthermore, Article 2 of the Royal Decree of 7 January 2014 requires BAC to redistribute the entire subsidy received from the State to certain airlines, on the basis of amounts determined for each airline in accordance with a method laid down in detail by the Royal Decree. This provision leaves BAC no latitude with respect to the choice of recipient airlines or the amounts allocated to each one. The payments made by BAC to the airlines under the Royal Decree of 7 January 2014 must be regarded as imputable to the State and financed by State resources, and this conclusion is unaffected by the fact that BAC is a corporation in which 75 % of the shares are held by private investors ([30]).

(139) It should also be noted that the only payments made pursuant to the Royal Decree of 7 January 2014 were made without fully abiding by the terms and conditions originally laid down by the Decree. The sums due to each airline, calculated in accordance with the provisions of Article 2 of that Royal Decree, were paid directly by the State to airlines satisfying the criteria laid down in Article 2(1) of the Royal Decree, without passing via BAC. Specifically, on 22 September 2014, the Belgian State paid the following amounts directly to the airlines: EUR 16 779 819 (Brussels Airlines), EUR 2 143 621 (TUI Airlines Belgium) and EUR 76 560 (Thomas Cook Airlines Belgium). These direct payments are clearly imputable to the State and financed with State resources.

(140) On the basis of these elements, it must be concluded that the subsidy scheme for airlines set up by Article 2 of the Royal Decree of 7 January 2014 is imputable to the State and granted by Belgium by means of State resources within the meaning of Article 107(1) TFEU.

7.1.3. *Economic advantage*

(141) In order to assess whether a State measure constitutes aid to an undertaking, it is necessary to determine whether the undertaking in question enjoys an economic advantage which avoids it to bear costs which would normally have had to burden its own financial resources or if it enjoys an advantage which it would not have enjoyed under normal market conditions ([31]).

([30]) See, for instance Judgment of the Court of Justice of 17 July 2008, Essent Netwerk Noord, C-206/06, ECLI:EU:C:2008:413, paragraphs 58-74.

([31]) See, inter alia, judgment of the Court of Justice of 14 February 1990, France v Commission, C-301/87, ECLI: EU: C: 1990: 67, paragraph 41.

(142) Only the effect of the measure on the undertaking is relevant, not the cause or the objective of the State intervention ([32]). Whenever the financial situation of an undertaking is improved as a result of State intervention on terms differing from normal market conditions, an advantage is present ([33]). To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been introduced ([34]). Since only the effect of the measure on the undertaking matters, it is irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it ([35]).

(143) Pursuant to Article 2 of the Royal Decree of 7 January 2014, BAC is required to redistribute the subsidy received from the State to users of the Brussels airport which have carried more than 400 000 departing passengers between 1 January and 31 December 2012, not including transit or transfer passengers, in accordance with the procedures laid down in that Article. These payments are intended to refund part of the security charge due to BAC by each of the airlines concerned, as shown by the calculation in recitals 39 to 41. The security charge is part of the airport charges set by BAC and billed to the airlines in exchange for commercial services, notably access to airport infrastructure, which the airlines need to provide air transport services. Moreover, this charge is expressed as an amount charged per departing passenger carried and therefore arises directly out of the airlines' commercial passenger transport activities. It is therefore one of the costs that the airlines operating at Brussels airport must bear under normal market conditions. Consequently, the measure in question avoids the airlines concerned from bearing costs that would normally have come out of their own financial resources and gives them an advantage which they would not have enjoyed under normal market conditions.

(144) According to Belgium, in order to assess the existence of an economic advantage in this case, a comparison must be made between the measure covered by the proceedings and a comparable situation in Belgium. Belgium points out in this respect that until the adoption of the measure in question, only Brussels airport charged its users a fee covering the security costs entailed by their use of the airport, without any public intervention. According to Belgium, Brussels airport differs in this respect from the other airports located in the Walloon Region and the Flemish Region, where all costs related to airport security and safety services are borne by the regions concerned. Belgium makes reference in this respect to the Charleroi decision, and in particular recitals 269 and 270 thereof. On the basis of points 54 to 60 of the aviation guidelines, on the application of the market economy operator principle to measures taken in favour of airlines, and on the use of comparator airport methods to that end, Belgium concludes that the measure in question does not offer any economic advantage to the airlines concerned. Brussels Airlines makes similar arguments, pointing out that no security charge is billed to the airlines at Charleroi airport.

(145) The Commission does not share Belgium's view as to the method to be used to assess the existence of an economic advantage in the present case. The Commission notes first of all that the aviation guidelines referred to by Belgium concern the analysis of the behaviour of an airport manager towards one or more airlines for the purpose of determining whether the charges billed by that manager are in line with the market economy operator principle. The measure under review does not fall within this framework as it relates to a partial State refund of charges billed by a private airport operator to three specific airlines.

(146) Moreover, for airlines operating in Belgium, normal market conditions are a situation in which they bear the entire financial burden of the airport charges billed to them, whatever the differences between those charges may be, the levels of which are set by the various airport managers on the basis of multiple factors such as their respective commercial policies, their respective cost levels, the regional or national regulatory framework in which they must determine these charges, or the extent to which which they must bear the financial burden of the activities falling under the remit of public authorities. Normal market conditions do not imply that airport charges at the various Belgian airports are uniform, even supposing that they are sufficiently comparable for the method recommended in points 54 to 60 of the aviation guidelines to be applied, which Belgium has not

([32]) Judgment of the Court of Justice of 2 July 1974, Italy v Commission, 173/73, ECLI:EU:C:1974:71 paragraph 27.
([33]) The term 'State intervention' refers not only to positive actions by the State but also covers cases where the authorities do not take measures in certain circumstances, for example to enforce debts. See, for example, Judgment of the Court of Justice of 12 October 2000, Magefesa, C-480/98, ECLI:EU:C:2000:559, paragraphs 19 and 20.
([34]) Judgment of the Court of Justice of 2 July 1974, Italy v Commission, 173/73, ECLI:EU:C:1974:71 paragraph 13.
([35]) Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1), recital 69; opinion of Advocate General Fennelly of 26 November 1998, France v Commission, C-251/97, ECLI:EU:C:1998:572, paragraph 26.

attempted to demonstrate. Consequently, a subsidy for the purpose of bringing the charges billed at one Belgian airport into line with the charges billed at other Belgian airports cannot, on that ground alone, escape classification as an economic advantage.

(147) Moreover, Belgium's reference to recitals 269 and 270 of the Charleroi decision does not appear to be relevant. In those recitals, the Commission does not take a stance but summarises Belgium's comments on the comments received from interested third parties in the context of a formal investigation procedure concerning Charleroi airport. In addition, the recitals in question concern the choice of the Belgian public authorities whether or not to take responsibility for the execution or funding of activities carried out by the airport managers and which those authorities consider to fall within the remit of the public authorities. This issue is not relevant to the analysis of the measure under review. As stated above, in recital 131 of this Decision, the Commission does not contest the Federal State's entitlement to offset costs incurred by BAC in connection with its security activities, but rather seeks to determine whether the mechanism for redistributing the subsidy introduced by the Royal Decree of 7 January 2014 in favour of the airlines confers an economic advantage on them.

(148) It follows from the foregoing that the none of the arguments put forward by Belgium and Brussels Airlines are such as to challenge the conclusion that the measure under examination avoids the airlines concerned bearing the costs that would normally have been incurred out of their own financial resources under normal market conditions.

(149) Moreover, had BAC received a subsidy under the conditions set out in Article 1 of the Royal Decree of 7 January 2014 without this subsidy being subject to any obligation to redistribute it to the airlines, it is unlikely that BAC would have passed on the effect of this subsidy on the security charge billed to the airlines in the same way as provided for in Article 2 of the Royal Decree.

(150) First, there is no clear indication that such a subsidy would cause BAC to reduce the security charge or refund part of it. BAC could allocate the subsidy to funding additional security investments not provided for in its pre-existing investment programme. In these circumstances, BAC would have no reason to reduce the security charge or to reimburse part of it. On the other hand, as noted in section 2.1.3, the tariff control system and the tariff control formula are set by BAC for a five-year regulatory period. The Royal Decree of 7 January 2014 was adopted during the 2011-2015 regulatory period. It is unlikely that the subsidy could have or would have incited BAC to find an incentive to propose a reduction in the safety charge or a partial refund of the charge before the end of this regulatory period, i.e. almost two years after the adoption of the Royal Decree.

(151) Furthermore, even assuming that such a subsidy could have or would have led BAC consider passing on the benefit of the subsidy to the airlines by reducing or reimbursing part of the security charge, it is reasonable to assume that it would have done so in a uniform manner for all users of Brussels airport. Indeed, the security charge currently takes the form of a single amount per departing passenger without any distinction as to the type of passenger. A subsidy reducing BAC's safety costs should therefore logically lead to a reduction in that single amount, thereby benefiting all airlines in proportion to the number of departing passengers they carry from Brussels airport. However, the mechanism provided for in Article 2 of the Royal Decree of 7 January 2014 leads to a very different outcome. In particular, in application of this mechanism, many users of Brussels airport do not benefit from any partial reimbursement of their security charge, while only three airlines share the available budget of EUR 19 000 000 a year.

(152) As a result, the redistribution mechanism alters the financial charges borne by the airlines using Brussels airport in favour of the three airlines benefiting from this mechanism, in relation to a hypothetical situation in which BAC had received a subsidy under the conditions laid down in Article 1 of the Royal Decree of 7 January 2014 without being obliged to redistribute this subsidy to the airlines.

(153) Moreover, the measure cannot be regarded as a financial compensation that the State would grant to the airlines concerned for the provision of any service of general economic interest, since Belgium has not claimed that any such service of general economic interest has been entrusted to the airlines concerned. The measure cannot therefore be considered as devoid of economic advantage under the Altmark judgment ([36]).

([36]) Judgment of the Court of Justice of 24 July 2003, Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, C-280/00, ECLI:EU:C:2003:415, paragraphs 87-93.

(154) It follows from all the above that the measure in question does confer an economic advantage on airlines.

(155) The Commission notes that, on 26 August 2014, the website of Mr Melchior Wathelet, then Deputy Prime Minister and former State Secretary for the Environment, Energy, Mobility and Institutional Reform, stated that 'the Ministerial Select Committee decided in December 2012 to grant an envelope of EUR 20 000 000 a year to support Belgian airlines (…)'. On 27 August 2014, Mrs Catherine Fonck, then State Secretary for Mobility, said: 'There is a government decision and it is very clear. The subsidies to airlines via Brussels airport must be paid'. These ministerial statements support the conclusion that the redistribution mechanism introduced by Article 2 of the Royal Decree of 7 January 2014 provides an economic advantage to the airlines concerned, and even suggests that the granting of such an advantage to these airlines could have been the main aim of the Royal Decree.

(156) It remains to be determined whether the economic advantage identified in recitals 141 to 154 is selective.

7.1.4. *Selectivity*

(157) Under Article 107(1) TFEU, in order to be regarded as State aid, aid granted by a State must favour 'certain undertakings or the production of certain goods'. Consequently, only measures that confer a selective advantage on certain undertakings, categories of undertakings or certain economic sectors may constitute State aid.

(158) The Commission notes first of all that under the Royal Decree of 7 January 2014, the measure can benefit only the three airlines that carried more than 400 000 passengers from Brussels airport in 2012, namely Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium, i.e. a subset of the airlines currently or potentially carrying passengers departing from Brussels airport. Thus, at the time the Royal Decree was adopted, the only possible beneficiaries of the measure were clearly identifiable and constituted a closed subset of the airlines carrying passengers departing from Brussels airport, determined solely on the basis of data for the year 2012, which were available when the Royal Decree was adopted. An economic advantage granted to a closed group composed of undertakings that are clearly identifiable at the time it is granted is necessarily selective, both *de jure* and *de facto*.

(159) The measure under review therefore does confer a selective advantage on the airlines benefiting from it. This conclusion cannot contradict the reasoning followed by the Court in its judgment of 21 December 2016 in case *Hansestadt Lübeck* ([37]), on the grounds set out in recitals 161 and 162.

(160) In that judgment, the Court considered the conditions under which a schedule setting the amount of airport charges at Lübeck airport could entail a selective advantage. It found that the relevant reference framework for analysing the selectivity criterion of the schedule at issue was the airport charge scheme applicable at Lübeck airport ([38]). Thus, it is within the group consisting of current and potential users of Lübeck airport that it is necessary to examine whether the schedule in question confers an advantage to certain undertakings over others and, if appropriate, to determine whether the granting of that advantage is justified by the nature and the economy of the system of which the measure concerned is a part.

(161) The measure under review here differs from the measure at issue in the case *Hansestadt Lübeck* in that it does not consist of regulating airport charges applicable to all users of Brussels airport, as an open group, but provides a subsidy to a closed subgroup of this group. In particular, any airline that carried less than 400 000 passengers departing from Brussels airport in 2012 is ineligible for the measure, regardless of the number and type of passengers it carries during the period of application of the measure. The selectivity analysis model used by the Court in the *Hansestadt Lübeck* case cannot therefore be applied to the measure under consideration.

([37]) Judgment of the Court of Justice of 21 December 2016, Commission v Hansestadt Lübeck, C-524/14 P, ECLI:EU:C:2016:971.
([38]) Judgment in Commission v Hansestadt Lübeck, cited in footnote 36, paragraph 62.

(162) However, even assuming that the redistribution mechanism introduced by Article 2(1) of the Royal Decree of 7 January 2014 can be assimilated to a measure relating to the setting airport charges for Brussels airport and that the possible selectivity of the measure should be examined taking as a reference the group formed by the current and potential users of the Brussels airport, it would still be just as selective, as was to be demonstrated in recitals 163 to 192.

(163) In the case referred to in recital 162, the relevant reference framework for assessing the possible selectivity of the measure in question should be the system of airport charges in force at Brussels airport and the scheme for funding security activities at that airport. Moreover, the existence of differences in treatment under the measure under examination and their possible justifications should be examined within the group composed of the current and potential users of Brussels airport. This is, at least implicitly, the approach that Belgium has taken during the procedure. Indeed, it has put forward a number of justifications for certain aspects of the measure that entail a difference of treatment among the current and potential users of Brussels airport, in particular the threshold of 400 000 passengers and the use of data for 2012 to identify the beneficiary undertakings. For the reasons given in recital 161, the Commission considers that this method is not applicable in the present case. Moreover, as demonstrated in recitals 164 to 192, the application of this method would lead to the conclusion that the measure is selective.

(164) If the method described in recital 162 were used, with a reference framework determined as set out in recital 163, it should be noted that the measure confers an advantage to some firms in relation to others in a comparable factual and legal situation. Indeed, all the airlines operating flights departing from Brussels airport are in a similar factual and legal situation, as they are subject to the same system of airport charges and in particular to a security charge expressed as a single amount charged per departing passenger without distinction as to the type or number of passengers. However, while some users receive a partial refund of their security charge, in this case those who satisfy the criterion laid down in Article 2(1) of the Royal Decree of 7 January 2014, others do not receive any refund.

(165) It remains to determine whether this difference in treatment is justified by the nature and the economy of the system of which the measure concerned is a part. In this respect, we should recall the objective of the Royal Decree of 7 January 2014 introducing the measure in question. In its own words, it is a measure to support security-related infrastructure at Brussels airport. It should also be remembered that under the current schedule, it is the responsibility of BAC to determine the level of airport charges, within the regulatory framework described in section 2.1.3. Under the provisions cited in recital 25, after consultation airport users, BAC sets the tariff system and the tariff control formula, which are assumed to be agreed between the parties unless a user notifies a substantiated disagreement. The economic regulatory authority may require certain adjustments or changes to the tariff control formula or the tariff system in the event of a disagreement between the parties pursuant to Article 55(4) of the Royal Decree of 21 June 2004. The tariff control formula and any changes to this formula imposed by the economic regulatory authority, as well as the tariff system, are subject to the approval of the Minister with responsibility for air navigation. Finally, the Commission notes that BAC introduced a security charge designed to fund BAC's security activities, at least until the introduction of the subsidy established by Article 1 of the Royal Decree of 7 January 2014. The elements referred to in that recital are part of the nature and the economy of the system in which the measure in question exists.

(166) The security charge is expressed as a single amount billed per departing passenger, regardless of the type of passengers carried. A public measure funding security activities should logically induce BAC, unless the entire subsidy is used to finance additional security expenditure, to reduce the security charge in a uniform way. Thus, all users of Brussels airport would benefit from the effects of this funding in proportion to the number of departing passengers they carry. However, the measure in question brings about a significantly different outcome, if only because many users are not eligible for any reimbursement under Article 2 of the Royal Decree of 7 January 2014. The measure thus departs, for no objective reason, from the general economy of the airport charges system for several reasons. First, it comes about as a the result of a unilateral decision by the federal government, which has no jurisdiction for determining airport charges. Indeed, the role of the federal government is limited to whether or not to approve the control formula and the tariff system after the process described in section 2.1.3, although that process was not followed in any respect when the measure at issue was adopted. Secondly, the measure is inconsistent with the structure of the security charge, which takes the form of

an amount per departing passenger and makes no distinction as to the type or number of passengers carried. Accordingly, the differences in treatment under the measure cannot be justified by the nature and economy of the system of which the measure concerned is a part.

(167) In the remainder of this Decision, and for the sake of completeness, the Commission will nevertheless examine the justifications put forward by Belgium ([39]) and certain third parties regarding the parameters that determine the beneficiaries of the measure.

Restriction of the number of beneficiaries on the basis of the threshold of 400 000 passengers per year in 2012, not including transit and transfer passengers.

(168) According to Belgium, the underlying concept of the measure is to reflect the decreasing marginal cost per passenger of the security costs and thus to avoid penalising the users who contribute most to the development of airport passenger traffic.

(169) Regarding the choice of the threshold of 400 000 passengers per year, not including transit and transfer passengers, to determine the beneficiaries, Belgium explains that this threshold was set on the basis of the following analyses:

— 41 % of the cost of security is fixed, while 59 % is variable;

— the transfer of passengers is not without security costs, which is a significant difference in relation to many European airports.

— the method of charging for security costs at Brussels airport does not reflect the decreasing security costs and the actual costs of managing passengers would therefore not be reflected in this pricing practice;

— Passenger airlines contribute more to security costs than freight carriers because charges are based on the number of passengers while a significant portion of the security costs arise from managing security for the freight carriers.

(170) According to Belgium, this analysis leads to the conclusion that passenger carriers have been overcharged and that corrective measures are necessary since the development of the airport specifically requires an increase in the number of passengers departing from Brussels airport.

(171) In presenting its justifications, Belgium adds that it aimed to stabilise the operations of the main carriers by means of a clear and objective incentive. According to Belgium, the incentive can take effect from the threshold of 400 000 passengers. It believes that a lower value would have the effect of diluting the measure, which subsidises only one-third of the airport security costs, while a higher value would make the objective unattainable for airlines wishing to develop at Brussels airport.

(172) Finally, Belgium added in its comments on the opening decision: 'the aim was to encourage airlines to expand in Brussels by compensating them for the reduced safety costs entailed by an increase in passengers' ([40]).

(173) First of all, the Commission notes that the considerations put forward by Belgium with regard to freight carriers cannot justify the differences that the measure causes among passenger carriers; those differences are the subject of this analysis.

(174) The other arguments put forward by Belgium, as summarised in recitals 169 to 172, cannot justify either the existence of the threshold of 400 000 passengers per year or its level, or the fact that it relates to historical data from 2012. Indeed, these arguments can be summarised in two main points. First, the threshold would be justified by the desire to promote or develop airport traffic, in particular by stabilising the traffic of operators carrying the most passengers. Secondly, it would be justified by the desire to offset the effects of the current security charge, which does not correctly reflect the actual security costs incurred by the passenger traffic of each airline.

([39]) Belgium's arguments in this regard were essentially put forward in its answer of 2 April 2014 to the request for information of 11 February 2014, in its comments on the opening decision and in its reply of 12 March 2015 to the request for information of 10 February 2015.

([40]) Comments from Belgium on the opening decision (letter of 15 January 2015).

(175) With regard to the first point, the Commission notes that the objective of stabilising or increasing the traffic at Brussels airport is not relevant to the stated purpose of the Royal Decree of 7 January 2014, namely the financing of security infrastructure. Moreover, the goal of stabilising or expanding traffic is in fact part of BAC's strategy and commercial policy. It should be recalled in this respect that the airport charges system at Brussels airport does not in any way provide for the federal government to act on behalf of BAC to implement financial incentives to foster traffic. As noted above, under the current schedule, it is the responsibility of BAC to determine the level of airport charges, within the regulatory framework described in section 2.1.3. Furthermore, while Belgium aims to increase traffic at Brussels airport, it is unclear why financial incentives should be restricted to airlines that carried more than 400 000 passengers in 2012, prior to the entry into force of the Royal Decree. In particular, airlines that did not achieve this traffic threshold in 2012 are excluded from the scope of the measure whereas they might to significantly increase their traffic in subsequent years if they received appropriate incentives.

(176) The only quantified elements put forward by Belgium to justify the threshold of 400 000 passengers a year are data on the number of departing passengers carried in 2012 and 2013 by the airlines that carried more than 100 000 departing passengers during either of these two years, broken down into transfer passengers, transit passengers and other departing passengers ([41]). Belgium comments on its data as follows: 'An analysis of the figures in Appendix 2 shows for 2012 that the growth rate — the angular coefficient of the curve derived from these data — increases significantly from the threshold of 400 000 departing passengers. It is therefore from this value that the incentive can achieve these effects.' ([42]). However, as these data only include changes in the number of passengers carried between 2012 and 2013, and not the relationships between airport charges, in particular the security charge, and the number of passengers carried, they do not in principle allow the incentive effects of the proposed measure on the traffic at Brussels airport to be assessed.

(177) The Commission therefore considers that the first main point of the arguments put forward by Belgium, as summarised in recital 174, cannot justify the threshold of 400 000 departing passengers a year specified in Article 2(1) of the Royal Decree of 7 January 2014.

(178) As regards the second main point mentioned in recital 174, the Commission notes that the concern to correct the way in which BAC passes on its security costs to the various airlines, which Belgium considers necessary to reflect the reality of the costs incurred by the various airlines, runs counter to the objective of the measure, namely support for safety-related infrastructure. Indeed, while the grant of a subsidy to BAC to reduce its cost structure for security ([43]) has the potential to support the security infrastructure, the way in which BAC distributes the portion of the subsidy between the various airlines does not seem to support that objective. In addition, it should be recalled that it is BAC's responsibility to propose a tariff system and a tariff control formula that reflect the real costs. The economic regulatory authority may only in certain circumstances and after a consultation process involving the users of Brussels airport make a final decision. By taking unilateral action, through the measure at issue, to make a de facto correction to the structure of the security charge, the federal government has departed for no objective reason from the general system for setting airport charges.

(179) Moreover, even assuming that the federal government could legitimately make such a correction to reflect the real security costs incurred by the various airlines, the exclusion of airlines that carried less than 400 000 departing passengers in 2012, not including transit and transfer passengers, cannot achieve that goal. Although it cannot be ruled out that the marginal cost per passenger of security costs is decreasing, nothing in the evidence provided by Belgium indicates that it is only from the 400 000th passenger that this decreasing effect is worth taking into account, or that airlines carrying fewer passengers should not benefit from the State taking over some of BAC's security costs. Belgium has not provided any qualitative or quantitative justification on this point. It should be noted that in any given year of application of the scheme, an eligible airline may be refunded the full security charge due for any departing passenger in excess of 400 000 provided that this can be done within the budget envelope of EUR 19 million. However, according to Belgium, a significant proportion of BAC's security

([41]) Annex 2 to the response of 2 April 2014 to the request for information of 11 February 2014.
([42]) Response of 2 April 2014 to question 14 of the request for information of 11 February 2014.
([43]) See the third recital of the Royal Decree of 7 January 2014, which sets out this objective.

costs (59 %) is variable. It follows that any additional passenger, including above and beyond the 400 000th, incurs significant additional security costs. The measure in question is therefore unlikely to accurately reflect the real security costs incurred by the various users of Brussels airport.

(180) Brussels Airlines, for its part, considered that a threshold related to the number of passengers was relevant in the case of a subsidy for airport security-related services because airport security costs are also related to the number of passengers. However, Brussels Airlines did not specify how the way in which security costs vary precisely according to the number of passengers justifies the choice of a threshold expressed as a number of passengers, thereby excluding from the outset a whole category of airlines. Neither did Brussels Airlines provide any justification regarding the level of the threshold chosen.

(181) Moreover, an airline that carried more than 400 000 departing passengers a year in 2013, 2014 or 2015, not including transfer or transit passengers, would not receive any partial reimbursement of its security charge for that year pursuant to Article 2 of the Royal Decree of 7 January 2014 if it did not attain the threshold of 400 000 passengers in 2012, and would be penalised by the structure of the security charge which, according to Belgium, insufficiently reflects the gradually decreasing security costs. Against this background, the exclusion *a priori* of airlines that transported less than 400 000 departing passengers in 2012 from the scope of the measure, not including transit and transfer passengers, is inconsistent with the objective of better reflecting the real security costs in the security charge.

(182) Finally, in its justifications, Belgium noted that transfer passengers were not exempted from security charges at Brussels airport, which would not reflect the decreasing security costs. Assuming that it is correct, this assertion is inconsistent with the fact that transfer and transit passengers are not taken into account when identifying airlines that exceed the threshold of 400 000 departing passengers carried in 2012 and therefore eligible for a refund under the measure at issue.

(183) In the light of the above, the second main point of the arguments put forward by Belgium, as set out in recital 174, cannot justify the threshold of 400 000 departing passengers a year, as specified in Article 2(1) of the Royal Decree of 7 January 2014.

(184) Moreover, while pursuant to Article 2(1) of the Royal Decree of 7 January 2014, transfer and transit passengers are excluded from the number of passengers calculated to determine the beneficiary airlines, these passengers are included when calculating the amounts to be repaid to each of the beneficiary airlines pursuant to Article 2(2) of the Royal Decree. However, the methods for calculating the subsidies should be consistent with the criterion used to determine the beneficiaries, otherwise they cannot be consistent with the objectives underlying the choice of the criterion for selecting the beneficiaries.

(185) Ryanair noted this inconsistency in its comments. In its comments on Ryanair's comments, Belgium merely made reference to this point in its previous submissions. However, those submissions do not contain any explanation about the difference in treatment of transfer and transit passengers in the definition of the criterion for the selection of beneficiaries and in the method for calculating the subsidy.

(186) The Commission observes in this respect that, if the transit and transfer passengers had been included in the passenger count made pursuant to Article 2(1) of the Royal Decree of 7 January 2014, two additional airlines would in principle have been eligible for the scheme, namely Lufthansa and Jet Airways. ([44])

(187) In the light of the above, it appears that the restriction in the number of beneficiaries to only those airlines that carried more than 400 000 passengers from Brussels airport in 2012, not including transit and transfer passengers, is not objectively justified by the nature and the economy of the system in which the measure exists.

Choice of the year 2012

(188) According to Belgium ([45]), 2012 was chosen as the reference year since it was the last year for which figures were available when the Council of Ministers decided to adopt the measure. According to Belgium, the use of the figures for 2012 ensures a measure of legal security for the beneficiary undertakings.

([44]) Belgium's response of 12 March 2015 to question 2 of the Commission's request for information of 10 February 2015.
([45]) Response of 2 April 2014 to the request for information of 11 February 2014 and response of 12 March 2015 to the request for information of 10 February 2015.

(189) The Commission does not consider this argument to be relevant, however. Article 2(2) of the Royal Decree of 7 January 2014 provides that the subsidies received by the airlines are calculated for a given year (2013, 2014 or 2015) taking account of the number of departing passengers. (not including transit and transfer passengers) during that year. There is therefore no objective reason to exclude *a priori* some airlines from the list of beneficiaries based on data for the year 2012. In fact, the criterion of Article 2(1) of the Royal Decree provides no certainty other than that of being excluded from the scheme for airlines which do not satisfy it. Belgium's argument relating to legal certainty is therefore invalid.

(190) According to Brussels Airlines, which agrees with Belgium in this respect, the use of 2012 as the reference year is explained by the fact that this was the last year for which the figures were available when the Council of Ministers decided to adopt the measure. Brussels Airlines is of the opinion that the choice of a reference point is still to some extent arbitrary, but by choosing 2012 as the reference year, Belgium does not appear to have exceeded the bounds of its discretion. However, these arguments are implicitly based on the assumption that it was necessary *a priori* to restrict the number of beneficiaries among all users at Brussels airport based on data for a certain past reference year. For the reasons given above, the Commission considers that this assumption is incorrect, which invalidates Brussels Airlines' argument.

(191) According to Belgium, the measure allows for the beneficiary airlines to be determined again on the basis of the number of passengers carried in 2015, for the budget period 2016, 2017 and 2018, which will make it possible, if appropriate, to include. other airlines or to exclude one or more of the current beneficiaries. Belgium considers that the mechanism is an incentive in that it is likely to result in a redistribution of the list of beneficiaries every three years ([46]). The Commission notes in this respect that the measure was introduced only for the years 2013, 2014 and 2015. It is therefore a hypothetical question as to whether it will be extended for a longer period.

(192) In the light of the above, the restriction of the number of beneficiaries on the basis of traffic data for 2012 is not justified by the nature or the economy of the system of which the measure concerned is a part.

Conclusion

(193) The measure provides an advantage to three specific users of Brussels National Airport over others, and this advantage is not justified by the nature and the economy of the system of which the measure concerned is a part. This conclusion confirms the selective nature of the measure.

(194) Moreover, it follows from all the above that all the other users of Brussels airport are excluded from the scheme, and therefore receive no subsidy, although their exclusion is not justified by the nature or the economy of the system of which the measure concerned is a part. Therefore, the entire subsidy received by the beneficiaries of the scheme constitutes a selective economic advantage.

7.1.5. *Effect on trade between Member States and on competition*

(195) Public support to undertakings only constitutes State aid under Article 107(1) of the TFEU if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only insofar as it 'affects trade between Member States'.

(196) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter is regarded as affected by that aid. According to the case law ([47]) in order for a measure to be recognised as potentially distorting competition, it is sufficient for the recipient of the aid to be in direct competition with other undertakings in markets open to competition.

([46]) Response of 14 March 2015 to the request for information of 10 February 2015.
([47]) Judgment of the Court of 30 April 1998, Het Vlaamse Gewest v Commission, T-214/95, ECLI:EU:T:1998:77, paragraphs 46 and 49-53.

(197) Regarding the effect on trade, there is no need to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade ([48]). In particular, the Union Courts have ruled that where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by the aid ([49]).

(198) The measure in question allows the beneficiary airlines to pursue a more aggressive pricing policy, as well as to maintain or artificially increase their offering of services provided in relation to normal market conditions, and thereby to distort competition with other airlines that do not benefit from the measure. The measure is therefore likely to strengthen the position of the beneficiary undertakings in relation to other airlines operating on the passenger air transport market within the Union. However, this market has been fully liberalised and open to all Union airlines as a result of Union legislation.

(199) It follows that, by distorting competition between airlines operating within the internal market, this measure may also distort trade between Member States.

7.1.6. *Conclusion on the existence of aid for the airlines*

(200) The measure at issue constitutes State aid within the meaning of Article 107(1) TFEU for the benefit of the airlines satisfying the conditions laid down in Article 2(1) of the Royal Decree of 7 January 2014.

## 7.2. **Legality of the aid**

(201) Pursuant to Article 108(3) of the Treaty, 'the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. (…) The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

(202) In the present case, the measure in question has already been implemented, as the Royal Decree of 7 January 2014 entered into force without the measure being notified to the Commission. The subsequent suspension of the Royal Decree has no impact on the illegality of the aid.

(203) The Commission has not identified a legal basis exempting Belgium from the obligation to notify this aid. The subsidy granted is not covered by Regulation (EC) No 800/2008, nor by Commission Regulation (EU) No 651/2014 ([50]), Article 58(1) of which provides that 'This Regulation shall apply to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9'. Moreover, it is excluded from the scope of Commission Decision 2012/21/EU ([51]), if only because the level of traffic at Brussels airport exceeds the threshold of 200 000 passengers a year, established by Article 2(1)(e) of that Decision.

(204) The measure at issue therefore constitutes unlawful aid.

## 7.3. **Compatibility of the aid**

(205) Since the subsidy referred to constitutes State aid within the meaning of Article 107(1) TFEU, its compatibility with the internal market must be examined. Since in its view the measure did not constitute State aid, Belgium has not referred to a legal basis or reasoning on the basis of which the measure could be declared compatible with the internal market if it were to be classed as State aid.

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([48]) Judgment of the Court of Justice of 14 January 2015, Eventech v The Parking Adjudicator, C-518/13, ECLI:EU:C:2015:9, paragraph 65; judgment of the Court of Justice of 8 May 2013, Libert and others, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

([49]) Judgment of the Court of Justice of 14 January 2015, Eventech v The Parking Adjudicator, C-518/13, ECLI:EU:C:2015:9, paragraph 66; judgment of the Court of Justice of 8 May 2013, Libert and others, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; judgment of the General Court of 4 April 2001, Friulia Venezia Giulia, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

([50]) Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

([51]) Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

(206) Brussels Airlines argued that if the Commission were nevertheless to conclude that State aid existed, that aid should be regarded as compatible until at least 4 April 2014, the date of entry into force of the new aviation guidelines. Brussels Airlines refers in this respect to the Charleroi decision, in which the Commission considered that several aid measures granted by the Walloon Region were compatible with the internal market until 4 April 2014.

(207) However, the measures examined in the Charleroi decision, to which Brussels Airlines refers, were aid measures in favour of the Charleroi airport manager, declared partially compatible with the internal market on the basis of section 5.1.2 of the aviation guidelines, on operating aid for airports. In so far as the measure at issue is aid to airlines, and not to airport managers, Brussels Airlines' argument is irrelevant.

(208) Despite Belgium failing to put forward any arguments to justify the compatibility of the aid with the internal market, the Commission has examined the compatibility of the aid with the aid of Article 107(3)(c) of the TFEU under which 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered compatible with the internal market.

(209) It does not appear that the aid can be declared compatible on any other legal basis. In particular, the measure cannot be regarded as compensation which would be granted to the airlines for the operation of services of general economic interest. The measure cannot therefore be declared compatible with the internal market on the basis of Article 106(2) TFEU.

(210) The aviation guidelines provide a general framework for assessing the compatibility of aid provided to airlines under Article 107(3)(c) TFEU.

(211) With the exception of aid of a social nature, benefiting the final consumer for a given route, which clearly does not apply to the measure in question, start-up aid is the only aid to airlines which may be authorised on the basis of the aviation guidelines.

(212) Pursuant to point 174 of the Aviation Guidelines, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. The Royal Decree was adopted on 7 January 2014, i.e. before 4 April 2014. On that date, start-up aid to airlines was governed by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports ([52]) (hereinafter 'the 2005 Guidelines').

(213) According to point 79(c) of the 2005 Guidelines, start-up aid should apply only to the opening of new routes or new schedules, which will lead to an increase in the net volume of passengers. The measure in question does not satisfy this condition since the passengers who are entitled to the refund provided for in Article 2(1) of the Royal Decree of 7 January 2014 are not necessarily passengers using new routes or routes with new schedules which will lead to an increase in the number of passengers.

(214) Moreover, whereas point 15 of the 2005 Guidelines distinguishes four categories of airport, A, B, C and D, point 79(b) of the Guidelines requires that start-up aid be paid for routes linking a regional airport in category C or D to another EU airport, while aid for routes between national airports (category B) can be considered only in duly substantiated exceptional cases. Paragraph 79(b) does not provide for start-up aid to be granted for flights between a Category A airport and a Category A or B airport or an airport outside the Union. However, Brussels airport handles more than 10 million passengers a year and therefore belongs to Category A. As the measure does not include any conditions as to the airport of destination of the routes used by passengers entitling it to a reimbursement of the security charge pursuant to Article 2(1) of the Royal Decree of 7 January 2014, the condition set out in point 79(b) of those guidelines is not satisfied.

(215) The aid does not satisfy the compatibility criteria for start-up aid under the 2005 guidelines.

(216) In the light of the above, the aid is incompatible with the internal market.

([52]) OJ C 312, 9.12.2005, p. 1.

## 8. **RECOVERY**

(217) According to the provisions of the TFEU and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market. Similarly, the Court has consistently ruled that the obligation of a Member State to withdraw aid considered by the Commission to be incompatible with the internal market is intended to restore the previous situation.

(218) In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(219) In line with the case-law, Article 16(1) of Regulation (EU) 2015/1589 stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (…)'.

(220) Therefore, since the measures in question were implemented in breach of Article 108(3) TFEU and are incompatible with the internal market, the aid must be recovered in order to restore the existing market situation before they were granted. The recovery must cover the period from the moment the advantage was granted to the beneficiaries, i.e. from the moment the aid was made available to the beneficiaries until it was actually recovered. The sums to be recovered must therefore attract interest until the moment they are actually recovered.

(221) By letter of 20 March 2017, Belgium informed the Commission of the withdrawal of the Royal Decree of 7 January 2014 by Royal Decree of 15 March 2017. Belgium has therefore abolished the aid measure, which will have no further effect in future.

(222) Furthermore, by letter of 16 May 2017, Belgium provided all the necessary evidence that Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium had repaid, pursuant to the Royal Decree of 15 March 2017, the amounts of aid received and interest calculated from 22 September 2014, on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Regulation (EC) No 271/2008 ([53]) amending Regulation (EC) No 794/2004, i.e. respectively EUR 16 779 819 of aid and EUR 543 546,30 of interest, EUR 2 143 621 of aid and EUR 69 438,01 of interest, and EUR 76 560 and EUR 2 480 of interest.

(223) In this light, taking account of the reimbursement of the amounts of aid received and the corresponding interest, the Commission considers that the beneficiaries have lost the advantage they had enjoyed in the market in relation to their competitors, and that the competitive situation prior to the payment of the aid has been reinstated.

(224) In the light of the above, there is no reason to require Belgium to abolish the measure or recover the incompatible aid from the beneficiaries since it has already taken that action.

## 9. **CONCLUSION**

(225) The Commission finds that Belgium has unlawfully implemented State aid for airlines satisfying the conditions set out in Article 2(1) of the Royal Decree of 7 January 2014, in breach of Article 108(3) TFEU. Since no grounds of compatibility can be identified for the scheme in question, it is found to be incompatible with the internal market.

(226) However, since Belgium has withdrawn the Royal Decree of 7 January 2014 and recovered the aid and corresponding interest, the situation prevailing before the granting of the unlawful and incompatible State aid has been re-established. There is therefore no need to order the repeal of the measure or the recovery of the aid in question.

HAS ADOPTED THIS DECISION:

*Article 1*

1. The subsidy granted by the Royal Decree of 7 January 2014 to certain airlines constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

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

2. This State aid granted unlawfully by the Kingdom of Belgium, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

*Article 2*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 18 July 2017.

*For the Commission*
Margrethe VESTAGER
*Member of the Commission*