

**COMMISSION DECISION****of 20 October 2004****concerning the aid scheme implemented by the Kingdom of Spain for the airline Intermediación Aérea SL***(notified under document number C(2004) 3938)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

(2005/351/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the Articles <sup>(1)</sup> cited above, and having regard to these comments,

Whereas:

**I. PROCEDURE**

- (1) By letter S(2002)4231 of 11 April 2002, registered under No NN/110/02, the Commission was informed that the Kingdom of Spain had implemented aid for the airline Intermediación Aérea SL (hereinafter referred to as Intermed) for the provision of air transport services on the Gerona–Madrid–Gerona route. By letter of 23 May 2002, the Commission asked the Spanish authorities for all relevant information. The latter replied by letter of 1 July 2002, registered on 5 July 2002.
- (2) By letter of 13 December 2002, the Commission informed the Kingdom of Spain of its decision to initiate the procedure provided for in Article 88(2) of the EC Treaty with regard to this aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission called on the parties concerned to submit their comments on the aid.
- (4) By letter of 9 January 2003 from the Permanent Representation of Spain to the European Union, the Spanish authorities asked for further time to reply to the letter of 13 December 2002. By letter TREN/A4(2003)838 of 20 January 2003, the Commission granted an additional period of 15 working days.
- (5) The Spanish authorities sent their comments by letter of 18 March 2003, reference A24-3996, registered by the Secretariat-General of the Commission on 19 March 2003.
- (6) The Commission received comments on this subject from parties concerned. It forwarded them to the Kingdom of Spain by letters of 13 March and 2 April 2003, allowing it an opportunity to comment on them, and received its comments by letter of 7 May 2003.

<sup>(1)</sup> OJ C 32, 11.2.2003, p. 2.

<sup>(2)</sup> See note 1.

## II. DETAILED DESCRIPTION OF THE AID

### Legal basis of the aid

- (7) According to the information in the Commission's possession, the measures provided for by the Spanish authorities appear in the Contract relating to air routes serving the cities of Gerona and Madrid concluded on 26 March 2002 between the Generalitat de Catalunya (Autonomous Government of Catalonia), the Diputación de Girona (Gerona Regional Council), the Gerona Chamber of Commerce and Industry and the representative of Intermed (hereinafter referred to as the contract).

### Aims of the aid

- (8) The aid is intended to promote the development of competitive, high-quality air transport on the Gerona–Madrid–Gerona route through the use of aircraft which meet appropriate conditions of comfort and reliability and to secure the proper level of profitability on this route.

### Procedure to select the company to provide the service

- (9) Given the lack of a scheduled service between the cities of Gerona and Madrid since no air carrier offered this service, the Autonomous Government of Catalonia contacted several national carriers as well as carriers in other Member States of the Community (Aerolíneas de Baleares (AeBal), Spanair S.A. (Spanair), Air Europa Líneas Aéreas (Air Europe), KLM UK Ld, Intermed, Air Catalunya S.A. (Air Catalunya), Ibertrans Aérea S.A. (Ibertrans) and Navegación y Servicios Canarios S.A. (Naysa)) individually by letter during the period from July to November 2001 to inform them of its initiative to encourage the establishment of this air link and to call on them to submit tenders or state that they were prepared to ensure this air link.
- (10) At the end of this process, the authorities of the Autonomous Government of Catalonia found that the only air carrier which had shown that it had the availability and capacity to ensure a regular air service and to fulfil the public service obligations inherent in it was Intermed and, consequently, the contract was concluded with this carrier.

### The Gerona–Madrid–Gerona air link

- (11) According to the information received from the Spanish authorities, the Gerona–Madrid–Gerona air link was provided, firstly, by means of a scheduled service operated by Intermed as of 15 April 2002 with a 48-seat ATR 42-300 aircraft and, secondly, by a charter service operated by the complainant in this case as of 3 April 2002 using an SA-227 aircraft.
- (12) Gerona airport is a small airport at which passenger numbers have developed as follows <sup>(3)</sup>:

#### *Development of passenger traffic*

Year	Number of passengers	Year	Number of passengers
1994	399 070	1999	631 235
1995	547 739	2000	651 402
1996	480 506	2001	622 410
1997	533 445	2002	557 187
1998	610 607	2003	1 448 796

<sup>(3)</sup> Website: [www.aena.es](http://www.aena.es) of Aeropuertos Españoles y Navegación Aérea, September 2004.

### Content of the contract

- (13) The contract stipulates that, for the provision of the service in question, Intermed will use a turboprop ATR 42-300 aircraft having the following chief characteristics:
- 48 seats arranged in 12 rows with an inclination of 30 °;
  - maximum loading capacity 4 687 kg;
  - volume of baggage hold 8,94 m<sup>3</sup>;
  - maximum altitude 5 485 m (18 000 feet);
  - flight speed 300 kt (556 km/h).
- (14) Initially, there will be two flights a day from Monday to Friday with the following timetables:
- morning: departure from Gerona at 07.00/departure from Madrid at 09.00.
  - afternoon: departure from Gerona at 17.00/departure from Madrid at 19.30.
- (15) In general terms, the flight timetables must always allow passengers from Gerona a minimum stay of five hours in Madrid from the time of arrival at the destination.

### Funding of the service

- (16) The maximum total amount of aid for the period covered by the contract is EUR 4 337 086,18. The Autonomous Government of Catalonia and the Gerona Regional Council undertake to bear the cost of funding the air service between Gerona and Madrid up to the following annual limits:
- 2002 financial year: for the 2002 financial year, during the first six months of operation of the air link, the Generalitat de Catalunya (Autonomous Government of Catalonia) and the Diputació de Girona (Gerona Regional Council) equally bear a maximum amount of EUR 410 582,34 each. For the rest of the 2002 financial year, the Autonomous Government of Catalonia and the Gerona Regional Council bear the cost of providing funding for this period up to the sum of EUR 34 166,62 for the Autonomous Government of Catalonia and EUR 135 227,75 for the Gerona Regional Council.
  - 2003 financial year: for this period, including any regularisation of the 2002 financial year, the ceiling is EUR 1 182 883,13, with EUR 641 972,13 borne by the Autonomous Government of Catalonia and EUR 540 911 by the Gerona Regional Council.
  - 2004 and 2005 financial years: for this period, the ceiling is EUR 1 081 822, with EUR 540 911 from the Gerona Regional Council as funding for the first half of each financial year, and EUR 540 911 from the Autonomous Government of Catalonia as funding for the second half of each financial year.
- (17) The aid paid to Intermed is calculated on the basis of the average annual occupancy rate of the seats in the aircraft operating on the Gerona–Madrid–Gerona route by applying the formula set out in Annex V to the contract.

- (18) According to the information from the Spanish authorities, the cost per flight, calculated on the basis of an average occupancy rate of 32 persons, is EUR 3 980,55, broken down as follows:

Item	EUR
Depreciation of the aircraft	353,16
Insurance	480,00
Line costs (including checking of the electrical system, the avionics and the landing gear and inspection of the fuel injection system)	250,00
Fuel	623,37
Staff costs (cabin and ground crews, including social security)	1 067,93
Airport charges and landing fees	447,81
Handling <sup>(1)</sup>	364,09
Eurocontrol (route charge)	52,89
Passenger services (catering, press, etc.)	372,00
Total	3 980,55

<sup>(1)</sup> The company had a self-handling permit. Handling may therefore be regarded as internal costs and entered as general expenditure.

#### **Advertising measures**

- (19) The Gerona Regional Council also undertakes to establish and finance all advertising for the promotion and marketing of this air link during the period of validity of the contract up to a maximum of EUR 120 202.
- (20) Similarly, the Gerona Chamber of Commerce, Industry and Navigation undertakes to do whatever proves to be necessary, within its field of competence, to support and ensure the smooth functioning of the air service covered by the contract.

#### **Termination of the contract**

- (21) It is provided that the contract will be terminated as of right in the event, for example, of another air carrier establishing an air service between Gerona and Madrid with characteristics similar to those of the air service covered by the contract in terms, in particular, of the type of aircraft, frequency, fares and period of service without public aid or any other State funding.

#### **Duration of the aid**

- (22) The contract is concluded for the period from 26 March 2002 to 31 December 2005. However, the service was suspended in December 2002 following the initiation of the Commission's formal investigation procedure.

#### **Other provisions**

- (23) The contract in question also contains provisions regarding the occupancy rate, regularity, punctuality, groundhandling services and applicable fares.

*Grounds for the decision to initiate the procedure*

- (24) In its decision to initiate the formal investigation procedure, the Commission expressed doubts regarding the compatibility of the aid in question with Article 86(2) of the EC Treaty, in particular the lack of compliance with the procedure established by Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes <sup>(4)</sup>.
- (25) In particular, the Commission asked Spain to send it, firstly, data showing the need for compensation and the net costs of the public service in question and the data used to calculate the volume of compensation and, secondly, the reasons which justify non-compliance with the procedure established by Article 4 of Regulation (EEC) No 2408/92.

**III. COMMENTS FROM PARTIES CONCERNED**

- (26) The company Air Catalunya points out that the air route between Gerona and Madrid was served, on the one hand, by the beneficiary of the aid and, on the other, by itself without public funding from 3 April 2002. The company draws attention to the harmful consequences it has suffered and the fact that there has been an obvious distortion of competition. It points out that the Gerona–Madrid–Gerona link has not been the subject of a public service obligation in accordance with the procedures established by Article 4 of Regulation (EEC) No 2408/92. The aid in question cannot be said to be compatible with the Treaty as it does not meet the requirements of necessity and proportionality which are inherent in a public service role. Air Catalunya therefore suspended its service in December 2002.
- (27) Austrian Airlines A.G. (Austrian Airlines) adds that the rules established in the Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector have not been followed in the case at issue.

**IV. COMMENTS BY THE KINGDOM OF SPAIN**

- (28) The Spanish authorities point out that, since the formal investigation procedure was initiated in December 2002, the payment of aid to Intermed has been suspended and that the company was consequently forced to suspend the Gerona–Madrid air service in December 2002 as it could not cover the costs involved, which shows that the air service in question is not profitable for any company.
- (29) The part-funding of the Gerona–Madrid route is subject to a time limit, in particular until the route in question is consolidated and becomes profitable on its own.
- (30) The Spanish authorities consider that the procedure which led to the selection of Intermed is not in compliance with the procedure laid down in Article 4 of Regulation (EEC) No 2408/92 to impose public service obligations on a given route.
- (31) The Autonomous Government of Catalonia presented a formal request to the Spanish Ministry for Regional Development with a view to imposing a public service obligation (PSO) on the Gerona–Madrid route in conformity with Regulation (EEC) No 2408/92. However, this request was rejected by the Ministry in question on the grounds that there were not sufficient reasons to invoke Article 4 of that Regulation.

<sup>(4)</sup> OJ L 240, 24.8.1992, p. 8. Regulation as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

### Consideration as a public service

- (32) The Spanish authorities consider that the material requirements demanded by Regulation (EEC) No 2408/92 for the service in question to be considered a public or general interest service are fully met.
- (33) The fact that no airline is able to operate the route shows how little economic interest the route generates. Only public authority intervention therefore made it possible to guarantee the Gerona–Madrid route with certain assurances regarding the stability and regularity of the service. In this regard, it is important to point out that Air Catalunya started operating the Gerona–Madrid route at the same time as Intermed, i.e. in April 2002. Before that date and since 28 October 2001, the date on which the previous company stopped operating the route, no company had been covering the Gerona–Madrid route. This route, which is considered essential, was not operated for five months, justifying the necessary intervention by the public authorities in view of the importance of this route for citizens.
- (34) The Spanish authorities draw attention to the importance of establishing an air link between Gerona and Madrid for the economic development of the region.

### Consequences of the infringement of Article 4 of Regulation (EEC) No 2408/92

- (35) However, since the formal conditions for imposing the obligation have not been fulfilled, i.e. a call for tenders open to all companies and communicated to the Commission and the other Member States, the subsidy cannot benefit from the presumption that no State aid has been given within the meaning of Article 87 of the EC Treaty and must therefore be subject to the general rules of the Treaty which govern this matter. This analysis is confirmed by the guidelines for the evaluation of State aid to air carriers in the Commission communication on the application of Articles 92 and 93 of the Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector <sup>(5)</sup>, paragraph 23 of which states that 'compensation of losses incurred by a carrier which has not been selected according to Article 4 of Regulation (EEC) No 2408/92 will continue to be assessed under the general State aid rules. The same rule applies to compensations which are not calculated on the basis of the criteria of Article 4(1)(h) of the Regulation'.
- (36) According to the Spanish authorities, the absence of a formal declaration of a public service obligation does not in any way affect the public service nature of the route in question.

### The compensation is compatible with Article 86(2) of the EC Treaty

- (37) According to the Spanish authorities, the compensation granted to Intermed may be considered to be State aid within the meaning of Article 87 of the EC Treaty, which is unlawful if no prior notification is sent to the Commission and Article 4 of Regulation (EEC) No 2408/92 is not complied with, but is nevertheless compatible with the common market pursuant to Article 86(2) of the Treaty. Although the latter is not the proper framework for the funding of public services imposed on air carriers, the particular features of this case and, more especially, the low impact on competition and Community trade, the suspension of the aid immediately following the initiation of the formal investigation procedure, the consequential suspension of the air service by Intermed, the low intensity of the aid and the short duration of the agreement limited to eight months may justify the exceptional application of the provision in question.
- (38) For Article 86(2) to be applied, the compensation must be necessary and proportional.

<sup>(5)</sup> OJ C 350, 10.12.1994, p. 5.

### Need for the compensation

- (39) The requirements imposed on Intermed in the agreement regarding regularity, continuity, capacity and the fares for the service make the flights unprofitable for any company at all. Indeed, the conditions imposed by the authorities give rise to additional costs which a company operating on a commercial basis could not itself bear.
- (40) The proof of this is that there is no significant competitor covering the Gerona–Madrid route subject to the requirements of frequency, capacity and continuity which have been imposed on Intermed. The company which operated this route in the past was forced to cease doing so as it was uneconomic. The fact is that several airlines which were asked by the Autonomous Government to offer such a service showed no interest in doing so and made it clear that they doubted whether such a service was economically viable.
- (41) Air Catalunya cannot be regarded as a significant competitor. In fact, Air Catalunya had been invited to take part in the selection procedure, but its tender could not be accepted since the company does not hold an air operator's certificate (AOC) or a licence to operate in Spain <sup>(6)</sup>. Even if the procedure provided for in Article 4 of Regulation (EEC) No 2408/92 for the imposition of the public service obligation had been followed, Air Catalunya would not have been able to take part in the tender procedure, which was restricted to companies which hold a licence to operate scheduled services. At any rate, the terms on which it offered its flights, which were not scheduled, differed considerably from the frequency and capacity imposed on Intermed. For example, when few seats were occupied in the aircraft chartered by Air Catalunya, the flight was cancelled and passengers were left without any rapid and efficient means of transport to get to Madrid.
- (42) Lastly, the lack of profitability on the route in question is underlined by the fact that, even though the Intermed service has been withdrawn, no company, not even Air Catalunya, is providing a service.

### Proportionality of the subsidy

- (43) The aid granted to Intermed does not exceed the minimum compensation required to offset the additional costs incurred in meeting the requirements laid down by the authorities. The compensation given to Intermed amounts to EUR 919 879,98. As is clear from Annex III to the Agreement, the cost per flight, calculated on the basis of an average occupancy rate of 32 persons, is EUR 3 980,55. A total of 640 flights were operated by Intermed during the period of validity of the agreement generating revenue of EUR 876 934,30. The shortfall as a result of providing the service was about EUR 1 670 608,70. This figure is calculated from the cost of the flight, i.e. EUR 3 980,55, multiplied by the number of flights operated, in other words EUR 2 547 552,00, less the revenue received, namely EUR 876 943,30. Consequently, the aid granted by the public authorities (EUR 919 879,98) was less than the shortfall sustained by the company when operating on the Gerona–Madrid route between April and December 2002.
- (44) As the Court of Justice of the European Communities has consistently held, 'the grant of State aid may, under Article 86(2) of the Treaty, escape the prohibition laid down in Article 87 of that Treaty provided that the sole purpose of the aid in question is to offset the extra costs incurred in performing the particular task assigned to an undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium' <sup>(7)</sup>.

<sup>(6)</sup> Initially (for two months), Air Catalunya operated with the charter flight permit issued by the Directorate-General for Civil Aviation to the Danish company North Flying and then with the licence held by the company Oestavi.

<sup>(7)</sup> See Case C-174/97 *La Poste* [1998] ECR I-1303.

### Limited impact on competition and intra-Community trade

- (45) The aid given to Intermed is of low intensity as it is less than EUR 1 million. To this must be added the relative shortness of the contract (only eight months: April to December 2002).
- (46) The position of Air Catalunya or other potential competitors on the route in question will not be damaged in future since payment of the aid was suspended on initiation of the procedure, and the Autonomous Government and the Gerona Regional Council have undertaken to revoke formally the contract concluded with Intermed.
- (47) Any negative impact of the grant of aid to Intermed on competition and trade between the Member States is therefore minimised.

### Application of the *Altmark* case law

- (48) The Spanish authorities consider that the case law which emerges in the *Altmark* case (pending before the ECJ at the date on which the Spanish authorities sent their comments) would not be applicable to the case at issue since this case is concerned with the application of Article 73 of the Treaty to impose public service obligations outside the framework provided for by the applicable regulations on inland transport.

### Non-recovery of the aid

- (49) The Spanish authorities consider that the procedure initiated following the subsidies granted to Intermed can be concluded by adopting a Commission Decision that declares the aid to be unlawful and requires it to be suspended, but does not order the aid paid to be recovered and regards it as compatible with the common market pursuant to Article 86(2).

## V. ASSESSMENT OF THE AID

### Evaluation of this aid in accordance with Article 87(1) of the Treaty

- (50) Article 87(1) of the Treaty indicates that any aid granted by the States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or certain production is incompatible with the common market insofar as it affects trade between Member States.

### Financial advantage

- (51) Paragraph 18 of the Commission Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector establishes the presumption that no aid is involved provided that a public service obligation was imposed and the relevant compensation calculated in conformity with the procedures provided for in Article 4 of Regulation (EEC) No 2408/92 on access for Community air carriers to intra-Community air routes. The criteria for assessing whether aid is involved in compensation for public services were subsequently clarified by the judgment of 24 July 2003 in the *Altmark* case<sup>(8)</sup>.
- (52) As explained in recitals 9 to 23 to this Decision, the authorities of the Autonomous Government of Catalonia selected the company without fulfilling the obligations established in Article 4 of Regulation (EEC) No 2408/92, which are essential to guarantee the principle of equal treatment and proper functioning of the procedure.

<sup>(8)</sup> See Case C-280/00 *Altmark* [2003] ECR I-7747.

- (53) In particular,
- the Commission was not informed of the imposition of a public service obligation on the Gerona–Madrid–Gerona route,
  - these obligations were not published in the *Official Journal of the European Union*,
  - the other Member States were not consulted,
  - the invitation to tender was not published in the *Official Journal of the European Union* and
  - the tenders submitted by the air carriers were not communicated to the other Member States concerned or to the Commission.
- (54) The Spanish authorities consider that the measure in question is, nonetheless, compensation for public service obligations imposed on Intermed.
- (55) The Commission considers that the only way of establishing public service obligations in the aviation sector is by applying Article 4 of Regulation (EEC) No 2408/92. In this Regulation, the Council has established uniform, non-discriminatory rules for the granting of air traffic rights on routes on which public service obligations have been imposed. The criteria for calculating the compensation are clearly defined. In the absence of any information to the contrary, reimbursement calculated in accordance with Article 4(1)(h) of the Regulation would have made it possible to presume that there was no financial advantage for the air carrier concerned <sup>(9)</sup>.
- (56) Article 4(1)(h) of Regulation (EEC) No 2408/92 provides that ‘a Member State may reimburse an air carrier, which has been selected under subparagraph (f), for satisfying standards required by a public service obligation imposed under this paragraph; such reimbursement shall take account of the costs and revenue generated by the service’. The Commission considers that the measure envisaged by the Spanish authorities in regard to the company Intermed does not comply with the provisions of Article 4 of the Regulation.
- (57) It follows that the said presumption of the non-existence of aid does not apply in this case.
- (58) Paragraph 23 of the guidelines on State aid in the aviation sector states that ‘compensation of losses incurred by a carrier which has not been selected according to Article 4 of Regulation (EEC) No 2408/92 will continue to be assessed under the general State aid rules. The same rule applies to compensations which are not calculated on the basis of the criteria of Article 4(1)(h) of the Regulation’. Similarly, paragraph 17 establishes that ‘the acceptability of the reimbursement shall be considered in the light of the State aid principles as interpreted in the Court of Justice’s case law’.

<sup>(9)</sup> See Judgment of the Court of First Instance of 5 August 2003, Joined Cases T-116/01 and T-118/01, *P & O European Ferries* [2003] ECR I 118, states that ‘in accordance with the Commission’s settled practice, the fact that such a tender procedure is conducted before a Member State makes a purchase is normally considered sufficient for the possibility that the Member State is seeking to grant an advantage to a given undertaking to be ruled out (see, in particular, Information from the Commission — Community framework for State aid for research and development (OJ 1996, C 45, p. 5), paragraph 2.5, and, to this effect, the Community guidelines on State aid to maritime transport (OJ 1997, C 205, p. 5), Chapter 9)’.

- (59) The Commission takes the view that where, in a specific sector, Community regulations stipulate that public service obligations must be awarded by a tender procedure, failure to comply with these regulations means that the compensation granted normally constitutes aid within the meaning of Article 87(1) of the Treaty. Nonetheless, the Commission assesses whether the measure in question grants a financial advantage to Intermed, and in particular, whether the compensation in question complies with the criteria established by the Court's case law, in particular the judgment of 24 July 2003 in the *Altmark* case.
- (60) This judgment confirms that amounts granted as compensation for public service obligations are not State aid provided several conditions are met. According to the Court, it follows from those judgments<sup>(10)</sup> 'that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty. However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied'<sup>(11)</sup>.
- (61) The Court has established four conditions. The first three conditions apply in all cases. The fourth condition provides for two alternatives in order to eliminate any financial advantage whatsoever from the compensation.
- (62) According to the first condition established by the Court, the recipient undertaking must actually have been required to discharge public service obligations and those obligations must have been clearly defined. According to the second condition, the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner.
- (63) In the case at issue, the recipient undertaking has been required to discharge certain obligations which are defined in the contract. These obligations as well as the parameters for calculation of the compensation, as established in Annexes III, IV and V to the contract, are the result of negotiations conducted between the competent regional authorities and the company which had already been selected to provide the air transport service. In fact, the Autonomous Government of Catalonia had contacted several carriers individually by letter during the period July to November 2001 in order to inform them of its initiative to encourage the establishment of this air route and to invite them to submit tenders or to state that they were prepared to operate this air service. During this process, the regional authorities invited only the airlines contacted to submit a tender. These letters contain no details about the obligations imposed on the companies or the parameters regarding compensation. It cannot be ruled out that the airlines which did not respond to the request from the regional authorities might have been interested in concluding the contract if more specific details about these obligations and the parameters for calculating the compensation had been available when the request was sent out by the regional authorities.

The Commission considers that, in the case at issue, the public service obligations were not defined in a clear and transparent manner and that, consequently, the first condition laid down in the *Altmark* judgment was not satisfied.

- (64) Furthermore, the contract concluded on 26 March 2002 between the Autonomous Government of Catalonia, the Gerona Regional Council, the Chamber of Trade and Industry of Gerona and the representative of Intermediación Aérea SL (Intermed) was simply announced by a press release but was not officially published and, according to the Commission's information, was not accessible to interested third parties. In addition, in the air transport sector the parameters for calculating compensation in advance in an objective and transparent manner are established by the method laid down by the Community legislator in Article 4 of Regulation (EEC) No 2408/92, which has not been complied with.

<sup>(10)</sup> See Judgment of 7 February 1985, *ADBHU*, Case 240/83 [1985] ECR 531, paragraphs 3, last sentence, and 18, and the Judgment of 22 November 2001, *Ferring*, Case C-53/00 [2001] ECR I-9067, paragraph 27.

<sup>(11)</sup> Paragraphs 87 and 88 of the *Altmark* judgment.

- (65) In addition, the Commission considers that the parameters on the basis of which the compensation is calculated in the case at hand were not established in advance in an objective and transparent manner. The second condition of the *Altmark* judgment has therefore not been satisfied.
- (66) According to the third condition laid down by the Court, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position. The purpose of this condition is to avoid overcompensation being paid to undertakings and to avoid the situation where the type and amount of compensation granted means that the undertaking has surplus cash which it could devote to activities which might distort competition. In the aviation sector, the method used by the legislator to avoid such overcompensation and to minimise any harmful effects of limiting market access is strict compliance with the tender procedure laid down in Article 4 of Regulation (EEC) No 2408/92.
- (67) The Commission considers that such a tender procedure prior to a purchase by a Member State is normally regarded as sufficient to rule out the possibility that the Member State concerned is seeking to grant an advantage to a particular undertaking. The Court of First Instance has confirmed this approach <sup>(12)</sup>. In the absence of an invitation to tender, it believes that it is difficult to determine precisely whether the amount received by Intermed corresponds to the costs arising from discharging the public service obligations, or whether it represents overcompensation and an advantage in its favour.
- (68) The Spanish authorities consider that the amount of the subsidy granted is less than the deficit run up in the months during which the service was operated and that, consequently, there has been no overcompensation. The Commission considers that, in the absence of objective means of establishing the level of compensation pursuant to the compulsory rules laid down by the Council, it cannot be ruled out that other companies may have been able to offer the services in question with a lower level of subsidy.
- (69) The Commission considers that the third condition of the *Altmark* judgment is not satisfied in the case at issue.
- (70) The fourth condition contains two alternatives:
- (a) either 'the undertaking which is to discharge public service obligations, in a specific case, is chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community',
- (b) or 'the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations'.

<sup>(12)</sup> Court judgment of 5 August 2003, Joined Cases T-116/01 and T-118/01, *P & O European Ferries*, [2003] ECR 118. See footnote 9.

- (71) The first alternative of the fourth condition is not satisfied in the case at issue. The selection procedure followed by the Spanish authorities does not comply with the criteria of transparency and objectivity which are essential for any public tender procedure, as pointed out in recitals 51 and 52 to this Decision, to be regarded as genuine competition and therefore cannot be regarded as sufficiently transparent to ensure 'the least cost to the community'.
- (72) The second alternative of the fourth condition referred to in recital 70(b) seems to apply in principle only where there is no obligation to issue an invitation to tender and not where the obligation exists but has not been complied with. Nonetheless, assuming that the second alternative of the fourth condition should be applied to the case at issue, the Commission must conclude that it has not been complied with. The compensation was not calculated on the basis 'of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those requirements, taking into account the relevant receipts and a reasonable profit for discharging the obligations'. As explained in the analysis of the second condition, the authorities did not carry out any advance analysis of the costs or of whether or not they were compatible with this standard, but confined themselves to providing compensation for the actual costs incurred by the operator in question. The Spanish authorities have not provided any data which enable the Commission to carry out such a check. In these circumstances, it is obvious that the fourth condition laid down in the *Altmark* judgment has also not been satisfied.
- (73) The Commission therefore finds that none of the conditions of the *Altmark* judgment has been satisfied in the case at issue. In the light of the foregoing, the measure involves an advantage for the beneficiary.

#### **Transfer of State resources**

- (74) The concept of State aid under the terms of the Treaty and as interpreted by the Court of Justice refers to any advantage granted directly or indirectly through State resources or constituting an additional burden for the State or the bodies appointed or set up for this purpose.
- (75) In the case at issue, the contract provides that the beneficiary company will receive a maximum of EUR 4 337 086,18 for the duration of the contract funded by the Autonomous Government of Catalonia and the Gerona Regional Council. As confirmed by the Spanish authorities, the amount of aid actually paid amounts to EUR 919 879,98. The fact that this amount was directly granted by the Spanish authorities clearly confirms the presence of State resources.

#### **Selective nature of the measure**

- (76) The measures in question concern only one transport sector, namely air transport, and the provision of a single air route: Gerona–Madrid–Gerona.
- (77) The contract was concluded with a single airline. From the information received from the Spanish authorities, it is not possible to deduce that the same measures would have applied to other companies which might have decided to provide scheduled air transport services between Madrid and Gerona.
- (78) The measure in question is therefore considered to be selective.

### The impact on competition and intra-Community trade

- (79) In order to make a finding of a distortion of competition, it is sufficient for the State intervention artificially to modify certain elements of an undertaking's production cost and to strengthen that undertaking's position vis-à-vis other undertakings competing in intra-Community trade<sup>(13)</sup>. The Court considers<sup>(14)</sup> that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may nonetheless have an effect on trade between Member States. Furthermore, the Court also stressed that aid could be capable of affecting trade between Member States and distorting the conditions of competition, even if, while in competition with undertakings in other Member States, the undertaking receiving the aid is not participating itself in cross-border activities. Where a Member State grants aid to an undertaking, internal supply may be maintained or increased with the consequence that the opportunities for undertakings established in other Member States to offer their services to the market of that Member State are reduced<sup>(15)</sup>.
- (80) In accordance with the third recital thereto and Article 1(a) thereof, Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid<sup>(16)</sup> does not apply to the transport sector. According to the Court's case law, there is no threshold or percentage below which it may be considered that trade between the Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected<sup>(17)</sup>.
- (81) In the case at issue, the air link between Gerona and Madrid is served by two operators, one receiving public funding and the other not receiving public funding.
- (82) It is true that the contract contains a termination clause which applies in the event of another air carrier establishing an air service between Gerona and Madrid with characteristics similar to those of the air service covered by the contract concerned in terms, in particular, of the type of aircraft, frequency, fares and the period of service without public aid or any other State funding.
- (83) However, if any competing operator provides services which do not comply with the abovementioned characteristics (for example, the use of a smaller aircraft), the selective nature would even be confirmed since two operators would be operating on the same route, one receiving aid and the other not. In fact, the complainant in this case operates the Gerona-Madrid-Gerona air link without receiving public aid. According to the information received from the Spanish authorities, the complainant has established a charter flight operation on the Gerona-Madrid-Gerona route using aircraft with less than 20 seats, which does not meet the requirements of the contract.
- (84) Furthermore, the measures in question affect trade between the Member States since they concern a company whose transport activity, which by its nature directly affects trade, covers part of the common market. In addition, they distort competition within this market since they are aimed at only one single undertaking which is in competition with another Community airline, in particular since the entry into force of the third air transport liberalisation package (third package) on 1 January 1993. Under these circumstances, the granting of advantages to Intermed by the Spanish authorities is aid within the meaning of Article 87 of the EC Treaty.

<sup>(13)</sup> Court judgments of 2 July 1974, *Italy v Commission* Case 173/73 [1974] ECR 709, and of 17 September 1980, *Philip Morris*, Case 730/79 [1980] ECR 2671.

<sup>(14)</sup> Paragraphs 77 to 82 of the *Altmark* judgment.

<sup>(15)</sup> Court judgment of 21 March 1991, *Italy v Commission*, Case C-303/88 [1991] ECR I-1433, paragraph 27, judgment of 13 July 1988, *France v Commission*, Case 102/87 [1988] ECR I-4067, paragraph 19, and judgment of 21 March 1991, *Italy v Commission*, Case C-305/89 [1991] ECR I-1603, paragraph 26.

<sup>(16)</sup> OJ L 10, 13.1.2001, p. 30.

<sup>(17)</sup> *Altmark* judgment, paragraph, 81; judgment of 21 March 1990, *Belgium v Commission*, 'Tubemeuse', Case C-142/87 [1990] ECR I-959, paragraph, 43, and judgment of 14 September 1994 *Spain v Commission*, Cases C-278/92 to C-280/92 [1994] ECR I-4103, paragraph 42.

### Advertising for promotion and marketing

- (85) The measures agreed by the Gerona Regional Council with a view to establishing and financing all the advertising for the promotion and marketing of this air route during the period of validity of the contract up to a maximum of EUR 120 202 must also be regarded as State aid. These measures, which are financed from public funds, are intended to make the creation of the new air service known to the general public.

### Conclusion

- (86) As the conditions of Article 87(1) of the Treaty are met, the Commission must conclude that the measure is a State aid measure which must be examined in order to ascertain whether it is compatible with the Treaty.

#### *Legality of the aid*

- (87) The Commission deplores the fact that Spain implemented the aid in contravention of Article 88(2) of the EC Treaty.

#### *Compatibility of the aid*

##### Application of Article 87(2) and (3)

- (88) Having determined that the measures under consideration are in the nature of State aid falling within the scope of Article 87(1) of the Treaty, an assessment confirmed by the Spanish authorities, the Commission must examine whether the measures may be considered compatible with the common market within the meaning of Article 87(2) and (3) and Article 86(2) of the Treaty.
- (89) The Commission must assess the compatibility of the aid pursuant to Article 87(2)(a) of the Treaty, according to which aid having a social character, granted to individual consumers, is compatible with the common market, provided that the aid is granted without discrimination related to the origin of the products concerned. According to the Commission Communication on State aid in the aviation sector, the aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region. According to the same communication, the aid has to be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operate the services. This also implies the absence of any barrier to entry on the route concerned for all Community air carriers.
- (90) In the case at issue, the aid has been paid solely to one airline operating the link in question, to the exclusion of the competing operator. The legal basis of this aid does not seem to allow other airlines access to the aid scheme. Consequently, this aid does not satisfy the first of the conditions required, namely non-discrimination between operators.
- (91) The derogation provided for in Article 87(2)(b) does not apply since, in the case at issue, the aid is not intended to make good the damage caused by natural disasters or exceptional occurrences.
- (92) Article 87(3) lists the aid which may be considered to be compatible with the common market.

- (93) In order to safeguard the proper functioning of the common market, and having regard to the principles set out in Article 3(1)(g) of the Treaty, the derogations from Article 87(1), as defined in Article 87(3), must be strictly interpreted when examining an aid scheme or any individual measure. Furthermore, in view of the increased competition following the liberalisation of air transport, the Commission must abide by a rigorous policy of monitoring State aid to make sure that it does not have any secondary effects which are contrary to the common interest:
- paragraphs (a) and (c) allow derogations for aid to promote or facilitate the development of certain areas<sup>(18)</sup>. The Commission notes that the Gerona region is not an area covered by Article 87(3)(a) and that this derogation is therefore not applicable. The Commission further notes that the Gerona region is not eligible to benefit from the derogation in Article 87(3)(c) of the Treaty, except districts situated in the Pyrenees which are not relevant in this case;
  - paragraphs (b) and (d) are not applicable since the aid is not intended to promote an important project of common interest or to remedy a serious disturbance in the economy of a Member State or to promote culture and heritage conservation and, in any case, the Spanish authorities have not invoked the derogation;
  - the derogation provided for in paragraph (c) concerns aid to facilitate the development of certain economic activities. The Commission considers that operational aid which is not intended to encourage investment may be authorised only in exceptional circumstances. To this end, it notes that the aid is neither for environmental nor for training purposes. Furthermore, the Commission can allow this derogation to apply to the restructuring of an undertaking. This is not the case with Intermed.
- (94) However, the aid can be compared to start-up aid, an analysis of which is made in recital 101.

#### Application of Article 86(2) of the Treaty

- (95) The only justification invoked by the Spanish authorities concerns the application of Article 86(2) of the Treaty. In this respect, the Commission considers that, for aid to be declared compatible on the basis of this provision of the Treaty, two conditions must be satisfied: the necessity and the proportionality of the aid.
- (96) The Commission should point out that the Spanish authorities do not contest that the provisions regarding Article 4 of Regulation (EEC) No 2408/92 have not been complied with. This would suggest that the Spanish authorities did not consider it necessary to impose public service obligations on the air link in question. This was confirmed when the administrative procedure had already been initiated by the Commission since, at the request of the Catalan regional authorities of 13 June 2002, the competent Spanish authorities refused to initiate the procedure to impose public service obligations on the grounds that there were not sufficient reasons to invoke Article 4 of the said Regulation<sup>(19)</sup>. In these circumstances, it would be contradictory to maintain, on the one hand, that the service is necessary within the framework of Article 86(2) of the Treaty and, on the other, to consider that the service in question is not necessary in order to apply the normal legal framework applicable to public service obligations in the aviation sector.

<sup>(18)</sup> Commission Communication on guidelines on regional State aid (OJ C 74, 10.3.1998). Reference to such regional aid is also made in paragraph 36 of the guidelines on State aid in the aviation sector. See also footnote 5.

<sup>(19)</sup> Comments from the Spanish authorities sent by letter of 18 March 2003 registered at the Secretariat-General of the Commission on 19 March 2003.

- (97) In the absence of compliance with the procedure established in Article 4 of Regulation (EEC) No 2408/92, the proportionality of the aid also cannot be confirmed. The Spanish authorities consider that the amount of the subsidy granted is less than the deficit run up in the months during which the service was operated and that there has therefore not been any overcompensation. The Commission does not dispute that the amount of aid is less than the deficit for the service, but it does consider that, in the absence of objective means for establishing the level of compensation pursuant to the mandatory rules laid down by the Council, it cannot be ruled out that other companies would have been able to offer the service in question with a lower level of subsidy.
- (98) As is clear from the Court's case law<sup>(20)</sup>, a joint assessment of compatibility must be carried out where certain arrangements of the aid contravene specific provisions of the EC Treaty other than Articles 87 and 88, and are inextricably linked to the object of the aid in such a manner that it is impossible to evaluate them separately. In such a situation, the conditions of these other provisions would be added to the compatibility requirements arising from Article 86(2) of the EC Treaty. In addition, it is clear that a State aid procedure must never lead to a result which is contrary to the specific provisions of the Treaty<sup>(21)</sup>, or to Community regulations adopted on the basis of such provisions.
- (99) In the case at issue, the procedure in Article 4 of Regulation (EEC) No 2408/92 is inextricably linked to the aid. In accordance with this case law, it is not possible to declare aid compatible if the arrangements for granting it have not complied with Article 4 of Regulation (EEC) No 2408/92. Furthermore, the last sentence of Article 86(2) of the Treaty also contains an additional requirement: 'the development of trade must not be affected to such an extent as would be contrary to the interests of the Community'. The Commission considers that, in a case such as this, it would be contrary to the Community interest to authorise aid which has been granted in breach of Regulation (EEC) No 2408/92.
- (100) Consequently, the aid in question cannot be declared to be compatible with Article 86(2) of the Treaty.

#### Start-up aid

- (101) In recital 278 of Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi airport to the airline Ryanair in connection with its establishment at Charleroi<sup>(22)</sup>, the Commission considers that aid measures that allow the development and better operation of regional airport infrastructures that are currently under-used and represent a cost to the local community may be of interest at European Community level and form part of the objectives of the common transport policy.
- (102) In this Decision, the Commission considered that certain operational aid intended to help the launch of new airlines or strengthen certain frequencies may be a necessary tool for the development of small regional airports. The measures may indeed persuade the interested companies to take the risk of investing in new routes. However, in order to declare such aid compatible on the basis of Article 87(3)(c) of the Treaty, it should be determined whether this aid is necessary and in proportion to the objectives sought, and whether it affects trade to an extent that is contrary to the common interest.
- (103) Operating aid is rarely likely to be declared compatible with the common market as it usually distorts conditions of competition in the areas where it is granted, without however being capable, because of its very nature, of achieving any of the aims laid down by the exemption provisions in the Treaty. In fact, as it does not involve any technical or structural alteration to the business and favours only its commercial development, it only allows the business to offer artificially favourable conditions to its clients and to increase its profit margin without justification.

<sup>(20)</sup> Judgment of 22 March 1977, Case 74/76, *Iannelli*, [1977] ECR 557.

<sup>(21)</sup> Judgment of 15 June 1993, Case C-225/91, *Matra v Commission* [1993] ECR I-3203.

<sup>(22)</sup> OJ L 137, 30.4.2004, p. 1.

- (104) There are, however, a number of exceptions to this principle and the Commission has in the past declared this type of aid compatible, provided certain conditions are met <sup>(23)</sup>.
- (105) In order to declare such aid compatible on the basis of Article 87(3)(c), it is therefore necessary to determine whether the aid paid in the case at issue is necessary and proportionate to the objective sought and whether it does not affect trade to a degree which is contrary to the common interest.

#### Aim of the measure and presence of Community interest

- (106) The first condition for granting start-up aid is that it forms part of a coherent airport development project and reflects a willingness to develop the profitability of infrastructures that are not always profitable.
- (107) The promotion of regional development, tourism, the local economy or the regional image will therefore be no more than a spin-off of this coherent policy intended first and foremost to develop airport activities on a long-term basis.
- (108) Regional airports could also provide a solution to one problem of transport policy: that of capacity saturation at major airports <sup>(24)</sup>.
- (109) In this case, no information suggests that other companies wishing to start up routes between Gerona and other destinations have had access to similar aid. The Commission has not been informed about the existence of any such project for the development of airport activities. The Spanish authorities merely state that Gerona airport did not have any scheduled flights until the establishment of the service between Gerona and Madrid.

#### The need for aid

- (110) The Commission defined the criterion of the need for aid in the *Ryanair* Decision <sup>(25)</sup>. In this respect, start-up aid must be essential for the development of the airport. Certain conditions must be met.
- (111) Firstly, the aid granted to the airlines should apply only to the opening of new routes or new frequencies, generating an increase in the net volume of passengers departing from the regional airport, so that part of the risk borne by the company is taken on.
- (112) Secondly, the aid should not be paid where the route is already being operated: the risk being run by the company is less, maybe even zero, and the need for aid is not justified. Thus, when a company already operates a route from an airport, it will not be able to benefit from public aid.
- (113) Thirdly, aid must not be paid to an airline for any new route that it starts operating in substitution for, and following the abandonment of, an old route that had previously benefited from start-up aid. All other things being equal, the airport would not have any net positive effect in terms of the number of passengers arriving at its site. Furthermore, the aid could not be granted for a route provided by the company in replacement for another route that it had previously served from another airport located in the same economic catchment area or population centre. The Commission in fact considers it essential that start-up aid does not create any spiral subsidy, for example through such relocations of routes once the maximum aid has been granted. Such a practice would in fact run contrary to the whole objective of start-up aid, which is development of the airport concerned in keeping with the common interest.

<sup>(23)</sup> *Ryanair* Decision, recital 281.

<sup>(24)</sup> *Ryanair* Decision, recital 287 to 296.

<sup>(25)</sup> *Ryanair* Decision, recitals 298 to 307.

- (114) Fourthly, aid must not be intended to assist a new entrant to open links that are already open and enter into direct competition with an existing operator already working on that route from the airport. The new arrival must rely on its own strength alone, and not on public aid, to compete with an existing operator.
- (115) With regard to the first, second and fourth conditions, it should be pointed out that the Gerona–Madrid–Gerona route was being operated by another company until 28 October 2001, but that the company abandoned the service as unprofitable. The route was not being operated by another carrier at the time of conclusion of the contract between the public authorities concerned and Intermed on 26 March 2002. However, another operator, Air Catalunya, started operating the same link a few days later, on 3 April 2002. Intermed started operating on 15 April 2002. The fact that the two companies started operating the Gerona–Madrid–Gerona route 12 days apart makes it impossible to determine clearly and definitively whether the service provided by Intermed can be considered to be a new route.
- (116) The third condition is met in the case at issue since the Madrid–Gerona–Madrid route was the first operated by Intermed.
- (117) The start-up expenditure on marketing and advertising to make the route known may be considered to be necessary in view of its aim, which is to inform the general public about the existence of such an air route.

#### The incentive nature of the aid

- (118) Aid must have an incentive effect: it must allow a business to develop an activity that it would not have embarked upon without public support. This activity, however, must prove itself to be profitable without aid in the long term. For this reason, aid intended for launching new connections or for increasing frequencies must be limited in time. Aid is used to launch a new route, but it cannot maintain the route artificially: routes must eventually be economically viable.
- (119) The Commission has considered that, in the framework of start-up aid in the aviation sector<sup>(26)</sup>, a maximum period of five years following the opening of each connection is reasonable, in particular for intra-European, point-to-point links.
- (120) In the case at issue, the part-funding of the Gerona–Madrid route and the publicity measures are limited in time (the contract was valid for three years), in particular until the route in question has been consolidated and achieves profitability itself or because another air operator, without public aid or any other State funding, establishes an air service between Gerona and Madrid which has the same characteristics as the service covered by the contract concerned as regards, in particular, the type of aircraft, frequency, fares and service period.

#### Proportionality of the aid

- (121) Proportionality must be established in the form of two links between the aid and its context. Firstly, there must be a strict link between the aim of the airport development, via the net growth of passenger traffic, and the level of aid paid to the airline. The total aid must therefore be calculated per passenger. An airline that cannot deliver to an airport the volume of passengers necessary for its development will not therefore be unduly favoured. Conversely, a company that meets the targets that make development of the airport possible will reap the benefit.

<sup>(26)</sup> *Ryanair* Decision, recitals 312 to 314.

(122) The second link which must be assessed with regard to proportionality between the aid and the costs incurred by its beneficiary. The Commission points out that the aid intensity, which the Commission limits to 50 % in the case of start-up aid, does not apply to all the operating costs, net of receipts, of the airline concerned.

(a) The only costs eligible for start-up aid are the additional start-up costs that the air operator would not have to bear once 'cruising speed' is reached and that require a public contribution in order to share the risk of non-viability linked to the start-up period. In the case of Intermed, they concern, for example, the marketing and advertising costs incurred at the outset for making the link known, and the start-up costs borne by Intermed at the Gerona site.

(b) Conversely, aid cannot be granted in relation to Intermed's standard operational costs such as hire or depreciation of aircraft, fuel, crew salaries or catering service costs.

Transparency, equal treatment of operators and non-discrimination in granting of aid

(123) The amount of aid granted to an airline for the development of air services must be transparent. For example, it should be calculated per embarking passenger in order to be easily identified and identifiable.

(124) The fact that an airport is ready to grant aid in return for economic services such as the launch of new routes must be publicised in order to make it possible for the interested airlines to present themselves and stake their claim. The rules and principles relating to procurement contracts and concessions should therefore be observed where applicable.

(125) Objective criteria must be developed by any airport wishing to encourage development of air services in terms of maximum totals and periods for aid, in order to ensure equal treatment between airlines.

(126) Appeal procedures must be provided at Member State level in order to ensure that no discrimination is exercised in the granting of aid and that no airline is favoured unfairly at a given airport.

Penalties and repayment mechanisms

(127) Penalty mechanisms must be implemented as and when a carrier fails to keep to the undertakings that it has made in relation to an airport when the aid is paid. A system for recovering aid may allow the airport to ensure that the airline is honouring its commitments. The contract in the case at issue does in fact contain a mechanism for recovering aid if Intermed does not honour its commitments.

Overlapping with other aid

(128) The aid granted cannot in principle be combined with other subsidies received by air carriers if it is aid of a social nature or compensation for public services defined as aid. Neither may it, in accordance with the rules of proportionality described above, be combined with other aid for the same costs, including aid paid in another State. The sum total of aid from which a new route benefits must never exceed 50 % of the start-up costs for the destination in question.

(129) In order to preserve the incentive character of start-up aid for air links over time as a development tool for regional airports only, the Commission believes it necessary to ensure that such aid cannot give any indirect advantage to large airports already largely open to international traffic and competition. Specific attention should therefore be paid to limiting eligible costs when an airline links Gerona (in this case) with a major airport such as Madrid.

(130) In addition, such aid cannot be granted when access to a route has been reserved for one carrier only under Article 4 of Regulation (EEC) No 2408/92, and in particular paragraph 1(d) of that Article.

- (131) In the case at issue, Intermed does not receive, for its routes from Gerona, subsidies by way of social aid or compensation for public services, as referred to above. Nor is access to the route operated by Intermed from Gerona reserved for this carrier alone under a tender procedure as provided for in Article 4 of Regulation (EEC) No 2408/92.

Description of measures required to be undertaken by the Member State concerned in order to make the aid compatible

- (132) The Commission notes that the aid paid by the Autonomous Government of Catalonia, the Gerona Regional Council, and the Chamber of Commerce and Industry of Gerona to Intermed fulfils some of the conditions applicable to start-up aid intended to promote air services operating out of regional airports, but that others have not been fulfilled and that conditions must therefore be imposed in certain cases to ensure compatibility.

- (133) The amounts paid by the Autonomous Government of Catalonia, the Gerona Regional Council, and the Chamber of Commerce and Industry of Gerona as funding for the air service between Gerona and Madrid are considered to be compatible with the common market as start-up aid for new routes, subject to the following conditions:

- (a) The contributions must form part of a programme for the development of Gerona airport;
- (b) All of the contributions must be subject to a time limit. This period will not exceed a maximum of five years following the opening of the route in question.
- (c) These contributions may not be paid if the aid is intended to help a new entrant to open links that are already open and to enter into direct competition with an existing operator who is already operating this route under similar conditions departing from Gerona airport.
- (d) The contributions must be justified by means of a development plan established by Intermed and validated beforehand by the competent authorities for the route concerned. This plan will specify the costs incurred and eligible, which must be directly concerned with the promotion of the route in order to make it viable without aid following the termination of the contract. Eligible costs are those directly related to the start-up, as described in recital 122 to this Decision. The competent authorities will, if necessary, be assisted by an independent auditor during this task.
- (e) The sum total of aid from which a new route benefits must never exceed 50 % of the start-up and advertising costs for the destination in question. Similarly, the contributions paid may not exceed 50 % of the actual costs in connection with this destination.
- (f) Any contributions paid by the Autonomous Government of Catalonia, the Gerona Regional Council, and the Chamber of Commerce and Industry of Gerona which, at the end of the start-up period provided for in the contract, prove to have exceeded the criteria thus laid down must be reimbursed by Intermed.
- (g) Spain must establish a non-discriminatory, transparent aid scheme to ensure equal treatment for airlines wishing to develop new air services departing from Gerona airport, in accordance with the objective criteria established by this Decision.

- (134) Should these conditions not be met, Spain must recover all of the corresponding aid referred to in the above recital.

## VI. CONCLUSIONS

The Commission concludes that Spain has unlawfully implemented aid for the airline Intermediación Aérea SL in breach of Article 88(3) of the Treaty. However, in view of the contribution which this aid may make toward launching new air transport services and the lasting development of a regional airport, part of the aid may be declared to be compatible with the common market, subject to the conditions set out in recital 133,

HAS ADOPTED THIS DECISION:

### *Article 1*

The State aid implemented by the Kingdom of Spain for the airline Intermediación Aérea SL, amounting to EUR 919 879,98, on the one hand, and EUR 120 202 on the other, is hereby declared to be compatible with the common market on the basis of Article 87(3)(c) as start-up aid for new routes, subject to the following conditions.

### *Article 2*

1. The contributions shall form part of a programme for the development of Gerona airport.
2. All of the contributions shall be subject to a time limit. This period shall not exceed a maximum of five years following the opening of the route in question.
3. These contributions may not be paid if the aid is intended to help a new entrant to open links which are already open and to enter into direct competition with an existing operator who is already operating this route under similar conditions departing from Gerona airport.
4. The contributions shall be justified by means of a development plan established by Intermed and validated beforehand by the competent authorities for the route concerned. This plan shall specify the costs incurred and eligible, which must be directly concerned with the promotion of the route in order to make it viable without aid when the contract between Intermed and the Autonomous Government of Catalonia, the Gerona Regional Council and the Chamber of Commerce and Industry of Gerona expires.
5. The eligible costs, directly related to start-up, shall meet the following conditions:
  - (a) they shall cover the additional start-up costs which the airline would not have had to bear if it had been fully operational and which require a public contribution in order to share the risk of non-viability linked to the start-up period;
  - (b) conversely, they shall not cover standard operational costs such as hire or depreciation of aircraft, fuel, crew salaries or catering service costs.

The competent authorities shall, if necessary, be assisted by an independent auditor during this task.

6. The total sum of aid from which a new route benefits shall never exceed 50 % of the start-up and advertising costs for the destination in question. Similarly, the contributions paid may not exceed 50 % of the actual costs in connection with this destination.

7. Any contributions paid by the Autonomous Government of Catalonia, the Gerona Regional Council and the Chamber of Commerce and Industry of Gerona which, at the end of the start-up period provided for in the contract, prove to have exceeded the criteria thus laid down shall be reimbursed by Intermed.

8. Spain shall establish a non-discriminatory, transparent aid scheme to ensure equal treatment for airlines wishing to develop new air services departing from Gerona airport, in accordance with the objective criteria laid down in this Decision.

*Article 3*

1. The Kingdom of Spain shall take all necessary measures to recover, from the beneficiary, aid which is incompatible with the common market as referred to in Article 2 and unlawfully made available.

2. Recovery shall take place immediately in accordance with the procedures of national law, provided that they permit the immediate, effective implementation of this Decision. The aid recovered shall include interest compounded from the date on which the aid is made available to the beneficiary until the date of recovery. The interest shall be calculated on the basis of the reference rate used to calculate the grant equivalent in the framework of regional aid.

*Article 4*

The Kingdom of Spain shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply with it.

*Article 5*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 October 2004.

*For the Commission*  
Loyola DE PALACIO  
*Vice-President*

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