

DECISIONS

COMMISSION DECISION

of 27 January 2010

on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair

(notified under document C(2010) 183)

(Only the Slovak text is authentic)

(Text with EEA relevance)

(2011/60/EU)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

measure in question. On 11 June 2008, Slovakia transmitted its comments on the initiation of the procedure to the Commission.

(2) The Commission's decision to initiate the procedure and to issue the information injunction was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measure in question within 1 month of the publication date.

(3) The Commission received comments on the subject from two interested parties. It transmitted the comments to Slovakia by electronic mail on 11 September 2008. Slovakia was given the opportunity to respond to these comments. At the request of the Slovak authorities, a meeting took place on 26 November 2008. The Commission received Slovakia's observations by electronic mail dated 17 December 2008.

1. PROCEDURE

(1) By letter dated 11 March 2008, the Commission informed the Slovak Republic of its decision to initiate the procedure provided for in Article 108(2) TFEU (ex Article 88(2) of the EC Treaty) with regard to the Agreement between Bratislava Airport and Ryanair (hereinafter: the 'Agreement' or the 'Ryanair agreement'), and that it had at the same time decided to issue an information injunction according to the provisions of Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽³⁾ (now Article 108 TFEU) (hereinafter: 'Procedural Regulation') with respect to all documents, data and information necessary for the Commission to be able to assess the

2. GROUNDS FOR INITIATING THE PROCEDURE

(4) In its decision to open the procedure, the Commission noted that Letisko M. R. Štefánika — Airport Bratislava, a.s. (hereinafter: 'BTS' or the 'Airport') is the principal international airport of the Slovak Republic. The shareholders of BTS are currently the Ministry of Transport, Posts and Telecommunications of the Slovak Republic (34 %) and the National Property Fund of the Slovak Republic ⁽⁵⁾ (hereinafter the 'National Property Fund') (66 %).

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ OJ C 173, 8.7.2008, p. 9.

⁽³⁾ OJ L 83, 27.3.1999, p. 1.

⁽⁴⁾ See footnote 2.

⁽⁵⁾ The National Property Fund is a legal entity established in 1991 pursuant to Act of the National Council No 253/1991 on the scope of activities by organisations in the Slovak Republic in matters involving the transfer of state property to other persons and on the National Property Fund of the Slovak Republic (for detailed information see <http://www.natfund.gov.sk/>). The purpose of its existence and its main activity is to transfer State property identified for privatisation to non-State entities. The Fund is under the direct supervision of the National Council of the Slovak Republic, to which the Fund's budget is submitted for approval, along with proposals for the use of the Fund's property pursuant to Article 28(3)(b) of the Act, annual financial statements and the annual report on the Fund's activities.

- (5) The decision to open the procedure is based on information submitted by the complainant and statements from the media ⁽⁶⁾ according to which BTS has provided Ryanair, on the basis of an agreement concluded on 5 December 2005, with a reduction in airport charges for new scheduled and existing destinations (i.e. destinations already served from the airport). This Agreement is valid until 30 June 2016.
- (6) The agreement with Ryanair has allegedly set out a so-called 'service charge' (a single price for different services) which includes aircraft-handling and related services, passenger services, ramp services, load control, communications and flight operations, support services and terminal and infrastructure services.
- (7) The charges applied are allegedly significantly lower than the list of charges officially published in the Aeronautical Information Publication ⁽⁷⁾ (hereinafter the 'AIP'). The amount of the service charge allegedly differs depending on whether the airline operates a new scheduled destination or an existing destination. The following table summarises the charges Ryanair would allegedly have to pay, if it was charged under the AIP, and the charges Ryanair allegedly in fact pays:

Table 1

Comparison of charges under AIP and charges in the Agreement with Ryanair

(in EUR)

	Charges under AIP ⁽¹⁾	Charges Ryanair allegedly pays for new destinations ⁽²⁾	Discount for new destination	Charges Ryanair allegedly pays for existing destinations ⁽³⁾	Discount for existing destinations
Landing charge	780				
Passenger charge	2 030				
Ground handling charge	250 ⁽⁴⁾				
Total	3 060	[...] ^(*)	[...]	[...]	[...]

⁽¹⁾ An example of the Boeing 737-800 aircraft with 189 seats, a load factor of 83 % and MTOM of 69,9 tonnes was considered for the calculations.

⁽²⁾ The Agreement allegedly provides for a substantial reduction in charges. With a given load factor (157 passengers), Ryanair pays to the Airport an all-inclusive fee of [...] per passenger ([...] for 157 passengers; departure and arrival) for the new scheduled destination.

⁽³⁾ The service charge for existing destinations allegedly amounts to [...] per Boeing 737-800 (departure and arrival).

⁽⁴⁾ Ground handling charges are regulated under separate agreements between the airport and the airline. According to the complainant, a very competitive handling fee amounts to approximately EUR 250 per aircraft.

^(*) Confidential information.

- (8) The so-called service charge for new destinations would be applied to all destinations during the first 12 months after the Agreement has entered into force. For each successive year, the service charge for new destinations will be increased by [...]. After the first [...] years the service charge applicable to new destinations shall be equal to the service charge applied to the existing destinations. The service charge would also include a parking charge. In addition, any new charges introduced in the future, which Ryanair would not be required to pay, would further increase the gap between the discounted tariff and the AIP tariff.
- (9) On the basis of the above, the decision to open the procedure raised the following three questions:
- whether the decision of BTS to conclude an Agreement with Ryanair is imputable to the Slovak authorities,

⁽⁶⁾ ETREND, 31.3.2006, <http://relax.etrend.sk/65787/cestovanie/ryanair-si-poistil-bratislavu>; Pravda.sk.

⁽⁷⁾ The complainant provided the Commission with a list of charges, published in the AIP, valid as of December 2005:

— landing charge: SKK 425 (approx. EUR 11,20) per tonne (MTOM),
 — parking charge: SKK 9 (approx. EUR 0,237) per tonne per hour,
 — passenger charge: SKK 490 (approx. EUR 12,90) per passenger,
 — approach and air traffic control charge: SKK 230 (approx. EUR 6,07) per tonne.

Landing charge, parking charge and passenger charge are paid to the airport. Charges for approach and airport control are collected by the Air Traffic Services of the Slovak Republic.

- whether BTS, in accepting a reduction in airport charges for new and existing Ryanair destinations for the period from the signing of the Agreement until 30 June 2016, acted as a market economy investor,
 - whether, if the service charge for new and existing destinations amounts to State aid, this aid is compatible with the internal market.
- (10) As regards the first question, the Commission observed in the opening of the investigation that on 22 October 2007 BTS shareholders, acting on a proposal from the Ministry of Transport, Posts and Telecommunications of the Slovak Republic, appointed the new chairman of the BTS board of directors. The Commission therefore expressed doubts regarding the non-imputability of the Agreement to the State, as argued by the Slovak authorities.
- (11) As regards the second question, the Commission had to examine whether, in this particular case, the behaviour of BTS had been guided by prospects of profitability and whether Ryanair's alleged advantage is one it would not obtain under normal market conditions.
- (12) In this respect, the Slovak authorities had submitted that BTS, as the airport operator, acts like any other undertaking on the market, i.e. it determines the charges for services provided to air carriers at the Airport for each carrier individually, on the basis of negotiations, i.e. by means of an agreement between the parties and in accordance with its commercial policy.
- (13) They had also considered that the granting of discounts represents common commercial practice in relation to all airlines and that the discounts 'encourage air carriers to transport more passengers to the airport, which enables the airport operator, BTS, to generate higher revenues, both from charges for services provided to the air carriers and from its other commercial activities at the airport that do not relate to air transport but are aimed at making the airport more attractive to passengers; in other words, supporting the activities of air carriers represents direct support for the development of the airport itself.'
- (14) Nevertheless, the Slovak authorities did not provide the Commission either with the terms of the Agreement or with details of the circumstances under which it had been concluded. The Commission therefore expressed doubts in its decision to open the procedure as to whether the behaviour of BTS was guided by prospects of long-term profitability. Thus the possibility could not be ruled out that the conclusion of the Agreement provided Ryanair with an advantage from which it would not have benefited under normal market conditions.
- (15) As regards the third question, the Commission expressed doubts as to whether the conditions for compatibility as set out in the Communication from the Commission on financing of airports and start-up aid to airlines departing from regional airports (hereinafter the '2005 Guidelines')⁽⁸⁾ had been satisfied in the present case and whether the State aid measure could be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- (16) The information injunction, issued according to Article 10(3) of the Procedural Regulation, requested the Slovak Republic to submit all documents, information and data needed for the assessment of the measure and in particular:
- the terms of the Agreement,
 - studies, internal documents or any other papers on the basis of which the Agreement was negotiated,
 - the business plan of the Airport and any other strategic document in relation to the business strategy towards Ryanair,
 - the rules/circumstances under which charges were negotiated with other airlines and the policy under which charges are applied to other companies operating to/from Bratislava (Air Slovakia, ČSA, Lufthansa, SkyEurope),
 - any existing shareholder agreement between the National Property Fund and the Slovak state regarding BTS, and
 - the information requested in paragraph 70 of the opening decision.
- ### 3. COMMENTS FROM SLOVAKIA
- (17) The Slovak authorities began their observations by providing background information on the destinations served by Ryanair (11 destinations) and other air carriers (Sky Europe: nine scheduled destinations and nine summer destinations; ČSA: one destination; Air Slovakia: four destinations; Lufthansa: one destination and Aeroflot: one destination) from the Airport in 2008.

⁽⁸⁾ OJ C 312, 9.12.2005, p. 1.

- (18) In their observations, the Slovak authorities further explained that AIP refers to the Airport's standard charges. However, in order to improve its profitability and to make better use of its capacities, the Airport can agree discounts from these standard charges on the basis of individual agreements. Such discounts are based on different criteria, such as the number of passengers carried, the frequency of the routes operated and/or the introduction of new routes. If the air carrier does not comply with the criteria agreed in an individual agreement, it loses the right to apply for discounts.
- (19) The Slovak authorities further explained that, as a commercial undertaking, BTS is itself responsible for its pricing strategy and the profitability of the agreements it concludes with different air carriers. BTS presents to the advisory board only its overall annual strategy with regard to the number of passengers at the Airport, its overall revenue and costs, its investments and the means of financing those investments. This annual strategy presentation does not take account of individual air carriers or of individual agreements.
- (20) The Slovak authorities explained further that, because of the independence of BTS, they are not in a position to provide the Commission with information concerning the profitability of the relevant routes, nor are they able to provide any documentation concerning the negotiation process in relation to the Ryanair agreement.
- (21) According to the Slovak authorities, the Agreement between BTS and Ryanair is based on commercial terms and does not involve State aid.

3.1. Ryanair agreement of 5 December 2005

- (22) The Slovak authorities have also provided a copy of the 'Airport Services Agreement', dated 5 December 2005 and concluded between BTS and Ryanair. The Agreement sets out the operational and financial conditions under which Ryanair establishes and operates commercial flights to and from the Airport. The Agreement commenced on the date of signature of the contract (i.e. 5 December 2005) and ends on 30 June 2016.
- (23) The Agreement was concluded on a non-exclusive basis, meaning that the parties agreed that the conditions granted to Ryanair according to the Agreement may also be available on a transparent and non-discriminatory basis to any other airline that would commit itself to an equivalent volume of activity at the Airport.
- (24) Ryanair committed itself in this Agreement to pay for a minimum of [...] routes per day as from 1 July 2009, even if it operated fewer routes in the period from 1 July 2009 to 30 June 2016. BTS committed itself to provide sufficient facilities to Ryanair in order to enable it to operate this agreed minimum of [...] routes per day.
- 3.1.1. *The Ryanair service charge*
- (25) Ryanair will pay for services provided by the airport a single charge per aircraft (departure and arrival), the so-called 'service charge', amounting to [...] per aircraft type B737-800 following signature of the contract. This charge will increase by [...] from 1 January each year against the previous year, except when the destination is a 'new destination' (see below). It includes the landing charge, airport departure charge and handling charges, including security and safety charges⁽⁹⁾. It does not include either the approach charge collected by the Aviation Traffic Control or the parking fees for aircraft, as Ryanair aircraft are not based at the airport.
- (26) According to the Agreement, if the Airport introduces security taxes or charges other than those already contained in the 'service charge' the Airport will have to collect those charges directly from passengers.
- 3.1.2. *The charge for new destinations*
- (27) The Slovak authorities also explain that a 'new destination' within the meaning of the Agreement is understood to be any scheduled flight not operated by another air carrier during the validity of the timetable in the same period of the year prior to start-up. The charge will be applicable only if the airline operates a minimum of [...] flights per week. In assigning the destination, the airport's IATA/ICAO code is the decisive factor; in other words, the definition of a new destination relates to the airport and not the city. The charge for new destinations covers the same items as the normal service charge.
- (28) Ryanair pays to the Airport the following service charges for each 12-month period following the launch date of the new destination:
- Year 1: [...] per aircraft type B 737-800 (departure + arrival),
 - Year 2: [...] per aircraft type B 737-800 (departure + arrival),
 - Year 3: [...] per aircraft type B 737-800 (departure + arrival),
 - Year 4: [...] per aircraft type B 737-800 (departure + arrival),
- ⁽⁹⁾ These charges include safety measures (such as firefighting), security checks on passengers and luggage and other security services required by law.

- Year 5: [...] per aircraft type B 737-800 (departure + arrival),
- Year 6: [...] per aircraft type B 737-800 (departure + arrival), and
- after 6 years the normal Ryanair service charge (see recital 25 above) will be applied.

- (29) The charges for new destinations do not increase by [...] each year.

3.1.3. Other services provided to Ryanair

- (30) As a handling agent, the Airport also provides Ryanair with a reservation and ticket agency facility. According to the Agreement, Ryanair pays a commission to the Airport at a rate of [...] of all new Ryanair bookings (excluding taxes, amendment fees, other fees and passenger service and other charges) sold by debit/credit card by the Airport. The commission fee is set according to the following schedule:

- monthly average collection per departing passenger up to EUR [...]: [...] commission on the total amount,
- monthly average collection per departing passenger between EUR [...] and EUR [...]: [...] commission on the total amount, and
- monthly average collection per departing passenger EUR [...] or more: [...] commission on the total amount.

4. COMMENTS FROM THIRD PARTIES

4.1. BTS

- (31) BTS comments were provided in a letter dated 8 July 2008.

4.1.1. Imputability of the Agreement to the State

- (32) With regard to its shareholders, BTS further explained that when the Agreement was signed (5 December 2005), the Ministry of Transport, Posts and Telecommunications of the Slovak Republic was the Airport's sole shareholder. The National Property Fund of the Slovak Republic only obtained ownership rights to

BTS's shares later in the privatisation process. Therefore, BTS is of the opinion that further demonstration of the role and influence of the National Property Fund is irrelevant.

- (33) BTS is of the opinion that the discounts granted to Ryanair were by no means provided from State resources since, as a private joint stock company, BTS has no state resources at its disposal. In BTS's opinion, the mere fact that the state owns BTS's shares does not automatically involve State resources. Pursuant to Article 295 of the EC Treaty, the Treaty does not discriminate between ownership by public authorities and private persons.

- (34) BTS further explains that the decision to sign the agreement is not imputable to the State, although the Ministry, as the sole shareholder, appointed the members of the board of directors who negotiated and signed the Agreement in question. In its opinion these members were selected pursuant to BTS's articles of association on the basis of a transparent selection procedure, and, pursuant to the Slovak Commercial Code and BTS's articles of association, the board of directors manages the activities of the company and makes business decisions and decisions of an operational and organisational nature, except where such decisions are within the remit of other bodies. In addition, pursuant to the Slovak Commercial Code, the board of directors is obliged to act for the benefit of the company and is liable for damages caused, unless it is proven that its members performed their duties with professional care and in good faith in the interests of the company. Members of the board of directors are liable even if their actions were approved by the supervisory board.

- (35) BTS explains that the management that negotiated and concluded the Agreement acted in its sole discretion with no intervention from the shareholder. The BTS management has never been bound to submit the company's business strategy towards individual carriers to the shareholder or any other body for approval.

4.1.2. AIP prices vs. the Agreement

- (36) With regard to passenger and landing charges according to the AIP in force, the Airport states that charges have not changed in recent years. Only in 2008 were landing charges decreased by 7 % due to increased utilisation of the Airport. The following table summarises developments in charges from 2003 until 2008.

Table 2

AIP price development at BTS in SKK

Charges in SKK	2003	2004	2005	2006	2007	2008
Passenger charges (per passenger)	490	490	490	490	490	490
Landing charges (per 1 tonne of aircraft takeoff weight)	425	425	425	425	425	395

- (37) In addition, the Airport is of the opinion that the prices stated in the AIP are only recommended prices and not binding on BTS. These prices are applicable to air carriers which do not accept any other contractual obligation towards BTS concerning the number of routes operated, frequency of flights, volume of passengers or duration of their operations at the Airport. In BTS's opinion, any contractual arrangement which goes beyond the scope of the standard rules stipulated by regulations and standards must be mutually balanced and reflected in prices. This gives the airport operator the possibility of differentiating the prices for services provided in connection with the obligations accepted by the air carrier, with the aim of maximising the economic benefits for the Airport.
- (38) BTS further explains that as the Agreement contains a clause concerning a year-on-year price increase of [...], the difference between Ryanair and AIP prices is gradually decreasing. Also, the 'one-off' reduction in AIP prices in 2008 was not reflected in Ryanair prices, further reducing the difference.
- (39) With regard to other published AIP prices, BTS further explains that the charge for approach and air traffic control is not included in the price agreed between BTS and Ryanair as this service is not provided by BTS. BTS also explains that, according to the AIP in force during the period in question, aircraft parking is free for the first 2 hours. Therefore BTS does not see how Ryanair gains any real benefit under the Agreement with regard to free parking, as firstly this condition corresponds to the AIP in force and, secondly, Ryanair's aircraft do not stay at the Airport longer than 2 hours⁽¹⁰⁾.
- (40) In the opinion of BTS, the information given above demonstrates that the contractual prices agreed between BTS and Ryanair are not at variance with the recommended AIP prices, despite their different structure, that they reflect the obligations assumed by Ryanair and that they provide an economic gain for BTS which is comparable to or higher than that from other carriers. BTS also explains that a discount on the unit price alone cannot be a reason to claim that the recipient received an economic advantage.

4.1.3. *The market economy investor principle and the Ryanair agreement*

- (41) BTS further explains that, in signing the Agreement, it did not seek to achieve regional economic development nor possible inward investment in the first place. It states that the main objective of its business decision was to increase revenues from aviation and non-aviation activities, to diversify the risk and the dependence on Sky Europe — the single key air carrier at the Airport — and to create more stable development of passenger volumes at the Airport. In the opinion of BTS, all these factors would help to increase its market value.

Table 3

Development of regular transport at the Airport 2004 — 2007 in passenger numbers

Regular transport in passenger numbers	2004		2005		2006		2007	
Ryanair	—	0 %	62 524	8 %	451 328	30 %	582 135	38 %
SKYEurope	329 463	71 %	587 048	73 %	837 325	56 %	815 459	53 %
ČSA	85 872	19 %	89 462	11 %	93 955	6 %	91 821	6 %
Slovenské aerolínie ⁽¹⁾	25 705	6 %	46 899	6 %	56 165	4 %	3 568	0 %
AIR Slovakia	22 115	5 %	22 408	3 %	44 349	3 %	58 379	4 %
Total	463 155	100 %	808 341	100 %	1 483 122	100 %	1 551 362	100 %

⁽¹⁾ The Slovak flag carrier, which was sold to Austrian Airlines and went into bankruptcy in 2006.

- (42) BTS also argues that, as the Agreement was concluded in December 2005, the data available at that time should be used for comparison, i.e. airport charges applicable at other European airports competing with BTS in attracting air carriers comparable to Ryanair.

⁽¹⁰⁾ Ryanair does not base its aircraft at the Airport.

- (43) BTS further argues that it is generally known that privately owned airports usually provide discounts to airlines in the expectation of increasing profitability. The discounts granted to Ryanair may seem to be providing an economic advantage if comparing unit prices as such, without taking account of the economic benefits and effects for the airport. In BTS's opinion, unit prices cannot be assessed without considering other contractual arrangements and without their relation to the number of passengers carried, the total annual number of passengers, the weight of aircraft, the regularity and number of flights during a year, seasonality and corresponding costs and other factors influencing the profitability of the airport as a whole. All these factors affect an airport's revenues and costs and must be taken into account when comparing prices charged to individual carriers.
- (44) BTS is of the opinion that, in concluding the Agreement, it acted as a private investor in a market economy. BTS carried out financial calculations of the profitability of the Agreement with Ryanair before signing it. Several conference calls between the management of BTS and Ryanair took place in order to negotiate the conditions. BTS's calculations assessed the costs and expected revenue resulting from the Agreement and were based on the experiences of various airports with low-cost carriers.
- (45) BTS further explains that, when the Agreement was concluded, the airport had sufficient operational capacity to increase passenger numbers in subsequent years, and therefore did not expect an additional increase in fixed costs related to increased capacity. It also states that an agreement with another air carrier to ensure an increase in passenger numbers comparable to that provided by Ryanair would be concluded under comparable conditions. In relation to the nature of services provided by BTS to Ryanair's passengers and aircraft, it explains that those services are significantly cheaper than those provided to standard carriers.
- (46) BTS further explains that the revenue from the Agreement with Ryanair represents a 'guaranteed income' stream. This is in particular because, according to Article 2.1 of the Agreement, in the period from 1 July 2009 to 30 June 2016 Ryanair is obliged to pay BTS for a minimum of [...] flights per day, even if it operates fewer flights in this period. In BTS's opinion, this commitment from Ryanair allows for better planning of long-term investment at the Airport. In addition, BTS explains that, due to Ryanair, non-aviation revenue at the Airport has increased substantially.
- (47) In relation to the mechanism for the application of the Agreement-based discount for new destinations, BTS emphasises that the discount cannot be calculated in relation to the first year of the Agreement's validity, but to the first 12 months from the commencement of links to the relevant destinations.
- (48) In relation to discounts for the so-called 'new destinations', BTS is also of the opinion that such a discount does not constitute a selective economic advantage to Ryanair, since BTS is only ready to provide the discounted prices for destinations meeting the respective criteria set out in the Agreement and providing an economic gain for the Airport. BTS also emphasises that the carrier is eligible for the discounted price only in the case of a regular destination with at least [...] flights per week. With the anticipated minimum utilisation of the capacity of B 737-800 aircraft (63 %) ⁽¹¹⁾, this represents at least 90 000 new passengers per year, representing more than 6,5 % of the total number of passengers handled by the airport at the time the Agreement was signed and more than 4,3 % of the total number of passengers handled by the airport in 2007.
- (49) At the same time it must be stated that, to date, only one of Ryanair's destinations since the signature of the Agreement has complied with the conditions for granting the discount, namely Frankfurt-Hahn. At the time of signing the Agreement, no other air carrier operated regular flights to this destination, nor do they now, so there was no takeover of existing passengers of another air carrier by Ryanair.
- (50) In addition, BTS explains that if an air carrier complies with the conditions of a 'new destination', the economic gain from such a destination, even after granting the highest discount in the first year, is more than [...] per year, which is [...] more than for a common average destination served by another carrier with three flights per week under AIP prices (i.e. [...]) and nearly [...] more than for another carrier's destination with five flights per week under AIP prices (i.e. [...]).
- (51) BTS is of the opinion that a new destination contributes significantly to the growth and development of the airport, particularly due to higher utilisation of airport capacity (terminal building and runways), where the gain from the high volume of revenues obtained as a result of introducing this new destination greatly exceeds the discounts provided and significantly contributes to the company's existing fixed costs ⁽¹²⁾ and, at the same time, to the sustainability of prices
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- ⁽¹¹⁾ In the opinion of BTS, the complainant incorrectly assumes Ryanair's load factor to be 83 %. Neither Ryanair nor any other comparable air carrier has ever achieved such a load factor at the Airport. Ryanair can only be compared with another low-cost carrier operating at BTS (e.g. Sky Europe in 2005), which achieved a load factor of 63 % in the year the Ryanair agreement was signed.
- ⁽¹²⁾ BTS also explains that almost 100 % of operating capacity costs, excluding aircraft handling costs (terminal, runways and other areas, depreciation, interest, repairs and maintenance, energy, services, IT system licences, personnel costs and administration) can be considered fixed company costs, which do not change substantially in the light of changes in the number of passengers handled by the airport.

for services provided by the Airport (see AIP price development). BTS further states that such a new destination also helps to increase the share of regular traffic at the airport and reduces the irregular utilisation of airport capacity caused by summer (charter) flights, which are the most significant factors affecting the need for investment in new airport capacity, and which place a burden on the airport's budget through depreciation and interest, and subsequently result in the need to increase prices for services provided.

- (52) BTS further explains that the conditions for granting discounts for new destinations must respect a seven-flights-per-week frequency, which was fulfilled by Ryanair only in the case of Frankfurt-Hahn. However, Ryanair opened several 'new' destinations for which it did not receive discounts because of insufficient weekly flight frequencies (e.g. Stockholm-Skavsta, East Midlands, Bristol and Bremen).
- (53) With regard to the profitability of routes, BTS explains that it does not have this information at its disposal and that the profitability of a route can only be evaluated by the air carrier. Since the beginning of its services at BTS, Ryanair cancelled only one route (Bratislava-Bremen, Germany). The route was cancelled after 8 months of operation, even though Ryanair paid a negotiated price for it (that is, lower than the price declared in AIP). BTS points out that this illustrates that the provision of any discount for destinations under normal market conditions is not sufficient for maintaining an unprofitable route.

4.1.4. Compatibility of the aid

- (54) BTS is of the opinion that the Agreement did not provide an advantage to Ryanair as it was based on market terms and therefore does not constitute State aid. It did not therefore provide explanations on compatibility criteria.
- (55) BTS is also of the opinion that the 2005 Guidelines do not constitute legally binding legislation in Community law, i.e. that they are not binding on EU Member States and natural and legal persons. Only Regulations, Directives and Decisions are binding. Recommendations and opinions have no binding force. In addition, BTS argues that the Agreement was concluded on 5 December 2005 and the 2005 Guidelines were published on 9 December 2005, and are not retroactively applicable in the present case.

4.2. Ryanair

- (56) Ryanair began its observations (dated 8 August 2008) by stating that in its opinion the initiation of a formal investigation procedure was unjustified and unnecessary.

It also stated that it regrets that the Commission did not give Ryanair the possibility to engage itself in the preliminary examination.

- (57) On the substance of the case, Ryanair is of the opinion that the Commission should have based itself on standard commercial arrangements and, inter alia, on the evidence of comparable airports submitted by Ryanair in the Charleroi investigation, and on this basis the Commission should have decided that the Agreement in question complies with the market economy investor principle and hence does not involve State aid.

4.2.1. Imputability of the Agreement to the State

- (58) With regard to the financing of the Agreement through State resources and its imputability to the Slovak authorities, Ryanair's understanding is that BTS was acting autonomously when it entered into the Agreement and that therefore no State measure was involved.
- (59) In Ryanair's opinion, the complainant appears to have been biased, taking Ryanair's objections to the takeover of BTS by Vienna Airport and the timing of the conclusion of the Agreement as evidence of the granting of State aid, and to have magnified the apparent extent of the alleged advantage granted to Ryanair.
- (60) While Ryanair confirms that it is true that it had raised competition concerns regarding the choice of buyer in the BTS privatisation process⁽¹³⁾, it is of the opinion that it would be absurd to conclude from Ryanair's position that it is against the privatisation of the Airport, or that it was opposed to Vienna Airport acquiring BTS because the Agreement could allegedly only work if the Airport was publicly owned, due to the necessity of State aid. Ryanair further explains that it was not against the privatisation of BTS per se, but against the choice of buyer (Vienna Airport), because this would have removed the competitive pressure created by Bratislava Airport on Vienna Airport and eliminated choice for airlines wishing to serve the catchment area covering parts of the Slovak Republic, Austria, Hungary and the Czech Republic.
- (61) With regard to the timing of the Agreement, Ryanair explains that the conclusion of the Agreement was preceded by a long phase of preparation and negotiation between Ryanair and BTS, starting at least as early as December 2003. The Agreement was indeed concluded on 5 December 2005, whereas the last day for the submission of bid proposals was 24 January 2006, i.e. more than one and a half months later.

⁽¹³⁾ Which finally failed.

- (62) In addition, Ryanair also explains that it was scheduled to take delivery of 20 aircraft between September 2005 and March 2006, up to four of which were to be dedicated to BTS operations. For these operational reasons, the process of concluding the Agreement could not be put on hold for over 10 months pending the conclusion of privatisation bids and approval by the Anti-Monopoly Office of the Slovak Republic (with a first deadline on 15 August 2006 and an extension of 45 days until October 2006).

4.2.2. *Explanations concerning the AIP and its charges for services at the Airport*

- (63) In relation to the AIP, Ryanair is of the opinion that this document provides only indications and is not binding on BTS in its negotiations with airlines. Besides this aspect, the AIP itself provides for special discounts and exemptions from its provisions, thus publicising the availability of discounts to be negotiated between airport operators and airlines on a case-by-case basis.
- (64) With regard to the standard parking charge, which applies when an aircraft is parked for more than 2 hours, Ryanair explains that this charge would not apply to it due to the specific nature of its operations and the fact that Bratislava is not a Ryanair 'base'. Ryanair's aircraft are never parked at BTS, and because of Ryanair's fast turnaround process, its aircraft spend only 25 minutes at the Airport each time, and they are never in the specified parking areas.
- (65) With regard to the introduction of new charges, Ryanair is of the opinion that the Commission's interpretation is misleading, because it suggests that new charges will not apply to Ryanair. However, such charges will simply be collected directly by BTS instead of Ryanair. Ryanair further explains that such charges, if collected directly by Ryanair, would have adverse effects on its business model and passenger numbers.
- (66) Furthermore, Ryanair states that if certain standard charges applicable at the Airport are eliminated or decreased, it would not enjoy any benefit since the combined landing, airport departure and handling charge provided for under the Agreement does not decrease when standard charges at the Airport decrease. This was a risk assumed by Ryanair when the Agreement was concluded. This actually happened, as the landing charge was reduced by 7,1 % in January 2008. In addition, the Agreement provides for an annual increase of [...] in the service charge.

4.2.3. *The Agreement meets the market economy investor principle*

- (67) Ryanair disputes the preliminary findings of the Commission that, because the Slovak authorities

mentioned regional economic development, possible incoming investment and other secondary and tertiary economic effects among the advantages provided by the Agreement, the market economy investor principle has not been fulfilled.

- (68) It further explains that BTS's main objective was to optimise its passenger volumes and compete in the market for airport services, and that BTS based its decision on continuously updated financial analyses, which can also be confirmed by exchanges of letters between BTS and Ryanair during a long negotiation process starting in December 2003. Ryanair states that, for example, a letter from BTS dated 12 December 2003 containing an interim offer of discounts indicates that the Airport had conducted financial cost-benefit analyses. Ryanair further states that an e-mail of 16 November 2004 also indicates that BTS had analysed the risks associated with the Agreement; for instance, it agreed to include in the service charge only those charges under its control (e.g. it did not include air traffic control in its service charge as BTS does not control it). Ryanair also gives the example that it provided BTS with a UNISYS report concerning the ability of secondary airports to capture some traffic from primary airports.
- (69) Ryanair explains that the charges it paid to BTS are similar to or even higher than those at other comparable airports (e.g. privately owned Blackpool Airport in the United Kingdom). Ryanair also argues that it has provided the Commission with examples of charges at numerous privately owned and privately financed airports at various stages during the administrative and judicial phases of the Charleroi case, and refers to the arguments, data, and conclusions provided in that case for further explanations. In its opinion there is no need for a complex economic assessment; a simple comparison of airport charges at different privately owned and financed airports should be sufficient.
- (70) Ryanair is also of the opinion that, as it has committed itself to operate at least [...] routes per day — the equivalent of over 2 million passengers per annum assuming a 75 % load factor — from Bratislava Airport starting on 1 July 2009, it provided a stable income stream for the Airport. In addition, Ryanair points out that this income was guaranteed by a penalty which would amount to charges for [...] routes per day if Ryanair did not meet its commitment. Therefore, in its opinion the lower charges at the Airport were applied with a view to an economic advantage, and it is thus in line with the market economy investor principle.
- (71) In addition, the service charge for new destinations is based on flight frequencies (seven flights per week) and equals over 100 000 passengers per year (assuming a 75 % load factor). Ryanair explains that the discounts for new destinations at the time of its observations only applied to the route between Bratislava and

Frankfurt-Hahn. It also argues that discounts granted by BTS for new destinations are in line with industry practice, as many privately and publicly owned airports apply the same, or a higher, level of discounts for new destinations.

- (72) Ryanair further explains that, by providing the Airport with a large number of passengers, it helps to maximise its non-aviation revenues and terminal utilisation. Non-aviation revenue includes parking charges for passengers, revenue from businesses attached to the airport such as car rental, shops, banks, post office and restaurants, revenue for shuttle services to neighbouring cities and advertising revenue. In addition, Ryanair is of the opinion that the Airport can generate additional revenue from ticketing and excess baggage charges and save costs by using different check-in procedures.
- (73) Ryanair rejects the complainant's assumptions that the load factor of its aircraft allegedly amounts to 84 % and that the maximum take-off mass per plane is 69,9 tonnes. Those assumptions are exaggerated in order to magnify the amount of the alleged advantage granted to Ryanair. Ryanair further explains that its assumption for the load factor per aircraft when it was negotiating with BTS was 75-80 %, which was confirmed by ex-post statistics. The maximum take-off mass of Ryanair aircraft operating to and from Bratislava Airport is 67 tonnes.
- (74) In Ryanair's view, it was foreseeable as early as 2005 that the Agreement concluded with BTS would make the Airport more profitable and thus provide an added value to shareholders. It has concluded similar contracts with other privately and publicly owned airports such as London-Stansted, London-Luton, Prestwick or Hahn.

4.2.4. *Absence of selectivity*

- (75) In the opinion of Ryanair, the measure lacks selectivity because the Agreement was concluded on a non-exclusive basis and any other air carrier could have obtained the same conditions granted to Ryanair on the basis of the commitments. It is also of the opinion that the Agreement provides for transparency and non-discrimination in the application of the financial and operational conditions offered to other airlines.
- (76) Ryanair further explains that, at the time the Agreement was concluded, the Airport operated below its available capacity and that it would have been able to accommodate competitors of Ryanair. It further states that Sky Europe enjoyed at least the same conditions as Ryanair as its commitments were comparable.

4.2.5. *Effect on trade between Member States and distortion of competition*

- (77) Ryanair disputes the Commission's preliminary findings in the opening of the procedure in relation to the

distortion of competition and the effect on trade between Member States. In particular, it objects to the fact that the Commission did not analyse arrangements between competing airlines and airports.

5. COMMENTS FROM SLOVAKIA ON THIRD-PARTY COMMENTS

- (78) The Slovak authorities began their observations by stating that they fully support the arguments of BTS and Ryanair that the Agreement does not involve State aid to Ryanair and that it was concluded on market terms.
- (79) With regard to the imputability of the Agreement to the State, they stress in particular that the Agreement was concluded only after a long-term negotiation process between the Airport management and Ryanair. In the opinion of the Slovak authorities, if the Agreement were imputable to the State the negotiation process would have been faster. It is also evident that the Agreement was not concluded under pressure. They also argue that the Airport is independent of local and regional authorities and that it was able to finance its operating costs from revenue without intervention from the authorities.
- (80) The Slovak authorities also argue that BTS acted as a market investor with the objective of obtaining the most favourable contract terms for the Airport. BTS had recently submitted to the Ministry of Finance a report compiled in late 2003 by a consultancy firm in relation to the low-cost strategy at the airport. The purpose of this report was to describe the activities of and trends in the low-cost airline business worldwide and in central Europe in order to provide the airport management with recommendations on prices, marketing and financial issues. Another analysis was conducted in April 2004 in order to assess passenger growth at the airport and pricing possibilities.
- (81) The Slovak authorities confirm that BTS also applied or offered discounts for new scheduled destinations to other carriers, such as Easyjet and Sky Europe, and that the Agreement with Ryanair did not constitute a special derogation. They also state that the definition of 'new destination' was comparable to the one used with other carriers and in no respect was Ryanair favoured.
- (82) The Slovak authorities further explain that, although they are of the opinion that the Agreement with Ryanair does not involve State aid, they have asked the Airport for an ex-post analysis of the profitability of the Agreement. The result of this analysis was that the Airport achieved 8,5 %-10 % profitability from the Agreement in 2006-2007.

6. EXISTENCE OF AID

6.1. State aid under Article 107(1) TFEU

- (83) Under Article 107(1) TFEU, *'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'*
- (84) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes State aid within the meaning of Article 107(1) TFEU, all of the following conditions need to be met. Specifically, the financial support should:
- be granted by the State or through State resources,
 - favour certain undertakings or the production of certain goods,
 - distort or threaten to distort competition,
 - affect trade between Member States.
- (85) In the present case, the Slovak authorities have argued that BTS has acted as a market economy investor would have done in a similar situation. If this is the case, Ryanair has not been favoured by the Agreement and no State aid is involved.

6.2. Application of the market economy investor principle

- (86) In assessing whether the Agreement was concluded under normal market conditions, the Commission has to examine whether, in similar circumstances, a private investor operating under normal market economy conditions would have entered into the same or similar commercial arrangements as BTS ⁽¹⁴⁾.
- (87) Both interested parties (i.e. BTS and Ryanair) claim that other privately and publicly owned airports also grant passenger-volume-based discounts and discounts for new destinations while expecting an increase in their profitability and improved utilisation of infrastructure. Thus they are of the opinion that the Commission should limit its private market investor test to comparing the charges contained in the Agreement with airport charges applied to low-cost airlines at other European airports. In particular, Ryanair submits

that charges at Bratislava Airport are similar to or even higher than those at other comparable airports (e. g. Blackpool Airport in the United Kingdom).

- (88) In this regard, the Commission considers that even though the airport charges applied at other European airports may provide a very general benchmark for the pricing of airport services, they do not allow for the conclusion that BTS acted as a private investor in this particular case.
- (89) The revenue and cost structure differs from airport to airport. They depend in particular on the airport's state of development, especially with regard to passenger numbers, airlines operating from/to the airport, available capacity (overcapacity, capacity restrictions or the need for new investment due to an increase in passenger volumes), the useful life of infrastructure, the need for replacement investment, depreciation levels, the regulatory burden, which may vary from Member State to Member State, and historical debts and obligations. The Commission also observes that agreements with airlines may be different at each airport, and that they may also depend on the attractiveness of its location for the airline in question and its competitors, the size of the catchment area and the level of services offered.
- (90) Therefore, the Commission considers that the question of whether the Agreement involves an advantage to Ryanair has to be assessed in relation to the conditions at Bratislava airport, and not by a simple comparison of the charges applied at other European airports whose characteristics may be different.
- (91) According to the principles established in case law, the Commission has to compare the conduct of BTS to a private operator guided by the prospect of profitability ⁽¹⁵⁾. BTS claims that it acted rationally, but did not provide the Commission with a formalised written report.
- (92) The Court declared in the Stardust Marine judgment that *'[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation'* ⁽¹⁶⁾.
- (93) In order to be able to apply the private investor test, the Commission has to place itself at the time the Agreement was signed. BTS signed the Agreement with Ryanair on 5 December 2005. The Commission must also base its assessment on the information and assumptions available to the operator when the Agreement was signed.

⁽¹⁴⁾ In order to carry out its assessment, the Commission also commissioned Moore Stephens (hereinafter: 'Commission expert') to carry out a study. The Commission expert analysed the financial data and assumptions underpinning the Ryanair Agreement. In carrying out this study they were assisted by BTS and had access to all necessary documents, provided by the airport in a data room, and also to BTS management. They were also given unlimited access to the airport's financial, contractual and other documentation.

⁽¹⁵⁾ Case C-305/89 Italy v Commission ('ALFA Romeo'), [1991] ECR I-1603, paragraph 20, Case T-296/97 Alitalia v Commission [2000] ECR II-3871, paragraph 84.

⁽¹⁶⁾ Judgment of the Court of 16 May 2002, C-482/99, France/Commission (hereinafter: 'Stardust Marine judgment'), Rec.2002, p. I-04397, paragraph 71.

- (94) According to the Agreement (Article 2.1), Ryanair committed to operate at least [...] existing destinations per day from mid-2009. After mid-2009, much lower growth was expected. Article 6.4 of the Agreement lays down that the price for a standard destination amounts to EUR [...] per turnaround (arrival and departure), increasing at [...] per year.
- (95) According to Article 6.3 of the Agreement, new destinations would be charged at a reduced rate of EUR [...] per aircraft turnaround and would increase by [...] per year during a six-year period starting from the introduction of the new destination. The information provided by the airport also shows that new destinations would represent a maximum of 20 % of the total destinations served by Ryanair ⁽¹⁷⁾.
- (96) On this basis, the airport was able to forecast the revenue generated by the Agreement with Ryanair. It should be stressed that such revenue only takes into account aviation revenue and not indirect revenue.
- (97) The Commission further notes that, due to Ryanair's commitment to operate at least [...] routes per day from the Airport, BTS was able to expect stable and foreseeable revenue during the duration of the Agreement.
- (98) The Airport's costs over the duration of the Agreement were estimated by projecting the actual costs ⁽¹⁸⁾ forward to 2016 on the basis of its business plan.
- (99) A part of each relevant cost position was attributed to the Agreement according to keys representing passenger share (29,38 % of passengers in 2007), aircraft movements at the airport (12,69 % in 2007), maximum take-off mass (19,07 %), administrative needs attributable to the Agreement and also the level of services offered to Ryanair. The yearly projected allocation keys are detailed below in Table 4, which shows that the share of costs born by Ryanair increases with its significance in the airport's activity.

Table 4

Cost allocation keys for the Ryanair agreement 2008-2016

Cost allocation keys	2008	2009	2010	2011	2012	2013	2014	2015	2016
Passangers	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Maximum take-off mass	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Aircraft movements at the airport	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Administration	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (100) The costs were thereafter projected until 2016, making the following key assumptions on the basis of the airport's business plan:

— Annual depreciation is based on the investment programme, which includes the cost of a new terminal and increases sharply during the construction of the new terminal between 2009 and 2012.

— Personnel costs are based on the assumption that the number of employees will increase at a rate of 50 % of the increase in passengers per year multiplied by an average salary per employee multiplied by an annual inflation rate.

⁽¹⁷⁾ In the context of a possible discrimination of charges between air carriers at BTS, the Commission observes that the Ryanair service charge per passenger in 2008 is comparable to the charge per passenger paid by Sky Europe, e.g. Sky Europe carried 892 939 passengers in 2008 and paid a charge of [...] per passenger, including a parking fee for aircraft at the airport; in comparison, Ryanair carried 762 541 passengers and paid a charge of [...] per passenger, excluding parking fees for aircraft. Thus, the charges at BTS differentiate only between the level of the service provided and the volume of passengers carried. The Commission did not receive any contrary comments from the competitors of Ryanair at BTS during its formal investigation.

⁽¹⁸⁾ In the calculation, the cost base relates to 2007; costs for 2005 were lower.

- Energy consumption (gas, electricity) and water costs are assumed to increase by 25 % of the increase in projected passenger numbers multiplied by the annual inflation rate, plus a one-off increase of 35 % in 2010 to reflect the opening of Phase 1 of the new terminal. There is no corresponding increase for the opening of Phase 2 of the new terminal in 2012 because in Phase 2 an existing building is replaced by a new building, so there is no net increase in energy use.
 - Repair and maintenance costs are based on an assumed rate of increase of 50 % of the rate of increase in projected passenger numbers multiplied by the annual inflation rate.
 - Annual inflation is based on the Slovak Ministry of Finance projection.
 - The exchange rate used to convert SKK to euro is fixed at the rate on the date the Agreement was signed (37,798 SKK/EUR).
- (101) The following table summarises the revenue and cost calculations in relation to the Agreement and its contribution to BTS profits during its lifetime. These calculations are based on the business plan provided by BTS management and the assumptions set out above.

Table 5

Profitability analysis of the Ryanair agreement 2005-2016

(EUR thousand)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Revenues	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit/Loss	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit margin	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
NPV ⁽¹⁾ of profits	[...]										
Average profit margin	[...]										

⁽¹⁾ Net Present Value (hereinafter: NPV), calculated on the basis of 6,9 % as the discounting rate.

- (102) The Commission notes that, over its lifetime, the Agreement with Ryanair generates a positive contribution to BTS's financial results, with an NPV for profits amounting to [...] million. BTS's overall NPV was also expected to be positive over the period of the Agreement.
- (103) The Commission also observes that the Agreement covers all attributable costs. The 'full cost approach' in this case includes depreciation costs for airport infrastructure and all other operating costs; it also includes costs for historical infrastructure ⁽¹⁹⁾ and also costs for security and safety measures which may represent measures falling within the public policy remit and would not be an economic activity within the meaning of Article 107(1) TFEU. Also, non-aviation revenues attributable to the Agreement were not taken into account. Thus the NPV of profits appears to have been underestimated, and the Agreement's positive contribution should be higher.
- (104) The Commission further observes that in 2010 and 2011 — in the years when the first part of the new terminal ⁽²⁰⁾ is to begin operation and additional capacity will be created at the airport — its costs (particularly depreciation and energy costs) will increase by 33 %-38 % in comparison to 2008 and will have a negative impact on results during these first 2 years.

⁽¹⁹⁾ Infrastructure investment and the financing thereof irrevocably committed before the airports were considered to be undertakings within the meaning of Article 107(1) TFEU (date of the first *Aéroport de Paris* judgment).

⁽²⁰⁾ The investment decision for the replacement of the old terminal was taken independently of the decision to enter into a contractual relation with Ryanair, and before the Ryanair agreement was signed. BTS did not receive State aid for the construction of the new terminal.

- (105) Table 5 shows that the average profit margin ⁽²¹⁾ (or 'return on sales') under the Agreement amounts to [...] and is comparable to average profit margins at other EU airports in 2006 and 2007 (see table below).

Table 6

Profit margin at other EU airports in 2006 and 2007

(in %)

Airports	Profit margin 2006	Profit margin 2007
Fraport	10,51	8,60
Aéroports de Paris	7,65	14,04
Flughafen München	6,73	4,98
Manchester Airports Group	17,69	20,42
Aeroporti di Roma	10,63	3,21
Flughafen Wien	17,62	16,77
SEA Aeroporti di Milano	7,44	5,90
Flughafen Düsseldorf	5,47	10,15
Aeroportos de Portugal	16,71	16,10
Finavia	8,85	10,82
Flughafen Köln-Bonn	1,98	2,00
Flughafen Berlin-Schönefeld	2,07	7,16
Hannover-Langenhagen	0,00	5,61
Lyon-Saint Exupéry	0,00	0,42
Peel Airports	- 3,64	2,93
Average profit margin	7,31	8,61

- (106) The Commission's expert has also carried out a sensitivity analysis of the Net Present Value of the Agreement in order to examine the impact of a variation in depreciation and energy costs — in the event that these costs were underestimated — on the profitability of the Agreement.

Table 7

Sensitivity analysis (increase in depreciation and energy costs) of the profitability of the Ryanair Agreement

Different scenarios	Net present value of the Ryanair contract (EUR thousand)
<i>Basic scenario</i>	[...]
<i>Alternative scenario 1:</i> Increase in depreciation and energy costs by 10 % in 2013 and 15 % in 2014–2016	[...]
<i>Alternative scenario 2:</i> Increase in depreciation and energy costs by 15 % in 2013 and 25 % in 2014 – 2016	[...]

- (107) Notwithstanding variations in the sensitivity analysis of between 10 % and 25 %, the contribution of the Agreement to BTS's net profit remains positive and is between EUR [...] million and EUR [...] million.
- (108) In the light of the above, the Commission considers that BTS's decision to conclude an Agreement with Ryanair was rational on the basis of the above-mentioned cost-benefit analysis.

⁽²¹⁾ The profit margin (also called the return on sales) compares net profit to sales (revenues). This ratio shows whether an undertaking is making sufficient return on sales, as it determines how much profit is produced per euro of sales revenue; it is a profitability and efficiency indicator.

Other aspects of the Agreement and risk analysis for BTS

- (109) The Commission deems it important to view the Agreement in the context of BTS's prior activity and its market position at the time.
- (110) The Commission further notes that, according to the Charleroi Judgment ⁽²²⁾, when assessing the measures at issue, it has to examine all the relevant features of the measures and their context.
- (111) In the present case, when assessing the rationale of BTS's decision to conclude the Agreement, other features which should be examined besides the cost-benefit analysis are the diversification of airlines operating from the Airport (and thus the reduction of risk), better allocation of resources and a reduction in overcapacity.
- (112) As the Slovak Republic does not currently have a national flag carrier and its former air carrier was small (6 % of passengers at BTS in 2005), and in other Member States comparable airlines still carry at least 40 % of the passengers at comparable airports, BTS was highly dependent on a privately owned airline, Sky Europe, which carried approximately 73 % of the passengers at the Airport in 2005. It should be noted that, due to the Agreement with Ryanair, BTS was indeed able to diversify its customer base, and was thus able to reduce the risk which arose during 2009 as Sky Europe went into bankruptcy.
- (113) In addition, BTS has also reduced the risk of creating overcapacity by replacing the old terminal with a new and bigger terminal. Optimising and making more regular use of infrastructure has also made it possible to reduce regular AIP charges as from 2008. Moreover, BTS did not include in the so-called 'service charge' charges which were not under its control, such as air traffic control charges.
- (114) Furthermore, Ryanair advertises Bratislava as one of its destinations on its website. However, BTS does not pay for this publicity, even though it cannot be excluded that a certain value could be attached to it.

- (115) The Commission notes that all these qualitative elements have also contributed positively to BTS's operational and financial situation and increased its market value for shareholders. They therefore complement the above-mentioned cost-benefit analysis.

Conclusion

- (116) In view of the above, the Commission concludes that, at the time the Ryanair Agreement was signed, BTS considered that the Agreement would make the airport more profitable. The Commission can therefore accept that, under similar circumstances, a market economy operator would have decided to conclude a similar agreement with Ryanair as BTS.
- (117) As at least one of the cumulative criteria pursuant to Article 107(1) TFEU is not met, the Commission considers that the Agreement does not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The Agreement of 5 December 2005 concluded between Letisko M. R. Štefánika — Airport Bratislava, a.s. and Ryanair Ltd does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the Slovak Republic.

Done at Brussels, 27 January 2010.

For the Commission
Antonio TAJANI
Vice-President

⁽²²⁾ Case T-196/04 Ryanair v Commission ('Charleroi Judgment'), [2008], paragraph 59.