

COMMISSION DECISION (EU) 2018/10
of 20 February 2014
on state aid SA.18855 — C 5/08 (ex NN 58/07) — Denmark
The 1999 Agreements between Aarhus Airport and Ryanair
(notified under document C(2014) 871)
(Only the Danish text is authentic)
(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾,

Whereas:

1. PROCEDURE

- (1) In February 2005, the Commission received a complaint from SAS Group ('SAS'). SAS alleged among other things that Aarhus Airport Ltd/Aarhus Lufthavn A/S ('Aarhus airport') had granted illegal subsidies to Ryanair. The subsidies allegedly consist of reduced airport and ground handling charges granted to Ryanair.
- (2) The Commission requested Denmark to provide further information in relation to the complaint by letters of 2 March 2005 and 20 May 2006. Denmark replied by letters of 18 May 2005 and 11 July 2006.
- (3) By letter dated 30 January 2008, the Commission informed Denmark of its decision to initiate the procedure provided for in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) ⁽²⁾ ('opening decision') in respect of the Agreement between Aarhus airport and Ryanair. Denmark provided its comments on the opening decision on 30 May 2008.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments within one month of the publication date.
- (5) The Commission received comments on the opening decision from three interested parties. SAS, Ryanair and Association of European Airlines submitted comments on 16 June 2008, 29 May 2008 and 4 July 2008 respectively. It transmitted these comments to Denmark by letter dated 17 July 2008. Denmark was given the opportunity to respond to them within one month. Denmark transmitted its comments by letter dated 29 September 2008.
- (6) By letter dated 25 March 2011, the Commission requested further information. Denmark responded by letter dated 28 March 2011. By letter dated 8 April 2011, the Commission requested Ryanair to provide further information. Ryanair responded by letter dated 15 July 2011. Ryanair's observations were forwarded to Denmark by letter dated 5 August 2011. Additional information was provided by Denmark by letters dated 8 September 2011 and 22 September 2011, 12 April 2012 and 22 May 2012.

⁽¹⁾ OJ C 109, 30.4.2008, p. 15.

⁽²⁾ With effect from 1 December 2009, Articles 87, and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of Articles 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 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

⁽³⁾ OJ C 109, 30.4.2008, p. 15.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Background to the investigation

- (7) Aarhus airport is located in Tirstrup, 36 km north-east of the City of Aarhus in Denmark. Aarhus airport, owner and operator of the airport, is a 100 % publicly owned Limited Liability Company ⁽¹⁾.
- (8) The airport is one of six regional airports serving the Jutland market with a population of approximately 2,5 million inhabitants. About 25 % of the Jutland population have Aarhus airport as the nearest airport. The largest airport of the Jutland region is Billund airport, which is located 140 km away (~ 1 hour 35 minutes travelling time by car). Aarhus airport is, after Billund airport, the second largest airport of the Jutland region mainly serving SAS (~ 48 % of the passengers) and Ryanair (~ 34,7 % of the passengers).
- (9) Aarhus airport has the capacity to handle approximately one million passengers per year. Usage peaked in 1996 when there were over 800 000 passengers using the airport. In 1996, the Great Belt Bridge was opened connecting the islands of Funen and Zealand and reducing the overland travelling time between Jutland and Copenhagen. The Great Belt Bridge gave travellers the option of driving from Aarhus to Copenhagen. After the opening of the bridge in 1996, the number of passengers at Aarhus airport started to decrease to around 600 000 per annum. In 1999, SAS closed its route from Aarhus to London. In the same year, the agreements between Ryanair and Aarhus airport were concluded and Ryanair started operating a route to London-Stansted on a daily basis. The following table summarises the development of passengers at Aarhus airport in 1995 to 2012:

Table 1

Passenger development at AAR 1995-2012

Actual passengers in 1995-2012									
Year	1995	1996	1997	1998	1999	2000	2001	2002	2003
Passengers (in thousand)	782	864	812	625	597	641	655	579	579
Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Passengers (in thousand)	525	539	554	571	573	526	562	591	485

2.2. The measures under investigation and the initial assessment by the Commission

- (10) The opening decision relates to the agreements concluded between Ryanair and Aarhus airport in 1999. This decision is thus without prejudice to any amendment or replacement of the 1999 agreements or any complementary agreement concluded thereafter.
- (11) In the opening decision, the Commission raised the question whether Aarhus airport acted as a market economy operator when it concluded the 1999 agreements with Ryanair. In particular, the Commission raised the question whether the level of airport charges and the subsequent rebates and marketing support offered to Ryanair by the airport constitutes state aid.
- (12) The Commission expressed in particular doubts whether the differentiation of airport charges applied at Aarhus airport was based on incremental revenue and incremental costs, meaning revenue and costs induced by the activity of Ryanair at the airport. In addition, Denmark did not provide the Commission either with the copy of the 1999 agreements with Ryanair nor with the business plan evaluating its profitability for Aarhus airport. Hence in its opening decision the Commission expressed doubts whether the behaviour of Aarhus airport was guided by prospects of long-term profitability. Accordingly, it could not be excluded that the 1999 agreements provided Ryanair with an advantage it would not have benefited from under normal market conditions.

⁽¹⁾ The airport operator is owned by the following municipalities/counties: Århus Municipality (64,60 %), Randers Municipality (16,70 %), Grenå Municipality (4,80 %), Ebeltøft Municipality (3,00 %), and Århus County (10,90 %).

- (13) The Commission expressed doubts whether the aid could be declared compatible on the basis of Article 107(3)(c) TFEU. In this respect the Commission expressed in particular doubts whether the compatibility conditions as set out in the 2005 Aviation Guidelines ⁽¹⁾ had been satisfied in this case.

3. COMMENTS FROM DENMARK

3.1. The decision-making process leading to the 1999 agreements with Ryanair

- (14) Denmark first submits its observations to the Commission regarding the lack of imputability of the 1999 Ryanair agreements to that Member State.
- (15) Denmark states that the 1999 agreements were concluded between Aarhus airport and Ryanair and are not imputable to any public authority. Denmark points out that neither that Member State nor any other public authority was involved in the negotiation of the agreements.
- (16) Denmark clarifies that according to Aarhus airport the preliminary negotiations between Aarhus airport and Ryanair started already at the beginning of 1998. Denmark clarifies further that these negotiations were temporarily suspended in spring 1999, because the parties could not reach an agreement.
- (17) Denmark further states that in June 1999 SAS announced that it would close the Aarhus-London route with effect from the end of October 1999. In this regard, Denmark points out that in the course of summer 1999 negotiations between Ryanair and Aarhus airport, represented by its director responsible for utility partnership, resumed.
- (18) With regard to the negotiations of the 1999 agreements, Denmark clarifies that the 1999 agreements were negotiated directly by the airport's director and the public owners neither proposed nor approved the conditions included in the agreements. According to Denmark, the director negotiating the agreements, including the provided discounts, had contacts neither with the board of directors nor with any other local authority.
- (19) Denmark further clarifies that the 1999 agreements were signed directly by the airport's director negotiating the agreements. Denmark explains further that the 1999 agreements were neither submitted for approval to the Danish civil aviation authorities, nor were the airport's charges approved by Denmark in the form of a schedule of charges or otherwise.
- (20) In order to support these statements (see recitals 15 to 19), Denmark provided a copy of the minutes of board meetings with the representatives of local authorities and also minutes of the annual general meetings.
- (21) Consequently, Denmark is of the opinion that neither the shareholders of the airport, nor the civil aviation authorities were directly or indirectly involved in the negotiations of the 1999 Ryanair agreements. Thus, in the view of Denmark, these agreements are not imputable to that Member State. As one of the cumulative conditions for the notion of State aid is not complied with, Denmark is of the opinion that the 1999 Ryanair agreements do not constitute State aid.

3.2. The 1999 agreements between Aarhus airport and Ryanair

- (22) Denmark provided a copy of two agreements concluded between Aarhus airport and Ryanair in 1999 and further clarifications.

The 1999 principal agreement

- (23) Denmark clarifies that on 2 November 1999, Aarhus airport entered into an agreement with Ryanair ('principal agreement'). Denmark further states that the agreement was planned to be in force until 31 October 2009 (i.e. for a period of 10 years).

⁽¹⁾ Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

- (24) Denmark states that the principal agreement obliged Ryanair to carry out at least [...] ⁽¹⁾ operation from Aarhus airport to London Stansted with a B737-type aircraft (allowing for a reduction in service only during public holiday periods, such as Christmas, New Year and Easter). Denmark clarifies that according to the principal agreement Ryanair was obliged to generate at least [...] passengers per annum at Aarhus airport between 1 January 2001 and 31 December 2001.
- (25) With regard to the fees to be paid by Ryanair, Denmark explains that, according to the principal agreement, Ryanair was obliged to pay to Aarhus airport the following fees summarised in Table 2.

Table 2

Airport charges to be paid by Ryanair to Aarhus airport according to the principal agreement concluded in 1999

Airport charges to be paid by Ryanair	[...]	[...]
Landing/Take off fee per rotation (including noise surcharge and local air traffic control)	DKK [...]	
Passenger Service Charge per departing passenger	DKK [...]	
Night fee	As per standard tariff	
Passenger and ramp handling charge per rotation	DKK [...]	DKK [...]

- (26) Denmark points out that according to the principal agreement Aarhus airport was obliged to give Ryanair a rebate of DKK [...] (for the first [...] years, i.e. [...]), or DKK [...] (for the last [...] years, i.e. [...]) of passenger service charge (this means [...] discount on the applicable passenger service charge), if Ryanair collects a net revenue of DKK [...] or less per one-way passenger on the London Stansted route. Denmark clarifies that this was the case from 1999 onwards.

The 1999 marketing agreement

- (27) Denmark points out that on the same day, 2 November 1999, Ryanair and Aarhus airport concluded a second agreement ('marketing agreement').
- (28) Denmark explains that the marketing agreement obliged Aarhus airport to pay to Ryanair:
- (i) an amount equal to [...] incurred by Ryanair in accordance with the principal agreement and
 - (ii) all increases in the level of passenger service charge at Aarhus airport over DKK [...] and over DKK [...].
- (29) Denmark explains further that, according to the marketing agreement, the reduction of landing/take-off/night fee charges was deemed to be marketing support. Denmark states that Aarhus airport did not know the purpose of the marketing support paid but assumed that it was to share the costs for the Aarhus/London-Stansted route.

3.3. Application of the Market Economy Operator Principle and selectivity

- (30) Regarding the application of the Market Economy Operator Principle ('MEOP'), Denmark is of the opinion that the Commission should compare the behaviour of Aarhus airport with the supposed conduct of a private operator guided by prospects of long-term profitability and pursuing a sectoral policy.

⁽¹⁾ This information is covered by the obligation of professional secrecy referred to in Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions (OJ C 297, 9.12.2003, p. 6).

- (31) Denmark states that the profitability of the 1999 agreements with Ryanair needs to be assessed for the entire expected duration of the agreements in questions (this means a period of 10 years). Denmark states that the 1999 agreements had a positive impact on the airport's finances for the period 1999 to 2009.
- (32) Denmark clarifies that, at the time of the conclusion of the 1999 agreements with Ryanair, Aarhus airport was facing the following challenges: First, it was competing for airlines and passengers with Billund airport, which had as the largest airport in the Jutland region a strategically stronger competitive position. Second, Aarhus airport was only operating at 40 % of its capacity and had already suffered from a decrease in passengers from approximately 860 000 to approximately 596 000 from 1996 to 1999, with a further decrease expected in the coming years. Third, the military activity of the airport, Tirstrup Air Base, had ceased, which meant that the Aarhus annual net costs associated with air traffic control, fire and rescue services, technical and ground services had risen by DKK 10-12 million. Fourth, a new motorway (namely, the Djursland motorway) providing a faster and easier transport link with Tirstrup, was scheduled to open in 2004.
- (33) Denmark explains further that the Great Belt Bridge had been opened (giving travellers the option of driving from Aarhus to Copenhagen) and the SAS route to London had been closed. Denmark points out that the opening of the Great Belt Bridge reduced the journey time between Aarhus and Copenhagen from approximately five hours to approximately three hours for alternative means of transport (car/train/express ferry).
- (34) Denmark points out that against this background (see recitals 32 and 33) Aarhus airport had to provide incentives in order to attract new clients and fill the idle capacity. Denmark clarifies that Aarhus airport's director estimated that Ryanair would be able to attract to the airport around [...] additional passengers per annum. Denmark states that, on the basis of these passenger forecasts, the agreements were expected to generate a net income of approximately DKK [...] (EUR [...]) in 2001. Denmark explains that the reliability of the director's forecasts was confirmed by the actual results, such as for example in 2001 the net income generated by the 1999 agreements was DKK [...] (EUR [...]). Denmark stresses that all costs (such as, for example, marketing, ground handling and other costs) incurred by the airport in connection with the entry into the agreement with Ryanair are financed directly through the revenue generated by that agreement. In addition, Denmark states that the net income generated by the agreement contributes to the overall profitability of the airport.
- (35) Denmark points out that the 1999 Ryanair agreements did not require any investments from Aarhus airport, because the airport was only operated at 40 % of its capacity. Denmark clarifies that also with regard to Aarhus airport's operating costs the 1999 agreements with Ryanair provided that the staff could cover up to 60 % of the capacity, for example the ground handling staff had already been financed from the airport's other income.
- (36) With regard to the marketing support to be paid by Aarhus airport to Ryanair according to the marketing agreement, Denmark points out that the management of the airport expected that Ryanair would assist the airport by increasing its exposure. Denmark further clarifies that at the same time Aarhus airport decided to downsize its other marketing activities as these were replaced by Ryanair, such as among others the advertising of Aarhus airport on Ryanair's website and at the airports served.
- (37) Denmark clarifies that Aarhus airport's intention was to increase its revenues through the increase in passengers and non-aeronautical revenue (such as shopping or parking revenue). Denmark clarifies further that, at the time when the 1999 Ryanair agreements were concluded, Aarhus airport expected the paid parking to be a major potential income generator. With regard to the shopping revenue, Denmark clarifies that only 30 % of the airport's available capacity was being leased out.
- (38) For these reasons, Denmark is of the opinion that the 1999 agreements with Ryanair were concluded in accordance with the MEOP as these agreements were expected to contribute in 1999 to 2009 around DKK [...] to the profitability of the airport and increased thus the financial viability of the airport operator.
- (39) In order to support this position, Denmark provided the business plan and profitability assumptions of the management of the airport operator. Table 3 summarises the expected profitability of the 1999 agreements with Ryanair provided by Denmark:

Table 3

**Overview of the expected profitability of the 1999 Ryanair agreements for Aarhus airport in
1 000 DKK**

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total (nominal)
Revenues	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>Aeronautical revenue</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>Non-aeronautical revenue</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>Ground handling</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>Marketing</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Results from 1999 Ryanair agreements	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (40) Denmark clarifies that Ryanair does not receive a selective advantage as the discounts granted on the basis of the 1999 agreements with Ryanair have been previously granted also to SAS. Further, Denmark pointed out that in 1999, Cimber Air A/S and Maersk Air A/S were also granted the same 50 % discount as Ryanair. Denmark further states that also the regional airline Sunair and EasyJet (previously Go) received offers for a similar discount agreement. In order to support this Denmark provided copies of these letters.
- (41) Denmark takes the view that the 1999 agreements concluded between Aarhus airport and Ryanair were concluded on market terms and do not confer an advantage on Ryanair, and thus do not constitute State aid.
- (42) Moreover, Denmark clarifies that the expected profitability was also confirmed by actual financial results of the airport manager. Denmark states further that for example Aarhus airport achieved net profits of around DKK 2 million in 2010, also for the next years positive results are expected. Denmark points out that the profits are the result of the gradual increase in passengers and the long-term switch from domestic to international flights following the opening of the Great Belt Bridge.

4. COMMENTS FROM THIRD PARTIES

- (43) The Commission has received observations from three interested parties.

4.1. Ryanair

- (44) Ryanair began its observations dated 29 May 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.
- (45) On the substance of the case Ryanair is of the opinion that the Commission should have based itself on standard commercial arrangements and on this basis it should have decided that the 1999 agreements comply with the MEOP, hence it does not involve State aid. Ryanair is of the opinion that the manager of Aarhus airport is benefiting from its presence at the airport.

- (46) With regard to the MEOP, Ryanair states that on the revenue side, both aeronautical and non-aeronautical revenues must be taken into account. On the costs side, Ryanair points out that the relevant costs to be taken into account are the incremental costs of entering the respective agreements with an airline. Ryanair is of the opinion that neither sunk costs nor fixed overhead costs should be taken into account. Ryanair states that if an airline enters into an agreement with an airport which is incrementally profitable, the agreement does not contain any aid.
- (47) Ryanair states that, in general, a market economy operator is not expected to enter into agreements which are incrementally loss-making. On the other hand, Ryanair states that an exception should be made if an airport is inefficient at the time the agreement is concluded, but believes the agreement will, in some way, help it to improve its efficiency. In that case, according to Ryanair, the deal could be profitable even if at the time of signing the agreement it appears to be below its incremental costs.
- (48) Furthermore, according to Ryanair, the Commission should have based its assessment on a comparator approach, comparing the agreements concluded by Ryanair with other public and private airports. Ryanair further states that, when assessing the agreements, the network externalities resulting from the 1999 agreements should also be considered.
- (49) It is the view of Ryanair that the investigated 1999 agreements correspond to a standard commercial arrangement between an airport and an airline in a liberalised market. Ryanair points out that it is rooted in the airport's independent decision to improve its capacity utilisation by means of maximising passenger numbers, in order to increase its aeronautical and non-aeronautical revenues.
- (50) Ryanair argues that Aarhus airport followed the example of many private airports in a comparable situation, deciding that the best way to maximise passenger numbers is to incentivise airlines to deliver large passenger volumes. According to Ryanair, airports provide such incentives in recognition of the fact that airlines delivering large passenger volumes generate economies of scale for the airport manager. According to Ryanair, the incentive scheme at Aarhus airport was rooted in Ryanair's commitment to generate at least [...] passengers per annum.
- (51) Ryanair provides examples of other European airports that follow a similar strategy as Aarhus airport, for example London Stansted, London Luton, and Frankfurt Hahn. In addition, Ryanair points out that, in order to be in line with the MEOP, it is sufficient, if the agreements improve the long-term financial situation of the airport.
- (52) Ryanair explains that the fees to be paid by SAS cannot be compared to those paid by Ryanair as the level of services provided, such as handling requirements and aircraft operations, of the two airlines are different.
- (53) Ryanair is of the opinion that the 1999 agreements concluded with Aarhus airport are in line with the MEOP.
- (54) With regard to the imputability of the 1999 agreements, Ryanair is of the opinion that Aarhus airport is an independent undertaking. Ryanair states that the owners do not exercise control over its management and finances. Ryanair explains that it was the management that determined the charges and negotiated the arrangement with the airline. The public authorities or Denmark were not involved in the negotiations. Further, Ryanair believes that the airport's shareholders retain no control over the setting of charges, including the deal with Ryanair.
- (55) With regard to the selective advantage, Ryanair is of the opinion that, since Aarhus airport is not in a dominant position in any of the European, national or regional markets for airport services, it is therefore not under an obligation pursuant to EU competition rules to treat all of its airline customers in a non-discriminatory manner. Nevertheless, Ryanair clarifies that Aarhus airport has always followed the principle of non-discrimination, and in fact offered the arrangement, eventually taken up by Ryanair, to a number of other airlines, including SAS, Cimber Air, Sun Air and Maersk. Ryanair points out that the fact that none of these airlines was interested in expanding their operations from Aarhus does not mean that Ryanair enjoys preferential treatment. In addition, Ryanair states that its 1999 agreements with Aarhus airport do not contain any reference to exclusivity.

- (56) In view of the above, Ryanair is of the opinion that the agreements concluded with Aarhus airport do not constitute State aid.

4.2. SAS

- (57) SAS submitted its comments on 16 June 2008.
- (58) In the opinion of SAS, Aarhus airport is not independent from its public owners (namely, the public authorities). SAS states that the majority of the board members are appointed and elected by the public owners of the airport. SAS believes that the board members are thus not independent from their employers and the owners that they represent.
- (59) With regard to the financial situation of the airport, SAS notes that Aarhus airport stated that its financial situation is sound and that Ryanair provides an annual net contribution to the airport of approximately DKK 5 to 6 million. SAS states that, even if this figure was correct, Aarhus airport showed a negative result of DKK 2 311 410 for the year 2007 despite a 12,5 % increase in revenue.
- (60) SAS further argues that the weak financial performance of the airport manager is also demonstrated by the fact that the accumulated negative results for the last five years amount to more than DKK 20 million. SAS believes that without the subsidies granted to Ryanair the financial position of the airport manager would have been significantly better.
- (61) SAS is of the opinion that Ryanair has been granted preferential treatment by Aarhus airport in the form of substantially reduced passenger service charges as well as reduced take-off and landing charges. SAS argues that, by granting Ryanair preferential treatment, other carriers operating at the airport are being discriminated against.
- (62) Furthermore, SAS states that these rebates also do not comply with the compatibility criteria for start-up aid to airlines set out in the 2005 Aviation Guidelines. According to SAS, it appears that there is no form of volume guarantee or similar offered by Ryanair in the 1999 agreements with the airport manager. In addition, SAS argues that there appears to be no particular penalty sanction in case Ryanair fails to keep the volumes or undertakings that it originally committed to the airport when the arrangement was negotiated back in 1999. In addition, SAS states that Ryanair has been starting and closing routes the last few years without any apparent negative impact on the financial benefits granted to it by the airport manager.
- (63) In the opinion of SAS, the aid granted to Ryanair by the airport manager is not aimed at developing an underdeveloped region, but rather at attracting additional operations in competition with other airports.
- (64) Finally, SAS states that the 1999 agreements with Ryanair have now been in place for nearly 10 years. SAS believes that, even if it could be argued that the 1999 agreements would satisfy the criteria for start-up aid to airlines as set out in the 2005 Aviation Guidelines, as such, the time frame in itself should render the 1999 agreements incompatible given the strict conditions for approving such aid.
- (65) In view of the above, SAS is of the opinion that the 1999 agreements between Ryanair and Aarhus airport constitute incompatible State aid.

4.3. Association of European Airlines

- (66) The Association of European Airlines ('AEA') submitted its comments on 4 July 2008. AEA's comments were fully in line with those provided by SAS.

5. COMMENTS FROM DENMARK ON THIRD PARTY COMMENTS

- (67) Denmark received the comments of the three interested parties.
- (68) Denmark began its observations by stating that the guidelines referred to by SAS are irrelevant for the assessment of the existence of aid regarding the 1999 agreements.

- (69) Denmark states that it does not agree with the observations of SAS that the 1999 agreements are imputable to that Member State. Denmark states that to demonstrate the imputability of the 1999 agreements it is not sufficient that Aarhus airport is publicly owned, but the effective involvement in the decisions of the airport manager needs to be shown. Denmark states that the public authorities were not involved in the negotiations of the 1999 agreements at any point in time.
- (70) Moreover, Denmark dismisses the observations of SAS that the agreements do not contain a 'volume guarantee' or penalty mechanism in the event of non-compliance by Ryanair. Denmark explains that the 1999 agreements include the possibility to renegotiate the terms of the agreements, should Ryanair fail to generate the minimum volume of [...] passengers in the first few years after the conclusion of the agreements. According to Denmark, this is a penalty mechanism. Moreover, Denmark is of the opinion that the start-up aid conditions set out in the 2005 Aviation Guidelines are not applicable to the 1999 agreements.
- (71) With regard to Ryanair's comments, Denmark explains that the 1999 agreement between Aarhus airport and Ryanair exemplifies and reflects a general development in the regional airports market.

6. EXISTENCE OF AID

- (72) By virtue of 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.'
- (73) The criteria provided for in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes aid within the meaning of Article 107(1) TFEU all of the following conditions need to be fulfilled. Namely, the financial support should:
- (i) constitute an advantage;
 - (ii) be granted by the Member State or through State resources;
 - (iii) favour certain undertakings or the production of certain goods;
 - (iv) distort or threaten to distort competition; and
 - (v) affect trade between Member States.
- (74) Since Aarhus airport is publicly owned, it clearly has public resources at its disposal. It is therefore not necessary to determine to what extent it has benefited from State aid in the past. In any event, when the 1999 agreements were concluded, the 1994 Aviation Guidelines considered financing of airports and airport infrastructure by the State to be a general measure of economic policy that could not be controlled under the Treaty rules on State aid. In its judgment in the *Aéroports de Paris case* of 12 December 2000 ⁽¹⁾, the General Court rules against that interpretation and held that the operation of an airport constitutes an economic activity. Until the judgment in the *Aéroports de Paris case*, the public authorities could legitimately consider that the public funding of airports did not constitute State aid. Due to the uncertainty that existed before this clarification of the law, financing measures that were granted before the judgment was pronounced cannot anymore be put into question on the basis of State aid rules.
- (75) In order to determine whether the 1999 agreements granted Ryanair an advantage, the Commission has to examine whether in similar circumstances an airport operating under normal conditions of the market economy and guided by prospects of profitability in the longer term would have entered into the same or a similar commercial arrangement as Aarhus airport ⁽²⁾. The existence of an advantage can normally be excluded if (a) the price charged for airport services corresponds to the market price or (b) if it can be demonstrated through an *ex ante* analysis that the agreements with the airline incrementally contribute to the profitability of the airport and

⁽¹⁾ Judgment of 12 December 2000, *Aéroports de Paris/Commission*, T-128/98, ECLI:EU:T:2000:290.

⁽²⁾ In order to carry out its assessment the Commission has also commissioned a study by Moore Stephens ('Commission's expert'). The Commission's expert analysed the financial data and the 1999 agreements concluded by Ryanair and Aarhus airport.

are part of overall strategy leading to profitability in the long term. Moreover, the airport infrastructure must be open to all airlines (this includes infrastructure more likely to be used by certain categories of airlines, such as low cost carriers or charters).

- (76) According to the *Charleroi judgment* ⁽¹⁾ when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of the 1999 agreements on Aarhus airport taking into account all relevant features of the measure in question.
- (77) 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.' ⁽²⁾
- (78) In order to be able to apply the market economy operator test the Commission has to place itself at the time when the 1999 agreements between Aarhus airport and Ryanair were concluded (that is, on 2 November 1999). The Commission must also base its assessment on the information and assumptions which were at the disposal of the airport when the 1999 agreements with a duration of 10 years were signed.

Comparison with the market price: benchmarking

- (79) Ryanair argues that in order to exclude an economic advantage that would not be obtained under normal market conditions the charges in the 1999 agreements have to be compared with airport charges applied at other European airports to low cost airlines.
- (80) The Commission considers that benchmarking of airport charges is indeed a possible approach to assess the presence of aid to airlines. However, the identification of a benchmark requires first that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.
- (81) In this respect the Commission notes that at the time when the 1999 agreements were concluded EU airports were considered not to be undertakings.
- (82) The Commission further notes that, even if some airports are privately owned or managed without social or regional considerations, the prices charged by these airports might be strongly influenced by the prices charged by the majority of publicly subsidised airport managers as these latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.
- (83) In this case, the benchmark airports are either publicly owned or received public funding in the past. Moreover, the level of the services provided by the comparator airports seems to be also different, for example such as parking for based aircraft, car parking for Ryanair based staff, base office, hangar, catering facilities, training room etc.; and the agreements are also of a different duration.
- (84) In those circumstances (see recitals 79 to 83), the Commission considers that at the present time an appropriate benchmark cannot be identified to establish the market price for services provided by the airport manager.

Profitability analysis of the 1999 agreements

- (85) In absence of an identifiable market benchmark, the Commission considers that the *ex ante* incremental profitability analysis is the relevant criterion for the assessment of arrangements concluded by airports with individual airlines.
- (86) The Commission considers that price differentiation is a standard business practice. Nevertheless, such differentiated pricing policies should be commercially justified to satisfy the market economy operator test ⁽³⁾.

⁽¹⁾ Judgment of 17 December 2008, *Ryanair/Commission* [2008], T-196/04, ECLI:EU:T:2008:585.

⁽²⁾ Judgment of 16 May 2002, *France/Commission* [2002], C-482/99, ECLI:EU:C:2002:294.

⁽³⁾ See Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/08 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p. 24), and Commission Decision in Case C25/2007 – Finland – Tampere Pirkkala airport and Ryanair, not yet published in the OJ.

- (87) Denmark argues that Aarhus airport acted rationally and substantiates its arguments with a copy of Aarhus airport's *ex ante* calculations.
- (88) In this respect the Commission observes that the airport infrastructure used by Ryanair is also open to all other airlines.
- (89) The Commission has to further assess whether the 1999 agreements can be deemed in line with the market economy operator test.
- (90) In this respect, the Commission considers that an agreement concluded between an airline and an airport can be deemed in line with the market economy operator test when it incrementally contributes, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that over the duration of the agreement it is capable of covering all costs stemming from the agreement with an airline with a reasonable profit margin ⁽¹⁾ on the basis of sound long-term prospects ⁽²⁾ when setting up the arrangement.
- (91) In order to assess whether an agreement concluded by an airport with an airline complies with the market economy operator test, expected non-aeronautical revenues stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport should be taken into account. Such incremental costs could encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. On the contrary, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEOP assessment.
- (92) In the profitability calculations conducted by the airport's management, it took into account the commitments of Ryanair as set out in the 1999 agreements and the expected increase in passengers. According to the 1999 agreements, Ryanair committed itself to commence its operation at Aarhus airport with at least [...] rotation. At the same time Ryanair committed itself to generate at least [...] passengers per annum at Aarhus airport in 2001. The 1999 principal agreement provides for a schedule of charges per rotation (see Table 2). Aarhus airport expected to generate around 150 000 passengers per annum during the first years of the beginning of Ryanair's activity at the airport with an assumed 50/50 distribution between departing and arriving passengers and based on [...] rotations.
- (93) In proportion to the increase in passengers, Aarhus airport expected to increase also its non-aeronautical revenue stemming in particular from the car park. In addition, the airport expected that over the duration of the Ryanair agreement also the shopping revenue at the airport would increase.
- (94) With regard to the expected costs induced by the presence of Ryanair at the airport, Aarhus airport expected that no additional investments will be required to provide services to Ryanair. Since before the beginning of Ryanair's activity at the airport, Aarhus airport's capacity was utilised only at approximately 40 %. Therefore, Aarhus airport assumed that no additional operating costs related to the take-off/landing and ground handling would arise.
- (95) In its calculation Aarhus airport has taken into account costs for ground handling. These costs were forecast on the basis of wages for three staff members for two hours per departure for the check-in and boarding of Ryanair passengers, even though it could be assumed that full manning will not be required for the full two hours check-in time. Moreover, Ryanair operates flights outside the morning and evening peak hours. Therefore, Aarhus airport's ground handling staff has spare time to provide services to Ryanair and it was not necessary to hire additional staff. Moreover, also the ground handling services for Ryanair's aircraft are limited. Aarhus airport does not provide any aircraft maintenance services, nor does it clean Ryanair's aircraft. Furthermore, neither aircraft pushback service is required, nor airside passenger transport. Ryanair's passengers walk from the aircraft to the terminal.

(1) A reasonable profit margin is a 'normal' rate of return on capital, i.e. a rate of return that would be required by a typical company for an investment of similar risk.

(2) This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.

- (96) In addition to the costs regarding ground handling services, Aarhus airport included in its calculation marketing costs induced by the 1999 marketing agreement.
- (97) Table 4 summarises the revenue and cost calculations in relation to the 1999 agreements and its positive contribution to Aarhus airport's profitability during its duration. These calculations are based on the business plan provided by Denmark and the previously described assumptions.

Table 4

Incremental profitability calculation in Net Present Value terms of the 1999 Ryanair agreements

in DKK	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Revenues from											
1999 Ryanair agreements	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Aeronautical revenue	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Non-aeronautical revenue	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Costs of Aarhus airport associated with 1999 Ryanair agreements	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Ground handling	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Marketing	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Results for Aarhus airports from 1999 Ryanair agreements	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
NPV of the net revenue from Ryanair agreements											
— Discount rate = 8,5 %		[...]									
— Discount rate = 15 %		[...]									

- (98) The Commission notes that the profitability calculation conducted by the management of Aarhus airport took into account all costs induced by the presence of Ryanair at the airport (that is to say, all incremental costs). The costs induced by the presence of Ryanair were the marketing support and the costs for ground handling services. The Commission further observes that due to the operation of Ryanair flights no additional ground handling staff had to be hired. The Commission observes further that the operation of Ryanair flights outside peak hours enables the airport to better use idle capacity and to become more efficient. Consequently, also the costs for ground handling services appear to be to a large extent non-incremental costs.

in DKK	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
NPV of the net revenue from											
Ryanair agreements											
— Discount rate = 8,5 %		[...]									
— Discount rate = 15 %		[...]									

- (104) The Commission observes that even after taking into account additional costs (including also non-incremental costs), such as a contribution to the water, electricity, security and depreciation costs in proportion to the passengers transported ⁽¹⁾, the 1999 agreements still provide a positive contribution to the profitability of the airport operator. Moreover, according to the assessment conducted by Commission's expert, because of the high percentage of non-incremental costs and spare capacity, if the airport had not entered into an agreement with Ryanair, it would have been occurring operating losses.
- (105) The Commission further notes that, when assessing airport/airline arrangements, it should also assess the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport to lead to profitability at least in the long term. In this respect, the Commission has to take into account the factual evidence that was available, and the developments that could reasonably be expected, at the time when the 1999 agreements were made, in particular the prevailing market conditions, notably the market changes induced by the liberalisation in the air transport market, the market entry and development of low-cost carriers and other point-to-point carriers, changes in the organisational and economic structure of the airport industry; the degree of the diversification and complexity of the functions undertaken by airports, the enhancement of the competition between airlines and airports, the uncertain economic environment due to the changes in the prevailing market conditions or any other uncertainty in the economic environment.
- (106) As mentioned in recital 74, the 1999 agreements were concluded at a point in time when the financing of airports and airport infrastructure by the State had been considered by the Commission itself to be a general measure of economic policy which could not be controlled under the Treaty rules on State aid. Therefore until the judgment in 'Aéroports de Paris', public authorities could legitimately consider that the public funding of airports did not constitute State aid.
- (107) The Commission observes further that the liberalisation of air transport in 1997 ⁽²⁾ led to the emergence of low-cost carriers operating a new business model. At the time the 1999 agreements were concluded, the EU market share of the low-cost carriers amounted to around 5 %, with an expected growth potential.
- (108) In the present case, the Commission further observes that, due to the opening of the Great Belt Bridge, Aarhus airport decided to modify its business model and to switch from domestic to international flights.
- (109) Moreover, as mentioned in recital 102, the 1999 agreements contribute to the profitability of the airport. The Commission also notes that according to Denmark, due to the gradual increase in passengers and the long-term switch from domestic to international flights following the opening of the Great Belt Bridge, Aarhus airport achieved net profits of around DKK 2 million in 2010 and expects also for the coming years positive results.
- (110) Consequently, the 1999 agreements can be considered part of an overall strategy of the airport to lead to profitability at least in the long term.
- (111) Finally, the Commission notes that the airport infrastructure used by Ryanair is also open to all other airlines.

⁽¹⁾ Ryanair's passenger share at Aarhus airport amounts to around 30 %.

⁽²⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

Conclusion

- (112) In view of the conducted incremental profitability calculation (see recitals 82 to 103), the Commission concludes that the 1999 agreements ⁽¹⁾ between Aarhus airport and Ryanair are in line with the MEOP, as they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport. In other words, all costs of the airport stemming from the arrangement with Ryanair are covered by the incremental revenue (from aeronautical and non-aeronautical activities) with a reasonable profit margin. Moreover, the 1999 agreements can be considered part of an overall strategy of the airport to lead to profitability at least in the long term, and the infrastructure used by Ryanair is also open to all other airlines.
- (113) Thus, the Commission concludes that Aarhus airport's decision to enter into the 1999 agreements with Ryanair does not confer any economic advantage on the airline that it would not have obtained under normal market conditions.

7. CONCLUSION

- (114) As one of the cumulative criteria pursuant to Article 107(1) TFEU is not fulfilled, the Commission considers that the 1999 agreements of 2 November 1999 between Aarhus airport and Ryanair do not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The principal agreement and the marketing agreement concluded on 2 November 1999 between Aarhus Lufthavn A/S and Ryanair Ltd do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 20 February 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽¹⁾ This is without prejudice to any amendment or replacement of the 1999 agreements or any other supplementary agreement concluded between Ryanair directly or any other entity controlled by Ryanair and the manager of Aarhus airport.