EUROPEAN COMMISSION

Brussels, 17.10.2013
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C(2013) 6986 final

Ryanair Ltd

Dublin Airport
County Dublin
Ireland

[…]

Subject: Case No COMP/39.886 – Ryanair/DAA-Aer Lingus – Complaint under Articles 101 and 102 of the Treaty
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Mr […],

(1) I am writing to you in connection with your complaint of 22 February 2011 against the Dublin Airport Authority ('DAA') and Aer Lingus Group Plc ('Aer Lingus') regarding alleged violations of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union ('Treaty') in connection with airport services at Dublin airport. I also refer to the Commission's letter of 22 November 2012 addressed to you in that matter and your letter of 24 January 2013 in which you submitted written observations in response to the Commission's preliminary assessment of your complaint, as well as further submissions you sent to the Commission since then.

(2) For the reasons set out below, the Commission considers that there are insufficient grounds to conduct a further investigation into the alleged infringement(s) and accordingly rejects your complaint pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.[1]

[1] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

1. **FACTUAL BACKGROUND**

1.1. Airport regulatory framework in Ireland

(3) DAA is an Irish state owned company, which has a statutory mandate to operate, manage and develop certain Irish airports. DAA owns and operates Dublin, Cork and Shannon airports. As part of its activities, DAA sets and collects airport charges. DAA is a commercial company with no recourse to state funding.

(4) The Commission for Aviation Regulation ('CAR') is a public body set up in 2001 with the principal function to regulate airport charges and aviation terminal services charges.[2] In particular, CAR approves the maximum level of airport charges proposed by DAA. In this context, CAR issues determinations which, for a period of five years, set the annual price caps on the maximum average amount of revenue per passenger which DAA may earn from its aeronautical charges.[3] Irish law requires CAR's determinations to be objectively justified, as well as non-discriminatory, proportionate and transparent.[4] In making its determinations, CAR takes account in particular of the level of investment in airport facilities, the level of operational income and costs and liabilities of DAA.[5]

(5) DAA has a legal obligation to ensure that average per passenger aeronautical revenues do not exceed the annual price cap set by CAR. The current determination of price caps was made by CAR in 2009 and covers the period from 2010 to 2014.

1.2. Refurbishment of Terminal 1 and construction of Terminal 2

(6) In May 2005, the Irish Government published the Aviation Action Plan. In this document, the Irish Government in particular decided:

- "The building of a new Pier for aircraft parking stands at Dublin Airport, available from 2007.
- The building of a Dublin Airport Authority owned new Terminal (Terminal Two) at Dublin Airport to open in 2009.

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2 Article 7 of the Aviation Regulation Act 2001.

3 Aeronautical charges are those that arise directly from aeronautical operations and passenger/freight facilitation. They include landing and aircraft parking charges and airbridge hire. The non-aeronautical revenue (e.g. rent from shops, restaurants etc. and car parking charges) is not regulated by CAR, but CAR takes account of the total income available to DAA in setting the level of airport charges (the so-called 'single till' model of economic regulation).

4 Aviation Regulation Act, 2001. Article 5(4).

5 Section 22 of the State Airports Act, 2004.

- A triple safeguard (consultation, verification, regulation) to ensure maximum efficiency and cost effectiveness of the building of Terminal Two."[6]

(7) To implement this policy mandate, DAA developed a EUR 1.2 billion investment programme for the period 2006-2009. DAA's plans were reviewed and approved by an independent verifier, appointed by the government. DAA submitted the capital investment programme to CAR for consideration as part of the 2007 interim review of the CAR's 2005 regulatory determination. After its review, CAR allowed for the remuneration of approximately 95% of the total proposed capital expenditure put forward by DAA. This has been reflected in the revised caps for airport charges set by CAR.

(8) DAA and its consultants carried out several rounds of consultations with the airport users and other stakeholders in relation to the envisaged development of Dublin airport.[7] In addition, CAR's determinations in relation to airport charges were subject to obligatory consultation with the airport users.

(9) The development of Dublin airport included the refurbishment of the existing Terminal 1 ('T1') and the construction of a new Terminal 2 ('T2'). The refurbishment of T1 comprised the construction of a new Pier D, new check-in facilities known as 'Area 14' and a T1 extension known as 'T1X'.[8] Construction of T2 and its associated facilities, including Pier E, was completed in November 2010. Both T1 and T2 provide International Air Transport Association ('IATA') level of service C.[9]

(10) T2 is the main terminal for Aer Lingus and a number of long-haul network airlines.[10] Ryanair operates exclusively from T1 and is the main user of the newly-constructed Pier D. There are also certain network airlines operating from T1 (including some long-haul flights).[11] DAA's airport charges at Dublin airport are not differentiated depending on whether an airline uses T1 or T2.

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6 Speech delivered by Minister for Transport, Martin Cullen TD, on the adoption of the Government Aviation Action Plan, dated 18 May 2005 (http://www.transport.ie/viewitem.asp?id=6658&lang=ENG&loc=1850).

7 The three consultations periods were January 2002, June 2005 and January 2006 onwards (see DAA's comments of 18 February 2011, pages 17 to 23).

8 T1X refers to the new extended retail /food and beverage area which was provided to the north end of the existing T1 building. It was designed to improve the retail offering and the overall passenger service at the airport as well as providing an enhanced link between Pier B and Piers A and D.

9 IATA levels of service for airport's terminals refer to the amount of floor space available per passenger in different parts of the airport (e.g. check-in queue area, or wait/circulate area). Level of service C is defined as good on a scale of A to E, which means the condition of stable flows, acceptable brief delays, good level of comfort at the airport.

10 Delta, United, US Airways, American Airlines and Etihad Airways use T2.

11 Lufthansa, SAS, British Airways, CityJet, Iberia, Turkish Airlines, Air Canada, Air Transat Luxair, or Swiss operate from T1.

(11) DAA estimates the capacity of T1 to be 18-20 million passengers per annum ('MPPA') and of T2 – 11-13 MPPA. Ryanair provides higher estimates: approximately 30 MPPA for T1 and 25 MPPA for T2. In recent years, the total passenger numbers at Dublin airport were as follows:

2007	2008	2009	2010	2011	2012
23.3 MPPA	23.5 MPPA	20.5 MPPA	18.4 MPPA	18.7 MPPA	19.1 MPPA

(12) During the development of Dublin airport, Ryanair disagreed with a number of issues. In particular, it challenged T2's sizing, cost and related pricing issues in the following proceedings under the Irish regulatory system:

- CAR's 2007 interim review of 2005 determination;
- Ryanair judicial review of CAR's 2007 interim review of 2005 determination in the High Court;
- Ryanair appeal to the 2008 aviation panel;
- Ryanair judicial review of CAR's 2009 determination in the High Court; and
- Ryanair appeal to the 2010 aviation panel.

1.3. Transfer Incentive Scheme

(13) In July 2010, DAA introduced a Transfer Incentive Scheme ('TIS') which offers a financial incentive to all airlines selling through tickets to transfer passengers[12] flying via Dublin on specific routes (i.e. from a qualifying origin airport to a qualifying destination airport via Dublin). The incentive takes form of a fixed amount paid to airlines per transfer passenger on the qualifying routes graduated over a number of years (year 1 and 2: EUR 6; year 3 and 4: EUR 4; year 5: EUR 2). The goal of the TIS is to promote transfer passenger traffic at Dublin airport.

1.4. Remote stand pricing

(14) DAA applies differentiated pricing for the use of contact stands and remote stands[13] at Dublin airport since 2008, with lower charges for the latter (in 2010: EUR 10 vs. EUR 6.30 per departing passenger; in 2011: EUR 11.50 vs. EUR 6.50 per departing passenger).

[12] Transfer passengers on through tickets travel to their destination on two or more flights with a single ticket. Self-connecting passengers travel to their destination on two or more flights with separate tickets bought independently from the relevant airline(s) or travel agent(s).

[13] A contact stand is the one which is (i) suitable for walking passengers to/from a stationary aircraft (via an airbridge or the tarmac); and (ii) accordingly accessible from the boarding gate. A remote stand is the one which is (i) not suitable for walking passengers to/from a stationary aircraft due to its distance from the pier building; and (ii) accordingly only accessible from a bussing lounge.

2. THE COMPLAINT

(15) In its complaint, Ryanair claims that DAA and Aer Lingus colluded to reward Aer Lingus' move to the T2 through implementation of the TIS and DAA's policy concerning remote stands. Allegedly as part of such collusion, DAA also increased the airport charges for the airlines remaining at T1. Ryanair argues that T1 was refurbished and upgraded merely to provide a justification for the non-differentiation of airport charges between the two terminals and the increased charges imposed on all airport users. In Ryanair's view, these arrangements amount to an infringement of Article 101 of the Treaty.

(16) Ryanair also asks the Commission to establish that the increase of airport charges (including their non-differentiation between terminals), the TIS and the policy on remote stand constitute an infringement of Article 102 of the Treaty by DAA. In Ryanair's opinion, these types of conduct represent excessive pricing, discrimination, bundling and a manifest failure to satisfy demand. As far as these four forms of abuse relate to the increased airport charges, Ryanair makes a cross-reference to its arguments set out in its complaint under Article 106 in conjunction with Article 102 of the Treaty in Case No COMP/39.838 – Ryanair/DAA. Those arguments will also be examined together with the issues raised in this complaint when relevant.

(17) Finally, Ryanair briefly mentions that the pricing schemes may qualify as an illegal state aid to Aer Lingus. Ryanair states that it may potentially pursue the case as a state aid complaint depending on the Commission's response to its antitrust complaint.[14] Based on this information, the Commission focused its investigation on the antitrust aspects of the complaint and the state aid allegation was not further investigated.

(18) In its letter of 24 January 2013, Ryanair further alleges that it was erroneous for the Commission to consider the service level of T1 and T2 as the same, based on the standard IATA Level C, and to claim that DAA differentiates airport charges. Ryanair argues in particular that the *passenger charge* to be paid for terminal services is not differentiated depending on the terminal used. Ryanair stresses that the limited unbundling of certain services, such as the use of airbridges, does not alter the fact that passenger charges for the use of T1 and T2 are identical although T1 passengers have zero use of passenger and baggage transfer facilities; or the US Customs and Border Protection installations. Furthermore they have smaller needs to use meeting and gate areas.[15]

(19) Ryanair also adds that the Commission has damaged its legitimate interests by not exercising its powers of investigation, in particular, the power to conduct unannounced inspections at the premises of undertakings, in this case at those of Aer Lingus and DAA, despite the duty to do so.[16]

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[14] Page 16 of Ryanair's Article 101/102 complaint.

[15] Pages 9 to 13 of Ryanair's letter of 24 January 2013.

[16] Pages 28 and 29 of Ryanair's letter of 24 January 2013.

(20) Finally, Ryanair further stresses that it has no other means available than to complain to the Commission because the Irish Competition Act does not provide the adequate means for remedying the situation.[17] Ryanair alleges that the Irish Competition Authority is significantly constrained in its resources and not likely to act on a complaint like Ryanair's.

3. PROCEDURAL STEPS

(21) The complaint was received on 22 February 2011. Ryanair provided supplementary information on 6 April, 30 May, 11 June, 10 October 2011 and 25 April 2013. The Commission met Ryanair to discuss the issues raised in the complaint on 6 April 2011. A follow-up meeting was held on 10 September 2013.

(22) By letters of 30 June 2011 accompanied by requests for information, the Commission sent a non-confidential version of the complaint for comments to DAA and Aer Lingus. DAA's response was received on 3 September 2011, Aer Lingus' response on 20 September 2011. On 27 October 2011, the Commission sent an additional request for information to DAA, the response to which was received on 23 November 2011.

(23) By letter of 22 November 2012, the Commission informed Ryanair of its intention to reject the complaint as it raised insufficient grounds to justify further investigation. In response to this provisional assessment, Ryanair submitted written observations by a letter of 24 January 2013.

(24) Based on the observations submitted by Ryanair, the Commission sent additional questions to DAA on 26 April 2013. On 13 May 2013, DAA submitted its response to the questionnaire.

4. ASSESSMENT

4.1. General

(25) After an assessment of your complaint, the Commission does not intend to conduct an in-depth investigation into your claims beyond the investigation already carried out. As you will appreciate, the Commission is unfortunately unable to pursue every alleged infringement of European Union competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.[18]

(26) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement.

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[17] Pages 31 and 32 of Ryanair's letter of 24 January 2013.

[18] OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, pages 25-27.

(27) The Commission may also take into account whether a national court or national competition authority might be well-placed to examine the allegations made.

4.2. Background: investments into Dublin airport

(28) Ryanair's claims concerning the anti-competitive collusion between DAA and Aer Lingus and the abuse of a dominant position by DAA are closely linked to the development of Dublin airport described in section 1.2 above. Ryanair alleges that the construction of the over-sized T2 and the refurbishment of T1 have created overcapacity at Dublin airport. In addition, according to Ryanair, as a result of the refurbishment of T1, DAA no longer provided an adequate service level and imposed on Ryanair unnecessary and over-specified services at T1. Ryanair claims that all airport users are now required to pay the same elevated charges for these excessive investments.

(29) The relevant investments into Dublin airport have already been subject to an extensive prior consultation and assessment process in Ireland in which external consultants and stakeholders participated. The views expressed have shaped and modified the project.[19] Like other airport users, Ryanair was afforded several opportunities to express its views during the process. In the national proceedings, Ryanair also had, and availed itself of, the possibility to challenge the points on which it disagreed before the specialist aviation panels and the Irish High Court.

(30) Furthermore, it follows from the file that as early as 2000 Dublin airport started to experience serious capacity shortages. In the 2005 Summer Season, peak demand was exceeding the declared capacity by 60%[20] and the trends indicated a further increase in traffic. There was a widespread criticism concerning overcrowding from air travellers and airlines. In early 2005, Ryanair itself was critical of T1 referring to it as 'the black hole of Calcutta'.[21] To remedy the problem it was decided to build the new T2 as well as to upgrade T1 with the construction of the new Pier D and Area 14 in 2007 and T1X in 2008.

(31) These investments were planned during a time of rising passenger numbers. The annual passenger traffic was steadily growing at least from 1992 until 2008, and further growth was forecasted at the time. The effects of the financial crisis on traffic, which severely impacted Ireland, were difficult to predict. Furthermore, investments into airports are made on a long term basis with the life-span of new infrastructure lasting several decades. While there was a significant decline in passenger numbers in 2008-2010 due to the economic crisis, it cannot be concluded solely on the basis of these indicators that the expansion of Dublin airport, as initially anticipated, was excessive. In addition, as mentioned by DAA, while Ryanair is critical of T2's capacity

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[19] For example, to address the concerns of some airport users, CAR introduced a two-stage approach for recovery of DAA's investment into T2 (through increased airport charges), which authorises part of such recovery only after traffic at Dublin airport reaches 33 MPPA.

[20] Page 20 of DAA's response of 2 September 2011.

[21] See pages 20 and 21 and 94 to 99 of DAA's response of 2 September 2011.

of 25 MPPA (which is two times higher than the DAA's own estimate of 11-13 MPPA), prior to 2005 Ryanair itself proposed to construct a terminal of the same size.[22]

(32) Based on the above, the Commission considers that the infrastructure investments have been decided at a point in time when traffic growth expectations in the mid- and long-term were high and that such investments have already been the subject of a number of internal control procedures. While the investments into Dublin airport provide relevant background to the infringements of Articles 101 and 102 of the Treaty claimed by Ryanair, in any event, it is not the role of European Union competition rules to assess whether such investments were well-founded. The Commission considers that even if it was established that DAA was wrong or made a bad business decision based on the information available at that time, this, in itself, would not make the behaviour abusive under Article 102 of the Treaty.

4.3. Limited likelihood of finding a violation of Article 101 of the Treaty

4.3.1. Agreement or concerted practice between undertaking

(33) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anticompetitive agreements between undertakings, decisions of associations of undertakings and concerted practices.

(34) An 'agreement' can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. An agreement may be express but can also be implicit based on the behaviour of the parties. Furthermore, it is not necessary for the parties to have agreed in advance upon a comprehensive common plan. It is sufficient for the parties to have expressed their joint intention to behave on the market in a certain way.[23]

(35) Although Article 101(1) of the Treaty draws a distinction between the concept of 'concerted practices' and 'agreements between undertakings', 'the object is to bring within the prohibition of that article a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition'.[24]

(36) The Commission considers that the complaint does not contain any indications – above the mere claims – that would point towards a common plan or some form of coordination between DAA and Aer Lingus to rewarding the latter for its move to T2.

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[22] Page 38 of DAA's comments of 18 February 2011.

[23] Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II)* [1999] ECR II-931, para. 715.

[24] Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, para. 64.

DAA's charging policy, the introduction of TIS and the access conditions of remote stands at Dublin airport do not seem to be part of an overall collusion against Ryanair, which is actually the largest single shareholder (29.82%) of the collusion's alleged beneficiary, Aer Lingus.

(37) Ryanair claims in its letter of 24 January 2013 that the Commission did not perform any investigation into the possible agreements or concerted practices by DAA and Aer Lingus.[25] It also criticizes the Commission's preliminary assessment that Ryanair's shareholding in Aer Lingus makes any agreement between DAA and Aer Lingus unlikely as Ryanair would benefit from it. According to Ryanair, '*Aer Lingus's management is resolved to squeeze Ryanair out of Aer Lingus' share capital*'. Ryanair alleges that there are some '*indirect indications*' which point towards '*a common plan or some form of coordination between DAA and Aer Lingus*': DAA's decision to allocate Aer Lingus to T2 despite its lack of competence to do so, the transfer of pre-immigration facilities to T2 confining TIS opportunities to T2 operators including Aer Lingus, and Aer Lingus' abstention from the Dublin Airport Consultative Committee's position, which reflected the view of all other airlines, that T2 was over-specified. Finally, according to Ryanair, the Commission damaged Ryanair's legitimate interests by failing to conduct an unannounced inspection at the premises of Aer Lingus and DAA although it has a duty to do so to gather information regarding the infringement of Article 101 of the Treaty.[26]

(38) Under Chapter V of Regulation 1/2003, the Commission has a number of investigative powers to conduct its investigations. The power to conduct inspections of undertakings set forth in Article 20 of Regulation 1/2003 is only one type of such investigative powers and is an option at Commission's disposal, not an obligation. The Commission has a freedom of action in the conduct of its investigations.[27] Contrary to Ryanair's claims, the Commission, even when acting on a complaint, has a wide discretion as to what type of investigative measures it wants to apply in order to carry out its duties.[28] In this respect the case-law also ruled that the Commission's only obligation is to examine the factual and legal particulars brought to its notice by the complainant, and that it is not obliged to prove that it has adopted measures of investigation.[29] In any event, in this particular case, the Commission sent requests for information with numerous questions to both DAA and Aer Lingus concerning the circumstances of the

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[25] Pages 26 to 27 of Ryanair's letter of 24 January 2013.

[26] Page 28 of Ryanair's letter of 24 January 2013

[27] Judgment of the General Court of 8 Jul. 2004 in Case T-48/00, Corus UK v. Commission [2004] ECRII-2331, para. 212.

[28] Joined Cases T−108/07 and T−354/08, *Diamanthandel A. Spira BVBA v Commission*, not yet published, para. 118.

[29] Case T-273/09 *Associazione* '*Giùlemanidallajuve*' *v Commission*, not yet published, para. 81; Case C−367/10 P *EMC Development AB v Commission*, [2011] I-00046* Summary publication, para. 77; Case T-204/03 *Haladjian Frères SA v. Commission* [2006] ECR II-3779, para. 28.

move to T2.[30] According to the case-law, the sending by the Commission of the requests for information attested to its willingness to examine carefully and impartially all the relevant aspects of the individual case in order, in particular, to be able to adopt a decision in full knowledge of the facts.[31]

(39) Furthermore, the Commission did not refer to Ryanair's minority shareholding as the circumstance making any agreement between DAA and Aer Lingus unlikely, it simply mentioned that an agreement benefitting Aer Lingus would also benefit Ryanair indirectly through its shareholding. The so-called '*indirect indications*' put forward by Ryanair do not establish any agreement or concerted practice between DAA and Aer Lingus because they only refer to DAA's decisions or to speculations about Aer Lingus' abstention in the Dublin Airport Consultative Committee.

(40) Therefore, based on the elements put forward by Ryanair, the Commission did not identify any elements that would point to the existence of an anticompetitive agreement/concerted practice as alleged by Ryanair. Therefore the Commission considers that there is a low likelihood of finding an infringement and that it is not necessary to invest more resources to investigate Ryanair's allegations.

4.3.2. Limited likelihood of finding violations of Articles 101 of the Treaty in relation to the non-differential pricing

(41) Ryanair claims that different airport charges should be applied in T1 and T2. According to Ryanair, DAA and Aer Lingus agreed that differential pricing will not be applied and, to justify this policy, DAA carried out unnecessary upgrades at T1.

(42) As described in section 4.3.1, there is no indication of an agreement or concerted practice as required under Article 101(1) of the Treaty. Also, as explained in paragraphs (28)-(31) above, the Commission sees no indication that infrastructure developments at T1 were completed without any economic reasons in order to justify the non-differential pricing to be applied after the opening of T2.

(43) Furthermore, the users of both airport terminals seem to receive the same level of service. According to DAA, both terminals have the same amount of space available per passenger in compliance with the IATA level of service C. In addition, DAA differentiates its airport charges to a substantial extent depending on the type of service actually provided. This means that airlines with different business models can pay substantially different amount of airport charges, and they can avoid many of the costs associated with services which they do not use. The arguments on non-differential pricing and discrimination are examined in more detail in paragraphs (90) to (107) in relation to Ryanair claims on Article 102 of the Treaty.

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[30] Request for information sent to DAA (30 June 2011) questions 8 to 17, request for information sent to Aer Lingus (30 June 2011), questions 1 to 11.

[31] Joined Cases T-108/07 and T-354/08, *Diamanthandel A. Spira BVBA v Commission*, not yet published, para. 118.

4.3.3. *Limited likelihood of finding violations of Article 101 of the Treaty in relation to the TIS*

(44) Ryanair alleges that DAA's TIS is clearly a direct and substantial subsidy to Aer Lingus, the anchor tenant of T2, financed by the users of T1. Ryanair is allegedly excluded from this incentive scheme although it tried to negotiate with DAA about its involvement. Ryanair objects that Aer Lingus, in exchange for its move to T2, receives such a generous subsidy at the times when other airlines face higher airport charges at Dublin airport.

(45) First, the issue of whether Aer Lingus benefits of any subsidy within the meaning of European Union state aid rules is not subject of the current antitrust investigation (see paragraph (17)).

(46) Second, based on the information from DAA, the airport applies numerous incentive schemes both for short haul and long haul routes.

(47) With respect to the TIS, it seems that the geographic location of Dublin airport provides an appropriate basis for the development of transfer traffic at the airport, especially on transatlantic routes. T2 is equipped with a full US Customs and Border Protection installation, which is an advantage compared to other airports serving transatlantic traffic from Europe. It can be seen from the file that DAA investigated already in 2009 the possibility of developing transfer traffic at Dublin airport. *[CONFIDENTIAL – BUSINESS SECRET OF DAA]*

(48) DAA tested the new incentive scheme on several key routes and followed the industry examples of Vienna and Malta airports.[32] In any case, a number of EU and non-EU airports differentiate their charges for point-to-point and transfer passengers respectively.[33] DAA explained that it made various calculations with regard to the expected revenue effect of the TIS and came to the conclusion that, over the 5 year period examined, it would produce a net revenue of over EUR 1 million even under conservative estimates.[34]

(49) As one of the two main users of the airport, Aer Lingus put more emphasis on connectivity within its network and tried to increase the number of connecting passengers following its restructuring to alleviate the effects of the financial crisis.[35] Since 2009, even before the introduction of the TIS, the percentage of Aer Lingus' transfer passengers has increased.[36] The differences between the point-to-point and

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32 See Section IV Narrative Annex D and E of DAA's response of 2 September 2011.

33 For example Vilnius, Copenhagen, Prague, Paris CDG and Orly, Frankfurt, München, Zürich or Tokyo Narita.

34 See response to question 20 on page 132 of DAA's response of 2 September 2011.

35 See pages 16 to 19 of Aer Lingus' response of 20 September 2011.

36 Annex 11 of Aer Lingus' response of 20 September 2011.

transfer passenger groups seem to make the application of different incentive schemes legitimate for airports.

(50) Finally, DAA stated that TIS is available to all airlines, including Ryanair, on an objective, transparent and non-discriminatory basis. DAA met Ryanair twice to discuss the available benefits under this scheme. DAA was open to modify the conditions of TIS to include Ryanair through the inclusion of self-connecting passengers, although Ryanair does not provide a true transfer service and in fact it discourages passengers from connecting between its flights. Ryanair explained to DAA *[CONFIDENTIAL – BUSINESS SECRET OF RYANAIR]*. However, Ryanair never made an application for TIS, instead it proposed an alternative discount scheme not related to transfer traffic. DAA rejected this individualised proposal on the ground that an incentive scheme similar to Ryanair's proposal already exists and that is the GROWTH Incentive Scheme.

(51) In its letter of 24 January 2013, Ryanair argues that transfer traffic generates greater costs than point-to-point traffic and argues that the discount represented by TIS basically means a cross-subsidisation by point-to-point traffic to transfer traffic.[37] Ryanair also claims that the fact that the US Customs and Border Protection facility was installed at T2 automatically excluded it from the benefits of TIS.[38] Finally, it emphasises that Malta is not a good example for similar industry examples like the TIS.

(52) As referred to in paragraph (46), DAA applies several incentive programmes for different types of traffic and TIS is only one of those programmes. Other programmes available for point-to-point traffic can include an annual discount as high as 100%. In those instances, the whole cost of participating airlines' airport operations are subsidised from other revenues. The mere existence of an incentive scheme involving discounts does not entail an automatic illegality of those programmes. The Commission also notes that although Ryanair criticises Malta as an industry example, it does not refute the numerous other examples mentioned by Commission (see footnote (34) above).

(53) The Commission refers to the fact that Ryanair earlier intended to apply for the TIS by identifying self-connecting passengers within its own short-haul network, since it does not operate long-haul flights or codeshare with any other airline. DAA was open to discuss the conditions of TIS to enable such application. Consequently, the location of the US Customs and Border Protection facility would have had no effect on Ryanair's possibility to benefit from the TIS programme.

(54) Based on the above, none of the elements of TIS, nor its development and effects, suggests that TIS is the result of an illegal collusion between DAA and Aer Lingus and not a legitimate business decision made by DAA taking into account the business environment.

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37 Page 25 of Ryanair's letter of 24 January 2013.

38 Ibid.

4.3.4. *Limited likelihood of finding violations of Article 101 of the Treaty in relation to the remote stand pricing*

(55) According to Ryanair the passenger charge discount connected to the use of remote stands is a way of providing only Aer Lingus with substantial discounts. Allegedly, DAA introduced the discount in 2010 as a result of collusion with Aer Lingus, rewarding the latter for accepting the role of anchor tenant at T2. Ryanair wished to operate as many flights as possible from remote stands to avail itself of the benefits of lower passenger charges but it claimed that it was deprived of these discounts.

(56) According to DAA, as of the beginning of November 2011, Ryanair has been operating *[CONFIDENTIAL – BUSINESS SECRET OF RYANAIR]* flights out of the average 25 daily passenger flights that use remote stands with passengers departing from bus lounges.[39] Accordingly, Ryanair is not refused access to remote stands.

(57) According to DAA, airlines had a strong preference for contact stands at Dublin airport. In the last 5 years, the percentage of total passengers embarking from contact stands was consistently over 90% and even higher in recent years.[40] The airport infrastructure was developed accordingly; DAA maximized the number of contact stands.

(58) Although the discount on remote stand usage was introduced already in 2008, Ryanair had a strong preference for contact stands for apparently other reasons than solely cost considerations.[41] Furthermore, if Ryanair´s own calculations were applied, the switch to remote stands would apparently also have been profitable during earlier years, but Ryanair did not opt for such switch then, but rather preferred to split its operations between contact stands and remote stands.[42]

(59) The stand allocation rules were changed after an open and formal consultation procedure in 2011. They are publicly available and apply the same criteria to all airlines using Dublin Airport.

(60) However, Aer Lingus itself is not a significant user of remote stands. It is rather Aer Lingus Regional flights operated by Aer Arann which represent the majority of operations. The Aer Lingus Regional flights using remote stands fly small 66-72 seat

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[39] See page 6 of DAA's response of 23 November 2011. Based on DAA's airport usage conditions remote stands should be only accessible from a bus lounge. See Dublin Airport Charges 2011 including Terms & Conditions of Use in relation to Airport Charges, DAA's response of 2 September 2011 Annexes Section V\Stand Allocation Rules\Narrative\B\\.

[40] In 2010: 95.7%; in the first 7 months of 2011: 97.6%.

[41] See pages 152 and 153 of DAA's response of 2 September 2011.

[42] Page 11 of Ryanair's Article 101/102 complaint. Ryanair claims that the 45% discount on passenger charges when using remote stands introduced in 2011 would have resulted in a saving of *[CONFIDENTIAL – BUSINESS SECRET OF RYANAIR]*. Ryanair's costs would have been only *[CONFIDENTIAL – BUSINESS SECRET OF RYANAIR]*. This also means that the previous 2010 discount of 37% would have also resulted in overall cost savings.

ATR aircraft. Aer Lingus' 'increased' presence at remote stands seems to be nothing more than a conversion of certain Aer Arann flights to Aer Lingus Regional. These flights had been operated from the remote stands before the change in the stand allocation rules as well, thus the new rules effectively kept the previous status quo.

(61) Therefore, on the basis of the elements put forward by Ryanair, it is unlikely that the allocation of the stands is the result of an anticompetitive agreement/concerted practice between DAA and Aer Lingus.

(62) In its letter of 24 January 2013, Ryanair does not refute any of the arguments contained in paragraphs (56) to (60), namely, that Ryanair was actually using around 50% of all remote stands and that even before the alleged collusion of DAA and Aer Lingus it would have been profitable for Ryanair to move flights to remote stands, still they preferred to use contact stands as in the years before. When developing the infrastructure and designing the scheme, DAA therefore could not have known on the basis of Ryanair's previous conduct that there would be such high demand for remote stands from Ryanair. Furthermore, although Ryanair, in its letter of 24 January 2013, emphasises the discrimination in favour of Aer Arann, based on the alleged collusion between DAA and Aer Lingus, it fails to explain how this alleged infringement would put Ryanair in a competitive disadvantage with respect to the latter airlines, given the limited extent of Aer Arann's operations.[43] It is difficult to see how the conduct of DAA would be the result of collusion between DAA and Aer Lingus to financially reward the latter and to deprive Ryanair of the same benefits. Furthermore, it is also unclear how this behaviour would significantly affect the competitive position of Ryanair and Aer Lingus compared to each other, much less the position between Ryanair and DAA, as they are not in competition with each other.

(63) Finally, the Commission also notes that the Irish competition authority and the Irish courts seem well-placed to deal with Ryanair's claims, since the alleged conduct has taken place in Ireland and involves Irish undertakings. Ryanair agues in its letter of 24 January 2013[44] that the Irish Competition Authority is not an appropriate forum because it has been reticent to commit to initiate court proceedings against public authorities such as the DAA. However, even if this was true, Ryanair does not contest that it could bring an action directly before the Irish courts.[45]

4.3.5. Conclusion on Article 101 of the Treaty

(64) Based on the elements set out in paragraphs (33) to (63), the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims alleging a violation of Article 101 of the Treaty, in particular in the light of the limited likelihood of establishing an infringement and also in view of the fact that the Irish

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[43] Aer Arann has less than 1/10 of Ryanair's traffic at Dublin Airport.

[44] Pages 31 to 32 of Ryanair's letter of 24 January 2013.

[45] According to Case T-320/07, *Jones and others v Commission,* [2011] II-00417*Summary publication, paragraph 94: '*the onus is on the applicants to show that it would actually be impossible for them to bring an action before the national courts*'.

competition authority and the Irish courts seem well-placed to deal with Ryanair's claims.

4.4. Limited likelihood of finding a violation of Article 102 of the Treaty

4.4.1. Introduction

(65) Ryanair claims that the non-differential pricing (i.e. increased charges for T1), the TIS and the access to and pricing of remote stands constitute an abuse of the DAA's dominant position through excessive pricing, discrimination, bundling and manifest failure to satisfy demand.

(66) With respect to the TIS and the remote stands policy, Ryanair's complaint does not, however, contain any explanations – above the mere allegations – that would clarify how these practices constitute the claimed four types of abuses. Ryanair's letter of 24 January 2013 refers to discrimination in both cases. In Ryanair's point of view, the discount provided by the TIS to airlines delivering eligible transfer traffic is subsidised by point-to-point airlines, therefore constitutes a discrimination against latter airlines. In the same vein, when the stand allocation rules favour Aer Arann's access to cheaper remote stands, Ryanair considers it as discrimination in favour of that airline.

(67) As explained in paragraphs (44) to (63) in relation to Article 101 of the Treaty, the evidence collected during the Commission's investigation indicates that the TIS and the remote stands policy are based on legitimate business decisions and are not targeted against Ryanair as an airport user to favour certain other airlines, like Aer Lingus or Aer Arann. It is difficult to see why DAA would be incentivised to favour certain of its customers at the expense of others. Therefore, Ryanair's claims that the TIS and the remote stands policy are in violation of Article 102 of the Treaty are not further discussed below.

(68) Furthermore, it has to be underlined that Article 102 subparagraph c) refers to an abuse consisting of '*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'*. In the present case Ryanair and Aer Lingus do not find themselves in the same equivalent position with regard to the TIS since Ryanair has never applied for the TIS.

(69) As concerns non-differential pricing, in its complaint Ryanair cross-refers to its other complaint filed under Article 106 in conjunction with Article 102 of the Treaty in Case No COMP/39.838 – Ryanair/DAA ('Article 106/102 complaint'). Therefore, sections 4.4.2-4.4.4 below set out the Commission's assessment of Ryanair's claims regarding abusive non-differential/increased charges at Dublin airport based on the information provided in the separate complaint under Article 106/102 of the Treaty and the relevant evidence obtained from third parties.

4.4.2. Relevant market

(70) Ryanair suggests that the relevant market is the market for airport services in the catchment area of Dublin airport, which covers the east of Ireland if not the whole territory of Ireland.

(71) The suggested definition of the relevant *product* market is in line with the Commission's precedents, which acknowledged the market for the provision of airport facilities and services to airlines.[46]

(72) The determination of the scope of the relevant *geographic* market involves an analysis of the airports which are substitutable to Dublin airport. In its complaint Ryanair appears to rely on the radius/catchment area approach used by the Commission mainly for the definition of the relevant geographic market in airline merger cases.[47] However, those cases dealt with the impact of airline mergers on *passengers*, who generally require transportation from a particular point of origin to a particular point of destination, and did not specifically examine the effect of a transaction on the *airline-airport* relationship.[48]

(73) In the present case, it would be necessary to investigate whether point-to-point low fares airlines are more flexible than passengers or even network airlines in choosing the airport they fly to and from, being guided by the expected revenue which depends, *inter alia*, on the level of airport charges. The investigation would have to determine whether non-proximate European airports are viewed as possible substitutes by point-to-point low fares airlines, which may not necessarily limit themselves to the catchment area of a particular airport. DAA supports this view stating that, in the present case, the geographic market is wider than the Dublin airport's catchment area since various airports compete against each other to attract airlines. DAA cites several examples of Ryanair withdrawing its flights from certain airports and switching them to other countries' airports in response in particular to rises in airport charges.[49]

(74) In its letter of 24 January 2013, Ryanair raised the argument that there is no competition from other airports to the services of DAA, therefore other European airports are obviously not substitutes for Dublin. In particular, it explained non-subtitutability of other airports with the high investments Ryanair made over several years to build demand at Dublin and the lack of similar untapped demand at other European airports.[50]

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46 Case COMP/M.4164 Ferrovial/Quebec/GIC/BAA; Case COMP/M.5652 GIP/ Gatwick Airport; Case COMP/M.5648 OTTP/Macquarie/Bristol Airport; Case 35.703 - Portuguese airports [1999] OJ L 69/31, Case 35.767 - Finish airports [1999] OJ L 69/24; Spanish airports [2000] OJ L 208/36.

47 See for example Case COMP/M.4439 Ryanair/Aer Lingus where the Commission used a proxy of 100 km radius/1 hour driving time to estimate an airport's catchment area.

48 In past decisions concerning mergers between airports, the Commission left the geographic market definition open (see e.g. Case IV/M.786 Birmingham International Airport; Case COMP/M.2262 Flughafen Berlin (II); Commission decision of 8.8.2005 referring Case COMP/M.3823 - MAG/Ferrovial Aeropuertos/Exeter Airport to the competent authorities of the UK).

49 Pages 67 and 68 DAA's comments of 18 February 2011. Also, Ryanair announced cancellation of 34 weekly flights to/from Morocco protesting against the airports authority 'imposing a new monopoly handling company on Ryanair which would have resulted in a massive increase in charges' (see Ryanair press release of 28 June 2012).

50 Pages 4 of Ryanair's letter of 24 January 2013.

(75) However, it is not necessary to take a position on these issues, since in the present case the exact definition of the relevant market can be left open. While its investigation would require significant resources, even the narrowest definition of the relevant market would not influence the Commission's conclusions in this decision.

4.4.3. Dominant position

(76) Ryanair claims that DAA has a monopoly position since there is no airport that handles commercial air traffic within a radius of 160 km (or 2 hours) by road from Dublin airport.

(77) In order for an undertaking to be in a dominant position it must have the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[51] In the present case, existence of such a power of DAA is not certain for at least two reasons.

(78) First, as mentioned in the previous section, it cannot be excluded that, in relation to point-to-point airlines like Ryanair, other European airports, located in other EU Member States, exercise a competitive constraint on DAA. Second, DAA's customers (airlines) may have countervailing buyer power to deter or defeat any adverse behaviour by DAA. The DAA states that both Ryanair and Aer Lingus are important customers of Dublin airport, transporting [35-45]% and [35-45]% of the airport's passengers respectively in 2010.[52] Switching any considerable number of flights by these airlines to alternative airports could substantially affect DAA's revenues. A threat of doing so would be credible: as noted in paragraph (73) above, Ryanair is known for withdrawing its flights in response to disagreements with the airports. According to DAA, Ryanair is also a significant company in terms of size and strength: its total revenues are approximately 15 times DAA's aeronautical revenues and it is ranked 5th airline in the world in terms of scheduled passengers and net profit.

(79) In its letter of 24 January 2013, Ryanair presented several arguments that are supposed to prove that DAA evidently has a dominant position. Especially, it argued that Ryanair lacks countervailing buyer power in its dealings with DAA and also referred to previous case-law where airports were found dominant in relation to their customers.[53]

(80) However, the Commission does not have to take a position on those arguments since it can be left open whether DAA enjoys a dominant position or not. Even if DAA had a dominant position, the Commission's conclusions with respect to the alleged abuses of such dominant position set out below would not change.

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[51] Case 22/76 *United Brands Company v Commission* [1978] ECR 207.

[52] Page 69 of DAA's response of 2 September 2011.

[53] Pages 4 to 6 of Ryanair's letter of 24 January 2013.

4.4.4. Abuse of dominant position

Alleged abuses

a. Excessive pricing

(81) Ryanair argues that the charges applied by DAA include a financial contribution to the cost of building and maintaining T1's and T2's overcapacity and over-specification. As low fares airlines derive no advantage from these additions, DAA's charges have no reasonable relation to the economic value of the product provided, and are therefore excessive.

(82) As Ryanair rightly notes, in European Union competition law, a price is excessive when it bears no reasonable relation to the economic value of the product supplied.[54] According to settled case law, such assessment involves a two-stage test. First, it is necessary to examine 'whether the difference between the costs actually incurred and the price actually charged is excessive'. Second, if the answer is affirmative, it is necessary to consider 'whether a price has been imposed which is either unfair in itself or when compared to competing products'.[55]

(83) With respect to the first limb of the test (price-cost comparison), Ryanair did not adduce any evidence indicating that DAA's airport charges are not based on the actual costs incurred by DAA through its airport investments. In fact, Ryanair does not claim that DAA did not incur the costs related to the airport investment. Instead, Ryanair appears to argue that the charges are excessive in relation to what Ryanair actually desires – a non-existent low-cost terminal – which is not a relevant measure for establishing excessive pricing.

(84) First, as already explained in section 4.2 above, it is not the role of competition policy to re-evaluate the economic rationale for the airport expansion taken several years ago and which, on top, were subject to an extensive national review process. Second, given that the DAA's airport charges were subject to the regulatory approval process which itself refers to cost-related criteria,[56] the Commission has no indications that the charges would not reflect the actual costs incurred, be it the investment or operating costs. Thus, the first part of the excessive pricing test is unlikely to be satisfied. For the Commission to revisit the relationship between the airport charges and the costs incurred would require substantial resources, in particular in order to establish and appropriately allocate the relevant costs and revenues. Given the limited likelihood of establishing an infringement, the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims on excessive pricing.

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[54] Case 27/76, *United Brands Company v Commission* [1978] ECR 207, para. 250.

[55] Ibid, para. 252.

[56] As mentioned in paragraph (4) above, in specifying the maximum level of airport charges CAR is required to take into account, *inter alia,* the level of investment in airport facilities and DAA's costs (section 22 of the State Airports Act, 2004).

(85) In its letter of 24 January 2013, Ryanair did not advance new relevant information in relation to the first limb of the test of excessive pricing as accepted under European Union competition law. The argument in itself that the infrastructure is excessive and overspecified does not satisfy the first limb of the test which requires excessive prices compared to the cost actually incurred. Ryanair argued[57] that T1 is overpriced because it has the same charges as T2, although its infrastructure and service is inferior to T2. However, Ryanair's arguments do not bring new elements about the costs actually incurred in relation to T1.

(86) As concerns the second limb of the test (price comparison), which would anyway only come under examination if the answer to the first limb of the test was affirmative, one relevant – albeit approximate – indication is the level of airport charges at comparable airports. In this respect, even considering the recent airport charges increases, the aeronautical revenue per passenger at Dublin airport is below the EU average.[58] Ryanair letter of 23 March 2012 does not change such conclusion, even if assuming a *[CONFIDENTIAL – BUSINESS SECRET OF RYANAIR]* for Ryanair despite the communication of DAA to 'freeze' the prices. This also does not lend support to Ryanair's claim regarding excessiveness of DAA's pricing.

(87) Ryanair's letter of 24 January 2013 rightly points to the fact that the data of DAA referred to in footnote (58) is from 2007.[59] However, its new submission does not show that a price has been imposed which is unfair when compared to competing products. Furthermore, DAA's more up to date data from 2011 and 2013 refutes again excessiveness of its charges compared to other airports' charges.[60]

(88) Finally, the simple comparison of DAA's airport charges with those of Stansted fails to take into account the significant investment realised at Dublin airport. In the same time period, Stansted experienced no comparable- size investment.[61]

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57 Page 22 of Ryanair's letter of 24 January 2013

58 Page 87 of DAA's comments of 18 February 2011.

59 Page 23 of Ryanair's letter of 24 January 2013. Ryanair also questions the comparison on the basis that (i) the published charges used to calculate the EU average mentioned in paragraph (86) do not include various incentives and discounts, (ii) the comparison relies on charges which do not reflect market conditions as they are set by dominant airports, and (iii) the comparison relates to airports with little or no low fares airlines presence. None of the three points argued by Ryanair are likely to make the comparison irrelevant. It has to be stressed that Dublin Airport also has various incentive schemes and discounts which benefit big operators such as Ryanair. As to the second point, such claim contradicts Ryanair's other claims where it finds Dublin Airport to be dominant as well. And even if all of those airports were dominant, it does not mean that all of them are abusing their dominance by charging above-market rates. Finally, in fact, many of the airports concerned have significant low cost traffic and serve as a base airport for low cost airlines (e.g. Manchester, East Midlands, Paris Orly, or London Gatwick).

60 Page 7 of DAA's response of 13 May 2013.

61 Ryanair used the argument of Stansted prices having doubled in recent years, while air traffic decreased. Nevertheless this does not provide any indication for the costs of Dublin Airport nor explanation for its current prices. In more general terms, it should be noted that the comparisons that Ryanair attempts to draw between Stansted Airport and Dublin Airport to support its case are actually overridden by its most recent actions. Despite of all Ryanair claims with respect to the situation at Stansted Airport, Ryanair has recently

(89) Based on the elements above, the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims alleging a violation of Article 102 of the Treaty by charging excessive prices, in particular in the light of the limited likelihood of establishing an infringement.

b. Discrimination

(90) Ryanair recalls that applying similar conditions to unequal transactions constitutes discrimination under European Union competition law.[62] Ryanair alleges that this applies in the present case since DAA levies the same set of charges on the users of T1 and T2 despite the considerable differences between those two terminals. In Ryanair's view, it is obliged to pay for the oversized and over-specified T2, although Ryanair does not use its services and facilities. Ryanair claims that it is effectively subsidising the provision of airport services and facilities of T2 to Aer Lingus (the largest user of T2) and other long haul network airlines operating at that terminal. This is allegedly discriminatory and distorts competition between low fares airlines, like Ryanair, and network airlines.

(91) As a preliminary observation, it should be noted that there is a distinction between *airport charges* and *passenger charges* at Dublin airport. Airport charges are a wider concept which includes all charges owed by an airline to the airport operator for the provision of airport services on a case by case basis. Airport charge is a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight.[63] At Dublin airport, airport charges cover a wide range of charges such as runway movement charge, aircraft parking, passenger charge, airbridge use, PRM charge, fast-track charge[64] and other miscellaneous charges, such as the US customs and border protection pre-clearance charge[65]. They are set for the whole of the Dublin airport, however, the final amount paid by an airline depends on the services actually used on a case by case basis.

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announced its plans to increase its passenger numbers at Stansted Airport by 50% over the next ten years in exchange for lower charges and more efficient facilities. This points not only to Ryanair's ability to negotiate favourable terms as a customer even at the airport serving its most important market, but also to the importance that Ryanair attaches to more efficient, improved facilities. http://www.ryanair.com/en/news/ryanair-agrees-10-year-growth-deal-at-stansted.

62 Case 13/63 *Italy v Commission* [1963] ECR 165, para 6.

63 Article 2 paragraph 4 of the Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, OJ L 70/11, 14.3.2009 (Airport Charges Directive).

64 http://www.dublinairport.com/gns/about-us/airport-charges/airport-charges.aspx

65 http://www.dublinairport.com/Libraries/Airport_Charges/20130312_Misc_word_Changes_2.sflb.ashx

(92) On the other hand, passenger charge relates only to the provision of the very basic airport infrastructure related to airport security, passenger screening and provision of infrastructure for hold baggage screening.[66]

(93) It is accurate that DAA has chosen to apply the same set of airport charges in general and passenger charge in particular to both users of T1 and users of T2. The possibility of differential pricing was subject to extensive discussions in the national proceedings in 2007-2010.[67] After consultation with the stakeholders and its own assessment, CAR decided not to require differential prices in relation to airport charges charged at each terminal.[68]

(94) In its letter of 24 January 2013, Ryanair emphasises for the first time that it is the passenger charge which is discriminatory. In its explanation, it mixes two separate issues by first focusing on the infrastructure of T1 being inferior to T2 and, second, comparing the infrastructure provided at Dublin Airport to its wishes, i.e. arguing that the limited unbundling of a few services offered by DAA does not apply to the main services that low fares airlines use less intensively.[69] In other words, Ryanair considers that, given the differences of the service levels at T1 and T2, and the different needs of airlines using T1, the passenger charge at T1 should be lower compared to T2. In support of its arguments, Ryanair also adds that 'an objective assessment of the respective services provided at T1 and T2 would lead to the rational conclusion that T2 has a superior offering for passengers to meet the needs of the airlines operating from it, which are different from the requirements of airlines using T1'.[70]

(95) However, apart from the 'freshness' of T2, Ryanair fails to explain how the services included in the individual components of the airport charges (as per paragraph (91)) differ in quality, scope or other criteria (e.g. aircraft parking, runway movements, etc.) which would justify their differentiation between T1 and T2.

(96) Ryanair falsely gives the impression that T1 is used by low fares airlines that would not need the IATA level C services and most of the services available at T1, while T2 is used by long-haul network airlines that all require these services. In reality, although Ryanair provides the great majority of traffic at T1, other network airlines such as Lufthansa, SAS, British Airways, CityJet, Iberia, Turkish Airlines, Air Canada, Luxair, or Swiss also operate from T1. Furthermore, although Emirates, Etihad Airways, Delta, United, US Airways, American Airlines and Aer Lingus operates from T2, the main operator, Aer Lingus, is a mid-frills carrier whose service is very close to

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[66] Dublin Airport Charges 2013 Including Terms & Conditions of Use in relation to Airport Charges.

[67] CAR's 2007 and 2009 regulatory reviews, 2010 Aviation Panel Appeal and CAR's Decision further to referral by the 2010 Aviation Panel.

[68] CAR concluded that: 'The Commission does not believe that there is anything to be gained by mandating the DAA to introduce differential pricing given it already does price differentially on occasion.' (Decision of CAR further to Referral by the 2008 Aviation Appeal Panel, page 14).

[69] See section II of Ryanair's letter of 24 January 2013.

[70] Page 9 of Ryanair's letter of 24 January 2013.

Ryanair's on the short-haul routes which carry almost 90% of its passengers over recent years. Consequently, it is misleading to argue that through the non-differentiated passenger charge, users of T1 subsidise exclusively all those services that benefit only airlines at T2.

(97) Consequently, the users of T2 do not appear to receive any extra product/service which is not available to the users of T1. On the contrary, according to DAA, both terminals have the same amount of space available per passenger in compliance with the IATA level of service C. DAA states that the opening of T2 benefited also the users of T1 since 40% of the earlier traffic at T1 was moved to T2, thereby increasing the available space and level of service for the 60% of the passengers remaining at T1.[71] In addition, investments at T1, such as the new Pier D, new check-in facilities known as 'Area 14' and a T1 extension known as 'T1X' benefitted airlines using T1, as acknowledged by Ryanair, too.[72]

(98) It has to be acknowledged that T1 was inaugurated in 1972, while T2 was opened in 2010, therefore there might be a difference in the perception of the aesthetics of the terminal building itself. However, T1 has undergone several improvements since 1972 including the upgrades mentioned in paragraph (97). The absence of perfectly identical buildings in DAA's offering does not render its conduct automatically abusive. In the alternative, if Ryanair arguments about the 'freshness' of T2 compared to T1 was accepted, any modernization of any airport infrastructure should automatically imply differentiated pricing, which clearly is not the case.[73]

(99) Ryanair considers that other than the use of airbridges, practically all other terminal services for which low fares airlines have no or little use are offered as a bundle and paid through the uniform, undifferentiated passenger charge.[74] In particular Ryanair claims that through the passenger charge they have to pay for baggage handling and transfer facilities, the US Customs and Border Protection installations, check-in, meeting and gate areas designed for the needs of network airlines.[75] Due to the lack of differentiation Ryanair cannot avoid the costs of these services.

(100) As described by DAA, the passenger charge contributes to covering the operating and capital cost of providing the basic range of facilities at the airport.[76] More specifically, passenger charges contribute to airport security, passenger screening and provision of

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71 Page 17 of DAA's response of 2 September 2011.

72 Page 15 to 18 of Ryanair's letter of 24 January 2013.

73 Ryanair's simple reference to the Airport Charges Directive has no implications on the potential infringement of Article 102 of the Treaty. In any case, under this directive, airport managing bodies are entitled – but not obliged – to charge differentiated prices depending on level of services.

74 Page 9 of Ryanair's letter of 24 January 2013.

75 Page 9 to 13 of Ryanair's letter of 24 January 2013.

76 Page 4 of DAA's response of 13 May 2013, Dublin Airport Charges 2013 Including Terms & Conditions of Use in relation to Airport Charges.

infrastructure for hold baggage screening. The passenger charge is paid to DAA which provides terminal, security and screening services.

(101) In contrast with the claims of Ryanair, at Dublin airport there are several elements separate from the general passenger charge.[77] For example the use of the US Customs and Border Protection installation is available against a separate charge of EUR 7.5, which is a substantial amount compared to the passenger charge.[78] In addition, passengers requiring quicker security screening to avoid queues (usually business passengers) have to pay a separate fast-track charge. With regard to the meeting and gate areas, long-haul airlines with multiple class configuration pay higher amounts since the passenger charge is paid on a per passenger basis. Therefore, the significantly higher number of passengers per flight entails higher contribution in the form of passenger charges.

(102) As regards other airport charges, there are also differences between the amount of charges paid in total by low fares airlines compared to long-haul network airlines. For example, the runway movement charges are calculated on the basis of the take-off weight, which means that a wide-body aircraft necessarily pays more charges than Ryanair operating narrow-body short-haul aircraft. DAA also applies different charges for aircraft parking depending on the size of the aircraft.

(103) Ryanair wrongly gives the impression that airlines having connecting passengers at Dublin airport use all the range of airport services and, on the top of that, the passenger and baggage transfer facilities. In fact, connecting passengers use a narrower range of airport facilities (and only those on the airside), compared to the broader range of both landside and airside facilities used by the non-transferring departing/arriving passenger, such as those of Ryanair. It is the transfer charge which applies to such passengers then.

(104) Consequently, it is not true that only the charge for airbridges are differentiated and the pricing practice of DAA does not allow low fare airlines to take into account the specificities of their business model.

(105) Furthermore, there are also other cost elements at Dublin airport that enable variation depending on the business model used by an airline. Baggage handling, check-in or lounge services are provided not by DAA in exchange of airport charges but by ground handlers against a separate payment based on a commercial relationship. Low fares airlines whose passengers are mainly using internet check-in or refrain from the use of airport lounges can avoid costs associated with these services by contracting for a lower number of check-in desks with ground handlers or not contracting for the use of lounges at all. This is enabled by the fact that ground handlers using the infrastructure of the airport such as check-in desks, pay an access to installation charge, which is paid on the basis of check-in desks used.[79] In addition, due to the single till system, all

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77 See par. 92 on the explanation of airport charges.

78 It is almost 2/3 of the passenger charge when compared to the highest amount of the passenger charge.

79 Page 5 and 6 of DAA's response of 13 May 2013.

revenue from ground handlers contributes to the lowering of airport charges. Therefore, the additional services used by, and paid for by, network airlines lower the charges for low fares airlines, too.

(106) Passengers intending to use airport lounges at Dublin airport have to pay EUR 20 to get access to executive lounges at T1 or T2, while passengers getting access due to their type of ticket pay indirectly through the price they pay for the airline enabling their access. In the end, both the ground handler or the lounge operating airline pays a rent to DAA contributing to the cost of infrastructure. Low fares passengers not availing themselves of these services do not pay these additional fees.

(107) In its letter of 25 April 2013, Ryanair cites DAA's statement in the UK Competition Commission's investigation into Ryanair's minority shareholding in Aer Lingus. It argues that DAA acknowledged that the services at T1 and T2 are not identical.[80] However, DAA confirmed only that the actual services provided to airlines with different business models differed and not that the available services offered at the two terminals were different.

(108) Considering the arguments in paragraph (90) to (107), it seems that airport charges and the pricing of services enable to take into account the differences in business models applied. The fact that the services used and charges paid do not match perfectly the needs of each individual airline does not make the practice of DAA abusive in itself.

(109) Airlines may, to a large extent, choose which particular service or facility they require and are willing to pay for in line with the business model they apply. There are no indications that DAA pursues a discriminatory practice with its airport charges policy. As evidenced by data of CAR, the difference between the average airport charges paid by the ten biggest customer of DAA can be as much as 50% or more.[81]

(110) Based on the arguments above, the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims alleging a violation of Article 102 of the Treaty by discrimination, in particular in the light of the limited likelihood of establishing an infringement.

c. Bundling

(111) Ryanair claims that in addition to the basic airport services, DAA provides to Ryanair and other low fares airlines certain over-specified facilities that they do not require or wish to purchase. In Ryanair's view, this represents 'unlawful tying'[82] of the product in

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80 Ryanair/Aer Lingus merger inquiry (UK Competition Commission)) Summary of third party hearing with Dublin Airport Authority held on 26 March 2013 paragraph 8: 'The underlying airport services and facilities provided to the airlines were quite different reflecting the differences in business models and related airline preferences—at a cost-per-passenger level there was probably a 10 per cent difference in terms of the input costs.'

81 Page 48 of DAA's response of 2 September 2011.

82 It is not fully clear whether Ryanair qualifies the alleged abuse as tying or bundling: the complaint appears to refer to the two interchangeably.

which DAA is dominant (presumably, basic airport infrastructure in the Dublin region) to another product (presumably, higher specification and capacity infrastructure).

(112) For tying or bundling to occur, there have to exist two distinct, identifiable products which are sold together to customers.[83] Ryanair does not provide detailed arguments on the two products that are allegedly tied or bundled and how the abuse has been carried out.

(113) Nevertheless, it should be observed that, after the construction of T2 and the upgrade of T1, the previous level of service received by users of Dublin airport is no longer available. The terminal capacity at the airport has been expanded with T2 and other new facilities have been constructed (e.g. Pier D, Area 14 and T1X). This resulted in mitigating terminal capacity congestion at Dublin airport and in offering an improved level of service to passengers. As a result, after the investments the previous level of service provided at Dublin airport ceased to exist. This change is irreversible: there is no evidence that it would be feasible, technically or economically, to reinstate the previous level of service without undoing the constructions made. The alternative acceptable to Ryanair, a low-cost terminal, is merely theoretical and has never existed; consequently it cannot be taken into consideration as a benchmark for the purposes of bundling analysis.[84] Hence, the current airport services at Dublin airport do not represent separate products, as required for bundling or tying.

(114) In its letter of 24 January 2013, Ryanair argues that the previous level of service at Dublin airport[85] is not the old T1 service that existed before the upgrades but rather the existing services of T1 (including upgrades like Pier D) at moderate prices.[86] Through the alleged bundling, namely the non-availability of T1 at moderate prices, DAA withdrew an existing facility from the market. Ryanair also claims that passenger and luggage transfer services, bag drop and bag distribution for departing and arriving point-to-point passengers, US Customs and Border Protection, large meeting and gate areas constitute distinct identifiable services that are offered in bundle.[87] The Commission already explained that these services are actually not tied/bundled together (see paragraphs (101) to (106)).

(115) However, Ryanair still does not provide any new information on how the conduct of DAA would constitute illegal bundling, what would be the distinct identifiable products which are sold together as required by European Union competition law. Furthermore, Ryanair itself does not clarify what it means by ‘moderate prices’, a concept unknown in competition law, as further explained in paragraph (122) below.

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83 Case T -201/04, *Microsoft Corp v Commission* [2007] II-ECR 3601, paragraphs 842 and 862.

84 The bundling argument in this form was originally presented in Ryanair’s separate complaint under Article 106/102 of the Treaty and cross-referred in its Article 101/102 complaint subject to the current decision.

85 See paragraph (113).

86 Page 21 of Ryanair’s letter of 24 January 2013.

87 Page 13 of Ryanair’s letter of 24 January 2013.

(116) Lastly, for tying or bundling to occur, the dominant undertaking has to be liable to foreclose competition.[88] By definition, there is no such foreclosure in this particular case as DAA is not in competition with the airport users.

(117) Based on the arguments above, the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims alleging a violation of Article 102 of the Treaty by tying and/or bundling, in particular in the light of the limited likelihood of establishing an infringement.

d. Manifest failure/refusal to satisfy demand

(118) Ryanair states that the demand of low fares airlines and their passengers has distinctive characteristics. Ryanair alleges that by introducing a 'higher specification' of terminal facilities and the associated cost, DAA fails to satisfy demand of low fares airlines, which carry 80% of passengers at Dublin airport.

(119) The Commission considers that DAA is unlikely to have manifestly failed to satisfy Ryanair's or other low fares airlines' demand. Ryanair does obtain airport services which allow its operations. Also, as mentioned in paragraphs (90) to (107) above, the DAA's pricing structure is substantially differentiated enabling it to accommodate the needs of various airline business models. Based on the information provided, there are different charges for contact and remote stands and for runway usage.[89] There is also a distinction with regard to narrow- and wide-body airplanes, as well as to the parking time of the aircraft. In addition, charges for optional facilities (such as check-in desks, airbridges, use of US Customs and Border Control facilities and lounges) are levied on a per usage basis. In sum, DAA argues, and the evidence corroborates, that it caters to the needs of low fares airlines by providing them with a possibility to avoid certain airport charges.

(120) In its letter of 24 January 2013, Ryanair maintains that DAA infringed European Union competition rules when it failed to satisfy demand by not offering airport services that correspond to Ryanair's needs, namely the services of T1 at moderate prices. In particular, it argues that the absolute unavailability of a service is not a condition under case law for the finding of abusive failure to respond to demand. Consequently, though Ryanair receives some airport services, since those services do not correspond to Ryanair's needs DAA commits an abuse of dominant position.

(121) The Commission notes that the case law referred to by Ryanair[90] concerns cases where undertakings with special or exclusive rights were manifestly incapable to meet demand while the actual pursuit of those activities by other undertakings was rendered

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88 Case T -201/04, *Microsoft Corp v Commission* [2007] II-ECR 3601, paragraphs 977, 1036 and 1037.

89 Runway charges vary both in relation to the season (winter/summer) and according to the weight of the aircrafts used.

90 Footnote 35 of Ryanair's letter of 24 January 2013 refers to the following cases: Case C-41/90 Höfner et Elser v. Macrotron [1991] ECR 1-1979, para. 24 and 34, operative part paragraph I, Case C-180/98 to C-184/98 Pavlov e.a. [2000] 1-6451, para. 126-127 and Case C-475/99 Ambulanz Glöckner [2001] ECR 1-8089, para. 63.

impossible by statutory provisions. The 'manifest' incapability was emphasised every time and it meant that the undertaking concerned failed to satisfy demand for part or the whole of the service in question.

(122) In its letter of 24 January 2013, Ryanair describes the services of a moderately priced terminal, as the service that was withdrawn and not available anymore at Dublin airport. It mentioned the services of the upgraded T1 prior to 2010 as fitting the needs of low fares airlines. To decide whether an undertaking is unable to satisfy demand requires difficult economic and factual assessments, however the mere fact that a service is not provided at a price that is considered appropriate by a customer, does not result in an abusive and manifest incapability to satisfy demand.

(123) The Commission maintains that Ryanair obtains airport services from DAA and there is no manifest incapability to satisfy demand that would infringe Article 102 of the Treaty. In fact, as described in paragraphs (90) to (107) above, the pricing practice of DAA does allow low fare airlines to take into account the specificities of their business model and they can avoid several of the costs of services they do not use.

(124) Ryanair also refers to case law related to refusal to supply as an abuse under Article 102 of the Treaty.[91] It has to be noted that several of the cases cited by Ryanair concerned vertically integrated undertakings which tried to eliminate or hinder their direct downstream competitors through the refusal to supply. DAA is not directly connected to any downstream undertakings competing with Ryanair that would benefit from the refusal to supply. Furthermore, as explained in paragraph (122), no service seems to be withdrawn from the market or refused to Ryanair. In relation to T1, DAA undertook investments that improved the service offering as acknowledged also by Ryanair. The fact that these services are provided at price levels that are considered not appropriate by Ryanair does not imply that there was a refusal.

(125) In these circumstances, the Commission is of the view that it would be disproportionate to further investigate Ryanair's claims regarding DAA's manifest failure/refusal to satisfy demand, in particular in light of the limited likelihood of establishing an infringement.

(126) As regards the various abusive practices alleged by Ryanair the Commission also notes that the Irish Competition Authority or national courts seem well-placed to handle the matters raised in your complaint. The effects of the DAA's practices complained of are essentially confined to Dublin airport, therefore the territory of Ireland. The Irish Competition Authority seem therefore particularly well-placed to gather the required evidence and, if necessary, able to effectively bring the entire alleged infringement to an end. Ryanair's statements regarding the lack of independence, willingness and sufficient powers of the Irish Competition Authority are irrelevant. It is for Ryanair, if it is not satisfied with the manner in which its rights have been taken into account by the competition authorities or the national courts, to take the necessary steps with the latter or to examine the national remedies available to them.[92]

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[91] Footnotes 32 and 49 of Ryanair's letter of 24 January 2013.

[92] Case T-60/05, Union française de l'express (UFEX) and others v Commission. ECR 2007 II-3397.

4.4.5. Conclusion on Article 102 of the Treaty

(127) In light of the above the Commission takes the view that it would be disproportionate to further investigate Ryanair's claims alleging a violation of Article 102 of the Treaty, in particular in the light of the limited likelihood of establishing an infringement and also considering that the Irish Competition Authority or national courts seem well-placed to handle the matters raised in your complaint.

5. **CONCLUSION**

(128) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects your complaint against DAA and Aer Lingus.

6. **PROCEDURE**

(129) An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 of the Treaty.

(130) The Commission reserves the right to send a copy of this Decision to DAA and Aer Lingus. Moreover, the Commission may decide to make this Decision public on its website, or a summary thereof.[93] Therefore, if you consider that certain parts of this Decision contain confidential information in general or information that would be confidential towards DAA and Aer Lingus in particular, I would be grateful if within two weeks from the date of receipt you would inform […] or […]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. After the expiry of the deadline, the Commission may decide to send this Decision to DAA and Aer Lingus and/or publish it on its website.

For the Commission

Joaquín Almunia
Vice-President

[93] See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.