EUROPEAN COMMISSION

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Ryanair Ltd.

Dublin Airport
County Dublin
Ireland

Subject: **Case AT.39905 – Ryanair/AENA (Alicante airport)**
Case AT.39942 – Ryanair/AENA (Malaga airport)
Case AT.40010 – Ryanair/AENA (Spanish airports)
Complaints of a breach of Article 102 of the Treaty

(Please quote these references in all correspondence)

Dear [redacted]

(1) I am writing to you in connection with your following submissions:

i) your complaint of 18 March 2011 concerning AENA's practices at Alicante airport,

ii) your complaint of 10 October 2011 concerning AENA's practices at Malaga airport, and

iii) your complaint of 11 May 2012 concerning AENA's practices at Spanish airports in general,

relating to an alleged breach of Article 102 of the Treaty on the Functioning of the European Union (the 'Treaty'). I also refer to the Commission's letter of 2 July 2014 addressed to you in that matter and your letters of 1 and 19 December 2014 in which you submitted written observations in response to the Commission's preliminary assessment of your complaints.

(2) This letter addresses only AENA's alleged infringement of Article 102 of the Treaty. The alleged infringement of Article 106 of the Treaty (in conjunction with Article 102) by the Kingdom of Spain is dealt with in a separate letter. For the reasons set out below, the Commission considers that there are insufficient grounds to conduct a

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further investigation into the alleged infringement(s) and accordingly rejects your complaints pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.[1]

1. THE COMPLAINTS

(3) In two similar complaints received on 18 March and 10 October 2011 regarding, respectively, Alicante and Malaga airports, Ryanair claimed that AENA - the operator of almost all Spanish airports - infringed Article 102 of the Treaty by forcing Ryanair to abandon the use of the walk-on/walk-off procedure to board its passengers as a result of the entry into service of new terminals in, respectively, March 2011 and March 2010.

(4) Ryanair considered that AENA's conduct at Alicante and Malaga airport would constitute an infringement of Article 102 of the Treaty in the form of excessive pricing, discrimination, tying/bundling, refusal to supply and refusal/inability to satisfy demand.

(5) On 11 May 2012, Ryanair submitted a comprehensive complaint against AENA in relation to airport charges levied at many Spanish airports. In particular, the alleged practices were the following:

i) forcing Ryanair to use airbridges instead of the walk-on/walk-off boarding procedure and pay the corresponding fees; lately, this claim was confirmed in the submissions of 5 September and 23 October 2013 where Ryanair underlined that at certain airports - like Alicante - it was still forced to pay the airbridge fee though it was allowed to use the walk-on/walk-off procedure;

ii) imposing excessive prices, since between 2007 and 2011 landing charges increased by 30% at Madrid airport, 14% at Barcelona airport, 21% for class I airports and 21% for class II airports;

iii) setting excessive cost-based passenger charges for 2012 due to unnecessary investments if compared to the level and cost of services that Ryanair would require or accept;

iv) bundling of extremely expensive and oversized runway services and core terminal infrastructure services with the allegedly unneeded use of airbridges.

(6) Finally, in its submission of 1 November 2012 Ryanair complained about the legality of AENA's planned new "Transfer Incentive" that includes a discount for transfer traffic and a cost increase for non-transfer traffic; in so doing, it allegedly benefits only network airlines - primarily Iberia - putting point-to-point carriers at a competitive disadvantage.

2. PROCEDURAL STEPS

(7) The complaint in relation to Alicante airport was received on 18 March 2011, supplemented by further submissions on 30 May 2011 and 5 September 2013. The

[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.

complaint in relation to Malaga airport was received on 10 October 2011. The general complaint against AENA's conducts at all the Spanish airports it operates was received on 11 May 2012. Ryanair provided supplementary information on 15 August, 1 November and 4 December 2012 and 23 October 2013. The Commission had a meeting with Ryanair on 10 September 2013 and a telephone conversation on 28 January 2014.

(8) The Commission treated the three complaints together and investigated Ryanair's allegations under the general complaint of 11 May 2012 against AENA. On 28 June 2012, the Commission sent a request for information to Ryanair and also asked for further clarifications on the complaint. The response of Ryanair was received on 20 July 2012.

(9) By letters of 21 September and 18 October 2012, accompanied by requests for information, the Commission sent a non-confidential version of Ryanair's complaints for comments to, respectively, AENA and the Kingdom of Spain. AENA's response was received on 19 October 2012, followed by a further submission on 10 December 2012; Spain's response arrived on 3 January 2013. On 1 August 2013, the Commission sent an additional request for information to AENA, the response to which was received on 20 September 2013. On 7 February 2014 the Commission sent a further request for information to AENA, the response to which was received on 17 March 2014, complemented by the submission of 26 May 2014, further revised on 2 June 2014.

(10) By letter of 2 July 2014, the Commission informed Ryanair of its intention to reject the complaints as they raised insufficient grounds to justify further investigation. In response to these provisional assessments, Ryanair submitted written observations by letters of 1 and 19 December 2014.

(11) By email of 15 July 2014, Ryanair requested to have access to the submissions of the Spanish government and AENA contained in recitals 19 and 43 of the Commission's letter of 2 July 2014.

(12) On 17 and 23 July 2014, the Commission services asked, respectively, the Spanish government and AENA for non-confidential versions of the documents. The rules on co-operation between the Commission and the Member States provide the latters with a ten-week period to reply. The Commission received the non-confidential versions of the documents from AENA and the Spanish government, respectively, on 17 September and 31 October 2014.

(13) On 3 November 2014, the Commission provided Ryanair with the non-confidential versions of the two documents, informing Ryanair that a new four-week period to reply to the Commission's letter of 2 July 2014 commenced as of that date. On the same date Ryanair asked for a one-week extension of the four-week deadline to comment on the Commission services' preliminary conclusions of 2 July 2014. In the submission of 18 December 2014 Ryanair complained about the Commission services' refusal to grant such extension, to which the Commission replied on 14 January 2015.

3. ASSESSMENT

3.1. General

(14) Based on its assessment, the Commission has decided not to conduct an in-depth investigation. 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 Commission Notice on the handling of complaints.[2]

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

(16) In this context, the Commission may also take into account whether a national court or national competition authority is well-placed to examine the allegations or has actually done so already.

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

(17) In its submission, Ryanair complains that AENA's policy in relation to airport charges and to the denying use of the walk on/walk off boarding procedure constitute an abuse of its dominant positions in the form of excessive pricing, discrimination, tying/bundling, refusal to supply and refusal/inability to satisfy demand.

3.2.1. Relevant market

(18) Ryanair suggests that the relevant market is that for the provision of airport services in Spain. 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.[3] The determination of the scope of the relevant *geographic* market involves an analysis of the individual airports which are substitutable to each other, primarily considering their individual catchments areas.[4]

(19) AENA is a Spanish state owned company entrusted with the management, coordination, operation, maintenance and administration of the large majority of airports in Spain, including the airports of Alicante and Malaga; therefore, an in-depth analysis of the catchment areas of specific airports is not required.

(20) Moreover, considering the importance of Spain within the European air transport and tourism sector, in particular for leisure passengers, it is unlikely that airports in neighbouring countries (e.g. Portugal) would be considered - by airlines and passengers - as full substitutes.

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

[3] 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 - Finnish airports [1999] OJ L 69/24; Spanish airports [2000] OJ L 208/36.

[4] See for example Case COMP/M.4439 Ryanair/Aer Lingus.

(21) In any event, even the narrowest definition of the relevant market would not alter the Commission's conclusions. Therefore, in the preliminary assessment comprised in the letter of 2 July 2014 the Commission concluded that, in the present case, the exact definition of the relevant market could be left open.

(22) In its submissions of 1 and 19 December 2014 Ryanair did not contest such preliminary conclusion. Therefore, the definition of the relevant market can be left open as stated in the letter of 2 July 2014.

3.2.2. Dominant position

(23) Ryanair claims that AENA has a monopoly on the market for airport services in Spain, and that therefore it has a dominant position within the meaning of Article 102 of the Treaty.

(24) 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.[5]

(25) Considering that AENA is the manager of almost all Spanish airports, AENA is an unavoidable trading partner and it is highly likely to have a dominant position in this segment. In the letter of 2 July 2014, the Commission took the view that as far as the assessment of this case is concerned, it was not necessary to come to a final conclusion on this point.

(26) In its submissions of 1 and 19 December 2014 Ryanair did not contest such preliminary conclusion. Therefore, the assessment of the dominant position carried out in the letter of 2 July 2014 can be confirmed.

3.2.3. Abuse of dominant position

a. Background: AENA's forecasting model and investments in the Spanish airport infrastructure

(27) AENA, as a public body, historically set airport charges at a cost based on the "maximum" real or foreseeable cost of the service which does not account for the logic cost recovery alone.[6] AENA operates under a legal framework designed to recover costs generated through the provision of services including operating expenses, capital cost and deficit adjustment.

(28) As already stated in the letter of 2 July 2014, AENA undertook a large-scale investment programme between 2001 and 2011 to increase capacity at Spanish airports. A large part of this investment was not covered by the airport charges imposed under the previous charging regime, which caused significant losses. In the period 2007-2012, the coverage of costs was between [redacted] and [redacted][7]

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

6 Response of the Spanish Ministry of Public Works and Transport, p. 2.

7 Response of AENA, Annex II.

(29) Between 2001 and 2011, the total traffic at AENA's airports increased from 144.6 million passengers to 204.3 million passengers on annual basis, while the highest level was reached already in 2007 with 210.5 million passengers.[8] In the same period, the traffic at Madrid Barajas airport increased from 34 million to 49.7 million passengers with a peak at 52 million in 2007. Passenger numbers increased from 20.7 million to 34.4 million annually at Barcelona El-Prat airport.

(30) In the letter of 2 July 2014, the Commission clarified that its preliminary assessment was made by taking into account the overall investments made into the Spanish airport infrastructure between 2001 and 2011, the significant passenger increase that occurred at the same time, and that the infrastructure investments were decided at a time when medium- and long-term traffic growth expectations were high.

(31) In its replies of 1 and 19 December 2014, Ryanair submitted two reports: the first one - made by an air transport-specialised consultant firm - analyses the relationship between actual traffic performance and AENA's investment strategy, focusing on a sample of selected airports in Spain (namely Malaga, Alicante, Valencia, Ibiza and Santiago). The second one is a special report of the European Court of Auditors concerning European airport infrastructure investment.

(32) The conclusion of the first report is that AENA failed *i)* to make robust assumptions when developing the forecasts used to underpin infrastructure planning and *ii)* more importantly, to update such forecasts prior to commencing developments. The report claims that this led to the building of unnecessary infrastructure at AENA's airports, with the result that carriers and customers were forced to pay higher airport charges to cover the costs of the infrastructure they have not requested or needed. In particular this would be the case at Malaga and Alicante where - according to the report - AENA should have stopped or reduced the scale of its original investment plans as actual figures clearly showing a downturn in the number of airport passengers and a substantial switch from full-service carriers to low-fare ones were progressively being made.

(33) As to the European Court of Auditors' study, it concludes that the EU-funded investments in airports produced poor value for money: too many airports, often in close proximity to each other, were funded and, in many cases, they were oversized. Only half of the examined airports succeeded in increasing their passenger numbers and improvements in customer service were not achieved. The Court finally recommends that in the 2014-2020 period the Commission should ensure that Member States only allocate EU funds to infrastructures in those airports which are financially viable and for which investment needs have been properly assessed and demonstrated.

(34) Preliminarily, as to the relevance of these reports in the assessment of the present case, it has to be restated that while the investments into Spanish airports constitute an important factor in determining whether there may be an infringement of Article 102 of the Treaty, it is however not the role of the European Union's antitrust policy to evaluate the economic rationale of AENA's investment plans taken several years ago in light of the economic forecasts and the observed trends.

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[8] Based on statistics from AENA's website.

(35) In particular, the report prepared by the consultant firm simply emphasizes that AENA failed to properly take into account various relevant factors when making passenger forecasts. Yet it does not propose an alternative model by means of which AENA could have obtained more accurate figures. In other words, it is only a pure *ex-post* exercise of the inaccuracy of AENA's forecasting model based on the comparison between predicted figures and actual ones. Nor does it consider whether, and to what extent, AENA could have ceased or amended its new infrastructure plans once the process had already started.

(36) The European Court of Auditors' report shows a broad picture of the degree of ability of some EU Member States (or their implementing agencies) of managing the airport infrastructure projects and of creating value using the European Union's funds. This general analysis, though rather negative and pointing at some individual cases of wrongdoing,[9] does not provide any guidance on the compatibility of the situations examined with the European antitrust rules.

b. Excessive pricing

(37) In the submission of 11 May 2012 and in the later supplements, Ryanair argued that at Spanish airports, it is forced to pay higher airport charges than those paid in the rest of Europe. Furthermore, AENA has increased airport charges in the past 10 years consistently and with no objective justification, though in the rest of Europe they have generally been decreasing. Ryanair held that this increase has been aimed at recouping the cost of new, expensive, oversized and unnecessary infrastructures which are neither required nor used by Ryanair. In Ryanair's view, as low-fares airlines would not derive any advantages from these high levels of infrastructure, AENA's charges have no reasonable relation to the economic value of the service provided, and are therefore excessive. Finally, Ryanair alleged excessive pricing also in relation to airbridges considering that the use of these facilities has no economic value to Ryanair.

(38) As Ryanair noted, in the European Union competition law, a price is excessive when it bears no reasonable relation to the economic value of the product supplied.[10] 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 so, it has to be considered '*whether a price has been imposed which is either unfair in itself or when compared to competing products*'.[11]

(39) In the preliminary assessment, the Commission concluded that with respect to the price-cost comparison, Ryanair did not provide any evidence showing that the airport charges do not reflect the actual costs related to previous investments into the Spanish airport infrastructure. Indeed, Ryanair does not contest that, on the basis of publicly available financial information, AENA did not report excessive profits. Instead,

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[9] Amongst the airports analyzed in the report there are eight Spanish airports, namely Córdoba, Vigo, Furteventura, La Palma, Murcia, Badajoz, Burgos and Madrid-Barajas; however neither Alicante nor Malaga airports are scrutinized.

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

[11] Ibid, para. 252.

Ryanair claims that the charges are excessive in relation to the (lower) level of services that Ryanair actually desires or the level that existed before these infrastructural investments were made. This is however not the relevant benchmark for excessive pricing under Article 102 of the Treaty. As a result, the price-cost comparison test is not met.

(40) The same line of argumentation applies to the pricing for the use of airbridges. The mere fact that Ryanair would prefer to use the walk-on/walk-off boarding procedure without any additional fees cannot render the airbridge user charge abusive in the form of excessive pricing. Ryanair has not provided, either in the initial submissions or in its replies of 1 and 19 December 2014, any facts supporting the conclusion that the fee for the use of AENA's airbridges bears no reasonable relation to the economic value of the product supplied.

(41) In any case, the Commission notes that the AENA airport charges will be frozen with effect as of 1 March 2015 and with indefinite validity.[12]

(42) In the light of the above, the preliminary conclusion contained in the letter of 2 July 2014 can be confirmed and the Commission is of the view that there is a low likelihood of finding an infringement of Article 102 in the form of excessive pricing as regards the airport charges and the use of airbridges.

c. Discrimination

(43) Ryanair claimed that AENA discriminates against Ryanair by applying identical conditions (i.e. charging all airlines for the use of airbridges) to unequal transactions (i.e. to both low-fares airlines and full services airlines). In Ryanair's opinion, AENA should not impose the use of airbridges at various Spanish airports regardless of the differences in airlines' individual business models and operational requirements.

(44) In the letter of 2 July 2014, the Commission preliminarily considered that there was a low likelihood of finding an infringement of Article 102 of the Treaty in the form of discrimination since all airlines receive and pay for the same type of services. The fact that Ryanair would prefer a different service, or not to receive certain services at all, does not render the treatment 'unequal'. In fact, AENA's fee policy does to some extent reflect the different airline business models: the airbridge use fee includes a variable element depending on the time spent by the aircraft in the parking position, the weight of the aircraft and other individual factors. The time-related pricing element is calculated on a per 15-minute basis, so that low-frills airlines using airbridges for a shorter period will have to pay a lower charge compared to full service airlines. In case of Alicante Airport, this was indeed reflected in the average airbridge fee per passenger of [redacted] i.e. [redacted] of the total average per passenger fee paid by Ryanair at this airport (2013) (see footnote 20). In addition, the mere fact that Ryanair would prefer more differentiated treatment for commercial reasons is not a sufficient basis for a finding of discrimination.

(45) In its submission of 1 December 2014, Ryanair argued that the Commission's preliminary assessment was incorrect since Ryanair - as well as the other low-cost

[12] https://www.boe.es/boe/dias/2014/12/30/pdfs/BOE-A-2014-13612.pdf

carriers - is *forced to use* AENA's services instead of *receiving* a service. Furthermore, Ryanair claimed that its request to use lower specification infrastructure is not due to reasons of a commercial nature but rather to operational reasons given that the airbridges turnaround time is 40% higher than the one feasible using the walk-on/walk-off procedure. Recalling the precedent set out in *United Brands v. Commission* Ryanair considers that this is sufficient for a finding an infringement of Article 102 TFUE.

(46) Ryanair's argument cannot be accepted. The choice of Ryanair to use a particular operational model is inherently correlated with the business model it adopts. Indeed the operational requirements are certainly affected and, up to some extent, determined by commercial decisions. In this regard, Ryanair as well as the other carriers may choose which services and facilities, among those available at the different Spanish airports,[13] are more in line with the business model they apply. Moreover, as reported in the submissions of 5 September and 23 October 2013, at many Spanish airports - including Alicante - Ryanair is now allowed to use the walk-on/walk-off procedure[14]. This allows Ryanair to choose the most efficient embarking/disembarking procedure according to its operational and business model. Therefore, in its letters of 1 and 19 December 2014 Ryanair did not add any new relevant arguments to the fact that AENA's alleged refusal to allow Ryanair to operate as it requires would be incompatible with the European competition law.

(47) In the light of these elements, the Commission confirms its preliminary conclusions that in the present case there is a low likelihood of finding an infringement of Article 102 of the Treaty in the form of discrimination.

d. Bundling

(48) Ryanair contended that in addition to the basic airport services, AENA imposes on Ryanair (and other low-fares airlines) the unnecessary use of airbridges, a service that Ryanair does not require or wish to purchase. In Ryanair's view, this represents 'unlawful tying' of the product in relation to which AENA is the dominant supplier (provision of basic airport infrastructure in Spain) to another product (use of airbridges).

(49) For tying or bundling to occur, there have to exist two distinct, identifiable products which are sold together to customers.[15] On a preliminary basis, it may be that the market for the provision of airport services (provision of infrastructure for landing and

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[13] The options generally available at AENA airports are: 1) contact stands with an airbridge (as in the present case); 2) remote stands, combined with bus transfer; and 3) contact stands without airbridge (no additional charge). The last option is only available at very few airports. All of these options are used by Ryanair across AENA's airports, subject to availability.

[14] Albeit it still has to pay airbridge stand changes as it blocks the contact stand space, see recital (52) and footnote 19.

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

take-off) is sufficiently distinct from the various ground handling activities provided at an airport.[16]

(50) Nevertheless, it has to be emphasised that, for a given behaviour to qualify as exclusionary tying or bundling, the dominant undertaking has to be liable to foreclose competition.[17] In the present case no such foreclosure of a competitor can occur as AENA does not compete with the airport users, such as Ryanair, in this respect.

(51) In any event, the legality of the practice in question under Article 102 of the Treaty was already raised in national Court proceedings, where Ryanair's action was dismissed and the judgment was not appealed.[18]

(52) Finally, Ryanair also claimed that the fact that at some airports in Spain it had to pay airbridge fees when using a contact stand equipped with an airbridge - even without actually using the airbridge - constitutes a breach of Article 102 of the Treaty. According to AENA's "Price Guide 2014", fees have to be paid for "*the use of an apron position that impedes the use of airbridges to other users*", regardless of whether the airbridge is used or not.[19]

(53) In July 2014, the Commission provisionally considered that there was a lack of European Union interest in further pursuing this alleged infringement for the following reasons: *i)* the Commission was informed by AENA that whenever Ryanair pays fees for using a contact stand equipped with an airbridge while using the walk-on/walk-off procedure, this is because this option was chosen on the basis of safety, operational and capacity reasons, and *ii)* the airbridge fee Ryanair has to pay when applying the walk-on/walk-off procedure on the basis of the AENA Price Guide is very small compared to the total fees Ryanair pays at the relevant airports, namely well below 3% of the average per-turnaround/per-passenger airport charges.[20] Overall, only 12% of all Ryanair passengers at AENA's airports account for the walk-on/walk-off procedure at contact stands equipped with an airbridge.

(54) In its submission of 1 December 2014, Ryanair argued that *i)* the safety reasons invoked by AENA are unjustified since the use of the walk-on/walk-off procedure is permitted throughout the rest of Europe and *ii)* the operational and capacity arguments have arisen only after the building of the new terminal. As to the number of passengers using the walk-on/walk-off procedure, Ryanair said that [redacted] of all Ryanair passengers equates to [redacted] of customers, which is a relevant, sizeable figure.

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[16] See Article 5.4. of the Annex of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ L272, 25/10/1996 p. 36.

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

[18] Juzgado de lo Mercantil No Tres de Alicante, Sede en Elche, Asunto Civil 000346/2011, Sentencia No 41/12.

[19] Section 4 "Use of Airbridges".

[20] Section 4 "Use of Airbridges": the fee per a 15-minute use is between ca. 25 and 33 euro, depending on the airport. For example, at Alicante Airport, the average airbridge fee per passenger - assuming a minimum turnaround time of around 30 minutes and taking into account the double of a Ryanair's flight average passenger number (the airbridge is used to both embark and disembark passengers) - is approximately [redacted] i.e. [redacted] of the total average per passenger fee paid by Ryanair at this airport (2013).

(55) None of these points lead the Commission to reverse its preliminary conclusion. As far as the safety issue is concerned, its appraisal depends on the technical features and structural characteristics of each airport; therefore, an unspecified comparison between the situation in Alicante and some other sites in Spain and that in the rest of Europe cannot constitute relevant evidence for establishing an infringement of the European competition law by AENA. Similarly, the operational and capacity arguments can become relevant and then raised by the airport manager when a new infrastructure is added and the efficient use of airport facilities re-evaluated. Therefore, the fact that AENA used these arguments to handle Ryanair's requests only once the new terminal entered into service in 2011 does not constitute evidence of an unlawful conduct under the European competition law. Finally, Ryanair did not contest the accuracy of the figure contained in the Commission's letter but only its evaluation. In any case, the financial impact of the airbridge use fee on passengers seems to be limited, even considering Ryanair estimate of [redacted] customers being concerned. For example, in Alicante Airport, the average airbridge fee per passenger is approximately [redacted] i.e. [redacted] of the total average per passenger fee paid by Ryanair at this airport in 2013 (see footnote 20).

(56) Based on the elements above, the Commission takes the view that there is a low likelihood of finding a violation of Article 102 of the Treaty in the form of tying and/or bundling. In any event, the possible impact of the alleged infringement on the functioning of the Internal Market would be very limited.

e. Manifest failure/refusal/inability to satisfy demand

(57) Ryanair stated that the demand of low fares airlines and their passengers has distinctive characteristics and alleged that by introducing a 'higher specification' of terminal facilities and the associated cost, AENA failed to satisfy demand of low fares airlines, which carry over [redacted] of all passengers at Spanish airports.[21] In Ryanair's view, the unnecessary service and the associated cost of airbridges denote a manifest failure/refusal/inability to satisfy the demand of Ryanair, wishing to use only services in line with its business model.

(58) The Commission considers that AENA is unlikely to have manifestly failed to satisfy Ryanair's or other low fares airlines' demand. At the airports operated by AENA low-fares airlines do actually obtain airport services which enable them to operate their specific business models, in particular through variable pricing systems, as explained above at recital (44).

(59) In addition, the mere fact that Ryanair would prefer a different treatment for commercial reasons is not a sufficient basis for Ryanair's claim.

(60) In its replies to the Commission's letter of 2 July 2014, Ryanair did not add any further evidence nor did it specifically question the preliminary conclusions reached by the Commission on this issue.

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[21] Ryanair's response of 20 July 2012 p. 5.

(61) In the light of the elements above, the Commission confirms its preliminary conclusions that in the present case there is a low likelihood of finding an infringement of Article 102 of the Treaty in the form of a manifest failure/refusal to satisfy demand.

f. Alleged abuse in relation to AENA's Transfer Incentive

(62) Lastly, Ryanair claimed that AENA's Transfer Incentive providing a [redacted] discount on passenger and security charges for transfer traffic constitutes an abuse of a dominant position as it benefits hub-and-spoke airlines in a discriminatory manner, primarily Iberia, while putting point-to-point airlines (such as Ryanair) at a disadvantage.

(63) In its letter of 2 July 2014, the Commission noted that AENA's Transfer Incentive appears to be very similar to those in place at other airports across the EEA.[22] Following a complaint from Ryanair, the Commission already concluded in relation to a comparable scheme at the Dublin airport that the differences between the point-to-point and transfer passenger groups seemed to make the application of different incentive schemes legitimate for airports.[23] In line with the Dublin Airport case, the AENA's Transfer Incentive is available to all airlines on an objective, transparent and non-discriminatory basis.

(64) In its preliminary conclusion, the Commission took the position that AENA's Transfer Incentive does not infringe Article 102 of the Treaty, in particular as it is available to all airlines operating at a given airport in the same manner. Moreover, any differentiation between point-to-point airlines and network airlines occurs on the basis of objective criteria and in an equal and transparent manner. It should also be noted that point-to-point airlines such as Ryanair can benefit from other types of incentives and discounts to which full services airlines would not be entitled. The mere existence of an incentive scheme involving discounts does not entail an automatic illegality of those programmes.

(65) In its submissions of 1 and 19 December 2014 Ryanair did not contest such preliminary conclusion. Therefore, based on the above, the Commission considers that there is a low likelihood that the Transfer Incentive violates Article 102 of the Treaty.

4. CONCLUSION

(66) 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 complaints against the Spanish government and AENA.

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[22] E.g. Copenhagen, Dublin, Frankfurt, Malta, Munich, Prague, Paris Charles de Gaulle and Orly, Zurich Tokyo Narita, Vienna or Vilnius.

[23] The complaint was rejected by Commission decision of 17 October 2013, Case No COMP/39.886 – Ryanair/DAA-Aer Lingus.

5. PROCEDURE

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

(68) The Commission reserves the right to send a copy of this Decision to the Spanish government and AENA. Moreover, the Commission may decide to make this Decision public on its website, or a summary thereof.[24] Therefore, if you consider that certain parts of this Decision contain confidential information in general or information that would be confidential towards the Spanish government and AENA in particular, I would be grateful if within two weeks from the date of receipt you would inform [redacted] 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 the Spanish government and AENA and/or publish it on its website.

For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

[24] 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.