



EUROPEAN COMMISSION

Brussels, 23.7.2014

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PUBLIC VERSION

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**Subject: State aid SA.24221 – C/2011 (ex NN/2011; CP 281/2007) – Austria – Klagenfurt Airport – Ryanair and other airlines**

Sir,

The Commission wishes to inform Austria that, after having examined the information supplied by your authorities in relation to the measure mentioned above, it has decided to extend the investigation procedure laid down in Article 108 (2) Treaty on the Functioning of the European Union ("TFEU").

## **1. PROCEDURE**

- (1) By letter of 5 October 2007 a competitor of Ryanair on the European air passenger transport market, which has requested not to have its identity disclosed, lodged a complaint with the Commission alleging that the Irish Airline Ryanair plc (hereinafter: "Ryanair") has been granted unlawful State aid by the Federal State of Carinthia, the City of Klagenfurt, Kärnten Werbung Marketing & Innovationsmanagement GmbH (hereafter: "Kärnten Werbung") and the Airport of Klagenfurt via its operating company Kärntner Flughafen Betriebsgesellschaft mbH.
- (2) By letter of 11 October 2007 the Commission has forwarded the complaint to Austria and requested information. The Austrian authorities responded by letter dated 2 January 2008.

Seiner Exzellenz Herrn Sebastian KURZ  
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- (3) The Commission requested additional information from the Austrian authorities by letters dated 15 November 2010 and 24 March 2011. The Austrian authorities responded by letters dated 28 January 2011 and 30 May 2011.
- (4) On 8 April 2011 the Commission invited Ryanair to provide certain information. Ryanair submitted the information by letter dated 4 July 2011. On 15 July 2011 the Commission forwarded the submission of Ryanair to the Austrian authorities, which provided their comments by letter of 20 September 2011.
- (5) After having examined the information supplied by the Austrian authorities, on 22 February 2012, the Commission decided to open the investigation procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union (“TFEU”). The decision to open the formal investigation procedure (“the opening decision”) was transmitted to Austria on the same date and was subsequently published in the Official Journal of the European Union<sup>1</sup>.
- (6) By letter dated 13 March 2012 Austria requested the Commission to extend the deadline to submit its observations about the Commission's decision to open the investigation procedure. The Commission granted an extension of the deadline by letter of 19 April 2012. Austria submitted its observations on 16 May 2012, 11 June and 31 August 2012.
- (7) By letters dated 20 June 2012, 5 October 2012, 3 May 2013 and 28 May 2014 the Commission forwarded third parties' observations to Austria.
- (8) By letter dated 24 February 2014 the Commission invited Austria to submit comments on the application of the new EU Guidelines on State aid to Airport and Airlines<sup>2</sup> (“the 2014 Aviation Guidelines”) to this investigation. Austria replied by letter of 20 March 2014.
- (9) By letter of 28 May 2014 the Commission requested further information from Austria regarding a marketing contract between the airport Klagenfurt and Ryanair signed on 22 January 2002. The Commission had previously learned from this contract by a submission of a third party (Ryanair).
- (10) By letter of 11 June 2014 Austria replied to this request for further information.

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<sup>1</sup> Commission decision SA.24221 (ex CP 281/2007) – Austria – Klagenfurt Airport – Ryanair and other airlines, OJ C 233 of 3.8.2012, p.28.

<sup>2</sup> OJ C99, 4.4.2014, p.3.

## **2. DESCRIPTION OF THE FACTS RELEVANT FOR THE EXTENSION OF THE INVESTIGATION PROCEDURE**

### **2.1. The opening decision**

- (11) The opening decision was based on the information at the disposal of the Commission at the moment of its adoption. For the general description of the facts regarding the Klagenfurt airport and the entities involved, also relevant for this decision, reference is made to the description of facts in the opening decision.<sup>3</sup>
- (12) The measures subject to opening decision of 22 February 2012 set out on the basis of the information at the disposal of the Commission at that date, can be summarised as follows:
- the financing of KFBG
  - the incentive scheme introduced in 2005 and its retroactive application for Austrian Airlines
  - the 2002 agreements with Ryanair and its subsidiary LeadingVerge.Com Ltd.
  - the 2006 agreements with Ryanair and its subsidiary Airport Marketing Services (Jersey) Ltd.
  - the financial contributions to TUIfly and Air Berlin
- (13) In the opening decision the Commission considered that all the measures in question might contain elements of State aid under Article 107(1) TFEU and it expressed the doubts on the compatibility of these potential illegal aids with the internal market.
- (14) As explained in sub-Section 7.3 and 8.2 of the opening decision, among other measures, the Commission opened the formal investigation procedure on:
- an airport services agreement (“the airport services agreement”) concluded on 22 January 2002 by Kärntner Flughafen Betriebs GmbH (hereafter "KFBG"), the operator of Klagenfurt airport, and Ryanair. Ryanair is obliged under the Agreement to operate passenger air services between Klagenfurt Airport and London-Stansted Airport commencing around the date of entering into force of the Agreement on at least a daily basis with low fares. Ryanair pays Klagenfurt Airport an all-inclusive fee of EUR 163 per rotation. Klagenfurt Airport is obliged to provide airport terminal and handling services for the services of Ryanair, to provide public relations and marketing functions with regard to the services of Ryanair (including press conferences) and to procure the payment by DMG to Ryanair’s media consultants of an amount of EUR 145,000 per year in respect of the daily rotation (see also points 45 to 53 of the opening decision).

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<sup>3</sup> See Section 2 "Description of facts" in the opening decision

- a marketing contract between Destinations Management GmbH (hereafter "DMG") and Leading Verge.com (hereafter "LV") signed on 22 January 2002 ("the first marketing agreement"). DMG is a 100% subsidiary of KFBG. LeadingVerge.com is a 100% subsidiary of Ryanair. DMG appoints LV to initiate marketing measures aimed at making the province of Carinthia better known in the English speaking world and to arrange for legally licensed air carriers to provide new scheduled passenger air services from locations within the United Kingdom and/or continental Europe to Klagenfurt airport. LV undertakes to procure the introduction and continuation of the Services and to generate a promotional plan and web links. DMG pays EUR 145,000 per year in respect of the daily rotation (see also points 54 to 59 of the opening decision).

## **2.2. Grounds for the extension of the investigation procedure**

- (15) A study submitted by Oxera Consulting on behalf of Ryanair in the context of the pending investigation mentions at several points another marketing contract signed on 22 January 2002 between DMG and Airport Marketing Services Limited (hereafter "AMS"). AMS is a 100% subsidiary of Ryanair. As the Commission was not aware of any agreement concluded between AMS and KFBG or DMG, it invited Austria to clarify whether such agreement existed and whether this was a different agreement from the above-mentioned marketing agreement with LV, already subject to the formal investigation procedure.
- (16) Austria confirmed the existence of this other marketing contract with AMS ("the second marketing agreement") and also mentioned the existence of an additional marketing contract ("the third marketing agreement"), concluded between DMG and LV also on 22 January 2002, and also so far unknown to the Commission. This third marketing contract has the form of a side letter to the first marketing contract between DMG and LV, which was the only marketing contract known to the Commission at the moment of the opening of the investigation procedure.
- (17) On the basis of the most recent information submitted by the Austrian authorities<sup>4</sup> it appears that in 2002 DMG signed not only the marketing contract of 22 January 2002 with LV, but also on the same day a marketing contract as a side letter to this marketing contract as well as an additional marketing contract with AMS.
- (18) The two additional contracts were not subject to the opening decision, as the cited measures "the 2002 agreements with Ryanair and its subsidiary LeadingVerge.com Ltd." in the opening decision only covered the airport services agreement of 22 January 2002 with Ryanair and the marketing contract between

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<sup>4</sup> Letter of the Austrian authorities of 11.6.2014 (Federal State of Carinthia) and relative annexes.

DMG and LV of 22 January 2002. No information about any other marketing contracts or side letters was at that date at the disposal of the Commission.

(19) The Commission considers thus necessary for an accurate analysis of all the contracts of 2002 between KFBG and its subsidiaries and Ryanair and its subsidiaries, to extend the scope of the investigation procedure to:

- i) the marketing contract between DMG and AMS of 22 January 2002 (the second marketing contract)
- ii) the side letter to the marketing contract between DMG and LV of 22 January 2002 (the third marketing agreement)

### **2.3. Description of the measures under the extended investigation**

#### *2.3.1. The marketing contract between DMG and AMS of 22.1.2002 (the second marketing agreement)*

(20) On 22 January 2012 DMG and AMS signed a marketing agreement which entered into force the same date for a duration of five years with a possible extension for additional five years.

(21) DMG appoints AMS to "establish, on or before 1 May 2002, and operate two links on [www.ryanair.com](http://www.ryanair.com) to websites chosen by DMG, which profile the attractions of the Federal State of Carinthia. AMS will provide additional services if the Parties so decide according to Articles 5.1. and 5.2."

(22) DMG pays for the described services of AMS EUR 200.000 per annum.

#### *2.3.2. The side letter of the marketing contract between DMG and LV of 22 January 2002 (the third marketing agreement)*

(23) The side letter of the marketing contract between DMG and LV was signed by both parties on 22 January 2002 and entered into force on the same day.

(24) It was agreed between the parties that "in relation to the contract between LV and DMG dated 22 January 2002 a further marketing payment for additional and intensified marketing measures within the duration of contract, in the amount of EUR 1.000.000 will be payable by DMG to LV on 1 May 2002."

### **3. COMMENTS FROM AUSTRIA**

(25) Austria regrets in its submission of 11 June 2014 the omission of the second marketing agreements from any of its previous submissions in this case. Austria explains the omission with the fact that this marketing contract cannot be found in the accounting system of KFBG. Moreover, Austria declares that no account statements can be found showing the yearly payment of EUR 200.000.

- (26) Austria explains that consequently this contract has not been taken into consideration in the calculations presented in previous submissions in relation to the application of the market economy operator principle to the agreements at issue.
- (27) At the same time Austria informed the Commission of the existence of the third marketing agreement and provided a copy of this document. It was not explained why this side letter had not been submitted previously during the ongoing investigation procedure. According to Austria, the payment of EUR 1.000.000 from the Federal State of Carinthia was first made to DMG and then from DMG to AMS.
- (28) According to Austria, it seems that the one-off amount of EUR 1.000.000 foreseen in the side letter was supposed to replace the amounts of EUR 200.000 foreseen during the five years of application of the marketing contract between DMG and LV, as the amount of EUR 1.000.000 corresponds to the total amount of the marketing contract between DMG and LV. Austria declared that no more documentation exists about the replacement of the marketing contract with the side letter. As the amount of EUR 1.000.000 did not come from the budget of the KFBG, but was paid from the budget of the Federal State of Carinthia, it was not listed in the annual balance sheets of KFBG.

#### **4. ASSESSMENT OF THE EXISTENCE OF AID**

- (29) For the assessment of the present case, the Commission first refers to the analysis made in the opening decision. The analysis set out in this extension decision complements the analysis carried out in the opening decision as regards the new measures taken under scrutiny, without any prejudice of all considerations therein expressed.
- (30) The Commission has analysed whether the second and third marketing agreements of 22 January 2002, between, respectively, DMG and AMS, and DMG and LV, may qualify as State aid.
- (31) By virtue of Article 107 (1) TFEU "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."
- (32) The criteria laid down in Article 107 (1) TFEU are cumulative. Therefore, in order to determine whether the measure in question constitutes State aid within the meaning of Article 107 (1) TFEU all of the following conditions need to be fulfilled. Namely, the financial support should:
- be granted by the State or through State resources,
  - favour certain undertakings or the production of certain goods,
  - distort or threaten to distort competition, and

- affect trade between Member States.

Preliminary analysis: joint assessment of the airport service agreement and the various marketing agreements

- (33) As regards contracts concluded between KFBG and Ryanair on 22 January 2002 (the airport service agreement) and DMG and, respectively, LV and AMS, of 22 January 2002 (the three marketing agreements), the Commission considers at this stage that the two types of contracts have to be assessed together, as Ryanair and LV/AMS formed a single beneficiary of the measures concerned at the time when each of the contracts was signed.
- (34) According to case T-196/04, *Ryanair Ltd v Commission*, when applying the market economy operator test the Commission has to envisage the commercial transaction as a whole to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy.<sup>5</sup> The Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context.<sup>6</sup> The Commission has therefore to assess in the present case whether the Federal State of Carinthia and KFBG together have acted as rational operators in a market economy.
- (35) The Commission observes that the marketing support provided for in the second marketing agreement consists in the provision of internet links by AMS in order to promote the Federal State of Carinthia. This promotion is linked to the routes operated by Ryanair from Klagenfurt and therefore the decision to conclude or not a marketing contract with Ryanair/AMS is directly linked to the decision to conclude also an airport services contract. Moreover, the Commission observes that the second marketing agreement has been concluded with the company which is 100% owned by Ryanair and signed on the same date as the airport service agreement.
- (36) As regards the third marketing agreement, the Commission observes that the marketing support consists in the provision of internet links by LV in order to promote the Federal State of Carinthia. This promotion is linked explicitly to routes operated by Ryanair from Klagenfurt ("the services") and therefore the decision to conclude or not a marketing contract with Ryanair/LV is directly linked to the decision to conclude also an airport services contract. Moreover, the Commission observes that the third marketing agreement has been concluded with the company which is 100% owned by Ryanair and signed on the same date as the airport service agreement.
- (37) Therefore, the Commission considers at this stage that the airport services agreement, the first, second and third marketing agreements should be assessed

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<sup>5</sup> Case T-196/04 *Ryanair Ltd v Commission*, [2008] ECR II-3643 (Charleroi judgment), paragraph 59.

<sup>6</sup> Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraph 270.

together as one single measure (“the 2002 measure”). The Commission invites Austria and third parties to submit their comments on this point.

#### State resources and imputability to the State

- (38) The airport services agreement was concluded by KFBG and Ryanair. The first, second and third marketing agreements were concluded between DMG a 100% subsidiary of KFBG and two 100% subsidiaries of Ryanair.
- (39) On 22 January 2002 KFBG was owned to 60% by the Federal Republic of Austria, to 20% by the Federal State of Carinthia and to 20% by the city of Klagenfurt. KFBG and DMG were therefore public undertakings according to Article 2 (b) of Commission Directive 2006/111/EC.<sup>7</sup> Therefore, their resources should be regarded as State resources.
- (40) At this stage the Commission takes the preliminary view that the second and third marketing agreements are imputable to the State and involve State resources, as well as the airport services agreement and the first marketing agreement. It is referred to the assessment in on State resources and imputability to the opening decision (in particular points 136 to 146 and 172), which applies *mutatis mutandis* also to the second and third marketing agreements.

#### Notion of Undertaking and Economic Activity

- (41) Ryanair, AMS and LV are undertakings in the sense of EU competition law.

#### Economic Advantage

- (42) In order to verify whether Ryanair, its subsidiaries LV and AMS have benefited from an economic advantage through the 2002 measure, the Commission applies the criterion of the “market economy investor principle” (the MEO test).
- (43) According to the principles established in the case law the Commission has to compare the conduct of KFBG and its subsidiary DMG to a market economy operator guided by prospects of profitability. In accordance with settled case-law, it is necessary to assess whether, in similar circumstances, a private airport operator would have entered into same or similar commercial arrangements as KFBG and DMG, having regard in particular to the information available and foreseeable developments at the date of the measure.
- (44) Regional or policy considerations cannot be taken into account for the purposes of the MEO test, as the Commission has to assess whether the arrangement concluded between the airline and the airport can incrementally contribute, from an ex ante standpoint, to the profitability of the airport.<sup>8</sup>

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<sup>7</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17 - 25

<sup>8</sup> See 2014 Aviation Guidelines, OJ C99 of 4.4.2014, paragraph 61 ff.



- (45) The Austrian authorities have provided the Commission with an *ex ante* cost-benefit analysis of the cooperation with Ryanair from 2002-2005 taking into account the refunded turnaround fees and the marketing fees of the marketing contract of 22 January 2002 between DMG and LV. This analysis comes to the conclusion that the cooperation with Ryanair was profitable. The Commission invited Austria to provide explanations and additional information about this cost-benefit analysis. At this stage, the Commission has not come to a final conclusion as to whether this analysis is a reliable basis for the application of the MEO test, irrespective of the fact that it does not take the second and third marketing agreements into consideration.
- (46) The Commission indeed notes that the second and third marketing contracts were omitted from the cost-benefit analysis. The Commission considers at this stage that this makes the cost-benefit analysis inappropriate in the context of the application of the MEOP, given that the airport services agreement, the first, second and third marketing agreements should be analysed as one single measure.
- (47) The Commission made some preliminary calculations by adding the marketing payments foreseen in the second and third marketing agreements into the costs identified in the cost-benefit analysis as submitted by Austria for the years 2002-2005. The cost-benefit analysis, adjusted in this manner, shows that the 2002 measure was unlikely to be profitable on an *ex ante* basis: The cost-benefit analysis gives an operating result of 172.006 EUR. The deduction of the marketing payments of 5x 200.000 EUR (second marketing agreement) and 1.000.000 EUR (third marketing agreement) from this operating result does not lead to a profitable result. The preliminary calculation therefore suggests that there is state aid.

Cost-benefit-analysis as submitted by Austria:

<b>Kosten-Nutzen-Analyse-Kooperation Ryanair</b>					
		4	3	2	1
		bis 29.10.2005		ab 27.06.2002	
	Gesamt	2005	2004	2003	2002
Passagiere abfliegend	152.191	41.347	44.865	39.020	26.959
Rotationen	1.218	301	366	362	189
MTOW	82.032	20.167	24.271	23.261	14.333
<b>EINNAHMEN</b>					
Aviation		1.425.764	1.619.279	1.364.744	819.571
Turnaround-Gebühren erstattet (lt. EU-Ausschreibung)		-1.357.954	-1.520.013	-887.495	-504.617
Non Aviation - Mehreinnahmen (pro abflieg. Passagier)		7	7	7	7
		289.429	314.055	273.140	188.713
<b>Einnahmen saldiert</b>		<b>357.239</b>	<b>413.321</b>	<b>750.389</b>	<b>503.667</b>
<b>AUSGABEN</b>					
<u>Projektkosten inkl. Infrastrukturkosten je Bezugsgröße</u>					
Traffic-Handling		-102.942	-125.172	-123.804	-64.638
(BAB 2009) passagierabhängig	0,47	-19.433	-21.087	-18.339	-12.671
(BAB 2009) Mtow-abhängig	10,74	-216.594	-260.671	-249.823	-153.936
Marketingvertrag Leading Verge und DMG vom 23.05.2002		-121.000	-145.000	-145.000	-72.500
<b>Ausgaben saldiert</b>		<b>-459.969</b>	<b>-551.929</b>	<b>-536.967</b>	<b>-303.745</b>
<b>ÜBERSCHUSS</b>	<b>172.006</b>	<b>-102.730</b>	<b>-138.608</b>	<b>213.422</b>	<b>199.922</b>
<b>ÜBERSCHUSS kumuliert</b>		<b>172.006</b>	<b>274.736</b>	<b>413.344</b>	
<b>Die Kosten-Nutzen-Analyse ergibt einen kumulierten Überschuss in Höhe von T€ 172.</b>					

(48) The Commission invites Austria to explain whether the cost-benefit analysis was made at the time of the decision and on what basis the decision was made to include only the first marketing agreement into the analysis and not the second and third marketing agreements.

(49) In view of what precedes, the Commission considers on a preliminary basis that the 2002 measures conferred an economic advantage on Ryanair and its subsidiaries AMS and LV.

#### Selectivity

(50) Article 107 (1) TFEU requires that a measure, in order to be defined as State aid, favours "certain undertakings or the production of certain goods". In the case at issue, the measure only benefits Ryanair and its subsidiaries. Thus it is selective within the meaning of Article 107 (1) TFEU.

#### Distortion of competition and affectation of trade

(51) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, the latter must be regarded as affected by that aid.<sup>9</sup> In accordance with settled case

<sup>9</sup> Case 730/79, Philip Morris [1980] ECR I-2671, para 11

law<sup>10</sup>, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

- (52) The measures described above are capable of affecting competition and trade since it benefits an airline, together with its subsidiary, active on the intra-EU air transportation market. As the market of air transport is characterised by intense competition, it follows that an aid to an airline affects trade between Member States and distorts or threatens to distort competition in the air transport sector.

### Conclusion

- (53) With the information available at this stage, the Commission concludes that the 2002 measure constitutes State aid within the meaning of Article 107(1) TFEU.

## **5. ASSESSMENT OF THE COMPATIBILITY OF THE AID**

- (54) The Commission must assess if the aid identified above can be found compatible with the internal market. According to the case-law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.<sup>11</sup>

- (55) According to the 2014 Aviation Guidelines, *“In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014.”*<sup>12</sup>

- (56) The 2005 Guidelines contain the same principle<sup>13</sup>. As the aid measures at stake came into effect before the entry into force of the 2014 Guidelines and the 2005 Aviation Guidelines, their compatibility with the common market has to be assessed under the rules applicable at the moment when the aid started to be paid. The aviation State aid guidelines of 1994 are inapplicable to the case at point as they limit the possibilities to grant operating aid for the provision of air routes to clearly delimited cases, which are not fulfilled in the present case.

- (57) The Commission has therefore to assess the aid measures in the present case directly under Article 107(3) (c) TFEU in accordance with the Commission's past decisional practice.

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<sup>10</sup> Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, para 46

<sup>11</sup> Case C-364/90, *Italy v Commission* [1993] ECR I-2097, paragraph 20

<sup>12</sup> 2014 Aviation Guidelines, paragraph 174

<sup>13</sup> Paragraph 85 of the 2005 Aviation Guidelines, OJ C 312, 9.12.2005, p.5.

(58) It is constant practice of the Commission that aid can be declared compatible with the common market if:

- i) it contributes to an objective of common interest;
- ii) it is necessary and proportional (providing for sanctions for non-implementation) to the additional costs of launching the route and has an incentive effect;
- iii) it is granted in a transparent and non-discriminatory manner;
- iv) it does not distort competition to an extent contrary to the common interest.

#### Contribution to an objective of common interest

(59) The Commission recognises that aid of the type considered in this case may contribute to an objective of common interest, when it constitutes start-up aid that allows the establishment of new viable routes at a regional airport.

(60) Klagenfurt airport was, throughout the relevant period, an airport of rather limited size. Start-up aid granted to airlines departing from this airport could therefore in principle fulfil an objective of common interest. The Commission notes however, that the air service was interrupted in 2005 and has doubts, whether the route established by Ryanair could be considered as viable.

#### Necessity, Proportionality and Incentive effect

(61) Start-up aid has to be limited in time, proportional to the goal to be achieved and digressive in order to meet its objective, that is to persuade air carriers to set up new routes from regional airports which will become economically viable in the medium-term, and provide an incentive effect, that is to encourage air lines to establish links and increase their efficiency. The Commission considers that the Austrian authorities have not shown that the intensity of the aid is necessary for making the new routes economically viable. Hence the Commission has at this stage doubts as to the necessity and proportionality of the aid. With respect to the incentive effect, the Commission considers that due to the absence of a digression of the aid, there is unlikely an incentive effect.

(62) The Commission also notes that there appear to be no sanctions foreseen in case of non-implementation, so that it has doubts whether this criterion is met.

#### Granting of the aid in a transparent and non-discriminatory manner

(63) DMG had opened a public tender for a new route to London in November 2001 which did not result in any offer. According to the information available at this stage, the marketing agreements on 22 January 2002 were negotiated bilaterally and it therefore cannot be excluded at this stage that the possible State aid involved in these agreements was granted following a transparent and non-discriminatory process. The Commission invites Austria and interested parties to comment on this point.

#### No distortion of competition contrary to the common interest

(64) The Commission notes that the aid might have negative effects on other airlines, which might have operated from Klagenfurt airport and which were offered different fees.

(65) In view of these elements, the Commission at this stage has doubts on the compatibility of the potential aid granted to Ryanair and its subsidiaries LV and AMS operating at Klagenfurt airport.

## **6. CONCLUSION**

(66) In view of the preliminary conclusions set up above the Commission doubts whether the measures at stake at Klagenfurt airport do not entail granting of State aid which is incompatible with the internal market.

(67) The Commission invites Austria and third parties to comment on this matter. In this context, the Commission invites Austria and third parties to provide, in particular, the following information:

- clarifications on the rationale behind the conclusion of the second and third marketing agreements in addition and in concomitantly to the first marketing agreement. More generally, the Commission invites Austria and third parties to provide all relevant explanations, relevant internal documents held by the entities concerned by these agreements, as well as all relevant correspondence exchanged between entities concerned by these agreements that could shed light on the context in which the first, second and third marketing agreements were negotiated and concluded;
- comment on whether the airport services agreement, the first, second and third marketing agreements constitute one single measure;
- explanations whether the cost-benefit analysis was made at the time of the decision and on what basis the decision was made to include only the first marketing agreement into the analysis and not the second and third marketing agreements; and
- comments on the possible compatibility conditions of the measure.

## **7. DECISION**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union, requests Austria to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter.

The measures under scrutiny include: 1) the marketing contract between DMG and AMS of 22.1.2002 and 2) the side letter of the marketing contract between DMG and LV of 22.1.2002.

The Commission wishes to remind Austria that Article 108 (3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Austria that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication. The interested parties are also required to supply a non-confidential version of their comments.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. In this context and for the purpose of the protection of confidentiality Austria is invited to consult the undertakings mentioned in the present decision with the aim to ensure that it does not contain information covered by professional secrecy under the above said Commission Communication. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language.

Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Bruxelles  
Fax: +32 2 296 12 42  
Stateaidgreffe@ec.europa.eu

Yours faithfully,  
For the Commission

*Joaquín ALMUNIA*

Vice-President