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Dit nummer bevat bijdragen van:
Annabelle Lepièce
Aniel Bangoer
Hans Houtman
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41 Financing of airport infrastructure under State aid rules: Guidelines and Practice of the European Commission

By Annabelle Lepièce[1]
In collaboration with
Sebastien Engelen

Introduction
Until recently, the public financing of the construction or the enlargement of airport infrastructure was considered by the European Commission as a general measure of economic policy which fell outside the scope of the EC Treaty rules on State aid.
In 2005, the European Commission adopted the Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports[2] (hereafter the 'Guidelines') which completely overturned that principle.
Airport operators now have to bear all the financing and construction costs of the infrastructure they manage. Under certain conditions, regional airports may receive aids which have to be notified and formally authorized by the Commission.
After brief description of the notion of State aid in Chapter I and a presentation of the Commission prior practice on the financing of airport infrastructure under Chapter II, Chapter III will describe the new policy of the Commission, first on the existence of State aid, then on the conditions under which an aid in favor of regional airports may be authorized by the Commission.

1. Preliminaries: The notion of State aid
State aid rules are set out under Articles 87 and 88 of the EC Treaty.
Under Article 87 (1) EC, 'save as otherwise provided in this Treaty, 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 common market'.
In order to determine whether a measure constitutes State aid within the meaning of that disposition, all of the following conditions have to be fulfilled:
- The public financing confers an abnormal economic advantage whatever its form to an undertaking, exercising an economic activity (grants, interest and tax relief, guarantees, government holdings of all or part of a company, or the provision of goods and services on preferential terms, etc.);
- the financial support is granted by the State or through State resources (for example, through the capital of a public company);
- it favours certain undertakings or the production of certain goods (criteria of selectivity);

1 Annabelle Lepièce is a member of the Brussels' bar and a senior associate at CMS DeBacker. She is specialized in Competition law and State aid. Annabelle_lepiece@cms-db.com.
2 OJ C 312, 9.12.2005, p. 1.

– it distorts or threatens to distort competition and it affects trade between Member States.

In the Guidelines, the Commission justified its new approach towards the public funding in favour of airports on the 'Aéroports de Paris' case.[3] The Commission considers that all airports are undertakings, exercising an economic activity within the meaning of Article 87 (1) EC.[4]

According to the EC Court of Justice, activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. In airports, such activities include safety, air traffic control, police, customs, etc.[5]

Article 87 (2) and (3) EC provides for derogations to the incompatibility of aid with the Common Market. State aid which may be authorized are for example regional aid, aid to SME, training aid, employment aid, rescue and restructuring aid, research and development aid or aid for the protection of the environment.

In principle, State aids have to be notified to the Commission and may not be granted to the beneficiary before their formal approval under Article 88 (3) unless they fall under the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (hereafter the 'General block exemption Regulation').[6] Aids to airport infrastructure do not fall under the General block exemption Regulation and must be therefore notified to the Commission prior to their implementation.

State aids which have not been authorized and which are not covered by the General block exemption Regulation are illegal under Article 88 (3) EC and both the Commission and national judges may order the recovery of the aids from the beneficiary.[7]

2. Financing of airport infrastructure prior the Guidelines

In the matter of public financing of airport infrastructure, the 1994 Community Communication on the application of articles [87] and [88] of the EC Treaty and article 61 of the EEA Agreement to State aids in the aviation sector which is still into force,[8] states that 'the construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid. Infrastructure development decisions fall outside the scope of application of this Communication in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.

This general principle is only valid for the construction of infrastructures by Member States and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies[9] when using

3 Judgment of the Court of First Instance of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/98, ECR, p. II-3929, confirmed by judgment of 21 October 2002, *Aéroports de Paris v. Commission*, C-82/01, ECR, p. I-9297. See A. LEPIECE, '*The Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports: Promoting regional airports or creating more legal certainty?*', *Journaal LuchtRecht*, February 2007, p. 11.

4 An economic activity is '*any activity that consists of offering goods or services for sale on a certain market*' (judgment of the Court of Justice of 16 June 1987, *Commission v. Italy*, 118/85, ECR, p. 2599).

5 Point 33 of the Guidelines.

6 OJ L 214, 9.8.2008, p. 3.

7 On 24 July 2003, the Administrative Tribunal of Strasbourg ordered Ryanair to reimburse the illegal aids granted by the Chamber of Commerce of Strasbourg. This judgment was confirmed by the Administrative Appeal Court of Nancy on 18 December 2003. *ADJA*, 23 February 2004, p. 396.

8 OJ C 350, 10.12.1994, p. 5.

9 The French version of the communication uses the term 'airlines'. This disposition of the communication did not therefore aim the airport operator.

the infrastructure. The Commission, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines'.

In 1999, the Commission decided that subsidies for the development and the modernization of Aerelba airport[10] and Manchester airport[11] did not constitute State aid as long as the infrastructure was in the collective interest and open to all airlines without discrimination.

According to the Commission, 'this kind of investment [airport infrastructure] is not intended to earn profits on the capital invested comparable to market rates of return for financial investments, but to generate relevant positive external effects in terms of economic and social development. The rationale of a public investor differs from that of a private one, in that the public investor aims at economic benefits wider than only return on capital invested. This is why, traditionally, aviation as well as infrastructure projects have been funded through public resources. Public-private partnerships are now developing, but the public sector continues to make significant amounts of money available as a reflection of the wider economic benefits of these projects'.[12]

The same year, the Commission announced in its Report on Competition Policy that 'nevertheless, in view of the increasingly important commercial role played by airports, the Commission is conducting a rethink which could call into question its traditional approach whereby aid for building or operating airport infrastructure does not fall within the scope of the Treaty rules on State aid'.[13]

In the Aer Rianta case, the Commission applied in 2001 its new position regarding the operation of an airport and stated that 'in the past the Commission did not perceive the provision of State resources in the form of tax exemptions to airports as affecting trade among Member States and distorting competition, since the provision and operation of airport facilities and services were not clearly identified as a competitive activity. However, the transformation of airports in commercial entities competing with each other is an example of "evolution of the common market" which makes a measure such as a tax exemption become an aid'.[14]

While examining in 2001 a fiscal exemption in favour of the Amsterdam airport,[15] the Commission clearly stated that large airports had become commercial entities competing with each other as a consequence of the liberalization of the air transport sector and that airport operators which were qualified as undertakings under Article 87 (1) EC were not entitled to benefit from fiscal exemption.

The next step for the Commission was to apply State aid rules to the financing of airport infrastructure.

3. The Guidelines on the financing of airports

Introduction

The Commission's new approach to the financing of airport infrastructure

In 2005, the Commission completely reversed its prior policy towards the financing of airport infrastructure.

In the Guidelines, the Commission imposes that the airport operator bears all the financing and construction costs of an airport infra-

10 Commission's decision of 30 March 1999, State aid N 638/1998 – Italy, Aerelba Airport, OJ C 67, 17.03.2004, p. 9.

11 Commission's decision of 14 June 1999, State aid NN 109/1998 – United Kingdom, Manchester Airport, OJ C 65, 13.03.2004, p. 7.

12 Idem.

13 Commission's Report on Competition Policy, 1999, paragraph 299.

14 Commission's decision of 5 October 2001,State aid N 550/2001 – Ireland, AER Rianta, OJ C 38, 12.02.2004, p. 6.

15 Commission's decision of 3 July 2001, State aid E 45/2000 – Netherlands, Schiphol Group, OJ C 37, 11.02.2004, p. 17.

structure.[16] In certain circumstances, regional airports may receive aids which have to be first notified and authorized by the Commission on the basis of imprecise criteria's.[17]

The definition of airport infrastructure
The Commission distinguishes four categories of airport:
- category A: large Community airports, with more than 10 million passengers a year;
- category B: national airports, with an annual passenger volume of between 5 and 10 million;
- category C: large regional airports, with an annual passenger volume of between 1 and 5 million;
- category D: small regional airports, with an annual passenger volume of less than 1 million.

The airport infrastructure includes:
1. The 'construction of airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security of safety equipment)'; and
2. The 'infrastructure pursuant commercial activities not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks'.[18]

The purely commercial infrastructure as defined in point 2 here above is not aimed at by the Guidelines and will be assessed on the basis of the general State aid rules, such as the private investor principle. The purely commercial infrastructure must be therefore entirely financed or financially supported by the airport operator and may not benefit from an aid.

The financing of infrastructure at market price: Absence of State aid

The Guidelines' principles
As far as the airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security of safety equipment) are concerned, the European Commission considers from now on that airport operators engaging in an economic activity should finance or support the costs of using or building the infrastructure they manage from their own resources.[19]
The Commission does not define which are the economic activities operated within an airport. It only refers to the EC Court of Justice's jurisprudence in the Aéroports de Paris case.[20] That case applied to fees imposed by the airport operator on handling companies for the use of the airport infrastructure.
Although it is not clearly stated by the Guidelines, infrastructure or part of it which is affected to activities which fall under the responsibility of the State such as security, customs, police, air traffic control or to public service missions do not have to be financially supported by the airports operators. The public funding of both those activities and the infrastructure affected to them is a choice which has to be made by the Member States under certain conditions.

16 Paragraph 57 of the Guidelines.
17 Paragraph 61 of the Guidelines.
18 Paragraph 53 of the Guidelines.
19 Paragraph 57 of the Guidelines. For a critical analysis of the Commission new policy, see A. LEPIECE, '*The Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports: Promoting regional airports or creating more legal certainty?*', *op. cit.*, p. 15.
20 Judgment of the Court of First Instance of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/98, ECR, p. II-3929, confirmed by judgment of 21 October 2002, *Aéroports de Paris v. Commission*, C-82/01, ECR, p. I-9297.

In its decision of 26 September 2006 regarding the Irish Capital Expenditure Grant Scheme in favour of regional airports, the Commission clearly stated that 'the practice of the Commission is that in relation to functions falling within the public policy remit, the financing of these functions or of infrastructure directly related to these functions does not constitute State aid'.[21]
The Guidelines impose that the principle of the private investor in economy market must be applied to the public financing of airport infrastructure.
If the airport operator does not own the infrastructure, it should pay a rent at market value.[22]
When additional infrastructure, which was not planned when the existing infrastructure was allotted, is made available to the airport operator, the rent should be commensurate with the costs of the new infrastructure and the duration of its use.[23]

Moreover, when a public airport operator finances new infrastructure through its own resources or through a public capital injection, this public financing will not constitute State aid whatever its form (capital injection, public guarantee, loan, etc.) if a private investor operating under normal market economy conditions who would be exclusively guided by prospects of profitability would have made such a transaction under the same conditions.[24]

Public authorities or public companies must therefore justify their funding on the basis of a business plan which demonstrates that a normal return (in dividends or capital gains) can be expected within a reasonable time from the capital invested.
Indeed, the Commission stated in its Guidelines that 'the provision of airport infrastructure to an operator by a Member State (including regional or local authorities) not acting as a private investor without adequate financial consideration or the granting to an airport operator of public subsidies intended to finance infrastructure can give that airport operator an economic advantage over its competitors and must therefore be notified and examined in the light of the rules on State aid'.[25]

Nevertheless, the private investor principle is impossible to respect in small regional airports as break-even cannot be reached under 500.000 up to 1 million passengers per year according to the Commission itself.[26]
Those airports are indeed unable to fully recover operating costs at competitive levels of airport charges[27] and they do not attract enough traffic to boost their commercial revenues.
Public contributions in favour of investment will therefore amount to aid according to the Commission's new approach unless they do not distort competition and affect trade between Member States (isolated or remote airports).

As far as the sale of public airport infrastructure is concerned, the Commission refers to the conditions it set out for operations such as the sale of land or buildings[28] or the privatization of an undertaking.[29] There will be no State

21 Commission's decision of 26 September 2006, State aid N 353/2006 – Ireland, Capital Expenditure grant scheme, not published, http://ec.europa.eu/community_law/state_aids/transports-2006/n353-06.pdf.
22 Paragraph 60 of the Guidelines.
23 Idem.
24 Communication of the European Commission on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings, *Bulletin EC*, 9-1984.
25 Paragraph 57 of the Guidelines.
26 Paragraph 72 of the Guidelines.
27 CRANFIELD UNIVERSITY, *Study on Competition between Airports and the Application of State Aid Rules*, September 2002, Final Report for the European Commission, DG TREN, p. 5-33, http://europa.int.eu.
28 Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10.7.1997, p. 3-5.
29 European Commission report on competition policy, 1993, paragraphs 402 and 403.

aid involved if these operations are made at market prices, in particular where the price is the outcome of a sufficiently well-publicized, open, unconditional and non-discriminatory bidding procedure which ensures that potential applicants are treated equally.

The Commission's practice
Since 2005, the Commission adopted several decisions relating to the financing of airport infrastructure following the notification of investment projects by Member States or formal complaints of competitors.
In practice, the Commission assesses the details of the financing at stake to determine if it contains a State aid under the conditions set out in Article 87 (1) EC.

First condition: The existence of an economic advantage in favour of a company
In order to be qualified as State aid, a public intervention must contain an economic advantage in favour of a company which it would not have received under normal market conditions.
Therefore, if an airport operator pays a rent which is commensurate with the costs of the infrastructure or finances it through its own resources (such as airport charges and commercial revenues), it would not in principle benefit from an economic advantage and therefore from a State aid.
On the other hand, if the rent does not reflect the value of the infrastructure or if the public financing does not fulfil the private investor criteria (subsidy, capital injection without a normal return within a reasonable time, public guarantee, public loan at a favourable interest rate, etc.), the airport operator receives an economic advantage which might be qualified as State aid by the European Commission.
In practice, the Commission examines the objectives of the new infrastructure and carries out an in-depth economic analysis of the investment project, its financing and its profitability.

In its decision of 26 September 2006 relating to the Capital expenditure grant scheme[30] and its decision of 23 October 2007 relating to Newquay Cornwall airport, the Commission concluded that 'although it is the intention of the public owners of the airport that the airport be capable of reaching break-even by 2013-14 and ensure long-term commercial viability thereafter the public authorities do not have any expectation of a financial return on the investment in question and, although it is their intention to make the airports more attractive to users and therefore more profitable they are not exclusively guided by prospects of profitability in the longer term'.[31] Therefore, the public contributions were in both cases qualified as State aid.

In the City of Derry Airport case, the Commission stated in 2006 that the public authorities at stake, i.e. the British and Irish Governments and the Derry City Council, the owner and operator of the airport, did not behave as private investors: 'neither the Member States nor the local authority in question have any expectation of a financial return on the money in question and although it is their shared intention to make the airport more attractive to users and therefore more profitable they are not exclusively guided by prospects of profitability in the longer term. Rather the stated aim of the public financing is (i) safety, (ii) regional policy and (iii) connectivity concerns.'[32] Thus,

30 Commission's decision of 26 September 2006, State aid N 353/2006 – Ireland, Capital expenditure grant scheme, *op. cit.*
31 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport Development, not published, http://ec.europa.eu/community_law/state_aids/transports-2007/n303-07.pdf.
32 Commission's decision of 16 May 2006, State aid NN 21/2006 – United kingdom, City of Derry Airport, not published, http://ec.europa.eu/community_law/state_aids/transports-2006/nn021-06.pdf.

the financing did not fulfil the private investor principle.

Following the complaint of an airline (SAS) in relation with the arrival of Ryanair at Tampere airport, the Commission examined the public financing of the conversion of a freight terminal into one suitable for low-cost operations.[33] On 10 July 2007, the Commission opened a formal in-depth inquiry on that measure because of its serious doubts about the respect of the private investor principle due to the absence of business plan and of concrete information on the operation. Indeed, the Commission received contradictory information on the rent paid by the airport operator and therefore it could not exclude that it might be below market price and therefore involve an economic benefit in favour of the airport operator. It invited the Finnish authorities and all interested parties to submit their comments and to provide information in order to help the Commission to assess the measures at stake. On the basis of those comments, the Commission will adopt soon a final decision on the public measures at stake.

In the Tortoli-Arbatax Airport case,[34] the Italian authorities had decided to finance the construction of additional infrastructure which was made available to the airport operator free of charge. The convention concluded between the public owner of the infrastructure and the airport operator, a private company, stated that a fee for the additional infrastructure was to be paid only if the passenger traffic exceeded 500.000 per year. This threshold was established as the break-even point in accordance with the Guidelines. The fee for additional infrastructure was to be calculated on the basis of the residual value of the asset following an amortization plan running over 20 years as from the date of completion of the works for movable assets and over 5 years for immovable assets.

As the average number of passengers for 2001 and 2005 was 46.000, and even taking into account the extension works, the Commission had serious doubts that such an increase (up to 500.000 passengers per year) would ever occur in a medium to long term perspective.

Therefore, it concluded that 'the measure at stake grants an economic advantage to the airport operator because the infrastructure is allocated free of charge to a predetermined manager which gains there from an advantage it would not have enjoyed under normal market conditions'[35]. The measure was thus qualified as State aid but authorized by the Commission in its decision of 24 January 2007.

In order to exclude any abnormal economic advantage in favour of the airport operator, public financing must be assessed in relation with the form it will take and under the relevant European regulation on State aid: capital injections,[36] guarantees and loans,[37] leases[38] or the sale of public land and buildings.[39]

In any case, a business plan must be drafted in order to demonstrate the profitability of the public investment: a normal return (in dividends or capital gains) should be expected within a reasonable time from the capital

33 Commission's decision of 10 July 2007, State aid NN 26/2007 – Finland, alleged State aid involving Ryanair at Tampere-Pirkkala Airport, not published, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2007/2007_0026_fi_nn.pdf.

34 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax Airport, not published, http://ec.europa.eu/community_law/state_aids/transports-2006/n491-06.pdf.

35 Idem, paragraph 39.

36 European Commission's communication on the application of Articles 87 and 88 of the EEC Treaty to public authorities' holdings, *EC Bulletin*, 9-1984.

37 Commission communication to the Member States – Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307, 3.11.1993, p. 3.

38 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, *op. cit.*

39 Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10.7.1997, p. 3.

invested. The investment return should be assessed leaving aside all social, regional policy and sector-based considerations.[40]

Second condition: Presence of State resources

The definition of State aid applies to any advantage, granted directly or indirectly, financed out of State resources. They can be granted by the State itself (federal state, regions, city councils, etc.) or by any intermediary entity, such as a public company, by virtue of powers conferred on it.

The Commission concluded that that condition was fulfilled when the public measure was financed by:

- The UK and Irish governments;[41]
- The general budget of the Italian State;[42]
- British Public funding agencies;[43]
- The Finish civil aviation administration;[44]
- The Flemish Region, the Port authority of Antwerp and a public company, all part of a public-private partnership;[45]
- The Region of Tuscany;[46]
- The Land Sachsen, shareholder of the Leipzig Airport.[47]

As stated here above, the decision to invest must be attributed to the State in its largest sense.

In the absence of such a decision, the funding despite its public origin will not constitute State aid.

In the Tallinn Airport case,[48] the Commission examined the investment in the rehabilitation of Tallinn Airport airside area. The airport owner and operator was Tallinn Airport Ltd, totally owned by the Estonian Government. The investment which benefited from a co-financing by the Community Cohesion Fund, was financed for 15% by Tallinn Airport Ltd from its own budget. The Commission emphasized that 'the financial resources used by this company for the co-financing come either from its own resources found by this company, without State intervention on the markets. There is no indication that the contribution by Tallinn Airport Ltd to this investment entails a transfer of State resources to this company'.[49]

This motivation is falling short on the non application of Article 87 (1) EC. Indeed, the airport's own revenues, such as airport charges, may constitute public resources. In a number of decisions, rebates on airport charges have been declared State aid by the Commission, which implies a transfer of public resources.[50]

40 Decision of the European Commission of 22 November 2006 on DHL and Leipzig-Halle Airport (State aid N 227/2006 – Germany), not published, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-48-2006-WLWL-en-22.11.2006.pdf.

41 Commission's decision of 16 May 2006, State aid NN 21/2006 – United Kingdom, City of Derry Airport, *op. cit.*

42 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax Airport, *op. cit.*

43 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport Development, not published, http://ec.europa.eu/community_law/state_aids/transports-2007/n303-07.pdf.

44 Commission's decision of 10 July 2007, State aid NN 26/2007 – Finland, alleged State aid involving Ryanair at Tampere-Pirkkala Airport, *op. cit.*

45 Commission's decision of 20 April 2005, State aid N 355 – Belgium, Public-Private-Partnership project Antwerp International Airport, not published, http://ec.europa.eu/community_law/state_aids/transports-2004/n355-04-fr.pdf.

46 Commission's decision of 22 September 2004, State aid N 106/2003 – Italy, Airport Marina di Campo Elba, not published, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2003/2003_0106_it_n.pdf.

47 Commission's decision of 22 November 2006, State aid N 227/2006 – Germany, DHL and Leipzig-Halle Airport, not published, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-48-2006-WLWL-en-22.11.2006.pdf.

48 Commission's decision of 24 April 2007, State aid N 379/2006 – Estonia, Tallinn Airport, not published, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2006/2006_0379_ee_n.pdf.

49 Idem, paragraph 19.

50 Commission's decision of 12 February 2004 concerning the advantages granted by the Walloon Region and Brussels South Charleroi Airport to Ryanair, OJ L 137, 30.04.2004, p. 1.

In this case, the Commission does not refer at all at the decision to invest. A proper motivation is necessary in order to guarantee legal certainty, especially in an area of law which has been completely reversed in the last years.

Third condition: The selectivity criteria

State aid implies that only certain companies or production are being favoured by the public measure. On the opposite, a public intervention which would apply to all companies, such as a general reduction of company taxes, constitutes a general measure falling outside the scope of Article 87 (1) EC.

By definition, a public measure aiming at a particular airport fulfils that condition.

That criteria also applies to aid schemes in favour of several airports such as the Irish Capital Expenditure grant scheme for regional airports[51] or the German scheme for the construction or the development of regional airports[52] as it favours a particular sector.

Fourth condition: Effect on competition and trade between Member States

According to Article 87 (1) EC, an aid distorts competition when the recipient of the aid competes with other undertakings on markets open to competition. It affects intra-Community trade when it strengthens the position of an undertaking compared with other undertakings competing in different Member States.[53]

In the Guidelines, the Commission set out general principles to assess competition between airports.

Indeed, 'Competition between airports can be assessed in the light of airlines' criteria of choice, and in particular by comparing factors such as the type of airport services provided and the clients concerned, population or economic activity, congestion, whether there is access by land, and also the level of charges for use of the airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract traffic and may significantly distort competition.'[54]

The size of the airport is also relevant. For example, the Commission is of opinion that aids in favour of Community and national airports will normally be considered as distorting or threatening to distort competition and as affecting trade between Member States, which will is unlikely to be the case of small regional airports. Nevertheless, the Commission must assess the situation of each airport while examining the impact of a public funding.

In many decisions, the Commission is very brief while motivating the fulfilment of that condition. It usually states that it 'cannot exclude that the aid may distort or threaten to distort competition inside the common market and affect trade between Member States, since it is directed at only one undertaking which is in competition with other airports operators within the Community'.[55]

In some cases, the Commission carries out an in-depth analysis of the competition of the airport at stake.

For example, in its decision of 23 October 2007 concerning the support for Rzeszow Jasionka

51 Commission's decision of 26 September 2006, State aid N 353/2006 – Ireland, Capital expenditure grant scheme, *op. cit.*

52 Commission's decision of 19 January 2005, State aid No N 644i / 2002 – Germany, Development of municipal economic infrastructures pursuant to Part II, Section 7 of the Framework plan under the joint Federal Government / Länder scheme for improving regional economic structures - I) Construction or development of regional airports, not published, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2002/2002_%20644_de_n.pdf.

53 Judgment of the Court of First Instance of EC of 30 April 1998, *Vlaams Gewest v Commission*, Case T-214/95, *Ecr*, p. II-717.

54 Paragraph 38 of the Guidelines.

55 Commission's decision of 24 April 2007, State aid N 379/2006 – Estonia, Tallinn Airport, *op. cit.*.

Airport,[56] the Commission examined the situation of the airport at stake with the one located in the near vicinity (170 km away). The aid granted to a large regional airport (category C) was likely to have a limited impact on the competition as the two airports served in principle different passengers markets but the Commission did not exclude that they could offer some substitutability from an airline's perspective due to their relative geographical proximity and their similar size. The Commission concluded then that the aid might limit opportunities of competing airport operators to develop their activities in Poland.[57]

In the Newquay Cornwall Airport case,[58] the UK authorities argued before the Commission that due to its remote location and key tourism role, that airport did not compete strongly with the three closest airports. They presented strong arguments based on the proximity of the airports at stake, the routes they served and their traffic. The UK authorities did admit that there remained some residual scope for competition between that airport and the closest ones as regards outbound traffic. Therefore, the Commission concluded that the threat of distortion of competition could not be excluded.[59]

The Commission also takes into consideration the impact of the public financing of airport infrastructure on other transport systems. The Commission examined the impact of the aid in favour of the Newquay Cornwall Airport on the train service but considered that it did not constitute a competitive alternative.[60]

As far as insular airports are concerned, the Commission evaluates the threat of distortion of competition on ferry services. In the Marina di Campo Airport case,[61] the Commission noticed that the ferry services to and from Elba transported up to 3.600.000 passengers per year while 20.000 passengers used the airport services. Therefore, the competitive situation of that airport, as compared to ferry services, was 'trivial'.[62] As the airport did not compete with any other airport, the Commission decided that the public contribution did not constitute an aid as it did not distort competition and affect trade between Member States.

Compatible aid for airport infrastructure

The conditions for the compatibility of the aid for airport infrastructure

When a public contribution for the construction of airport infrastructure and equipment or facilities that directly support them fulfils the four conditions listed here above, it constitutes a State aid and it must be notified to the Commission prior to its implementation according Article 88 (3) EC so that the Commission can assess its compatibility with the Common Market.

The Guidelines set out rather broad and imprecise criteria for the authorization of those aids:

- 'the construction and the operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.);
- the infrastructure is necessary and proportional to the objective which has been set;
- the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;

56 Commission's decision of 23 October 2003, State aid NN 21/2007 and NN 22/2007– Poland, support for Rzeszow Jasionka Airport, not published, http://ec.europa.eu/dgs/energy_transport/state_aid/doc/decisions/2007/2007_0021_pl_nn.pdf.

57 Idem.

58 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport Development, *op. cit.*

59 Idem.

60 Idem.

61 Commission's decision of 22 September 2004, State aid N 106/2003 – Italy, Airport Marina di Campo Elba, *op. cit.*

62 Idem.

- all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
- the development of trade is not affected to an extent contrary to the Community interest.'[63]

On the basis of those sole criteria, it is impossible for Member States and airport operators to apprehend the legality of the aids which might be granted for the financing of airport infrastructure before submitting their draft investment to the Commission.[64]
The Commission's recent practice clarifies slightly the application of this new category of compatible aids.

The Commission's practice

First condition: The construction and the operation of the infrastructure meet a clearly defined objective of general interest (regional development, accessibility, etc.)
In each case submitted to its assessment following the notification of the Member State concerned or a complaint by a competitor, the Commission examines the primary motivations of the public authorities in granting the financial support.
The Commission authorized aids in favour of the construction of airport infrastructure, equipment or facilities which are aimed to the following objectives:
- The connectivity and the regional development: 'the public investment is necessary to meet the general interest objective of developing transport and communication links via the airport which is situated in one of the most remote areas of the UK (Cornwall)';[65]
- The improvement of the safety of the infrastructure: 'the primary motivation of the public authorities in granting the financial support to CoDA is to enable the airport to be fully compliant with current and known future aerodrome safety requirements and to make better use of the existing infrastructure';[66]
- The tourism development: 'the Regional Administration considers the further investment in the Tortoli-Arbatax airport infrastructure as being highly relevant for the promotion and development of the Ogliastra province's economy, particularly for tourism';[67]
- The decrease of aircraft noise: 'the extension of the runway will enable landing of bigger aircrafts. The Italian authorities believe that it will reduce the number of landing in general and therefore, the aircraft noise beyond the tourist centers';[68]
- The promotion of the development of regional airports in order to achieve their profitability;[69]
- The investment necessary for the proper functioning of the airport and the best use of the existing infrastructure (fire safety and computer upgrade).[70]

The localization of the airport in an assisted area which is eligible for regional aids in accordance with Article 87 (3) (a) and (c) EC is taken into account favourably by the Com-

63 Paragraph 61 of the Guidelines.
64 A. LEPIECE, '*The Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports: Promoting regional airports or creating more legal certainty?*', *op. cit.*, p. 16-17.
65 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport Development, *op. cit.*
66 Commission's decision of 16 May 2006, State aid NN 21/2006 – United Kingdom, City of Derry Airport, *op. cit.*
67 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax Airport, *op. cit.*
68 Idem.
69 Commission's decision of 20 April 2005, State aid N 355 – Belgium, Public-Private-Partnership project Antwerp International Airport, *op. cit.*
70 Commission's decision of 16 May 2006, State aid NN 21/2006 – United Kingdom, City of Derry Airport, *op. cit.*

mission in its assessment of the positive impact of the aid.[71]

Second condition: The infrastructure is necessary and proportional to the objective which has been set

In order to establish the compatibility of the aid with the Common Market, Member States must demonstrate to the Commission that the infrastructure investment is manifestly necessary and proportional bearing in mind the objective in question.

It will be the case for example when the investment is required in order to perform works which are necessary for obtaining the civil operating licence from the Civil Aviation Authority for a former military airport.[72]

The investment also fulfils that condition if a new infrastructure is necessary to increase passenger throughput at an airport from 330.000 passengers in 2005 to approximately 700.000 by 2011 in order to improve the connectivity and the regional development of the area at stake.[73]

Some investments, such as the runway extension, are sometimes required to allow the proper functioning of the airport and the best use of the infrastructure.[74]

The size of the airport is also relevant. The Commission observed that 'given their relatively small turnover the airports in question might well struggle to obtain financing for these necessary improvements'.[75]

Therefore, the Commission will take into consideration the fact that 'a private investor would not be willing to finance the modernization of the infrastructure due to the lack of airport profitability'.[76]

Third condition: The infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure

Under this condition, the Commission has to determine if there is a need for the additional infrastructure and whether it will result in competitive distortions.[77]

Member States will therefore have to provide the Commission with forecasted growth in numbers of passengers[78] or demonstrate that the additional infrastructure will promote the best use of the airport complex, especially in relation with the existing infrastructure.[79]

In the conversion of a freight terminal into a low cost services one in Tampere Airport, the Commission expressed doubts as whether this condition was fulfilled as complainants had affirmed that there was no need for an additional terminal as the main one had sufficient capacity for new carriers to provide scheduled passenger services.[80]

Therefore, the Commission invited the Finnish authorities to submit a business plan for the creation of a low cost terminal to demonstrate the need in additional infrastructure.[81] The procedure is still pending.

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71 Commission's decision of 23 October 2003, State aid NN 21/2007 and NN 22/2007 – Poland, support for Rzeszow Jasionka Airport, *op. cit.*

72 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport, *op. cit.*

73 Idem.

74 Commission's decision of 16 May 2006, State aid NN 21/2006 – United Kingdom, City of Derry Airport, *op. cit.*

75 Commission's decision of 26 September 2006, State aid N 353/2006 – Ireland, Capital expenditure grant scheme, *op. cit.*

76 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax Airport, *op. cit.*

77 Commission's decision of 10 July 2007, State aid NN 26/2007 – Finland, alleged State aid involving Ryanair at Tampere-Pirkkala Airport, *op. cit.*.

78 Commission's decision of 23 October 2003, State aid NN 21/2007 and NN 22/2007 – Poland, support for Rzeszow Jasionka Airport, *op. cit.*

79 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax airport, *op. cit.*

80 Commission's decision of 10 July 2007, State aid NN 26/2007 – Finland, alleged State aid involving Ryanair at Tampere-Pirkkala Airport, *op. cit.*.

81 Idem.

Fourth condition: All potential users of the infrastructure have access to it in an equal and non-discriminatory manner

Member States must guarantee that all potential users of the airport infrastructure and land (aircraft owners and operators) will have access to the infrastructure and facilities on an equal and non-discriminatory manner.

In practice, the risk might arise following the construction or the conversion of an infrastructure into a low-cost terminal.

The Commission will not authorize the aid if the infrastructure is financed and constructed for the exclusive benefit of one or more predetermined operators.[82]

As this condition is difficult to assess prior to the use of the new infrastructure, the Member States have to make a commitment to respect it in the future.

In the Tampere Airport case,[83] the Commission noticed that although the Finnish authorities stated that all airlines were free to make use of the low cost terminal, it could not exclude that airlines would be discriminated against as the contract with Ryanair, including the charges for the use of that new terminal, was secret. The Finnish authorities were therefore invited to guarantee that other users would have access to the new terminal in an equal and non-discriminatory manner.

In its decision to open an in-depth inquiry on the alleged aid to DHL and Leipzig-Halle Airport,[84] the Commission also had doubts that the new runway was not going to be dedicated to one particular user, DHL. The Commission examined the contract between the airline and the airport which guaranteed 40 air movements per hour at peak period. Although the new runway was not expressly reserved to DHL, the Commission feared that in fact the major part of the possible air movements during the nights would effectively be reserved to DHL. Following the information submitted by the German authorities, the Commission revised its position and authorized on 23 July 2008 the aid in favour of the infrastructure.[85]

Fifth condition: The development of trade is not affected to an extent contrary to the Community interest

As far as this last condition is concerned, the Commission will first take into account the number of passengers of the airport at stake and therefore the category it falls into.

Indeed, aids granted to small regional airports falling into category D are 'unlikely to distort competition or affect trade to an extent contrary to the common interest'.[86]

Then, the Commission will examine the proximity of other airports and the impact of the public measure on their activities.[87]

If the public measure does not lead to an increase of the traffic of the airport in question, but aims for example to improve security and safety,[88] the Commission will conclude that its competitive impact can be considered 'inconsequential'.[89]

On the opposite, if an airline such as DHL has been negotiating with three airports before selecting the airport which benefits from the public financing for the construction or the development of its infrastructure, the Commission is likely to consider that the decision

82 Commission's decision of 23 October 2007, State aid N 303/2007 – United Kingdom, Newquay Cornwall Airport, *op. cit.*

83 Commission's decision of 10 July 2007, State aid NN 26/2007 – Finland, alleged State aid involving Ryanair at Tampere-Pirkkala Airport, *op. cit.*.

84 Commission's decision of 22 November 2006, State aid N 227/2006 – Germany, DHL and Leipzig-Halle Airport, *op. cit.*

85 Press release of 23 July 2008, http://europa.eu/rapid.

86 Paragraph 39 of the Guidelines.

87 Commission's decision of 26 September 2006, State aid N 353/2006 – Ireland, Capital expenditure grant scheme, *op. cit.;* Commission's decision of 16 May 2006, State aid NN 21/2006 – United Kingdom, City of Derry Airport, *op. cit.*

88 Commission's decision of 22 September 2004, State aid N 106/2003 – Italy, Airport Marina di Campo Elba, *op. cit.*

89 Commission's decision of 24 January 2007, State aid N 491/2006 – Italy, Tortoli-Arbatax airport, *op. cit.*

to move to this airport and to base there its operations will have an impact on trade.[90]

Conclusion

Following the Commission's new approach towards the public financing of airport infrastructure, public authorities will have to assess carefully their funding measures in favour of airport infrastructure.

This new policy applies to all public authorities, including Federal governments, regional or provincial authorities, local councils or public companies and to all forms of public funding (subsidies, loans, capital injections, guarantees, leases, etc.).

In order to exclude the existence of a State aid in the meaning of Article 87 (1) EC, the public financing must fulfil the private investor principle. The rent paid by the airport operator must reflect the economic value of the infrastructure put at his disposal or the airport operator has to finance on its own resources the investment on the basis of a business plan which demonstrates the profitability of the investment within a reasonable time.

The application of the private investor principle proves extremely difficult in this particular sector as airports cannot be compared to any ordinary business. They are vital in terms of connectivity, economic and regional development or tourism whatever their size and thus their profitability. Those objectives are difficult to be disregarded by public authorities while strategic investments are being decided.

Moreover, this principle implies the demonstration of the profitability of the investment which is impossible to achieve in small regional airports.

The Commission adopted therefore a favourable policy towards public investments made in regional airports. Up to this day, all the aids in favour of regional airports infrastructure which have been submitted to the Commission have been authorized. The aid intensity varies from 50% up to 75%.

The Commission is much more cautious when the investment has been requested by an airline in order for it to launch new operations at the airport at stake. It will assess if the public funding is not in reality an indirect aid to airline.

Further decisions will still have to improve the predictability of the Commission's new approach towards the public financing of airport infrastructure in order to insure the predictability of State aids rules and to help public authorities in respecting those rules while deciding to construct or develop airport infrastructure.

90 Commission's decision of 22 November 2006, State aid N 227/2006 – Germany, DHL and Leipzig-Halle Airport, *op. cit.*