

OPENING OF AIRPORT SERVICES' MARKET: REGULATORY FRAMEWORK AND PROBLEMS WITH ITS APPLICATION

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For decades air transport has been an industry managed exclusively by states, in Europe and worldwide. States were the sole owners of both national air carriers (flag carriers) and airports, providing them with unlimited financial means. Also, air transport was highly regulated, i.e. limited in terms of traffic rights which granted the so-called “freedoms of the air” only to carriers from the state of arrival and the state of departure, respectively. Airport management was simply a reflection of exercising such rights by the carriers. Only in the last two decades, through creation of the internal market, air transport has been liberalised within the European Union (EU). These changes prompted a partial opening of the market of “air transport-related” services – first and foremost airport services, at least the ones whose “nature” allows market opening. The International Civil Aviation Organisation (ICAO) has long published documents on the basic principles regarding airport services, as well as the charges paid by air carriers for such services. Not only did those principles become binding by their transposition into EU law, but they also enabled further changes, i.e. created a regulatory framework for partial liberalisation of such services. The application of competition law to air transport and related services, which were for such a long time known for strong state protectionism, has led to rich and extensive legislation by both the European Commission and the European Court of Justice. Most recently, the Commission has published the Guidelines on State aid to airports and airlines (2014/C 99/03), thus trying to create an adequate framework for the growing

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number of air carrier business models and subsequent problems with applicable law. Namely, the emergence of low-cost carriers, airline alliances as well as “hybrid” models (a combination of legacy carrier and low-cost carrier), combined with partial privatisation of airports, caused the applicable legal framework to grow as well, imposing obligations on the Member States to open their markets – a move which lead to various agreements between air carriers and airports, potentially incompatible with competition law.

In this paper I will give an overview of the applicable legal framework on airport services provided within the EU, the stage of liberalisation of such services and the reasoning behind such regulatory measures. Also, I will show the consequent evolution of the Commission’s guidelines on airport and airline state aid, focusing specifically on problems with the application of such framework in the Republic of Croatia, taking into account the volume of traffic and high seasonality. Finally, I will try to find a reason for the recent failure in the attempt to change the existing regulatory framework for airport and groundhandling services and examine the potential consequences of these developments on further market opening in the so-called “aviation value chain” (supporting services by the air navigation service provider).

Keywords: airports, competition, air transport, groundhandling services, airport services, liberalisation, state aid

1. INTRODUCTION

Almost 20 years after the creation of an internal air transport market, civil aviation in Europe has changed in an unexpected manner. Airline industry is fully liberalised and probably more vulnerable than ever: the threat of carriers coming from completely different (and lot less regulated) markets, namely the Gulf carriers, is more “palpable” than ever: a highly debatable subject which might not even be a subject had there been clear and consistent regulations in the first place. Services provided at airports are regulated and divided based on their potential provider, but amendments to the existing rules, aimed to clarify misunderstandings and loopholes in the text and take account of the most significant changes in the industry, were recently withdrawn by the Commission¹ due to “no foreseeable agreement”.² This turn of events, along

¹ European Commission, (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2015 A New Start, COM(2014)910 final, Strasbourg.

² *Ibid.*, Annex 2, p. 14.

with the stalling of the so-called “SES 2+” proposal³ aimed at liberalizing part of air navigation services, could have serious effects on future development of the EU air transport market and its global competitiveness. In order to find the root of the problems as well as potential solutions, it is necessary to have a deeper look into the regulatory changes during the last few decades.

2. THE LONG ROAD TO THE COMMUNITY FRAMEWORK FOR CIVIL AVIATION

Every mode of transport in the EU has gone through significant regulatory changes in order to create a single common market. But these changes did not take place simultaneously. The Treaty establishing the European Economic Community (hereinafter: Treaty of Rome), signed in 1957, did not contain any provisions on air and sea transport. The reason for this was most probably strong reservations from the “original” Member States who were set on protecting their national carriers. Not only did the Treaty of Rome fail to regulate these two modes of transport, but it also did not specify whether the basic principles of the common market are to apply – a fact which in the following decades caused substantial controversy and numerous debates regarding the creation of EU common transport policy.⁴ The question of applicability of the general provisions of the Treaty of Rome to air and sea transport was not solved until two major rulings by the European Court of Justice (hereinafter: CJ or the Court).

The French Seamen case⁵ was the first step towards establishing a common transport policy. Based on an action brought by the Commission against the French Republic, the CJ had to decide on the application of the Treaty provisions on the freedom of movement of workers to sea (and subsequently air) transport. The Court concluded that the Treaty provisions apply to both sea and air transport, *i.e.* “that the general rules of the Treaty must be applied insofar as they are not excluded”.⁶ The Court therefore ruled that “the appli-

³ European Commission, (2013), Proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM/2013/0410 final - 2013/0186 (COD), Strasbourg.

⁴ For more on the creation of the EU common transport policy see Radionov, N.; Čapeta, T.; Marin, J.; Bulum, B.; Kumpan, A.; Popović, N.; Savić, I., *Europsko prometno pravo*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2011, pp. 11 – 15.

⁵ European Court of Justice, (1974), Judgment of the Court of 4 April 1974, Commission of the European Communities v French Republic, Case 167-73, European Court Reports 1974, 00359.

⁶ *Ibid.*, para 28.

cation of Articles 48 to 51 to the sphere of sea transport is not optional but obligatory for member states".⁷

Although it seemed that the question of application of the Treaty to air and sea transport was answered, it soon became obvious that the term "general rules", used in the French Seamen case, was quite elusive. Therefore another case appeared before the CJ (the *Nouvelles Frontières* case⁸) where the French court asked for a preliminary ruling on the question whether the competition rules contained in Part III of the Treaty apply to air transport. The Court noted that only Article 61 of the Treaty, which states that freedom to provide services in the field of transport is governed by the provisions of the title relating to the common transport policy makes its application to the transport sector subject to the realization of a common transport policy.⁹ So the conclusion was that "the rules in the Treaty on competition, in particular Articles 85 to 90, are applicable to transport".¹⁰ Furthermore, the Court emphasized that if the Treaty intended to remove transport from the scope of the competition rules, it would explicitly have said so in its provisions. Additionally, the Court once again confirmed its judgment from the French Seamen case.¹¹

The French Seamen and *Nouvelles Frontières* cases¹² created the perfect ground for what was coming next: the opening up of the air transport market through regulatory changes on the Community level. Having in mind that any sudden changes in the air transport sector could have profound social and economic consequences in the Member States, the Commission decided to go with the gradual approach: through three deregulation packages, each of them removing specific barriers to an open market from 1987 to 1992. The first step was taken through the adoption of two Regulations¹³, one Di-

⁷ *Ibid.*, para 33.

⁸ European Court of Justice, (1986), Judgment of the Court of 30 April 1986 - Criminal proceedings against Lucas Asjes and others, Andrew Gray and others, Andrew Gray and others, Jacques Maillot and others and Léo Ludwig and others. - References for a preliminary ruling: Tribunal de police de Paris - France. - Fixing of air tariffs - Applicability of the competition rules in the EEC Treaty. - Joined cases 209 to 213/84, European Court reports 1986, 01425.

⁹ *Ibid.*, paras 37 and 38.

¹⁰ *Ibid.*, para 42.

¹¹ *Ibid.*, para 45.

¹² For more on both rulings see Radionov *et al.*, *op. cit.* (fn. 4), pp. 374 – 376.

¹³ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374/87); Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374/87).

rective¹⁴ and a Decision¹⁵ which enabled more flexibility regarding capacity on certain routes. Also, the first package allowed for multiple designation by a state, which meant access to various routes was available to several and not only one carrier. This prompted more private investments in the airline business and various types of commercial cooperation between carriers, for example interline and code share agreements, but also the creation of strategic alliances.¹⁶ The second package¹⁷ came into effect in 1990 and paid more attention to pricing: greater freedom was introduced in the setting of fares and capacity-sharing. Also, all Community carriers were given the right to carry an unlimited number of passengers or cargo between their home state and another Member State. In other words, they were given unlimited third and fourth freedom' rights¹⁸, as well as fifth freedom¹⁹ under certain con-

¹⁴ Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States (OJ L 374/87).

¹⁵ Council Decision of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States (OJ L 374/87).

¹⁶ Knieps, G., *Market versus state in building the aviation value chain*, Journal of Air Transport Management, vol. 41, 2014, pp. 30 – 37.

¹⁷ Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services (OJ L 217/90); Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States (OJ L 217/90); Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 217/90).

¹⁸ International Civil Aviation Organisation, (2012), Manual on the Regulation of International Air Transport (Doc 9626, Part 4), Montreal: "Third Freedom of The Air – the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a Third Freedom Right). Fourth Freedom of The Air – the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a Fourth Freedom Right)."

¹⁹ *Ibid.*, "Fifth Freedom of The Air – the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a Fifth Freedom Right)."

ditions. Finally, the third package²⁰, as the last stage in creating a common air transport market, allowed Community carriers (carriers who were issued an air transport license by any Member State) to operate freely within the Community (free market access) along with free pricing. Division between scheduled and non-scheduled traffic ceased to exist and cabotage rights²¹ were to be fully opened on 1 April 1997.

To truly allow liberalisation, changes needed to be made in the airport sector as well: just like carriers, Community airports were heavily subsidised by the states and if carriers were to compete freely, a genuine level playing field had to be created. So the Commission started preparations for further deregulation: the groundhandling market which, until the early 90s, consisted of airports and major airlines as the only providers of those kind of services.

It should be noted that during the late 80s the air transport sector saw strong growth and profitability which prompted the need for implementation of competition rules. Unlike today, airline business back then was blooming with an average profit margin of 3.0%.²² Unfortunately, this "golden age" was soon followed by a sharp decrease in demand, mixed with overcapacity as a result of aircraft orders placed during previous years. Last but not least, restrictive bilateral agreements made it almost impossible to use this capacity on more potential markets.²³ Taking into account that the United States deregulated their air transport market back in 1978, it is no wonder that European airlines suffered a much heavier blow anytime a specific event would influence a traffic demand. Political turmoil, severe weather conditions, economic collapse of a certain market is something most carriers know how to handle by simply using their fleets elsewhere. But if an airline has to do business within regulatory limits which leave no room for adjusting their business to world events and shifts in markets, they are practically doomed.

²⁰ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240/92); Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240/92); Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240/92).

²¹ ICAO Manual Doc 9626, Part 4, *op. cit.* (fn. 18): "Ninth Freedom of The Air – the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State."

²² European Commission, (1994) Communication from the Commission - the way forward for civil aviation in Europe, Bruxelles, COM(94)218 final, 1.6.1994, Bruxelles.

²³ *Ibid.*, p. 6.

In order to increase productivity and efficiency of European airlines, it was essential not only to go through restructuring but to, for the first time, acknowledge the problems within a wider area which contributed to their lack of competitiveness. For example, airport charges in Europe were, on average, three times higher than in the USA.²⁴ The figures were also unfavourable when it came to charges paid for the air traffic control services (ATC charges) and with congestion-induced delays and waste of fuel.²⁵ Subsequently, operating costs of European carriers were considerably higher than those of their counterparts in the USA. Notwithstanding that these issues are first and foremost airline management issues, it was nonetheless crucial to recognize that a huge portion of airline costs consisted of services which were outside their control. In 1994 the Commission recognized for the first time that “public decisions on air transport infrastructure capacity and quality, as well as on rules concerning the use of such infrastructure will in future have to be based on a clear recognition of their impact on the overall efficiency of the civil aviation system”.²⁶ In other words, apart from the restructuring of carriers, it is essential to understand that the only way they are to compete successfully in the global market is to have a healthy and supportive home market: without barriers and fully efficient. State aids can help achieve that goal if granted under strict and clear conditions. Therefore, the creation of a Single European Market in the civil aviation sector is much needed. The Commission firmly believed that, in the long run, “major conflicts of interest do not really exist”²⁷ because every airport authority needs a strong and healthy airport user – especially a domestic one.²⁸ This paradigm is however only true to a certain extent: although European airlines and airports do share some common interests like the need to expand traffic numbers, on the other hand airlines are always competing with other airlines while airports usually have a dominant position and rarely compete against each other. The recent expansion of certain third country carriers has made this difference all the more visible: European carriers can hardly compete with foreign ones which are being subsidized by their countries – European airports, on the other hand, are more than happy to serve new players and couldn’t care less about their source of financing.

²⁴ *Ibid.*, p. 7.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 9.

²⁸ Abeyratne, R., *Law and Regulation of Aerodromes*, Springer International Publishing Switzerland, Montreal, 2014, p. 131.

The need for a Single European Market, as explained above, prompted the creation of the so-called “1994 Aviation Guidelines”²⁹ on the application of competition provisions of the Treaty to state aids in the aviation sector. Although state aids in the past were mostly overshadowed by strong State intervention, now, with a deregulation framework in force, it was time to establish new rules and limit the use of state aids in air transport. Therefore the Commission said that it would “not allow further aid unless under exceptional circumstances, unforeseeable and external to the company”.³⁰ On the other hand, the Commission was aware that additional factors needed to be taken into account: in order to create truly competitive European airlines, a sensitive approach had to be taken. Airlines at that time were facing serious social and economic burdens which couldn't be resolved merely by making better commercial decisions as of today. A majority of them were bound by collective agreements and huge aircraft orders which did not cater to the open market conditions. Unfortunately, for many of them, if they ever wanted to truly compete in the market, state aid was inevitable. For this reason, the Commission conditioned this aid by making restructuring plans which could prove that potential aid would be compatible with the common market and acceptable to the market economy investor (“market economy investor principle”; hereinafter: MEIP³¹) meaning those which a “private investor operating under normal market conditions would find acceptable in providing funds to a comparable private undertaking”.³² Another kind of aid which has been recognized and approved by the Commission was regional aid – provided that it is not used to cross-subsidize the routes on which there is effective competition between carriers. The Commission therefore established clear rules for the “public service obligation” (hereinafter: PSO) as a part of the third package³³: PSO can be established only for scheduled air services operating to a peripheral or developing region, or any other provided that it is vital for the economic

²⁹ European Commission, (1994), Application of articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350/94).

³⁰ *Ibid.*, p. 7.

³¹ “The market economy investor principle will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.” (*Ibid.*, p. 12).

³² *Ibid.*

³³ See *supra*, fn. 20.

development.³⁴ The carrier serving such a region is chosen by a public tender, for a maximum period of 3 years and although he is entitled to compensation for such services, it cannot bring him any special benefit – otherwise it would constitute state aid.

Now that the legal framework for air carriers was established, further steps needed to be taken in order to achieve the aim of allowing freedom to provide services within the common transport policy, as well as creating a level playing field in the air transport market. The Commission prompted the Council to broaden the existing regulatory framework with “the Groundhandling Directive”.³⁵ It recognized that some of the airports’ services and facilities constituted a monopoly by their nature (*e.g.* landing fee, which is essentially a fee for the use of runway), whereas others could be, and should be liberalized (*e.g.* catering services). On the other hand, the same approach should be used as with carriers, given the fact that airport services are also subject to strict safety and security rules and therefore, just like airlines, needed a gradual approach when it comes to market opening. Therefore the Groundhandling Directive recognized the provisional period until 2001. After this deadline, all the provisions apply and they basically opened up the groundhandling market completely when it comes to self-handling (airport users providing groundhandling services for themselves) and third-party handling on all Community airports open to commercial traffic whose annual traffic is at least 2 million passenger movements or 50 000 tons of freight. There are, of course, exceptions to the rule for certain types of services (baggage handling, ramp handling, fuel and oil handling, cargo and mail handling), and in cases of capacity or space constraints which make the market opening impossible. Furthermore, since the airport managing body now acts both as a provider of services offered exclusively by them, which constitutes a monopoly (*e.g.* landing, parking, lighting, all charged through airport charges) and the provider of groundhandling services which are subject to market conditions, the Groundhandling Directive sets an obligation for airports to separate the accounts of their groundhandling activities from the accounts of their other activities. This way no cross-subsidizing would be possible and airport charges would be set on a clear cost-related bases while groundhandling charges would be decided on by the market. This

³⁴ There are 8 PSO routes in Croatia, currently served by Croatia Airlines and Trade Air.

³⁵ Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272/96).

kind of solution sounds good in theory but, as we will see in practice, is hardly applicable.

3. NEW CENTURY, NEW CHALLENGES

Profound regulatory changes and the 9/11 attacks in the United States led to a rise of the low cost carriers. Also called “no-frills” carriers, they grew very rapidly and profitably during the first decade of the 21st century. By 2009 there were around 30 low-cost carriers in Europe³⁶, taking larger and larger profit share from the existing, legacy carriers.

Apart from the “no-frills” business model, another important feature of these carriers is the aim to create a demand. Instead of operating from hub³⁷ airports and trying to compete with the biggest players in the business, a majority of low-cost carriers decided to turn to secondary and smaller airports and simply create a demand by offering cheap flights to other secondary airports. This kind of model could hardly work on its own – agreement with airport is needed, and if the airport in question is desperate to get more traffic and attract airlines, there is more chance of getting incentives for new routes, start-up aid or other kind of help through various commercial agreements.

Recognizing these trends and trying to allow the development of new business models (for both airlines and airports) while taking into account competition rules and recent disputes with major low cost carriers³⁸, the Commission developed the “2005 Aviation Guidelines”³⁹ on the financing of airports and start-up aid to airlines departing from regional airports. Considering that the previous Guidelines from 1994 apply to the conditions for granting state aid to airlines, the 2005 Guidelines should be considered as an addition rather than a replacement. The document acknowledges the fact that the airports which were privatized are usually the ones making profit, while smaller airports

³⁶ Doganis, R., *Flying off Course: Airline economics and marketing, Fourth edition*, Routledge, Oxford, 2010, p. 133.

³⁷ Hub is any airport which an airline uses as a transfer point.

³⁸ The Commission issued a Decision in 2004 regarding possible state aid to Ryanair: Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

³⁹ European Commission, (2005), Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312/05).

which continue to be publicly owned cannot compete with major hubs and can hardly influence the trade between Member States. Also, the impact of airports to the local community in terms of education, economy and even health cannot be disregarded. Although, while providing this positive impact, airports cannot compete with high speed rail – the two services can only complement each other⁴⁰ – a somewhat strange approach by the Commission considering the high number of subsidies involved in the rail sector. The Commission also makes reference to research showing that small airports rarely compete with other airports except, in some cases, “with neighbouring airports of a similar size whose markets overlap”.⁴¹ Furthermore, the Commission now stretches the principles of public service obligation to certain airport activities as well, saying that they could be regarded as services of general economic interest – if they pass the so-called “Altmark test”.⁴² As regards start-up aid, financial advantages given to certain airlines from airports’ own resources, would not be considered state aid if they were given under the same conditions like the ones given by private investors – which is usually proven by a sound business plan. When it comes to groundhandling services, and having in mind the framework set by the Groundhandling Directive, the 2005 Guidelines allow for airports under the 2 million threshold to cross-subsidize, but without including services which it provides as an airport authority, *i.e.* recipient of public resources. Also, they should always have in mind the applicable competition rules on the dominant position and its possible abuse. However, when the 2 million passenger threshold is reached, cross-subsidy is not allowed.

The principles set out in the 2005 Aviation Guidelines were strongly shaken however when the European Court of Justice published its Judgment in the case *Ryanair Ltd v Commission of the European Communities* of 17 December 2008 regarding possible State aid granted to Ryanair through agreements with the Walloon Region and the Brussels South Charleroi airport.⁴³

⁴⁰ *Ibid.*, p. 2.

⁴¹ *Ibid.*, p. 3.

⁴² The CJ ruling on which four criteria have to be met so that the compensation for public service does not constitute State aid within the meaning of Article 87 of the EC Treaty (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] European Court Reports I-7747).

⁴³ Judgment of the Court of First Instance (Eighth Chamber, extended composition) of 17 December 2008 *Ryanair Ltd v Commission of the European Communities*, Case T-196/04, European Court Reports 2008 II-03643.

The Commission Decision⁴⁴ which declared the reduction on airport landing charges granted to Ryanair at Brussels South Charleroi airport incompatible with the common market and therefore considered as state aid, was annulled. The Court found that the Commission failed to correctly examine the possible infringement of competition law by not applying the private investor principle simply because the Walloon region (the owner of Charleroi airport) is a public authority. The Commission took the view that it therefore cannot be regarded as an entity exercising an economic activity – which would then be subject to the private investor test. The Court however concluded that the state can indeed act as an undertaking operating as a private investor, in this case when managing an airport's infrastructure. Needless to say, this ruling gave a strong boost to low-cost carriers and even caused new arrangements between them and secondary airports, often walking the fine line between sound business decisions and infringement of competition rules.

In the meantime, business at major hubs is going strong: the Groundhandling Directive has “put down roots” and more and more undertakings have set up businesses at major airports. Some airport managing bodies have ceased to provide groundhandling services all together, and some have continued but now in the free market environment, *i.e.* facing heavy competition. Airlines did not stand still either: major carriers set up their own self-handling and therefore expand their business. The problem, in the context of competition, usually arises on those airports where the airport managing body continues to provide groundhandling services while at the same time acts as a monopoly in terms of providing airport services. This has usually happened in Member States whose national law stipulates that groundhandling services have to be provided at certain airports: an obligation which can hardly be imposed on privately owned enterprises like third party handlers, or expected of them at airports with small traffic. In order to provide a clearer distinction between these two types of very different services from the provider's point of view (one is liberalized, the other provided exclusively by the airport) a new Directive⁴⁵ was published in 2009 (hereinafter: Airport Charges Directive). In this Directive, principles⁴⁶ established long ago under the International Civil Aviation Orga-

⁴⁴ See *supra*, fn. 36.

⁴⁵ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70).

⁴⁶ International Civil Aviation Organisation, (2012), Doc 9082, ICAO's Policies on Charges for Airports and Air Navigation Services, Montreal.

nisation (ICAO) were given the power of EU law. The airport charge, “a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight”⁴⁷ should be calculated in a transparent, non-discriminatory and cost-related manner. This “pay what you use” principle is ensured by creating the Airport Users’ Committee, which regularly holds consultations with the airport managing body to ensure that all the charges are calculated in the above mentioned manner. Furthermore, and because user opinions are not binding, airport charges are approved by an independent supervisory authority⁴⁸ which makes sure that the same principles are respected.

When it comes to groundhandling, the application of the Groundhandling Directive started to show results in strong growth of third party handlers which brought along lower prices, but unfortunately quite often also lower quality of the service. Changes which happened in the airline business (growing number of alliances, joint ventures and holding companies) needed to be addressed as the Groundhandling Directive did not foresee these kinds of business arrangements when it set the rules for self-handling 15 years ago. This called for a new legislative package, and this time the Commission decided to propose a draft Regulation, which would ensure unified application of the rules unlike the present differences in interpretation of the Groundhandling Directive.⁴⁹

The Proposal for a new Regulation⁵⁰, which was part of the so-called “aviation package”⁵¹, tried to address all the issues which did not even exist when the

⁴⁷ Directive 2009/12/EC, (fn. 41), Article 2.

⁴⁸ In most EU Member States, the power of independent supervisory authority is given to the civil aviation authority. Only a few states have given this power to their competition authorities. Given the changes in the air transport market, it is to be expected that more and more Member States will delegate at least some of the tasks to their competition authorities.

⁴⁹ For more on EU regulatory framework for airports see Diederiks-Verschoor, I., *An introduction to Air Law*, Kluwer Law International, Alphen aan den Rijn, 2012, pp. 88 – 93.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC, COM/2011/0824 final - 2011/0397 (COD).

⁵¹ The Commission adopted in 2011 a comprehensive package of rules to tackle capacity problems at EU airports and improve services offered to passengers. The package contains three legislative proposals on slots, groundhandling and noise.

Groundhandling Directive was adopted. In the context of this paper, the most important changes are the requirement of legal separation between the airport and its groundhandling services, which would ensure that the airport provider of the groundhandling services does not have any benefits from the airport – manager of airport services. This goes one step further than the Groundhandling Directive, which has a requirement for airport managing bodies to separate their accounts for the respective services. But even so, if the activities are legally separated, *i.e.* divided based on their nature and with a legally different provider, there still remains the issue of centralised infrastructure. This would refer to, as stated in the Proposal, “specific installations and/or facilities at an airport which cannot, for technical, environmental, cost or capacity reasons, be divided or duplicated and whose availability is essential and necessary for the performance of subsequent groundhandling services”.⁵² So, there is an infrastructure whose management constitutes a monopoly because it can only be done by one provider (the airport managing body) and is, at the same time, essential for providing groundhandling services – which are liberalised and open to several providers – one of which can also be the airport. To be able to call these services truly liberalised and to ensure the level playing field, the centralised infrastructure had to be managed in a most transparent, objective and non-discriminatory way – especially if the airport managing body is both in charge of centralised infrastructure and is one of the groundhandling providers competing with others for their market share.⁵³ The Proposal accordingly left to the airport managing body to decide which infrastructure is going to be centralised, but only after a consultation with the Airport Users Committee and under the supervision of the independent supervisory body. The changes proposed would have created a much needed next regulatory step for the opening of the airport services’ market and contributing to competitiveness of the European air transport sector in general. Unfortunately, as stated previously in this paper, the Commission recently decided to withdraw the Proposal.⁵⁴

It was not only the groundhandling rules that needed a change. The last guidelines concerning competition rules in air transport sector were published in 2005 and a lot has changed since then – not to mention the Ryanair vs.

⁵² Proposal for Regulation on groundhandling services, Article 2.

⁵³ For more on the issue of non-discriminatory access to central airport infrastructure see Knieps, *op. cit.* (fn. 16), pp. 30 – 37.

⁵⁴ See *supra*, fn. 1.

the Commission ruling by the CJ.⁵⁵ In 2014 the Commission adopted new guidelines⁵⁶ on state aid to airports and airlines (hereinafter: the 2014 Aviation Guidelines), thus recognizing that the new landscape in aviation now consists of major hub airports, often congested and privatised, and at the same time numerous regional or secondary airports with their own market consisting of mostly low-cost or charter carriers. The 2014 Aviation Guidelines recognize the difference between airport activities which constitute an economic activity and therefore are subject to competition rules, and activities which are considered non-economic and are available for public funding without being in danger of constituting state aid.⁵⁷ The biggest news is the introduction of the so-called “sunset rules” for operating aid; it is granted to regional airports for a transitional period of 10 years which should give them time to adapt to the market changes by gradually increasing airport charges and changing their business models altogether. The most important factor in allowing operating aid is a business plan which can prove that the airport will be able to cover their operating costs at the end of the transitional period. Start-up aid for airlines departing from airports with fewer than 3 million passengers per year, if allocated on a non-discriminatory bases, is allowed for a maximum period of 3 years and the aid may cover a maximum of 50% of the airport charges.

4. A FULLY OPEN INTERNAL MARKET: ILLUSION OR REALITY?

The present EU regulatory framework, as presented in this paper, has various effects on airports, depending on its size.

Major hubs, who compete with other hubs, try to provide diversity of services and thus attract as many carriers as possible. So far, most of the profit came from transfer and business passengers therefore demands from the biggest carriers had to be accommodated. The main focus was on creating a good product for a low price and facilitating the travel experience as much as possible. This means that there is usually strong competition among groundhandlers and bigger carriers provide not only self-handling but also third party handling.⁵⁸ The biggest concern for users is the fact that the airport

⁵⁵ See *supra*, fn. 41.

⁵⁶ European Commission, (2014), Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99/14).

⁵⁷ For instance, air traffic control, police, customs etc.

⁵⁸ Mostly to their alliance partners.

managing bodies still provide airport services and handling services, or at least they get to choose the groundhandling providers – which creates a potential conflict of interest and possible abuse of dominant position. This is especially visible in the context of the so-called “access fee”, *i.e.* fee charged for access to centralized infrastructure, which is charged by the airport managing body and is supposed to be determined in a transparent and non-discriminatory way. Still, if one competitor is in the position to determine the conditions of market entry of other competitors, there is always going to be room for discrimination.⁵⁹

As for smaller airports, although some of these rules do not apply to them⁶⁰, they are still obliged to comply with competition rules, as well as separate their accounts according to the Groundhandling Directive. On the other hand, not all smaller airports are the same. Some have crucial roles in their community, providing connections to major hubs, boosting trade and the economy in general. Others exist only because of social reasons and are no longer needed; unlike the times when all airports were publicly owned and subsidised, serving the equally subsidised flag carrier. Another common feature of secondary airports is high seasonality and the ways to fight it range from establishing PSO routes during the winter to attracting major low-cost carriers by offering huge incentives and start-up aids on new routes. All of this, as seen in this paper and in accordance with the recent 2014 Aviation Guidelines, could subside in the years to come.

The obligation to separate accounts if the airport managing body provides both airport services and groundhandling services is especially challenging for smaller airports: not only do they not have the expertise and means to introduce sophisticated accounting systems, but they cannot generate enough revenue to see profit, or even break even, on both accounts. For them, cross-subsidizing could be a matter of survival and it shouldn't be an issue, especially because an operator of a small airport is usually the only one providing any kind of service at the airport – from groundhandling to selling food and beverages to car parking. Major hubs experience more and more commercial revenue,

⁵⁹ For more on the issue on access fee, see Colangelo, M.; Zeno-Zencovich, V., *Introduction to European Union Transport Law*, Edizioni Universitarie di Roma Tre, Roma, 2015, pp. 47 – 55.

⁶⁰ The Airport Charges Directive applies only to airports with annual traffic of over five million passenger movements and to the airport with the highest passenger movement in each Member State.

allowing them to be generous with their incentives or keeping the airport charges attractive enough. Small airports hardly have any commercial activities to cover the costs of their usually non-profitable aeronautical activities.

Besides, applicable safety and security rules impose almost the same burden on all airports, regardless of their size in passenger traffic or revenue.⁶¹

Another problem on the horizon, for both types of airports, is that the airline business is still changing: low-cost carriers are moving to major hubs and trying to attract at least a portion of business travellers, and legacy carriers are cutting costs and developing at least low-cost subsidiaries. From airports' point of view, this could bring down the quality of service at major hubs while putting in greater danger the survival of secondary airports. The airlines would therefore like to have a say in choosing the handling providers by the airport, since the quality of this service directly affects their service. Also, given the number of alliances and consolidation of the airline business in general, they want self-handling to include alliances, joint ventures, holding companies and all other forms of cooperation, which makes sense for some of them, where the point of cooperation is to introduce a common, better product to passengers.

The same problem exists in Croatia where, apart from Zagreb International Airport, all other international airports are state owned, do not have traffic exceeding 2 million passengers per year and have a very strong seasonality problem. Although the EU law, as presented in this paper, is not always applicable to airports with smaller passenger numbers, the core principles of these rules are still applicable through national law, not to mention competition law.

High seasonality creates a demand for extra workforce and capacity in the summer, while in winter all these factors contribute to operating losses. To be able to create more traffic during winter, regulatory flexibility is crucial: airlines can be attracted only with significant incentives, marketing agreements and cross-subsidizing between regulated and non-regulated charges – at least until the numbers and profit go up significantly. In a country which has an airport with only, for example, 16 passengers in the first month of the year, putting any kind of regulatory burden on it in terms of competition seems not only unnecessary, but counterproductive.

The last issue is the creation of the Airport Users Committee, which is supposed to control the airport operator and make sure that every charge is

⁶¹ JLS Consulting; John Strickland, (2015), Current challenges and future prospects for EU secondary airports (study), European Parliament, Directorate-General for Internal Policies Policy Department B: Structural and Cohesion Policies, Bruxelles.

cost-related, non-discriminatory and transparent. Again, on an airport which only serves two operators once a week, what are the chances that they are going to spend their resources on this kind of Committee, which would consist of 3 people? The situation is not much different with other Croatian airports – users, *i.e.* carriers, are rarely interested in this kind of obligation on airports which is not their hub.

5. CONCLUSION

Air transport is facing major challenges. Although the application of competition rules is more than welcome, the “one size fits all” approach needs to be thoroughly revised. In terms of the airport business, one must seriously consider their role in the local, and even state economy before putting a heavy regulatory burden on them. Naturally, this does not mean their business should not comply with competition rules, it simply means that these rules should be different – because the competition itself is different, sometimes even non-existent – like with several Croatian airports. Rules on protecting rail against air should also be reconsidered, as well as traffic numbers as thresholds for the application of certain rules – having 2 million passengers per year does not mean that competition rules, in their present form, can be abided by during winter, or during summer for that matter. The Croatian coastal airports have seen a large traffic rise in recent years but it is highly debatable if that would be the case if they had not been able to offer operating aid to their carriers. Regulators should reconsider this kind of benchmarking because the passenger number on an annual level does not necessarily imply a reason for the application of a heavier set of rules.⁶²

In order to improve the conditions of the sector and its competitiveness, profitable players have to be subjected to strong competition rules while others should be given opportunities, within the legal system, to exercise their commercial freedom and improve business. One should keep in mind that, when it comes to air transport, their market is far bigger than Europe and therefore needs to be strong enough to be able to compete globally.

⁶² For a completely different proposal of the regulatory framework, suggested by European Low Fares Airline Association (ELFAA), see Peeters, M., *The European Commission's Airport Package*, Air & Space Law, vol. 33, 2008, p. 260.

Sažetak

Ana Kapetanović *

**LIBERALIZACIJA USLUGA ZRAČNIH LUKA EUROPSKE UNIJE:
REGULATORNI OKVIR I PROBLEMI U PRAKSI**

Zračni promet desetljećima je, kako u Europi tako i u svijetu, bio isključivo predmetom državnog interesa. Države su bile jedini vlasnici zračnih (nacionalnih) prijevoznika (tzv. flag carriers), kao i zračnih luka, te su i jedni i drugi uživali neograničenu financijsku pomoć. Uz to, poslovanje prijevoznika bilo je strogo regulirano, tj. ograničeno: pravo obavljanja zračnog prijevoza iz/u određene države pripadalo je samo zračnim prijevoznicima država između kojih se prijevoz obavlja, a poslovanje zračnih luka bilo je samo odraz korištenja takvih prava. Tek je u posljednjih dvadeset godina stvaranjem jedinstvenog tržišta potpuno liberaliziran zračni prijevoz unutar Europske unije. Paralelno s takvim promjenama u zračnom prijevozu donekle su liberalizirane i usluge koje "prate" takav prijevoz – prije svega usluge koje se prijevoznicima pružaju u zračnim lukama, a koje su po svojoj prirodi takve da omogućuju otvaranje tržišta. Aerodromske usluge, kao i naknade koje se za njih naplaćuju prijevoznicima, odavno su predmetom smjernica koje je izdala Međunarodna organizacija za civilno zrakoplovstvo (International Civil Aviation Organisation; ICAO). Navedene smjernice dobile su obvezujući karakter tek transpozicijom u propise EU-a, a navedenim zakonodavstvom otišlo se i korak dalje – stvoren je pravni okvir za otvaranje tržišta dijela takvih usluga.

Primjena prava tržišnog natjecanja na granu prijevoza i s njim povezane usluge, koje su toliko dugo bile obilježene snažnim državnim protekcijom, dovela je pak do bogate prakse Europske komisije i Europskog suda. Jedan od posebno bitnih dokumenata čine Smjernice o državnim potporama zračnim lukama i zračnim prijevoznicima (2014/C 99/03), kojima se nastoji adekvatno odgovoriti na probleme u primjeni postojećeg pravnog okvira i činjenicu sve većeg broja poslovnih modela zračnih prijevoznika. Naime, pojava niskotarifnih prijevoznika, zatim alijansi te tzv. "hibridnih" modela (kombinacija klasičnih linijskih i niskotarifnih prijevoznika), kombinirana s djelomičnom privatizacijom zračnih luka i sve opsežnijim pravnim okvirom kojim se definiraju obveze država članica da otvore tržište usluga koje se pružaju u zračnim lukama dovela je do raznih vrsta ugovora između prijevoznika i zračnih luka i potencijalnog kršenja prava tržišnog natjecanja.

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U ovom radu prikazat ćemo primjenjivi pravni okvir za usluge koje se pružaju u zračnim lukama EU-a, mjeru u kojoj su one liberalizirane, logiku takvih zakonodavnih promjena te prikaz postupnog prilagođavanja smjernica Europske komisije iz područja prava tržišnog natjecanja trenutačnoj situaciji i promjenama u načinu poslovanja zračnih prijevoznika i zračnih luka. Pritom ćemo se posebno osvrnuti na probleme u primjeni navedenih propisa na zračne luke u Republici Hrvatskoj, s obzirom na opseg prometa i visoku sezonalnost, te ćemo pokušati odgovoriti na pitanje zašto najavljene promjene u regulaciji aerodromskih usluga nisu uspjele i kako bi to moglo utjecati na liberalizaciju drugih usluga u tzv. "prehrambenom lancu" zračnog prometa (pomoćne usluge koja obavlja pružatelj usluga u zračnoj plovidbi).

Ključne riječi: zračne luke, natjecanje, zračni prijevoz, zemaljske usluge, usluge zračne luke, liberalizacija, državne potpore