NEW RULES ON INVESTMENT AID TO AIRPORTS – DO THEY CLARIFY IT ALL?

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The overriding goal of the present paper is to provide a critical evaluation of the compatibility criteria for investment aid to airports in the light of the 2014 Aviation Guidelines. The subject matter will be analysed with reference to relevant Commission's decisions, as well as European jurisprudence. Special attention will be paid to the responses given by the participants of the consultations on the draft guidelines. It will be shown that they had a significant impact on the final version of the new guidelines. The main shortcoming of the compatibility criteria will be indicated. The analysis leads to the conclusion that the conditions for investment aid to airports do not seem to take sufficient account of the market realities of the aviation sector, namely the fact that airport infrastructure is highly subsidised in other parts of the world. Moreover, it is the author's contention that the order of the assessment of the compatibility conditions should be modified. Therefore, a proposition for a new approach in this regard will be presented.

Keywords: investment aid to airports, EU law, aviation law

1. INTRODUCTION

On 20 February 2014 the European Commission adopted new guidelines on State aid to airports and airlines (hereinafter: "the 2014 Aviation

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Guidelines").[1] They entered into force on 4 April 2014, which was the day of their publication in the Official Journal of the European Union. The 2014 Aviation Guidelines replaced the previous Commission guidelines on State aid in the aviation sector, namely the Community guidelines on the financing of airports and start-up aid to airlines departing from regional airports (hereinafter: "the 2005 Aviation Guidelines")[2], as well as the guidelines regarding the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (hereinafter: "the 1994 Aviation Guidelines").[3]

The material scope of the 2014 Aviation Guidelines is wide and they cover not only state aid to airports and start-up aid to airlines, but also the public funding of services of general economic interest and aid of a social character. Considering the importance of airports for the improvement of regional connectivity and the promotion of economic development of the European Union, it is the rules on investment aid to airports that kindle interest.

The aim of the present paper is to provide a critical evaluation of the compatibility criteria for investment aid to airports in the light of the 2014 Aviation Guidelines. The paper is divided into two parts. The first one presents the scope of application of the 2014 Aviation Guidelines in relation to investment aid to airports. The second part takes a comprehensive look at the conditions that need to be satisfied so as to declare an investment aid to airports compatible with the internal market. Lastly, a conclusion will mark the ending of this article.

2. SCOPE OF APPLICATION OF THE 2014 AVIATIONS GUIDELINES IN RELATION TO INVESTMENT AID TO AIRPORTS

As regards the material scope of application, the 2014 Aviation Guidelines define the notion of investment aid (in French "*aides à l'investissement*", in German "*Investitionsbeihilfe*"). Pursuant to point 25.18) investment aid means "*aid to finance fixed capital assets, specifically, to cover the capital costs funding gap*". In order to properly understand the concept of investment aid, it is therefore necessary to specify the meaning of the capital costs funding gap. The

1 See: Communication from the Commission - Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, pp. 3 – 34.

2 OJ C 312, 9.12.2005, pp. 1 – 14.

3 OJ C 350, 10.12.1994, pp. 5 – 20.

capital costs funding gap (in French "*déficit de financement des coûts du capital*", in German "*Kapitalkosten-Finanzierungslücke*") should be understood as the net present value of the difference between the positive and negative cash flows, including investment costs, over the lifetime of the investment in the fixed capital assets.[4]

As to the issue of the personal scope of the 2014 Aviation Guidelines, the investment aid may be granted to airports, that is to say, to an entity or group of entities performing the economic activity of providing airport services to airlines.[5] The concept of economic activity has autonomous Union meaning. Under EU competition law, economic activity means any activity consisting in offering goods and services on a given market.[6] It is clear from the case-law that the question of whether an activity at issue is a profit-making one is not in itself relevant for the purposes of determining whether it is an economic activity within the meaning of Union State aid law.[7] However, it should be an activity that, at least in principle, may be carried out by a private undertaking in order to make a profit.[8] As to the notion of airport services, it embraces the services provided to airlines by an airport or any of its subsidiaries in order to ensure the handling of aircraft from landing to take-off, as well as the passenger and freight service.[9]

It is relevant to note that although this is not explicitly indicated in the text of the 2014 Aviation Guidelines, there is no doubt that the solutions contained in this document apply only to airports located within the Member States. It should be pointed out that the Commission recognises the distinct nature

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4 See: the 2014 Aviation Guidelines, point 25.11).

5 See: the 2014 Aviation Guidelines, point 25.6).

6 See: Case 118/85 Commission v Italy [1987] ECR 2599, par. 7; Case 35/96 Commission v Italy [1998] ECR I-3851, par 36.

7 See: Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-1979, par. 22; Case C-244/94 Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013, par. 21; Joined cases C-180/98 to C-184/98 Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451, par. 118; Case T-155/04 SELEX Sistemi Integrati SpA v Commission of the European Communities [2006] ECR II-4797, par. 90.

8 See: Opinion of Advocate General Tesauro regarding joined cases C-159/91 and C-160/91 Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon [1993] ECR I-637, par. 8.

9 See: the 2014 Aviation Guidelines, point 25.8).

of airports specialising in freight. However, the Commission is of the opinion that it does not yet have sufficient experience in assessing the compatibility of aid to this type of airports in order to publish a separate set of guidelines. In this situation, the investment aid to airports specialising in freight will be assessed on a case-by-case basis and in accordance with the common principles of compatibility as set out in section 5 of the 2014 Aviation Guidelines.[10]

As regards the temporal scope of the 2014 Aviation Guidelines, the principles stipulated therein will be applied to all notified investment aid measures in respect of which the Commission is called upon to take a decision as of 4 April 2014.[11] It is also true for projects that were notified prior to that date. In compliance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, in case of unlawful investment aid to airports the Commission will apply the rules in force at the time when the aid was granted. The date of grant of the aid measure is the date when the public authorities of a Member State took a legally binding commitment to award the aid.[12] It follows that the principles set out in the 2014 Aviation Guidelines will not be applicable to unlawful investment aid granted to airports before 4 April 2014.

3. COMPATIBILITY CRITERIA FOR INVESTMENT AID TO AIRPORTS

3.1. Introductory Remarks

The prohibition of state aid stipulated in Article 107(1) TFEU is not an absolute one. In fact, Article 107(2) and Article 107(3) TFEU lay down provisions for specific types of aid that are or may be declared compatible with the internal market. As regards investment aid to airports, the most important exemption is listed in Article 107(3)(c) TFEU, which states that *žaid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*', may be considered to be compatible with the internal market. It is relevant to note that the above-mentioned justification is not an automatic one. It may be granted only by the Commission, which in such a case enjoys a wide

[10] See: the 2014 Aviation Guidelines, point 22.

[11] See: the 2014 Aviation Guidelines, point 173.

[12] See: the 2014 Aviation Guidelines, point 25.14).

margin of discretion (the so-called 'discretionary derogation').[13] However, the Commission may not take an arbitrary decision.[14] In order to bring about greater transparency and certainty of law, Commission lays down a number of guidelines.[15]

The 2014 Aviation Guidelines provide a framework for assessing whether aid to airports falling within the ambit of Article 107(1) TFEU may be declared compatible pursuant to Article 107(3) TFEU. They mention a number of criteria which the Commission takes into consideration in this regard. According to point 79 of the 2014 Aviation Guidelines, the Commission has to examine whether following cumulative conditions are satisfied:

a) contribution to a well-defined objective of common interest;
b) need for state intervention, which means that a state aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself;
c) appropriateness of the aid measure, *i.e.* the aid measure must be an appropriate policy instrument to address the objective of common interest;
d) incentive effect, which means that the aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or they would carry out in a restricted or different manner or location;
e) proportionality of the aid, namely the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned;
f) avoidance of undue negative effects on competition and trade between Member States;
g) transparency of aid, which means that Member States, the Commission, economic operators, and the public, must have easy access to all rele-

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[13] For more information see: Aldestam, M., *EC State aid rules applied to taxes – An analysis of the selectivity criterion*, Iustus Förlag, Uppsala, 2005, pp. 113 – 120; Bacon, K., *European Community Law of State Aid*, Oxford University Press, New York, 2009, pp. 112 – 114.

[14] Schina, D., *State Aids under the EEC Treaty Articles 92 to 94*, ESC Publishing, Oxford, 1987, p. 44.

[15] Landi, N., *Exemptions from the General Incompatibility Principle under Article 87(2) and (3) of the EC Treaty*, in: Santa Maria, A. (ed.), *Competition and State Aid. An Analysis of the EC Practice*, Kluwer Law International, The Netherlands, 2007, p. 56.

vant acts and to pertinent information about the aid awarded thereunder as outlined in section 8.2.

The aforementioned criteria are not altogether new, as their origins may be traced back to the Commission's Communication on State Aid Modernisation.[16] It is appropriate to note that these conditions are common for three types of state aid, namely: a) investment aid to airports; b) operating aid to airports and c) start-up aid to airlines.[17] However, their precise meaning shall be determined with particular reference to provisions dedicated to each category of state aid.

Referring to the assessment of the compatibility criteria, we shall first discuss the requirement that an aid measure should contribute to a well-defined objective of common interest. Second, we shall determine when public funding is to be considered necessary. As there is a correlation between the necessity of state intervention and the incentive effect, these two conditions will be analysed together. Third, we will take a closer look at the appropriateness of state aid and the proportionality of the intended measure. Lastly, we will share some thought as to additional requirements provided for investment aid to airports, *i.e.* avoidance of undue negative effects on competition and trade between Member States, the need for transparency of aid and the notification requirements. The compatibility criteria will be analysed with reference to relevant Commission's decisions.

3.2. Need for State Intervention in Order to Contribute to a Well-defined Objective of Common Interest

In order to enable airports to adapt to the new liberalized market realities and to avoid any disruption in air traffic, the Commission allows the use of investment aid to airports, provided that it contributes to the achievement of at least one of the three enumerated objectives of common interest. The aid measure at issue will be considered to fulfil this requirement, if it:

a) increases the mobility of Union citizens and the connectivity of the regions by establishing access points for intra-Union flights; or
b) combats air traffic congestion at major Union hub airports; or
c) facilitates regional development.

[16] See: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM(2012) 209, p. 4.

[17] See: the 2014 Aviation Guidelines, points 83, 112 and 138.

The objectives are diverse in nature. The first and third one show the beneficial effects of airports on other EU policies. The second objective focuses on solving one of the crucial problems of the aviation sector, namely excessive congestion at major Union hub airports.

Taking a closer look at the objectives of common interest, it should be noted that the first of them shall have a positive impact on the free movement of persons and goods within the European Union. Additionally, it contributes to increasing social and territorial cohesion. There is no doubt that airports play a vital role in the integration of the European Union, as well as its interaction with the world.[18] The importance of air transport is especially crucial in the case of the peripheral or isolated regions of Europe.

The third objective shows that the provision of investment aid to airports may enhance the local business climate and scope for further economic development of the European Union. As the Commission correctly goes on to state, properly managed airports '*act as a magnet for airlines and thus promote business activity*'.[19]

The second objective is designed to remedy one of the major problems of Union hub airports, *i.e.* excessive surface congestion. It was in 2001 that the Commission already signalled this issue, pointing out that '*almost half of the 50 European airports have already reached or are close to reaching saturation point in terms of ground capacity*'.[20] Regrettably, the problem has not yet been solved. On the contrary, it may have even greater repercussions on the economy in the future. According to the data presented by the Commission, nowadays there are five major European hubs - Dusseldorf, Frankfurt, London (Gatwick and Heathrow) and Milan (Linate) – that use their maximum capacity. The long-term forecast of flight movements shows that air traffic in Europe is expected to double by 2030.[21] If the current trends continue, this will lead to a similar level of congestion of as many as 13 major airports in the European Union. This, in turn, may trigger widespread delays, affecting up to 50% of all passenger and cargo flights. All of this implies that Europe may not be able to meet a large part of the growing demand for air services, due to the limited airport capacity.

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[18] See: the 2014 Aviation Guidelines, point 1.

[19] See: the 2005 Aviation Guidelines, point 9.

[20] European Commission, White Paper - European transport policy for 2010: time to decide, Brussels, 12.9.2001, COM(2001) 370, p. 37.

[21] EUROCONTROL, *Long-Term Forecast. Flight movements 2010-2030*, 2010, p. 9.

Special attention should be given to paragraph 85 of the 2014 Aviation Guidelines, which stipulates that the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. In case of an investment project primarily aimed at creating new airport capacity, it is necessary for the new infrastructure to meet, in the medium-term, the forecasted demand of the airlines, passengers and freight forwarders in the catchment area of the airport.[22] Moreover, the Commission has explicitly stated that any investment which does not offer satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area, cannot be considered to serve an objective of common interest. For this reason, the provision of investment aid to an airport located in the catchment area of an existing airport is likely to be challenged by the Commission, provided that the latter is not operating at or near full capacity.[23]

The analysis of the relevant Commission's decisions indicates that the investment project is considered to serve an objective of common interest, in particular, when it improves accessibility of the region concerned[24], provides employment[25] or stimulates economic and social development of the region.[26] It is relevant to note that the requirement for an investment project to contribute to a well-defined objective of common interest is not a new one. Such a condition was already imposed in the 2005 Aviation Guidelines. The main change is that the objectives provided in the 2014 Aviation Guidelines form an exhaustive list.[27] In view of the characteristics of airport infrastructure, it seems that the requirement for the investment project to contribute to at least one of the objectives of a common interest will be easily satisfied.

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22 Pursuant to point 25.12) of the 2014 Aviation Guidelines, the catchment area of an airport means a geographic market boundary that is normally set at around 100 kilometres or around 60 minutes travelling time by car, bus, train or high-speed train. However, the catchment area of a given airport needs to take into account the specificities of each particular airport.

23 See: the 2014 Aviation Guidelines, point 86.

24 See: Commission Decision n° SA.18857 on alleged aid to Västerås Airport and Ryanair Ltd, 1.10.2014, not published yet, par. 159.

25 See: Commission Decision n° N63/2010 on State guarantee for the construction of Murcia International Airport, Brussels, 10.06.2010, C (2010) 3546, par. 54; Commission Decision n° N 335/2010 on financing the extension of Kassel-Calden airport, Brussels, 20.12.2010, C (2010) 9523, par. 43.

26 See: Commission Decision n° SA.38441 on Isles of Scilly Air links, Brussels, 7.05.2014, C/2014/2626/2, par. 47.

27 See: the 2005 Aviation Guidelines, point 61.

3.3. Necessity of State Intervention and Incentive Effect

In addition to the contribution to a well-defined objective of common interest, investment aid to airport must fulfil further criteria outlined in the 2014 Aviation Guidelines, so as to be declared compatible with the internal market.

It is constant case law that the Commission can declare aid compatible with the internal market only if it is necessary for achieving a legitimate objective.[28] Under the 2014 Aviation Guidelines, the need for state intervention should be examined in two stages.[29] Firstly, it is necessary to identify a problem that cannot be solved by the market itself. Secondly, it is indispensable to show that the provision of state aid can bring about a material improvement.

The survey of the Commission's decisional practice suggests that state intervention shall be deemed necessary if the existing infrastructure cannot meet safety and/or environmental requirements.[30] It is also certain that public support may be given to an airport which, under current market conditions, is not able to obtain financing from the private sector in order to carry out the planned investments.[31] Moreover, in the case of Saarbrücken Airport the Commission authorised the investment so as to decongest the airport and ensure the connectivity of the region.[32]

In the Commission's view, the need for public funding to finance infrastructure projects will, due to high fixed costs, vary depending on the size of airport and will normally be greater for smaller airports.[33] The concept that

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28 See: Case 730/79 Philip Morris Holland BV v Commission of the European Communities [1980] ECR 2671, par. 17; Case C-390/06 Nuova Agricast Srl v Ministero delle Attività Produttive [2008] ECR I-02577, par. 68; Case T-162/06 Kronoply GmbH & Co. KG v Commission of the European Communities [2009] ECR II-00001, par. 65.

29 See: the 2014 Aviation Guidelines, point 87.

30 See: Commission Decision n° N41/2010 on State aid related to investments in Riga airport infrastructure, Brussels, 28.04.2010, C (2010) 2539, par. 37; Commission Decision n° SA.38168 on Dubrovnik Airport Development, Brussels, 11.02.2014, C (2014) 940, par. 33.

31 See: Commission Decision n° N63/2010 on State guarantee for the construction of Murcia International Airport, Brussels, 10.06.2010, C (2010) 3546, par. 68; Commission Decision n° N 335/2010 on financing the extension of Kassel-Calden airport, Brussels, 20.12.2010, C (2010) 9523, par. 61.

32 See: Commission Decision n° SA.26190 on Saarbrücken Airport, Brussels, 01.10.2014, C (2014) 5062, paras. 260-261.

33 See: the 2014 Aviation Guidelines, point 89.

smaller airports are more in need of investment aid for infrastructure project is largely true, as it is harder for them to attract private investors. As a consequence, the Commission has divided airports into five categories according to their financial viability, which are as follows:

(a) airports with up to 200 000 passengers per annum may not be able to cover their capital costs to a large extent;
(b) airports with annual passenger traffic of between 200 000 and 1 million are usually not able to cover their capital costs to a large extent;
(c) airports with annual passenger traffic of 1–3 million should, on average, be able to cover their capital costs to a greater extent;
(d) airports with annual passenger traffic of above 3 and up to 5 million should, in principle, be able to cover, to a large extent, all their costs (including operating costs and capital costs) but, under certain case-specific circumstances, public support might be necessary to finance some of their capital costs;
(e) airports with annual passenger traffic above 5 million are usually profitable and are able to cover all of their costs, except in very exceptional circumstances.

The classification proposed by the Commission brings about greater transparency and certainty of law. What is striking, however, is that the Commission did not present any economic data which might confirm its validity. Therefore, the thresholds may be regarded as arbitrary. It is widely argued that the criterion applied for thresholds to distinguish different categories of airports is not warranted. According to Lufthansa, the use of number of passengers allows airlines to steer traffic in accordance with the threshold. As a result Lufthansa believes that the criterion for granting aid should be changed to consider airports' maximal capacity.[34] The Association of European Airlines (hereinafter: "AEA") is of the opinion that the decisive factor should be the passenger capacity that an airport builds up as the passenger volume can rapidly change.[35] To illustrate, the AEA gives an example of an airport that expanded a terminal for five million passengers. In such a situation, the airport at issue must be measured economically against this capacity, considering that it was its own economic decision to undertake this expansion. A threshold that is based on

[34] See: Lufthansa's position paper on draft State aid guidelines to airports and airlines, 25.09.2013, p. 2.

[35] See: AEA's position on the Draft EU Guidelines on State aid to airports and airlines, 24.09.2014, p. 4.

the actual passenger volume would lead carriers to try to remain under this threshold in order to receive further state aid. The proposition of the Polish government is also worth mentioning. The Polish Office of Competition and Consumer Protection suggested including additional criteria, such as: function of an airport, its business model and the characteristics of the region in which the airport is located.[36]

Referring to the existence of an incentive effect[37], it must be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any state aid.[38] In other words, the provision of public funding must change the behaviour of the beneficiary undertaking in such a way that it engages in an activity that contributes to the achievement of a public interest objective that (i) it would not carry out without the aid, or (ii) it would carry out in a restricted or different manner.[39]

The existence of an incentive effect shall be identified through counterfactual analysis. This means that the Commission will compare the levels of intended activity with aid and without aid.[40] In practice, such a comparison may prove difficult. That is why, in case of no specific counterfactual scenario, the Commission allows the assumption of an incentive effect, provided that the capital cost funding gap[41] is identified on the basis of an *ex ante* business plan.[42]

It could be argued that there is no need to examine an incentive effect as a separate requirement on the grounds that it forms part of the condition to show that aid is necessary. As indicated earlier, State intervention is necessary when there is a problem which cannot be solved by the market itself, and the provision of aid will bring about a material improvement in this regard. Point 94 of the 2014 Aviation Guidelines stipulates, in turn, that an investment project at an airport may have an incentive effect only if it is not economically attractive in its own right. It seems reasonable to believe that an economically attractive investment project can be pursued without state aid, as it is possi-

[36] See: Polish remarks and proposals on the Commission's draft guidelines on State aid to airports and airlines, Warsaw, 2013, p. 6.

[37] In French it is called "*effet d'incitation*", while in German it is called "*Anreizeffekt*".

[38] See: the 2014 Aviation Guidelines, point 89.

[39] See: Commission Decision n° SA.38168 on Dubrovnik Airport Development, Brussels, 11.02.2014, C (2014) 940, par. 54.

[40] See: the 2014 Aviation Guidelines, point 95.

[41] The notion of capital cost funding gap has been clarified in the second point of the present paper.

[42] See: the 2014 Aviation Guidelines, point 96.

ble to find private investors willing to finance it. In such a case, there is no market failure to be addressed and, therefore, no public funding is necessary. This would lead to the conclusion that every aid deemed necessary has also an incentive effect. The overriding goal of both conditions is to ensure that public funding is indispensible to carry out the intended infrastructure project.

3.4. State aid as appropriate and proportional measure

If it has been decided that the public support at stake is necessary to contribute to at least one of the legitimate objectives set out in point 84 of the 2014 Aviation Guidelines, the Commission must then assess the appropriateness and the proportionality of the intended measure. As both these conditions are aimed at determining the best-suited policy instrument in a given situation, it seems reasonable to discuss them together.

Pursuant to point 90 of the 2014 Aviation Guidelines, Member States are obliged to demonstrate that "*the aid measure is an appropriate policy instrument to achieve the intended objective or solve the problems intended to be addressed by the aid*". This means that Member States are compelled to examine different viable options and choose the least distortive one that assures the attainment of the intended objective.[43] It is therefore advisable to provide state aid in the form of loans, guarantees or repayable advances.[44] Hence, a direct grant must be seen as an instrument of last resort.

When the selected aid measure is appropriate, the next step is to assess its proportionality. An aid measure is considered to be proportionate, only if the same result could not be reached with less aid.[45] This means that the amount and intensity of the aid must be limited to the minimum needed for the intended investment project to be carried out.

Pursuant to point 99 of the 2014 Aviation Guidelines, investment aid must be restricted to the extra costs (net of extra revenues) which result from undertaking of the aided project rather than the alternative project that the recipient company would have undertaken if it had not received the aid. In the case of no counterfactual scenario, the amount of aid may be deemed proportionate

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[43] See: Commission Decision n° SA.38441 on Isles of Scilly Air links, Brussels, 7.05.2014, C/2014/2626/2, par. 56.

[44] See: the 2014 Aviation Guidelines, point 91.

[45] See: Commission Decision n° SA.38441 on Isles of Scilly Air links, Brussels, 7.05.2014, C/2014/2626/2, par. 63.

if it does not exceed the funding gap of the investment project. The so-called capital cost funding gap corresponds to the net present value of the difference between the positive and negative cash flows over the lifetime of the relevant investment. It should be determined on the basis of an *ex ante* business plan covering the period of the economic utilisation of the asset. In the decision concerning investment aid at Riga airport the Commission stated that the use of competitive tender procedures for the implementation of the investment programme is a useful tool that helps to ensure the proportionality of the aid measure.[46]

The 2005 Airport Guidelines left open the issue of aid intensity. For this reason, aid intensities proposed by Member States were assessed on a case-by-case basis and the decisions were taken following a broad assessment of aid intensity being reasonable in relation to the size of the airport, type of investment and prevailing competition conditions in the relevant region.[47] The 2014 Aviation Guidelines introduced certain ceilings of permissible aid intensity, which depend on the size of the airport as measured by the number of passengers per annum.[48] According to point 101 of the 2014 Aviation Guidelines, public funds granted to airports serving below 1 million passengers a year may cover up to 75% of eligible costs[49] of the investment project. As

[46] See: Commission Decision n° N41/2010 on State aid related to investments in Riga airport infrastructure, Brussels, 28.04.2010, C (2010) 2539, par. 63.

[47] See: Commission Decision n° N63/2010 on State guarantee for the construction of Murcia International Airport, Brussels, 10.06.2010, C (2010) 3546, par. 69.

[48] Under the 2014 Aviation Guidelines, the average annual passenger traffic of a functioning airport should be determined taking into account two financial years preceding the year in which the aid was notified or actually granted or paid in the case of non-notified aid. When it comes to the newly created passenger airport, the forecasted average annual passenger traffic should be considered, taking as a timeframe two financial years after the beginning of the operation of commercial passenger air traffic. It is important to note that the thresholds indicated above refer to one-way count. This means that a passenger flying to the airport and back would be counted twice. If an airport is part of a group of airports, the number of passengers shall be determined separately for each airport.

[49] Pursuant to point 97 of the 2014 Aviation Guidelines, the notion of eligible costs encompasses the costs regarding investments in airport infrastructure, including planning costs, ground handling infrastructure and airport equipment. This provision, however, explicitly excludes the following types of costs: 1) investment costs relating to non-aeronautical activities; 2) investment costs regarding the provision of ground handling services, insofar as they are not part of ground handling infrastructure.

regards airports with a passenger volume of 1-3 million per annum, it is up to 50% of eligible costs. The maximum permissible aid intensity is lower for larger airports and, in the case of airports with 3-5 million passengers per year, it may not exceed 25% of eligible costs. As a general rule, investment projects at airports above the 5 million passengers threshold cannot involve state aid.

At the consultation stage, it was widely argued that the provisions regarding maximum aid intensity were too rigid.[50] As a corollary, the final version of the 2014 Aviation Guidelines recognises some exceptions to these thresholds, thereby providing much needed flexibility in this regard. Firstly, the maximum aid intensities for investment aid may be increased by up to 20% in the case of airports located in remote regions irrespective of their size.[51] For the purpose of the 2014 Aviation Guidelines, the notion of remote regions embraces outermost regions, Malta, Cyprus, Ceuta, Mellila, islands which are part of the territory of a Member State, and sparsely populated areas.[52] It was mainly Sweden and Estonia that called for a more lenient approach towards the assessment of investment aid given to airports located in remote regions of the European Union. The Swedish Government pointed to the particularly difficult conditions prevailing in the Nordic countries, namely great distances and sparsely populated areas, which create specific demands on the transport systems.[53] For this reason, state aid to airports and airlines plays an important role in maintaining a reasonable and necessary accessibility of such regions. As noted by Estonia, the provision of state aid to outer regions of the EU also contributes to a reduction of their economic and social shortfalls compared to other Member States.[54]

Secondly, in the case of an airport with the passenger volume below 1 million a year, the Commission may, in exceptional circumstances, justify the

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[50] See: European Low Fares Airline Association (ELFAA) response to consultation on draft Guidelines on State aid to airports and airlines, 2013, Brussels, p. 3; Ireland's response to the European Commission on its Draft EU Guidelines on State aid to airports and airlines, p. 3; Ryanair response to consultation on draft Guidelines on State aid to airports and airlines, 2013, Dublin, p. 16; Hungarian response to consultation on draft Guidelines on State aid to airports and airlines, p. 1.

[51] See: the 2014 Aviation Guidelines, point 102.

[52] See: the 2014 Aviation Guidelines, point 25.27).

[53] See: Swedish remarks and proposals on the Commission's draft guidelines on State aid to airports and airlines, 2013, pp. 1 – 2.

[54] See: Estonia's response to the European Commission on its Draft EU Guidelines on State aid to airports and airlines, p. 3.

aid intensity exceeding 75% of eligible costs.[55] The decision will be subject to a case-by-case assessment and will depend on the particular characteristics of the relevant airport, intended investment project and the region served. To illustrate, the Commission mentions that the investment projects at airports below the 1 million threshold located in peripheral regions of the European Union may result in a funding gap higher than the maximum permissible aid intensities. It is however regrettable that the Commission did not follow the opinion of French authorities advocating the view that the maximum intensity rate of aid should be fixed more gradually for airports with less than 1 million passengers, as this category of airports covers very different situations that should be assessed more accurately.[56]

Thirdly, the Commission recognises the specific characteristics concerning the relocation of an existing airport. In such a case the assessment of the proportionality, the necessity and the maximum aid intensity of state aid will be conducted regardless of the average passenger traffic of an airport at issue.[57] It must also be observed that the investment in landmark greenfield airport projects may not be viable without some form of public funding.[58] Two main reasons identified for this are the long timescales involved and the massive investment sums required. The lack of special provisions regarding this type of investment must be thus criticised.

Fourthly, the Commission may, under very exceptional circumstances, allow state aid aimed at financing infrastructure at airports with average annual passenger traffic over 5 million.[59] In such cases, however, an in-depth assessment will always be required. It can be claimed that the provision of investment aid to this type of airports may, in some cases, prove more justified than the creation of a new airport in the same catchment area.[60] Account needs to be taken of the fact that public financing plays a central role in airport infrastructure development not only in the Gulf and Asia, but also in the United States. As noted by the Association of European Airlines, there is a risk that,

[55] See: the 2014 Aviation Guidelines, point 103.

[56] See: French response to consultation on draft Guidelines on State aid to airports and airlines, p. 3.

[57] See: the 2014 Aviation Guidelines, point 104.

[58] See: Airports Council International's response to the European Commission on its Draft EU Guidelines on State aid to airports and airlines, pp. 11 – 12.

[59] See: the 2014 Aviation Guidelines, point 105.

[60] See: Polish remarks and proposals on the Commission's draft guidelines on State aid to airports and airlines, Warsaw, 2013, p. 4.

especially for international airports that are mainly in competition with airport system outside the EU, competitive distortions may result from the absence of such aids.[61]

3.5. Compliance with Additional Requirements set out in the 2014 Aviation Guidelines

The classification of a relevant public investment as state aid means that a measure at issue generates distortions of competition and affects the trade between Member States.[62] The adverse effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive. For this reason, the 2014 Aviation Guidelines require that undue negative effects on competition and trade should be avoided.

It has been stated that the duplication of unprofitable airports or the creation of additional unused capacity in the same catchment area of existing infrastructure might have distortive effects.[63] Hence, it appears probable that the investment aid to airport located in the same catchment area of an existing airport is to be declared incompatible with the internal market, provided that the latter is not operating at or near full capacity. It should be observed in that regard that investment in airport infrastructure is complicated and time-consuming. As Polish authorities correctly pointed out, starting construction work at the beneficiary airport only when the airport located in the same catchment area is about to reach its maximum capacity is likely to result in flight delays and additional construction costs.[64] Moreover, it could significantly reduce the effectiveness and attractiveness of the airport at issue, as compared with other airports in the same catchment area. Such an approach would also contradict the reasonable way of doing business, i.e. to anticipate potential threats to business activity.

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[61] See: AEA's position on the Draft EU Guidelines on State aid to airports and airlines, 24.09.2014, p. 5.

[62] For more information about the distortions of competition and the effects of State aid on trade please see: Bacon, K., *op. cit.* (fn. 13), pp. 93 – 100; Dony, M., *Contrôle des aides d'Etat*, Editions de l'Université de Bruxelles, Brussels, 2007, pp. 71 – 79; Ebner, M., Gambaro, E.., *The Notion of State Aid*, in: Santa Maria, A. (ed.), *Competition and State Aid. An Analysis of the EC Practice*, Kluwer Law International, The Netherlands, 2007, pp. 32 – 36.

[63] See: the 2014 Aviation Guidelines, point 106.

[64] See: Polish remarks and proposals on the Commission's draft guidelines on State aid to airports and airlines, Warsaw, 2013, p. 6.

Moreover, the Commission indicates the permissible forms of investment aid that can be granted to airports with average annual traffic below 5 million passengers. The relevant airport may receive public support as an upfront fixed amount that covers eligible investment costs or in annual instalments in order to compensate for the capital cost funding gap resulting from the business plan of the airport.[65] The draft version of the 2014 Aviation Guidelines stipulated that the investment aid granted for the financing of initial investments at airports with passenger traffic exceeding 3 million should have been given only as a repayable advance.[66] In the light of strong opposition to this provision[67], the Commission has reconsidered its approach and decided not to include this obligation.

Under the 2005 Aviation Guidelines, the Commission had to assess whether all potential users of the aided infrastructure had access to it in an equal and non-discriminatory manner.[68] This requirement has been incorporated in the 2014 Aviation Guidelines as an instrument that may further limit any distortions of competition.[69]

It must also be observed that the Commission intends to improve the transparency of state aid in the European Union. In order to achieve this goal the 2014 Aviation Guidelines impose an obligation on Member States to publish relevant information regarding not only aid schemes but also decisions granting individual aid.[70] Although the 2014 Aviation Guidelines do not specify the precise moment of publication, it appears reasonable that it should be done without undue delay. The required information must be kept for at least 10 years and should be regularly updated.[71] In order to reduce the administrative burden for the Member States, the creation of a central database or a website is advised.[72]

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[65] See: the 2014 Aviation Guidelines, point 107.

[66] See: draft Guidelines on State aid to airports and airlines, European Commission, 2013, point 95.

[67] See: French response to consultation on draft Guidelines on State aid to airports and airlines, p. 4; Hungarian response to consultation on draft Guidelines on State aid to airports and airlines, p. 1.

[68] See: the 2005 Aviation Guidelines, point 61.

[69] See: the 2014 Aviation Guidelines, point 108.

[70] See: the 2014 Aviation Guidelines, point 162.

[71] See: the 2014 Aviation Guidelines, point 163.

[72] See: United Kingdom's response to the European Commission on its proposed new Guidelines on State aid to airports and airlines, p. 6; Ireland's response to the European Commission on its Draft EU Guidelines on State aid to airports and airlines, p. 4.

Compared to the 2005 Aviation Guidelines, the requirement of notification has been lessened. Under the 2005 Aviation Guidelines, a measure in question must have been notified if the possibility of state aid could not have been ruled out.[73] As a result, the previous guidelines were based on the assumption that all aid measures should be notified. The 2014 Aviation Guidelines take a different approach as they enumerate the cases in which, due to a higher risk of distortion of competition, aid measures should always be notified individually.[74] The newly adopted solution shall be evaluated positively, as it will allow the Commission to focus on cases which are most likely to distort competition.

4. CONCLUSION

The 2014 Aviation Guidelines are a step in the right direction in regard to investment aid to airports. While the 2005 Aviation Guidelines left open the issue of investment aid, the revised guidelines provide a fairly detailed approach to the assessment of this type of aid. It is, however, regrettable that the new rules do not seem to reflect the market realities of the aviation sector, as well as the wider positive economic externalities that it can generate. It is therefore doubtful that the 2014 Aviation Guidelines will meet the goal of protecting competition while, at the same time, they will enhance social cohesion and development and boost economic growth in the European Union. As the Association of European Airlines rightly pointed out, strict compatibility criteria regarding investment aid are likely to weaken the competitiveness of the Union airports in comparison to airports located outside the EU, which are largely subsidised.[75] In view of the prevailing market conditions, it is to be hoped that the European authorities will conduct a broader reflection on their general policy in the matter of state aid to airports and airlines.

Moreover, it is relevant to note that the views expressed by the consultation participants had a significant impact on the final version of the new guidelines, namely in respect to the maximum permissible aid intensities. It shows that the consultation process plays an important role in shaping the European state aid policy.

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73 See: the 2005 Aviation Guidelines, point 61.

74 See: the 2014 Aviation Guidelines, point 111.

75 See: AEA's position on the Draft EU Guidelines on State aid to airports and airlines, 24.09.2014, p. 4.

It could also be argued that the sequence of conditions used by the Commission should be altered. The author of this paper is of the opinion that proper assessment of investment aid to airports should consist of four consecutive stages. Firstly, the Commission should examine if the aid measure at issue contributes to at least one of the objectives of common interest outlined in point 84 of the 2014 Aviation Guidelines. As the airports play a paramount role in increasing regional connectivity and are considered to be the catalysts for economic regeneration and growth, it seems that this condition will almost always be met. Secondly, it should be determined whether public funding is necessary in a given situation. There is a strong correlation between the necessity of state intervention and the incentive effect. The overriding goal of both those conditions is to ensure that public support is indispensible to carry out the intended infrastructure project. As a consequence, they should be analysed together. Thirdly, the Commission should assess the appropriateness and the proportionality of aid in question. As both these conditions are aimed at determining the best-suited policy instrument in a given situation, it seems reasonable to discuss them together. It is important to note that the assessment of the appropriateness and the proportionality of the relevant aid should be allowed only if it has been determined that the aid measure at issue is necessary. Fourthly, the Commission should make sure that the aid measure does not generate undue negative effects on competition and trade.

Sažetak

Jadwiga Urban-Kozłowska *

NOVA PRAVILA O POTPORI ZA ULAGANJA U ZRAČNE LUKE – JESU LI DOVOLJNO JASNA?

Zračni prijevoz ima ključnu ulogu u integraciji i konkurentnosti u Europskoj uniji. Postojanje zračne luke u nekom području olakšava njegovu povezanost. Štoviše, može imati povoljan učinak na lokalno gospodarstvo i poticati koheziju unutar EU-a. U tome kontekstu valja napomenuti da su ukupni troškovi izgradnje nove zračne luke iznimno veliki, a izgledi za profitabilnost takvog ulaganja neizvjesni. U praksi se izgradnja ili modernizacija zračnih luka uglavnom financira javnim sredstvima jer je veoma teško naći odgovarajućeg privatnog investitora. Stoga je pitanje državnih potpora od velike važnosti za ulaganja u infrastrukturu zračnih luka. Javno financiranje izgradnje ili modernizacije zračnih luka unutar Europske unije mora biti u skladu s pravilima EU-a o državnim potporama. Neka od najvažnijih takvih pravila su članak 107. Ugovora o funkcioniranju Europske unije i Smjernice Komisije o državnim potporama u zrakoplovnom sektoru. Europska komisija usvojila je 2014. nove Smjernice o državnim potporama za zračne luke i zrakoplovne tvrtke (dalje u tekstu: Smjernice iz 2014.), koje su zamijenile prethodne smjernice iz 2005. (dalje u tekstu: Smjernice iz 2005.).

Cilj je ovog izlaganja ponuditi dubinsku analizu novih kriterija za određivanje usklađenosti potpore za ulaganja u zračne luke iz Smjernica iz 2014., uz poseban osvrt na izmjene u odnosu na Smjernice iz 2005. To će omogućiti ispravno razumijevanje različitih uvjeta za dodjelu državne potpore infrastrukturama zračnih luka i razriješiti nedoumice oko njihovih tumačenja.

Ključne riječi: investicijske potpore za zračne luke, pravo EU-a, zračno pravo

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