

## **INFRASTRUCTURE ANALYTICAL GRID N° 2<sup>1</sup> – CONSTRUCTION OF AIRPORT INFRASTRUCTURES**

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudice possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### **General principles**

1. This analytical grid covers the application of State aid rules to airport infrastructure. The Commission distinguishes three types of public support:
  - Support for the construction of airport infrastructure (investment aid);
  - Support for the operation of airport infrastructure (operating aid); and
  - Support for the airlines using the infrastructure.
2. According to established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of airport infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

### **Instances in which the existence of State aid is excluded**

#### **No economic activity: activities within the public policy remit**

3. The distinction between public policy remit and economic activities has to be assessed on a case-by-case basis.
4. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general fall outside the scope of the State aid rules. Certain investments in airport infrastructure, which are exclusively reserved for functions within such a "public policy remit", may concern such non-economic activities<sup>2</sup>. This can be the case in particular for air traffic control-related infrastructure, customs and police related infrastructure (e.g. premises allocated to customs / police within a terminal), aircraft rescue and firefighting (ARFF) infrastructure and infrastructure necessary to counteract public threats or terrorist attacks (such as equipment to screen luggage or passengers, CCTV and

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See paragraph 98 of Joined Cases T-443/08 and T-455/08 Flughafen Freistaat Sachsen and others v Commission EU:T:2011:117. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatised.

fences preventing access to the airport's reserved area<sup>3</sup>). Public funding granted for the construction, extension or modernisation of infrastructure exclusively used for such activities does not constitute State aid provided that it is limited to compensating the costs to which they give rise and does not lead to undue discrimination between airports<sup>4</sup>.

5. While the exact extent of the services provided by airports varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all Member States<sup>5</sup>.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

6. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.
7. The financing of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEOP are nevertheless complied with<sup>6</sup>.

#### **No economic advantage at the level of the user of the infrastructure**

8. Where an airport has public resources at its disposal, aid to an airline using that airport can, in principle, be excluded if: (a) the price charged for the airport services corresponds to the market price, as estimated on the basis of prices charged by comparable airports ("benchmarking approach" or (b) it can be demonstrated through an ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport. However, the

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<sup>3</sup> See Commission decisions of 23 July 2014 in case SA.22614 – France – Airport Pau Pyrénées, OJ 201, 30.7.2015, p. 109, [http://ec.europa.eu/competition/state\\_aid/cases/223036/223036\\_1614098\\_1194\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/223036/223036_1614098_1194_2.pdf) and in case SA.33961 – France – Aéroport de Nîmes, not yet published.

<sup>4</sup> When it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be recipients of State aid, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature (see paragraph 37 of Guidelines on State aid to airports and airlines ("Aviation Guidelines"), OJ C 99, 4.4.2014, p. 3).

<sup>5</sup> See paragraphs 31-33 of the Aviation Guidelines (footnote 4).

<sup>6</sup> See for example Commission decision of 13 July 2014 in case SA.32576 Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/243457/243457\\_1359832\\_419\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf); Commission decision of 3 October 2012 in the case SA.23600 Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, [http://ec.europa.eu/competition/state\\_aid/cases/226773/226773\\_1399901\\_101\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf).

Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price. Thus it considers the *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines for the purposes of determining whether they involve State aid.

**No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

9. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of a genuine service of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require<sup>7</sup>.
10. The Aviation Guidelines provide guidance on what activities can be considered an SGEI<sup>8</sup>. In substance, the overall management of an airport can be considered as an SGEI only in exceptional cases, such as airports located in isolated, remote or peripheral regions of the Union. In any case, the pursuit of commercial activities not directly linked to the airport's core activities cannot be included in the scope of an SGEI<sup>9</sup>.

**SGEI de minimis Regulation**

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI de minimis Regulation are also fulfilled<sup>10</sup>.

**No potential effect on trade between Member States: de minimis**

12. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>11</sup>.

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<sup>7</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415.

<sup>8</sup> See paragraphs 67-73 of the Aviation Guidelines.

<sup>9</sup> See paragraph 73 of the Aviation Guidelines, and decision of 23 July 2014 in case SA.33963 - Aéroport d'Angoulême, OJ 201, 30.7.2015, p. 48, [http://ec.europa.eu/competition/state\\_aid/cases/244154/244154\\_1603693\\_425\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/244154/244154_1603693_425_2.pdf).

<sup>10</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>11</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

### **Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

13. State aid may be considered compatible with the Treaty and can be granted without notification in the following instances<sup>12</sup>:

#### **Service of general economic interest: SGEI Decision<sup>13</sup>**

14. If the construction, renovation or extension of an airport is necessary for the provision of an SGEI, it may be considered as part of the SGEI mission, depending on the exact content of the public service obligations imposed on the airport operator. If the compensation of such an SGEI concerns airports with an average annual traffic of fewer than 200 000 passengers, it may be covered by the SGEI Decision, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation<sup>14</sup> established ex ante, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

#### **If aid can be granted under an existing State aid scheme**

15. If the Commission has approved a scheme allowing aid for airport infrastructure, Member States may grant aid in conformity with the conditions established in the legal acts adopted by the Member State to establish the scheme, as notified to the Commission, and in the Commission decision clearing the scheme.

### **Instances in which notifying for State aid clearance is necessary**

16. If the measure constitutes State aid and the measure does not meet the conditions of a scheme approved by the Commission or the conditions allowing an exemption from the notification obligation, a notification to the Commission for State aid clearance is required.

#### **Aviation Guidelines<sup>15</sup>**

17. The compatibility of State aid for airport infrastructure is normally assessed on the basis of the **Aviation Guidelines**. Investment aid for airports can be declared compatible by the Commission, provided that the conditions detailed in paragraphs 84 to 108 of the Aviation Guidelines are complied with.

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<sup>12</sup> Currently Commission Regulation No 651/2014 (GBER) includes no criteria based on which airports could be exempted from notification. Provided that sufficient case experience is further developed allowing the design of operational exemption criteria ensuring the ex ante compatibility of aid for airport infrastructure, the Commission intends to review the scope of the GBER with a view to including that type of aid.

<sup>13</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>14</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

<sup>15</sup> See footnote 4.

18. Member States can notify State aid schemes for investment aid for airports with average annual traffic below 3 million passengers.
19. The following aid measures cannot be covered by State aid schemes and should always be notified individually:
- investment aid to airports with average annual traffic above 3 million passengers;
  - investment aid with an aid intensity exceeding 75 % to an airport with average annual traffic below 1 million passengers, with the exception of airports located in remote regions;
  - investment aid granted for the relocation of airports;
  - investment aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the two financial years preceding that in which the aid is notified;
  - investment aid aimed at the creation of a new passenger airport (including the conversion of an existing airfield into a passenger airport); and
  - investment aid aimed at the creation or development of an airport located within 100 kilometres distance or 60 minutes travelling time by car, bus, train or high-speed train from an existing airport.

**Service of General Economic interest: SGEI Framework<sup>16</sup>**

20. The compatibility of State aid for airport infrastructure which is necessary for the provision of an SGEI in airports with more than 200 000 passengers per year may be assessed on the basis of the SGEI Framework<sup>17</sup>.
21. The considerations as to the definition of a genuine SGEI in the airport sector (see point 10) will apply.

**Projects that in principle should not be supported**

22. Projects that involve State aid but do not comply with the relevant compatibility rules (Aviation Guidelines and SGEI) should not be supported. Projects falling into that category would be those involving:
- investment aid to airports with more than 5 million passengers per year, except in very exceptional circumstances<sup>18</sup>;
  - investment aid to an airport located in the catchment area of an existing airport when the said investment does not have satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area<sup>19</sup>.

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<sup>16</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

<sup>17</sup> According to that article: "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*"

<sup>18</sup> Such as relocation of an existing airport, where the need for State intervention is characterised by clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited distortions of competition.

Such cases would most likely require an in-depth assessment which could result in a conclusion that the aid is incompatible with the internal market.

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*References:*

- Guidelines on State aid to airports and airlines ("[Aviation Guidelines](#)"), OJ C 99, 4.4.2014, p. 3.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

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<sup>19</sup> The Commission will have doubts as to the medium-term prospects for use of airport infrastructure at an airport located in the catchment area of an existing airport where the existing airport is not operating at or near full capacity.