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AEA’s position on the Draft EU Guidelines on State aid to airports and airlines

I. Background

The new EU Guidelines were urgently needed because the current set of rules, which date back to 1994 and 2005, no longer reflect the current market environment and do not address the on-going “race for subsidies”, which is not only resulting in distortions of competition in various ways, but also leading to a waste of money better to be used e.g. for enhancing capacity at airports where there is real and sustainable demand for traffic:

- Their application is often not at all or not consequently monitored, their provisions are often not or not consequently executed and some route start-up aid schemes are not even notified to or by Member States. At the present time, there is no stringent policy to prevent the creation of unclear subsidy schemes, resulting in market distortion. Even though a significant number of proceedings have been initiated, most of these cases are still pending. This is not acceptable, as a few of these proceedings were initiated as long ago as 2007/2008 and are therefore considered to be in breach of the maximum duration of proceedings (18 months) as laid down in Implementing Regulation 659/99. In addition, this situation has been aggravated by the initiation of further proceedings without formal closure of the initial proceedings. Without a formal decision on the pending cases, AEA believes that the new draft Guidelines will not serve their purpose.
- These practices are particularly problematic considering that there are obvious cases of subsidy abuse, such as the expansion of an airport with the purpose of a de facto exclusive use by a single carrier (e.g. Charleroi, Altenburg, Hahn). These cases could have easily been decided in a short period of time.
- For the time being, no decisional practice of the Commission regarding the expansion of airport infrastructure, which could have constituted a useful reference, has emerged. In this context, it seems contradictory that the new Guidelines intend to allow both investment and operating aid for airports, even though there is no sustainable demand.
- AEA notes that rescue and restructuring aid to airlines has been completely left out with the new Guidelines. The Commission has to be particularly vigilant concerning restructuring aids received by some European airlines through capital injections and loans given under favourable conditions in the past. A “level-playing field” without any EC created distortion of competition is needed.

These non-coherent State aid policies lead to legal uncertainty. They also result in a shifting of the market shares to the benefit of specific business models operating at smaller airports, such as low-cost carriers (LCC), which are partially conducting “subsidy hopping”. The success of these LCC was in many cases only enabled through State aids not available to other carriers. For the traditional carriers and the remaining airports this resulted in damages running into millions.
Due to this subsidy practice certain airports grew thanks to public funds, whereas in the past profitable airports in the same catchment area have suffered a massive decrease in passenger numbers and have become loss-making. Due to the lack of a “level-playing field” and the fact that certain carriers could base their business model on permanent subsidies; the current subsidy scheme has significant distortive effects on competition to the detriment of the aviation community as a whole. Furthermore, this highly distortive effect inherent to the payments of State aid not only leads to detrimental economic effects for the aviation sector as a whole, but also seems to contradict the aims pursued with the implementation of the Emission Trading Scheme (ETS). The collective burdening of an entire industry under ETS on the one hand, and the selective granting of reliefs in the form of State aid on the other, constitutes a highly contradictory situation.

II. General statement

AEA generally welcomes the Commission’s decision to finally revise the “Draft EU Guidelines on State aid to airports and airlines” from 2005 and publish a new draft on 3 July 2013. However, AEA has strong concerns that the new Draft EU Guidelines will not achieve the objectives unless various issues as laid down in this paper are taken into account.

The draft Guidelines should offer more legal certainty to European operators with regard to the conditions under which aid to airlines and airports can be legally granted. However, AEA feels that this draft (a) does not sufficiently address the issue of prior and ex-post facto control by both the Member States and the Commission; (b) should set stricter conditions for operating aid (either to the airport or to an airline), in particular when the airport concerned is not a “true” regional airport but rather a secondary airport located in the same catchment area as other airports where there is a higher potential for distortion of competition between airlines and airports; (c) will only be truly implementable once the Commission has taken a final position on the numerous State aid cases where proceedings have been opened but remain pending; (d) should clarify the conditions under which they will apply to aid granted before their final adoption. Furthermore, AEA sees no reason why this type of operating aid to airlines should be accepted in the aviation sector on an evergreen basis, while it is proposed that the same type of aid for airports should be limited to a 10-year transitional period. AEA respectfully suggests that aid to airlines, if any, should be limited to a three-year transitional period.

Regarding aid to airports, allowing operating aid for airports, even retroactively, is a very surprising move from the Commission, which has to the best of our knowledge always considered operating aid as the most distortive form of aid that can exist on a market. This move represents a radical change in the Commission’s long-standing policy on this topic. AEA is of the view that, at a minimum, the possibility for airports to be granted operating aid should be limited in time, for a transitional period of 3 years as a maximum and for airports with traffic of less than 500,000 passengers/year. In addition, Member States should collectively be encouraged to reflect on an airport policy that would ensure the end of the fruitless investment race between different communities to develop under-utilised airport infrastructure in the same catchment areas or within airport networks. The limitation of operating aid to airports should help trigger those reflections.
As a more general remark regarding the Commission’s policy on State aid towards airports, AEA believes that the European authorities should also conduct a broader reflection on their general policy in this matter and the global competitive environment in which the European airlines operate. Indeed, the European policy goes in the direction of globally and strictly limiting public support in the financing and the management of airport infrastructure while third countries’ policies in this regard allow, and even sometimes favour, such public support to airports (Gulf countries, China and to a large extent the USA). This is very detrimental to European based carriers since their main competitors based in the above mentioned countries directly benefit from such favourable policies, in particular through much lower airport charges. Considering the extensive liberalisation process that the Commission instigated several years ago vis-à-vis third countries, European airlines do not face a level playing field when competing with third country-carriers which benefit from a more favourable State aid policy. Against this background, AEA believes that the Commission should leave the door open for possible investment aids for large airports with a passenger volume of over 5 million per annum in order to take into account that emerged external markets are now a major source of competition for Europe’s airlines and airports.

Europe remains a “high cost” zone and European network carriers need to improve their competitiveness. Improving competitiveness is both an internal and an external exercise: for the past few years European network carriers have been doing their utmost to reduce their internal costs. However, as far as external costs are concerned, European carriers face multiple issues such as high levels of taxation, a dependence on different monopoly suppliers (including the airports), the development of additional unwelcome layers of regulation and the absence of a level playing field with third country carriers which benefit from public support in their home countries. The challenges for the European network carriers are consequently huge. AEA consequently believes that the European authorities need to reconcile the European policy, which drastically limits State aid to the financing and management of airport infrastructures and airlines alike, with the fact that opposite trends exist in third-countries in an ever larger liberalized environment. It is consequently AEA’s position that the European Institutions should urgently take all appropriate steps to address the issue of market access for third country airlines which benefit from State subsidies.

Finally, AEA notes that State aid to rail infrastructure and rail operators is not dealt with on an equal basis, even though this mode of transport competes fiercely with the airline industry. Should State aid exist for other modes of transport, particularly between cities in which airports do not qualify for State aid, then the Commission should take the necessary steps in order to ensure that civil aviation is not in an unfair disadvantage compared to these other modes of transport. AEA therefore calls on the European Commission to come up with equivalent Guidelines for the railway sector and in particular to make clear that State aid to infrastructure should only be admissible under certain conditions.
III. Draft EU Guidelines

AEA’s comments on the different types of aid included in the Draft EU Guidelines on State aid to airports (I) and to airlines (II) as well as miscellaneous points (III) can be found below.

1. Aid to airports

The draft Guidelines envisage 3 categories of aid to airports that can be declared compatible with the Common market: investment aid, operating aid and aid in the form of public service compensation.

The approach of the new Guidelines to focus on the annual passenger volumes of an airport for the application of investment and operating aid is not acceptable and also poses legal problems. In this context, the decisive factor should not be the annual passenger volume of an airport, but rather the passenger capacity that an airport builds up. The passenger volume can rapidly change. One example is the airport at Strasbourg: after a competitor of Ryanair had succeeded in requesting provisional measures against the airport (respectively the Chamber of Trade and Industry of Strasbourg), Ryanair immediately stopped operating to Strasbourg and transferred all flights to Baden-Baden. As a result of such decisions passenger volumes can change significantly within a short period of time. Therefore, the passenger capacity that an airport builds up and expands rather than the actual passenger volume should be decisive. For example, an airport that expanded a terminal for five million passengers must be measured economically against this capacity, considering that it was its own economic decision to undertake this expansion. Consequently, it cannot play a crucial role for the subsidization, regardless of whether this passenger volume will actually be achieved or whether the past passenger volume will be reduced due to route changes by the airport’s main customer. A threshold that is based on the actual passenger volume would lead carriers to try to remain under this threshold in order to receive further State aid.

a) Investment aid to airports

Contrary to the 2005 Aviation Guidelines, the draft Guidelines define the maximum intensity of an investment aid depending on the size of the airport and exclude possible investment aid for large airports with over 5 million passengers per annum.

It is AEA’s position that special attention should be paid to public investments made in airport infrastructures and that in particular airports dealing with large traffic volumes should be in a position to finance their investment without any form of aid. AEA notes in particular that the Commission indicates that airports with a volume of traffic of above one million passengers are in a position to break even. Consequently, it would seem reasonable that airports with a traffic volume above this threshold (and not located in remote regions or islands) are required to self-finance their investments. AEA also notes however that this self-financing of infrastructure is not the rule in numerous countries which subsidise their airline operators which compete with EU carriers through
cheap infrastructure. It has to be noted that there is a risk, especially for international airports that are
mainly in competition with airport system outside the EU, that competitive distortions result from the
absence of such aids. Finally, AEA believes that special attention should be paid to investment aid
granted to an airport which is not a “true” regional airport but rather a secondary airport located in
the same catchment area as other airports, whatever the level of traffic enjoyed. Airport networks
should also be specially considered since investments are usually done at the expense of airport
charges paid by the rest of operators of the network.

b) Operating aid to airports

With the possibility to grant operating aid to airports (with an annual traffic of less than 3 million
passengers), the European Commission departs from its long-standing strict policy which, up to now,
banned any operating aid for airports. Under the 2005 Aviation Guidelines, only investment aid to
airports was allowed. Indeed, the European Commission has always considered operating aid as very
distortive form of aid that should only be authorised in very exceptional cases.

Therefore, as a matter of principle it seems quite surprising that these Draft Guidelines introduce a
new form of operating aid in the aviation sector for a transitional period of 10 years. The objective
pursued by the Commission seems to be to enable the airports that currently operate with the support
of public authorities to adapt to the new market situation and to be able to self-finance their
operations in the future. The Commission believes that, during this transitional period, aided airports
will gradually increase airport charges to airlines, introduce rationalisation measures, or attract new
airlines and customers.

One may fear that small regional airports already benefiting from operating aid and airports that will
benefit from such aid will continue to be managed as they currently are, without adapting themselves
to the new market situation. Particularly worrying will be the situation of non-profitable airports
integrated in a network. While non-integrated airports will not have another way out than increasing
their charges and try to survive on their own in the long/medium term, other small airports, equally
unprofitable but integrated into an airport network, will not be forced to be viable on their own.
These airports will continue hiding their lack of sustainability keeping charges artificially low at the
expense of other airport users operating at larger airports. Charges should be airport specific to avoid
this.

Given the above, the transition period for operating aid should consequently be reduced to a
maximum of three years, for airports with an annual passenger volume (or passenger capacity, see
above) exceeding 500 000. AEA also notes that the draft Guidelines do not mention the beginning of
the transitional period. In order to avoid any discrimination between airports benefitting or that will
benefit from operating aid, the starting date should be the same for all airports. AEA would favour
that the transitional period be calculated as from the adoption of the new Guidelines (i.e. the
publication in the OJEU).

c) Passing-through of state-aid from the airport to airlines

In contrast to the Guidelines of 2005, the new draft Guidelines do not establish a link between aids
granted to airports and a possible pass-through of these aids to airlines, in cases where the airport is
continually unprofitable. Paragraph 12 differentiates between aids granted to the airport, on the one hand, and those granted to airlines on the other. This differentiation is justified against the backdrop of the separate application of the principles of private investors. However, AEA notes that in practice in some cases aids granted to airports could be passed-through to airlines. This could be true especially when these airports make losses over several years, which are then compensated by governmental stakeholders. In this case, the Commission has to presume that the airlines using this airport indirectly benefit from the aids granted to these airports. An exemption can only apply if the airline can prove that it pays charges that bear benchmark comparison with the charges of others, by means of an ex-ante profitability analysis Paragraph 56 of the draft Guidelines specifically indicates that the Commission itself doubts that an appropriate benchmark could be realised given the fact that prices set by privately owned/managed airports are influenced by prices set by publicly owned airports which, currently, largely benefit from public funding. The same applies when operating aid granted to airports does not comply with the conditions laid down within recital 104 of these Guidelines, concerning a stepwise coverage of these airports’ operating costs. These cases clearly indicate the pass-through or direct granting of aid to an airline, given that the airport operator cannot prove that the fees charged to these airlines meet the requirement laid down within section 3.5.

2. **Aid to airlines**

   a) **Start-up aid to airlines**

   The criteria of compatibility of start-up aid to airlines have been streamlined and limited in time. Experience in applying the 2005 Aviation Guidelines had indeed shown that a revision was very much needed in order to clarify and simplify the aid for new services that can be granted to airlines. The revised Guidelines are therefore positive in this respect.

   However, contrary to the operating aid to airports, operating aid to airlines in the form of start-up aid for new services or increased frequencies is not subject to a transitional period but is authorised on an evergreen basis. Like operating aid to airports, operating aid to airlines has the potential to be very distortive. AEA sees no reason why the rationale for allowing operating aid to airports for a transitional period only should not also be applied to operating aid to airlines. In AEA’s view start-up aid to airlines under the new criteria defined in the draft guidelines should only be authorized for the same transitional period, i.e. 3 years. Applying an identical regime to both airports and airlines seems to be a coherent approach for the aviation sector and would have the merit of reconciling the current market situation with the Commission’s long-standing policy of banning operating aid. AEA also sees the need to ensure that where start-up aid is granted, airlines shall pay back these aids should the additional route or frequency not be maintained for at least 24 months.

   As already indicated during the 2011 consultation process, one of the lessons drawn from the application of the 2005 Aviation Guidelines is that a strict respect of any European Commission Guidelines necessitates an active engagement on the part of both the Commission and the Member States. Despite numerous State aid complaints lodged by European carriers, the Commission has been dragging its feet for many years when it comes to condemning illegal start-up aid schemes implemented in Europe. This absence of control by the European competition authorities as well as
the failure by some Member States to diligently notify potential State aid schemes has led national authorities to largely ignore the distortion of competition created by these start-up aid schemes. Some Member States in particular have openly stated that they are waiting for further clarity from the competent European body before notifying additional cases. Such an absence of control of the correct implementation of the 2005 Aviation Guidelines has led to public subsidies being granted to selected airlines in a disproportionate way throughout the European territory, resulting in a serious distortion of competition within the European air transport market.

One of the crucial objectives of the draft Guidelines should therefore be to ensure that the Guidelines are diligently applied by both Member States and the Commission. In this respect, AEA is of the strong opinion that these Guidelines should be accompanied in the very near future by consistent case law built around Commission decisions in the numerous pending State Aid cases. In addition, the Commission should use its enforcement powers to make sure that Member States strictly adhere to the new Guidelines.

As regards the conditions suggested by the Commission in its draft Guidelines for a Start-up aid to be found compatible with European State aid Law, AEA wishes to submit the following comments:

i. AEA believes that the threshold of 3 million passengers is too high. This would mean for example that all but 10 airports on the French territory could grant such aid to airlines. A threshold, if any, of one million passengers per year seems more reasonable. In particular, we have strong reservations when such aid may be granted by a secondary airport located in the same catchment area as another airport.

ii. The amount calculated as being a maximum of 50% of the start-up cost for a new service or increased frequencies seems difficult to apply. It is our belief that some airlines have grossly exaggerated the level of cost they are supposed to incur. Consequently we would favour either the introduction of a cap or limit on the possibility to grant start-up aid to specific incentive measures (i) offered to all operators in a non-discriminatory and transparent manner (usually in the form of a reduction in airports charges or of funding for publicity campaigns aimed at promoting an airport or a region) and (ii) strictly limited in time and intensity (see Commission decisions in NN/109/98 United Kingdom/Manchester of 14 June 1999 and Sunair/Ostend airport of 21 January 1998).

iii. Rather than excluding a route from the eligible start-up ones simply because it is operated by a high-speed rail service, the Commission should ensure that all operators compete on equal conditions without any aid.

b) Airport/airlines’ arrangements in line with the Market Economy Operator principle

During the consultation process back in 2011, stakeholders voiced their concerns about the contractual arrangements entered into between certain airports and airlines, which granted rebates and other advantages to airlines. Given the widespread use of this type of arrangement, it was felt that transparency, non-discrimination and clear Guidelines were needed.
Unfortunately, the draft Guidelines only remind the airport management that support granted to airlines in the form of reduction of the price of airport services shall comply with the Market Economy Operator test. The draft Guidelines indicate that compliance with the MEO test is ensured if the price charged for the airport services corresponds to the market price, or if such price is shown, through an ex-ante analysis, to lead to a reasonable return on capital for the airport manager. The Commission itself considers that a comparison of the market price through a benchmark is a very difficult exercise to conduct at the present time. In order to ensure compliance with the MEO test, airport managers are therefore left with only the ex-ante profitability analysis.

AEA sees some clear merits in the Commission providing a description of what should be a sound ex-ante profitability analysis. It will at least show to airport managers that marketing agreements without a sound ex-ante business case will not be acceptable for the Commission. However, the draft Guidelines are lacking clear explicit rules on compliance with the MEO test. This absence of clarity, coupled with the fact that smaller airports are usually not equipped for providing such a proper economic documentation, raises the chances that non-compliant “marketing arrangements” continue to be entered into between airports and certain airlines. In this respect, it may be helpful that the Commission defines a number of criteria that ought to be fulfilled (e.g. the existence of audited accounts, a proper cost accounting system) before being able to submit that a marketing arrangement follows the Market Economy Operator principle.

Experience has shown in the past that there are cases where significant part of the infrastructure, and sometimes an entire airport, has been built because of regional political considerations and for a certain carrier. In these cases not only the incremental costs should be taken into account but also the costs for the entire infrastructure. Examples include the German airports at Weeze/Niederrhein and Altenburg, as well as the systematic expansion of Hahn airport. In the latter case (Hahn airport), AEA therefore supports the position of the Commission, which in its opening decision has taken into account the total costs of the new terminal built for Ryanair.

With regard to the subject of financial relationships between airports and airlines, AEA strongly believes that draft Guidelines should remind the airports that, in addition to compliance with the MEO principle, they should fully comply with Article 102 of the TFEU and all other applicable legislation such as the EU directive on airport charges. Certain airports hold a dominant position in their relationships with airlines, particularly with the ones that have historically chosen an airport as their main base or hub. As it is impossible to move a hub from one airport to another just for the sake of obtaining reduced airport charges, these airlines become captive clients for the airports, which can easily use their market power to increase unreasonably the financial burden on those airlines, through increased airport charges or costly projects which are partially financed through the charges imposed on such airlines. Under such circumstances, non-discrimination should prevail and hub carriers should be entitled to enjoy the same conditions as those granted to the other carriers operating on the platform.

AEA carriers would also like to draw attention to the fact that the new Draft Guidelines do not assess appropriately the relevance of marketing agreements concluded by individual airlines with the local authorities. In practice, offsetting the operational costs of an airline and “start-up aids” are different
from case to case. Certain airlines will only operate from certain regional airports if an agreement is signed with the local authorities to compensate for the operational costs of the airline under the pretext of regional promotion. No monitoring and verification of the goals of the promotional aids are undertaken. To enable monitoring and to prevent the distortive effects of such aids, it is essential to develop national schemes (paragraph 46) which address the regional concerns, are transparent, and which will be enforced at national level (paragraph 75).

3. **Annexes & Application**

   **a) Public funding of Services of General Economic Interest**

   The Commission elaborates the Services of General Economic Interest in chapter 4.1., but refers primarily to the consequences of Regulation 1008/2008 for airport operators. In AEA’s view the Commission does not fully address the more generic need to ensure reliable services to entire regions. AEA believes that it is worth positioning the new draft Guidelines in a broader context of measures which the EU must update and adapt to market realities, and which are geared to ensuring reliable services to regions. This requires an analysis of the economic impact of the aids. For example, under certain circumstances the maximum period of an aid is, less relevant, if criteria such as GDP performance KPIs, population density, other modes of transportation and exposure to non-EU competition are taken into account to assess how to best ensure competitiveness. In this context, Regulation 1008/2008 should be reviewed in order to create more opportunities to introduce tenders for Public Service Obligations for airlines. Redefining such PSO obligations then requires a more detailed and systematic re-cast of the Guidelines in this regard.

   **b) “Definition of regional airports” and “catchment area”**

   The concept of a regional airport is not adequately defined. “Regional” airports are no longer “peripheral”; they are generally small airports in the vicinity of large hub airports. Conversely, airport systems are not covered appropriately in the Guidelines either. The question remains unanswered whether, for the purposes of possible financial support, the airports would be considered separately or as an entity. Likewise, the definition of “catchment area” is in need of review. For instance, several new Polish airports are within a 100 km radius of existing, larger airports (examples: Modlin, Gdynia-Kosakowo and Radom) and travel time varies in function of traffic. In other parts of Europe, the smaller airports are outside the range of 100 km (example: Memmingen is over 110 km from Munich) and yet are marketed so as to enable the operator to tap into the catchment area of the hub. Because the routes are badly defined, direct competition between services
from, say Memmingen (marketed as “Munich-West”) and Munich to the same third country
destination is incorrectly treated as a “start-up”. In this respect, it is worth noting that in order to truly
avoid the duplication of airport infrastructure within a 100 km/90 minutes access time radius, the
respective distance/driving-time between the relevant airports must actually be set at twice these
values within the new draft Guidelines, so as to avoid an overlap of these catchments, in which
residents may be able to access several airports within less than 100 km or 90 minutes.

c) Non-economic activities

Although the new draft Guidelines apply only to economic activities, extra care should be taken on
how States decide to support non-economic activities. The equal treatment of airports and airlines
should, in principle, be taken into account. AEA sees therefore the need for a uniform definition of
non-economic activities as well as a uniform regulation of the cost coverage of these activities. For
instance, a State should not support a reduction of a terminal navigation charge at one airport, while
all other airports in the State pay full charges.

On the one hand, the draft Guidelines do not clarify whether this term is interpreted and applied in all
Member States in the same manner. On the other hand, it leads to distortion of competition when
States selectively promote specific traffic through the allocation of costs to other locations or by
bearing the costs.

According to paragraph 32, discrimination between airports and airlines which partially self-finance
non-economic activities and those where the costs of non-economic tasks are publicly financed is to
be avoided. Therefore, the term non-economic activities has to be defined first in order to guarantee a
uniform application.

d) Network charges

The new Guidelines do not provide any explanation as to how the Guidelines will apply to an
undertaking that has a network of airports, particularly, situations in which charges at each individual
airport do not bear any relation to the costs of these airports. AEA sees the need that the Commission
assesses whether this exists at each individual airport in the network. If this approach is not followed,
significant distortions of competition could arise especially due to the fact that users at other airports
of the network would cross-subsidise these airports. AEA is therefore against the introduction of
network charging.
e) Application

According to paragraph 112 and 125 the new Guidelines shall be applicable retroactively in regard to operating aid. This would enable the Commission to (retroactively) approve already granted operating aid without any further prerequisites, in case an incentive has been set and no airline has been discriminated. According to the Guidelines of 2005, however, this operating aid is illegal and not justifiable. This approach (approval of granted operating state aid by means of the new Guidelines) distorts competition and is not in line with European law. Furthermore, the wording of paragraph 125 is not clear. More precisely:

- This approach distorts competition: The publication of such an approach encourages the Member States to grant substantial subsidies until the date of effectiveness of the new Guidelines since until then they don’t have to fear any legal steps and negative consequences. This leads to a further impairment of the already substantially distorted market environment.

- This approach is not in line with European law: This approach implies a retroactive application which is not solely privileging, but at the same time negatively affecting all market players, that strictly adhered to the Guidelines of 2005 and therefore intentionally abstained from collecting public (financial) support in many cases. Market players, however, that did not miss any occasion to collect illegal or at least legally questionable public (financial) support (while often intentionally disregarding the Guidelines of 2005) in order to expand market shares would retroactively be rewarded for their anti-competitive – and in many cases intentionally illegal – behaviour. A retroactive application of the new Guidelines would therefore negatively affect many market players and has therefore – according to general principles and rules of law – to be considered as illegal. This also results from judicature by European Courts. According to the European Court of Justice (see case Acciaierie di Bolzano (C-74 and C-75/00P)) the following applies:

> “Although, as a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (...). In that regard, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them”.

These rules of law have been confirmed by the European Court of Justice in its judgement from 20 March 2013, T-92/11 Jorgen Andersen/EU Commission). According to this judgement the following three requirements have to be given in case of an intended retroactive application of rules: (i) The achievement of a specific objective, (ii) the protection of legitimate expectations of affected/concerned parties, (iii) a clear wording that stipulates the retroactive application. The planned approach neither complies with the first requirement (which objective is intended?) nor with the second requirement (how are the legitimate interests of negatively affected parties,
which in the past strictly adhered to the Guidelines of 2005, protected?). Furthermore the wording is unclear: Paragraph 112 references to a previous lit. f) which does not exist. Consequently, AEA believes that a retroactive application of the new Guidelines to pending cases on operating aid is not justified and can be considered as a breach of the principle of the protection of legitimate expectations and, therefore, of the principle of legal certainty.

It is therefore AEA’s position that the Guidelines shall be effective for operative and investment aids granted or notified after entry into effect of these Guidelines. Operative and investment aids granted prior to the implementation of these Guidelines shall be treated in accordance with the Guidelines of 2005.

The Commission should reach final decisions as soon as possible, as some of these cases were brought in front of the Commission almost ten years ago. The absence of Commission decisions condemning forms of aid since the adoption of the 2005 Aviation Guidelines has prevented stakeholders from receiving useful guidance on the application of the text. The current consultation process in view of the adoption of new Guidelines should not further delay the Commission’s action in these pending cases. AEA therefore urges the Commission to act swiftly on these cases, independently from the adoption of the new text.

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