BRUSSELS AIRPORT COMPANY

COMMENTS ON THE EUROPEAN COMMISSION’S PUBLIC CONSULTATION ON THE DRAFT EU GUIDELINES ON STATE AID TO AIRPORTS AND AIRLINES
1. **INTRODUCTION**

1.1 On 3 July 2013 the European Commission (the *Commission*) published its revised draft **EU Guidelines on State aid to airports and airlines (the *draft Guidelines*)**. Brussels Airport Company (*BAC*)\(^1\) welcomes the opportunity to respond to the Commission’s public consultation on the draft Guidelines.\(^2\)

1.2 Important developments have taken place in the aviation industry over the past two decades. The European aviation industry has seen a significant increase in competition between airports, not only as a result of the rapid and continuous expansion of regional or secondary airports but also due to increased competitive pressure from other international airports situated in the EU. Another important development has been the general trend towards the consolidation of the airline industry and the appearance of new business models to which legacy carriers have had to adapt.

1.3 BAC recognizes the potential benefits in certain cases of State aid to the air transport sector and the overall economy, in particular to allow the development of small airports that help introduce services in areas where this would otherwise be unsustainable.\(^2\)

1.4 However, State aid measures which distort competition should not be tolerated. Illegal State support has in many cases resulted in the diversion of traffic from unsubsidised airports (such as Brussels Airport (*BRU*)) to airports located in their geographic vicinity, rather than the creation of new routes or services. The continuous public financing of the provision and operation of infrastructure at such airports has resulted in significant inefficiencies including the duplication of infrastructure and has led to a distortion of competition.

1.5 BAC therefore welcomes the fact that the Commission has published the draft Guidelines which take stock of the new legal and economic situation concerning the public financing of airports and airlines and specify the conditions under which such public financing can constitute State aid within the meaning of Article 107(1) of the

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\(^1\) BAC is a limited liability company to which the Belgian State has granted the licence to operate Brussels Airport (IATA-code *BRU*), located 11 km northeast of the centre of Brussels. 75% of the shares in the group to which BAC belongs are held by a consortium of private investors. The Belgian State owns the remaining 25% (minus one) of the shares. In 2012, BAC handled 19 million passengers.

\(^2\) State aid may also be justified in limited circumstances to allow the construction of an entirely new airport, in particular in case of relocation of an existing airport. However, BAC considers this scenario extremely unlikely in view of economic, environmental and geographic constraints. Accordingly, BAC would warn against unnecessary duplication of airport infrastructure. Extreme examples of unnecessary duplication of airport infrastructure are the regional airports in Ciudad Real near Madrid, Castellón-Costa Azahar near Valencia and Kassel in Germany. These airports are to a large extent funded by public money but attract little or no passengers or airlines. See e.g. *The Guardian*, 7 August 2013, “*Yours for €100 million: Spanish airport, mint condition, one careless owner*”, [http://www.theguardian.com/business/2013/aug/07/ciudad-real-airport-up-for-sale](http://www.theguardian.com/business/2013/aug/07/ciudad-real-airport-up-for-sale). See also EU Commissioner (Regional Development) Johannes Hahn’s statement “*Wir wollen keine Geisterflughäfen mehr*” (“*We no longer want ghost airports*”) in the *Frankfurter Allgemeine* of 8 August 2013, [http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/eu-kommissar-hahn-wir-wollen-keine-geisterflughaefen-mehr-12341963.html](http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/eu-kommissar-hahn-wir-wollen-keine-geisterflughaefen-mehr-12341963.html).
Treaty on the Functioning of the European Union (TFEU) and when such State aid can be declared compatible with the internal market.

1.6 BAC agrees that the final version of the Guidelines must be first and foremost forward-looking, but also considers it crucial that violations of the currently applicable framework\(^3\) are not blessed retroactively (including through the application of transition measures) or left unchallenged as a result. Accordingly, it is important that ongoing State aid infringement cases result in decisions that address existing distortions and that any new State aid measures which are adopted in the run-up to the adoption of the Guidelines are equally scrutinized. This applies both to investment aid and operational aid.

1.7 BAC considers that a level playing field can only exist if the effects of past State aids are not allowed to continue producing effects for the future. This implies that, while it may not be necessary for the Commission to seek repayment of all past incompatible State support to airports, there must be put an immediate stop to additional aid (with the exception of small regional airports) and the Guidelines must also provide an assurance that past State aid is taken into account when assessing an airport’s future operations and financing.

1.8 This submission first sets out BAC’s general observations on the draft Guidelines and then turns to some more detailed comments on a number of specific aspects of the draft.

2. GENERAL OBSERVATIONS ON THE DRAFT GUIDELINES

2.1 As a general matter, the draft Guidelines propose a balanced approach towards the assessment of whether public financing constitutes State aid and the conditions under which such State aid can be declared compatible with the internal market. BAC agrees with the Commission’s view that ensuring a level-playing field amongst EU airlines and airports is of paramount importance to improve the competitiveness and growth potential of the EU airport and airlines industries as well as for the entire internal market.

2.2 BAC agrees that there may be a continued need to allow State aid for investment in airport infrastructure if there is a genuine transport need and public funding is needed to ensure accessibility of a region. BAC welcomes that the Commission is seeking to introduce objective criteria to determine whether investment aid should be allowed and if so, what the maximum permissible aid intensities are.

2.3 BAC also shares the Commission’s view that operating aid constitutes a very distortive form of State aid which should only be authorised under exceptional circumstances. Already in its 2005 Aviation Guidelines, the Commission clearly articulated the principle that an airport operator, like any other business, should meet

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\(^3\) The 2005 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports ([2005 Aviation Guidelines](#)) and the 1994 Guidelines on 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 ([1994 Aviation Guidelines](#)).
the normal costs of running and maintaining the airport infrastructure from its own resources.\(^4\)

2.4 BAC furthermore welcomes the increased transparency and legal certainty which the draft Guidelines are intended to create. Although BAC recognises the need to create legal certainty for recipients of State funding, it considers that the Commission should equally take into account the interests of other airports to compete on a level playing field. Distortions to this level playing field can result not only from State aid which may be granted in the future, but also as a result of aid granted in the past, as past aid often affects an undertaking’s financial position for the future. From that perspective, BAC repeats that the adoption of the new Guidelines on State aid to airports and airlines cannot result in blatant violations of the State aid rules which have taken place in the past being held compatible with the internal market or being disregarded, particularly in cases where the Commission has already taken the preliminary view that illegal State aid has been granted.

2.5 Finally, it would be appropriate for the Guidelines to recognize that, where airports and airlines have benefitted from State aid in the past and have grown their business on this basis (often over an extended period of time), this will be factored into the Commission’s assessment of any State support granted to these entities in the future, in particular in the context of applying the Market Economy Operator (MEO) test.\(^5\) The adverse effects of past State aids should not be perpetuated through new support measures.

3. **Detailed Comments on Specific Aspects of the Draft**

*Scope of application of the draft Guidelines – inclusion of freight transport*

3.1 BAC submits that significant distortions of competition exist as a result of State aid granted to airports specialised in freight transport. BAC therefore submits that the Commission’s lack of sufficient experience in assessing the compatibility of aid to freight airports and airlines\(^6\) should not result in the Commission attaching less importance to distortions of competition resulting from aid granted to freight airports or airlines. BAC would welcome if the Commission were to define appropriate limits, based on yearly cargo volumes, above which no State aid should be allowed for airports specialised in freight.

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\(^4\) Article 4.2 of the 2005 Aviation Guidelines.

\(^5\) Case T-11/95, *BP Chemicals*, paras 170 and 171.

\(^6\) Paragraph 20 of the draft Guidelines.
**Notion of undertaking and economic activity**

3.2 BAC agrees that certain activities of an airport manager are not of an economic nature, but submits, in line with the case law of the Court of Justice of the European Union and as recognized by the Commission in the draft Guidelines, that only activities which fall within the exercise of public powers are not of an economic nature. In particular, the Guidelines should recognize that activities such as fire services, security costs and maintenance costs (all of which represent an important part of BAC’s operating expenses) are economic in nature.

3.3 The draft Guidelines propose a definition whereby airport services constitute an economic activity if they are subject to airport charges. This definition may however lead to circumvention: it results in a situation whereby, as a result of State financing, an airport manager can provide a certain type of service without demanding payment of airport charges from its customers even though the type of service is clearly of an economical nature, without leading to its (appropriate) qualification as economic activity.

3.4 It is more appropriate, in assessing whether specific services are of an economical nature or not, to assess how they are treated at comparator airports. The draft Guidelines recognize this notion, by stating that if certain airlines or airport managers providing the same services do not have to bear the costs of providing certain services whereas others do, the former might be granted an advantage even if the provision of those services is considered non-economic. However, rather than limiting this to entities that operate under the “same public authorities” (as the draft Guidelines suggest), this should be applied as between entities within the same catchment area or, as a minimum, within the same Member State (even if the entities fall under the direct competencies of different public authorities within that Member State). For example, if in a given catchment area or Member State one airport has to carry its own costs of fire services, security costs and/or maintenance costs whereas

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7 The draft Guidelines express the view that, in light of the gradual development of market forces in the airport sector, it is not possible to determine a precise date as from when the operation of an airport should have been undoubtedly considered as an economic activity (para. 25 of the draft Guidelines). It then considers that since the Aéroports de Paris judgement of the General Court (Case T-128/98, Aéroports de Paris v Commission, [2000] ECR II-3929) it has not been possible to consider the operation and construction of airport infrastructure as a task falling outside the ambit of State aid control. BAC considers that in this respect the Aéroports de Paris judgement is not a decisive point as the interpretation given by the judgements of the European courts of provisions of EU law (such as what constitutes an economic activity for the purpose of EU competition law) merely expresses what is contained in these provisions ab initio (in this case since the entry into force of the Treaty of Rome in 1958). Therefore the management and operation of airport infrastructure has always constituted an economic activity, both before and after the Aéroports de Paris judgement, and the State financing of such infrastructure has therefore always been the subject of the State aid rules.


9 Paragraph 32 of the draft Guidelines.

10 Paragraph 28 of the draft Guidelines.

11 Paragraph 34 of the draft Guidelines.
another airport receives State funding for such activities, the latter airport benefits from State aid regardless of how these services are labelled and of the level of government under which they resort.

**Financial relationship between airports and airlines**

3.5 The draft Guidelines express doubts about the use of benchmarks. BAC is of the view that it should be possible, when assessing whether the price charged for airport services corresponds to the market price, to determine a benchmark for a true market price in a particular catchment area around a given airport, by looking at the prices charged for similar services at comparator airports in that catchment area. While BAC recognises there may be some variations in charges, for example due to the level of service provided, a significant difference in the charges which cannot be explained by an objective justification should be considered as a refutable presumption (or at least a strong indication) that the operations may be subsidised, possibly by means of State aid granted to the airport.

3.6 Also regarding the financial relationship between airports and airlines, the draft Guidelines suggest that an airline would meet the MEO test when the price it pays covers the airport’s marginal costs. As is recognised in the draft Guidelines, 70% to 90% of an airport’s costs are fixed and the marginal cost of an airport’s operations is therefore limited. BAC would therefore urge the Commission to clarify that, in this respect, any past or ongoing State subsidies should be factored into the “counterfactual” analysis to avoid that the airport’s cost base is considered at an artificially low level, especially in situations where the Commission has indeed concluded in the past that illegal State aid has been granted.

**Services of general economic interest in the aviation sector**

3.7 BAC welcomes the restrictive interpretation the draft Guidelines adopt of the concept of services of general economic interest (SGEI) in the context of airports and airlines. BAC welcomes the fact that the Commission explicitly refers to Regulation 1008/2008 to determine when a public service obligation can be granted as regards air transport services on a specific route or group of routes. In addition, the overall management of an airport should indeed only be considered an SGEI under specific, restrictive conditions, when the catchment area around the airport would effectively be isolated from the rest of the EU without the airport.

**Compatibility of aid under Article 107(3)(c) of the TFEU**

3.8 BAC welcomes the fact that the draft Guidelines seek to articulate clear conditions which need to be complied with before aid to airports or airlines can be declared compatible with the internal market, as this enhances transparency and legal certainty.

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12 Paragraph 56 of the draft Guidelines.

13 Paragraph 62 and following of the draft Guidelines.

14 Paragraph 72 of the draft Guidelines lists six (not seven) necessary conditions every state measure has to comply with.
**Investment aid**

3.9 As indicated above, BAC agrees that investment aid to airports can be justified if there is a genuine transport need and to the extent that public money is needed to ensure accessibility to a region. Duplication of unprofitable airports or the creation of additional unused capacity in the catchment area of an existing airport should thereby indeed be avoided, as this would have distortive effects on competition.\(^{15}\) Indeed, the draft Guidelines should state more clearly that investment aid to airports located within the same catchment area is not compatible.

3.10 BAC welcomes the categorization of airports on the basis of yearly passenger volumes and their corresponding financial viabilities. However, BAC submits that thresholds on the basis of yearly passenger volumes should be lowered, as smaller airports can be profitable and should therefore be able to cover their operating and capital costs.\(^{16}\) In addition and as mentioned above, BAC would urge the Commission also to take into consideration when assessing the compatibility of investment aid to an airport that the current profitability of an airport may be affected by illegal investment or operating aid granted to the airport in the past.

3.11 BAC supports the Commission’s proposed approach to define maximum investment aid intensities on the basis of the size of the airport and to restrict investment aid to airports with a passenger traffic exceeding 3 million to repayable advances only.

3.12 BAC agrees that eligible costs for investment aid should only include the costs relating to the aeronautical activities of an airport. In the description of what constitute eligible costs, it is however unclear what is referred to with ground handling infrastructure and how the costs for ground handling infrastructure can qualify as eligible costs, whereas investment costs relating to the provision of ground handling services by the airport are ineligible. BAC would suggest clarifying the difference between costs for ground handling infrastructure and ground handling services, thereby referring to the terminology used in the Directive on ground handling.\(^{17}\)

3.13 The draft Guidelines currently foresee that they will apply to investment aid notified or granted after the entry into force of the Guidelines and that investment aid granted before the entry into force will be assessed on the basis of the 2005 Aviation Guidelines, the TFEU provisions and the relevant case law.\(^{18}\) BAC wants to stress that the publication of the new Guidelines cannot result in a situation whereby investment aid which was granted before the entry into force of the Guidelines (and which will continue to affect an airport’s profitability in the future) is “whitewashed”, i.e.

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\(^{15}\) Paragraph 93 of the draft Guidelines.

\(^{16}\) ACI reports that airport operations can be a profitable activity “once a certain threshold of activity is reached – typically 0.5 million or more passengers (or workload units) a year”. See ACI, “The social and economic impact of airports in Europe”, January 2004, available via [www.aci-europe.org](http://www.aci-europe.org), page 38.


\(^{18}\) Paragraph 126 of the draft Guidelines.
deemed compatible with the internal market. Indeed, past investment aid must still be examined under applicable rules, and ongoing investigations into such aid must result in final decisions, declaring the aid incompatible where the relevant conditions are fulfilled.

Operating aid

3.14 As indicated above, BAC shares the Commission’s view that operating aid constitutes a very distortive form of State aid which should only be authorised under exceptional circumstances. BAC is of the view that such exceptional circumstances would only exist in case of small airports of which the operations are necessary for the connectivity of a region and which therefore perform a SGEI. The 2005 Aviation Guidelines reflected this view, as they only allowed for operating aid to be granted to small regional airports in remote areas in order to provide compensation for a SGEI.

3.15 Against this background, BAC is surprised that the draft Guidelines refer to a “gradual shift to a new market reality”\(^{19}\) to justify the introduction of a transition period during which certain categories of operating aid to airports and airlines might still be justified. It has been clear since the 2005 Aviation Guidelines that operating aid to airports and airlines – similar to the situation in other industries – can only be compatible with the State aid rules in exceptional circumstance.

3.16 Rather than introducing a 10 year transitional period for airports with passenger volumes not exceeding 3 million, BAC would propose that the new Guidelines confirm the principle that an airport operator, like any other business and in line with the TFEU’s State aid rules, should meet the normal costs of running and maintaining the airport infrastructure from its own resources. For airports with passenger volumes below 1 million, the Guidelines could introduce – in a structural way – diminished allowed intensities of operating aid, depending on the size of the airport in terms of passenger volume (similar to the proposed introduction of maximum investment aid intensities). As a minimum, both the volume threshold and the time period should be reduced. Indeed, there are many examples of airports which have less than 3 million passengers which operate profitably without State aid. Similarly, a 10 year transition period (even with certain adjustments as proposed in the draft Guidelines) would appear disproportionate in particular given the fact that operating aid is in principle prohibited under the State aid rules.

3.17 The draft Guidelines will apply to all cases concerning operating aid even if the aid was granted before the entry into force of the Guidelines and the beginning of the transitional period. It is currently foreseen that less restrictive compatibility criteria will apply to cases of past operating aid, in the sense that such aid may be declared compatible to the full extent of uncovered operating costs provided that there is an incentive effect and that access to the airport is open to all users. BAC understands that these transitory provisions could result in a scenario whereby operating aid granted in the past (and up to the moment of entry into force of the Guidelines) and which is not intended to compensate for a SGEI, would be deemed compatible with the internal market. This would be highly undesirable in BAC’s

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\(^{19}\) Paragraph 14 of the draft Guidelines.
view, as it would have significant distortive effects on competition. As a minimum, the Guidelines should state unequivocally that for airports that have grown to a level of 3 million passengers today, any past and future operating aids will be assessed under the most stringent compatibility criteria.

4. **CONCLUSION**

4.1 BAC welcomes the Commission’s intention to create a level playing field for airports and airlines that are active in the EU. The draft Guidelines generally set out a clear and pro-competitive framework to attain this objective. However, in this submission BAC has proposed a number of changes which in its view are required to ensure that some of the distortive practices of the past do not continue into the future, as this would be harmful for consumers and businesses in the EU.