Comments on the
Draft of “EU Guidelines on State aid to airports and airlines”

1. Introduction

A revision of the Guidelines on state aid of 2005 was overdue. In the interest of a uniform and stringent competition policy within the European Union, the Lufthansa Group explicitly welcomes the renewed activity of the Commission in this topic. However, the basis for the introduction of the new draft of the Guidelines is characterized by significant upheaval and changes in the air transport sector, which are currently not reflected in the new draft. Therefore, the draft urgently requires amendments in certain points, in order to truly achieve its objectives:

- The old 2005 Guidelines have been applied rarely in practice. Until now, the EU COM lacks a stringent policy, which stops the ongoing uncontrolled increase in subsidies. Although a number of proceedings have been initiated, these proceedings were not completed until today. This is particularly difficult to understand because a number of proceedings was initiated in 2007/2008 (e.g. airports Lübeck, Dortmund and Hahn), and thus the proceedings by far exceeded the maximum duration for procedures of 18 months as laid down in the Regulation 659/99. Furthermore, new proceedings were initiated in a number of other cases, without even completing the proceedings originally initiated (airports Lübeck, Dortmund and Hahn).

- Particularly symptomatic for the long duration of these proceedings is the case Charleroi, which was closed by a decision of the EU Commission already in 2004. After the Court has declared this decision to be void in December 2008, the EU COM has only four years later issued a new decision to initiate a proceeding in December 2012. Starting from the first initiation of proceedings in December 2002, these proceedings now continue for more than ten years.

- This time wise very cumbersome practice is also problematic since there are very obvious cases of subsidy abuse, such as the building and expansion of the airports Altenburg and Hahn to the de facto exclusive use by one airline. In this context, in particular the question arises, why the proceedings on the Altenburg case have not been completed, since this airport has meanwhile closed down.

- The lack of completion of proceedings by the EU COM causes an ongoing subsidization-race with ever-larger amounts. A particularly problematic example from the
practice is the subsidization of Hahn Airport. In the period of 1999 until 2011, this airport generated losses of approximately EUR 200 million, which had always been compensated. At the end of 2012 the press published internal comments, according to which the equity capital was likely to be used up soon and the airport was threatened by insolvency without a cash infusion. Therefore, a supplementary budget of the state of Rhineland-Palatinate was introduced. From this supplementary budget, “shareholder loans” of the state amounting to EUR 80 million shall be granted to the airport, whereby the first payments have already been made. The shareholder loans were not previously notified to the EU COM and therefore not approved. Indeed, such a notification would have been legally required. These loans include aid which distorts competition, regardless of whether the loans bear market rate interests or not: Due to the permanent losses, no private investor would have offered such a high loan or would have even granted it. Nevertheless, nothing has been done by the EU COM in this obvious case so far.

Also problematic is the fact that the opening of proceedings are partly not reaching far enough to stop the abuse of subsidies. One example is the Airport Weeze / Niederrhein which, although privately owned, is only kept alive through public money. In turn, Ryanair is then being subsidized with this public money. However, the EU COM’s decision to initiate the proceeding, so far only relates to the unauthorized public financing of the airport.

In addition, the previous practice of the EU COM on the expansion of the airport infrastructure was too liberal. It is therefore questionable, how e.g. the assessment of demand regarding infrastructure aid will be handled under the new guidelines.

Finally, it is striking that there are no proceedings in certain countries, although the use of public funds is quite obvious there. This concerns, for example, also the Kingdom of Spain. According to press reports, in recent years more than EUR 250 million was granted as aid there. One airline alone is supposed to have received at least EUR 100 million thereof. However, these cases, such as the airports of Barcelona (Prat), Girona (specially built for and used by one airline) and Valencia, have so far not been subject to investigations by the EU COM.

This non-stringent policy causes legal uncertainty.

At the same time, this policy leads to a significant shift of market shares in favor of low cost carriers, which partly practice systematic subsidy-hopping. Thereby, the traditional airlines and other airports experienced damages of many millions. Through this undisturbed subsidy practice, some airports have grown at state expense, while other previously profitable airports in the same catchment area are suffering massive declines in passengers or even generate losses.

This shift of market shares is based on the fact that the EU COM does not provide any leverage on how to react to the mostly illegal staid aid according to Art. 107 para. 1 TFEU. On the other hand, over many years the national courts – at least in Germany – have not taken into consideration the protection granted by Art. 108 para. 3 TFEU according to European jurisdiction.
2. The new draft of the guidelines

Considering the foregoing the most important points will be detailed in the following:

2.1 Operating Aid

Since no “level-playing-field” exists and some airlines were able to line up their business model on permanent subsidization, the European practice of subsidization led to massive distortions of competition, which harm the entire European aviation industry.

The current German Federal Government has made it clear in the "Airport concept of the Federal Government 2009" that the demand for airports in Germany is generally covered and refuses permanent operating aid. In this respect, a maximum period of 5 to 10 years is applied. It should be taken into account, however, that many of the smaller airports with less than 3 million passengers a year have been dependent on operating aid for many years already and therefore a further transitional period also contradicts the basic idea of the airport concept. Therefore not only the transitional period has to be reduced to a maximum of 3 years but also the threshold for the granting of long-term state aids should be lowered to one million passengers (or capacity of one million passengers, see below).

2.2 Non-economic activities

There is a need for consistent rules on the borne costs for non-economic activities. If an airport carries out non-economic tasks, these shall not be overcompensated. Furthermore there shall be no discrimination in the sense that in some cases the costs for carrying out non-economic activities are waived, but not in another case. Therefore para 34. of the guidelines had to be clarified respectively.

2.3 Transfer of aid to air carriers

Opposed to the guidelines of 2005 the new draft lacks a link between air to airports and a possible transfer of this aid to air carriers. Actually it is strictly differentiated between aid to airports on the one hand and aid to air carriers on the other hand. Per se this differentiation is accurate. In both cases the principle of a private market investor must be taken into account separately. However in practice there are several cases where aid to an airport is transferred to an air carrier. That is always the case where airports do not work profitable for several years and are then compensated by public shareholders. In such cases it should be assumed that air carriers which use such airports do indirectly benefit from the aid originally given to the airport. An exception can only apply if the air carrier can prove that it pays an amount that can withstand in a benchmark-comparison with the charges of privately run airports or that withstand an ex ante evaluation of the profitability.

This must also apply in cases where airports are granted operating aid but – contrary to the new guidelines – do not increasingly cover the amount of their operating costs.

2.4 Incremental costs

In 3.5.2 of the draft for the guidelines the principle of the private market investor for certain measures between airports and air carriers is described. The presumption is that the incremental costs have to be covered which are caused by the usage of the infrastructure of an airport. This approach is accurate. Nonetheless there are cases known where parts of an airport infrastructure or even a whole airport were built primarily due to regional politic
interests and in favor of a certain air carrier. In these cases not only the incremental costs have to be considered, but instead the entire costs for the infrastructure. Examples are the airport of Weeze in the lower Rhine area, Altenburg and the systematic development of the airport of Hahn. In the last mentioned case it is therefore accurate that the EU COM in its decision to initiate proceedings in 2008 took into account the entire costs for the building of a terminal, the coverage of which would have been envisaged by a private investor.

2.5 Relevance of passenger capacity instead of passenger amount

The approach in the new draft guidelines according to which the amounts for start-up and operation aids are to be calculated on the basis on the annual amount of passengers of an airport is not accurate and legally problematic. In this case the actual annual amount of passengers should not be taken into account, but instead the potential passenger capacity of an airport. The amount of passengers can change within short time. An example is represented by the airport of Strasbourg: After a competitor of Ryanair initiated some successful preliminary court proceedings against the airport or rather the chamber of industry and commerce on the subsidization of Ryanair, Ryanair immediately left Strasbourg immediately and moved to the airport of Baden-Baden on the other side of the Rhine. Due to such moves the annual number of passengers can change rapidly. Therefore the only decisive criterion can be the established passenger capacity instead of the amount of actual passengers. Thus, e.g. an airport which builds up a capacity of five million passengers has to accept that its decision to do so is taken into account: It was the airport’s own economic decision to develop the airport and therefore from an aid perspective it is of no relevance whether the envisaged passenger numbers are achieved later on or not due to a change of routes of the main customer.

This view is also confirmed by the wording of the draft on the guidelines at the end of 5.1.1. lit. a) on “capacity”; only a capacity can be utilized and therefore the term “volume” should be changed into capacity.

Furthermore a threshold only considering passenger numbers would give a negative stimulation to try to be under that drawn line in order to be granted future aid.

2.6 No legalization of former operating aid

The new draft on the guidelines sets out in para. 112 and para. 125 a retroactive legalization of former operating aid which was granted prior to the new guidelines coming into effect. In accordance therewith former operating aid can be granted generally without specific requirements. The requirements for the possibility of granting aid are only an incentive effect and the nondiscrimination of air carriers at the airports concerned. In accordance with the guidelines of 2005 such operating aids (aids for infrastructure and groundhandling services) were not eligible for approval. Therefore the new guidelines shall serve as a tool for approving all operating aid granted until new guidelines come into effect. The EU COM thereby would give up its role as a solicitor and guardian of the state aid rules to a large extend. This approach distorts competition and is not in line with European law. Furthermore the wording is not clear. In detail:

- The approach distorts competition: The publishing of such a concepts, which is non conform with any understanding of competition, is expected to cause the Member States to grant great amounts of aid in the time period between the publishing of the draft until it becoming effective, because they are not subject to any
legal consequences. Due to that a market already impeded is even more destabilized.

- The approach is not in line with European law: the approach is based upon a repercussion (which is intended in the context with para. 125). This repercussion does not only have a positive but also a negative reflex and therefore illegal: market participants which respected the law at all times would be negatively affected and therefore weakened. Participants on the market which —partially in full awareness— disregarded the borders of the limits of the guidelines of 2005 would belatedly benefit from the new rules; those participants have gained market shares due to subventions on the shoulders of other market participants and now would be able to retain that unlawfully gained benefit. Therefore for a considerable amount of market participants this repercussion is negative and consequently forbidden by law. That follows from case law of the European Courts which in this regard is not sufficiently taken into account. In accordance with the case Acciarie di Bolzano (C-74 and 75/00P), para. 119 it is established:

“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 principles of law were confirmed by the Court in its case of 20th March 2013, T-92/11 (Jorgen Anderson vs. Commission – Dansk Greyhound). According to that judgment the following requirements must be met accumulatively in order to enable a repercussion: (i) The achievement of a certain goal, (ii) protection of the legitimate expectations of the concerned, (iii) a certain wording that sets out rules for the repercussion. The intended approach in the case at hand does not even meet the first and second requirements; firstly it is not apparent which or what goal is intended, secondly the legitimate expectations of those market participants is harmed whose behavior was in line with the former state aid rules. Their market position would be degraded as shown above. On the other hand those who were benefitting from a long term practice of disregarding the law would be rewarded for their behavior.

- The wording of the provision is unclear: Rec. 112 refers to a lit. f), which however does not exist.