European Commission draft Guidelines on State aid to airports and airlines

Suggestions regarding the draft proposal
submitted by
Norton Rose Fulbright LLP
Avenue Louise 489, B-1050, Brussels, Belgium

This paper is submitted by the Antitrust and Competition Group of Norton Rose Fulbright LLP, the international legal practice, in response to the European Commission (the Commission)’s invitation to comment on the draft proposal for revised guidelines on State aid to airports and airlines (the State aid Guidelines Proposal).

As a preliminary remark, we welcome the general approach used by the European Commission in the State aid Guidelines Proposal, most notably to clarify and expressly state its view on various (still) controversial issues. For example:

- The clear statement that financing of airport infrastructure before 12 December 2000 (i.e., the date of the Aéroports de Paris judgement)\(^1\) did not constitute State aid (paras 25 and 26). This statement clarifies an important aspect of many of the on-going State aid investigations where the measures assessed by the Commission were implemented before 2001.

- The clarification that the mere fact that an airport operator receives or has received State aid does not automatically imply that its customer airlines are also beneficiaries of aid (para 12). This draws a clear distinction between (i) potential infrastructure/operational aid granted by the State to the airports and (ii) potential State aid granted by the airport to the airlines. Such distinction is particularly relevant in those cases where both types of measures are subject to the same investigation of the Commission. To our understanding, it implies different tests applied by the Commission to each of the two sides of its investigation.

- The clarification that non-aviation revenues shall be taken into account for the purpose of the market economy operator (MEO) principle. This clarification puts an end to a long lasting discussion on whether or not an airport’s commercial income (as opposed to aviation income) should be considered for the MEO test. Non-aviation revenues can represent a substantial part of an airport’s profit considering that the related costs are in most cases minimal. Because an airport’s income derives from various activities that are inextricably interrelated, a prudent private investor could not fail to consider foreseeable proceeds resulting from aviation and non-aviation activities seen as a whole.

- Expressly approaching the topic of economic and non-economic activities related to airport’s operation and trying to draw the borderline between the two. We welcome the Commission’s

For the attention of the Directorate-General for Competition–Unit for State aids in the Transport sector

initiative in this respect because such differentiation plays a crucial role in the correct identification of the costs to be taken into account for the purpose of the MEO test performance.

Nevertheless, there are several points that we would like to raise and suggestions that we would wish to make in connection with the State aid Guidelines Proposal, as follows:

1 Comments related to Chapter 3: Presence of State aid

1.1 Notion of undertaking and economic activity:

(a) After clarifying that financing of airport infrastructure before Aéroports de Paris judgement does not constitute State aid, the Commission classes such financing measures as existing aid pursuant to article 1(b)(v) of Regulation 659/1999 (para 27).

(i) Issue: The issue with existing aid is that it triggers the concept of “alteration to existing aid”, which has to be notified to the Commission as new aid. This may cause practical difficulties with assessing financing measures after the Aéroports de Paris judgement if these are classed as “alteration to existing aid” rather than being assessed independently. The difficulty stems from the fact that considering “alterations to existing aid” would require the precise identification and incidental consideration of the “existing aid”.

(ii) Suggestion: Our first suggestion would be to delete para 27 pertaining to existing aid. Should this not be desirable to the Commission, we suggest clarifying how the assessment of “alterations to existing aid” should be made. Such clarification is important for legal certainty.

(b) The Commission draws a distinction between economic and non-economic activities of the airport manager (para 31). The Commission further cites the relevant case of the Court of Justice which states that activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. At an airport, activities such as air traffic control, police, customs and activities necessary to safeguard civil aviation against acts of unlawful interference are considered to be of a non-economic nature (para 32).

(i) Issue: Establishing what activities fall under the State’s official powers as a public authority is crucial to accurately calculate the correct cost base necessary for carrying out the MEO test. The Commission’s clarification regarding the cost of infrastructure falling under the responsibility of the State is welcome. However, several issues remain unclear amongst which, and most importantly, are:

(A) The Commission offers obvious examples of activities falling under the responsibility of the State; unless a general principle on how to identify such activities in borderline situations is provided, the State aid Guidelines Proposal will be insufficient to facilitate a solution in exactly those situations which require clarification; and

(B) How to allocate costs of infrastructure which is used both for economic purposes and for complying with State’s responsibility.

(ii) Suggestion: In addition to the cited Court of Justice case, we suggest clarifying the borderline in the unclear cases of activities which do not clearly fall in the sphere of non-economic activities. For example, does the safety of an existing runway fall under the State’s responsibility? In addition, the situation of common costs (i.e., attributable to

both economic and non-economic activities) should be clarified because, in particular, in para 33 separated cost accounting is required for the two categories of activities. For example, how should the cost of the security screening for a baggage belt used to carry the checked-in baggage should be split between economic and non-economic activities?

(c) The Commission specifies that public financing of non-economic activities must not lead to undue discrimination between airlines and airport managers (para 34). If certain airlines or the airport managers bear some costs of their non-economic activities whilst others are exempted, such exemption may constitute State aid (para 34).

(i) **Issue:** Section 3.1 is dedicated to “Notion of undertaking and economic activity”. Exemption from taxes, charges and other fees may constitute State aid. However, the fact that fee exemptions may constitute State aid does not mean that State aid rules apply to undertakings not involved in economic activities. State aid rules only apply to undertakings involved in economic activities. The fact that the State treats them unequally, by for example a selective tax exemption, may involve State aid. It is confusing to mix explanations regarding economic activities with statements regarding non-economic activities which may misleadingly indicate that State aid rules apply to non-economic activities.

(ii) **Suggestion:** We suggest deleting para 34. Should this not be desirable to the Commission, we suggest being accurate and avoid implying that State aid rules might apply to undertakings which are not involved in economic activities. As a matter of text structure, such statements would be rather fit as a footnote to para 35 (Section 3.2: Use of State resources and imputability to the State).

1.2 Public funding of airports and the application of the MEO principle

(a) Any profitability assessment of the airport manager shall take into account airport revenues as defined in Annex I (para 47). The definition of airport revenue in Annex I enumerates, amongst other categories of revenues “revenue stemming from non-aeronautical activities”.

(i) **Issue:** From the enumeration we understand that non-aviation revenues shall be taken into account in the calculation of aggregate airport revenues. Our interpretation is also consistent with the Commission’s approach in the context of financial relationships between airports and airlines (i.e., in para 59 it is clearly stated that non-aviation revenues should be taken into consideration). However, we have heard voices in the industry that the wording of the airport revenue definition is slightly unclear and leaves room for interpretation on whether non-aviation revenues should be considered taken into account for the MEO test in the case of airport funding by the State.

(ii) **Suggestion:** We suggest rewording the definition of Airport revenue in Annex I to make it unequivocal that non-aviation revenues are included and shall be taken into account.

(b) “The absence of a business plan constitutes an indication that the MEO test might not be met” (para 48).

(i) **Issue:** This is one of the most critical points of the State aid Guidelines Proposal. The Commission practically sets out a new rule according to which the mere absence of an actual business plan or similar document preceding the relevant measure creates the legal presumption that the conditions of the MEO test were not met. The new standard of proof required by the Commission is extremely high and the obligation to provide such an a priori plan is confusing. Does it mean that, despite a favourable MEO test carried out after the measure and based on ex ante profitability prospects, the Commission still has the discretion to decide that the MEO test is not met just because it has not seen a written analysis preceding the measure? In our view such an interpretation is untenable because, pursuant to article 107(1) TFEU the Commission
must prove the existence of an advantage in order to class a measure as State aid. If a correctly performed MEO test, irrespective of its date of performance, indicates the absence of any advantage, the measure at stake is not State aid. Against this background, since the Commission is bound by the favourable result of the MEO test, irrespective of its date, what is the purpose of this presumption? Given the unitary nature of the EU State aid rules, it would also be unjustifiable and inconsistent to require such a high standard of proof only in the aviation sector and not across all industries. Even if such a high level of evidence was acceptable, for the purpose of legal certainty it should not be applied retroactively. This means that it should not apply to measures granted before the publication of the new guidelines.

(ii) **Suggestion:** We suggest deleting the content of para 48 from “The absence of (…)” onwards.

### 1.3 Financial relationships between airports and airlines

(a) The Commission clearly specifies that **non-aeronautical revenues stemming from the airline’s activity “should be taken into consideration together with airport charges”** (para 59). Whilst we welcome such recognition, we would suggest more clarity on practical terms, as explained below.

(i) **Issue:** The question is how to identify the proportion of the non-aeronautical activities “stemming from the airline’s activity”. For example, what part of the revenues achieved from shop renting should be attributed to one airline or another?

(ii) **Suggestion:** In order to clarify this issue in full and avoid future discussions and inconsistent application, we suggest the Commission provides a formula for attributing non-aviation revenues to airlines. For example, because non-aviation revenues depend on passenger numbers, the percentage of such revenues attributable to a certain airline could be equal to the percentage represented by the passenger number flown by that airline in the total passenger number at that airport in each relevant year.

(b) The airport manager should demonstrate that it is capable of covering costs stemming from the arrangement with an airline with a reasonable profit margin on the basis of sound medium-term prospects when setting up the arrangement (para 60).

(i) **Issue:** Another critical point of the State aid Guidelines Proposal is the period of time taken into account for the application of the MEO test. In para 47 the Commission makes reference to Alfa Romeo and Westdeutsche Landesbank, where the Court of Justice and the General Court compared the conduct of a public investor with that of a private investor guided by prospects of profitability in the longer term. However, in the context of relationships between airport and airlines, the Commission indicates medium-term prospects. This is surprising considering that in its recent decision in Tampere-Pirkkala the Commission considered if Airpro had been guided by long-term prospects for profitability when granting the advantage from which Ryanair allegedly benefited. Making reference to the medium-term is confusing and appears to be inconsistent with even the Commission’s recent practice.

(ii) **Suggestion:** We recommend replacing “medium-term” with “long-term” in para 60. Characterising the length of the prospects as long-term is definitely necessary. Whilst making such suggestion, we are aware of the fact that the concept of long-term is not itself free of debate. In the industry, the figures vary between a minimum 10 and maximum 30 years. The Airports Council International Europe (ACI) and the European

---

3 Case C-305/89 Italy v Commission (Alfa Romeo) [1991 ECR I-1603.
Low Fares Association answered in their reply to the Commission’s consultation Paper on the 2005 Guidelines that the time needed for an airport’s high fixed costs to be offset and the airport to break even or reach critical mass could take more than 10 to 15 years. While counting losses for such long periods might be unacceptable for other investments, an investor in an airport infrastructure may not achieve a return on his investments for a very long time. As such, 15 or even 20 years should not be disregarded as an acceptable time frame for the application of the MEO test. We suggest leaving the indication of the precise number of years outside the State aid Guidelines Proposal but clearly indicate that it should be long-term. The precise duration should be determined based on the particular circumstances of each case, without excluding from the start that it can be as long as over 20 years.

The State aid Guidelines Proposal does not provide for the possibility to take network effects into account for the purpose of the MEO test. By network effects we mean that the attractiveness of an airport increases with the additional number of passengers brought by an airline which can be expected to bring large passenger numbers.

Under a competitive market mechanism, a typical private investor would be willing to attribute an additional intangible value to the operations of an airline from that airport if the airline can be expected to bring large passenger numbers. This is due to the fact that, by its example, such airline may act as a “growth facilitator”, likely to attract more airlines at that airport. This also implies that, even assuming the contract with that airline terminates, there may be a value of the airline’s service which will remain externalized from the airline’s perspective and subsequently internalized by the airport (i.e., the additional business which that airline’s example facilitated).

We suggest the Commission to recognize that, depending on the concrete case, there may be a non-tangible value stemming from the “growth facilitator” expectation to be taken into account for the application of the MEO test.

2 Comments related to Chapter 5: Compatibility of aid under article 107(3)(c) TFEU

2.1 Aid to airports

Infrastructure investment shall not be allowed in the case of airports with average passenger traffic above 5 million (para 92).

Fluctuations in passenger numbers can make such strict thresholds relative. In addition, changes in passengers’ mobility and developments of large non-EU airports (e.g., Istanbul, Dubai) increasingly competing against well-established EU hubs may change the international landscape and require financial flexibility in order to promote EU business sustainability.

If the Commission’s view is firm in keeping the 5 million threshold, we suggest at least introducing wording in order to allow flexibility in assessing extraordinary circumstances which may justify State aid for airports above the threshold. In addition, since article 107(3) TFEU is in principle applicable in all cases, there is no obvious legal basis which may justify a total prohibition in the case of certain types of airports.

If a genuine transport need and positive externalities for a region can be established, investment aid to airports should continue to be accepted after the transitional period (para 16).

While chapter 1 introduces the concept of externalities for a region as a reason to allow infrastructure aid after the transitional period, chapter 5 dedicated to the
 compatibility of aid with article 107(3) TFEU does not elaborate further on the concept of externalities.

(ii) *Suggestion:* For the sake of legal certainty, we suggest being more precise on the content of such externalities and the conditions under which State aid can be acceptable after the transitional period. In addition, as with the case above, since article 107(3) TFEU is principle applicable in all cases, there is no obvious legal basis which may justify a total prohibition of a certain type of aid.

Please feel free to contact us if you would like to discuss any aspect.

Norton Rose Fulbright LLP

September 2013

Contacts

Michael Jürgen Werner Raluca Marian
Partner (competition, Brussels) Senior Associate (competition, Brussels)
Tel: +32 2 237 6151 Tel: +32 2 237 6168
Email: michaeljuergen.werner@nortonrosefulbright.com Email: raluca.marian@nortonrosefulbright.com