European Commission
Directorate-General for Competition
State Aid Registry
Ref.: “HT 2635”
1049 Bruxelles
Via e-mail: Stateaidgreffe@ec.europa.eu

Brussels, 2 October 2013

Dear Sirs,

We welcome the opportunity to contribute to the debate over the European Commission’s Consultation on the draft Guidelines on State aid to airports and airlines.

Please find herein below the comments of the Antitrust and EU Law Department of Pavia e Ansaldo Studio Legale. As you will see, we have dealt with a selected number of topics addressed in the Draft Guidelines. In particular, we have considered the following key issues: (i) Market definitions, (ii) the notion of State Aid, with particular reference to the imputability of the measures to the State, (iii) profiles related to Public Service Obligations in air transport; (iv) financial relationships between airports and airlines, with particular reference to low cost carriers.

The European Union is committed to achieve a single, integrated system of transport. We believe that air transport plays a central role within that system. The development of sea transport and inland waterway transport, but especially the growth of high-speed rail connections
have created ways of transport provided with - under certain conditions - a certain degree of substitutability. However, despite the growth of competitiveness recorded by alternative means of transport, we believe that air transport has not lost and will not have to lose its centrality in the system of European mobility.

In the White Paper “Roadmap to a Single European Transport Area” (“2011 White Paper”) the European Commission underlined the need of a more sustainable transport system, to be obtained also through the internalization of transport externalities, the elimination of unjustified subsidies and the protection of a free and undistorted competition.

From the perspective of the State aid legislation, the White Paper recognized that there may be circumstances in which external benefits of transport justify subsidies from an efficiency perspective; however it is important to assess the merits of subsidies to infrastructure and to operational costs.

In this regard, the 2011 White Paper identified, on one hand, a need for clarification on the legal framework concerning the State Aid nature of the public funding of basic infrastructure of airports, which is one of the case in which the lack of incentives and/or financial capability for private investments more easily arises. On the other hand, however, the Commission recognized that the clarification of the legal framework does not detract from the need to apply a comprehensive and uniform cost/benefit analyses to different infrastructure projects to identify funding priorities.

1. Market Definition: the classification of airports

We fully welcome the choice of the European Commission to completely modify the approach on the definition of various types of airports for the purpose of the EU Law on State aid.

As mentioned in the Draft Guidelines, the relevant development of the aviation market in the last decade has created new markets perspectives. It is thus necessary a review of the airport classification, also with reference to the factors to be considered for the comparison among airports.

We agree with the Commission’s consideration concerning the need of aid measures to the smaller airports. Accordingly, we appreciate that the Commission aims to make easier the access to public funding of new infrastructure for smaller airports, which are faced to more complicated conditions when searching private investments for their infrastructure than those enjoyed by the European larger airports and hubs.
In our observations of 7 June 2011 to the previous public consultation launched by the European Commission on the above matter, we underlined that the existing classification does not reflect the real market structure of the sector and should therefore be revised in order to take into account further indicators of competition in addition to the data on the passengers flow.

In fact, the current guidelines classify merely classified airports on the basis of the annual number of passengers, establishing four different categories:

- category A: ‘large Community airports’, with more than 10 million passengers a year;
- category B: ‘national airports’, with an annual passenger volume of between 5 and 10 million;
- category C: ‘large regional airports’, with an annual passenger volume of between 1 and 5 million;
- category D, ‘small regional airports’, with an annual passenger volume of less than 1 million.

These thresholds, only based on passenger traffic volumes, have been set theoretically. We therefore pointed out that the way in which airports are classified does not allow any definite conclusions to be drawn as to the extent of the competition existing between airports. Moreover, we believe that passenger figures are an important indicator of competition, but they certainly cannot be seen as the sole criterion. Accordingly, additional criteria have to be taken into consideration as well.

We believe that it is of primary importance take into account the catchment area concerned by an airport, which should be identified with the relevant geographic market. In our comments of 2011 we proposed, as a possible solution, that the revised Guidelines could have introduce a distinction between “regional airports” – those with a reduced passenger traffic volume and not insisting in the catchment area of other airports - and “secondary airports”, the which scope should include airports with a small passenger volume belonging to a geographic area already covered by a bigger airport. State aid for regional airports could be, in principle, declared compatible; whereas in case of secondary airports a case by case approach should be preferred, in order to make a deeper analysis concerning the effects of the aid on competition and on intra-EU trade before declaring aid compatibility.

The Draft Guidelines introduce a new approach on the classification of the airports. Indeed, the Commission has chosen a differentiated approach depending on the type of aid has been granted to the airports. Furthermore, a classification of airports is now only made with reference to the assessment of the compatibility of aid under Article 107(3) TFEU and not with reference with the presence of an aid. As a consequence, the assessment of the compatibility will take into consideration different factors depending on whether the aid granted is framed in the
context of the operating aid or investment aid to airports or in the context of start-up aid to airlines:

i. concerning the assessment of compatibility of investment aid to airport infrastructures, a classification mainly based on the traffic volume has been kept. Otherwise than the guidelines currently in force, the Draft Guidelines define maximum permissible aid intensity depending on the size of the airport, as measured by the number of passenger per year\(^1\). It follows that, for large airports with a passenger volume of over 5 million per year, investment aid should not declared compatible with the internal market while investment aid granted for the financing of initial investment at airports with passenger traffic of up to 3 million passengers can be granted as an upfront fixed amount to cover eligible investment costs or in annual instalments to compensate for capital costs. The maximum intensity of aid admissible for airports under this threshold is up to 50% of the investment, which is increased up to 75% for airports having a traffic volume of less than one million. Concerning the investment aid granted to airports with passenger traffic exceeding 3 million, they can be granted only as a repayable advance\(^2\). The annual number of passengers is not the only criterion taken into consideration by the Commission. The Draft Guidelines provide indeed that the Commission will have doubts as to the compatibility of initial investment into airport infrastructure at an airport located in the catchment area of an existing airport in case the existing airport is not operating at or near full capacity. This represent, in our opinion, the most relevant amendment in the guidelines and could be a way to sort out the issues we underlined within the previous consultation concerning the need of distinguish between regional airport with an exclusive catchment area and regional airport located in the catchment area of a bigger airport. We therefore welcome the choice of the Commission to include the analysis of the catchment area in the assessment of the compatibility of aid within Article 107(3) TFEU.

ii. the provisions on the compatibility assessment for operating aids to airports represent another significant change made by the Draft Guidelines which allow, under certain conditions, a type of aid strictly forbidden under the current regime. According to the proposed guidelines, operating aids can be considered compatible within the meaning of

---

\(^1\) According to the definition contained in the Draft Guidelines, the actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In case of a newly created passenger airport the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes.

\(^2\) According to the Draft Guidelines, the repayable advance is expressed as a percentage of the eligible costs and may not exceed the relevant maximum aid intensity as specified herein. The underlying contract for the repayable advance must make detailed provision for repayment in the case of successful project outcome. Such outcome must be clearly defined in advance.
Article 107(3)(c) TFEU either as individual aids or as aids under an aid scheme. However, such kind of aid is allowed only for a transitional period up to 10 years and can be granted only if the airport is open to all potential users and is not dedicated to one specific user. Concerning the airport classification, the Draft Guidelines provides that operating aid cannot be granted if the annual traffic of the airport exceed 3 million passengers.

iii. Equally, the airport characteristics influence also the assessment of the compatibility conditions for **start up aid to airlines**. The Draft Guidelines establish that such aid can in principle be paid solely for routes linking an airport with fewer than 3 million passenger per year to another airport within the Common European Aviation Area. Anyway, also in such case the proposed guidelines introduce further factors not related to the size of the airport which have to be taken into consideration. In fact, the Commission considers that the restrictions concerning the traffic volume do not apply to routes departing from airports located in outermost regions and bound for neighbouring third countries. As a consequence, aid for routes between airports with more than 3 million passengers per year can be considered only in duly substantiated exceptional cases, in particular where one of the airports is located in a remote region, such as for example in an outermost region, on an island or a sparsely populated area. Moreover, the Draft Guidelines takes into account also the presence of alternative modes of transport. Accordingly, the Commission states that when the connection (e.g. city-pair) operated by the new air route or by the new schedule is already covered by a high-speed rail service or by another airport in the same catchment area under the same conditions, such air route shall not be eligible for start-up aid.

In the light of the above, we welcome the new approach of the Commission and we appreciate the changes introduced in the Draft Guidelines. This new approach is more in line with today’s reality of the European market and allows the Commission to better assess, with respect to the current regime, the effects on the market of the aid granted in the context of air transport.

2. **Notion of State aid within the meaning of Article 107(1) of the TFEU: use of State resources and imputability to the State.**

According to the 2011 White Paper, the current legal framework of State Aid on aviation is more concentrated on the assessment of the compatibility of the measures with Article 107, paragraph 3, TFEU, while the nature of State Aid of certain public funding of transport infrastructure within the meaning of Article 107, paragraph 1, TFEU, are only cursory addressed.
We therefore welcome the choice of the Commission to keep clearly separated the assessment of the presence of State aid measures from the assessment of the conditions under which such measures, once ascertained the nature of aid, can be declared compatible with the internal market. Such choice allow a detailed assessment from a proper legal perspective in relation to both the notion of State aid and the assessment of compatibility with the internal market.

We appreciate that the proposed guidelines analyse the notion of State aid more in detail compared to the current guidelines. However, we want to point out that the guidelines could represent an opportunity for the Commission to better clarify some aspects of the imputability to the State of certain measures granted by undertaking publicly owned.

In fact, we regret the choice of the Commission to do not clear certain conditions related to the imputability to the State of measures granted by publicly owned undertaking.

As the same Commission pointed out in the 2011 White Paper, since the current guidelines show a lack of provisions related to the aid nature of public intervention in airport infrastructure, this matter is today regulated only by the jurisprudence of the court. Should the Commission wants to amend the guidelines in order to make the relevant legal framework clearer and more predictable in compliance with the principle of legal certainty, we believe it should have further specified the current rules as well as the interpretation given to them by the jurisprudence.

Conversely, and with specific reference to the imputability of measures granted by publicly owned undertaking, the new guidelines only illustrate the position taken by the Court of Justice in the Stardust Marine case. According to the mentioned judgment, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, the actual exercise of that control in a particular case cannot be automatically presumed. Therefore, in such cases, the imputability to the State of the measures taken by a public undertaking needs to be further and autonomously assessed. In the Stardust Marine case the court indicated that the imputability to the State in such cases may not be assumed; it should be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.

Nevertheless, the principle ruled by the Court is capable of being interpreted in different ways. In particular, the reference to a ‘set of indicators’ seems to leave a too large discretionarily power to the Commission on the choice of which circumstances can be considered as valid ‘indicators’ in

---

4 Judgment of the Court French Republic v Commission, C-482/99, mentioned, paragraph 52.
5 Judgment of the Court French Republic v Commission, C-482/99, mentioned, paragraphs 55 and 56.
order to assess the imputability. Such discretionarily can lead to a violation of the principle of legal certainty.

In other words, by limiting itself to simply recalling the position of the Court, the Commission did not comply with its purpose to clarify and make more predictable the legal framework of State Aid in the above issue.

Furthermore, under a constant jurisprudence, a large power of appreciation in chief of the Commission within the evaluation of the nature of State Aid is contrary to the Treaty. To this regard, the Courts ruled that the concept of aid is objective and the characterisation of a measure as State aid cannot in principle justify the attribution of a broad discretion to the Commission, save for particular circumstances owing to the complex nature of the State intervention in question.

In the light of the above, we consider that the new Guidelines should address the question of the imputability to the State of certain measures granted by undertaking publicly owned in a more specific way, notably by clearly defining the perimeter of the circumstances which can be used to infer the intervention of a public authority. It is clear that - in line with the Stardust jurisprudence – such circumstances should anyway lead to an undeniable imputability to the State of the measures taken by a public undertaking (i.e. the Commission cannot infer the imputability to the State of the contested measures on the mere basis of clues generic and not directly related to the context of the grant of such measures).

3. Public funding of Service of General Economic Interest

Section 4 of the Draft Guidelines illustrate the European Union legal framework on the definition of certain economic activities carried out by airport managers or airlines as services of general economic interest (“SGEI”) within the meaning of Article 106, paragraph 2, TFEU and the Altmark case-law. The legislative framework of the SGEI is most likely the one that has been affected by the major change with respect to both the provisions contained in the current guidelines and the consultation that preceded the drafting of the Draft Guidelines.

---

6 Judgment of the Court of First Instance of 27 January 1998, Ladbroke Racing Ltd v Commission of the European Communities, T-67/94, [1998] II-00001. According to the Court “The relevance of the causes or aims of State measures falls to be appraised only in the context of determining — pursuant to Article 92(3) of the Treaty [now Article 107(3) TFEU] — whether such measures are compatible with the common market. It is only in cases where Article 92(3) [now Article 107(3) TFEU] fails to be applied and where, accordingly, the Commission must rely on complex economic, social, regional and sectoral assessments, that a broad discretion is conferred on that institution (Case C-169/95 Spain v Commission [1997] ECR I-135, paragraph 18, and Case C-355/95 P TWD v Commission [1997] ECR I-2549, paragraph 26)”.

First, the Commission set out new rules for the SGEI by adopting the ‘2011 SGEI package’. The major innovation is the inclusion of the aviation transport sector within the scope of application of both the SGEI Decision and the SGEI Framework, while under the previous ‘package’, the air transport was only subject to the 2005 Decision, but excluded from the scope of the 2005 Framework on SGEI. The new legal framework on SGEI need to be coordinated with the Regulation (EC) n. 1008/2008 (“Regulation 1008/2008”) on operation of air services in the Community which sets out the conditions to impose Public Service Obligations (“PSOs”) in the air transport services.

In the previous consultation on the “Review of the Community Guidelines on financing airports and start-up aid to airlines departing from regional airports”, we underlined two major issues which should be addressed by the Commission in the review of the current guidelines:

i. a lack of coordination between the Regulation (EC) n. 1008/2008 and the 2005 Decision;
ii. a need for clarification with reference to the mechanism for assessing compensation for PSOs.

(a) **The coordination between the Regulation (EC) n. 1008/2008 and the 2011 SGEI package**

Concerning the coordination between the Regulation (EC) n. 1008/2008 and the 2005 Decision, we mentioned that the link between the **Altmark** conditions and the 2005 Decision was

---

8 The ‘2011 SGEI package’ includes:

i. the Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ of 11.1.2012, C 8 (“SGEI Communication”), aimed at clarifying the main state aid concepts relevant for SGEIs;
ii. the Commission Decision of 20 December 2011 on the application of Article 106, paragraph 2, of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ of 11.1.2012, L 7 (“SGEI Decision”). The Decision exempts public authorities from the notification referred to in Article 108, paragraph 3, of the Treaty to State aid granted in the form of compensation for PSOs for the provision of SGEI by certain categories;
iii. the Commission Communication on a European Union framework for State aid in the form of public service compensation (2011), OJ of 11.1.2012, C 8, (“SGEI Framework”). The SGEI Framework clarifies the conditions that such State aid must meet in order to be declared compatible with the internal market;
iv. the Regulation (EU) n. 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ of 26.4.2012, L 114, (“SGEI Regulation”). The de minimis amounts for SGEI is set at € 500,000 per company over a period of three years.

9 Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312 of 29 November 2005.


problematic, especially as regards the public service compensation paid to airlines. We therefore required the Commission to clarify which was the relation between the sectoral Regulation 1008/2008 and the rules on SGEI.

Given the adoption of the 2011 SGEI package, we now have to assess whether consistency exists between the latter and the Regulation 1008/2008. Otherwise than as we assumed in our comments on the previous consultation, the Draft Guidelines stresses that the only compliance with the requirements of Regulation 1008/2008 cannot exclude the presence of State aid. Therefore the Member States anyway need to assess the compliance of the measures granted with Article 107(1) TFEU.

With regards to the public service compensations which constitutes State aid within the meaning of Article 107(1) TFEU, the Draft Guidelines indicates that the SGEI Decision sets out the conditions to obtain the exemption from the notification of the measures according to Article 108(3) TFEU. The scope of the SGEI Decision covers the public services compensation granted to:

1) the management of airports where the average annual traffic does not exceed 200,000 passengers over the duration of the SGEI entrustment; and
2) the airlines as regards the air links to islands where the average annual traffic does not exceed 300,000 passengers.

Differently, the measures which constitute State aid which are not covered by the SGEI Decision can be declared compatible under Article 106(2) TFEU if they met the conditions set out in the SGEI Framework.

In the light of the above, we consider that the Draft Guidelines now offers a clear approach to correctly identify the legal basis of the State aid framework applicable in case of entrustment of SGEIs in the aviation sector. In particular it has been clarified that the rules set out in the Regulation 1008/2008 only constitute a quid pluris in respect to the assessment of the nature of State aid under Article 107(1) TFEU as well as the rules foreseen in the SGEI Decision and SGEI Framework. This is further confirmed by the fact that the Draft Guidelines specify that the

---

12 More in detail, we underlined that the granting of such compensation is strictly regulated by Regulation 1008/2008 and in particular its Articles 16 and 17. These articles impose conditions that ultimately lead to respect the four Altmark criteria: PSOs are formally imposed, they are subject to a notice published in the European Official Journal (Art. 16.4); the operator is selected through a tender procedure (section 17); the tender and the resulting contract must contain objective and transparent parameters underlying the calculation of compensation for the performance of the PSO (Article 17.3.e); and the compensation “may not exceed the amount required to cover the net costs incurred in discharging each public service obligation, taking account of revenue relating thereto kept by the air carrier and a reasonable profit” (section 17.8).

13 According to the Draft Guidelines, this threshold refers to a one-way count, i.e. a passenger flying from the airport and back to the airport would be counted twice.
consideration on the conditions of the Regulation 1008/2008 will apply for the assessment of both SGEI Decision and SGEI Framework.

Nevertheless, concerning the airports, the Draft Guidelines indicate, in addition to the above mentioned legal provisions, the conditions to be matched to justify the entrustment of SGEI to the overall management of an airport. The Commission, in line with the rules of the Regulation 1008/2008, considers that such situation can be justified only in the case if part of the area potentially served by airport would be, without the airport, isolated from the rest of the EU to an extent that would prejudice its social and economic development.

In this regards, we strongly appreciate the fact that the Commission requires that such assessment should take account of the presence of other modes of transport, notably high-speed rail services or maritime links served by ferries. However, this requirement could be further clarified with reference to the territorial scope and the intensity of the alternative mode of transport. This is especially true if one considers that such situations will be subject to a case-by-case assessment that, in the absence of detailed guidelines, might just give the Commission wide margin of discretion in the analysis of the measures granted to airport management entrusted of SGEI, with the risk to affect the uniformity of assessments in a sector already characterized by a great variety of managerial characteristics and geographical circumstances.

(b) The mechanism for assessing compensation of PSOs.

From a different perspective, we underlined a need of clarification on the mechanism for assessing compensation of PSOs, in particular with reference to the admissible amount of the “reasonable margin of profit” which can be added to the public service compensation, without falling within the scope of the ‘overcompensation’.

To this extent, the Draft Guidelines are silent, except for the reference to the SIEG Framework. Anyway, the latter contains a detailed discipline to determine the amount of compensation admissible to be declared compatible with the internal market under Article 106(2) TFEU. Like the previous rules, the SGEI Framework provide that the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit. In addition, however, the SGEI Framework now includes the description of the methodology aimed to calculate the net cost necessary, or expected to be necessary, and the reasonable profit.
The Commission considers that the most accurate method for determining the cost of a public service obligation is the ‘net avoided cost methodology’\textsuperscript{14}. In case the use of that methodology is not feasible or appropriate, the Commission can accept, where duly justified, alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the ‘methodology based on cost allocation’\textsuperscript{15}.

Specifically concerning the calculation of a reasonable profit, the SGEI Framework indicates that it corresponds to the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the entrustment act, taking into account the level of risk. The level of risk can depend on the sector concerned, the type of service and the characteristics of the compensation mechanism.

According to the SGEI Framework, the reasonable profit can be calculated - where duly justified - with profit level indicators other than the rate of return on capital. However, regardless to the indicator chosen, the Member State must provide the Commission with evidence that the projected profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions. Anyway, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act.

In the light of the above, the Draft Guidelines - read in conjunction with the 2011 SGEI package - seem to offer a tool sufficiently accurate to identify the ‘reasonable margin of profit’ which can be added to the public service compensation. We thus consider that the proposed version of the Draft Guidelines have already remedied the lack of clearness arisen from the current guidelines on State aid in the air transport.

\textsuperscript{14} Accordingly, the net cost necessary to discharge the public service obligations should be calculated using such methodology where this is required by Union or national legislation and in any case where this is possible. Under the net avoided cost methodology, the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation.

\textsuperscript{15} Under the cost allocation methodology, the net cost necessary to discharge the public service obligations can be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act.
4. **Commercial relationships between airports and airlines: State Aid granted to Low Costs Carriers.**

According to the Draft Guidelines, one of the main conclusions which have been drawn from the public consultation launched in 2011 was a need of more guidance on the application of State aid rules to rebates or other advantages granted by regional airports to certain airlines.

Upon the previous consultation, we underlined that the main economic development of the aviation markets in the recent years was the strong growth of the low-cost carriers ("LCC") phenomenon. The business model based on low-cost routes to secondary airports and the maximum use of available places through a tight marketing campaign has proven to be effective and revolutionary, so that low-cost carriers had reinforced their position: in 2011 they already represented more than 30 % of the total intra EU-traffic\(^\text{16}\). We also underlined that such phenomenon had deeply influenced the aviation sector as a whole, especially the competition between airlines and airports.

Concerning the competition between airports, we emphasised that low-cost carriers are able to flexibly deploy their aircrafts and crews at the most profitable locations while airports tend to expand their business in order to attract new traffic in their area. As a result, the low cost business involves an increased managerial complexity for the airports, which need have a higher ability to manage negotiations with multiple carriers in order to find commercial agreements; they need to optimize operational processes and staff; they should be able to develop commercial revenues in the different business areas and to find a balance between operational effectiveness and cost containment. As studies have shown, airports that cannot handle complexity can incur in significant economic losses\(^\text{17}\). Moreover, airports have diversified their structure order to respond to the new market challenges: in many medium and large scale airports Europe, terminals dedicated to special categories of flights are becoming more and more common. In particular, terminals dedicated exclusively to low-cost carriers have been built, characterized by lower quality services and a less costly infrastructure, according to low carriers’ pricing policies and the lower needs of passengers who benefit from such flights\(^\text{18}\).

---


\(^{17}\) KPMG, *Evoluzione del traffico low cost a livello europeo e nazionale*, mentioned above.

In respect of the State aid enforcement, we also reminded the role of the European jurisdiction on the assessment of the validity of Commission’s decisions on State aid related to air transport and, more specifically, to the financial relationships between airports and LCCs.\(^{19}\)

Two years after the submission of our comments, our practical experience on State aid issues related to the air transport has shown once more the preeminent relevance of the agreements between airports and LCCs. From one side, such agreements can easily involve the presence of State aid within the meaning of Article 107(1) TFEU; from another side, the variety of airport management schemes and ownerships as well as the different contractual frameworks don’t allow to easily investigate the respect of the Union’s law on State aid.

The State aid measures granted to airlines through the scheme of a commercial agreement between the latter and airports can have the shape of funding of service costs incurred by a company owned by the airlines or rebates on for the management of aviation services.\(^{20}\)

In a specific case we observed that the balance sheets of a public owned airport management company showed an overall increase in production costs which coincided exactly with the entry into force of the agreement between the airport and the LCC company. More in detail, we noted such increase on the costs of service marketing paid to the service marketing company which was fully owned by the airline. These costs increased exponentially on an annual basis, starting from the entry into force of the agreement between the manager and the airline. In this case, the financial statements of the management of the airport acknowledged that the costs indicated had an “extraordinary scope in terms of investment value”, because of the “unity of the contract” concluded with the marketing company. We have considered that these contingencies made legitimate to suppose the existence of funding in the form of costs for marketing services granted by the manager to the airline.

From another perspective, in the same case we noticed that, when comparing the revenues of the handling services over three years with the number of passengers carried during the same period

\(^{19}\) In particular, reference was made to few leading cases as the Ryanair case (T-196/04, Ryanair v Commission [2008] ECR II-3643), in which the General Court has annulled Commission decision n. 2004/93/EC, as the private market investor test had not been applied in respect to airport fees. We also recalled the Leipzig-Halle decision (Joined cases Joined cases T-443/08 and T-455/08, Freistaat Sachsen and Other v Commission, Judgment of the General Court of 24 March 2011, nyr.), in which the General Court confirmed the Commission’s evaluation according to which the construction of airport infrastructure is subject to State aid scrutiny.

\(^{20}\) The case records on State aid confirm this trend. The Commission has recently decided to initiate a formal investigation procedure according to Article 108(2) TFEU with reference to two cases concerning commercial agreement between a publicly owned airport and its customer airlines. In the case SA.31662 (“Wizz Air”) the Commission is investigating a marketing agreement signed between Timisoara airport and Wizz Air and the non-payment of airport charges as well as additional rebates on airport charges to large aircraft. In the case SA.26190 (“Saarbrücken Airport”), the Commission is investigating the rebates and the marketing agreement concluded between few German airports publicly funded and some airlines using them.
of time, one could infer the existence of preferential tariffs to advantage of low-cost airline. An analysis of the financial statements of the airport management company has evidenced as during the period considered, there had been a decline in revenues of handling services in the face of an exponential increase in the number of passengers carried. This contraction, totally unjustified in light of the increasing volume of traffic, could only arise from the reduction granted to the airline, the tariffs applied to the latter for handling services.

To this extent, the approach of the Draft Guidelines is strictly linked to the assessment of the Market Economy Operator test (“MEO”). Accordingly, if the conditions offered to an airline at a given airport would have been offered by a profit-driven airport operator whose incentives are not distorted by public support, the airline cannot be deemed to receive an advantage within the meaning of State aid rules.

The Draft Guidelines thus identify two conditions which can exclude the presence of aid from the measures granted to the airlines by an airport manager that disposes of public resources. In fact, the Commission considers that the relationship between the airport manager and the airline complies with the MEO when:

1) the price charged for the airport services corresponds to the market price; or
2) the price charged for the airport service is shown, through an ex ante analysis, to lead to a reasonable return on capital for the airport manager.

The Draft Guidelines also identifies some indicators to be used in the comparison of airport charges for services, within a benchmarking exercise based on the assessment of comparable airports providing comparable services under normal market conditions. The indicators include:

a) traffic volume;

b) type of traffic (business, leasure, outbond destinations);

c) presence of a large city within the catchment area of the airport;

d) number of habitants in the catchment area;

e) prosperity of the surrounding area in terms of GDP per capita;

f) different geographical areas for which passengers could be attracted.

However, the Commission has strong doubts on the identification of an appropriate benchmark to establish a true market price for airport services. In the light of the above, the Draft

---

21 This is mainly due to the fact that the large majority of European airports benefit from public funding to cover investment and operating costs and they were not able to survive in the market without such support. Moreover, the public ownership implies that the airport activity is not managed as an economic activity operating under market rules rather than an infrastructure to facilitate the local development. This circumstance influences the price determination as freed by the logic of the market and without prospect of an *ex ante* economic viability. Also the airports privately owned or managed without social or regional consideration are strongly influenced by the majority of publicly subsidised airports in their price determination, because the airlines take into account as reference the price of the latter during the negotiations with privately owned or managed airports.
Guidelines consider the *ex ante* profitability prospects as the most relevant criterion for the assessment of measures granted by airport managers to individual airlines. In fact, analysing the relevant jurisprudence of the European Courts, the Commission considers that measures granted to airlines by an airport manager can be deemed in line with the MEO test when they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport manager. The airport manager should, in fact, demonstrate its ability to cover the cost stemming from the agreement with the airline with a reasonable profit margin on the basis of sound medium-term prospects when setting up the arrangement. On the contrary, costs which the airport manager would have to incur anyway independently from the arrangement with the airline do not need to be taken into account in the MEO assessment.

We consider that this area of European legislation still remain complex and thus requires additional efforts and more case records before finding the correct balance between an effective protection of the competition in the market and the need of support to the sustainable development of the airport infrastructures, for which it has been demonstrated that the financial relationship between airport management and LCCs can play a fundamental role.

However, we believe that the approach chosen by the Commission goes in the right direction, as it is oriented to a case-by-case assessment of the agreements between airports and airlines, but without disregarding the existence of an *ex ante* evaluation of profitability. We believe that, in such way, the Draft Guidelines provide, on the one hand, a more clear legal framework for airports and companies wishing to conclude commercial agreements and, secondly, a more objective yardstick for the Commission when it is called upon to enforce these rules.

Avv. Stefano Grassani

Avv. Alessandra Franchi

Avv. Lorenzo Picciano

Avv. Gianpaolo Gangemi