



EU State Aid Law and Aviation

Competition Law in the Transport Sector, Amsterdam, 31 January 2017

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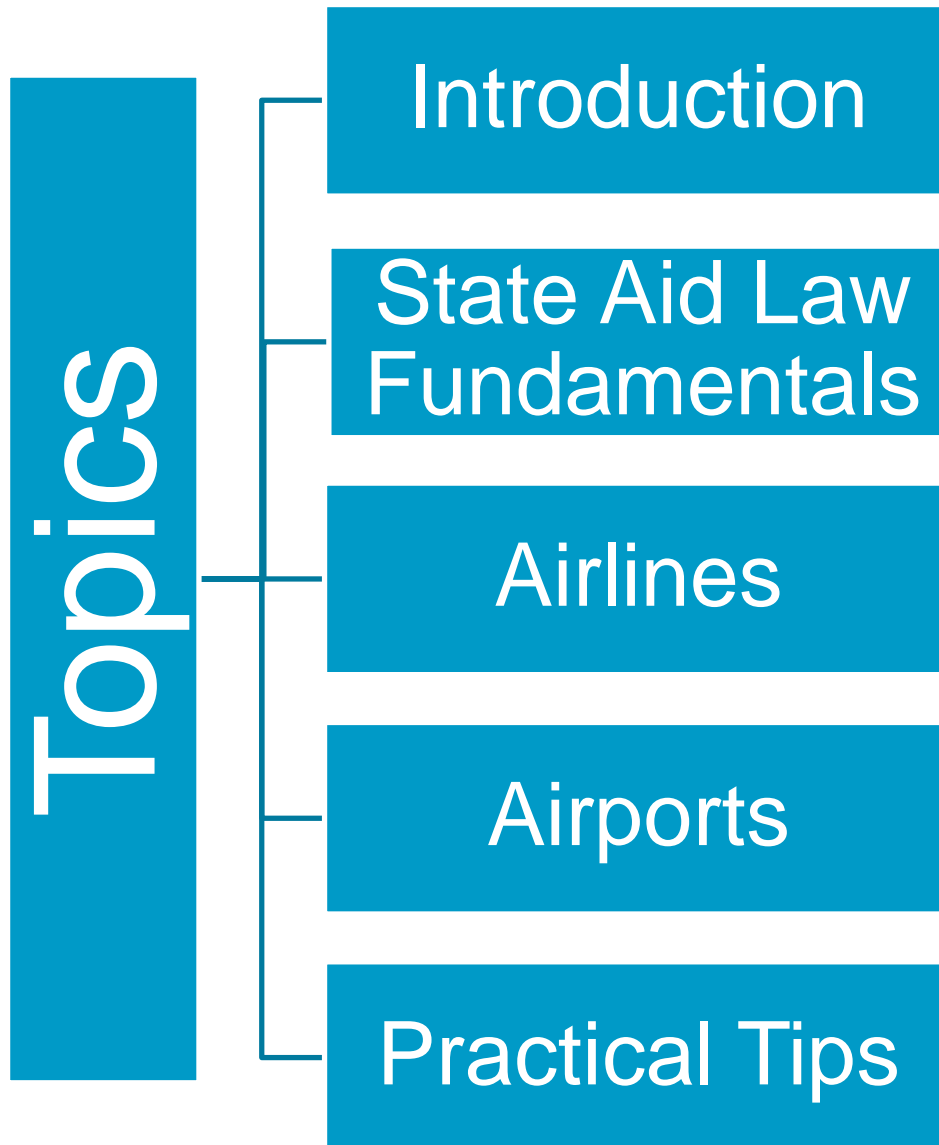


**To describe European Union State Aid Law
as it relates to aviation**

(i.e., airlines and airports)

but paying particular attention to airports

(because of the recent EU focus on airports)



Introduction

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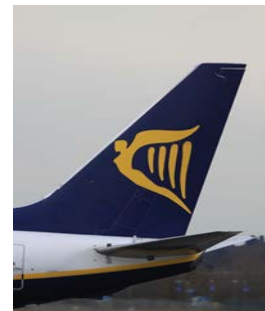
State Aid and Air Transport

- Christopher Columbus – from Genoa in modern-day Italy – explored and found “The Americas” using State Aid from modern-day Spain!



- All of the issues since have just been a variation on a theme....


There are over 150 airlines in the EU. There have been EU State aid cases involving the following airlines – and more – according to European Commission decisions. Not all of these airlines have received State aid but the number of airlines involved in such cases shows the pervasive nature of the issue:



State Aid and Air Transport: A Pervasive Issue

There have been State aid cases involving many of the EU's 460+ airports including the following sample (not all of these involved the provision of unlawful State Aid) – this sample shows the pervasive nature of the issue:

Tampere-Pirkkala	Vaasa	Chania	Gdynia-Kosakowo
Bratislava	Munich	Kassel	City of Derry
Leipzig	Aarhus	Antwerp	Rzeszow Jasionka
Tampere-Pirkkala	Schipol	Oulu	Kiel-Holtenau
Berlin-Schönefeld	Elba	Tallinn	Niederrhein-Weeze
Newquay Cornwall	Falconara	Riga	Saarbrücken
Kassel-Calden	Grosseto	Cardiff	Beauvais

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- Establishment / Start-up of Airline or Routes
 - Loan Guarantees
 - Loan Subsidies / Soft Loans
 - Tax Breaks
 - Subsidised Services
 - Preferential Financing
 - Survival Aid



Reduced Landing Charges

Free or Subsidised Accommodation

Marketing Subsidies

Subsidised Services

Grants

Tax Breaks

Regional Aid

There is no finite or complete list of State aid in aviation...so vigilance is required on all sides!

THE AVIATION WORLD HAS CHANGED

- Airlines were traditionally State-owned in the EEC until the mid/late-1980s+
- Liberalisation of the sector
- Privatisation / Commercialisation of airlines and airports
- Hub and regional airports
- Increase in Competition and hence increase in the number of Complainants about State Aid
- Opening-up of regional/secondary airports
- Development of the low-fares airline model

THE AVIATION WORLD HAS CHANGED

- Development of former military airports into commercial airports after the fall of the Berlin Wall
- Economic Crises resulting in airlines running into difficulties
- Events such as the terrorist attacks of 11 September 2001
- Capital-Intensive Industry with Expensive Assets
- Social and Regional Policy Issues (e.g., regional/smaller airports)
- National Pride v National Support v European Market
- DG COMP took over responsibility for State Aid in Transport from the Transport DG on 1 May 2010

1994

- Aviation Guidelines
- (Mainly Airlines)

2005

- Aviation Guidelines
- (Financing of airports and start-up aid to airlines)

2014

- “Guidelines on State Aid to Airports and Airlines”
- (Mainly Airports)

“9. The application of State aid rules to the airport and air transport sectors constitutes part of the Commission's efforts aimed at improving the competitiveness and growth potential of the Union airport and airline industries. A level-playing field among airlines and airports in the Union is of paramount importance for those objectives, as well as for the entire internal market. At the same time, regional airports can prove important both for local development and for the accessibility of certain regions, in particular against the backdrop of positive traffic forecasts for air transport in the Union.”

- 2014 Guidelines on State Aid to Airports and Airlines (footnote omitted)

State Aid Law Fundamentals

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State Aid and Air Transport

What is State Aid?

Elements of State Aid

Key Concepts

The Court of Justice of the European Union (“CJEU”) has ruled:

“...for a national measure to be categorised as State aid within the meaning of Article 107(1) TFEU, there must, first, be an intervention by the [Member] State or through [Member] State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient and, fourth, it must distort or threaten to distort competition....”

- Case C-270/15 P, *Belgium v Commission*, 30 June 2016, ECLI:EU:C:2016:489 (The *TSE* Case), para.31

	Element
1	There must be an intervention by the Member State or through Member State resources (“Member State Intervention”)
2	The intervention must be liable to affect trade between Member States (“Effect on Trade between Member States”)
3	Intervention must confer a selective advantage on the recipient (“Selectivity”)
4	Intervention must distort or threaten to distort competition (“Distorting Competition”)

	Element
1	Member State Intervention
2	Effect on Trade between Member States
3	Selectivity
4	Capable of Distorting Competition

- Section 3.1 of the 2014 Guidelines
- Recipient must be an Undertaking
- Entities engaged in economic activity regardless of their legal status, ownership or financing (Case C-180/98 *Pavlov*)
- Airlines are undertakings
- Infrastructure construction:
 - » 1994 Guidelines: a general measure of economic policy
 - » But *Aéroports de Paris* and *Leipzig-Halle* decided that this is an economic activity

“31. The entity or group of entities performing the economic activity of providing airport services to airlines, that is to say, the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services, will be referred to as the ‘airport’. An airport provides a range of services (‘airport services’) to airlines, in exchange for payment (‘airport charges’). While the exact extent of the services provided by airports, as well as the labelling of charges as ‘fees’ or ‘taxes’ varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all Member States.”

- 2014 Guidelines (footnotes omitted)

“88 Contrary to what is stated by the Commission in recital 145 of the contested decision, it must be held that the actions of the Walloon Region were economic activities. The fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of airport infrastructure, which is an economic activity (see, to that effect, *Aéroports de Paris v Commission*, paragraph 66 supra, paragraphs 107 to 109, 121, 122 and 125).”

- Case T-196/04 *Ryanair v Commission (Charleroi)*

However, not all activities at an airport are economic activities so a case-by-case analysis is needed:

“98 It is true that all the activities of airport operators are not necessarily economic in nature. Activities which fall within the exercise of public powers are not of an economic nature justifying the application of the EC Treaty rules of competition....

The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity engaged in by a given entity.....”

– Case T-443/08 *Leipzig-Halle*

As the 2014 Guidelines state:

“34..... If an airport carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.”

Typical non-economic activities:

- ATC, Police, Customs, Firefighting and Security
(2014 Guidelines, §35)

“36. The public funding of such non-economic activities does not constitute State aid, but should be strictly limited to compensating the costs to which they give rise and may not be used to finance other activities....”

(2014 Guidelines citing the 2003 9/11 Decision)

- Member State action
- Use of State Resources
- Imputable to a Member State (e.g., the circumstances of the case: Case C-482/99 *Stardust Marine*, paras.55-56)
- EU Funds but allocated at a Member State's discretion (2014 Guidelines, §38, footnote 44)
- State Aid even if granted by a private body where the other conditions are met (2014 Guidelines, §40)

- Strengthens the position of an undertaking when compared with other undertakings (Case 78/76 *Steinike & Weinlig*, para.21)
- Competition within a market (Guidelines, para.43)
- Even the “markets for airport infrastructure operation” (Guidelines, §44)
- Even small amounts of aid may distort competition (Guidelines, para.45 citing *Altmark*, para.77-82)


What is State Aid? – Effect on Trade between Member States


- This test is easily satisfied in aviation but particularly in international aviation
- It usually causes no difficulties

- Selectivity is critical to many of these cases
- A general measure is usually not selective
- A derogation from the normal tax rules that “does not apply generally to all relevant undertakings in a Member State” may be selective but selective does not mean that there is State aid
- In this context, the “relevant undertakings” are those in a “legal and factual situation that is comparable in the light of the objective pursued by the measure in question”
- But “Selectivity” is still an evolving concept

- Market Economy Operator (“MEO”) Principle
- The EU Ownership Neutrality Principle (Art.345 TFEU)
- MEO test “should be based on available information and foreseeable developments at the time when the public funding was granted and it should not rely on any analysis based on a later situation” (§48) – easy to express but more difficult to apply in practice
- What would a clinical profit-driven MEO do? (§49)
- “sound *ex ante* profitability prospects for the entity granting the financing” (§50). Realistic analysis and reasonable sensitivity analysis (§51)

- The Commission's Notice on the Notion of State Aid
- Court case-law
- Commission decisional practice
- Commission's 2014 Guidelines
- Ultimately, bearing in mind that the CJEU is the final “court of appeal” – scrutinise the Guidelines thoroughly but never lose sight of the Treaty, legislation and case law

- 
- Establishment / Start-up of Airline or Routes
 - Loan Guarantees
 - Loan Subsidies / Soft Loans
 - Tax Breaks
 - Subsidised Services
 - Preferential Financing
 - Survival Aid

- 
- Reduced Landing Charges
 - Free or Subsidised Accommodation
 - Marketing Subsidies
 - Subsidised Services
 - Grants
 - Tax Breaks
 - Regional Aid

- Treaty on the Functioning of the European Union
 - » Articles 107-109
 - » Article 106
 - » But not, in the context of aviation, Articles 93 and 96
- Regulations
- Decisions

- But also the Guidelines

Provision

Summary

Article 107(1)

General Rule

Article 107(2)

Automatically Permitted
(Exceptional)

Article 107(3)

Permitted on a Case by
Case Basis

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following **shall** be compatible with the internal market:
- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

“3. The following **may** be considered to be compatible with the internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

Provision	Summary
Article 107(1)	General Rule
Article 107(2)	Automatically Permitted (Exceptional)
Article 107(3)	Permitted on a Case by Case Basis

Article 106 of the TFEU

- “1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”

- General Block Exemption Regulation
 - » Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1)

- Guidelines
 - » Guidelines on State aid to airports and airlines (OJ C 99/3, 4.4.2014)
 - » Guidelines do not apply to ground handling services
 - » Freight transport is on a case by case basis
 - » Other Guidelines may also be relevant (e.g., Horizontal Guidelines)
 - » Cumulation, Reporting, Transparency, Monitoring & Review
- Other areas of EU law as well (e.g., environmental law – §20 of the Guidelines)

Selected Sources of Possible Approval for Aviation State Aid

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A diagram showing six sources of aid. On the left, a vertical line with diagonal end caps has six white circles. Each circle is connected to a horizontal blue bar that contains text. The sources, from top to bottom, are: Social Aid, Environmental Aid, Restructuring Aid, Training Aid, Natural Disasters Aid, and Regional Aid.

Social Aid

Environmental Aid

Restructuring Aid

Training Aid

Natural Disasters Aid

Regional Aid

An aid measure will be considered compatible with the internal market pursuant to Article 107(3) of the Treaty provided that the following cumulative conditions are met:

- (a) contribution to a well-defined objective of common interest;
- (b) need for State intervention;
- (c) appropriateness of the aid measure;
- (d) incentive effect;
- (e) proportionality of the aid (aid limited to the minimum);
- (f) avoidance of undue negative effects on competition and trade between Member States; and
- (g) transparency of aid.

- Aid must effectively be for the benefit of final consumers
- Aid must have a social character (certain categories of passengers or a remote region (§156(b)))
- Aid granted without discrimination as to the origin of the services (i.e., “irrespective of the airline which is operating the services).

State Aid and Airlines

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State Aid and Air Transport

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- (f) avoidance of undue negative effects on competition and trade between Member States; and
- (g) transparency of aid.

“53. Where an airport has public resources at its disposal, aid to an airline using the airport can, in principle, be excluded where the relationship between the airport and that airline satisfies the MEO test. This is normally the case if:

(a) the price charged for the airport services corresponds to the **market price**....; or

(b) it can be demonstrated through an **ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport**....”

“(a) the price charged for the airport services corresponds to the market price”

- How do you establish the market price”? (§§54-60)
- Available data (§54)
- A sufficient number of comparable airports (§55)
- But data could be skewed by other considerations (§56)
- So a net net figure is used (§60)

“(b) it can be demonstrated through an ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport....”

- The most relevant criterion (§61)
- Does it incrementally contribute, from an ex ante perspective, to the profitability of the airport? (§63) Does it cover all costs stemming from the arrangement, over its duration, with a reasonable profit margin on the basis of sound medium-term prospects? (§63 and footnotes 60-61)

- Section 5.2 of the Guidelines
- Contribution to a well-defined objective of common interest
- Need for State Intervention
- Appropriateness of State aid as policy instrument
- Existence of Incentive Effect
- Proportionality of the Aid Amount/Limited to the Minimum Necessary
- Avoidance of Undue Negative Effects on Competition and Trade
- Notification: §154 refers to Member States being “strongly encouraged to notify national schemes for start-up aid to airlines, rather than individual aid measures for each airport”

- Joined Cases C-164/15 P and C-165/15 P *Commission v Aer Lingus Ltd, Ryanair Designated Activity Company and Ireland*
- Long history to the case
- 2009: Request to the Commission
- 2012: Commission Decision: Aid present - a lower rate for short-haul flights constituted State aid incompatible with the internal market
- 2015: General Court Judgment – Partial Annulment
- 2016: CJEU found on 21 December 2016: the difference between the lower and normal rates of the Irish air travel tax constituted unlawful aid which must be recovered regardless of the benefit the airlines actually derived from the aid. Contrary to what the General Court decided, the CJEU considered that the Commission was not required to examine whether and to what extent the beneficiaries of the aid actually utilised the economic advantage arising from the application of the lower rate. Thus, the General Court's decision was vitiated by an error of law to the extent that it criticised the Commission for having set the amount of aid to be recovered at €8 per passenger.

State Aid and Airports

4

State Aid and Air Transport

- 460+ airports
- As a general rule, smaller/regional airports are, as a general rule, less likely to be commercially viable and are more likely to be in receipt of, or providing, State aid
- Regional, social and economic policy considerations could support the granting of State Aid to some airports (e.g., accessibility and easing of congestion)
- Overcapacity in certain regions
- Changing commercial practices - published price lists to changed commercial practices (e.g., long term contracts, marketing supports, incentives)
- Establish the nature of the airport for the purposes of the Guidelines

2014 Guidelines

“12. Where public support constitutes State aid, the Commission considers that under certain conditions, certain categories of aid to regional airports and airlines using those airports can be justified, in particular to develop new services and contribute to local accessibility and economic development. Nevertheless, distortions of competition on all markets concerned should be taken into consideration and only State aid which is proportional and necessary to contribute to an objective of common interest can be acceptable.”

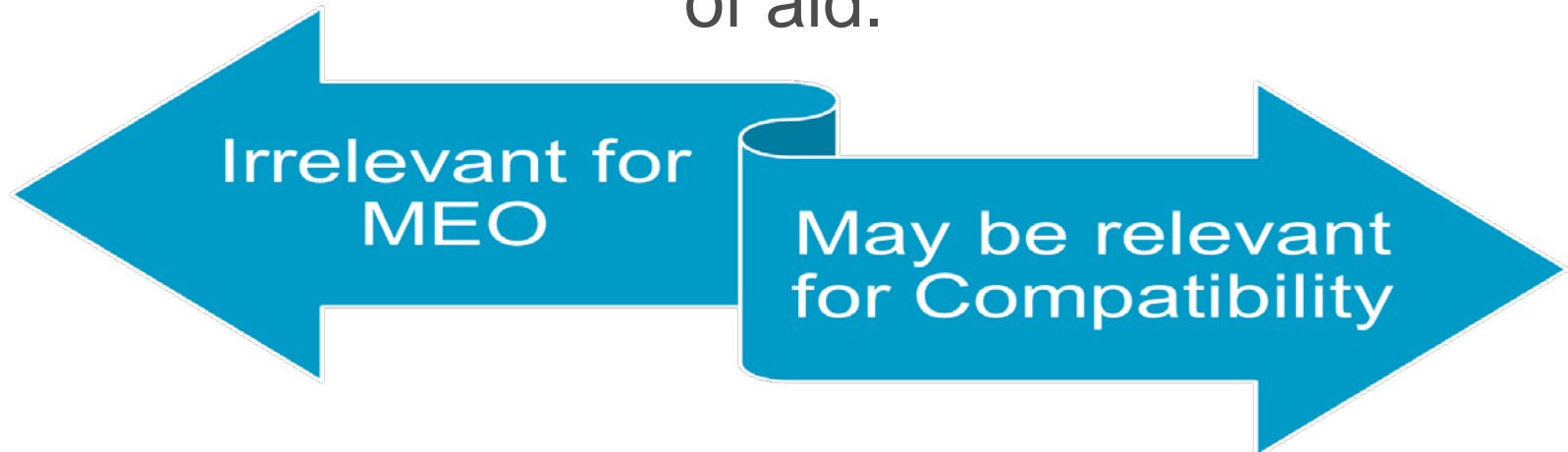
But operating aid is difficult to authorise (§13)

“11..... the Commission considers that the mere fact that an airport operator receives or has received State aid does not automatically imply that its customer airlines are also aid beneficiaries. If the conditions offered to an airline at a given airport would have been offered by a profit-driven airport operator, the airline cannot be deemed to receive an advantage for the purposes of State aid rules.”

- 2014 Guidelines

- Size, type and location of airport matters
- *Large* airports (5m+ pax pa): Investment aid should generally not be declared compatible with the internal market except in very exceptional circumstances (e.g., relocation of an existing airport)
- Maximum permissible aid intensities for investment aid are increased by up to 20% for airports in *remote* regions
- An airport with annual pax traffic volume of up to 3 million pax per annum would be a *regional* airport

“52. Airports can play an important role in fostering local development or accessibility. Nevertheless regional or policy considerations cannot be taken into account for the purposes of the MEO test...Such considerations can, however, under certain conditions, be taken into account when assessing the compatibility of aid.”



- Public Funding of Services of General Economic Interest (“SGEI”)
- Part 4 of the 2014 Guidelines
- Can relate to airlines and airports (§67)
- *Altmark* criteria

- *Altmark* criteria
- “Public funding for the provision of an SGEI does not entail a selective advantage within the meaning of Article 107(1) of the Treaty if the following four conditions are met: (a) the beneficiary of a State funding mechanism for an SGEI must be **formally entrusted** with the provision and discharge of an SGEI, the obligations of which must be clearly defined (b) the **parameters** for calculating the compensation must be established beforehand in an objective and transparent manner; (c) the **compensation cannot exceed what is necessary** to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, that allows for the provision of the service at the least cost to the community, the **level of compensation granted must be determined** on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.”

An aid measure will be considered compatible with the internal market pursuant to Article 107(3) of the Treaty provided that the following cumulative conditions are met:

- (a) contribution to a well-defined objective of common interest;
- (b) need for State intervention;
- (c) appropriateness of the aid measure;
- (d) incentive effect;
- (e) proportionality of the aid (aid limited to the minimum);
- (f) avoidance of undue negative effects on competition and trade between Member States; and
- (g) transparency of aid.

- Investment Aid to Airport (5.1.1)
- Consideration of the §79 Conditions which need to be fulfilled
- Application of the Criteria in Practice
- Proportionality: Maximum Aid Intensity Levels
- Practical Considerations

Practical Tips for Aviation Executives in regard to State Aid

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State Aid and Air Transport

- The simplest rule is “don’t accept State aid” but the real world is more complex
- Assume that the airport is an undertaking
- Assume, but verify, whether there is an economic activity involved
- Be vigilant as to the possibility of State aid (in particular, disguised State aid)
- Take no comfort from the fact that others are getting the same or a better deal
- Take no comfort from the fact that it is enshrined in legislation
- Understand that the national regimes across the EU differ (Guidelines, §32)
- Establish who is making the decision and who is operating the airport

- Conduct a *contemporaneous* independent examination as to whether there is State aid present before the aid is provided (Guidelines, para.48)
- Have the review done independently and covering the ex ante analysis
- Real and credible comparators (if possible) should be used
- In case of doubt, get a second opinion
- Conduct thorough due diligence in all M&A/Joint Venture transactions as well as all commercial transactions generally to determine if State aid
- Only Member States may notify State aid so beneficiaries need to press Member States to address the issues (Should beneficiaries be able to self-notify?)

- Have a detailed written business plan prepared in advance
- Review the prior and pending cases
- Press the Member State to ensure that there is no State aid
- Drill down into the detail and the numbers
- Provide for the possibility that State aid may have to be repaid (with interest)
- Always remember that the State aid regime is still evolving so expect the unexpected!



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