

A stylized world map composed of various geometric shapes in shades of blue, orange, and purple. The map is centered on the Atlantic Ocean, with North America on the left and Europe/Asia on the right. The shapes are arranged in a way that creates a sense of movement and connectivity.

EU State Aid Litigation

Competition Law in the Aviation Sector

State Aid Developments

KNect365, Brussels, 9 April 2019

Jacques Derenne
Partner, Global Co-Practice Group Leader, *Antitrust and Competition*
Sheppard Mullin, Brussels
Professor, University of Liège & Brussels School of Competition
Global Competition Law Centre, College of Europe

SheppardMullin
Unpacking Complexity
Unfolding Opportunity



Outline

- New market reality
- Relevant period: 2017-2019
- Legislation
- Commission's decisional practice
 - Investment & operating aid to airports
 - Start-up aid to airlines
 - Marketing agreements
 - Rescue and restructuring aid
 - SGEIs
 - No aid
- EU case law
 - Aid to airports & to airlines
 - Pending cases
- National courts - Private enforcement
 - Obligations and powers of national courts
 - Typology of actions and actors - example
 - Beneficiaries – No legitimate expectations



New Market Reality

- Air transport contributes significantly to EU economy
- Europe 2020 Strategy – Single Transport area
- Low-cost carriers and increase in traffic
- Growing private involvement in airports infrastructure
- Majority of regional airports subsidized
- Poor accessibility to certain regions
- Major hubs facing increasing levels of congestion
- Growing cooperation between airports and airlines



Legislative developments

- June 2017 – new extension of the GBER
 - Commission Regulation 2017/1084 – aid for port and airport infrastructure (a.o)
 - Definitions + new sections 14 and 15 of GBER
 - Open access principle
 - Investment aid: Regional airports $\leq 3\text{M}$ passengers per year (§9)
 - Aid should not be granted to airports located in the catchment area (100 km distance or 60 min of travel time) of another airport (§6) (except when an airport is located within 100 km distance of another airport but travel time of at least 90 min by maritime transportation or air transport - §9)
 - Aid only covers the funding gap: the aid does not go beyond what is necessary to trigger the investment, taking into account future revenues from the investment (§11)
 - Maximum aid intensities (§13-14)
 - More flexible rules for investment aid granted to small airports $\leq 200,000$ passengers per year (no condition re catchment area + must comply with either funding gap rule or maximum aid intensities)
 - Operating aid: $\leq 200,000$ passengers per year (§15)
- Ongoing ex-post evaluation study
 - General fitness check (announced on 7 January 2019)
 - Aviation: focus on operating aid to airports



Commission's decisional practice (1)

Operating and investment aid to airports

- **Operating aid**

- SA.47969 – Germany - Frankfurt-Hahn Airport
- SA.46945 – Germany - Erfurt-Weimar Airport
- SA.44377 – Denmark – Aarhus Airport
- SA.49709 – Germany - Rostock Airport
- Approved in preliminary examination (2014 Aviation Guidelines)

- **Investment aid**

- SA.46408 – Latvia – Modernisation of Riga Airport
- SA.46378 – Hungary - Modernisation of Debrecen International Airport
- SA.43787 – Germany - Investment aid to Memmingen Airport
- SA.42413 – France - Investment aid to Tarbes Airport
- Approved in preliminary examination (2014 Aviation Guidelines)



Commission's decisional practice (2)

Start-up aid to airlines

- SA.46709 - Italy - new routes from/to the airports in the region of Calabria
 - Approved in preliminary examination (2014 Aviation Guidelines)
- SA.48345 – Romania - routes from Tulcea Airport
 - Approved in preliminary examination (2014 Aviation Guidelines)
- SA. 38105 – Belgium - Brussels Airlines, TUI Airlines Belgium and Thomas Cook Airlines Belgium
 - Scheme on airport security charges
 - Initiation of formal investigation in 2014
 - Aid recovered in March 2017 before the Commission concluded its investigation
 - Negative decision without recovery in July 2017



Commission's decisional practice (3)

Marketing agreements

- SA.47867 – France - Alleged aid to Ryanair at Montpellier Airport
 - Formal investigation procedure initiated on 4 July 2018
 - Complaint (marketing agreements between the Association for the Promotion of Touristic and Economic Flows and Ryanair and its subsidiary AMS)
- SA.43260 – Germany - Alleged aid to Frankfurt Hahn Airport and Ryanair
 - Formal investigation procedure initiated on 4 July 2018
 - Marketing agreements Rhineland-Palatinate and Ryanair
 - Services agreements between FFHG (airport operator) and Ryanair
 - Land measures in favour of FFHG



Commission's decisional practice (4)

Rescue and Restructuring aid

- Rescue aid to airports
 - SA.48050 - Italy - airport Marche Ancona
 - Decision not to raise objections
- Rescue aid to airlines
 - SA.48937- Germany - Air Berlin
 - Decision not to raise objections
 - SA.48171 – Italy – Alleged State aid in favour of Alitalia
 - Formal investigation procedure initiated on 23 April 2018
 - €900 million State loan (duration of the loan)



Commission's decisional practice (5) SGEIs

- SA. 49331- Denmark - Bornholm Airport
- SA.49203 – Romania - Bacau International Airport
- SA.49482 - United Kingdom - Sumburgh Airport


All measures meet the conditions of the SGEI Framework and are compatible with Article 106(2) TFEU



Commission's decisional practice (6)


No aid decisions

- SA.21877, SA.27585 and SA.31149 – Germany - Alleged aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport
 - No selectivity
 - Ref. to C-524/14 P, *Lübeck* (2016)
 - Reference system/framework - 2006 schedule at Lübeck only
 - Competing airlines at competing airports (advantage) not comparable
- SA.29064 - Ireland - Irish air travel tax
- SA.48509 – Greece - Extension of the airport development agreement for Athens International Airport concession



EU case law (1) - Aid to Airports

- GCEU, 17 November 2017, *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, T-263/15
 - Annulment of the Commission decision (SA.35388) that ordered recovery of 92 million zloty for Gdynia Kosakowo Airport
 - the Commission did not allow interested parties (the Gdynia Kosakowo operator) to submit their comments after it changed the legal basis (2014 Aviation Guidelines)
 - Pending appeal (C-56/18 P)
- GCEU, 25 January 2018, *Brussels South Charleroi Airport*, T-818/14
 - New "Charleroi" decision
 - No aid to Ryanair
 - Air to BSCA
 - Action dismissed (see next slide)



EU case law (2) - Aid to Airlines

- GCEU, 27 April 2017, *Germanwings*, T-375/15
 - Annulment of the Commission decision regarding Zweibrücken airport because the Commission had failed to prove the existence of an advantage
 - The Commission could not prove that the investments in the terminal had been undertaken primarily in order to provide services to Germanwings by relying solely on unsubstantiated declarations of the German State
- GCEU, 13 December 2018, *Ryanair DAC and Airport Marketing Services Ltd*, T-111/15, T-165/15, T-165/16, T-53/16 and *Transavia*, T-591/15
 - GC essentially confirms Commission decisions declaring unlawful and incompatible aid granted to Ryanair and Transavia resulting from airport and marketing services contracts
 - Annulment of the decision concerning Zweibrücken airport (T-77/16) – no proof of selectivity (see Lübeck case)



EU case law (3) - Pending cases

- C-56/18 P - *Commission / Gmina Miasto Gdynia et Port Lotniczy Gdynia Kosakowo*
 - Appeal against GCEU judgment in case T-263/15
- C-202/19 P, C-203/19P, C-204/19P, C-205/19P - *Ryanair and AMS/ Commission*
 - Appeal against GCEU judgments in cases T-111/15, T-165/15, T-53/16, T-165/16
- T-218/18 - *Deutsche Lufthansa / Commission*
 - Action for annulment against decision in Case SA.47969 - Hahn Airport
- T-833/17 - *Ryanair et Airport Marketing Services Ltd / Commission* and T-8 /18 - *easyJet Airline / Commission*
 - Actions for annulment against decision in Case SA.33983 - Italy - Compensation to Sardinian airports for public service obligations (SGEI)
- T-492/15 - *Deutsche Lufthansa / Commission*
 - Action for annulment against decision Case SA.21121- Flughafen Hahn and Ryanair



National courts (1)

- Private enforcement – Obligations and powers of national courts
- Typology of actions – actors - example
- Beneficiaries – No legitimate expectations



National courts (2) - Obligations and powers of national courts

NATIONAL COURTS

- Unlawful ("illegal")
 - aid not notified
 - aid notified but implemented before Commission decision
 - misuse of existing aid
- national courts
 - obligation to protect subjective rights of third parties
 - ensure that Commission can carry out its compatibility assessment
 - no stay of proceedings
 - enforce Commission negative decisions

COMMISSION

- Incompatible
 - lawful or unlawful aid
 - aid not exempted
 - Article 107(2) or (3) TFEU
 - Article 106(2) TFEU
- exclusive powers of Commission
 - prohibition to implement incompatible aid
 - obligation to order recovery if unlawful



National courts (3) - Particularly relevant legislation

- Article 108(3) TFEU: notification/standstill obligation
- Art. 16(3) of Regulation 2015/1589:

The Member State shall take “all necessary measures” to ensure “immediate and effective” recovery

- National procedures
 - Effectiveness/Equivalence
 - No delay
- Recovery Notice – 15.11.07 (2019 draft revised notice)
 - Enforcement Notice – 25.02.09
 - Objective: encourage private enforcement + effective remedies
 - Role of national courts regarding unlawful aid and implementation of negative Commission decisions
 - Commission support for national courts



National courts (4)

C-39/94, *SFEI*, *DHL*, *Fedex v La Poste* - 11 July 1996

- The Commission and the national courts have distinct but complementary role with respect to control of State aid
 - **Commission:** control of the substance, compatibility of the aid with the internal market
 - **national courts:** regularity of the procedure, ensure that draft aid are notified to the Commission, in protecting subjective rights of third parties
 - other principles in *SFEI*:
 - direct effect
 - no stay of proceedings if Commission reviewing
 - immediate action (interim relief if appropriate)
 - qualification of aid (preliminary reference to CJEU or question to Commission)
 - obligation to recover if no exceptional circumstances
 - damages if necessary
 - beneficiary liable of unfair competition act under national liability law



National courts (5) Distinct but complementary roles

Commission

- application of notion of aid
- assessing compatibility of aid
- obligation to recover unlawful and incompatible aid
- Article 107(3) TFEU
- Article 108(1-2) TFEU

National courts

- application of notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108(3) TFEU

Interaction: Article 107(1) TFEU

- national courts competent despite ongoing procedure before Commission
- questions from national courts to the Commission or to the CJEU



National courts (6) – what should they do?

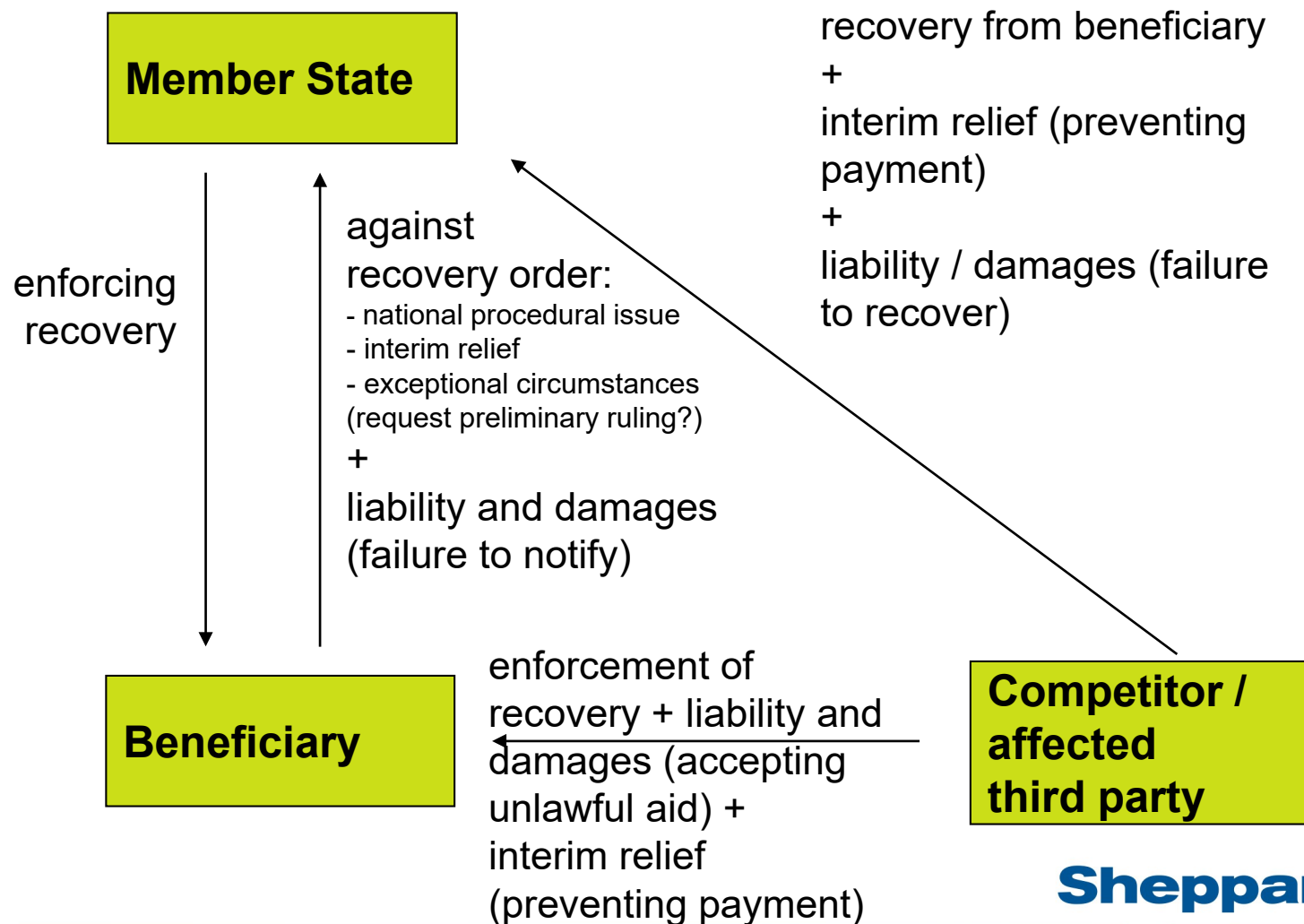
- Aid qualification (Art. 107(1) TFEU – but *Deutsche Lufthansa* case)
- Obligation to recover unlawful aid under national law (Art. 108(3) TFEU)
 - Recovery order (including interest)
 - Interim measures
 - Enforce negative decisions of the Commission
 - Final decision
 - 108(2) decision
 - *Case 314/85 Foto Frost* otherwise
 - Compatibility decision does not *a posteriori* regularise the unlawfulness of aid
- Re-establish *ex ante* situation on the market
 - Annul litigious measures (eg contracts)
 - Interim measures, including injunctions not to pay unlawful aid
 - Award damages



National courts (7) - Who can initiate a State aid action before national courts?

- Competitor of recipient of aid / any third parties affected by unlawful aid
 - against beneficiary
 - against the State
- Aid beneficiary (against recovery)
 - against the State
- State authorities (recovery)
 - against the beneficiary

National courts (8) - by type of actors





National courts (9) - by type of actions

- Annulment
- Recovery – cease and desist orders cases
 - *Breda* case (President Brussels Commercial Court, 1995)
 - *Scott III*
 - *Ryanair* cases
- Unlawful but compatible aid
 - *CELF I+II* cases (French Council of State, 2008, 2010)
- Tax cases
 - *Boiron* cases (Court of Appeal of Versailles, 2 septembre 2010, 3 cases)
- Interim relief
- Damages
 - SFEI, 1996: competitor v beneficiary (principle)
 - competitor v State
 - Fontanille, Salmon, 2004, 2006, France: beneficiary v State



National courts (10-1) - Beneficiaries – the case of legitimate expectations

- Article 16(1) of Regulation 2015/1589
- *“In view of the mandatory nature of the supervision of State aid [...], undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.”* (C-5/89, Commission v Germany, paras 13-15; C-24/95, Alcan, para. 25)



National courts (10-2) - Beneficiaries – the case of legitimate expectations

- Three conditions to claim protection of legitimate expectations
 - precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities
 - those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed
 - the assurances given must comply with the applicable rules.

(T-394/08, T-408/08, T-453/08 and T-454/08, Regione Autonoma della Sardegna, para. 273)




National courts (10-3) – Beneficiaries - The case of legitimate expectations

- Assurances given by national authorities about State aid matters are, by definition, incapable of creating any legitimate expectation
- *A fortiori* for assurances that are manifestly against the law
 - a promise not to recover a State aid that the Commission has already declared incompatible and to be recovered
 - A State guarantee covering recovery.



Recent example of enforcement at national level (by public authority)

- Negative aid decision with recovery in 2014 (SA.33963 Aéroport d'Angoulême)
- Ryanair plane grounded and seized by French authorities at Bordeaux airport in November 2018
- Ryanair refused to pay back
- The French authorities decided to immobilise the plane until the sum is paid
- Payment was done within two hours.



Thank you for your attention!

Jacques Derenne

Avocat aux barreaux de Bruxelles et de Paris

Partner - *Co-Practice Group Leader, Antitrust & Competition*

+32 2 290 79 05 - jderenne@sheppardmullin.com

SheppardMullin

Sheppard, Mullin, Richter & Hampton LLP

Brussels

IT Tower

Avenue Louise 480

1050 Brussels

Belgium

T: +32 (0)2 290 7900

Beijing | Brussels | Century City | Chicago | Dallas | London | Los Angeles | New York | Orange County | Palo Alto
San Diego (Downtown) | San Diego (Del Mar) | San Francisco | Seoul | Shanghai | Washington, D.C.

www.sheppardmullin.com