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(Information)

COMMISSION

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COMMUNITY GUIDELINES ON FINANCING OF AIRPORTS AND START-UP AID TO AIRLINES DEPARTING FROM REGIONAL AIRPORTS

(2005/C 312/01)

(Text with EEA relevance)

1. INTRODUCTION

1.1. General context

(2) In addition, a number of measures have been taken in areas such as allocation of slots ⁽²⁾, groundhandling services ⁽³⁾ and computerised reservation systems ⁽⁴⁾, in order to underpin this market liberalisation and allow businesses to compete on a level playing field. New targeted proposals will shortly be made in relation to slots (for the first time, a market mechanism for allocation of slots will be proposed to increase mobility in saturated airports), equal access to computerised reservation systems and groundhandling services. The latter proposal is aimed at boosting competition between service providers by increasing their access to the market.

(1) These guidelines form part of the general plan to create a single European airspace, a subject on which the Commission has been working for over 10 years. The set of liberalisation measures known as the 'third air package', in force since 1993, has enabled all air carriers holding a Community licence to have unrestricted access to the intra-Community market, with freedom of tariffs, since April 1997 ⁽¹⁾. As a corollary, to guarantee citizens continuous quality service at affordable prices throughout their territory, those Member States that wish to do so have established public service obligations relating to frequency, service punctuality, availability of seats or preferential rates for certain categories of users within a clear legal framework. These public service obligations have enabled air transport to make a significant contribution to economic and social cohesion and to balanced development in the regions.

(3) At the same time, the opening-up of the industry, which has obviously had a major impact on the activities and behaviour of traditional airlines or flag carriers, has been accompanied by strict control of State aid. The application of the principle of single aid for restructuring (one time-last time) has thus allowed the more adaptable airlines to make the transition from a relatively protected

⁽¹⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

⁽²⁾ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

⁽³⁾ Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36).

⁽⁴⁾ Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ L 220, 29.7.1989, p. 1).

operating regime to competing as normal players in the market. This has led to a significant restructuring of the whole air industry, a measure that became even more necessary after the events of 11 September 2001, the consequences of which on air transport were significant. Examples of consolidation in the industry are the recent alliances such as Air France/Alitalia, Lufthansa/Austrian Airlines and Iberia/British Airways, and the recent merger of Air France and KLM.

- (4) The *Open Skies* ⁽¹⁾ judgments of the Court of Justice have also given a new impetus to the air industry by confirming that the Community has international negotiating powers in the field of civil aviation. The importance of these judgments is considerable, since they will promote consolidation among European airlines and enhance their ability to face competition from third-country airlines on a Community basis.
- (5) There have been two other major developments on the European air transport market in recent years. One of these is the emergence of a number of new Community-wide companies offering promotional rates supported by a *low-cost* structure. The other development is the drive by airports in recent years to secure new air links.

1.2. Developments in the airport sector

- (6) The initial development of airports was often determined by purely territorial considerations or, in some cases, military requirements. These land-use planning considerations may still persist in some cases, but in many others airports have been transferred from State to regional control, in some cases to be operated by public companies, or even to the private sector. The process of transfer to the private sector has normally taken the form of privatisation or a progressive opening-up of capital.
- (7) The Community's airport industry has therefore undergone fundamental organisational changes that reflect not only the active interest of private investors in the airport sector but also a change of attitude on the part of the public authorities regarding the contribution of private investment to airport development. This development has led to greater diversification and complexity of the functions undertaken by airports.

- (8) However, this development affects the EU's airports differently. The seven largest EU airports account for over a third of all EU traffic, and the 23 largest account for more than two thirds ⁽²⁾. Although they are primarily providers of infrastructure to the air transport industry, these airports have become highly efficient commercial operators. On the other hand, most small airports in the EU are still owned and operated by public authorities in the public interest. As a result, the influence of one airport's activity on that of other airports and on trade between Member States varies greatly according to the category it belongs to (see *Types of Airport*, section 1.2.1 below).
- (9) Moreover, it is generally accepted that airports can have an impact on the success of local economies and on maintaining local services such as education and health. They also play a major role in the integration of the outermost regions of Europe. Passenger and freight services can be crucial for competitiveness and development in some regions. Airports that provide good services can act as a magnet for airlines and thus promote business activity as well as economic, social and regional cohesion within the EU.
- (10) However, the Commission notes that air transport is not the only driver of development in terms of regional accessibility. High-speed train connections also make a significant contribution to social and economic cohesion in the EU, particularly between large regional cities. As emphasised in the 2001 White Paper ⁽³⁾, rail/air intermodality, with rail and air travel complementing rather than competing with each other and high-speed trains connecting cities, is bound to boost capacity significantly.

1.2.1. Types of airport

- (11) In the airport industry there are currently several different levels of competition between the different types of airport. This is a key factor when investigating State aid, and makes it necessary to examine the extent to which competition could be distorted and the single market affected. Competition scenarios are evaluated case by case, based on the markets in question. However, research ⁽⁴⁾ has shown that, generally, *major international hubs* are competing with similar airports in all the

⁽¹⁾ Cases C-466/98 to C-469/98, C-471/98 and C-472/98 *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium and Luxembourg respectively* [2002] ECR I-9427 to 9741.

⁽²⁾ Based on data for EU-25 in 2004 from the Airports Council International.

⁽³⁾ European Transport Policy for 2010: time to decide, COM (2001) 370, 12.9.2001.

⁽⁴⁾ 'Study on competition between airports and the application of State aid rules' — Cranfield University, June 2002.

transport markets concerned, with the level of competition depending on factors such as congestion and the existence of alternative transport, or, in certain cases (see below), with large regional airports. *Large regional airports* may be competing not only with other large regional airports but also with the major Community hubs and land transport, especially if there is high-quality land access to the airport. This research has also shown that *small airports* do not generally compete with other airports except, in some cases, with neighbouring airports of a similar size whose markets overlap.

(12) In practical terms, the Decision of the Council and of the European Parliament on Community guidelines for the development of the trans-European transport network ⁽¹⁾ defined three categories of airport:

- international connecting points (generally with an annual passenger volume of no less than 5 000 000),
- Community connecting points (generally with an annual passenger volume of between 1 000 000 and 4 999 999), and
- regional connecting points and accessibility points (generally with an annual passenger volume of between 250 000 and 999 999).

(13) The Committee of the Regions, for its part, proposed five categories of European airports in its Outlook opinion of 2 July 2003 on regional airport capacities ⁽²⁾:

- major hub airports (over 25 million passengers, four airports), accounting for approximately 30 % of European air traffic,
- national airports (10 to 25 million passengers, 16 airports), accounting for approximately 35 % of European air traffic,
- 15 airports of 5 to 10 million passengers accounting for approximately 14 % of European air traffic,

- 57 airports of 1 to 5 million passengers accounting for approximately 17 % of European air traffic,
- 67 airports of 200 000 to 1 million passengers accounting for approximately 4 % of European air traffic ⁽³⁾.

(14) According to the Committee of the Regions, regional airports generally fall into the latter two categories, but some airports in the intermediate category may also be considered regional airports.

(15) The Commission considers that there is a broad overlap between these two classification schemes, and for the purposes of these guidelines has defined the following four categories:

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

1.3. Low-cost companies

(16) Compared with traditional air carriers, the market share of low-cost airlines has risen from just 4,0 % in 1998 to 20,8 % in 2004, although this share varies considerably between Member States ⁽⁴⁾. In 2004, the three main low-cost airlines transported over 62 million passengers in the EU ⁽⁵⁾.

⁽¹⁾ Decision of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network (OJ L 228, 9.9.1996, Annex II, section 6).

⁽²⁾ Outlook opinion of the Committee of the Regions of 2 July 2003 on the capacity of regional airports (CdR 393/2002 fin).

⁽³⁾ NB: There are approximately 200 airports with fewer than 200 000 passengers per year.

⁽⁴⁾ Over 40 % in the United Kingdom, Ireland and Slovakia, 38 % in Spain, over 25 % in Belgium, Germany, Italy, Austria, Hungary and Sweden, 19 % in France and Greece, 18 % in the Czech Republic and less than 15 % in the other Member States. Source: OAG Summer Schedules 2004, seats available on intra-EU flights.

⁽⁵⁾ Ryanair, Easyjet, AirBerlin. Source: Airclaims.

(17) The Commission welcomes this development and appreciates the contribution made by these companies to the general reduction in the price of air travel in Europe, the wider range of services available, and the accessibility of air travel to a wider public. As the guardian of the Treaty, it must nevertheless ensure that internal market rules are complied with, in particular competition rules, especially concerning State aid. The negotiating methods used by the low-cost airlines to obtain aid from public authorities, whether directly or through the airport operator, have raised a number of questions regarding the application of competition rules under the EC Treaty and have been the subject of several complaints to the Commission. This led the Commission to adopt its recent decision on the establishment of Ryanair at Charleroi⁽¹⁾. This has led to expectations within the market of a clear legal framework defining the rules applicable to these new practices.

2. OBJECTIVES OF THESE GUIDELINES AND CHANGES COMPARED WITH THE 1994 GUIDELINES

(18) The Commission's 1994 guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid to the aviation sector⁽²⁾ (hereinafter the aviation sector guidelines) do not cover all the new aspects relating to the financing of airports and start-up aid for new routes.

(19) They relate almost exclusively to the conditions for granting State aid to airlines, by limiting direct operating aid to airlines solely to public service obligations and aid of a social nature. Part II.3 of the guidelines relates to public investment in airport infrastructure. It states that 'the construction of (airport) infrastructure projects... represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid. This general principle applies only to the construction of infrastructures by Member States, and does not apply to aid resulting from preferential treatment of certain companies for the use of the infrastructures.' These guidelines therefore add to, rather than replace, those from 1994 by specifying how the competition rules must be applied to the various

means of financing airports (see section 4), and start-up aid for airlines leaving from regional airports (see section 5).

(20) To this end, the Commission takes account of the contribution that developing regional airports makes to numerous Union policies. Thus:

- increased use of regional airports is an asset in combating air traffic congestion at the major European hubs. In its White Paper 'European transport policy for 2010: time to decide'⁽³⁾, the Commission explains that 'there is already a specific action plan on congestion of the sky, but congestion on the ground is not yet receiving the necessary attention or commitment. However, almost half of Europe's fifty largest airports have already reached or are close to reaching saturation point in terms of ground capacity.'

- more access points for intra-European flights increase the mobility of European citizens;

- developing these airports also helps develop the regional economies concerned.

However, regional airports often face a less favourable situation when developing their services than the major European hubs such as London, Paris or Frankfurt. They do not have a large reference airline that focuses its operations on that airport in order to offer passengers as many connections as possible and to take advantage of the significant economies of scale that such a structure allows. They may not have reached the critical size needed to be sufficiently attractive. In addition, regional airports often have to overcome a poor image and low profile due to their location in the outermost regions of the Community (e.g. the Azores) or in areas affected by economic crisis (e.g. Charleroi, the site of a former coalfield).

(21) This is why in these guidelines the Commission has taken a positive approach to developing regional airports, while at the same time ensuring strict compliance with the principles of transparency, non-discrimination and proportionality so as to prevent any distortion of competition which would not be in the common interest in terms of public funding to regional airports and State aid to airlines.

⁽¹⁾ Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ L 137, 30.4.2004, p. 1).

⁽²⁾ Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).

⁽³⁾ White Paper, European Transport Policy for 2010: time to decide. COM(2001) 370 final.

- (22) This approach must also fit in with the general aims of transport policy, in particular intermodality with railways. In recent years the Community has made a significant contribution, in terms of both policy and financing, to the pursuit of ambitious programmes to develop a high-speed rail network. High-speed rail offers a highly attractive alternative to air travel in terms of time, price, comfort and sustainable development. Notwithstanding the work that remains to be done to extend the high-speed rail network to the whole territory of the EU, we should therefore seek to benefit from the capacity of high-speed rail travel to provide efficient, high-quality connections, and encourage rail and air operators to cooperate in accordance with Article 81 of the EC Treaty in order to develop complementarity between the two modes in the interest of users.
- (23) In so far as these guidelines take a stand on issues such as the absence or presence of aid, they set out, for information purposes, the Commission's general interpretation of these issues at the time of drafting. This is purely indicative, and without prejudice to the interpretation of this concept by the Court of Justice and the Court of First Instance.
- (27) In its communications and other measures on regional aid, the Commission has indicated the conditions under which regional aid can be considered compatible with the common market in accordance with Article 87(3)(a) and (c). Operating aid ⁽¹⁾ granted to airports or airlines (such as start-up aid) can only be declared compatible under exceptional circumstances and under strict conditions in underprivileged regions, i.e. regions covered by the derogation set out in Article 87(3)(a) of the EC Treaty, the most remote regions and sparsely populated areas ⁽²⁾.
- (28) In accordance with Article 87(3)(b), aid to promote the execution of an important project of common European interest may be considered to be compatible with the common market. Particular reference is made to projects relating to trans-European networks, which may include airport projects.
- (29) When the above provisions are not applicable, the Commission will evaluate the compatibility of the aid given to airports and start-up aid under Article 87(3)(c). The following provisions set out the principles the Commission will follow in carrying out its assessment.

3. SCOPE AND COMMON COMPATIBILITY RULES

3.2. Existence of State aid

3.1. Scope and legal basis

3.2.1. Airports' economic activity

- (24) This framework specifies to what extent and how public financing of airports and State aid for starting up air routes will be assessed by the Commission in the light of Community rules and procedures on State aid. The Commission will base its assessment on Article 86(2) or Article 87(3)(a), (b) or (c) of the Treaty.
- (25) Article 86(2) of the Treaty allows Member States to derogate from the Community rules on State aid in respect of undertakings entrusted with the operation of services of general economic interest if the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them and provided the development of trade is not affected to such an extent as would be contrary to the interests of the Community.
- (26) Article 87(3) of the Treaty lists the aid that may be declared to be compatible with the common market. Article 87(3)(a) and (c) provide for derogations for aid granted to promote or facilitate the development of certain areas and/or certain economic activities.
- (30) The Treaty adopts a neutral stance on the question of whether a State opts for public or private ownership of airports. As regards the existence of State aid, the essential point is whether the beneficiary is engaged in an economic activity ⁽³⁾. There can be no doubt that airlines are engaged in an economic activity. Likewise, once an

⁽¹⁾ In the guidelines on State aid for the regions, operating aid is defined as aid 'intended to reduce the undertaking's current expenditure' (point 4.15), while initial investment aid relates to 'an investment in fixed capital relating to the creation of a new establishment, the extension of an existing establishment, or the commencement of an activity that involves a fundamental change in the product or procedure provided by an existing establishment' (point 4.4).

⁽²⁾ See point 4.15 et seq. of the guidelines on State aid for the regions.

⁽³⁾ According to Court of Justice case-law, any activity consisting in offering goods and services on a given market is an economic activity. See Case C-35/96 *Commission v Italy* [1998] ECR I-3851 and Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451.

airport engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 87(1) of the EC Treaty, and the Treaty rules on State aid therefore apply ⁽¹⁾.

(31) In the 'Aéroports de Paris' case ⁽²⁾, the Court of Justice ruled that airport management and operation activities consisting in the provision of airport services to airlines and to the various service providers within airports are economic activities because they consist in the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by the manager, and do not fall within the exercise of its official powers as a public authority and are separable from its activities in the exercise of such powers. Thus, the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) of the EC Treaty, to which the rules on State aid apply.

(32) However, not all the activities of an airport operator are necessarily of an economic nature. It is necessary to distinguish between its activities and to establish to what extent its activities are of an economic nature ⁽³⁾.

(33) The Court of Justice has held 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. Such activities include safety, air traffic control, police, customs, etc. Generally speaking, the financing of these activities must be strictly limited to compensation of the costs to which they give rise and may not be used instead to fund other economic activities ⁽⁴⁾. As explained by the Commission in its Communication of 10 October 2001 following the attacks of 11 September 2001, 'It goes without saying that, if certain measures are imposed directly on airlines and other operators in the sector such as airports, suppliers of groundhandling services and providers of air navigation services, the financing of such measures by the public authorities must not give rise to operating aid incompatible with the Treaty.'

3.2.2. Airport activities constituting services of general economic interest

(34) Certain economic activities carried out by airports can be considered by the public authority as constituting a service of general economic interest. In this case, the authority imposes on the airport operator certain public service obligations in order to ensure that the general public interest is appropriately served. In such circumstances, the airport operator may be compensated by the public authorities for the additional costs deriving from the public service obligation. It is not impossible for the overall management of an airport, in exceptional cases, to be considered a service of general economic interest. In this case, the public authority might impose public service obligations on an airport, for example, an airport located in an isolated region, and might decide to pay compensation for these obligations. However, it should be noted that the overall management of an airport as a service of general economic interest should not cover activities which are not directly linked to its basic activities and listed in paragraph 53(iv).

(35) In this connection, the Commission draws attention to the Court judgment in the Altmark case ⁽⁵⁾, which established case-law in this regard. The Court ruled that compensation for public service does not constitute State aid within the meaning of Article 87 of the EC Treaty provided that the following four criteria are met:

1. the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined;
2. the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and

⁽¹⁾ Cases C-159/91 and C-160/91, *Poucet v AGF and Pistre v Cancava* [1993] ECR I-637.

⁽²⁾ Case T-128/98, *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-3929, confirmed by Case C-82/01 [2002] ECR I-9297, points 75-79.

⁽³⁾ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43.

⁽⁴⁾ Case C-343/95 *Calì & Figli v Servizi ecologici porto di Genova* [1997] ECR I-1547. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001. Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the port sector.

⁽⁵⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.

4. where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.

(36) When it complies with the conditions established by the Altmark judgment, compensation for public service obligations imposed on an airport operator does not constitute State aid.

(37) Public financing of airports other than those referred to above may constitute State aid within the meaning of Article 87(1) if it has an effect on intra-Community competition and trade.

3.2.3. *Effects of financing given to airports on competition and trade between Member States*

(38) Competition between airports can be assessed in the light of airlines' criteria of choice, and in particular by comparing factors such as the type of airport services provided and the clients concerned, population or economic activity, congestion, whether there is access by land, and also the level of charges for use of the airport infrastructure and services. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract traffic and may significantly distort competition.

(39) However, on the basis of these guidelines, the Commission considers that the categories identified in section 1.2.1 can provide an indication of the extent to which airports are competing with one another and therefore also the extent to which public funding granted to an airport may distort competition.

Thus, public financing granted to national and Community airports (categories A and B) will normally be considered to distort or threaten to distort competition and to affect trade between Member States. Conversely, funding granted to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest.

(40) However, beyond these general indications, it is not possible to establish rules covering every possible case, particularly for airports in categories C and D.

For this reason any measure which may constitute State aid to an airport must be notified so that its impact on competition and trade between Member States can be examined, and, where appropriate, its compatibility.

(41) By way of exception, when airports in category D are entrusted with a mission of general economic interest, the Commission has decided to exempt the public service compensation constituting State aid granted to them from the prior notification obligation and declare them compatible, as long as they comply with certain conditions ⁽¹⁾.

3.2.4. *The principle of private investor in a market economy*

(42) Article 295 of the Treaty of Rome states that the Treaty in no way prejudices the rules in Member States governing the system of property ownership. Member States can accordingly own and manage undertakings, and can purchase shares or other interests in public or private undertakings.

(43) This principle means that the Commission's action cannot penalise or give more favourable treatment to public authorities which subscribe to the capital of certain companies. Similarly, it is not for the Commission to make any judgment on the choices made by undertakings between different types of financing.

(44) Consequently, these guidelines make no distinction between the different types of beneficiaries in terms of their legal structure or whether they belong to the public or private sector, and all references to airports or the companies which manage them include all types of legal entity.

(45) Moreover, these principles of non-discrimination and equality do not exempt public authorities or public companies from applying competition rules.

(46) In general, whether the public funding benefits airports or is granted directly or indirectly by the public authorities to airlines, the Commission will assess whether it constitutes aid by considering whether 'in

⁽¹⁾ Commission Decision of 13 July 2005 on the application of Article 86 of the Treaty to State aid granted in the form of public service compensation to certain undertakings entrusted with management of services in the general economic interest.

similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' ⁽¹⁾.

(47) The Court has ruled that 'the principle of equality, to which the Governments refer in connection with the relationship between public and private undertakings in general, presupposes that the two are in comparable situations. (...) private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions.' ⁽²⁾ Thus the concept of foreseeable profitability for the operator who effectively provides the funds as a market player is of central importance.

(48) The Court has also ruled that the conduct of a public investor must be compared with that of a private investor pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term ⁽³⁾. These considerations are particularly pertinent to investment in infrastructure.

(49) All State resources used by Member States or public authorities to benefit airport operators or airlines must therefore be assessed with regard to these principles. In cases where Member States or public authorities act as private economic operators would, these advantages will not constitute State aid.

(50) If, on the other hand, public resources are made available to a company under more favourable conditions (i.e., in economic terms, at a lower cost) than would be provided by a private economic operator to a company in a comparable financial situation and facing similar competition, that company is receiving assistance which constitutes State aid.

(51) In terms of start-up aid, it is possible that a public airport gives an airline financial advantages from its own resources generated by its business activity, which would not constitute State aid if it proves to be acting as a private investor, for example by providing a business plan setting out the profitability forecasts for its airport economic activity. Conversely, if a private airport gives funding which in fact is no more than a redistribution of public resources given to it for this purpose by a public body, these subsidies must be considered as State aid if the decision to redistribute public resources is taken by the public authorities.

(52) Applying the principle of the private investor, and therefore that there is no aid, presupposes the reliability of the whole economic model of the operator acting as an investor: an airport which does not finance its investments or does not pay the corresponding fees, or whose operating costs are partly covered by public funds, over and above a task undertaken in the general interest, cannot usually be considered as a private operator in a market economy, subject to a case-by-case assessment; it is therefore extremely difficult to apply this reasoning to such an operator.

4. FINANCING AIRPORTS

(53) Airport activities can be categorised as follows:

- (i) construction of airport infrastructure and equipment (runways, terminals, aprons, control tower) or facilities that directly support them (fire-fighting facilities, security or safety equipment);
- (ii) operation of the infrastructure, comprising the maintenance and management of airport infrastructure;
- (iii) provision of airport services ancillary to air transport, such as groundhandling services and the use of related infrastructure, fire-fighting services, emergency services, security services, etc; and
- (iv) pursuit of commercial activities not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks. As these are not transport activities, public financing of them is not covered by these guidelines and will be assessed on the basis of the relevant sectoral and general rules.

⁽¹⁾ Case 40/85 *Kingdom of Belgium v Commission* [1986] ECR I-2321.

⁽²⁾ Joined Cases 188/80 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1982] ECR 2571, point 21 of the Grounds.

⁽³⁾ Case C-305/89 *Italy v Commission (Alfa Romeo)* [1991] ECR I-1603, point 20. Case T-228/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435, points 250-270.

(54) These guidelines apply to all airport activities, with the exception of safety, air traffic control and any other activities for which a Member State is responsible as part of its official powers as a public authority ⁽¹⁾.

4.1. Financing of airport infrastructure

(55) This section concerns aid for the construction of airport infrastructure and equipment or facilities that directly support them as defined in paragraphs 53(i) and 54 above.

(56) Infrastructure is the basis for the economic activities carried out by the airport operator. However, it also represents one of the ways in which the State can affect regional economic development, land-use planning policy, transport policy, etc.

(57) Any airport operator engaging in an economic activity within the meaning of the Court judgment referred to in paragraph 30 should finance the costs of using or building the infrastructure it manages from its own resources. Consequently, the provision of airport infrastructure to an operator by a Member State (including regional or local authorities) not acting as a private investor without adequate financial consideration or the granting to an airport operator of public subsidies intended to finance infrastructure can give that airport operator an economic advantage over its competitors and must therefore be notified and examined in the light of the rules on State aid.

(58) The Commission has already had occasion to spell out the conditions under which operations such as the sale of land or buildings ⁽²⁾ or the privatisation of an undertaking ⁽³⁾ does not, in its opinion, involve the possibility of State aid. This is generally the case if these operations are made at market prices, in particular where the price is the outcome of a sufficiently well-publicised, open, unconditional and non-discriminatory bidding procedure which ensures that potential applicants are treated equally. Without prejudice to the obligations deriving from the rules and principles applicable to public procurement and concessions, when these are applicable, the same kind of reasoning applies in principle, *mutatis*

mutandis, to the sale or provision of infrastructure by public authorities.

(59) In any case, it is not possible to rule out the possibility that particular cases may contain elements of aid. For example, there might be aid if the infrastructure in question were allotted to a predetermined manager which gained undue advantage therefrom, or if an unjustifiable difference between the sale price and a recent construction price were to give the purchaser an undue advantage.

(60) In particular, when additional infrastructure, which was not planned when the existing infrastructure was allotted, is made available to the airport operator, the operator must pay rent at market values commensurate with the costs of the new infrastructure and the duration of its use. Moreover, if further development of the infrastructure was not provided for in the original contract, the additional infrastructure must be closely linked to use of the existing infrastructure and the subject of the manager's initial contract must stay the same.

(61) If it is not possible to rule out the possibility of State aid, the measure in question must be notified. If it is confirmed that the measure involves aid, such aid may be declared compatible, in particular pursuant to Articles 87 (3)(a), (b) or (c) or 86(2) and, where applicable, their implementing provisions. To that end, the Commission will in particular examine whether:

— construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),

— the infrastructure is necessary and proportional to the objective which has been set,

— the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure,

— all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,

— the development of trade is not affected to an extent contrary to the Community interest.

⁽¹⁾ See Commission Decision N 309/2002 — France: Air Safety — compensation for costs following the attacks of 11 September 2002.

⁽²⁾ Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10 July 1997, pp 3-5.

⁽³⁾ European Commission report on competition policy, 1993, paragraphs 402 and 403.

4.2. Aid for operation of airport infrastructure

(62) In principle, the Commission considers that an airport operator, like any other business, should meet the normal costs of running and maintaining the airport infrastructure from its own resources. Any public financing of these services would reduce the expenses normally borne by the airport operator in carrying out its current operations.

(63) Such funding does not constitute State aid if it is compensation for public services allocated for management of the airport in accordance with the conditions established by the Altmark judgment ⁽¹⁾. In other cases, operating subsidies are State operating aid. As stated in part 3.1 of these guidelines, such aid may be declared compatible only on the basis of Articles 87(3)(a) or (c), under certain conditions, in disadvantaged regions, or on the basis of Article 86(2) if it meets certain conditions which ensure that it is necessary for the operation of a service of general economic interest and does not affect trade to an extent contrary to the Community interest.

(64) As regards the application of Article 86(2), as stated in paragraph 40 of these guidelines, the Commission has decided to consider compensation for public services constituting State aid granted to category D airports to be compatible, subject to certain conditions. Any compensation for public services constituting State aid granted to larger airports (categories A, B or C) or failing to meet the criteria and conditions of this Decision should be notified and examined on a case-by-case basis.

(65) To that end, the Commission will verify that the airport really has been entrusted with the operation of a service of general interest and that the compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit.

(66) The award of public service missions to the airport must be recorded in one or more official documents, the form of which may be determined by each Member State. These documents should contain all the information needed to identify the specific costs of the public service, and must in particular specify:

- the precise nature of the public service obligation,

⁽¹⁾ See footnote 3, page 8.

- the operators and the territory in question,

- the nature of any special or exclusive rights granted to the airport,

- the arrangements for calculating, monitoring and reviewing compensation,

- the means of preventing and correcting any over or under-compensation.

(67) When calculating the amount of compensation, the costs and revenue to be taken into consideration must include all costs and revenue linked to performance of the service of general economic interest. If the airport operator in question has other special or exclusive rights associated with this service of general economic interest, the associated revenues must also be taken into account. Consequently, there must be a transparent accounting system and separation of the accounts for the operator's different activities ⁽²⁾.

4.3. Aid for airport services

(68) Groundhandling services are a commercial activity open to competition over a threshold of two million passengers annually pursuant to Directive 96/67/EC ⁽³⁾.

An airport operator acting as a provider of groundhandling services may charge different rates for the groundhandling charges invoiced to airlines if these different rates reflect cost differences linked to the nature or scale of the services provided ⁽⁴⁾.

(69) Up to the threshold of two million passengers, the airport operator acting as service provider may offset its various sources of revenue and losses between purely

⁽²⁾ Although not applicable to the transport sector, the Community framework for state aid in the form of public service compensation of 13 July 2005 can provide indications of how paragraphs 65 to 67 apply.

⁽³⁾ See footnote 3, page 1.

⁽⁴⁾ Paragraph 85 of the decision to initiate the proceeding concerning the case of Ryanair at Charleroi: 'With regard to groundhandling tariffs, the Commission believes that economies of scale could be applied when an airport user makes significant use of a company's assistance services. It comes as no great shock that the tariff applied to some companies will be lower than the general tariff, in so far as the service requested by these companies will be less than for other clients'.

commercial activities (such as its groundhandling activities or the management of a car park), with the exclusion of public resources granted to it as airport authority or operator of a service of general economic interest. However, in the absence of competition in the provision of groundhandling services, it must take particular care not to infringe national or Community provisions, and in particular not to abuse its dominant market position, thereby infringing Article 82 of the Treaty (which prohibits undertakings in a dominant position within the common market or in a substantial part of it from applying dissimilar conditions to equivalent transactions with different airlines, thereby placing them at a competitive disadvantage).

- (70) Above the threshold of two million passengers, groundhandling services must be self-financing and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest.

5. START-UP AID

5.1. Objectives

- (71) Small airports often do not have the passenger volumes necessary for them to reach critical mass and the break-even point.
- (72) There are no absolute figures with regard to the break-even point. The Committee of the Regions evaluates it at one and a half million passengers per year, while the University of Cranfield study mentioned above, which cites two different figures ((500 000 and one million passengers per year), shows that there are variations according to the country and the way in which the airports are organised ⁽¹⁾.
- (73) While certain regional airports can perform well when sufficient numbers of passengers are brought in by airlines carrying out public service obligations ⁽²⁾, or when social aid schemes are established by the public authorities, airlines prefer tried and tested hubs in good locations which provide rapid connections, have an established passenger base, and where they have slots

⁽¹⁾ Report 'Study on Competition between airports and the application of State Aid Rules', Cranfield University, September 2002, points 5.33 and 6.11.

⁽²⁾ Ibid. points 5-27: 'To some extent, subsidisation of air services within the PSO framework can be interpreted, as an indirect subsidy to an airport. In relation to some remote airports in Scotland and Ireland, they are almost exclusively reliant on subsidised PSO air services.'

which they do not wish to lose. Furthermore, in many cases, airport and air traffic policies and investment have for years concentrated traffic at major national cities.

- (74) As a result, airlines are not always prepared, without appropriate incentives, to run the risk of opening routes from unknown and untested airports. This is why the Commission can accept that public aid be paid temporarily to airlines under certain conditions, if this provides them with the necessary incentive to create new routes or new schedules from regional airports and to attract the passenger numbers which will enable them to break even within a limited period. The Commission will ensure that such aid does give any advantage to large airports already largely open to international traffic and competition.
- (75) However, in the light of the general objective of intermodality and optimising the use of infrastructure described above, it will not be acceptable to grant start-up aid for a new air route corresponding to a high-speed train link.
- (76) Finally, in accordance with the Commission's constant practice in this area, some special arrangements will be accepted for the outermost regions which are penalised by their poor accessibility.

The Commission has laid down guidelines for the harmonious development of such regions ⁽³⁾. Their development strategy is based on three main principles: helping to make them more accessible, increasing their competitiveness and bolstering their regional integration in order to reduce the impact of their remoteness from the European economy, as they are closer to the geographical markets of the Caribbean, America and Africa.

For these reasons the Commission accepts that start-up aid for routes from the outermost regions is subject to more flexible compatibility criteria, in particular in terms of intensity and duration, and will not raise any objection to such aid for services to neighbouring non-member countries. Similar provisions in terms of intensity and duration will also be accepted for the regions referred to in Article 87(3) and for sparsely populated regions.

⁽³⁾ Commission communications of 26 May 2004 (COM(2004) 343 final) and 6 August 2004 (SEC(2004) 1030) on a stronger partnership for the outermost regions.

5.2. Compatibility criteria

(77) Financial start-up incentives, except in cases where the public authorities act as would a private investor working in a market economy (see section 3.2.4), advantage beneficiary undertakings and can therefore directly create distortions between companies as they reduce the beneficiary's operating costs.

(78) They can also indirectly affect competition between airports by helping airports to develop or by encouraging a company to 'relocate' from one airport to another and transfer a route from a Community airport to a regional one. For these reasons they usually constitute State aid and must be notified to the Commission.

(79) In view of the above objectives and the significant difficulties which can result from launching a new route, the Commission may approve such aid if it fulfils the following conditions:

- (a) Recipients: the aid is paid to air carriers with a valid operating licence issued by a Member State pursuant to Council Regulation (EEC) No 2407/92 on licensing of air carriers.
- (b) Regional airports: the aid is paid for routes linking a regional airport in category C or D to another EU airport. Aid for routes between national airports (category B) can be considered only in duly substantiated exceptional cases, in particular where one of the airports is located in a disadvantaged region. These conditions may not apply to routes departing from airports located in outermost regions and bound for neighbouring third countries, subject to a case-by-case assessment.
- (c) New routes: aid will apply only to the opening of new routes or new schedules, as defined below, which will lead to an increase in the net volume of passengers ⁽¹⁾.

This aid must not encourage traffic simply to be transferred from one airline or company to another. In particular, it must not lead to a relocation of traffic which is unjustified with regard to the frequency and viability of existing services leaving from another airport in the same city, the same conurbation ⁽²⁾ or the same airport system ⁽³⁾, which serve the same or a similar destination under the same criteria.

Also, start-up aid must not be paid when the new air route is already being operated by a high-speed rail service under the same criteria.

The Commission will not accept cases of abuse in which a company seeks to circumvent the temporary nature of start-up aid by replacing a line receiving aid with a supposedly new line offering a similar service. In particular, aid will not be able to be granted to an airline which, having used up all the aid for a given route, applies for aid for a competing route departing from another airport in the same city or conurbation or the same airport system and serving the same or a similar destination. However, the mere substitution, during the aid period, of one route for another leaving from the same airport and expected to generate at least an equivalent number of passengers, will not call into question the continuation of payment of aid for the complete period, as long as this substitution does not affect the other criteria under which the aid was initially granted.

- (d) Long-term viability and degressiveness: the route receiving the aid must ultimately prove profitable, i. e. it must at least cover its costs, without public funding. For this reason start-up aid must be depressive and of limited duration.
- (e) Compensation for additional start-up costs: the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running. Examples of such costs are the marketing and advertising costs incurred at the outset for publicising the new link; they may include the installation costs incurred by the airline at the regional airport in question in order to launch the route, provided the airport falls within category C or D and aid has not already been received in respect of the same costs. Conversely, aid cannot be granted in relation to standard operating costs such as hire or depreciation of aircraft, fuel, crew salaries, airport

⁽¹⁾ This concerns in particular a seasonal route being made permanent or a non-daily frequency becoming at least daily.

⁽²⁾ Council Regulation (EEC) No 2408/92.

⁽³⁾ As defined under Article 2(m) of Regulation (EEC) No 2408/92.

charges or catering costs. The remaining eligible costs must correspond to real costs obtained in normal market conditions.

- (f) Intensity and duration: degressive aid may be granted for a maximum period of three years. The amount of aid in any one year may not exceed 50 % of total eligible costs for that year and total aid may not exceed an average of 30 % of eligible costs.

For routes from disadvantaged regions, i.e. the outermost regions, the regions referred to in Article 87(3)(a), and sparsely populated regions, degressive aid may be granted for a maximum period of five years. The amount of aid in any one year may not exceed 50 % of total eligible costs for that year and total aid may not exceed an average of 40 % of eligible costs. If the aid is granted for five years, it may be maintained at 50 % of total eligible costs for the initial three years.

In any event, the period during which start-up aid is granted to an airline must be substantially less than the period during which the airline undertakes to operate from the airport in question, as indicated in the business plan required in paragraph 79(i). Furthermore, the aid should be stopped once the objectives in terms of passengers have been reached or when the line breaks even, even if this is achieved before the end of the period initially foreseen.

- (g) Link with the development of the route: aid payments must be linked to the net development of the number of passengers transported. The amount per passenger must, for example, decrease with the net increase in traffic for the aid to remain an incentive and to avoid adjusting ceilings.

- (h) Non-discriminatory allocation: any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services. The notification must in particular include the description of the route as well as the objective criteria in terms of the amount and the duration of the aid. The rules and principles relating to public procurement and concessions must be respected where applicable.

- (i) Impact on other routes and business plan: when submitting its application, any airline which proposes a service to a public body offering to grant start-up aid must provide a business plan showing, over a substantial period, the viability of the route after the aid has expired. The public body should also carry out an analysis of the impact of the new route on competing routes prior to granting start-up aid.
- (j) Publicity: States must ensure that the list of routes receiving aid is published annually for each airport, in each instance indicating the source of public funding, the recipient company, the amount of aid paid and the number of passengers concerned.
- (k) Appeals: in addition to the appeal procedures provided for by the 'Public Procurement' Directives 89/665/EEC and 92/13/EEC ⁽¹⁾, where applicable, appeal procedures must be provided for at Member State level to ensure that there is no discrimination in the granting of aid.
- (l) Penalties: penalty mechanisms must be implemented in the event that a carrier fails to keep to the undertakings that it gave in relation to an airport when the aid was paid. A system for recovering aid or for seizing a guarantee initially deposited by the carrier will allow the airport to ensure that the airline honours its commitments.
- (80) Cumulation: start-up aid cannot be combined with other types of aid granted for the operation of a route, such as aid of a social nature granted to certain categories of passengers and compensation for discharging public services. In addition, such aid cannot be granted when access to a route has been reserved for a single carrier under Article 4 of Regulation (EEC) No 2408/92, and in particular paragraph 1(d) of that Article. Also, in accordance with the rules of proportionality, such aid cannot be combined with other aid granted to cover the same costs, including aid paid in another State.
- (81) Start-up aid must be notified to the Commission. The Commission calls on the Member States to notify start-up aid schemes rather than individual cases since this results in greater coherence across the Community. The Commission may carry out a case-by-case assessment of

⁽¹⁾ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33). Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

aid or a scheme which fails to fully comply with these criteria, but the end result of which would be comparable.

6. RECIPIENTS OF PREVIOUS UNLAWFUL AID

(82) When unlawful aid, on which the Commission has adopted a negative decision involving a recovery order, has been granted to a company and the aid has not been recovered in accordance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁾, the assessment of all airport infrastructure aid or start-up aid should take account of both the cumulative effect of the earlier and the new aid and the fact that the earlier aid has not been repaid ⁽²⁾.

7. APPROPRIATE MEASURES WITHIN THE MEANING OF ARTICLE 88(1)

(83) In accordance with Article 88(1) of the Treaty, the Commission proposes that Member States amend their existing schemes relating to State aid covered by these guidelines to conform to these guidelines by 1 June 2007 at the latest. Member States are asked to confirm in writing that they accept these proposals by 1 June 2006 at the latest.

(84) Should a Member State fail to confirm its acceptance in writing before that date, the Commission will apply Article 19(2) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings provided for in that Article.

8. DATE OF APPLICATION

(85) The Commission will apply these guidelines from the date of their publication in the *Official Journal of the European Union*. Notifications registered by the Commission prior to that date will be examined in the light of the rules in force at the time of notification.

The Commission will assess the compatibility of all aid to finance airport infrastructure, or start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty, on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*. In other cases, the Commission will carry out an assessment based on the rules applicable when the aid started to be paid.

(86) The Commission informs the Member States and interested parties that it intends to undertake a detailed assessment of the application of these guidelines four years after the date of their implementation. The results of that study may lead the Commission to revise these guidelines.

⁽¹⁾ OJ L 83, 27.3.1999, p. 1. Regulation amended by the 2003 Act of Accession.

⁽²⁾ Case C-355/95 P *Textilwerke Deggendorf v Commission* [1997] ECR I-2549.