

**COMMISSION DECISION (EU) 2017/1149****of 27 September 2016****on State aid SA.30931 (11/C) (ex N 185/10) implemented by Romania for Romanian regional airports***(notified under document C(2016) 6031)***(Only the Romanian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) By electronic notification dated 17 May 2010, Romania notified to the Commission, in accordance with Article 108(3) of the Treaty, an aid scheme providing for public support in favour of small <sup>(2)</sup> regional airports. The notification was registered under case number N 185/2010.
- (2) The Commission requested additional information on the notified measure on 23 June 2010, 7 October 2010, 3 December 2010 and 17 March 2011. The Romanian authorities provided the information requested on 22 July 2010, 27 October 2010, 20 January 2011 and 5 April 2011.
- (3) On 15 September 2010 the Romanian authorities informed the Commission on certain changes to the notified scheme, in particular as regards the number of beneficiaries.
- (4) By letter dated 24 May 2011, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the TFEU in respect of the notified aid and of other measures in favour of airports which were not part of the notification but were brought to the attention of the Commission by Romania in the preliminary assessment phase (hereinafter 'the opening decision') <sup>(3)</sup>. In particular, in the preliminary assessment phase the Commission was informed by the Romanian authorities that regional airports had been granted public financing in the period 2007-2009 to cover operating losses.
- (5) The Commission adopted a Corrigendum to the opening decision on 23 June 2011.
- (6) The opening decision was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission called on interested parties to submit their comments.
- (7) With letters dated 27 June 2011, 5 July 2011 and 19 August 2011, Romania submitted its comments on the opening decision.

<sup>(1)</sup> OJ C 207, 13.7.2011, p. 3.

<sup>(2)</sup> 'D-category' airports, namely, airports with traffic of less than 1 million passengers, as defined by the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).

<sup>(3)</sup> The formal investigation procedure concerns both the notified scheme for public funding to support the development of infrastructure at small regional airports, as well as the public financing to cover operating losses granted to certain airports.

<sup>(4)</sup> See footnote 1.

- (8) The Commission received comments from three interested parties, namely the air carrier Carpatair, Cluj-Napoca airport and the Romanian Association of Airports (hereinafter 'RAA').
- (9) By letter dated 16 September 2011, the Commission forwarded the comments of the interested parties to Romania.
- (10) By letter dated 25 July 2011, Romania withdrew its notification of the planned financing scheme of infrastructure investments at the Romanian small regional airports. Romania undertook to finance such airports in compliance with Commission Decision 2005/842/EC <sup>(5)</sup> (hereinafter 'the 2005 SGEI Decision' on the application of Article 86(2) of the EC Treaty (now Article 106(2) TFEU) (hereinafter 'the 2005 SGEI Decision'). Consequently, on 31 October 2011 the Commission closed its investigation in respect of that measure. The formal investigation procedure remained open as concerns the public funding granted to Romanian regional airports in the period 2007-2009.
- (11) The Commission guidelines on State aid to airports and airlines (hereinafter 'the 2014 Aviation Guidelines') were published in the *Official Journal of the European Union* on 4 April 2014 <sup>(6)</sup>. They replaced the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports (hereinafter 'the 2005 Aviation Guidelines').
- (12) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines in this case within one month of the publication date. The Commission received no reply to that invitation.

## 2. DETAILED DESCRIPTION OF THE MEASURE/AID

### 2.1. THE DISPUTED MEASURES

- (13) As already mentioned above, in the framework of the notification of infrastructure investments at small regional airports, Romania informed the Commission that most regional airports in Romania were loss-making, and that their operating losses were covered by public financing on a yearly basis.
- (14) Table 1 shows the list of the public financing made available to D category airports <sup>(7)</sup> in the period 2007-2009, as submitted by Romania.

Table 1

#### Public financing granted to 13 regional airports (thousand RON)

Airport	2007	2008	2009	Total
Arad	2 900	3 400	4 041	<b>10 341</b>
Bacău	3 730,99	1 765,52	394,14	<b>5 890,65</b>
Baia Mare	2 620	6 977	6 135	<b>15 732</b>
Cluj-Napoca	34 927	43 500	44 500	<b>122 927</b>
Craiova	6 505,33	8 377,08	25 099	<b>39 981,38</b>

<sup>(5)</sup> Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

<sup>(6)</sup> OJ C 99, 4.4.2014, p. 3.

<sup>(7)</sup> See footnote 2.

Airport	2007	2008	2009	Total
Iași	19 843,12	12 314,89	7 812,15	<b>39 970,16</b>
Oradea	3 160	6 021	5 450	<b>14 631</b>
Satu Mare	3 890	3 460	2 676	<b>10 026</b>
Sibiu	13 889	66 818	13 545	<b>94 252</b>
Suceava	5 812,43	5 464,52	4 614,07	<b>15 918,02</b>
Targu Mureș	4 083,30	18 175,60	15 573,65	<b>37 832,55</b>
Tulcea	11 651	16 921	2 069	<b>30 641</b>
Constanța	25 054,85	17 042,27	10 161,42	<b>52 258,54</b>
<b>TOTAL</b>	<b>138 067,02</b>	<b>210 236,88</b>	<b>142 070,43</b>	<b>490 401,3</b>

- (15) During the preliminary investigation phase Romania submitted that this financing would mostly amount to aid exempted from the notification requirement on the basis of the 2005 SGEI Decision. The only exception would be the public financing granted to Timișoara airport. That financing is being investigated by the Commission under case number SA.31662 <sup>(8)</sup>.
- (16) In particular, Romania claimed that the public financing granted annually to the regional airports represented compensation for the provision of a service of general economic interest (hereinafter 'SGEI'). In this sense, the measure would have cumulatively observed the conditions laid down by the 2005 SGEI Decision, namely:
- (a) the operation of the service of general economic interest was entrusted to the airport managers by Government Decision 398/1997/EC laying down, inter alia, the public service obligations (hereinafter 'PSOs'), the parameters for calculating the compensation and the arrangements for avoiding any overcompensation;
  - (b) the annual traffic at the airports did not exceed 1 000 000 passengers.
- (17) Government Decision 398/1997/EC refers to the transfer of ownership of the regional airports from the Ministry of Transport to the local counties councils and thereby changing their statute from 'regii autonome' with special characteristics of national interest to 'regii autonome' with special characteristics of local interest. The Decision includes, inter alia, provisions regarding their assets, budgets and personnel. The Decision lays down in its Annexes provisions regarding the organisational structure and the financing of the airports. The Annexes also list the activities of the airport managers (e.g. management of the airport infrastructure, organisation and provision of handling services, ensuring security of, inter alia, aircrafts, passengers, airport activities, development, maintenance and modernisation of runways, taxiways aprons, equipment, etc.) but they do not present these activities as PSOs imposed on the airport managers. The list of activities applies to all concerned airports across the board, i.e. there is no separate list for each airport. Romania claimed that these activities, namely the overall management of the airports in question, should be regarded as SGEI and the compatibility of the measure should be assessed under Article 106 of the Treaty.
- (18) Regarding the financing of the airports, Government Decision 398/1997/EC sets out that the operating and capital costs of the airports in question would be covered by own resources supplemented by public financing. The Romanian authorities contend that this mechanism prevents overcompensation insofar as the airports can only receive the amount necessary to cover all costs, thereby avoiding overcompensation.
- (19) In addition, the Romanian authorities pointed out that activities not directly linked to the core activities of the airports are not being subsidised, in accordance with points (34) and 53(iv) of the 2005 Aviation Guidelines.

<sup>(8)</sup> State aid — Romania — State aid SA.31662 (11/C) (ex CP 237/10) — Timișoara International Airport — Wizz Air — Invitation to submit comments pursuant to Article 108(2) (OJ C 270, 13.9.2011, p. 11).

- (20) One of the airports listed in Table 1, Constanța airport, is not subject to Government Decision 398/1997/EC. The Romanian authorities clarified that the public financing to this airport represents compensation for the discharge of PSOs pursuant to Government Decision 523/1998/EC. This Decision lays down that Societatea Națională 'Aeroportul Internațional Constanța' is a shareholding company owned by the State and that the old legal entity (Regia Autonomă Aeroportul Internațional Constanța — Mihail Kogălniceanu) is abolished. The Decision and its annexes include provisions regarding the assets, the organisational structure, the financing and list the activities to be undertaken by the airport manager (e.g. operating the airport infrastructure, organisation and provision of handling services, ensuring security of passengers, aircraft, etc., maintenance of runways, taxiways, aprons, etc.). These activities are not presented as PSOs imposed on the airport manager. Regarding the financing, the Government Decision 523/1998/EC sets out that depending on the type of assets and costs to be financed, costs would be financed by own resources and credits or by own resources supplemented by public financing or only by public financing <sup>(9)</sup>. The Romanian authorities also specified that this airport is a Romania-US military base, therefore its operational continuity is considered a strategic national security objective.

## 2.2. GRANTING AUTHORITIES

- (21) For the airport owned by the State (Constanța) the financing in question is granted from the State budget. For the remaining airports, whose ownership was transferred to local authorities by Government Decision 398/1997/EC, the public financing is granted by local authorities through local resources.

## 2.3. THE BENEFICIARIES

- (22) The beneficiaries are the operators of Romanian airports at Arad, Bacău, Baia Mare, Cluj-Napoca, Craiova, Iași, Oradea, Satu-Mare, Sibiu, Suceava, Târgu-Mureș, Tulcea and Constanța.
- (23) Table 2 shows the traffic at the airports concerned in the period under assessment 2007-2009 as well as in the recent years (2013-2015).

Table 2

### Traffic at the thirteen airports

Airport	2007	2008	2009	2013	2014	2015
Arad	67 183	128 835	88 147	40 855	28 405	8 623
Bacău	114 323	119 657	195 952	307 488	313 376	364 727
Baia Mare	15 334	22 468	24 983	16 568	21 560	19 228
Cluj Napoca	390 434	752 181	834 400	1 035 438	1 179 161	1 485 937
Craiova	5 113	13 021	13 977	40 291	138 886	116 947
Iași	126 334	145 933	148 538	231 933	273 047	381 603
Oradea	35 805	38 913	39 108	38 805	36 501	8 118

<sup>(9)</sup> Government Decision 523/1998/EC foresees that: (i) the capital expenses related to own assets would be financed from own resources, credits and other sources; (ii) the costs related to the creation of new public assets as well as the extension and modernisation of existing public assets would be covered by the State budget; (iii) financing of the airport investments approved by the Government until the date of the creation of the new legal entity would be ensured by own resources supplemented by public financing; (iv) payments obligations for investments related to private assets undue until the establishment of the new legal entity would be covered from own resources supplemented by public financing; (v) payment obligations related to the creation of new public assets or the modernisation of existing ones undue until the establishment of the new legal entity would be covered by the state budget.

Airport	2007	2008	2009	2013	2014	2015
Satu Mare	5 883	7 298	11 101	16 195	12 644	17 375
Sibiu	105 654	141 032	154 160	189 152	215 951	278 403
Suceava	20 909	23 591	32 590	20 054	219 <sup>(1)</sup>	2 359
Targu Mureş	157 531	70 349	84 120	356 699	343 521	335 993
Tulcea	1 029	4 032	854	1 894	1 311	394
Constanţa	48 705	67 227	73 664	70 090	154 320	71 165

<sup>(1)</sup> Airport was open only in January.

- (24) Out of the 13 airports, only five airports (Arad, Baia Mare, Satu Mare, Constanţa and Oradea) had another EU airport within 100 km or 60 minutes travelling time. Arad airport is at 50 km and 40 minutes travelling time from Timișoara Airport. Baia Mare and Satu Mare airports are situated 76 km and 1h10 minutes travelling time from each other. Constanţa Airport is situated 45 km and 30 minutes travelling time from Tuzla Airport. Oradea airport is situated at 80 km and approximately 1h30 minutes travelling time from Debrecen airport, which is located in Hungary.

Table 3

**Distance and travelling time to closest airports**

Airport	Closest neighbouring airport	Distance (km)	Travel time
Arad	Timișoara	50	0h40
Bacău	Iași	138	2h
Baia Mare	Satu Mare	76	1h10
Cluj Napoca	Târgu Mureș	104	1h27
Craiova	Sibiu	223	3h28
Iași	Bacău	128	2h
Satu Mare	Baia Mare	76	1h10
Sibiu	Târgu Mureș	124	1h46
Suceava	Iași	170	2h45
Targu Mureș	Cluj-Napoca	107	1h45
Tulcea	Constanța	111	1h30
Constanța	Tuzla	45	0h30
Oradea	Debrecen (Hungary)	80	1h30

- (25) As regards the airports for which another airport is located within less than 100 kilometres or 60 minutes travelling time, the Romanian authorities were asked to detail the specificities of the airports concerned, if any, which could justify the assumption that those airports are located in different catchment areas, as defined by the 2014 Aviation Guidelines <sup>(10)</sup>.
- (26) In reply to this request by the Commission Romania clarified the following <sup>(11)</sup>:

## ARAD-TIMIȘOARA

- (27) Arad airport is open to domestic and international passenger and freight traffic and operated a 1 800 × 45 m runway. The capacity of the airport amounts to 200 passengers/hour. The airport is endowed with good quality technical equipment. According to Romania, at the time of the submission of information, the local authorities approved financing for the extension and the modernisation of Arad airport given, inter alia, the local authorities strategic objective to convert the airport into an intermodal passenger and freight hub for the development of the region.
- (28) During the period 2007-2009, the airport was focused on low cost traffic. Blueair operated several European destinations (Verona, Valencia, Stuttgart, Barcelona, Treviso) and Ryanair served one destination (Milano) for the period April-June 2008.
- (29) The Romanian authorities have submitted to the Commission an analysis — prepared by the airport in 2008 — of the activity of that time and the passenger traffic for the period 2009-2020.
- (30) The analysis showed:
- growth in non-aeronautical revenues from RON 0,7 million in 2007 to RON 1,3 million in 2008,
  - growth in aeronautical revenues from RON 1,7 million in 2007 to RON 2,3 million in 2008,
  - growth in handling revenues from RON 0,2 million in 2007 to RON 1 million in 2008,
  - an increase in the public financing to the airport from RON 2,4 million in 2007 to RON 3,4 million in 2008.
- (31) According to the analysis, the airport largely relied on low cost traffic as major growth driver: in 2008 88 % of overall passenger traffic was represented by scheduled flights operated by Blue Air and 11 % by Ryanair traffic. The analysis assumed a diversification of airline connections by attracting a new low-cost airline, EasyJet.
- (32) The forecasts presented in the analysis foresaw Arad airport to increase its traffic from 128 834 passengers in 2008 to 1 064 116 passengers in 2020 in an optimistic scenario.
- (33) Regarding Timișoara airport, its passenger traffic increased from 859 329 passengers in 2007, 886 083 passengers in 2008 and 991 758 passengers in 2009. From 2007 to 2009, the airport was a regional hub for Carpatair, a regional full service carrier which operated some 32 domestic and European destinations. Other airlines such as Tarom, Lufthansa, Austrian Airlines, Malev, Alitalia, Moldavian Airlines, Alpi Eagles, SkyEurope Airlines, Wizzair served the airport.

## BAIA MARE-SATU MARE

- (34) The characteristics of the runway at Baia Mare airport allow the operation on a regular basis of aircraft with a maximum capacity of 75 passengers for short-haul flights.
- (35) The characteristics of the runway at Satu Mare airport allow the operation of aircrafts with a seating capacity of up to 180 passengers for medium-haul flights. The capacity of the airport amounts to 100 passengers/hour.

<sup>(10)</sup> Letter of the Commission of 19 February 2015.

<sup>(11)</sup> Romania's letters of 19 March 2015 and of 24 June 2016.

## CONSTANȚA-TUZLA

- (36) Tuzla airport operates a grass strip used by small aircraft (i.e. not exceeding a maximum take-off weight (MTOW) of 5 700 kg <sup>(12)</sup>) and has no radio navigation system. In the period 2007-2009, the number of aircraft movements of aircrafts of maximum MTOW of 5 700 kg from Constanța airport was significantly lower (5 to 16 times lower in the period under assessment) than at Tuzla airport. Tuzla airport mainly serves specialised flights while Constanța airport serves medium and large aircraft for commercial traffic.

## ORADEA-DEBRECEN

- (37) Debrecen Airport (Hungary) is at 80 km from Oradea airport, but the travelling time is of at least 1h30 since the trip includes passing of a border passport control from Romania which is not in the Schengen area to Hungary which belongs to the Schengen area. Debrecen airport had 42 900 passengers in 2007, 42 650 passengers in 2008 and 25 060 passengers in 2009. The two airports had different business models in 2007-2009 since Debrecen airport was focused on charter flights (with low cost traffic developing only in the last years), while Oradea airport was focused on domestic flights by regional and national full service carriers.

## 2.4. BUDGET

- (38) The total budget of the measure under assessment is 490 401,3 thousand RON, as detailed in Table 1.

## 2.5. OTHER PENDING INVESTIGATION PROCEDURES

- (39) On 31 July 2015, the Commission opened two formal investigation procedures concerning, inter alia, public funding measures in favour of Cluj-Napoca Airport granted over the period from 2010 to 2014 <sup>(13)</sup> and Târgu Mureș airport granted from 2011 to 2014 <sup>(14)</sup>, other than those covered by the investigation subject to this Decision.

## 3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (40) As explained in recital 4 above, in the opening decision, the Commission decided to initiate the formal investigation procedure in respect to the notified aid and public financing in the period 2007-2009 to cover operating losses. Subsequently, following the withdrawal by Romania of its notification of the planned financing scheme of infrastructure investments, the formal investigation procedure remained opened as concerns the public financing granted to Romanian regional airports in the period 2007-2009 (see recital 10 above).
- (41) In the opening decision, the Commission took the preliminary view that the conditions for the compensation for SGEIs not to constitute an advantage within the meaning of Article 107 of the Treaty were not cumulatively met in this case.
- (42) Indeed, according to the fourth condition of the Altmark judgement <sup>(15)</sup>, the compensation must be limited to the minimum necessary for an efficient undertaking in order for it to escape State aid qualification. This criterion is deemed to be fulfilled if the recipients of the compensation have been chosen following a tender procedure. Failing that, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means 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.

<sup>(12)</sup> By comparison an Embraer ERJ 135 ER has a seating capacity of 37 and a MTOW of 19 000 kg.

<sup>(13)</sup> Case SA. 32963 (2012/NN) (ex 2011/CP) *Romania — State aid to Wizz Air and Cluj-Napoca Airport* (OJ C 104, 18.3.2016, p. 77).

<sup>(14)</sup> Case SA. 33769 (2015/NN) (ex-2011/CP) — *Romania — Alleged aid to Târgu Mureș Transilvania Airport, Wizz Air, Ryanair and other airlines* (OJ C 104, 18.3.2016, p. 45).

<sup>(15)</sup> Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* C-280/00EU:C:2003:415, paragraph 93. See also the analysis in recitals 84-85 of the present decision.

- (43) The Commission took the preliminary view that this condition was not fulfilled since the operators of the beneficiary airports had not been chosen following a public tender procedure. Nor had Romania claimed that the compensation had been set on the basis of an analysis of the costs of a typical airport operator, well run and adequately provided with means to provide the public service.
- (44) Therefore the Commission considered that the measure provided the recipients with an economic advantage and came to the preliminary conclusion that the annual operating subsidies constituted State aid in the meaning of Article 107 of the Treaty.
- (45) The Commission also noted that Romania had not contested the aid qualification of the measure.
- (46) As concerns compatibility of the measure, the Commission had doubts that the criteria laid down by the 2005 SGEI Decision were complied with and therefore that the operating subsidies paid yearly to the airports were exempted from the notification requirement, as initially claimed by Romania.
- (47) In this sense, the Commission first noted that in order for the 2005 SGEI Decision to be applicable in specific cases, the services in question must qualify as genuine SGEIs and be clearly defined as such by the Member State.
- (48) The Commission took the view that in this case insufficient information had been provided by Romania to justify that the operation of the thirteen regional airports should be considered SGEI in the sense that the areas served by those airports would be insufficiently connected to the rest of the country if left to the market forces alone.
- (49) The Commission further considered that the airport services had not been clearly defined as SGEIs by the Member State. The Commission took the preliminary view that the apparent duplication of regional airports in Romania within the same catchment area could be a reason why those airports were loss making. To this end, the Commission noted that several of these airports had less than 50 000 passengers per year and were located within a linear distance of less than 100 km from each other.
- (50) Therefore the Commission took the view that the definition of the public service was not sufficiently clear and may contain manifest error insofar as the operation of the airports could have been defined as SGEI without an effective need to ensure a proper connection of the catchment area of each airport to the rest of the country.
- (51) The Commission also had doubts that the requirements of Article 4 of the 2005 SGEI Decision relating to the content of the entrustment act were met in full.
- (52) Finally, the Commission noted that although the Romanian authorities have confirmed that only core activities of the airports were being subsidized, it was not sufficiently clear whether in fact only the costs of eligible activities had been subsidized. No specific provision to restrict eligible costs to the core activities of the airports was included in the acts of entrustment.

#### 4. COMMENTS FROM ROMANIA

- (53) Romania's comments on the opening decision mainly referred to the doubts raised by the Commission on the State aid scheme for the financing of infrastructure for airports with annual traffic of less than 1 million passengers, whose notification has been withdrawn.
- (54) As regards the public funding to Romanian regional airports, in reply to the view of Commission according to which the apparent overabundance of airports in certain regions may hinder the development of the airports in question, Romania submitted that the situation of regional airports (with low traffic which does not allow them to reach a level of profitability) was primarily due to the state of development of the regions where those airports were located, rather than to the distance to neighbouring airports.
- (55) Regarding the public financing on the basis of the Government Decision 398/1997/EC, Romania clarified that amounts are not paid at the beginning of the year on the basis of forecasts of costs and any surplus is not returned to the State at the end of the financial year as stated in the opening decision, but that such financing is granted at the moment when the activities are undertaken based on justifications and within the limits of the approved budget.



## 5. COMMENTS FROM INTERESTED PARTIES

### 5.1. COMMENTS FROM CARPATAIR

- (56) Carpatair's comments partially refer to public financing to Timișoara airport and Wizz Air. As explained in recital 15, public financing of Timișoara airport and Wizz Air is subject to another formal investigation procedure <sup>(16)</sup>. In what follows the Commission will therefore only summarise Carpatair's comments with relevance to the present case.
- (57) Carpatair submits that operating aid is generally considered illegal and against EU interest, and should only be granted in exceptional circumstances. Granting operating aid to airports would in Carpatair's view be disruptive for the industry, for the following reasons:
- (a) it would create unfair competition between EU airports and allow an airport benefitting from State aid to attract air carriers by offering discounts on airport charges. Airports not benefitting from aid would be unable to compete for carriers effectively;
  - (b) the measure would urge airports that receive operating aid to grant high discounts to airport charges, and such discounts would not be granted if the airports acted on market terms.
- (58) Carpatair points out that operating aid has a negative effect on the air transport and airport services markets as it leads to unfair competition between airports and ultimately unfair competition between airlines operating from those airports. As such, operating aid causes unfair competition between airports in Romania and also affects negatively airports in neighbouring countries such as Hungary.

### 5.2. COMMENTS FROM RAA

- (59) RAA is a non-profit private law legal entity representing Romanian civil airports.
- (60) RAA comments on the opening decision focus on the aspects related to the State aid scheme for the financing of infrastructure. RAA essentially submits that the infrastructure of most regional airports in Romania requires updating and is well below that of airports of other EU Member States. According to RAA, public funding to upgrade airport infrastructure would be justified by the absence of feasible and reliable transport alternative in Romania (no motorways nor high speed trains).

### 5.3. COMMENTS FROM CLUJ-NAPOCA AIRPORT

- (61) According to Cluj-Napoca airport, the public funding granted to it by the local council served to subsidise only non-economic activities and hence fell outside the scope of Article 107(1) of the Treaty.
- (62) In particular, the amounts in question presumably aimed to cover costs of certain non-economic activities taking place inside airport premises (such as Border Patrol, Special Forces Brigade, Customs, Police, Special Aviation Unit), as well as costs of support infrastructure and equipment including maintenance, upgrade, management of the infrastructure, costs with the auxiliary services provided by the airport, fire prevention, emergency assistance, safety measures. According to Cluj-Napoca airport, those costs fall under State responsibility in the exercise of its official powers and therefore do not fall within the scope of the rules on State aid.
- (63) The airport further submitted that in the period 2007-2009 the airport recorded no operating losses.

## 6. ROMANIA'S COMMENTS ON INTERESTED PARTIES COMMENTS

- (64) By letter dated 17 October 2011 Romania submitted to the Commission its comments on the observations submitted by interested parties in the investigation.

<sup>(16)</sup> See footnote 8.

- (65) Although these comments exclusively referred to the notified State aid scheme for infrastructure investments, some of those comments are of relevance for the assessment of the operating subsidies under assessment in this Decision. Those comments are summarised in what follows.
- (66) Romania submits that most of the Romanian regional airports have an annual traffic of less than 50 000 passengers and none of these airports will exceed 300 000 passengers by 2015. On this basis, Romania considers that public support to those airports is unlikely to affect competition and distort trade between Member States.
- (67) Nor would the distance between those airports affect their development in any way, according to Romania. This is because even in those cases where the linear distance between the airports is less than 100 km, the travelling time is generally over 2 hours such that the airports in question exert no competitive pressure on each other.

## 7. ASSESSMENT OF THE AID

- (68) As explained in recital 10 above, following the withdrawal by Romania of its notification of the planned financing scheme of infrastructure investments, the formal investigation procedure remained open as concerns the public funding granted to Romanian regional airports in the period 2007-2009. The assessment set out below therefore concerns that measure.
- (69) In the light of the decisions to open a formal investigation for Cluj-Napoca Airport and Târgu Mureş airport adopted on 31 July 2015 (see point 39 above), the Commission considers appropriate to close the present investigation for all airports subject to it, except for Cluj-Napoca airport and Târgu Mureş airport. The Commission intends to close investigation SA.30931 with respect to those two airports together with the investigations opened on 31 July 2015. Consequently, the assessment set out below only applies to the measures granted to the 11 other airports.

### 7.1. EXISTENCE OF AID

- (70) Pursuant to Article 107(1) of the Treaty, 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 provision of certain goods, in so far as it affects trade between Member States, shall be incompatible with the internal market save as otherwise provided by the Treaty.
- (71) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures under scrutiny constitute State aid within the meaning of Article 107(1) of the Treaty, all the above mentioned conditions need to be fulfilled. Namely, the financial support:
- (a) is granted by the State or through State resources;
  - (b) favours certain undertakings or the production of certain goods;
  - (c) distorts or threatens to distort competition;
  - (d) affects trade between Member States.

#### 7.1.1. *Economic activity and concept of undertaking*

- (72) According to settled case law, the Commission must first establish whether the airport managers are undertakings within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed <sup>(17)</sup>. Any activity consisting in offering goods or services on a given market is an economic activity.
- (73) In *Leipzig/Halle Airport*, the General Court held that from the date of the judgment in *Aéroports de Paris* (12 December 2000), the application of State aid rules to the financing of airport infrastructure could no longer be excluded.

<sup>(17)</sup> Judgment of 23 April 1991, *Höfner and Elser/Macrotron* C-41/90 EU:C:1991:161, paragraph 21; Judgment of 17 February 1993, *Poucet and Pistre/AGF and Cancava* C-160/91 EU:C:1993:63, paragraph 17; Judgment of 18 June 1998, *Commission/Italy* C-35/96, EU:C:1998:303, paragraph 36.

- (74) The Commission therefore finds that at least as of from 12 December 2000, the airport manager has been engaged in an economic activity and that it constitutes an undertaking in the sense of Article 107(1) of the Treaty (see also point 29 of the 2014 Aviation Guidelines).

#### 7.1.2. *Public policy remit*

- (75) While airport managers must be considered to constitute undertakings in the sense of Article 107(1) of the Treaty at least as of 12 December 2000, it must be recalled that not all activities of an airport manager are necessarily of an economic nature (see also point 34 of the 2014 Aviation Guidelines) <sup>(18)</sup>.
- (76) The Court of Justice has held that activities that normally fall under the State's 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.
- (77) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid <sup>(19)</sup>. At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are generally considered to be of a non-economic nature (see also point 35 of the 2014 Aviation Guidelines) <sup>(20)</sup>.
- (78) However, public financing of non-economic activities must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case-law that an advantage is present when public authorities relieve undertakings of the costs inherent to their economic activities <sup>(21)</sup>. Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves non-economic (see also point 37 of the 2014 Aviation Guidelines).
- (79) At no time did Romania claim that the financing granted to any of the regional airports subject to this Decision covered costs which would qualify as public policy remit costs. Nor have any of the airport operators, apart from Cluj-Napoca Airport, claimed in the course of the investigation that it would be the case. As a matter of fact, the compensation mechanism is designed to cover the difference between the revenues and losses of the airports, without making a distinction between public policy remit costs and other types of costs. This question can be left open as regards Cluj-Napoca Airport and Târgu Mureş Airport, since this Decision does not close the pending investigation with respect to those airports. As to the other airports, the Commission concludes that the measures do not constitute compensation for public policy remit costs.

#### 7.1.3. *State resources and imputability*

- (80) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it. Thus, it also applies to all advantages granted by regional or local authorities of Member States, whatever their status and description <sup>(22)</sup>.
- (81) In this case the financing is granted directly by the State or the local authorities through their own resources. Therefore, the Commission confirms that all measures under assessment are granted through State resources and are imputable to the State.

<sup>(18)</sup> Judgment of 19 January 1994, SAT Fluggesellschaft/Eurocontrol C-364/92, EU:C:1994:7.

<sup>(19)</sup> Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001 (OJ C 148, 25.6.2003, p. 7).

<sup>(20)</sup> See, in particular, Judgment of 19 January 1994, SAT Fluggesellschaft/Eurocontrol C-364/92, EU:C:1994:7, paragraph 30 and Judgment of 26 March 2009, Selex Sistemi Integrati/Commission C-113/07 P, EU:C:2009:191, paragraph 71.

<sup>(21)</sup> See Judgment of 3 March 2005, Heiser C-172/03, EU:C:2005:130, paragraph 36, and case-law cited.

<sup>(22)</sup> Judgment of the Court of 14 October 1987, *Federal Republic of Germany v Commission of the European Communities*, C-248/84, EU:C:1987:437 and Judgment of the General Court of 12 May 2011, joined cases *Région Nord-Pas-de-Calais, T-267/08* EU:T:2011:209 and *Communauté d'agglomération du Douaisis v European Commission*, T-279/08, EU:T:2011:209, paragraph 108.

#### 7.1.4. *Selective economic advantage*

- (82) The public funding granted to the airport managers aimed at offsetting the losses incurred when carrying out their ordinary activity. Nothing in the factual evidence available to the Commission or in the comments received from Romania or third parties suggest that the granting authorities could expect any financial return as a result of those funding measures when they decided to grant them. Therefore, the measures at issue do not comply with the market economy operator principle.
- (83) In the course of the investigation Romania claimed that the disputed public financing would represent compensation for the provision of SGEIs.
- (84) In case of undertakings entrusted with the provision of an SGEI, in order to conclude whether or not the measures under assessment constitute an economic advantage within the meaning of Article 107(1) of the Treaty, the Commission must examine observance of the conditions set out by the Court in its judgement in the *Altmark* case <sup>(23)</sup>. Those conditions may be summarised as follows:
- (a) the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined (hereinafter ‘Altmark 1’);
  - (b) the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (hereinafter ‘Altmark 2’);
  - (c) 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 (hereinafter ‘Altmark 3’);
  - (d) 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 (hereinafter ‘Altmark 4’).
- (85) Those four conditions must be fulfilled cumulatively. Therefore, if one of them is not satisfied, it cannot be claimed that the measures at issue do not involve an economic advantage on the basis of the *Altmark* judgement.

##### 7.1.4.1. **Altmark 1**

- (86) The requirement of the first *Altmark* condition coincides with the requirement of clear entrustment and definition of the SGEI provided by Article 106(2) of the Treaty <sup>(24)</sup>.
- (87) Article 106(2) of the Treaty applies only to ‘undertakings entrusted with the operation’ of an SGEI. The Court of Justice has consistently underlined the need for an entrustment act <sup>(25)</sup>. Therefore, the need for a clear definition of the SGEI is inherent to and inseparable from the idea of entrustment and derives directly from Article 106(2) of the Treaty.

<sup>(23)</sup> Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

<sup>(24)</sup> Paragraph 47 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

<sup>(25)</sup> Judgment of the Court of 27 March 1974, *Belgische Radio en Televisie v SV SABAM and NV Fonior*, C-127/73, EU:C:1974:6 at paragraphs 19-20; Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, C-66/86, EU:C:1989:140 at paragraphs 55-57; Judgment of 2 March 1983, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission*, C-7/82, EU:C:1983:52; Judgment of the Court of 14 July 1981 *Gerhard Züchner v Bayerische Vereinsbank AG*, C-172/80, EU:C:1981:178.

- (88) In the 2001 Communication on services of general interest, the Commission already underlined the link between clear definition, entrustment and necessity and proportionality of the SGEI compensation under Article 106(2) of the Treaty <sup>(26)</sup>. Paragraph 22 of that Communication explained that ‘in every case, for the exception provided for by Article 106(2) of the Treaty to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority [...]. This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment’. Entrustment and definition are thus a logical prerequisite of any meaningful assessment of the proportionate level of any compensation. The Union Courts have consistently underlined the need for a clear definition of the PSOs for the application of both the *Altmark* exception and Article 106(2) of the Treaty <sup>(27)</sup>.
- (89) Also the 2011 Communication from the Commission on the application of the European Union State aid rules to compensation granted for provision of SGEIs <sup>(28)</sup> clarifies that the SGEI and the PSOs must be clearly defined in advance. According to paragraph 51 therein, for Article 106(2) of the Treaty to apply, the operation of an SGEI must be entrusted to one or more undertakings. The undertakings in question must therefore have been entrusted with a special task by the State. The first *Altmark* criterion requires that the undertaking has PSOs to discharge. Accordingly, in order to comply with the *Altmark* case-law, a public service entrustment is necessary that defines the obligations of the SGEI provider in question and those of the public authority entrusting the SGEI in question. According to paragraph 52 thereafter the public service task must be assigned by way of one or more acts that must at least specify the PSOs; the undertaking and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking by the authority in question.
- (90) In this case, Romania claimed that the public financing granted to the airports in question in the period 2007-2009 represented compensation for the provision of SGEIs. Romania claimed that Government Decision 398/1997/EC laid down in a clear and transparent manner the PSOs, the parameters for calculating the compensation and the arrangements for avoiding any overcompensation.
- (91) However, whilst Government Decision 398/1997/EC set out that operating and capital costs of the airports listed therein would be covered by own resources supplemented by public financing and listed the activities to be performed by the airport managers across all airports concerned (i.e. not for each airport individually), it did not impose clear PSOs on any of the airport managers.
- (92) As concerns Constanța airport, whilst the Government Decision 523/1998/EC set out which costs are either to be supplemented by public financing or be fully covered by public financing and listed the activities to be performed by the airport manager, it did not impose clear PSOs on any of the airport managers.
- (93) Romania’s claim that airport services would be essential for the economic development of the respective regions or aim to fulfil a strategic security objective does not suffice to consider that the beneficiaries were correctly entrusted with the SGEI to the extent that the PSOs.
- (94) Regarding the issue as to whether the airports in question qualify as genuine services of general economic interest, the Commission leaves this question open since an assessment in this respect is not necessary given that, as explained above, the PSOs are not clearly defined in an entrustment act. The Commission therefore does not need to take a position on this aspect.
- (95) Therefore, the measures at issue do not comply with *Altmark* 1.

<sup>(26)</sup> Commission Communication on Services of General Interest in Europe (the 2001 SGEI Communication) (OJ C 17, 19.1.2001, p. 4).

<sup>(27)</sup> Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87; Judgement of 7 November 2012, *CBI v Commission*, T-137/10, not yet reported, paragraphs 97 and 98.

<sup>(28)</sup> OJ C 8, 11.1.2012, p. 4.

**7.1.4.2. Altmark 4**

- (96) The fourth Altmark criterion provides that the compensation must be the minimum necessary in order for it not to qualify as aid. This criterion is fulfilled if the recipient of the compensation has been chosen following a tender procedure that would allow for the selection of the tenderer capable of providing the required SGEI at the least cost to the community or, failing that, if the compensation has been calculated by reference to the costs of an efficient undertaking.
- (97) In this case, the beneficiaries have not been chosen following a tender procedure. There is also no evidence showing that the level of compensation has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required 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 these obligations (not correctly defined — see recitals 86-95). The Commission therefore considers that the public financing in question cannot be found to have been determined on the basis of the costs of an efficient undertaking.
- (98) Consequently, the measures under investigation do not comply with Altmark 4.

**7.1.4.3. Conclusion — existence of a selective economic advantage**

- (99) As the Altmark 1 and 4 conditions are not complied with, the Commission finds that the four conditions set out by the Court of Justice in the Altmark case were not cumulatively met in the present case. Since the market economy operator principle is not complied with either as mentioned in recital 82 above, the measures under assessment conferred an economic advantage on the airport managers.
- (100) Furthermore, that economic advantage is selective as it is directed at certain undertakings belonging to a given economic sector, namely airports.

**7.1.5. Distortion of competition and effect on trade between Member States**

- (101) 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 the level of charges and overall commercial conditions for use of airport infrastructure and services (see point 43 of the 2014 Aviation Guidelines).
- (102) Moreover, airport operators are in competition for the management of airport infrastructure, including at local and regional airports. The public funding of an airport may therefore distort competition in the markets for airport infrastructure operation. Moreover, public funding to airports can distort competition and have an effect on trade in air transport markets across the Union. Finally, intermodal competition may also be affected by public funding to airports (see point 44 of the 2014 Aviation Guidelines).
- (103) Therefore, the measures under assessment distorted competition or at least threatened to distort competition and affected trade between Member States.

**7.1.6. Conclusion on existence of aid**

- (104) On the basis of the above, the Commission concludes that the measures under assessment constitute State aid to those airports within the meaning of Article 107(1) of the Treaty.

**7.2. TYPE OF AID: EXISTING OR NEW AID?**

- (105) The assessment made under Section 3.2.2 'Type of aid: existing or new aid' (paragraphs 93 to 95) of the opening decision as to whether the aid should be considered as existing or new aid under the provisions of Annex V to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania remains valid. Therefore, the measures do not qualify as existing aid.

7.3. *LAWFULNESS OF THE AID*

- (106) The measures under investigation were put into effect before formal approval by the Commission. Therefore, they constitute unlawful aid unless they fulfil the relevant conditions of a Union act providing for a block exemption from the notification obligation laid down in Article 108 of the TFEU for certain categories of aid. In this case, the only possible act that could have potentially provided such an exemption is the 2005 SGEI Decision.
- (107) In the course of the investigation Romania has argued that the aid to the thirteen airports in question would comply with the conditions laid down in the 2005 SGEI Decision, which was in force when the measures at issue were granted.
- (108) The 2005 SGEI Decision applied to airports:
- (a) for which the annual traffic does not exceed 1 000 000 passengers;
  - (b) to airports with an annual turnover before tax of less than 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation of less than EUR 30 million <sup>(29)</sup>.
- (109) The 2005 SGEI Decision only applied to aid under the form of public service compensation for genuine SGEI services. In order to benefit from this exemption, public service compensation for the operation of SGEI must also comply with the detailed conditions set out in Articles 4, 5 and 6 thereof <sup>(30)</sup>.
- (110) Article 4 of the 2005 SGEI Decision requires that the SGEI be entrusted to the undertaking concerned by way of one or more official acts, setting out, inter alia, the nature and duration of the PSOs, the parameters for calculating, controlling and reviewing the compensation, and the necessary arrangements for avoiding and repaying any overcompensation. Article 5 of the 2005 SGEI Decision laid down that the amount of compensation has to be limited to what is necessary to cover the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit. Finally, Article 6 of the 2005 SGEI Decision requires Member States to carry out regular controls to ensure that undertakings are not receiving compensation in excess of the amount determined in accordance with Article 5.
- (111) As indicated in Section 7.1.4.1, Romania has failed to demonstrate that the airport managers were entrusted with clearly defined PSOs through the alleged entrustment acts on which it relied, namely Government Decision 398/1997/EC and Government Decision 523/1998/EC. The requirements of Articles 4 are therefore not met.
- (112) Consequently, the aid to the eleven airport managers cannot be considered compatible with the internal market and exempted from the notification requirement on the basis of the 2005 SGEI Decision.
- (113) According to Article 10 of the Commission Decision 2012/21/EU <sup>(31)</sup> (hereinafter 'the 2011 SGEI Decision'), any aid put into effect before its entry into force that was not compatible with the internal market nor exempted from the notification requirement in accordance with the 2005 SGEI Decision can be declared compatible with the internal market and exempt from the requirement of prior notification if the aid fulfils the conditions laid down therein. For similar reasons to those set out in Section 7.1.4.1, the aid does not fulfil the conditions laid

<sup>(29)</sup> Article 2(1)(a) thereof.

<sup>(30)</sup> See Article 10 thereof for the date of entry into force of the 2005 SGEI Decision and notably the date of application of Article 4 (c), (d) and (e) and Article 6, thereof.

<sup>(31)</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

down in Articles 4, 5 and 6 of the 2011 SGEI Decision, which are largely similar to Articles 4, 5 and 6 in the 2005 SGEI Decision. Therefore, the aid cannot be considered compatible with the internal market and exempted from the notification requirement on the basis of the 2011 SGEI Decision.

- (114) The measures at hand thus constitute unlawful State aid.

#### 7.4. COMPATIBILITY OF THE AID

- (115) For the reasons explained above, the aid cannot be declared compatible with the internal market in accordance with the 2005 SGEI Decision and the 2011 SGEI Decision. Consequently, the Commission will assess the compatibility of the measures at issue on the basis of the criteria laid down respectively in the 2011 SGEI Framework and the 2014 Aviation Guidelines, which seem to be the only possible legal bases under which those measures might potentially be found compatible with the internal market.

##### 7.4.1. *Compatibility under the 2011 SGEI Framework*

- (116) Article 106(2) of the Treaty sets out that ‘undertakings entrusted with the operation of an SGEI or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, 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 EU interest.’
- (117) That Article provides for a derogation from the prohibition of State aid contained in Article 107 of the Treaty to the extent that the aid is necessary and proportional to ensure the performance of the SGEI under acceptable economic conditions. Under Article 106(3) of the Treaty it is for the Commission to ensure application of this Article, including, inter alia, by specifying under which conditions it considers the criteria of necessity and proportionality to be fulfilled.
- (118) Prior to 31 January 2012, the Community framework for State aid in the form of public service compensation (hereinafter ‘the 2005 SGEI Framework’) <sup>(32)</sup> and the 2005 SGEI Decision represented the Commission’s policy of applying the derogation of Article 106(2) of the Treaty.
- (119) On 31 January 2012 the new SGEI package, including the European Union framework for State aid in the form of public service compensation (2011) (hereinafter ‘the 2011 SGEI Framework’) <sup>(33)</sup> and ‘the 2011 SGEI Decision’ entered into force.
- (120) According to paragraph 69 of the 2011 SGEI Framework, ‘the Commission will apply the principles set out in this Communication to unlawful aid on which it takes a decision after 31 January 2012 even if the aid was granted before this date’.
- (121) Paragraph 16 of the 2011 SGEI Framework sets out the requirements for an SGEI to be considered validly entrusted. Notably paragraph 16(a) thereafter lays down that the entrustment act must spell out the content and duration of PSOs. Therefore, for the same reasons already mentioned in Sections 7.1.4.1 and 7.3 above, in this case the aid cannot be considered compatible under the 2011 SGEI Framework.
- (122) The Commission therefore considers that the aid measure in question cannot be declared compatible with the internal market pursuant to Article 106(2) of the Treaty.

<sup>(32)</sup> OJ C 297, 29.11.2005, p. 4.

<sup>(33)</sup> OJ C 8, 11.1.2012, p. 15.



#### 7.4.2. *Compatibility under the 2014 Aviation Guidelines*

- (123) The 2014 Aviation Guidelines apply to operating aid granted to airports before 4 April 2014 <sup>(34)</sup>. The compatibility conditions laid down in the 2014 Aviation Guidelines for operating aid to airports differ depending on whether the aid was granted before or after 4 April 2014, the date of entry into force of the guidelines <sup>(35)</sup>.
- (124) Operating aid granted before the entry into force of the 2014 Aviation Guidelines, that is before 4 April 2014, may be declared compatible provided that the following conditions are met:
- (a) *Contribution to a well-defined objective of common interest*: this condition is fulfilled, inter alia, if the aid increases the mobility of Union citizens and connectivity of the regions or facilitates regional development <sup>(36)</sup>;
  - (b) *Appropriateness of State aid as a policy instrument*: the Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid <sup>(37)</sup>;
  - (c) *Need for State intervention*: the aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver <sup>(38)</sup>;
  - (d) *Existence of incentive effect*: this condition is fulfilled if it is likely that, in the absence of operating aid, and taking into account the possible presence of investment aid and the level of traffic, the level of economic activity of the airport concerned would be significantly reduced <sup>(39)</sup>;
  - (e) *Proportionality of the aid amount (aid limited to the minimum necessary)*: in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place <sup>(40)</sup>;
  - (f) *Avoidance of undue negative effects on competition and trade* <sup>(41)</sup>.

##### 7.4.2.1. *Contribution to a well-defined objective of common interest*

- (125) The operating support measures granted to Romanian regional airports were aimed to allow the airports to have enough capital to continue operating viably. According to Romania, regional airports have an instrumental role to play in promoting accessibility to catchment areas and the financing at issue improve airport safety, security and efficiency, whilst contributing towards the achievement of wider regional development objectives. In addition, the most convenient mode of transport to/from those regions is air travel, apart from road/rail services, which however in Romania, given the poor condition of the infrastructure, involve considerably higher travelling times.
- (126) Nevertheless, the Commission notes that in view of the close proximity between some of the airports in the investigation, a possible duplication of airport infrastructure could militate against finding financing for those airports meets a clearly defined objective of common interest. Therefore the Commission must assess that the financing of those airports does not lead to the duplication of airport infrastructure within the same catchment area.
- (127) The 2014 Aviation Guidelines define the 'catchment area of an airport' as the geographic market boundary that is normally set at around 100 kilometres or around 60 minutes travelling time by car, bus, train or high-speed train. The definition of the catchment area of a given airport needs to take into account the specificities of each particular airport. The size and shape of the catchment area depends on various characteristics of the airport, including its business model, location and the destinations it serves.
- (128) As set out in recital 24 above, the only airports subject to the present assessment for which another airport is present within the catchment area of 100 km or 60 minutes travelling time by road, train or high-speed train, as set out in point 25 (12) of the 2014 Aviation guidelines are Arad, Baia Mare, Satu Mare, Constanța and Oradea.

<sup>(34)</sup> Point 172 of the 2014 Aviation Guidelines.

<sup>(35)</sup> Point 137 of the 2014 Aviation Guidelines.

<sup>(36)</sup> Points 137 and 113 of the 2014 Aviation Guidelines.

<sup>(37)</sup> Points 137 and 120 of the 2014 Aviation Guidelines.

<sup>(38)</sup> Points 137 and 116 of the 2014 Aviation Guidelines.

<sup>(39)</sup> Points 137 and 124 of the 2014 Aviation Guidelines.

<sup>(40)</sup> Points 137 and 125 of the 2014 Aviation Guidelines.

<sup>(41)</sup> Points 137 and 131 of the 2014 Aviation Guidelines.

For all the other airports, the Commission considers that the aid contributed to maintaining in operation infrastructure necessary to the mobility of citizens and accessibility of the regions where those airports are located, given in particular the poor quality of the road and rail infrastructure. Therefore, for those airports, the aid contributed to the furtherance of an objective of common interest for the Union. As to the remaining airports, the Commission notes the following.

*Arad airport*

- (129) Arad airport is located only 50 km from Timișoara, which amounts to a travelling time by road of 40 minutes.
- (130) Timișoara and Arad airports had different business models during the period 2007-2009. Timișoara was a well-established airport pursuing a business model that is significantly different from that of Arad airport. Timișoara airport offered mainly scheduled flights of regional and international full service carriers connecting Timișoara with a number of Romanian and European cities <sup>(42)</sup> whilst, as mentioned in recitals 28 and 31 above, the business model of Arad was based on low-cost traffic. The two airports continued to operate under different models from 2009 onwards with low-cost traffic drastically reduced and subsequently disappearing at Arad airport (the airport served only 8 632 passengers in 2015 and according to publicly available information, it had no commercial passenger traffic in 2016) and Timișoara airport gearing towards low cost traffic. The fact that the business models of the airports at Timișoara and Arad were different during the period under assessment and subsequently is an indication that the two airports are imperfect substitutes for one another.
- (131) According to point 85 of the Aviation Guidelines, the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. In this respect, the Commission notes that Timișoara was profitable during the period under assessment. In addition, Timișoara airport made investments in various terminals over 2007-2010 to expand its capacity and cater for increased air traffic (e.g. extension and modernisation of the international flights terminal in 2007, extension of the domestic departure terminal over 2008-2010). Timișoara airport therefore, already far bigger, had to invest to grow, so it is unlikely that absent the aid to Arad, Timișoara could have absorbed Arad's traffic without further investments. This is a further indication of the imperfect degree of substitutability between the two airports.
- (132) In the light of the arguments put forward in recitals 130 and 131 above, the Commission finds that while Arad airport is situated in the same catchment area as Timișoara airport, there is no duplication between the two airports.
- (133) On the basis of the above, the Commission can conclude that the aid to Arad airport contributed to the mobility of citizens and accessibility of the region where it is located and therefore served a well-defined objective of common interest.

*Baia Mare and Satu Mare airports*

- (134) As regards Baia Mare and Satu Mare airports, they are located 76 km from each other and both airports served mostly scheduled flights to Bucharest operated by the Romanian flag carrier, TAROM. Based on publicly available information, at Baia Mare airport, during the period 2007-2009, TAROM operated several weekly flights to Bucharest, while Austrian Airlines operated one destination (Vienna) during the period April 2008-February 2009 and Blueair served three European destinations for just a few months (October to December 2009). TAROM also operated several weekly flights from Satu Mare airport to Bucharest. However, given the poor condition of the road infrastructure in that area, the travelling time between the two airports is 1h10 minutes by road, which exceeds the 60 minutes travelling time criterion used to delineate the catchment area of an airport according to the 2014 Aviation Guidelines.
- (135) In addition, as mentioned in recitals 34 and 35 above there was a difference in the size of the aircrafts which could be regularly operated at the two airports given the difference in infrastructure.

<sup>(42)</sup> Low cost carrier Wizz Air Wizz Air started its operations from Timisoara airport only at the end of 2008.

- (136) Therefore, in the light of the arguments set in recitals 134 and 135 above, while the two airports are situated within 100 kilometres distance criterion used to delineate the catchment area of an airport according to the 2014 Aviation Guidelines, the Commission finds that there is no duplication between them.
- (137) Based on the above, the Commission concludes that the aid received by each of the two airports contributed to a well-defined objective of common interest by increasing mobility and accessibility in the areas where those airports are located.

*Constanța airport*

- (138) Constanța airport is situated at 45 km and 0h30 travelling time from Tuzla airport. In 2007-2009, Constanța offered scheduled flights to several European destinations and therefore had a different business model compared to Tuzla which did not offer any airport services for commercial aviation and focused on specialised flights (e.g. for agricultural purposes, for advertising purposes as well as leisure, training and emergency flights). Consequently, although Tuzla airport is situated in the same catchment area as Constanța airport, it cannot be considered an 'airport' within the meaning of point 25(6) of the 2014 Aviation Guidelines and therefore cannot be regarded as the duplication of the airport infrastructure at Constanța airport.
- (139) On this basis, the Commission concludes that the aid to Constanța airport contributed to a well-defined objective of common interest by increasing mobility and accessibility in the area where the airport is located.

*Oradea airport*

- (140) Oradea is 80 km away from Debrecen (Hungary), but traveling time is at least 1h30 (due to the need to pass a non-Schengen border).
- (141) In addition, over 2007-2009 the airports had a different business model with Oradea operating domestic flights by regional and national full service carriers and Debrecen airport focusing at that time on charter flights (with low cost traffic developing only in recent years). This is an indication that the two airports in the period under assessment have been imperfect substitutes for one another. Therefore, while the two airports are situated within 100 kilometres distance criterion used to delineate the catchment area of an airport according to the 2014 Aviation Guidelines, the Commission concludes that there is no duplication between them.
- (142) Based on the above, the Commission finds that the aid to Oradea airport contributed to a well-defined objective of common interest by increasing mobility and accessibility in the area where the airport is located.

**7.4.2.2. Need for State intervention, appropriateness of State aid as a policy instrument, existence of an incentive effect, proportionality of the aid amount**

- (143) As regards necessity of the aid, point 116 of the 2014 Aviation Guidelines requires that the operating aid brings about a material improvement that the market itself cannot deliver. According to point 120 of the 2014 Aviation Guidelines, Member States must demonstrate that the aid is appropriate to achieve the intended objective or resolve the problems intended to be addressed by the aid. This is the case if, absent the aid in question, the Romanian airports in question would likely have been forced to exit the market, depriving Romania's regions of a transport infrastructure which plays a significant role in its accessibility and development, or reduce their activity to a significant extent. According to the 2014 Aviation Guidelines, smaller airports may have difficulties in ensuring the financing of their operation without public funding. According to point 118 of the 2014 Aviation Guidelines, airports with annual passenger traffic below 200 000 passengers per annum may not be able to cover their operating costs to a large extent. In this sense, the Commission notes that traffic at the eleven airports subject to this assessment was below 200 000 passengers in the period 2007-2009.
- (144) According to point 124 of the 2014 Aviation Guidelines, operating aid has an incentive effect if it is likely that, in the absence of the operating aid, and taking into account the possible presence of investment aid and the level

of traffic, the level of economic activity of the airport concerned would be significantly reduced. In the present case, absent the aid the activity of the beneficiaries would have been significantly reduced if not terminated altogether due to uncovered losses. According to point 125 of the 2014 Aviation Guidelines, in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place. The measures under investigation were limited to the minimum necessary to offset losses and allow the airports to continue to operate viably.

- (145) Therefore, the Commission concludes that all operating aid was necessary and limited to the minimum necessary for the aided activity to take place.

#### 7.4.2.3. Avoidance of undue negative effects on competition and trade

- (146) As set out in recital 24 above, the only airports subject to the present assessment for which another airport is present within 100 km or 60 minutes travelling time by road, train or high-speed train are Arad, Baia Mare, Satu Mare, Constanța and Oradea. As explained in recital 128 above, for all the other airports, the Commission considers that the aid contributed to maintaining in operation infrastructure necessary to the mobility of citizens and accessibility of the regions where those airports are located, given in particular the poor quality of the road and rail infrastructure. Therefore, for those airports, the aid contributed to the furtherance of an objective of common interest for the Union and did not give rise to undue distortions of competition. As to the remaining airports, the Commission notes the following.

##### *Arad airport*

- (147) The Commission notes that in the period under assessment, Arad airport had very limited traffic, both in absolute terms and compared with Timișoara airport (situated at 50 km and 40 minutes travelling time). The number of passengers per year at Arad airport varied between 67 183 and 128 835 in the period under assessment, whereas traffic at Timișoara airport varied between 859 329 to 991 758 passengers per year. Traffic at Arad airport represented only 7,8 % of the traffic at Timișoara airport in 2007, 14,5 % in 2008 and 8,8 % in 2009. The competitive impact of the aid received by Arad airport on Timișoara airport has been very limited in view of the difference in traffic level between the two airports <sup>(43)</sup>. More generally, the overall competitive effects of the aid have been necessarily modest in view of the small traffic at the airport. In addition, the traffic evolution at the two airports does not seem correlated. Traffic at Arad airport increased from 67 183 passengers in 2007 to 128 835 in 2008 and decreased to some 88 147 passengers in 2009 while Timișoara airport increased steadily its traffic (from 859 329 passengers in 2007 to 886 083 passengers in 2008 and 991 758 passengers in 2009) <sup>(44)</sup>. This absence of correlation suggests that the two airports served different needs and market segments and were not simply duplicating each other.
- (148) Furthermore, given that Timișoara airport was profitable between 2007 and 2009 and made investment to increase its capacity, it is unlikely that the effect of the aid to Arad airport have had a material impact on the operations of Timișoara airport.
- (149) In view of the above, the Commission considers that the distortions of competition brought about by the aid were limited and did not outweigh the contribution of the aid to mobility and accessibility.

<sup>(43)</sup> In case SA 33961 (2012/C) (ex 2012/NN) implemented by France in favour of Nîmes-Uzès-Le Vigan Chamber of Commerce and Industry, Veolia Transport Aéroport de Nîmes, Ryanair Limited and Airport Marketing Services Limited (OJ L 113, 27.4.2016, p. 32), the Commission found that the competitive impact of the aid to Nîmes airport on the nearby Montpellier airport was also, inter alia, found limited due to the difference in traffic between the two airports as the traffic at Nîmes was six times lower than the one of Montpellier.

<sup>(44)</sup> The non-correlation of the traffic evolution of the neighbouring airports was also one criteria used in case SA.22614 (C 53/07) implemented by France in favour of the Chamber of Commerce and Industry of Pau-Béarn, Ryanair, Airport Marketing Services and Transavia (OJ L 201, 30.7.2015, p. 109), for arguing compatibility of the aid to Pau airport.

*Baia Mare and Satu Mare airports*

- (150) Given the extremely low level of traffic of the two airports in the period under assessment (from 15 334 passengers in 2007 to 24 983 passengers in 2009 for Baia Mare and from 5 883 passengers to 11 101 passengers in 2009 for Satu Mare) and the difference in size of the type of aircrafts operated as indicated in recitals 34 and 35 above, the Commission concludes that the distortions of competitions caused by the aid were very limited and did not outweigh the positive contribution of the aid to mobility and accessibility.

*Constanța airport*

- (151) As explained in recital 138 above, Constanța which operated commercial traffic had a different business model than the nearby Tuzla airport, which did not offer any airport services for commercial aviation. Tuzla airport is not even an 'airport' within the meaning of point 25(6) of the 2014 Aviation Guidelines. Moreover, Constanța had a very low traffic in the period under assessment, which limits the distortions of competition brought about by the aid that it received. Therefore the Commission finds that the contribution of the aid received by Constanța airport in 2007-2009 to mobility and accessibility outweighed any distortion of competition brought about by that aid.

*Oradea airport*

- (152) As explained in recitals 37 and 140 above, Oradea is 80 km away from Debrecen (Hungary), but traveling time is at least 1h30 (due to the need to pass a non-Schengen border). In addition, over 2007-2009 Oradea had very low traffic (less than 40 000 passengers) and had a different business model compared to Debrecen airport (see recital 141).
- (153) On this basis, the Commission considers that contribution of aid received by Oradea airport to mobility and accessibility outweighed any distortion of competition brought about by that aid.

**7.4.3. Conclusion on the compatibility of the aid**

- (154) On the basis of the above assessment, the Commission concludes that the aid granted in 2007-2009 to Romanian airports at Arad, Bacău, Baia Mare, Craiova, Iași, Oradea, Satu-Mare, Sibiu, Suceava, Tulcea and Constanța in the period 2007-2009 is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty.
- (155) This assessment is entirely without prejudice to any potential future assessment by the Commission of any potential aid granted to those airports after 4 April 2014, since any such aid would have to be assessed against criteria that differ from those applicable to the measures at hand <sup>(45)</sup>.

**8. CONCLUSION**

- (156) The funding granted by Romanian public authorities between 2007-2009 to airports located in Arad, Bacău, Baia Mare, Craiova, Iași, Oradea, Satu-Mare, Sibiu, Suceava, Tulcea and Constanța constitutes unlawful State aid which is compatible with the internal market pursuant to Article 107(3)(c) TFEU.
- (157) For the reasons explained in recital 69, the investigation for the public funding granted to Cluj-Napoca airport and Târgu Mureș airport between 2007-2009 remains open,

HAS ADOPTED THIS DECISION:

*Article 1*

1. The public funding which Romania has provided in the period 2007-2009 for Romanian airports at Arad, Bacău, Baia Mare, Craiova, Iași, Oradea, Satu Mare, Sibiu, Suceava, Tulcea and Constanța, amounting to 490 401,3 thousand RON, constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, implemented in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

<sup>(45)</sup> In particular for aid granted after April 2014 point 115 of the 2014 Aviation Guidelines foresee that there is a need to prove the capacity of an unprofitable airport to achieve full operating cost coverage at the end of the transitional period (see paragraphs 128 to 130 of the 2014 Aviation Guidelines) and point 132 of the Aviation Guidelines sets out the need for Member States to prove that all airports in the catchment area will be able to achieve full operating cost coverage at the end of the transitional period.

2. The State aid referred to in paragraph 1 is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

*Article 2*

This Decision is addressed to Romania.

Done at Brussels, 27 September 2016.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

---