

A New Sound Approach to EC State Aid Control of Airport Infrastructure Funding

What Can We Learn from the Draft Broadband Guidelines?

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I. Introduction: The Problem before Us

State Aid in the aviation sector may serve several purposes and can be granted in various ways.¹

According to the Commission Communication OJ 2005/C 312/01 on Community Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports (the "2005 Guidelines"), State aid in the airline industry can adopt the following basic forms: aid for airport infrastructure funding, start-up aid and operating aid. However, the 2005 Guidelines state that they "...do not cover all the new aspects relating to the financing of airports and start-up aid for new routes..." and that they "...add to, rather than replace, those from 1994 by specifying how the competition rules must be applied to the various means of financing airports (...) and start-up aid for airlines leaving from regional airports..."²

This statement has opened a passionate debate about the real role of the 2005 Guidelines as interpreted in light of the Commission's practice. Specifically, issues have been raised concerning

their legal basis as well as their potential incompatibility with the general legislative framework on State aid for infrastructure funding, with special regard to the Commission Communication OJ 1994/C 350/07 on 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 (the "1994 Guidelines") as well as to the more economics-based balancing test proposed by the State aid action plan "Less and better targeted State aid: a roadmap for State aid reform 2005-2009" SEC(2005), 795 COM/2005/0107 final (the "State Aid Action Plan").

Indeed, while some scholars³ suggest that the 2005 Guidelines replace in practice the older ones, others⁴ believe that the two sets of rules hardly coincide.

This paper aims at contributing to the aforesaid debate by proposing a set of criteria for a sound co-existence of all legal instruments in force, with particular regard to the Commission's newest criteria as included in the Community Guidelines for the Application of State aid rules in relation to rapid deployment of broadband network (the "Draft Broadband Guidelines").⁵ Structurally, the above mentioned objective is to be reached as follows:

- (i) Summary presentation of the logic of the Community legal framework on the presence and compatibility of State aid to *general* infrastructure funding.
- (ii) Development of a systematic approach to a compatible and consistent legal framework on the presence and compatibility assessments of State aid to *airport* infrastructure funding. Methodologically, such approach will be based on the analysis of the ongoing debate on the role of the 2005 Guidelines within the EC State aid control system and with especial regard to the 1994 Guidelines, the secondary law concerning services of general economic interests ("SGEI") and the Draft Broadband Guidelines.

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1 Ulrich Soltész, "The new Commission Guidelines on State Aid for Airports – A step too far...", *European State Aid Law Quarterly* 4, 2006, pp. 719 ff.

2 2005 Guidelines paras. 18-19.

3 Ulrich Soltész, *Op. Cit.*, p. 721.

4 Antigoni Lykotrafiti: "Low Cost Carriers and State Aids: A Paradox? Reflections on the Ryanair/Charleroi Case" in *European State Aid Law Quarterly* 2, 2008, pp. 226 ff.

5 According to Commission unofficial sources, the Draft Broadband Guidelines represent a crucial development in the Commission's general approach to State aid control of infrastructure funding.

- (iii) Development of concrete interpretative criteria of the scope and meaning of the 2005 Guidelines that are in line with all other relevant legal instruments in force.
- (iv) Conclusions: Proposal for a consistent and compatible system based on the aforementioned approach.

II. The Logic of Infrastructure Funding under EC State Aid Law

1. Presence of State Aid to Infrastructure Funding

The financing of infrastructure by the State can fall within the category of a SGEI and fulfill the criteria set by the European Court of Justice ("ECJ") in case C-280/00 *Altmark Trans GmbH und Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH* (the "Altmark criteria") or conform to market conditions according to the market economy test ("MET"). For the sake of argument, we shall now focus on the hypothesis where none of these statements holds. Even then, State infrastructure funding has often been held by scholars, the Commission and the Community Courts to be a general measure of economic policy, i.e. a non specific measure within the meaning of Art. 87 (1) EC. The fulfillment of the non-selectivity requirement has to be tested on all relevant market levels, i.e. the end-users level, the level of operators and owners and that of the shareholders of the operator and/or user.⁶

At the end-users level State aid can be ruled out by the granting of open access to all potential users on a non-discriminatory basis. However, if the potential users are limited to one or few specific undertakings, State aid might be involved.⁷ If the infrastructure is 100% owned and operated by the State the problem ends here: no State aid exists where the open access requirement is fulfilled. On the contrary, where private capital is involved, the two following levels have to be analyzed as well.

At the owners and operators level, "[w]hile the use of a tender ensures that any aid is limited to the minimum amount necessary for the particular project, the financial support enables the successful bidder to conduct a commercial activity on conditions which would not otherwise be available on the market," as stated in the Broadband Guidelines Para. 14.

In other words, where the infrastructure involves upstream and downstream markets, the tendering procedure might prevent the existence of any advantage for managers but simultaneously create a residual advantage for certain commercial users, so that the elimination of upstream aid may result in downstream distortions.⁸ In this event, State aid can only be ruled out if all beneficial downstream effects have been priced-in upstream, thereby avoiding State aid in the form of a residual advantage.⁹ This form of advantage could also be present in horizontal neighboring markets, as open and non-discriminatory access is a vertical relationship. Therefore, State aid is only excluded at the end-users level if no particular user or group of users is specifically benefited in any of the relevant markets.

Further, State aid can be excluded from the level of the shareholders of the owners and operators whenever these enjoy

6 Cf. Commission Decision of 25.11.1998 on measures by Germany to assist *InfraLeuna Infrastruktur und Service GmbH*, OJ 1999/L 260/1.

7 Cf. Commission Decision of 16.6.2004 concerning aid for the construction of a propylene pipeline between Rotterdam, Antwerp and the Ruhr area notified by Germany, the Netherlands and Belgium, OJ 2003/C 315/7 and 2005/L 056/15. See also Commission Decision of 26.6.2003 on Aid for the construction of an aviation fuel pipeline to Athens International Airport, OJ 2003/C 148/11.

8 Phedon Nicolaidis and Maria Kleis: "Where is the Advantage? The Case of Public Funding of Infrastructure and Broadband Networks" in *European State Aid Law Quarterly* 4, 2007, pp. 615 ff.

9 Cf. i.a. Commission Decisions of 20. 7.2004 on Project Atlas, OJ 2005/C 131/10; of 16.11.2004 on Project de Réseau de Télécommunication haut débit des Pyrénées-Atlantiques", OJ 2005/C 162/5; of 3.5.2005 on Infrastructure haut débit sur le Territoire de la Région Limousin, OJ 2005/C 230/6 and of 8.3.2006 on Metropolitan Area Networks, OJ 2006/C 207/3.

According to a prior interpretation i.a. of Commission Decisions of 20.12.2001 on Freight Facilities Grant, OJ 2002/C 45/2 and of 2.10.2002 on London Underground PPP, OJ 2002/C 309/14, State aid could normally be ruled out by an open and non-discriminatory procedure – e.g. tendering – that ensures a normal market return on their investment or on their activities. Where no tendering is possible due to property rights held by the investor on the construction site, the Commission has accepted the low-profit principle as a valid alternative to exclude aid. However, this principle neglects the fact that there is not only competition on but also for the market, and cannot prevent distorting effects – e.g. hidden gains – on the upstream level. Therefore, the application of the Altmark criteria to these situations (i.e. beyond SGEI) should be preferred. Cf. Christian Koenig and Michael Scholz: "Öffentliche Infrastrukturförderung durch Bau- und Betriebsgesellschaften im EG-beihilfenrechtlichen Kontrollraster der EG-Kommission" in *EuZW* 2003, pp. 133 ff.

- (i) no preferential terms of use – e.g. because of strict control of the planning process – and
- (ii) no privilege regarding dividend payments – e.g. due to a temporary ban of sale of assets and shares.¹⁰

2. Compatibility of State Aid to Infrastructure Funding

Once the presence of State aid infrastructure financing has been established under Art. 87 (1) EC, it must be deemed compatible with the Common Market if it fulfills the requirements of Art. 87 (2) and can be deemed compatible in accordance with Arts. 87 (3) or 86 (2) as developed by the relevant secondary law.

In this regard, the 2005 State Aid Action Plan introduced a more economic three stage balancing test, concretized by the 2005 Guidelines and included also in the Draft Broadband Guidelines Para 28 and 29. Indeed, “[i]n assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, i.e. distortions of trade and competition. In applying this balancing test, the Commission will assess the following questions:

- (i) Is the aid measure aimed at a well-defined objective of common interest, i.e. does the proposed aid address a market failure or other objective?
- (ii) Is the aid well designed to deliver the objective of common interest? In particular:
 - Is State aid an appropriate policy instrument, i.e. are there other, better placed instruments?
 - Is there an incentive effect, i.e. does the aid change the behavior of the undertakings?
 - Is the aid measure proportional, i.e. could the same change in behavior be obtained with less aid?

- (iii) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?”

The concrete steps of the balancing test in the airline sector as established in the 2005 Guidelines and the issue of its relation to the 1994 Guidelines are set out in further detail below.

III. Current Issues on Airport Infrastructure Funding under EC State Aid Law

According to their text, the 2005 Guidelines intend to “...add to, rather than replace...”¹¹ the preexisting ones. This created serious controversy as to their role within the system of State aid control of infrastructure funding, with special regard to the 1994 Guidelines.

1. The Substitution Approach

1.1. Main Arguments

The substitution approach has been clearly explained by *Soltész*.¹² In his view, although the Commission did not intend a complete departure from its older practice, it has made such departure by

- (i) generalizing in Para. 54 the scope of application of the 2005 Guidelines “...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;”
- (ii) categorizing with “no indications in the primary law” the aforesaid “airport activities” as “economic activities”, therefore considering “...financial aid for the construction or enlargement of regional airports as being State aid subject to the notification obligation.”¹³

The author quotes in this regard Para. 30 and 57 of the 2005 Guidelines and thereon concludes that “State subsidies that serve to finance airports are now generally subject to State aid legislation. Such subsidies have to be notified to the Commission and are assessed on the basis of Art. 87 EC. The operation or construction and enlargement of airport infrastructure is qualified as economic activity

10 Christian Koenig and Michael Scholz, *Op. Cit.*, pp. 133 ff.

11 2005 Guidelines para. 19.

12 Ulrich Soltész, *Op. Cit.*, pp. 722-723.

13 Ulrich Soltész, *Op. Cit.*, pp. 722.

within the meaning of State aid law. Only the subsidization of smaller regional airports that are entrusted with a general economic task can be exempted from the notification obligation subject to the strict prerequisites of the Commission's Decision on the application of Art. 86 (2) EC to settlement payments. Accordingly, the new Guidelines bring about a clear tightening of the rules."¹⁴

1.2. Critical Assessment

First, there seems to be confusion regarding the scope of application of the 2005 Guidelines, i.e. on the differentiation between the assessment of the presence or exclusion of aid and that of the compatibility or incompatibility of existing aid.

According to Para. 29, the 2005 Guidelines only set the principles on which basis the Commission will carry out the compatibility assessment of State aid to the airline industry on the basis of Art. 87 (3) (c) EC. Therefore, the 2005 Guidelines apply to all airport activities *if and only if* they

- (i) are of economic nature;
- (ii) present elements of State aid; *and*
- (iii) have not yet been deemed compatible with the Common Market on an alternative legal basis.

Regarding the characterization as "economic activities" within the meaning of State aid law, the 2005 Guidelines do not create an absolute presumption but rather a relative one based on the fact that they often are. Indeed, the legal statement of Para. 30 quoted by the author is limited to an if-then clause, according to which "...*once* an 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..."¹⁵ From this follows that "...*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..."¹⁶

Here is where presumptions become useful. And these are not mere Commission criteria but the interpretation of primary law by the ECJ in Cases C-343/95 *Calì & Figli v. Servizi ecologici porto di Genova* [1997] ECR I-1547, *Aéroports de Paris v. Commission of the European Communities* [2000] ECR I-9297, confirming Case T-128/98 [2000] ECR II-3929. These cases establish, respectively, the following presumptions:

- (i) "...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..."; and
- (ii) "...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."¹⁷

The first presumption is absolute (i.e. non-rebuttable), but must be complemented in its application with other EC provisions. Indeed, the potential creation of competitive advantages by the performance of activities that would normally fall under the State's responsibility can be controlled under EC merger control. For example, in Case No. COMP/M.2315, regarding the Airline Group/NATS, the Commission's Notification of 5 April 2001 pursuant to Article 4 of Council Regulation No 4064/89 contemplates in Para. 34-36 potential vertical effects that would benefit the airlines who would – along with the State – become shareholders of the undertaking NATS because of its air traffic control activities.

The second presumption is, on the contrary, only relative (i.e. rebuttable). Moreover, its scope of application is limited to airport operation and management. Therefore, *it does not apply to the funding of airport infrastructure in se but only insofar as it benefits certain undertakings within the meaning of the State aid rules*. This is perfectly compatible with the general State aid rules on infrastructure funding: if the development measure is not general but specific, either upstream or downstream, State aid elements might be present.

14 Ulrich Soltész, *Op. Cit.*, pp. 727.

15 2005 Guidelines para. 30. Emphasis added.

16 2005 Guidelines para. 32. Emphasis added.

17 2005 Guidelines paras. 31 and 33. Emphasis added.

2. The Limited Overlap Approach

2.1. Main Arguments

*Lykotrafiti*¹⁸ points out that, while the first stages of State aid control in the airline sector aimed at creating a level playing field by conditioning national flag carriers, its later development is mostly concerned with the preservation and/or restoration of the level playing field previously established. This shift of perspective was heralded by the Ryanair/Charleroi decision (the "Ryanair Decision")¹⁹ and formally expressed in the 2005 Guidelines. No more and no less than this change in the Commission's approach is reflected in the different meaning of the 1994 and 2005 Guidelines: Whereas the former dealt mostly with the smooth adaptation of national airlines to the newly liberalized sector markets, the newer rules introduce criteria to handle the change of scenery regarding various agreements between low cost carriers and public regional airports. Such criteria are reflected in the provisions on

- (i) start-up aid, a new concept which constitutes an exception to the prohibition of operating aid first introduced in the 1994 document;
- (ii) the financing of airport infrastructure and operation, previously merely contemplated in a general provision of the 1994 Guidelines relating to public investment in air transport infrastructure.²⁰

Therefore, concludes the author, the two sets of rules hardly coincide. The 2005 Guidelines and the Ryanair Decision merely encapsulate a newly introduced State aid policy of the Commission. Such policy is allegedly based on the rationale of "...the development of small, regional airports currently underutilized and unpopular" and the insurance of legal certainty after a shift in the Commission's practice.²¹ However, the author contends that such rationale is only apparent, as "[t]he 2005 Guidelines

simply reflect the Commission's anxiety to justify its earlier erroneous [Ryanair] decision, providing a weak and untimely legal basis."²²

2.2. Critical Assessment

As correctly stated by *Lykotrafiti*, the 1994 and the 2005 Guidelines were dictated at two different stages of the development and liberalization process of the aviation sector, in order to deal with the respective issues. Such teleological divergence does not, in our opinion, necessarily result in an equally different scope of application. In sum: the fact that the Commission's focus expanded from national carriers and international hubs to low cost carriers and regional airports does not mean that the 1994 Guidelines deal exclusively with issues related to the first market operators and the 2005 Guidelines address only the problematic caused by the latter.

Indeed, the 1994 Guidelines state in Section 2 on Scope that they "...cover aid granted by EC Member States in favor of *air carriers*. These may include any activities accessory to air transport, direct or indirect subsidization of which could benefit airlines such as flight schools, duty free shops, *airport facilities*, franchises, airport charges..."²³ Therefore, it is clear that the old guidelines apply in principle *rationae personae* to all airlines and *rationae materiae* i.a. to airport infrastructure funding insofar as it may benefit the carriers.

In the following step the Commission proceeds to create an exemption to this principle by excluding *certain* infrastructure developments. The "general principle" is that the "construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids."²⁴ However, such principle has three clearly defined limits.

- (i) "Infrastructure development decisions fall outside the scope of application of this communication *in so far* as they are aimed at meeting planning needs or implementing national environmental or transport policies."
- (ii) "This general principle is *only valid* for the construction of infrastructures by Member States, and
- (iii) is *without prejudice* to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure."²⁵

18 Antigoni Lykotrafiti, Op. Cit.

19 Commission Decision of 12.2.2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi, OJ 2004/L 137/1.

20 1994 Guidelines para. 12.

21 Antigoni Lykotrafiti, Op. Cit. p. 226.

22 Antigoni Lykotrafiti, Op. Cit. p. 229.

23 1994 Guidelines para. 10. Emphasis added.

24 1994 Guidelines para. 12.

25 1994 Guidelines Para. 12. Emphasis added.

In other words, regarding infrastructure development the 1994 Guidelines

- (i) request the measure to be one of general economic policy either aimed at meeting planning demands or constituting a part of the above mentioned policies;
- (ii) exclude from EC State aid control the levels of the operators, owners and their respective shareholders, *if and only if* the infrastructure is developed and managed exclusively by the State;
- (iii) demand open, non-discriminatory access at the end-users level.

This approach is perfectly consistent with the rules on general infrastructure funding.

In sum, we believe that both communications apply to State aid to all carriers (regardless of their legal status, organization and structure) and to the funding, operation and use of infrastructure projects that benefit said carriers. The 2005 Guidelines further specify these criteria by contemplating new scenarios where such developments grant an economic advantage to specific undertakings other than air carriers, e.g. airport owners, operators and managers, since these were normally not undertakings back in 1994.

Therefore, we agree that the 2005 Guidelines "build on" the 1994 rules, but we beg to differ with the statements that "...the two sets of rules hardly coincide" and that the newest have a weak legal basis, since they merely "...are expressions of administrative bureaucracy and ill-perceived regulatory authority."²⁶

IV. The Logic of Airport Infrastructure Funding under EC State Aid Law

The 2005 Guidelines state, in line with the provisions on State aid to general infrastructure funding, that

- (i) the presence of State aid is excluded
 - within the context of SGEI, if the Altmark criteria are cumulatively met (Para. 34 to 36 and 41), and
 - outside the scope of SGEI, if the aid constitutes a general measure of economic policy or, being specific, if the MET is successfully applied (Para. 42 to 52 and 58 to 60);
- (ii) existent State aid can be deemed compatible with the Common Market, in particular pur-

suant to Art. 87 (3) or 86 (2) and, where applicable, the implementing provisions (Para. 61). Although the 2005 Guidelines do not reiterate it, State aid must be deemed compatible with the Common Market if it fulfills the requirements of Art. 87 (2) EC and can be derogated in accordance with Arts. 88 and 89 EC.

1. Presence of State Aid to Airport Infrastructure Funding

1.1. SGEI

As stated in Para. 34 of the 2005 Guidelines, "[c]ertain 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)."

These consist of the "...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."

As for those activities that can be defined as SGEIs, they will not entail State aid provided that all four Altmark criteria are met (Para. 35 juncto 36). At this point it should be noted that the entrust-

²⁶ Antigonis Lykotrafiti Op. Cit. P. 226 and 229, respectively.

ment act has to be extremely clear and precise in the definition of the infrastructure covered. The establishment of operational activities as SGEI should preferably be done in a separate entrustment act, although such clear-cut separation might prove difficult in "grey areas" such as the cost allocation of the maintenance of the infrastructure in question. A contrario sensu, if such criteria are not fulfilled, public financing of airports may constitute State aid and must therefore be notified to the Commission (Para. 37 to 40).

So far, the 2005 Guidelines follow general principles of State aid control of infrastructure funding and precise them for the specific case of airports. For this purpose, they address an issue not covered by the 1994 Guidelines, which included only provisions on public service obligations imposed on air carriers in Section III.2. Therefore, up to this point substitution cannot be argued, but either a limited overlap or a supplementation/specification approach could be reasonably taken.

1.2. MET

The 2005 Guidelines Section 3.2.4. merely cite settled EC case law on the principle of equality between undertakings with different financing and legal form²⁷ and then state in Para. 52 that "[a]pplying 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..." These statements being of a general nature (and substantiated only with regard to start-up aid), recourse to a relevant example of the Commission's and the Court's appli-

cation of such test to airport infrastructure funding becomes pertinent.

In Case T-196/04 *Ryanair Ltd v. Commission* [2008] OJ 2009/C 32/25 (the "Ryanair Judgment"),²⁸ the European Court of First Instance ("CFI") annulled the Ryanair Decision on the grounds of misapplication of the MET by the Commission.

As summarized by the CFI in the Ryanair Judgment Para. 15 to 16, in the Ryanair Decision "... the Commission rejects application to the Walloon Region of the principle of the private investor in a market economy (...). It takes the view, in essence, that the fixing of landing charges falls within the legislative and regulatory competence of the Walloon Region and is not an economic activity that can be assessed by reference to the private investor principle. Rather than acting within the framework of its public powers, the Walloon Region, in the Commission's view, acted in an unlawful and discriminatory manner by granting to Ryanair, for a period of 15 years and by means of a contract under private law, a reduction in the level of airport charges which was not available to other airlines. The Commission concludes that the reduction in airport charges and the guaranteed indemnity constitute an advantage within the meaning of Article 87 (1) EC (recitals 139 to 160). However, in spite of the difficulties in doing so, the Commission undertakes an assessment of whether the private investor test can be considered to have been satisfied in the case of the measures adopted by BSCA (recitals 161 to 170). Taking the view that the latter did not act in accordance with the private investor principle, the Commission decided that the advantages granted by BSCA to Ryanair constitute advantages within the meaning of Article 87 (1) EC (recitals 161 to 238)."

The Ryanair Decision was challenged by relying on two pleas in law, the second regarding the classification of the measures at issue as State aid and therefore as an infringement of Article 87 (1) EC. In this respect, "[t]he applicant puts forward, in essence, several arguments to the effect that the Commission

- (i) failed, when examining the measures at issue, to take into consideration the fact that the Walloon Region and BSCA ought to be regarded as one single entity,
- (ii) erred by refusing to apply the private investor principle to the measures adopted by the Walloon Region and
- (iii) misapplied that principle to BSCA."²⁹

27 Case 40/85 *Kingdom of Belgium v. Commission* [1986] ECR I-2321; 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; Case C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603; Case T-228/99 *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435.

28 Full text available only under Celex Nr. 62004A019685.

29 *Ryanair Judgment*, paras. 33 to 34.

Before examining the merits of the plea, the CFI made following clarifications:

- (i) It recognized in Para. 41 the Commission's discretion regarding the MET assessment, and confirmed settled case law stating that judicial review is therefore limited to verifying whether
- the Commission complied with the relevant rules governing procedure and the statement of reasons;
 - there was any error of law;
 - the facts on which the contested finding was based have been accurately stated;
 - there has been any manifest error of assessment of those facts or any misuse of powers.
- In particular, the Court reiterated that it is not entitled to substitute its own economic assessment for that of the author of the Decision.³⁰
- (ii) It pointed out in Para. 84 to 85 that, as a matter of law, "...for the purposes of determining whether a measure of State aid constitutes an advantage within the meaning of Article 87 (1) EC, a distinction must be drawn between the obligations which the State must assume as an undertaking exercising an economic activity and its obligations as a public authority (...). While it is clearly necessary, when the State acts as an undertaking operating as a private investor, to analyse its conduct by reference to the private investor principle, application of that principle must be excluded in the event that the State acts as a public authority. In the latter event, the conduct of the State can never be compared to that of an operator or private investor in a market economy."³¹

Within this framework, the CFI concluded in Para. 101 to 102 that "[t]he mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator. In light of all of the foregoing, it must be concluded that the Commission's refusal to examine the advantages granted by the Walloon Region and by BSCA together, and to apply the private investor principle to the measures adopted by the Walloon Region in spite of the economic links binding those two entities is vitiated by an error in law." On these grounds, it annulled the Ryanair Decision.

Despite this error in the Commission's practical MET assessment in a particular case, tacitly recognized by its decision not to appeal the Ryanair Judgment, it must be pointed out that the 2005 Guidelines prove also in this regard perfectly compatible with the general framework on infrastructure funding. They do not introduce significant changes to pre-existing criteria on MET application. In fact, they barely mention such criteria at all. It is rather the MET's application in practice by the Commission and the Courts, which elucidates them. Generally, it can be said that subjecting airport infrastructure funding to the MET has proven difficult at first and that such assessment has evolved into a more stable practice.³² This evolution is possible under the 2005 Guidelines as these do not reiterate any concrete Commission views on the subject. Proof of this is that the annulment of the Ryanair Decision did not entail any modification of the 2005 Guidelines, so that the idea that these "...simply reflect the Commission's anxiety to justify its earlier erroneous decision, providing a weak and untimely legal basis"³³ is hard to conceive.

Regarding their relation to the 1994 Guidelines, it can be argued that the newer document complements the older one. Indeed, the latter cites in Section I.3. the recommendation of the 1994 Report of the Comité de Sages, stating that "...financial injections to air carriers (or to airport handling services) in whatever form, should as a rule, be disapproved if they are incompatible with normal commercial practices," and neglected to include a similar provision on specific measures on airport infrastructure funding. Therefore, there seems to be

30 Cf. i.a. Case C-323/00 P *DSG v. Commission* [2002] ECR I-3919, para. 43 and Case T-152/99 *HAMSA v. Commission* [2002] ECR II-3049, para. 127.

31 Cf. i.a. Joined Cases C-278/92 to C-280/92 *Spain v. Commission* [1994] ECR I-4103, para. 22, and Case C-334/99 *Germany v. Commission* [2003] ECR I-1139, para. 134.

32 Cf. i.a. Commission Invitation to Germany, Flughafen Frankfurt and Ryanair to submit comments pursuant to Article 88 (2) of the Treaty, OJ 2009/C 12/6; Commission Invitation to submit comments pursuant to Article 88 (2) of the Treaty regarding measures in favor of Munich Airport Terminal T2, OJ 2009/C 5/4. However, the Commission's application of the MET is being challenged yet again in respect to Commission Decision C(2008) 3178 final in State aid case C 18/2007 concerning State aid planned by Germany for DHL at Leipzig Halle Airport, the annulment action pending before the CFI in Case T-396/08 *Freistaat Sachsen and Land Sachsen-Anhalt v. Commission*, OJ 2008/C 327/30.

33 Antigoni Lykotrafiti, *Op. Cit.* p. 229.

no substitution but rather a limited overlap or a supplementation/specification between the two sets of rules.

2. Compatibility of State Aid to Airport Infrastructure Funding

2.1. SGEI

In the event that a SGEI is established in such a way that it only complies with the first three Altmark criteria, i.e. not with the efficiency-benchmark requirement, its compensation constitutes State aid that can be deemed compatible with the Common Market on the basis of Art. 86 (2) EC as interpreted by Commission Decision (2005/842/EC) "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 2005/L 312/67) (the "SGEI Decision").³⁴ In particular "...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,"³⁵ i.e. those of the SGEI Decision. Category D is that of "...small regional airports,' with an annual passenger volume of less than 1 million."³⁶ Airports of more than 1 million passengers fall within the scope of the SGEI Decision in cases where the public service compensation is less than EUR 30 million and the undertaking managing the airport has an annual turnover of less than EUR 100 million. In this case,

pursuant to Recital 19 of the SGEI Decision, the most favorable ceiling will apply.³⁷

2.2. 2005 Guidelines Para. 61 Criteria

Economic activities which do not constitute SGEI and to which the MET cannot be successfully applied can be deemed compatible with the Common Market on the basis of Art. 87 (3). According to the 2005 Guidelines Para 61, "[t]o 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."

As stated above, these criteria can also be found in the 2005 State Aid Action plan as well as in the Draft Broadband Guidelines. In the airline sector, they were fulfilled i.a. in Commission Decision N 619/2006 Augsburg Flughafen GmbH (OJ 2007/C 133/3).³⁸ In this case public investment was made for the development of the Augsburg airport into a "city-airport," by means of extending and improving existing runway infrastructure, developing a new infrastructural space for the construction of hangars and taking measures on drainage and noise reduction.

On 7 March 2007, the Commission approved such aid on the grounds that:

- (i) both the construction and operation of the infrastructure meet clearly defined objectives of general interest, i.e. regional development in the first place and creation of working places in the second;
- (ii) necessity and proportionality of infrastructure to the aim in view were proven by a comparison of the demand for air traffic in the region with the existing infrastructural capacities;
- (iii) the developments have satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure, as they will

34 The above explained need of a clear description of the infrastructure covered and its correspondent differentiation from any operational activities in the entrustment act is crucial under the SGEI Decision as well.

35 2005 Guidelines para. 41.

36 2005 Guidelines para. 15.

37 Cf. Commission Staff Working Document of 20 November 2007 SEC(2007) 1516 final, accompanying the Communication on "Services of general interest, including social services of general interest: a new European commitment."

38 See also Commission Decisions N 303/2007 Newquay Cornwall Airport (OJ 2007/C 319/1), N 620/2006 Regionalflughafen Memmingen (OJ 2007/C 133/3) and NN 14/2007 N 112/2008 Flughafen Kassel-Calden (OJ 2009/C 97/4). The last two stress the need to analyze the issue of capacity limits of neighboring airports when carrying out the compatibility assessment.

- result in an activity increase (especially of commercial flights);
- (iv) all potential users of the infrastructure are granted equal and non-discriminatory access by Section 49 (2) No. 1 of the "Luftverkehrszulassungsordnung," i.e. the German regulation for access in the airline sector.
 - (v) the development of trade is not affected to an extent contrary to the Community interest, since Augsburg airport is a small regional airport pertaining to category D of the 2005 Guidelines.

V. Conclusions: A Proposal for a Consistent and Compatible System

1. The Relation between the 1994 and 2005 Guidelines is One of Supplementation and/or Specification

Having recognized that the newer rules address more recent and therefore different issues, we have to agree with the Commission that the relation is one of supplementation/specification. On the one hand, the 2005 Guidelines do not substitute the 1994 provisions, as they are an instrument to assess the compatibility of State aid with the Common Market, where the presence of aid has been established and where such compatibility has not yet been declared on an alternative legal basis, including, where applicable, the 1994 Guidelines. On the other hand, the premises of the limited overlap approach do not prove conclusive either.

First, the divergence in focus does not automatically result in a clear-cut divergence in the scope of application of both sets of rules. As stated above, the old guidelines apply *rationae personae* to all airlines and *rationae materiae* i.a. to specific measures on airport infrastructure funding insofar as it may benefit the carriers and are not covered by the limited exception included therein. The 2005 Guidelines specify and/or supplement the older rules by contemplating new scenarios where infrastructure developments benefit specific undertakings other than air carriers, e.g. airport owners, operators and managers.

Second, it must be pointed out that the mere fact that both scopes of application do not coincide completely is no indication of a deviation in the exercise of the Commission's authority³⁹ but rather

a common regulatory practice. Indeed, it makes perfect sense to respond to a demand for legal certainty in developing fields of evolving industries (such as the airline sector) without derogating the provisions that still validly address not so recent issues.

2. The Relation to the Further Applicable Legal Framework is One of Supplementation and/or Specification

A consistent system of EC State aid control presupposes that the system's rules on specific infrastructure sectors (e.g. airport infrastructure) do not collide with those general infrastructure funding, or if so, that the particularities of the sector explain such divergence which legally translates into the *lex specialis derogat legi generali* principle. So far, no such approach has been proposed. Both the substitution and the limited overlap approaches limit themselves to mainly discussing the relation between the 1994 and 2005 Guidelines. With regard to the rest of the applicable framework they merely state that the 2005 Guidelines have a weak real legal basis or that certain provisions included therein lack any array in primary law. We beg to differ.

The 2005 Guidelines are basically a compilation of relevant criteria for the Commission's application of pre-existing legal instruments. Therefore, such instruments can be equally applied in the absence of guidelines, as it was the case in the Ryanair Decision.

Following the general scheme of EC State aid control and substantiating it along with other instruments (such as the 1994 Guidelines) to the airline sector, they apply to all airport activities only in so far as they are economic activities. In this regard, the 2005 Guidelines state, in perfect consonance with primary law, that "...*once* an 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..."⁴⁰ From this follows

39 Cf. Antigoni Lykotrafiti, Op. Cit. p. 229.

40 2005 Guidelines Para. 30. Emphasis added.

counter-incentive to investment in "white areas" where the construction or expansion of airports might prove economically viable.

The definition of geographic areas according to the level of competition is, however, based on different criteria for the broadband and airline sectors. While competition for the provision of broadband services is mainly determined by the existence of adequate infrastructure (i.e. coverage), this is only a first step towards establishing competition between airports.

From the supply side, airport facilities can be destined by their owners and operators to different purposes, e.g. to hosting different types of aircrafts. In Recital 20 of its Decision upheld by CFI in Case T-210/01 General Electric Company v Commission of the European Communities, the Commission "...first defined regional aircraft as those with '30 to 90+' seats with a range of under 2 000 nautical miles and a cost of up to USD 30 million (recital 10 of the contested decision). Next, it defined two distinct markets within that category: the market for small regional aircraft with 30 to 50 seats and the market for large regional aircraft capable of carrying 70 to 90+ passengers. It drew that distinction on the ground that 'owing to their different seating capacity, size, flying range and the resulting operating costs (i.e. seat-mile cost), these two types of regional jets serve distinct mission profiles and are not substitutable with one another.' Consequently, airport facilities hosting just one kind of the aforementioned jets are not substitutable by those hosting only the other aircraft category. On the same basis, developments devoted to the operation for regional airplanes are not substitutable by those

destined to international flights. This holds, provided, however, that technical and/or economic reasons do not determine a change of the utilization aim.

Therefore, within the term "airport infrastructure" one could distinguish several markets for different "infrastructure facilities" according not only to their technical characteristics but also to their functional use. For example, an area where two airports exist, one hosting only small regional aircrafts and the other one holding all kinds of regional aircrafts, effective competition could theoretically exist with regard to the smaller jets (i.e. a "black area") while competition could be insufficient concerning flights requiring large regional airplanes (i.e. a "grey area").

Additionally, in the airline industry consumer preferences are crucial.

From the demand side, objectively comparable facilities will be considered as subjectively substitutable depending on various factors. For instance, low-cost regular passengers will be normally willing to travel a larger distance to get to a given airport than low-cost business passengers. Further, while low-cost passengers can use any airport hosting this type of carriers or offering competitive tariffs, customers which do not make use of this travelling model will only use airports hosting non-low-cost-carriers, e.g. international hubs.

In sum, further extrapolation, concretization and development *mutatis mutandi* of the Commission criteria for the design of the aid measure with particular regard to the need to avoid and/or limit distortions of competition as stated in Para. 41 ff. of the Draft Broadband Guidelines is needed in EC State aid control of airport infrastructure funding.