The Future of Aviation in Northern Europe

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State Aid to Airports and Airlines: The European Commission's new Aviation Guidelines

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Key Issues to discuss:

- Scope of the Aviation Guidelines ("Guidelines on State aid to airports and airlines", adopted 20 Feb 2014)
- Basic overview: State aid rules in the air transport sector
- Main provisions and key changes introduced in the Aviation Guidelines
- But will they work in practice?

What are the “Aviation Guidelines” about?

- ⇨ Conditions under which the European Commission will consider State aid to airlines or airports EU-compatible and legal
- Questions of possible State aid regularly affect, *e.g.*:
  - Loss-making regional airports;
  - Large national airports engaging in infrastructure expansion;
  - Low-cost air carriers with special ASAs, marketing or other deals with airports they fly to;
  - Flag carriers in need of any form of support by the State
- They replace the 2005 Aviation Guidelines which led to dozens of pending cases in Brussels and national courts, <u>but</u> only a few decisions so far.

Why are the Guidelines important?

- A "Safe Haven": you are safe if you comply, but this does not mean everything else is prohibited
- Guidelines are binding on the Commission only
- No radical changes, but some important lessons learnt from the last 10 years of market development, particularly as regards low cost airlines and the role of regional airports
- Implementation of the new Guidelines will strongly affect the industry's future across Europe:
  - regional vs. national airports
  - hub-and-spoke vs. point-to-point flying
  - flag carriers vs. low-cost carriers

Matters covered by the Aviation Guidelines:

- General principles on the presence of State aid, *i.e.*, is there any State aid involved to begin with?
- Public funding of "Services of General Economic Interest" (SGEI)
- EU-compatible State aid to airports
- EU-compatible start-up aid to airlines
- Other issues (social aid, transition etc.)

What is "State Aid"?

- Article 107 of the TFEU (ex EC Treaty) prohibits, subject to exceptions, any aid
  - granted by an EU Member State and through State resources;
  - in any form whatsoever (grant, tax rebate, loan, credit guarantee etc.);
  - which distorts or threatens to distort competition;
  - by favouring certain entities engaged in an economic activity ("selectivity criterion");
  - insofar as it affects trade between EU Member States (possible also for only local or regional services).
- These conditions are typically the subject of dispute in State aid cases

State Aid: Activities that can be caught

- All "economic activities", regardless of legal status of entity that provides them.
- These include:
  - ✓ Any transport services by airlines;
  - ✓ Operation of airports <u>and</u> construction of airport infrastructure ("*Aéroports de Paris*", 2000)
  - ✓ Non-aeronautical activities of the airport (*e.g.*, rental of space for shops or restaurants, parking)

but not:

Activities that normally fall under the responsibility of the State (air traffic control, police, customs, firefighting, security) ⇨ non-economic activities,

BUT:

- the State should finance only the relevant costs;
- public financing should not discriminate (e.g. between airports)

Use of State resources and "imputability" to the State

- State resources: national, regional or local – also EU funds if allocated at a Member State's discretion
- Many possible forms (direct grants, tax rebates, soft loans, subsidised services, benefits in kind)
- Granted directly or through other bodies (*e.g.*, a public airport), but "*the mere fact that an airport operator receives or has received State aid does not automatically imply that its customers airlines are also beneficiaries*" (para. 11)
- Even if the State can control a public undertaking, <u>actual exercise of that control</u> in a particular case cannot be automatically presumed ("*Stardust Marine*" case)

"Market Economy Operator" (MEO) test

- Assuming public funding or other advantage is involved, would a private investor
  - acting in similar circumstances,
  - having regard to the reasonably foreseeable return (in the longer term, over the lifetime of the investment) at the relevant time (*i.e.*, not *ex post*),
  - leaving aside all social, regional or other, public policy considerations,

  grant a similar funding or advantage?
- Commission thinks that the "*absence of a business plan constitutes an indication that the MEO may not be met*"; but other internal documents can also help

MEO test in relations between (public) airports & airlines - I

Under the MEO test, seemingly favourable treatment by the airport to an airline is <u>not</u> State aid if:

- the airline pays the <u>market price</u>
  - are there appropriate comparator airports?
  - the Commission's theory of State aid "pollution" effects on private airports - and possible counterarguments
  - indicators for a proper benchmarking exercise (type & volume of traffic, type of airport services, proximity to large cities, inhabitants and income level in catchment area, geography)

  <u>or</u>
- it can be shown *ex ante* that the airport/airline arrangement will lead to positive <u>incremental profit contribution</u> for the airport (= *ex ante* profitability analysis) on a sound medium term, taking into account airline-specific incremental costs

(Under the 2005 Guidelines, there was a presumption that public airports <u>could not</u> be considered as a private operator in a market economy.)

MEO Test in relations between (public) airports & airlines - II

- To be taken into consideration on the <u>revenue</u> side:
  - expected, airline-specific, non-aeronautical revenues
  - airport charges, net of any rebates, marketing support or incentive schemes
- To be taken into consideration on the <u>cost</u> side:
  - all costs incrementally incurred by the airport linked to the airline in question,
  - but <u>not</u> costs the airport would have to incur anyway
- This is a more economic/business approach than the one reflected in the 2005 Guidelines

MEO Test in relations between (public) airports & airlines - III

- If the airport has received <u>compatible aid</u>, no "pass on" to a specific airline (or, at most, such aid is EU compatible) if:
  - – infrastructure open to all airlines; and
  - – airlines pay tariffs covering at least incremental cost
- If the airport has received <u>incompatible investment aid</u>, no "pass on" to a specific airline, under the same conditions as those above

Public funding of "SGEI"

Public funding of SGEI is not selective if the four "Altmark" conditions are met:

- the beneficiary must be formally entrusted by a public authority with the provision of a SGEI, with clearly defined obligations;
- compensation parameters must be established beforehand, objectively and transparently;
- compensation < costs + reasonable profit
- for beneficiaries not chosen through public procurement procedures, costs should be those of a typical, well run, enterprise

SGEI/PSOs

Already in place: “SGEI package”

- 2011 SGEI Framework Communication, 2012 SGEI Communication, Regulation 360/2012 (de minimis aid to SGEI providers), Commission Decision 2012/21/EU (also covers public service compensation to
  - airports < 200 000 ppa
  - airlines to islands < 300 000 ppa

- For air transport, public service obligations (PSOs) can only be imposed in accordance with Regulation 1008/2008 (i.e., for specific routes only, to fulfill transport needs that cannot be adequately met)

SGEI/PSOs - Key outstanding issues

- Member States retain a large margin of discretion
- Implementation and importance varies greatly across Member States (and geography is not the only explanation)
- In most Member States, there is not much zeal among airlines to provide PSO ⇨ Effective monopoly and artificially high State subsidies? (the example of France)

Conditions for the approval of State Aid

- Basis: Article 107(3)(c) ("*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*")
- The Aviation Guidelines set out detailed conditions for
  - Aid to airports
    - investment aid
    - operating aid
  - Start-up aid to airlines
- See attached overview in Guidelines' Annex I

Conditions for the approval of State Aid: a few key changes

- Investment aid to airports
  - not covered by the 2005 Guidelines
  - covered by the 2014 Guidelines, with maximum permissible aid depending on airport size; no investment aid to airports with > 5 m ppa, increase of aid intensity by 20% if airport is remotely located
- Operating aid to regional airports (< 3 m ppa):
  - effectively prohibited under 2005 Guidelines
  - now allowed, under conditions, for a transitional period of 10 years
  - for < 700 000 ppa, higher aid intensity for 5 years (with reassessment thereafter)
- Start-up aid to airlines:
  - streamlined (for airports < 3 m ppa unless located in remote areas, 3-5 m ppa exceptionally, maximum allowed 50% for 3 years)

Transitional Issues

- Entry into effect upon publication in the OJ
- Member States have 12 months to adjust
- Guidelines will also apply to:
  - all existing pending cases of operating aid to airports;
  - all existing notified cases of investment aid;
  - all existing notified cases of start-up aid to airlines

Will the 2014 Aviation Guidelines be a success?

- Better thought through than 2005 Guidelines, but
- new State aid cases and litigation still likely because of
  - strong, conflicting interests within the industry (flagship v. low-cost carriers, regional v. national airports)
  - the more economic approach may be better than a simplistic black & white approach, but it's also more open to complex conflicting interpretations
- What if regional airports do not manage the 10 year transition? (Political consequences could be grave)
- Could PSOs become more competitive?
- A lot will depend on the Commission's implementation & setting the right precedents through pending cases

Thank you!

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