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Guidelines on State aid to airports and airlines

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1. INTRODUCTION: STATE AID POLICY IN THE AVIATION SECTOR

1. Linking people and regions, air transport plays a vital role in the integration and the competitiveness of the European Union, as well as its interaction with the world. Air transport contributes significantly to the Union's economy, with more than 15 million annual commercial movements, 822 million passengers transported to and from Union's airports in 2011, 150 scheduled airlines, a network of over 460 airports, and 60 air navigation service providers.¹ The Union profits from its position as a global aviation hub, with airlines and airports alone contributing more than EUR 140 thousand million to the Union's Gross Domestic Product each year. The aviation sector employs some 2.3 million people in the Union.²
2. The Europe 2020 Strategy ("EU 2020") underlines the importance of transport infrastructure as part of the Union's sustainable growth strategy for the coming decade. In particular, the Commission has emphasised in its White Paper "Roadmap to a Single Transport Area"³ that the internalisation of externalities, the elimination of unjustified subsidies and free and undistorted competition are an essential part of the effort to align market choices with sustainability needs. The "Roadmap to a Single Transport Area" also emphasises the importance of an efficient use of resources. In practice, transport has to use less and cleaner energy, better exploit a modern infrastructure and reduce its negative impact on the climate and the environment and in particular on key natural assets like water, land and ecosystems.
3. The gradual completion of the internal market has led to the removal of all commercial restrictions for airlines flying within the Union, such as restrictions on routes, number of flights or the setting of fares. Since the liberalisation of air transport in 1997,⁴ the industry has expanded as never before, and this has contributed to economic growth and job creation. This has also paved the way for the emergence of low-cost carriers, operating a new business model based on quick turn-around times and very efficient fleet use. This development has generated a tremendous increase in traffic, with low-cost carriers' traffic growing at a fast pace since 2005. In 2012 for the first time, low-cost airlines (44.8%) exceeded the market share of incumbent air carriers (42.4%), a trend which continued in 2013 (45.94% for low-cost and 40.42 % for incumbent).
4. While still predominantly publicly owned and managed,⁵ airports across the Union are currently witnessing growing involvement of private undertakings. New markets

¹ Sources: Eurostat, Association of European Airlines, International Air Transport Association.

² Study on the effects of the implementation of the EU aviation common market on employment and working conditions in the Air Transport Sector over the period 1997/2010. Steer Davies Gleave for the European Commission, DG MOVE. Final report of August 2012.

³ Roadmap to a Single Transport Area – Towards a competitive and resource efficient transport system, COM(2011) 144.

⁴ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8), and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

⁵ According to Airport Council International Europe, 77 % of airports were fully publicly owned in 2010, while 9% were fully privately owned, see Airport Council International Europe: The Ownership of Europe's Airports 2010.

have been created in the last decade through partial privatisation of certain airports, as well as through competition for the management of publicly owned airports, including regional airports.

5. Smaller airports display the greatest proportion of public ownership⁶ and most often rely on public support to finance their operations. These airports' prices tend not to be determined with regard to market considerations and in particular sound ex ante profitability prospects, but essentially having regard to local or regional considerations. Under the current market conditions the profitability prospects of commercially run airports also remain highly dependent⁷ on the level of throughput, with airports that have fewer than 1 million passengers per annum typically struggling to cover their operating costs. Consequently the vast majority of regional airports are subsidised by public authorities on a regular basis.
6. Certain regions are still hampered by poor accessibility from the rest of the Union, and major hubs are facing increasing levels of congestion.⁸ Nevertheless, the density of regional airports in certain regions of the Union has led to substantial overcapacity of airport infrastructure relative to passenger demand and airline needs.
7. The pricing system in most Union's airports has traditionally been designed as a publicly available scheme of airport charges based on passenger numbers and aircraft weight.⁹ However, the evolution of the market and the close cooperation between airports and airlines have gradually paved the way for a wide variety of commercial practices, including long-term contracts with differentiated tariffs and sometimes substantial amounts of incentives and marketing support paid by airports and/or local authorities to airlines. In particular, public funds earmarked for supporting airport operations may be channelled to airlines in order to attract more commercial traffic, thereby distorting air transport markets.¹⁰
8. In its Communication on State Aid Modernisation (SAM)¹¹, the Commission points out that State aid policy should focus on facilitating well-designed aid targeted at market failures and objectives of common interest of the European Union, and avoiding waste of public resources. State aid measures can indeed, under certain

⁶ This is exemplified by the fact that, although in 2010 their share of the overall number of airports amounted to 77%, publicly owned airports accounted for only 52% of total passenger traffic.

⁷ As shown in 2002 by the 'Study on competition between airports and the application of State aid rules' - Cranfield University, June 2002, and subsequently confirmed by industry reports.

⁸ 13 airports in the Union are forecasted to be operating at full capacity eight hours a day every day of the year in 2030, compared to 2007 when only 5 airports were operating at or near capacity 100% of the time (see Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility of 1 December 2011, COM(2011) 823 ("the Communication on Airport policy in the European Union").

⁹ As evidenced by the International Civil Aviation Organization's policies on charges for airports and navigations services (Document 9082), last revised in April 2012.

¹⁰ In particular where aid is determined on the basis of ex post calculations (making good for any deficits as they arise), airports may not have much incentive to contain costs and charge airport charges that are sufficient to cover costs.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation (SAM), COM(2012) 209 final.

conditions, correct market failures, thereby contributing to the efficient functioning of markets and enhancing competitiveness. Furthermore, where markets provide efficient outcomes but these are deemed unsatisfactory from a cohesion policy point of view, State aid may be used to obtain a more desirable, equitable market outcome. However, State aid may have negative effects, such as distorting competition between undertakings and affecting trade between Member States to an extent contrary to the common interests of the European Union. State aid control in the airport and air transport sectors should therefore promote sound use of public resources for growth-oriented policies, while limiting competition distortions that would undermine a level playing field in the internal market, in particular by avoiding duplication of unprofitable airports and creation of overcapacities.

9. The application of State aid rules to the airport and air transport sectors constitutes part of the Commission's efforts aimed at improving the competitiveness and growth potential of the Union airport and airline industries.¹² A level-playing field among airlines and airports in the Union is of paramount importance for these objectives, as well as for the entire internal market. At the same time, regional airports can prove important both for local development and for the accessibility of certain regions, in particular against the backdrop of positive traffic forecasts for air transport in the Union.
10. As part of the general plan to create a single airspace of the Union and taking account of market developments, in 2005 the Commission adopted guidelines on financing of airports and start-up aid to airlines departing from regional airports¹³ (the "2005 Aviation guidelines"). Those guidelines specified the conditions under which certain categories of State aid to airports and airlines could be declared compatible. They supplemented the 1994 Aviation guidelines,¹⁴ which mainly contained provisions with regard to the restructuring of flag carriers and social aid for the benefit of Union's citizens.
11. These guidelines take stock of the new legal and economic situation concerning the public financing of airports and airlines and specify the conditions under which such public financing may constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, and when it does constitute State aid, the conditions under which it can be declared compatible with the internal market. The Commission's assessment is based on its experience and decision-making practice, as well as on its analysis of current market conditions in the airport and air transport sectors. It is therefore without prejudice to its approach in respect of other infrastructures or sectors. In particular, the Commission considers that the mere fact that an airport operator receives or has received State aid does not automatically imply that its customer airlines are also aid beneficiaries. If the conditions offered to an airline at a given airport would have been offered by a profit-driven airport operator, the airline cannot be deemed to receive an advantage within the meaning of State aid rules.

¹² See the Communication on Airport policy in the European Union.

¹³ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12. 2005, p. 1).

¹⁴ Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10. 12. 1994, p. 5).

12. When public support constitutes State aid, the Commission considers that under certain conditions, certain categories of aid to regional airports and airlines using these airports can be justified in particular to develop new services and contribute to local accessibility and economic development. Nevertheless, distortions of competition on all markets concerned should be taken into consideration and only State aid which is proportional and necessary to contribute to an objective of common interest can be acceptable.
13. In this context, it should be underlined that operating aid constitutes, in principle, a very distortive form of aid and can only be authorised under exceptional circumstances. The Commission considers that airports and airlines should normally bear their operating costs. Nevertheless, the gradual shift to a new market reality, as described in points 3 to 7, explains that regional airports have received widespread operating support by public authorities prior to the adoption of these guidelines. Against this backdrop, for a transitional period, and to enable the aviation industry to adapt to the new market situation, certain categories of operating aid to airports might still be justified under certain conditions. As explained in point 5, under the current market conditions the available data and industry consensus point to a link between an airport's financial situation and its traffic levels, with financing needs normally being proportionately greater for smaller airports. In light of their contribution to economic development and territorial cohesion in the Union, managers of smaller regional airports should therefore be given time to adjust, for example, by gradually increasing airport charges to airlines, by introducing rationalisation measures, by differentiating their business models or by attracting new airlines and customers to fill their idle capacity.
14. At the end of the transitional period, airports should no longer be granted operating aid and they should finance their operations from their own resources. Whilst the provision of compensation for uncovered operating costs of services of general economic interest (SGEI) should remain possible for small airports or to allow for connectivity of all regions with particular requirements, the market changes stimulated by the new guidelines should allow airports to cover their costs as in any other industry.
15. Development of new air traffic should, in principle, be based on a sound business case. However, airlines are not always prepared, without appropriate incentives, to run the risk of opening new routes from unknown and untested small airports. Therefore, under certain conditions, airlines can be granted start-up aid during and also after the transitional period, if this provides them with the necessary incentive to create new routes from regional airports, increases the mobility of European Union citizens by establishing access points for intra-European Union flights and stimulates regional development. As remote regions are penalised by their poor accessibility, the start-up aid for routes from these regions is subject to more flexible compatibility criteria.
16. The allocation of airport capacity to airlines should therefore gradually become more efficient (that is to say demand-oriented), and there should be less need for public funding of airports as private investment becomes more widespread. If a genuine transport need and positive externalities for a region can be established, investment

aid to airports should nevertheless continue to be accepted after the transitional period, with maximum aid intensities ensuring a level-playing field across the Union.

17. Against this backdrop these guidelines introduce a new approach to the assessment of compatibility of aid to airports:

- (a) Whereas the 2005 Aviation guidelines left open the issue of investment aid, these revised guidelines define maximum permissible aid intensities depending on the size of the airport.
- (b) However, for large airports with a passenger volume of over 5 million per annum, investment aid should in principle not be declared compatible with the internal market, save in very exceptional circumstances, such as relocation of an existing airport, characterised by a clear market failure and taking into account the magnitude of the investment and the limited competition distortions.
- (c) The maximum permissible aid intensities for investment aid may be increased by up to 20% for airports located in remote regions.
- (d) For a transitional period of 10 years, operating aid to regional airports can be declared compatible. However, with regard to airports with passenger traffic of less than 700 000 per annum the Commission will, after a period of four years, reassess the profitability prospects of this category of airport in order to evaluate whether special rules should be devised to apprehend the compatibility with the internal market of operating aid in favour of those airports.

18. In addition, the compatibility conditions for start-up aid to airlines have been streamlined and adapted to recent market developments.

19. The Commission proposes a balanced approach which is neutral vis-à-vis the various business models of airports and airlines, and takes into account the growth prospects of air traffic, the need for regional development and accessibility and the positive contribution of the low-cost carriers business model to the development of some regional airports. But at the same time, a gradual move towards a market-oriented approach is undoubtedly warranted; except in duly justified and limited cases, airports should be able to cover their operating costs and public investment should be used to finance the construction of viable airports meeting the demand of airlines and passengers; distortions of competition between airports and between airlines, as well as duplication of non-viable airports should be avoided. This balanced approach should be transparent, easily understood and straightforward to apply.

20. These guidelines are without prejudice to Member States duty to comply with Union Law. In particular, to avoid that the investment would lead to environmental harm, Member States must also ensure compliance with Union environmental legislation, including the need to carry out an environmental impact assessment when required by law and ensure all relevant permits.

2. SCOPE OF APPLICATION AND DEFINITIONS

2.1. Scope of application

21. These principles set out in these guidelines apply to State aid to airports and airlines.¹⁵ They will be applied in accordance with other Union's guidelines on State aid, other provisions of the Treaty and secondary legislation adopted pursuant to the Treaty.¹⁶
22. Some airports and airlines are specialised in freight transport. The Commission does not yet have sufficient experience in assessing the compatibility of aid to airports and airlines specialised in freight transport to summarise its practice in the form of specific compatibility criteria. For these categories of undertakings, the Commission will apply the common principles of compatibility as set out in section 5 through a case-by-case analysis.
23. The Guidelines on national regional aid for 2007– 2013¹⁷, the Guidelines on regional State aid for 2014-2020¹⁸ or any future guidelines on regional aid are not to be applicable to State aid granted to airport infrastructure.
24. These guidelines replace the 1994 and 2005 Aviation guidelines.

2.2. Definitions

25. For the purpose of these guidelines, the following definitions should apply:
 - a) ‘aid’ means any measure fulfilling all the criteria laid down in Article 107(1) of the Treaty;
 - b) ‘aid intensity’ means the total aid amount expressed as a percentage of eligible costs, both figures expressed in net present value terms at the moment of the granting of the aid and before any deduction of tax or other charges;
 - c) ‘airline’ means any airline with a valid operating licence issued by a Member State or a Member of the Common European Aviation Area pursuant to Regulation (EC) No 1008/2008;

¹⁵ The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless of whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules. Pursuant to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36), or any subsequent legislation on access to the ground handling market at Union's airports, airports that carry out ground handling are required to keep separate accounts of their ground handling activities and other activities. Moreover, an airport may not subsidise its ground handling activities from the revenue it derives from its role as an airport. These guidelines also do not apply to undertakings which, though active at an airport, are engaged in non-aeronautical activities.

¹⁶ Notably, but not exclusively, Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3) , Directive 96/67/EC on provision of ground handling services, Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p.11), and any subsequent legislation on airport charges.

¹⁷ Guidelines on national regional aid for 2007– 2013 (OJ C 54, 4.3.2006, p. 13).

¹⁸ Guidelines on regional State aid for 2014-2020 (OJ C 209, 23.7.2013, p. 1).

- d) ‘airport charge’ mean a price or a levy collected for the benefit of the airport and paid by the airport users for the use of facilities and services which are exclusively provided by the airport and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight; for the purposes of these guidelines the airport charge may include also charges or fees paid for ground handling services and fees for centralised ground handling infrastructure;
- e) ‘airport infrastructure’ means infrastructure and equipment for the provision of airport services by the airport to airlines and the various service providers, including runways, terminals, aprons, taxiways, centralised ground handling infrastructure and any other facilities that directly support the airport services, excluding infrastructure and equipment, which is primarily necessary for pursuing non-aeronautical activities, such as car parks, shops and restaurants;
- f) ‘airport’ means an entity or group of entities performing the economic activity of providing airport services to airlines;
- g) ‘airport revenue’ consists of the revenue from airport charges net of marketing support or any incentives provided by the airport to the airlines, revenue stemming from non-aeronautical activities (free of any public support), excluding any public support and compensation for tasks falling within public policy remit, or services of general economic interest;
- h) ‘airport services’ mean services provided to airlines by the airport or any of its subsidiaries, to ensure the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services; airport services may include the provision of ground handling services and the provision of centralised ground handling infrastructure;
- i) ‘average annual passenger traffic’ means a figure determined on the basis of the inbound and outbound passenger traffic during the two financial years preceding that in which the aid is notified or granted in the case of non-notified aid;
- j) ‘capital costs’ mean the depreciation of the eligible investment costs into airport infrastructure and equipment including the underlying costs of financing;
- k) ‘capital costs funding gap’ means the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment in fixed capital assets;
- l) ‘catchment area of an airport’ in general means a 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; however, the catchment area of a given airport may be different and needs to take into account the specificities of each particular airport. The size and shape of the catchment area varies from airport to airport, and depends on various characteristics of the airport, including its business model, location and the destinations it serves.
- m) ‘costs of financing’ mean the costs related to debt and equity financing of the eligible investment costs of the investment; in other words, the costs of

- financing take into account the proportion of total interest and own capital remuneration that corresponds to the financing of eligible investment costs of the investment, excluding the financing of working capital, investments in non-aeronautical activities or other investment projects;
- n) ‘date of award of the aid’ means the date when the Member State took a legally binding commitment to award the aid that can be invoked before a national court;
 - o) ‘eligible investment costs’ mean the costs relating to investments in airport infrastructure, including planning costs, but excluding investment costs for non-aeronautical activities (such as parking, hotels, restaurants, and offices), investment costs in relation to ground handling equipment for ground handling services, ordinary maintenance costs and costs for tasks falling within the public policy remit;
 - p) ‘ground handling services’ mean services provided to airport users at airports as described in the Annex to Directive 96/67/EC, or and any subsequent legislation on access to the ground handling market at airports;
 - q) ‘high-speed train’ means a train capable of reaching speeds of over 200 km/h;
 - r) ‘investment aid’ means aid to finance fixed capital assets; specifically, to cover the ‘capital costs funding gap’; established ex ante as a fixed amount, it can relate both to an upfront payment (that is to say to cover upfront investment costs) and to aid paid out in the form of periodic instalments (to cover capital costs);
 - s) ‘net present value’ is the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value using the cost of capital, i.e. the normal required rate of return applied by the company in other investment projects of a similar kind or, where not available, the cost of capital of the company as a whole, or expected returns commonly observed in the airport sector;
 - t) ‘non-aeronautical activities’ means other commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers, renting out of offices and shops, car parking, hotels, etc.;
 - u) ‘operating aid’ means aid to cover the ‘operating funding gap’; established ex ante as a fixed amount, it can relate both to an upfront payment and to aid in the form of periodic instalments to cover expected operating costs (periodic lump sum payments)
 - v) ‘operating costs’ of an airport means the underlying costs of the provision of airport services, including cost categories such as cost of personnel, contracted services, communications, waste, energy, maintenance, rent, administration, etc., but excluding the capital costs, marketing support or any other incentives granted to airlines by the airport, and costs falling within a public policy remit;
 - w) ‘operating funding gap’ means the operating losses of the airport over the relevant period, discounted to their current value using the cost of capital, that

- is to say the shortfall (in Net Present Value terms) between airport revenues and operating costs of the airport;
- x) ‘outermost regions’ means the regions referred to in Article 349 of the Treaty¹⁹;
 - y) ‘reasonable profit margin’ means a rate of return on capital, for example, measured as an Internal Rate of Return (IRR), that the undertaking is normally expected to make on investments with a similar degree of risk;
 - z) ‘regional airport’ means an airport with annual passenger traffic volume of up to 3 million;
 - aa) ‘remote regions’ mean outermost regions, Malta, Cyprus, Ceuta, Mellila, islands, which are part of the territory of a Member State and sparsely populated areas;
 - bb) ‘sparsely populated areas’ mean NUTS 2 regions with less than 8 inhabitants per km² or NUTS 3 regions with less than 12.5 inhabitants per km² (based on Eurostat data on population density);
 - cc) ‘start of works’ means either the start of construction works on the investment, or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever comes first, and does not include preparatory works, such as obtaining permits and conducting preliminary feasibility studies;
 - dd) ‘total costs’ of the airport means the airport’s capital and operating costs.

3. PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

3.1. Notion of undertaking and economic activity

26. According to Article 107(1) of the Treaty, State aid rules apply only where the recipient is an ‘undertaking’. The Court of Justice of the European Union has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed.²⁰ Any activity consisting in offering goods and services on a market is an

¹⁹ Currently: Guadeloupe, French Guiana, Martinique, Réunion, Saint-Martin, Mayotte, the Azores, Madeira and the Canary Islands. In accordance with European Council Decision (2010/718/EU) of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy (OJ L 325, 9.12.2010, p. 4), from 1 January 2012, Saint-Barthélemy ceased to be an outermost region and became an overseas country or territory referred to in Part Four of the Treaty. In accordance with European Council Decision (2012/419/EU) of 11 July 2012 amending the status of Mayotte with regard to the European Union (OJ L 204, 31.7.2012, p. 131), from 1 January 2014, Mayotte ceased to be an overseas country or territory and became an outermost region.

²⁰ See 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,) part 2.1 and associated case law, in particular joined Cases C-180/98 to C-184/98 *Pavlov and Others*, [2000] ECR I-6451.

economic activity.²¹ The economic nature of an activity as such does not depend on whether the activity generates profits.²²

27. It is now clear that the activity of airlines which consists in providing transport services to passengers and/or undertakings constitutes an economic activity. The Commission's 1994 Aviation guidelines, however, still reflected the view that "*[t]he 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.*" In its judgment "*Aéroports de Paris*"²³, the European Courts ruled against this view and held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity. In its judgment in the "*Leipzig-Halle airport*" case,²⁴ the General Court clarified that the operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part.
28. As far as past financing measures are concerned, the gradual development of market forces in the airport sector²⁵ does not allow for a precise date to be determined, from which the operation of an airport should have been undoubtedly considered as an economic activity. However, the European Courts have recognised the evolution in the nature of airport activities. In "*Leipzig/Halle airport*", the General Court held that, from 2000, the application of State aid rules to the financing of airport infrastructure could no longer be excluded.²⁶ Consequently, from the date of the judgment in "*Aéroports de Paris*" (12 December 2000), the operation and construction of airport infrastructure must be considered as a task falling within the ambit of State aid control.
29. Conversely, due to the uncertainty that existed prior to the judgment in "*Aéroports de Paris*", public authorities could legitimately consider that the financing of airport infrastructure did not constitute State aid and, accordingly, that such measures did not need to be notified to the Commission. It follows that the Commission cannot now bring into question, on the basis of State aid rules, financing measures granted²⁷ before the "*Aéroports de Paris*" judgment.²⁸

²¹ Case 118/85 *Commission v Italy*, [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy*, [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75.

²² Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, [1980] ECR 3125, paragraph 88; Case C-244/94 *FFSA and Others*, [1995] ECR I-4013, paragraph 21; and Case C-49/07 *MOTOE*, [2008] ECR I-4863, paragraphs 27 and 28.

²³ Case T-128/98 *Aéroports de Paris v Commission*, [2000] ECR II-3929, confirmed by Case C-82/01, [2002] ECR I-9297, paragraphs 75-79.

²⁴ Joined Cases T-443/08 and T-455/08 *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission*, ("*Leipzig-Halle airport*" judgment), [2011] ECR II-1311, in particular paragraphs 93 and 94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, [2012] not yet reported.

²⁵ See point 3, and *Leipzig-Halle airport* judgment, paragraph 105.

²⁶ See *Leipzig-Halle airport* judgment, paragraph 106.

²⁷ The relevant criterion for the date at which a possible aid measure is deemed to have been granted is the date of the legally binding act by which public authorities undertake to award the measure at stake to its beneficiary. See Case T-358/94 *Compagnie Nationale Air France v Commission*, [1996] ECR II-2109, paragraph 79, Case T-109/01, *Fleuren Compost BV v Commission*, [2004] ECR II-127, paragraph 74 and Joined Cases T-362/05 and T-363/05 *Nuova Agricast v Commission*, [2008] ECR II-297, paragraph

30. In any event, measures that were granted before any competition developed in the airport sector did not constitute State aid when granted, but could be considered as existing aid pursuant to Article 1 (b) (v) of Council Regulation (EC) No 659/1999²⁹ if the conditions of Article 107(1) of the Treaty are met.
31. The entity or group of entities performing the economic activity of providing airport services to airlines, that is to say, the handling of aircrafts, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services,³⁰ will be referred to as the "airport ".³¹ An airport provides a range of services ("airport services") to airlines, in exchange for payment ("airport charges"). While the exact extent of the services provided by airports, as well as the labelling of charges as "fees" or "taxes" varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity.
32. The legal and regulatory framework within which individual airports are owned and operated varies from airport to airport across the Union. In particular, regional airports are often managed in close cooperation with public authorities. In this respect, the Court has ruled that several entities can be deemed to perform an economic activity together, thereby constituting an economic unit, under specific conditions.³² In the field of aviation, the Commission considers that significant involvement in an airport's commercial strategy, such as through the direct conclusion of agreements with airlines or the setting of airport charges, would constitute a strong indication that, alone or jointly, the relevant entity performs the economic activity of operating the airport.³³
33. Apart from the airport services described in point 31, an airport may also provide other commercial services to airlines or other users of the airport, such as ancillary services to passengers, freight forwarders or other service providers (for example, through the rental of premises to shop and restaurant managers, parking operators, etc.). These economic activities will be collectively referred to as "non-aeronautical activities".
34. However, not all the activities of an airport are necessarily of an economic nature.³⁴ Since the classification of an entity as an undertaking is always relative to a specific activity, it is necessary to distinguish between the activities of a given airport and to establish to what extent these activities are of an economic nature. If an airport

²⁸ 80, and Joined Cases T-427/04 and T-17/05, *France and France Télécom v Commission*, [2009] ECR II-4315, paragraph 321.

²⁹ Decision C 38/2008 of 3 October 2012 on Munich airport Terminal 2, (OJ L 319, 29.11.2013, p.8), paragraphs 74 to 81.

³⁰ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

³¹ See Directive 2009/12/EC, recital 1.

³² The airport may or may not be the same entity that owns the airport.

The joint exercise of an economic activity is normally assessed by analysing the existence of functional, economic and organic links between the entities. See for instance, Case C-480/09 P *AceaElectrabel Produzione SpA v Commission*, [2010] ECR I-13355, paragraphs 47 to 55; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others*, [2006] ECR I-289, paragraph 112.

³³ Case T-196/04 *Ryanair Ltd v Commission*, [2008] ECR II-3643 ("Charleroi" judgment), paragraph 88.

³⁴ Leipzig-Halle airport judgment, paragraph 98.

carries out both economic and non-economic activities, it is to be regarded as an undertaking only with regard to the former.

35. The Court has held that activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general do not fall within the scope of the rules on State aid.³⁵ 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 those activities are considered in general to be of a non-economic nature.³⁶
36. The public funding of such non-economic activities does not constitute State aid, but should be strictly limited to compensating the costs to which they give rise and may not be used instead to finance other activities.³⁷ Any possible overcompensation by public authorities of costs incurred in relation to non-economic activities may constitute State aid. Moreover, if an airport is, alongside its economic activities, engaged in non-economic activities, separated cost accounting is required in order to avoid any transfer of public funds between the non-economic and economic activities.
37. Public financing of non-economic activities must not lead to undue discrimination between airports. Indeed, it is established case law that there is an advantage when public authorities relieve undertakings of the costs inherent to their economic activities.³⁸ Therefore, when it is normal under a given legal order that airports have to bear certain costs inherent to the operation of a civil airport, whereas other airports do not, the latter may be granted an advantage, regardless of whether or not those costs relate to an activity, which in general is considered to be of a non-economic nature.

3.2. Use of State resources and imputability to the State

38. The transfer of State resources may take many forms such as direct grants, tax rebates,³⁹ soft loans or other types of preferential financing conditions. State resources will also be involved if the State provides a benefit in kind or in the form of subsidised services,⁴⁰ such as airport services. State resources can be used⁴¹ at

³⁵ Case C-118/85 *Commission v Italy*, paragraphs 7 and 8, and Case C-30/87 *Bodson/Pompes funèbres des régions libérées*, [1988] ECR I-2479, paragraph 18.

³⁶ See, in particular, Case C-364/92 *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 30 and Case C-113/07 *P Selex Sistemi Integrati v Commission*, [2009] ECR I-2207, paragraph 71.

³⁷ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova*, [1997] ECR I-1547. Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001, (OJ C 148, 25.6.2003, p. 7). Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the port sector, (OJ C 284, 21.11.2002, p. 2).

³⁸ See among others Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck*, [2005] ECR I-01627, paragraph 36, and case-law cited in that judgment.

³⁹ See Decision N 324/2006 of 24 October 2006 – France, Aid in support of the charter of an ATR 72-500 by Air Caraïbes, (OJ C 300, 9.12.2006, p. 10).

⁴⁰ See Case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* [2003] ECR I-13769, paragraph 29.

national, regional or local level. Funding from European Union's funds will likewise constitute State resources, when those funds are allocated at a Member State's discretion.⁴²

39. The Court has also ruled that even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed.⁴³ Therefore, it needs to be assessed whether measures granted by public undertakings are imputable to the State. The Court indicated that the imputability to the State of a measure granted by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.⁴⁴
40. Against this background, the resources of a public airport constitute public resources. Consequently, a public airport can grant aid to an airline using the airport when the measure is imputable to the State and the other conditions of Article 107(1) of the Treaty are met. The Court has also ruled that whether a measure is granted directly by the State or by public or private bodies established or appointed by it to administer the measure is irrelevant to whether it is regarded as/considered to be State aid.⁴⁵

3.3. Distortion of competition and effect on trade

41. According to the case law of the Court, financial support distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings.⁴⁶
42. In general, when an advantage granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in a given Union's market, trade between Member States must be regarded as affected by that advantage.⁴⁷
43. 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. The charge level is a key factor, since public funding granted to an airport could be used to maintain airport charges at an artificially low level in order to attract airlines and may thus significantly distort competition.

⁴¹ Resources of a public undertaking constitute State resources within the meaning of Article 107(1) of the Treaty because the public authorities control these resources. See Case C-482/99 *France v Commission*, [2002] ECR I-4397 ("Stardust Marine" judgment).

⁴² The Court has confirmed that once financial means remain constantly under public control and are therefore available to the competent national authorities, this is sufficient for them to be categorized as State aid, see Case C-83/98 P *France v Ladbrooke Racing Ltd and Commission*, [2000] ECR I-3271, paragraph 50.

⁴³ See Stardust Marine judgment, paragraph 52.

⁴⁴ See Stardust Marine judgement, paragraphs 55 and 56.

⁴⁵ Case C-78/76, *Steinike & Weinlig v Germany*, [1977] ECR I-595, paragraph 21.

⁴⁶ Case C-310/99, *Italy v Commission*, [2002] ECR-I-2289, paragraph 65.

⁴⁷ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ("Altmark" judgment), [2003] ECR I-7747.

- 44. The Commission further notes that airports 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 both airports and to airlines 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 or airlines.
- 45. The Court held in the *Altmark* judgment⁴⁸ that even public funding granted to an undertaking which provides only local or regional transport services may have an effect on trade between Member States, as the supply of transport services by that undertaking may thereby be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services. Even a small amount of aid or the relatively small size of the undertaking which receives public funding does not, as such, exclude the possibility that trade between Member States might be affected. Consequently, the public financing of airports or airlines operating services from those airports might affect trade between Member States.

3.4. Public funding of airports and the application of the Market Economy Operator principle

- 46. Article 345 of the Treaty states that the Treaty in no way prejudices the rules in Member States governing the system of property ownership. Member States can accordingly own and manage undertakings, and can purchase shares or other interests in public or private undertakings.
- 47. Consequently, these guidelines make no distinction between the different types of beneficiaries in terms of their legal structure or whether they belong to the public or private sector, and all references to airlines and airports or the companies which manage them encompass all types of legal entity.
- 48. In order to assess whether an undertaking benefited from an economic advantage, the so-called Market Economy Operator ("MEO") test is applied. This test should be based on available information and foreseeable developments at the time when the public funding was granted and it should not rely on any analysis based on a later situation.⁴⁹
- 49. Consequently, when an airport benefits from public funding, the Commission will assess whether such funding constitutes aid by considering whether in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations,⁵⁰

⁴⁸ See *Altmark* judgment, paragraphs 77 to 82.

⁴⁹ *Stardust Marine* judgment, paragraph 71. Case C 124/10P *European Commission v EDF*, [2012], not yet reported, paragraphs 84, 85 and 105.

⁵⁰ Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech Stahlwerke v Commission*, [1999] ECR II-17, paragraph 120. See also case C-40/85, *Belgium v Commission*, [1986] ECR 02321, paragraph 13.

would have granted the same funding. Public funding granted in circumstances which correspond to normal market conditions is not regarded as State aid.⁵¹

50. The Court has also ruled that the conduct of a public investor may be compared with that of a private investor guided by prospects of profitability in the longer term,⁵² over the lifetime of the investment. These considerations are particularly pertinent to investment in infrastructure, which often involve important amounts of financial resources and can produce a positive return only after many years. Any profitability assessment of the airport must take into account airport revenues.
51. Consequently, as regards public financing in airports, the analysis of conformity with the MEO test should be based on sound *ex ante* profitability prospects for the entity granting the financing.⁵³ Any traffic forecasts used for that purpose should be realistic and subject to a reasonable sensitivity analysis. The absence of a business plan constitutes an indication that the MEO test may not be met.⁵⁴ In the absence of a business plan, Member States can provide analysis or internal documents from the public authorities or from the airport concerned showing clearly that an analysis conducted before the granting of the public financing demonstrates that the MEO test is met.
52. Airports can play an important role in fostering local development or accessibility. Nevertheless regional or policy considerations cannot be taken into account for the purposes of the MEO test.⁵⁵ Such considerations can, however, under certain conditions, be taken into account when assessing the compatibility of aid.

3.5. Financial relationships between airports and airlines

53. When an airport has public resources at its disposal, aid to an airline using the airport can, in principle, be excluded when the relationship between the airport and that airline complies with the MEO test. This is normally the case if:
 - a) the price charged for the airport services corresponds to the market price (see section 3.5.1), or
 - b) it can be demonstrated through an *ex ante* analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport (see section 3.5.2).

3.5.1. Comparison with the market price

54. One approach to the assessment of the presence of aid to airlines involves establishing whether the price charged by an airport to a particular airline

⁵¹ Stardust Marine judgment, paragraph 69. See also Case C-303/88 *Italy v Commission*, [1991] ECR I-1433, paragraph 20.

⁵² Case C-305/89 *Italy v Commission* ("Alfa Romeo" judgment), [1991] ECR I-1603, paragraph 20. Case T-228/99 *Westdeutsche Landesbank Girozentrale v Commission*, [2003] ECR II-435, paragraph 250-270.

⁵³ See Commission Decision in Case C25/2007 – Finland – Tampere Pirkkala airport and Ryanair, (OJ L 309, 19.11.2013, p.27).

⁵⁴ Case C-124/10 *Commission v EDF* [2012] ECR I-0000, paragraph 84, 85 and 105.

⁵⁵ Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech Stahlwerke v Commission*, [1999] ECR II-17, paragraph 120. See also case C-40/85 *Belgium v Commission*, [1986] ECR 02321, paragraph 13.

corresponds to the market price. On the basis of available and relevant market prices, an appropriate benchmark can be identified, taking into account the elements set out in point 60.

55. The identification of a benchmark requires, first, that a sufficient number of comparable airports providing comparable services under normal market conditions can be selected.
56. In this respect the Commission notes that for the moment, a large majority of Union airports benefit from public funding to cover investment and operating costs. Most of those airports can only remain on the market with public support.
57. Publicly owned airports have been traditionally considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound *ex ante* profitability prospects, but essentially having regard to social or regional considerations.
58. Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airport as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.
59. In these circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation can change or evolve in the future, in particular with full application of State aid rules to public financing of airports.
60. In any event, the Commission considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts, or any other incentive), across a sufficient number of suitable "comparator airports", whose managers behave as market economy operators. In particular, the following indicators should be used:
 - (a) traffic volume;
 - (b) type of traffic (business or leisure or outbound destination), the relative importance of freight and the relative importance of revenue stemming from the non-aeronautical activities of the airport;
 - (c) type and level of airport services provided;
 - (d) proximity of the airport to a large city;
 - (e) number of inhabitants in the catchment area of the airport;
 - (f) prosperity of the surrounding area (GDP per capita);
 - (g) different geographical areas from which passengers could be attracted.

3.5.2. *Ex ante* profitability analysis

61. At present the Commission considers *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines.

62. In this respect, the Commission considers that price differentiation is a standard business practice, as long as it complies with all other relevant competition and sectoral legislation.⁵⁶ Nevertheless, such differentiated pricing policies should be commercially justified to comply with the MEO test.⁵⁷
63. The Commission considers that arrangements concluded between airlines and an airport can be deemed to comply with the MEO test when they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that over the duration of the arrangement it is capable of covering all costs stemming from the arrangement with an airline (for example, an individual contract or an overall scheme of airport charges) with a reasonable profit margin⁵⁸ on the basis of sound medium-term prospects⁵⁹ when setting up the arrangement.
64. In order to assess whether an arrangement concluded by an airport with an airline complies with the MEO test, expected non-aeronautical revenues⁶⁰ stemming from the airline's activity should be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes.⁶¹ Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport should be taken into account.⁶² Such incremental costs could encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs. In contrast, costs which the airport would have to incur anyway independently from the arrangement with the airline should not be taken into account in the MEO test.
65. When an airport operator has benefited from compatible aid, the advantage resulting from such aid is not passed on to a specific airline⁶³ if the following conditions are met: the infrastructure is open to all airlines⁶⁴ (this includes infrastructure which is

⁵⁶ Relevant provisions include Articles 101 and 102 of the Treaty, and Directive 2009/12/EC.

⁵⁷ See Commission Decision in Case C12/2008 – Slovakia - Agreement between Bratislava Airport and Ryanair (OJ L 27, 1.2.2011, p.24), and Commission Decision in Case C25/2007 – Finland – Tampere Pirkkala airport and Ryanair, (OJ 309, 19.11.2013, p.27).

⁵⁸ A reasonable profit margin is a 'normal' rate of return on capital, that is to say, a rate of return that would be required by a typical company for an investment of similar risk. The return is measured as an Internal Rate of Return ("IRR") over the envisaged cash flows induced by the arrangement with the airline.

⁵⁹ This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.

⁶⁰ Non-aeronautical revenues are notably parking fees, shop rental fees, etc.

⁶¹ Any public support, such as for example marketing agreements directly concluded between public authorities and the airline, designed to offset part of the normal costs incurred by the airport in relation to the airport/airline arrangement will likewise be taken into account. This is irrespective of whether such support is directly granted to the airline concerned, or channelled through the airport or another entity.

⁶² Charleroi judgment, paragraph 59.

⁶³ What is said in this paragraph about airlines applies in the same way to other users of the airport.

⁶⁴ See notably joined Cases T-443/08 and T-455/08 Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission, [2011] ECR II-1311, paragraph 109.

more likely to be used by certain categories, like low cost operators or charters) and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental cost as defined in point 64. Furthermore, the Commission considers that under such conditions, even if there would have been State aid to the airlines, such aid would in any event have been compatible with the internal market for the same reasons that justify the compatibility of the aid at the level of the airport. When an airport operator has benefited from incompatible investment aid, the advantage resulting from such aid is not passed on to a specific airline if the following conditions are met: the infrastructure is open to all airlines and not dedicated to a specific airline; and the airlines pay tariffs covering at least the incremental cost as defined in point 64. The Commission considers that under such conditions sectorial advantage to the airline industry or other users cannot be excluded but should not lead to recovery from specific airlines or other users.

66. When assessing airport/airline arrangements, the Commission will also take into account the extent to which the arrangements under assessment can be considered part of the implementation of an overall strategy of the airport expected to lead to profitability at least in the long term.

4. PUBLIC FUNDING OF SERVICES OF GENERAL ECONOMIC INTEREST

67. In some cases, public authorities may define certain economic activities carried out by airports or airlines as services of general economic interest ("SGEI") within the meaning of Article 106(2) of the Treaty and the *Altmark* case-law,⁶⁵ and provide compensation for discharging such services.
68. In such cases, the SGEI Communication⁶⁶ and Commission Regulation (EU) No 360/2012⁶⁷ provide guidance on the conditions under which the public financing of an SGEI constitutes State aid within the meaning of Article 107(1) of the Treaty. Aid in the form of public service compensation will be assessed under Commission Decision 2012/21/EU⁶⁸ and the SGEI framework.⁶⁹ Together they form the 'SGEI

⁶⁵ See *Altmark* judgment, paragraphs 86 to 93. Public funding for the provision of an SGEI does not entail a selective advantage within the meaning of Article 107(1) of the Treaty if the following four conditions are met: (a) the beneficiary of a State funding mechanism for an SGEI must be formally entrusted with the provision and discharge of an SGEI, the obligations of which must be clearly defined (b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner; (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, taking into account the relevant receipts and a reasonable profit for discharging those obligations and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, that allows for the provision of the service at the least cost to the community, the level of compensation granted must be determined on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.

⁶⁶ Commission Communication 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, 11.01.2012, p. 4), .

⁶⁷ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

⁶⁸ 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

package', which also applies to compensation granted to airports and airlines. What follows will only illustrate the application of some of the principles set out in the SGEI package in the light of certain sectoral specificities.

4.1. Definition of a service of general economic interest in the airport and air transport sectors

69. The first *Altmark* criterion requires a clear definition of tasks which constitute a service of general economic interest. This requirement coincides with that of Article 106(2) of the Treaty.⁷⁰ According to case law,⁷¹ undertakings entrusted with the operation of an SGEI must have received that task by an act of a public authority. The Commission has also clarified⁷² that, for an activity to be considered as an SGEI, it should exhibit special characteristics as compared with ordinary economic activities, and that the general interest objective pursued by public authorities cannot simply be that of development of certain economic activities or economic areas provided for in Article 107(3)(c) of the Treaty.⁷³
70. As regards air transport services, public service obligations can only be imposed in accordance with Regulation (EC) No 1008/2008 of the European Parliament and of the Council.⁷⁴ In particular, such obligations can only be imposed on a specific route or group of routes,⁷⁵ and not on any generic route originating from a given airport, city or region. Moreover, public service obligations can only be imposed on a route to fulfil transport needs which cannot be adequately met by an existing air route or by other means of transport.⁷⁶
71. In this respect, it should be stressed that compliance with the substantive and procedural requirements of Regulation (EC) No 1008/2008 does not take away the need for the Member State(s) concerned to assess compliance with Article 107(1) of the Treaty.
72. As far as airports are concerned, the Commission considers that it is possible for the overall management of an airport, in well-justified cases, to be considered an SGEI.

compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L7, 11.1.2012, p.3).

⁶⁹ Commission Communication on a European Union framework for State aid in the form of public service compensation (2011) (OJ C8, 11.1.2012, p.15).

⁷⁰ Case T-289/03 *British United Provident Association Ltd (BUPA) v Commission* [2008], ECR II-81, paragraphs 171 and 224.

⁷¹ See Joined Cases T-204/97 and T-270/97 EPAC — *Empresa para a Agroalimentação e Cereais, SA v Commission* [2000] ECR II-2267, paragraph 126 and Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECR II-2031, paragraphs 186, 188-189.

⁷² See SGEI Communication, paragraph 45.

⁷³ See decision N 381/04 - France, Project for a high capacity telecommunications network in the Pyrénées-Atlantiques (DORSAL), (OJ C 162, 2.7.2005, p. 5).

⁷⁴ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3), Articles 16, 17 and 18.

⁷⁵ Both origin and destination airports must be clearly identified see Article 16(1) of Regulation (EC) No 1008/2008.

⁷⁶ In particular, the Commission considers that it would be difficult to justify PSOs on a route to a given airport if there are already similar services notably in terms of transport time, frequencies, level and quality of service, to another airport serving the same catchment area.

In the light of the principles outlined in point 69, the Commission considers that this can only be the case if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development. Such an assessment should take due account of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries. In such cases, public authorities may impose a public service obligation on an airport to ensure that the airport remains open to commercial traffic. The Commission notes that certain airports have an important role to play in terms of regional connectivity of isolated, remote or peripheral regions of the Union. Such a situation may, in particular, occur in respect of the outermost regions referred to in Article 349 of the Treaty, as well as for islands or other areas of the Union. Subject to a case-by-case assessment and depending on the particular characteristics of each airport and of the region which it serves, it may be justified to define SGEI obligations in those airports.

73. In the light of the specific requirements attached to public service obligations for air transport services,⁷⁷ and in view of the complete liberalisation of air transport markets, the Commission considers that the scope of public service obligations imposed on airports should not encompass the development of commercial air transport services.

4.2. Compatibility of aid in the form of public service compensation

74. If one of the cumulative criteria of the *Altmark* judgment is not fulfilled, public service compensation provides an economic advantage to its beneficiary, and might constitute State aid within the meaning of Article 107(1) of the Treaty. Such State aid may be regarded as compatible with the internal market, if the compatibility criteria developed for the application of Article 106(2) of the Treaty are met.

75. State aid in the form of public service compensation is exempt from the notification requirement of Article 108(3) of the Treaty if the requirements set out in Decision 2012/21/EU are met. The scope of Decision 2012/21/EU covers public service compensation granted to:

- a) airports as regards airports where the average annual traffic does not exceed 200 000 passengers⁷⁸ over the duration of the SGEI entrustment, and
- b) airlines as regards air links to islands where the average annual traffic does not exceed 300 000 passengers.⁷⁹

76. State aid not covered by Decision 2012/21/EU can be declared compatible under Article 106(2) of the Treaty, if the conditions of the SGEI Framework are met. However, it should be noted that for assessment under both, Decision 2012/21/EU

⁷⁷ See point 70 and Regulation (EC) No 1008/2008, recital 12 and articles 16 to 18.

⁷⁸ This threshold refers to a one-way count, that is to say, a passenger flying from the airport and back to the airport would be counted twice. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

⁷⁹ This threshold refers to a one-way count, that is to say, a passenger flying to the island and back would be counted twice. It applies to individual routes between an airport on the island and an airport on the mainland.

and the SGEI Framework, the considerations on the definition of public service obligations imposed on airports or airlines in points 69 to 73 of these guidelines will apply.

5. COMPATIBILITY OF AID UNDER ARTICLE 107(3)(C) OF THE TREATY

77. If public funding granted to airports and/or airlines constitutes aid, this aid can be considered compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty provided that it complies with the compatibility criteria for airports in section 5.1 of these guidelines and for airlines in section 5.2. State aid granted to airlines which incrementally decreases the profitability of the airport (see point 63 and 64) will be deemed incompatible with the internal market, unless the compatibility conditions for start-up aid set out in section 5.2 are met.
78. To assess whether a State aid measure can be considered compatible with the internal market, the Commission generally analyses whether the design of the aid measure ensures that the positive impact towards an objective of common interest exceeds its potential negative effects on trade and competition.
79. The Communication on State Aid Modernisation (SAM) called for the identification and definition of common principles applicable to the assessment of compatibility of all aid measures carried out by the Commission. An aid measure will be considered compatible with the internal market within the meaning of Article 107(3) of the Treaty provided that the following cumulative conditions are met:
- (a) contribution to a well-defined objective of common interest: a State aid measure must have an objective of common interest in accordance with Article 107(3) Treaty;
 - (b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
 - (c) appropriateness of the aid measure: the aid measure must be an appropriate policy instrument to address the objective of common interest;
 - (d) incentive effect: the aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or they would carry out in a restricted or different manner or location;
 - (e) proportionality of the aid (aid limited to the minimum): the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned;
 - (f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of the aid must be sufficiently limited, so that the overall balance of the measure is positive;
 - (g) transparency of aid: Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder as outlined in section 8.2.

80. As regards State aid in the aviation sector, the Commission considers that those common principles are respected when State aid granted to airports or airlines meets all the conditions outlined respectively in sections 5.1 and 5.2. Therefore, compliance with those conditions implies compatibility of the aid with the internal market pursuant to Article 107(3)(c) of the Treaty.
81. However, if an inseparable aspect of a State aid measure and the conditions attached to it (including its financing method when the financing method forms an integral part of the State aid measure) entail a violation of Union law, the aid cannot be declared compatible with the internal market⁸⁰.
82. Moreover, in assessing the compatibility of any State aid with the internal market, the Commission will take account of any proceedings concerning infringements of Article 101 or 102 of the Treaty which may concern the beneficiary of the aid and which may be relevant for its assessment under Article 107(3) of the Treaty.⁸¹

5.1. Aid to airports

5.1.1. Investment aid to airports

83. Investment aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty provided that the following cumulative conditions are met:
- (a) Contribution to a well-defined objective of common interest:
84. Investment aid to airports will be considered to contribute to the achievement of an objective of common interest, if it:
- a) increases the mobility of European Union citizens and connectivity of regions by establishing access points for intra-European Union flights; or
 - b) combats air traffic congestion at major European Union hub airports; or
 - c) facilitates regional development.
85. Nevertheless, the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. If an investment project is primarily aimed at creating new airport capacity, the new infrastructure must, in the medium-term, meet the forecasted demand of the airlines, passengers and freight forwarders in the catchment area of the airport. Any investment which does not have satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area, cannot be considered to serve an objective of common interest.
86. Accordingly, the Commission will have doubts as to the medium-term prospects for use of airport infrastructure at an airport located in the catchment area of an existing airport where the existing airport is not operating at or near full capacity. The medium-term prospects for use should be demonstrated on the basis of sound

⁸⁰ See for instance Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhône Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

⁸¹ See Case C-225/91 *Matra v Commission*, [1993] ECR I-3203, paragraph 42.

passenger and freight traffic forecasts incorporated in an ex ante business plan and must identify the likely effect of the investment on the use of already existing infrastructure, such as another airport or other modes of transport, in particular high-speed train connections.

(b) *Need for State intervention:*

87. In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.
88. The conditions that smaller airports face when developing their services and in attracting private financing of their infrastructure investments are often less favourable than those faced by the major airports in the European Union. For these reasons, under present market conditions, smaller airports may have difficulties in ensuring the financing of their investments without public funding.
89. The need for public funding to finance infrastructure investments will, due to high fixed costs,⁸² vary according to the size of an airport and will normally be greater for smaller airports. The Commission considers that, under current market conditions, the following categories of airports,⁸³ and their relative financial viabilities, can be identified:
- a) airports with up to 200 000 passengers per annum may not be able to cover to a large extent their capital costs;
 - b) airports with annual passenger traffic of between 200 000 and 1 million are usually not able to cover to a large extent their capital costs;
 - c) airports with annual passenger traffic of 1-3 million should, on average, be able to cover a larger portion of their capital costs;
 - d) airports with annual passenger traffic of 3-5 million should, in principle, be able to cover to a large extent all their costs (including operating costs and capital costs) but, under certain case-specific circumstances, public support might be necessary to finance some of their capital costs;
 - e) airports with annual passenger traffic above 5 million are usually profitable and are able to cover all of their costs, with the exception of duly justified exceptional circumstances.

(c) *Appropriateness of State aid as a policy instrument:*

90. The Member States must demonstrate that the aid measure is an appropriate policy instrument to achieve the intended objective or resolve the problems intended to be addressed by the aid. An aid measure will not be considered compatible if other less distortive policy instruments or aid instruments allow the same objective to be reached.

⁸² Between 70 % and 90 % of the airport's costs are fixed.

⁸³ The categories of airports for the purposes of these guidelines are based on the available industry data.

91. The Member States can make different choices with regard to the use of different policy instruments and forms of aid. In general, where a Member State has considered other policy options and the use of a selective instrument, such as State aid in the form of a direct grant has been compared with less distortive forms of aid (such as loans, guarantees or repayable advances), the measures concerned are considered to constitute an appropriate instrument.
92. Wherever possible, Member States are encouraged to design national schemes that reflect the main principles underlying public financing and to indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce the administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Further, Member States are encouraged to give clear guidance for the implementation of State aid financing for regional airports.

(d) Existence of incentive effect:

93. Works on an individual investment can start only after submitting an application to the granting authority. If works begin before submitting an application to the granting authority, any aid awarded in respect of that individual investment will not be considered compatible with the internal market.
94. An investment project at an airport may be economically attractive in its own right. Therefore, it needs to be verified that the investment would not have been undertaken or would not have been undertaken to the same extent without any State aid. If this is confirmed, the Commission will consider that the aid measure has an incentive effect.
95. The incentive effect is identified through counterfactual analysis, comparing the levels of intended activity with aid and without aid.
96. Where no specific counterfactual is known, the incentive effect can be assumed when there is a funding gap ("capital cost funding gap"), that is to say, when on the basis of an ex ante business plan, it can be shown that there is a difference between the positive and negative cash flows (including investment costs into fixed capital assets) over the lifetime of the investment in net present value⁸⁴ terms.⁸⁵

(e) Proportionality of the aid amount (aid limited to the minimum)

97. The maximum allowed amount of State aid is expressed as a percentage (%) of eligible costs (the maximum aid intensity). Eligible costs are the costs relating to the investments in airport infrastructure, including planning costs, ground handling infrastructure (such as baggage belt, etc.) and airport equipment. Investment costs

⁸⁴ The net present value (NPV) is the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value using the cost of capital, i.e. the normal required rate of return applied by the company in other investment projects of a similar kind or, where not available, the cost of capital of the company as a whole, or expected returns commonly observed in the airport sector.

⁸⁵ This does not preclude foreseeing that future benefits may offset initial losses.

relating to non-aeronautical activities (in particular parking, hotels, restaurants, and offices) are ineligible.⁸⁶

98. The investment costs relating to the provision of ground handling services (such as buses, vehicles, etc.), insofar as they are not part of ground handling infrastructure, by the airport itself are ineligible.⁸⁷
99. In order to be proportionate, investment aid to airports must be limited to the extra costs (net of extra revenues) which result from undertaking the aided project/activity rather than the alternative project/activity that the beneficiary would have undertaken in the counterfactual scenario, that is to say, if it had not received the aid. Where no specific counterfactual is known, in order to be proportionate, the amount of the aid should not exceed the funding gap of the investment project (so-called ‘capital cost funding gap’), which is determined on the basis of an ex ante business plan as the net present value of the difference between the positive and negative cash flows (including investment costs) over the lifetime of the investment. For investment aid the business plan should cover the period of the economic utilisation of the asset.
100. As the funding gap will vary according to the size of an airport and is normally wider for smaller airports, the Commission will use a range of permissible maximum aid intensities to ensure overall proportionality. The aid intensity must not exceed the maximum permissible investment aid intensity and should, in any case, not go beyond the actual funding gap of the investment project.
101. The following table summarises the maximum permissible aid intensity depending on the size of an airport as measured by the number of passengers per annum:⁸⁸

Size of airport based on average passenger traffic (passengers per annum)	Maximum investment aid intensity
3-5 million	up to 25 %
1-3 million	up to 50 %
<1 million	up to 75 %

⁸⁶ Financing of such activities is not covered by these guidelines, as they are of a non-transport character, and will thus be assessed on the basis of the relevant sectoral and general rules.

⁸⁷ The principles set out in these guidelines do not apply to aid for the provision of ground handling services regardless whether they are provided by the airport itself, by an airline or by a supplier of ground handling services to third parties; such aid will be assessed on the basis of the relevant general rules.

⁸⁸ Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying, for example, to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

- 102. The maximum aid intensities for investment aid to finance airport infrastructure may be increased by up to 20 percent if the airport is located in remote regions irrespective of its size.
- 103. Airports with average traffic below 1 million passengers per annum should contribute at least 25% to the financing of the total eligible investment costs. However, investment projects at certain airports with average traffic below 1 million passengers per annum located in peripheral regions of the Union may result in a funding gap, which is higher than the maximum permissible aid intensities. Subject to a case-by-case assessment and depending on the particular characteristics of each airport, investment project and the region served, intensity exceeding 75% may be justified in exceptional circumstances for airports with traffic volume below 1 million passengers per annum.
- 104. In order to take account of the specific circumstances regarding a relocation of an existing airport and cessation of airport activities at an existing site, the Commission will assess, in particular, the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis or the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.
- 105. Additionally, under very exceptional circumstances, characterised by a clear market failure and taking into account the magnitude of the investment, the impossibility to finance the investment on capital markets, a very high level of positive externalities and the competition distortions, airports over 5 million passengers per annum may receive aid to finance airport infrastructure. However, in such cases, the Commission will always carry out an in-depth assessment, in particular on the proportionality, the necessity and the maximum aid intensity of the State aid granted on the basis of the funding gap analysis and the counterfactual scenario of each specific case, regardless of the average passenger traffic of that airport.

(f) Avoidance of undue negative effects on competition and trade:

- 106. In particular, the duplication of unprofitable airports or the creation of additional unused capacity in the catchment area of existing infrastructure might have particularly distortive effects. Accordingly, the Commission will, in principle, have doubts as to the compatibility of investment into airport infrastructure at an airport located in the catchment area of an existing airport⁸⁹ where the existing airport is not operating at or near full capacity.
- 107. Further, in order to avoid the negative effects of aid that may arise where airports face soft budget constraints⁹⁰, investment aid to airports with traffic of up to 5 million passengers can be granted either as an upfront fixed amount to cover eligible investment costs or in annual instalments to compensate for the capital cost funding gap resulting from the business plan of the airport.

⁸⁹ See Section 5.1.1. (a).

⁹⁰ If the aid were to be determined on the basis of ex post calculations (making good for any deficits as they arise), airports might not have much incentive to contain costs and charge airport charges that are adequate to cover costs.

108. In order to further limit any distortions, the airport, including any investment for which aid is granted, must be open to all potential users and must not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.

Notification requirements for aid schemes and individual aid measures:

109. Member States are encouraged to notify State aid schemes for investment aid for airports with average annual traffic below 3 million passengers.
110. When assessing an aid scheme, the conditions relating to the necessity of the aid, the incentive effect and the proportionality of the aid will be considered to be satisfied if the Member State has committed itself to granting individual aid under the approved aid scheme only after it has verified that the cumulative conditions in Section 5.1.1 are met.
111. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:
- a) investment aid to airports with average annual traffic above 3 million passengers;
 - b) investment aid to an airport with average annual traffic below 1 million passengers exceeding 75% aid intensity, with the exceptions of airports located in remote regions;
 - c) investment aid granted for the relocation of airports;
 - d) investment aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the two financial years preceding that in which the aid is notified;
 - e) investment aid aimed at the creation of a new passenger airport (including the conversion of an existing airfield into a passenger airport);
 - f) investment aid aimed at the creation or development of an airport located within 100 kilometres distance or 60 minutes travelling time by car, bus, train or high-speed train from an existing airport.

5.1.2. Operating aid to airports

112. Operating aid granted to airports either as individual aid or under an aid scheme will be considered compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty for a transitional period of 10 years starting from the date of the publication of these guidelines provided that the following cumulative requirements are met:

(a) *Contribution to a well-defined objective of common interest*

113. As described in point 13, in order to give airports time to adjust to new market realities and to avoid any disruptions in the air traffic and connectivity of the regions, the Commission consideres that for a transitional period of 10 years operating aid to airports will be considered to contribute to the achievement of an objective of common interest, if it:

- a) increases the mobility of European Union citizens and connectivity of regions by establishing access points for intra-European Union flights; or
 - b) combats air traffic congestion at major European Union hub airports; or
 - c) facilitates regional development.
114. Nevertheless, the duplication of unprofitable airports does not contribute to an objective of common interest. Where an airport is located in the same catchment area of another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airports located in that catchment area.
115. Accordingly, the Commission will have doubts as to the prospects for an unprofitable airport to achieve full operating cost coverage at the end of the transitional period, if another airport is located in the same catchment area.
- (b) Need for State intervention
116. In order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. State aid should be targeted towards situations where such aid can bring about a material improvement that the market itself cannot deliver.
117. The conditions that smaller airports face when developing their services and in attracting private financing are often less favourable than those faced by the major airports in the European Union. Therefore, under present market conditions, smaller airports may have difficulties in ensuring the financing of their operation without public funding.
118. Under current market conditions, the need for public funding to financing operating costs will, due to high fixed costs, vary according to the size of an airport and will normally be proportionately greater for smaller airports. The Commission considers that, under current market conditions, the following categories of airports, and their relative financial viabilities, can be identified:
- a) airports with up to 200 000 passengers per annum may not be able to cover to a large extent their operating costs;
 - b) airports with annual passenger traffic between 200 000 and 700 000 passengers per annum may not be able to cover a substantial proportion of their operating costs;
 - c) airports with annual passenger traffic of 700 000 to 1 million should in general be able to cover a larger portion of their operating costs;
 - d) airports with annual passenger traffic of 1-3 million should, on average, be able to cover the majority of their operating costs;
 - e) airports with annual passenger traffic above 3 million are usually profitable at operating level and should be able to cover their operating costs.

119. Therefore, the Commission considers that in order to be eligible for operating aid, the annual traffic of the airport must not exceed 3 million passengers.⁹¹

(c) *Appropriateness of State aid as a policy instrument:*

120. 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. An aid measure will not be considered compatible if other less distortive policy instruments or aid instruments allow the same objective to be reached.⁹²

121. In order to provide proper incentives for efficient management of the airport, the aid amount is, in principle, to be established ex ante as a fixed sum covering the expected funding gap of the operating costs (determined on the basis of an ex ante business plan) during a transitional period of 10 years. For these reasons no ex post increase of the aid amount should, in principle, be considered compatible. The Member State may pay the ex-ante fixed amount as an up-front lump sum or in instalments, for instance on an annual basis.

122. In exceptional circumstances, where future costs and revenue developments are surrounded by a particularly high degree of uncertainty and the public authority faces important information asymmetries, the public authority may also calculate the maximum amount of compatible operating aid according to a model based on the initial operating funding gap at the beginning of the transitional period. The initial operating funding gap is the average of the operating funding gaps (that is to say the amount of operating costs which is not covered by revenues) during the five years that precede the beginning of the transitional period (2009 to 2013).

123. Wherever possible, Member States are encouraged to design national schemes that reflect the main principles underlying public financing and to indicate the most relevant features of the planned public funding of airports. Framework schemes ensure coherence in the use of public funds, reduce administrative burden on smaller granting authorities and accelerate the implementation of individual aid measures. Furthermore, Member States are encouraged to give clear guidance for the implementation of State aid financing for regional airports and airlines using those airports.

(d) *Existence of incentive effect:*

124. 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.

(e) *Proportionality of the aid amount (aid limited to the minimum necessary):*

⁹¹ Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes. If an airport is part of a group of airports, the passenger volume is established on the basis of each individual airport.

⁹² See also point 91.

- 125. In order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.
- 126. The business plan of the airport must pave the way towards full operating cost coverage at the end of the transitional period. The key parameters of this business plan form an integral part of Commission's compatibility assessment.
- 127. The path towards full operating cost coverage will be different for every airport and will depend on the initial operating funding gap of the airport at the beginning of the transitional period. The transitional period will start from the date of the publication of these guidelines.
- 128. In any event, the maximum permissible aid amount during the whole transitional period will be limited to 50% of the initial funding gap for a period of 10 years.⁹³ For instance, if the annual average funding gap of a given airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an ex-ante established fixed sum would be EUR 5 million over ten years ($50\% \times 1 \text{ million} \times 10$). No further operating aid will be considered compatible for that airport.
- 129. By 10 years after the beginning of the transitional period at the latest, all airports must have reached full coverage of their operating costs and no operating aid to airports will be considered compatible with the internal market after that date, with the exception of operating aid granted in accordance with horizontal State aid rules, such as rules applicable to the financing of SGEIs.
- 130. Under the current market conditions, airports with annual passenger traffic of up to 700 000 may face increased difficulties in achieving the full cost coverage during the 10-year transitional period. For this reason, the maximum permissible aid amount for airports with up to 700 000 passengers per annum will be 80% of the initial operating funding gap for a period of five years after the beginning of the transitional period. For instance, if the annual average funding gap of a small airport over the period 2009 to 2013 is equal to EUR 1 million, the maximum amount of operating aid that the airport could receive as an ex-ante established fixed sum would be EUR 4 million over five years ($80\% \times 1 \text{ million} \times 5$). The Commission will reassess the need for continued specific treatment and the future prospects for full operating cost coverage for this category of airport, in particular with regard to the change of market conditions and profitability prospects.

(f) Avoidance of undue negative effects on competition and trade:

- 131. When assessing the compatibility of operating aid the Commission will take account of the distortions of competition and the effects on trade. Where an airport is located in the same catchment area of another airport with spare capacity, the business plan, based on sound passenger and freight traffic forecasts, must identify the likely effect on the traffic of the other airports located in that catchment area.

⁹³ The 50% intensity corresponds to the funding gap over 10 years for an airport which, starting from the initial operating cost coverage at the beginning of the transition period, achieves full operating cost coverage after 10 years.

- 132. Operating aid for an airport located in the same catchment area will be considered compatible with the internal market only when the Member State demonstrates that all airports in the same catchment area will be able to achieve full operating cost coverage at the end of the transitional period.
- 133. In order to limit further the distortions of competition, the airport must be open to all potential users and not be dedicated to one specific user. In the case of physical limitation of capacity, the allocation should be done on the basis of pertinent, objective, transparent and non-discriminatory criteria.
- 134. Further, in order to limit the negative effects on competition and trade, the Commission will approve operating aid to airports for a transitional period of 10 years beginning from the date of the publication of these guidelines. The Commission will reassess the situation of airports with annual passenger traffic of up to 700 000 four years after the beginning of the transitional period.

Notification requirements for aid schemes and individual aid measures:

- 135. Member States are strongly encouraged to notify national schemes for operating aid for the financing of airports, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the Member States' authorities and for the Commission.
- 136. Due to a higher risk of distortion of competition, the following aid measures should always be notified individually:
 - (1) operating aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the two financial years preceding that in which the aid is notified;
 - (2) operating aid to an airport, if other airports are located within 100 kilometres or 60 minutes travelling time by car, bus, train or high-speed train from an existing airport.

Aid granted before the beginning of the transitional period

- 137. With regard to operating aid granted before the beginning of the transitional period (including aid paid before the publication of these guidelines), such operating aid may be declared compatible to the full extent of uncovered operating costs provided that conditions a), b), c), d), e) and f) as set out in section 5.1.2, except points 115, 119, 121, 122, 123, 126, 127, 128, 129, 130, 132, 133 and 134 are met. In particular, when assessing the compatibility of operating aid granted before the entry into force of the present guidelines, the Commission will take account of the distortions of competition.

5.2. Start-up aid to airlines

- 138. As mentioned in point 15, State aid granted to airlines for launching a new route with the aim of increasing the connectivity of a region will be considered compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty, if the following cumulative conditions are fulfilled:
 - (a) *Contribution to a well-defined objective of common interest:*
- 139. Start-up aid to airlines will be considered to contribute to the achievement of an objective of common interest, if it:

- a) increases the mobility of European Union citizens and connectivity of regions by opening new routes; or
 - b) facilitates regional development of remote regions.
140. When a connection which will be operated by the new air route is already operated by a high-speed rail service or from another airport in the same catchment area under comparable conditions notably in terms of length of journey, it cannot be considered to contribute to a well-defined objective of common interest.
- (b) *Need for State intervention:*
141. The conditions that smaller airports face when developing their services are often less favourable than those faced by the major airports in the European Union. Also, airlines are not always prepared to run the risk of opening new routes from unknown and untested airports, and do not have appropriate incentives to do so.
142. On this basis, start-up aid is only allowed for routes linking an airport with fewer than 3 million passengers per annum⁹⁴ to another airport within the Common European Aviation Area⁹⁵.
143. Start-up aid for routes linking an airport located in a remote region to another airport (within or outside the Common European Aviation Area) can be granted irrespective of the size of the airports concerned.
144. Start-up aid for routes linking an airport with more than 3 million passengers per annum⁹⁶ and less than 5 million passengers per annum not located in remote regions can be considered compatible with the internal market only in duly substantiated exceptional cases.
145. Start-up aid for routes linking an airport with more than 5 million passengers per annum not located in remote regions cannot be considered compatible with the internal market.
- (c) *Appropriateness of State aid as policy instrument:*
146. 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. An

⁹⁴ Actual average annual passenger traffic during the two financial years preceding that in which the aid is notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes.

⁹⁵ Council Decision 2006/682/EC on the signature and provisional application of the Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area (ECAA) (OJ L 285, 16.10.2006, p. 1).

⁹⁶ See also Footnote 94.

aid measure will not be considered compatible if other less distortive policy instruments or aid instruments allow the same objective to be reached.⁹⁷

147. An ex ante business plan prepared by the airline should establish that the route receiving the aid should have prospects of becoming profitable for the airline without public funding at least after 3 years. In the absence of a business plan for a route, the airlines must provide an irrevocable commitment to the airport to operate the route at least for a period as long as the period during which it received start-up aid.

(d) *Existence of incentive effect:*

148. Start-up aid to airlines has an incentive effect if it is likely that, in the absence of the aid, the level of economic activity of the airline at the airport concerned would not be expanded. For example the new route would not have been launched.
149. The new route can start only after submitting the application for aid from the granting authority. If the new route begins before submitting the application for aid from the granting authority, any aid awarded in respect of that individual start-up aid will not be considered compatible with the internal market.

(e) *Proportionality of the aid amount (aid limited to the minimum necessary):*

150. Start-up aid may cover up to 50 % of airport charges in respect of a route for a maximum period of three years. The eligible costs are the airport charges in respect of a route.

(f) *Avoidance of undue negative effects on competition and trade:*

151. In order to avoid undue negative effects on competition and trade, when a connection (for example, city-pair) which will be operated by the new air route is already operated by a high-speed rail service or by another airport in the same catchment area under comparable conditions, notably in terms of length of journey, such air route will not be eligible for start-up aid.
152. Any public body which plans to grant start-up aid to an airline for a new route, whether or not via an airport, must make its plans public in good time and with adequate publicity to enable all interested airlines to offer their services.
153. Start-up aid cannot be combined with any other type of State aid granted for the operation of a route.

Notification requirements for aid schemes and individual aid measures:

154. Member States are strongly encouraged to notify national schemes for start-up aid to airlines, rather than individual aid measures for each airport. This is intended to reduce the administrative burden both for the Member States' authorities and for the Commission.
155. Due to a higher risk of distortion of competition, start-up aid to airports not located in remote regions with average annual traffic above 3 million passengers should always be notified individually.

⁹⁷

See also Footnote 94.

- 6. AID OF A SOCIAL CHARACTER UNDER ARTICLE 107(2)(A) OF THE TREATY**
156. Aid of a social character in air transport services will be considered compatible with the internal market within the meaning of Article 107(2)(a) of the Treaty, provided that the following cumulative conditions are met:⁹⁸
- (a) the aid must effectively be for the benefit of final consumers;
 - (b) the aid must have a social character, that is, it must, in principle, only cover certain categories of passengers travelling on a route (for instance passengers with particular needs like children, people with disabilities, people on low incomes, students, elderly people, etc.); however, where the route concerned links remote regions, such as for example outermost regions, islands, and sparsely populated areas, the aid could cover the entire population of that region;
 - (c) the aid must be granted without discrimination as to the origin of the services, meaning whatever airlines are operating the services.
157. Member States are strongly encouraged to notify national schemes for aid of a social character, rather than individual aid measures.

- 7. CUMULATION**
158. The maximum aid intensities applicable under these guidelines apply regardless of whether the aid is financed entirely from State resources or is partly financed by the Union.
159. Aid authorised under these guidelines may not be combined with other State Aid, *de minimis* aid or other forms of Union financing, if such a combination results in aid intensity higher than that laid down in these guidelines.

8. FINAL PROVISIONS

8.1. Annual reporting

160. In accordance with Council Regulation (EC) No 659/1999⁹⁹ and Commission Regulation (EC) No 794/2004¹⁰⁰, Member States must submit annual reports to the

⁹⁸ See for example, as regards the assessment of aid of a social character granted to individual consumers, Commission decision of 16 May 2006, N 169/2006 – United Kingdom – Aid of social character air services in the Highlands and Islands of Scotland (OJ C 272, 9.11.2006, p.10); Commission decision of 11.12.2007, N 471/2007 – Portugal – Social allowances to passengers residing in the Autonomous Region of Madeira and students, in air transport services between mainland Portugal and the Autonomous Region (OJ C 46, 19.2.2008); and Commission decision of 5 January 2011, N 426/2010 – France - Aid of a social character for certain categories of passenger on air services between La Réunion and metropolitan France (OJ C 71, 5.3.2011, p.5).

⁹⁹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

¹⁰⁰ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

Commission. The annual reports will be published on the internet site of the Commission.

8.2. Transparency

161. The Commission considers that further measures are necessary to improve the transparency of State Aid in the Union. In particular, steps must be taken to ensure that the Member States, economic operators, the interested public and the Commission have easy access to the full text of all applicable aid schemes in the aviation sector and to pertinent information about individual aid measures.
162. Member States should publish on a comprehensive State aid website, at national or regional level, the following information on State aid measures:
- a) the full text of the approved aid scheme or the individual aid granting decision and its implementing provisions,
 - b) the identity of the granting authority,
 - c) the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME / large company), the region in which the beneficiary is located (at NUTS level II) and the principal economic sector in which the beneficiary has its activities (at NACE group level). Such a requirement can be waived with respect to individual aid awards below EUR 200 000.

163. Such information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the general public without restrictions.¹⁰¹

8.3. Monitoring

164. Member States must ensure that detailed records regarding all measures involving the granting of State aid in accordance with these guidelines are kept. Such records must contain all information necessary to establish that the compatibility conditions and notable those regarding, where applicable, eligible costs and maximum allowable aid intensity, have been observed. These records must be maintained for 10 years from the date on which the aid was granted and be provided to the Commission upon request.
165. In order to allow the Commission to monitor the progress of the phasing out of operating aid to airports and its impact on competition, Member States must submit a regular report (on a yearly basis) on the progress in terms of reduction of operating aid for each airport benefiting from such aid. In certain cases, a monitoring trustee may be appointed to ensure compliance with any conditions and obligations underpinning the authorisation of the aid.

8.4. Evaluation

166. To further ensure that distortions of competition and trade are limited, the Commission may require that certain schemes be subject to a limited duration and to

¹⁰¹ This information should be regularly updated (e.g. every 6 months) and should be available in non-proprietary formats.

an evaluation. Evaluations should in particular be carried out for schemes where the potential distortions are particularly high, that is to say schemes that may risk to significantly restrict competition if their implementation is not reviewed in due time.

167. Given its objectives and in order not to put a disproportionate burden on Member States and on smaller aid measures, this requirement applies only for aid schemes with large aid budgets, containing novel characteristics or when significant market, technology or regulatory changes are foreseen. The evaluation must be carried out by an expert independent from the aid granting authority on the basis of a common methodology¹⁰² and must be made public.
168. The evaluation must be submitted to the Commission in due time to allow for the assessment of the possible prolongation of the aid scheme and in any case upon expiry of the scheme. The precise scope and methodology of the evaluation that is to be carried out will be defined in the decision approving the aid scheme. Any subsequent aid measure with a similar objective must take into account the results of that evaluation.

8.5. Appropriate measures

169. Member States should, where necessary, amend their existing schemes in order to bring them into line with these guidelines within 12 months of their publication.
170. Member States are invited to give their explicit unconditional agreement to the present guidelines within two months from the date of their publication in the *Official Journal of the European Union*. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

8.6. Application

171. These principles in these guidelines will be applied from the date of their publication in the Official Journal and will replace the 1994 Aviation Guidelines and the 2005 Aviation Guidelines.
172. In the light of the development of the aviation sector, and notably its liberalisation, the Commission considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State Aid¹⁰³ should not apply to pending cases of illegal operating aid to airports granted prior to the publication of these guidelines. Instead, the Commission will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before the publication of these guidelines and the beginning of the transitional period.
173. As regards investment aid to airports, the Commission will apply these guidelines to all notified investment aid measures in respect of which it is called upon to take a decision from the publication of these guidelines, even where the projects were notified prior that date. In accordance with the Commission notice on the

¹⁰² Such a common methodology may be provided by the Commission.

¹⁰³ Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.05.2002, p. 22).

determination of the applicable rules for the assessment of unlawful State aid¹⁰⁴, the Commission will apply to unlawful investment aid to airports the rules in force at the time when the aid was granted. Accordingly, it will apply these guidelines in the case of unlawful investment aid to airports granted from the publication of these guidelines.

174. As regards start-up aid to airlines, the Commission will apply these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from the publication of these guidelines, even where the measures were notified prior that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will apply these guidelines in the case of unlawful start-up aid to airlines granted from the publication of these guidelines.

8.7. Review

175. The Commission may undertake an evaluation of these guidelines at any time and will do so at the latest six years after their publication. That evaluation will be based on factual information and the results of wide-ranging consultations conducted by the Commission on the basis of data provided by Member States and stakeholders. The Commission will reassess the situation of airports with annual passenger traffic up to 700 000 in order to appreciate, looking forward, the need for continued specific compatibility rules on operating aid in favour of this category of airport in the light of the future prospects for full operating cost coverage, in particular with regard to the change of market conditions and profitability prospects.
176. After consulting Member States, the Commission may replace or supplement these guidelines on the basis of important competition policy or transport policy considerations.

¹⁰⁴ Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.05.2002, p. 22).