ACI EUROPE POSITION

A level playing field for European airports – the need for revised guidelines on State Aid

16 June 2010

1. INTRODUCTION

Airports play a vital role in the European economy. They ensure the connectivity of a region and its citizens, contribute extensively to economic growth and support thousands of jobs at local, regional and national level. Consequently, in light of their positive economic impact, the development of airports has become a key priority in the framework of national and regional economic policies.[1]

At the same time, European airports are increasingly competing for traffic in a liberalised European aviation market. Any distortion of competition between airports that may arise from incompatible state aid given to airports and airlines is therefore not acceptable. It is of fundamental importance to ensure a level playing field for airports in a European single market – also with a view to other transport modes such as rail.

In recent years, the use of public funds for the development of airports has been repeatedly contested both by competing airports and by airlines flying to these airports. In order to ensure a level-playing field for airports in Europe, ACI EUROPE had welcomed a clarification of this issue through the European Commission's 'Guidelines on financing of airports and start-up aid to airlines departing from regional airports' in 2005.[2]

Unfortunately, these guidelines have failed to provide a clear legal framework for airports to play their role in a competitive aviation industry. Numerous complaints from third parties on alleged state aid have resulted in a heavy workload for the European Commission and a disproportionate administrative burden for airports subject to an investigation by the Commission.

Indeed, airports are highly capital-intensive businesses, hence large infrastructure projects at specific airports may require some form of public funding at the outset. In particular, the public funding of infrastructure is crucial for many regional airports. In addition, it is common practice to share the risk between airports and airlines when establishing new routes, e.g. through incentive measures such as reduced airport charges. Therefore, legal certainty in these areas is of fundamental importance for the aviation sector as whole.

Against this background, ACI EUROPE is calling for a revision of the current guidelines, with the ultimate objective to

- **Create a level-playing field within the airport industry;**
- **Establish a clear and simple set of rules to achieve legal certainty for European airports; and**
- **Encourage entrepreneurship in the aviation industry by allowing for commercially viable partnerships between the airports and the airlines.**

---

[1] See ACI EUROPE Policy Outlook 2010. According to a study conducted by ATAG in 2008, European airports have contributed approx. €59 billion to European GDP in 2006.
[2] 2005/C 312/01

2. ASSESSMENT OF THE GUIDELINES FROM 2005

The current guidelines from 2005 constitute a highly complex set of provisions. The overall assessment of the application of the guidelines, however, is negative.

2.1 The public funding of infrastructure

The Commission practice with regard to the development of airport infrastructure has been constructive. The Commission adopted a flexible approach in recent years and approved all submitted notifications of state aid. This included both smaller airports and larger airports, giving rise to additional questions on the scope of the guidelines (which in principle excluded larger airports from state aid).

However, it remains contested whether the public funding of infrastructure as a whole should fall under EU State Aid Guidelines. In a pending case before the European Court of Justice related to Leipzig/Halle airport, Germany is appealing against a Commission decision to consider the public investment in the airport as (compatible) aid. In this respect, Germany is seeking clarity on whether the public funding of infrastructure should be subject to EU State Aid rules in general. The court ruling will have a major impact on the future assessment of public investment in infrastructure in the EU. Further clarification will be required in the revised guidelines.

2.2 Start-up aid to airlines

Only a few notifications of aid schemes have been submitted to the European Commission since the publication of the guidelines. This is a clear indication of the overly complex set of rules and resulting legal uncertainty for airports. At the same time, numerous complaints from third parties have been submitted to the Commission, leading to lengthy investigations on alleged state aid and a disproportionate burden for airports to justify the grant of specific incentive measures.

Overall, this procedure is not compatible with the commercial approach all airports are expected to pursue, be they public or private – airports need to be able to flexibly react to commercial opportunities, e.g. the attraction of a new carrier at the airport. A simplification and clarification of the present guidelines on both key elements is therefore clearly needed.

3. KEY PRINCIPLES FOR A REVISION OF THE GUIDELINES

3.1 A level playing field for European airports

The European aviation sector has undergone major changes in recent years, in particular due to the liberalisation of the market in the 1990s. A new market structure has emerged – Low-Cost carriers (LCCs) now represent 35% of total intra EU-traffic, and restructured network carriers which already cooperate within three major global alliances are engaged in a process of consolidation, thus increasing the market power of the airlines.

This new market structure has led to a strong competition between airports in all segments of the industry. Low-cost carriers are able to flexibly deploy their aircraft and crews at the most profitable location, and network carriers and their alliances have followed this trend by diversifying their base structure. At the same time, most European airports, while still publicly owned, are managed as a corporatized company, thus acting as businesses in their own right and actively seeking to expand their business to gain new traffic.[3]

Against this background, the creation of a level-playing field for European airports is crucial. State aid for investments in airport infrastructure and start-up aid for airlines that could distort competition in the European single market should only be accepted in exceptional circumstances. The current guidelines from 2005 have failed to provide this level-playing field and need to be clarified and simplified.

3.2 A clear and simple set of rules

First of all - the market investor principle!

As a general principle, private investment cannot be considered as State aid. At the same time, a public operator can act as a private investor if the investment is commercially justifiable, i.e. that a private investor would have acted in a similar way. In the area of airports, however, it should be noted that investments are often large-scale infrastructure projects with a very long time-horizon. Consequently, a first return on capital for public and private investors alike may take as long as 10-20 years in some cases. This needs to be reflected in the way the Private Investor Test is applied to airports.

In particular, it should be clarified that public financing which is commercially justifiable in a long-term perspective do not constitute state aid and should not be subject to the guidelines.

Create legal certainty in the revised guidelines!

However, in practice it is often not clear for the airport which requirements are needed to fulfil the Private Investor Test. Whereas flexibility is needed in the application of the test, some clear criteria should be established giving the airport an indication on the elements it needs to comply with. Only those cases that go beyond these criteria should be assessed on a case by case basis.

In addition, investments and support measures undertaken by publicly-owned airports with their own revenues generated from their activities should not constitute state aid, as no proper public funds are involved. However, there remains a considerable degree of legal uncertainty on the interpretation of own resources in the current guidelines (§51). This legal uncertainty is detrimental to the flexibility needed in a competitive market and should be clarified in the revised guidelines.

[3] According to the ACI EUROPE ownership report 2010, 74% of publicly owned airports are managed as a corporatized company in Europe (236 airports in total).

Establish clear and simple rules for compatible State Aid!

As a general rule, State aid that distorts competition is not compatible with the internal market and should be ruled out for all airports.

However, several exemptions should apply, based on the EU Treaty and general policy considerations:

- **Airports in category D** (up to 1 million pax): It is widely acknowledged that airports below a certain threshold are normally not commercially viable and may need public funding. In addition, these small airports often ensure the territorial connectivity of regions and conurbations and usually do not adversely affect trading conditions in the EU given their limited traffic volume. Therefore, the use of public funds for the development of new infrastructure and new routes should be allowed without prior notification. However, any public funding should end a soon as the threshold of 1 Million passengers has been reached.
- **Outermost regions:** According to the EU Treaty (Art. 107), aid granted for the development of certain regions and the execution of certain important projects of common economic interest may be considered compatible with the internal market.
- **Public Service Obligations:** As stated by the current guidelines, public financing of Public Service Obligations (PSO) at airports of all categories carried out in compliance with the Altmark judgment and the Commission decision 2005/842/EC does not constitute State Aid. The scope of these PSOs may be extended up to the overall management of the airport.
- **Operation of airport infrastructure**: As a general rule, operating aid for airports should be prohibited, unless this aid relates to PSO (see preceding paragraph) or activities under State responsibility such as security, air traffic control, police or fire fighting.
- **Construction of Airport Infrastructure:** As a general principle, the public financing of airport infrastructure (runway, terminal) for airports in categories A, B, and C that does not fall under the private investor principle should not be permitted. However, **airport-related infrastructure** such as access roads or train stations which enhance the connectivity and inter-modality at the airport should be excluded from the guidelines.

3.3 Encourage entrepreneurship in the aviation industry by allowing for commercially viable partnerships between the airports and the airlines

The grant of start-up aid to airlines has been one of the most contested issues both within the airport industry and between competing airlines. The low number of notified aid schemes and the high number of complaints underline the fact that the current framework does not correspond to the needs of the market.

Today, incentive measures for airlines are a common practice at almost all European airports. Airports offering reduced airport charges for a limited period of time share the entrepreneurial risk of a new route with the airline. The EU Airport

Charges Directive rightly recognises this practice by explicitly allowing the airport to modulate their charges.

In the same way, negotiated long-term agreements between a carrier and the airport are a market reality in Europe. These agreements usually define the level of airport charges levied by the airport and the number of flights offered by the airline over a defined period of time. They benefit both parties – this enables the airport to invest in its facilities with a view to its long-term development, while the air carrier benefits from a fixed level of costs during that period.

Against this background, clear rules for incentive measures and long-term agreements between the airport and the air carrier are needed in order to create a level-playing field. They should apply to all airports and should replace the overly complex rules of the current guidelines.

- **Incentive schemes for new routes**: As a general rule, only commercially viable support schemes should be allowed at Community airports. In the case of publicly funded schemes, these measures need to fulfil the requirements of the Private Investor Test. This means that they should be degressive over time and may have a maximum duration of five years.
- **Long-term agreements:** Depending on the regulatory system in place at national level, an airport may have the commercial freedom to negotiate individual agreements with an air carrier for a fixed amount of time. If concluded, these agreements need to be non-discriminatory and need to fulfil the requirements of the private investor test if funded by public means.
- **Category D airports and outermost regions**: As an exception, Category D airports and airports located in outermost regions shall be exempted from State aid rules and may use public funds to develop their airports. It should be kept in mind that air transport fulfils both an essential social and economic function in remote regions, connecting communities to key services. No notification should be required for these measures. However, any public funding should end as soon as the threshold of one Million passengers has been reached.

ACI EUROPE believes that new guidelines based on these elements will ensure a level playing field for European airports. At the same time, it should create legal certainty and reduce the administrative burden for both public authorities and airports that become subject of detailed state aid investigations. A clear and simple legal framework will contribute to a sustainable growth of the aviation sector in Europe.

***

For further information, please contact:

Christoph Köppchen
Policy Manager
ACI EUROPE
6, Square de Meeûs, 1000 Brussels, Belgium
Tel: 0032 (0)2 552 09 73 – fax: 0032 (0)2 502 56 37
Email: christoph.koeppchen@aci-europe.org

ACI EUROPE is the European region of Airports Council International, the only worldwide professional association of airport operators. ACI EUROPE represents over 400 airports in 46 European countries. Member airports handle 90% of commercial air traffic in Europe, welcoming nearly 1.5 billion passengers each year.