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Zuzanna Kurek i6000275

Anjena Narang i6003586

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**THE DEVELOPMENT OF STATE AID IN THE AVIATION SECTOR:
A CASE STUDY ON THE LOW-COST AIRLINE RYANAIR**

Abstract

This paper deals with state aid in the aviation sector and concentrates in particular on the case law of Irish low-cost carrier, Ryanair. The authors first provide a general introduction to European legislation in the aviation sector as well as a historical overview of developments in that area, starting from 1987 when the EU agreed to liberalize the air transport sector and create one single aviation market. In the second part of this paper, the authors concentrate on Ryanair, as an example of a state aid beneficiary. The EU Commission's approach towards allowing operating aid in the form of start-up aid will be discussed. A particular emphasis will be put on the Charleroi case that can now be considered a groundbreaking judgment for the aviation sector. The paper concludes with a discussion on the impact of the Charleroi case on the current and future developments of state aid in the European aviation sector.

Keywords: *State aid – aviation sector – low cost airlines*

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1. Introduction

1987 was a breakthrough year for the European aviation sector – the EU agreed to liberalize the air transport sector and create one single aviation market. It nevertheless took several years for that market to expand. It finally did boom around the year 2000, when the liberalization brought a number of new players to the aviation market – the low-cost airlines. The low-cost airlines offered European travelers a complete new approach – flights available at low prices, provided at the expense of excessive comfort and exclusivity. Today, 26 years after the decision to liberalize the aviation sector was taken, we can observe a great development in this area. The aviation sector contributes heavily to the European economy with more than 130 scheduled airlines, a network of over 450 airports, and 60 air navigation service providers. The various airlines and airports contribute with more than 120 billion euro to the European Union's GDP.¹ The evolution of the air transport sector was a long and relatively slow process – as an example, even though the low-cost airlines emerged in the 00's, it was only until recently that a groundbreaking decision in this field has been rendered. It is nevertheless interesting, and also important, to look at the growing expansion of that area, especially with regards to the granting of state aid, as this type of financial support is crucial for the establishment and development of the low-cost carrier model. The Commission has accepted that airports can have an impact on the success of local economies, even in relation to education and health services. More importantly they play a significant role in the integration of the outermost regions within the EU.

This paper is divided into two substantial parts – in the first part, the authors will provide a general overview of the legal developments in the EU's aviation sector starting from 1987 (the year the market was liberalized) until the most recent piece of legislation – the 2005 Aviation Guidelines. The impact of the liberalization in the aviation sector will be addressed, pointing towards the rather newly established low-cost carrier airline models and the role of regional airports in the EU. As the authors want to avoid the simple conceptualization of the topic, the second part will more generally concentrate on a particular case. The case in question is the groundbreaking judgment of the Court of First Instance in the *Ryanair Ltd. v*

¹ European Commission Press Release, State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland, IP/12/833, 25th July 2012.

*Commission of the European Communities*² (hereinafter: the Charleroi case), rendered in December 2008. Before analyzing all the merits of the dispute, a short introduction of the main actor involved – Ryanair, will be provided, including a general overview of almost a dozen of other cases that have been initiated by the European Commission against the Irish airline.

By concentrating on both theory and practice, this paper will provide a general overview of existing laws and procedures in the field of low-cost airlines and state aid. The throughout description of past and existing European legislation in that field will provide a clear outline of the developments that have occurred in that sector. That will be complimented by a more practical approach of providing a detailed overview of the Charleroi case. The Charleroi decision of the CFI can be considered as groundbreaking, as it provided a new approach for the Commission to undertake while assessing state aid granted in the aviation sector. It is therefore necessary to address that case in particular as its significance was way bigger than any other case we could have seen being decided upon in the field of low- cost airlines.

Following the analysis of the Charleroi case, where key issues from both the Commission decision and the CFI's judgment will be identified, we will provide their own opinion about the developments of state aid for the low-fare airlines sector. We will discuss the possible impact of the Charleroi judgment on the future decisions rendered by the European Commission. We will also take a critical approach towards the assessment of the development that has occurred in the European legislation dealing with state aid granted to the aviation sector. The paper will conclude with the findings and main points that the authors have thoroughly discussed in this paper.

² Case T-196/04 *Ryanair Ltd. v. Commission of the European Communities* (supported by the Association of European Airlines ('AEA')).

2. EU State aid in the Aviation sector

The aviation sector contributes heavily to the European economy with more than 130 schedules airlines, a network of over 450 airports, and 60 air navigation service providers. The various airlines and airports contribute with more than E120 billion to the European Union's GDP.³ Traditionally, air transport has been a highly regulated industry in itself, dominated mainly by national flag carriers and state-owned airports. In order to tackle problems of air transport congestions in the main European airports, the Commission has taken the view that developing regional airports will also have a positive effect on regional economies concerned.⁴ The aim to regulate state aid in the aviation sector thus relates closely to the proper attainment of the internal market, where fair conditions of competition in the industry on the one hand and securing free movement rights by triggering economic circulation on the other, are crucial.

It was not until 1987 that in order to create a single market for air transport, the EU liberalized its air transport sector in three stages. Before that point, protected and fragmented aviation markets existed across Europe. Domestic air services within each country were governed by national rules, which varied enormously in the degree to which competition was permitted or promoted. International air transport in Europe was governed by the bilateral air services agreements between each pair of countries. Although some of these agreements were relatively liberal, all contained traditional ownership and control restrictions and many restricted market access and capacity, frequently allowing only one airline from each country to operate services, often on a limited number of specified routes.⁵

In the first phase, the 1987 measures granted more flexibility to airlines in respect of seat capacity sharing and by this means, limited the right of governments to object the introduction of new fares. The decision to create a single market in aviation was in line with the aim to create a single internal market across diverse ranges of economic activities within the Union. The Council took the first major step towards the creation of a common air transport policy in the EU, with the adoption of the First Aviation Liberalization Package, which was agreed in

³ European Commission Press Release, State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland, IP/12/833, 25th July 2012.

⁴ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ 2005 C/312/.

⁵ International Civil Aviation Organization, *European Experience of Air Transport Liberalization*.

December 1987.⁶ Although the bilateral framework controlling air traffic in the EU was left in place, relaxation and flexibility were on the agenda. The package removed the single designation provisions, thus any number of airlines could operate on various international routes in the Community. Most importantly it removed the possibility for Member States to block proposals for economic low fares. As a result of the first package legislation, low fair airlines were able to enter the previously protected market. Yet, the first package was limited in time and was enacted on the assumption that it would be revised by 1990 and further measures should be adopted in 1992. The second Aviation Liberalization Package in 1990 opened up the market further as it opened up routes between almost all European airports.⁷ The third package, following the stage of liberalization, applied measures from January 1993. The legislative package introduced the freedom to provide services within the EU as well as the right for airlines of one Member State to operate a route within another Member State. It harmonized requirements for an operating license for European airlines and allowed for the possibility for national governments to impose public service obligations on routes, essential for regional development.

2.1 Emergence of the low-cost carrier business model

As a result of the single market in air transport, European carriers were granted an almost absolute freedom to choose their routes, schedules, capacities and fares without any state intervention. This also meant that access to the air transport market was essentially open to all carriers that could qualify for a Community license. Due to the market opening, particular national flag carriers were marking minimal profits. The single market did consequently create a whole new industrial phenomenon, the 'low cost carriers' (LCC). Interestingly, not only the LCC emerged out of market liberalization but also the 'niche operator' companies, which were focused on business flights only. The impact of the liberalization policy in the air transport sector thus led to a crucial degree of market segmentation.⁸

National carriers were redundant towards the new competitive environment. The shift from a highly regulated market, with strong government protectionism, towards an open market and

⁶ 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 1994 *OJ C* 350, 10.12.1994.

⁷ Louise Butcher, *Aviation: European liberalization*, 1986-2002, House of Commons, Library.

⁸ D. Johnson and C. Turner, *European Business* (2nd edition, Routledge, New York, 2006) p.222.

promotion of competition was seen as a threat to already established airlines and routes.⁹ Particularly due to the liberalization, a new generation of airlines applying the low fares business model – with Ryanair and easyJet being the most noticeable examples, were changing the nature of the aviation sector. Following early liberalization between Ireland and the UK, Ryanair emerged as a new entrant in a market that had been dominated by Aer Lingus and British Airways. Ryanair initially introduced services between Ireland and UK destinations, including London. Once the third liberalization package was introduced in 1993 Ryanair was able to start services between the UK and continental Europe (for more information about Ryanair, consult chapter 3).¹⁰

2.2 The importance of regional airports in light of EU competition law – a new phenomenon?

The Commission has accepted that airports can have an impact on the success of local economies, even in relation to education and health services. More importantly, they play a significant role in the integration of the outermost regions within the EU. Strikingly, airports are given a heavy emphasis in the promotion of business activity as well as economic, social and regional cohesion within the EU. In light of liberalization and the emergence of the LCC's, regional airports were given even more attention. Given the fact that there is currently no universally accepted definition of 'regional airports', they are regarded as category C and D airports, which cover national airports, with an annual passenger volume of between 5 and 10 million (C), and small regional airports with a volume of less than 1 million passengers (D).¹¹

What has been closely interlinked with the development of regional airports, is the aim to enhance mobility for European citizens. The European Commission acknowledges that regional airports often face a less favorable situation compared to larger hub airports, due to their decreased reference airlines, which mostly prefer larger airports in order to offer passengers as many connections as possible and make use of the economies of scale of larger airports.¹² Hence, regional airports do not naturally achieve the size needed for being sufficiently attractive for common airlines and passengers, also due to the location of these airports, which is often in the outset of bigger cities, e.g. Brussels Charleroi airport, which is

⁹ European Low Fares Airline Association, *Liberalization of European Air Transport: The benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment*.

¹⁰ *Ibid*.

¹¹ 2005 Guidelines, para.13.

¹² *Ibid*, para.20.

set on the site of a former coalfield.¹³ The effects of state aid given to airports on competition and trade between Member States, relate to the competition between airports itself and to the extent public funding may distort competition therein.¹⁴ The Commission is of the opinion that larger airports and public funding respectively are likely to distort competition, whereas aid to regional airports, particularly to airports of class D, is unlikely to distort competition incompatible with the internal market, but would on the opposite, foster regional development. It is in this vein that the Commission has altered its strict state aid regime in favour of regional airports and LCC's since an increasing number of small-medium regional airports rely on the operational activity of such airlines, as will be discussed in the forthcoming.¹⁵

2.3 Liberalization and EU State aid Law

Air transport was specifically excluded from the application of the competition provisions, yet the importance of them was indisputable. For many years, State aid granted to or by airports was given little significance in the Commission's State aid policy. The situation changed with the implementation of the third liberalization package, which created a single aviation market by giving all airlines in possession of a Community license, unrestricted access to the intra-Union market. This change made it necessary to ensure that Member states did not engage in behavior, which would distort competition between the different carriers. In this vein, a number of EC governments developed plans for capital injections and restructuring to ensure that those airlines survived. The European Commission accepted that there was a need for a period of restructuring in the airline industry.¹⁶

Hence, liberalization has been closely linked to the application of European state aid rules. The application of European state aid rules in the aviation sector has often been described as “politically and legally controversial”¹⁷ as well as “one of the most spectacular areas” in State aid law.¹⁸ Although the lasting view has long been that there is no need for further State aid to the aviation industry, nonetheless the last two decades show heavy state intervention in

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 39.

¹⁵ T. D'Alfonso et. al, *Assessing the Impact of Competition on the Efficiency of Italian Airports*, Technical Report no.1, 2013.

¹⁶ International Civil Aviation Organization, 2013.

¹⁷ Soames and Ryan, ‘State Aid and Air Transport’, *European Competition Law Review* 5, 1995, p. 309.

¹⁸ L. Hancher, et. al, *EC State Aids*, (2nd edition, Sweet & Maxwell, London, 1999, p. 262.

this sector. The liberalization process removed the regulatory protection that most national airlines had enjoyed. In the early to mid 1990s, this had led to a series of major financial problems of various European air-carriers. Against the context of liberalization of the market for air transport services, in 1994 the Commission adopted Guidelines on State aid in the aviation sector (the 1994 Aviation Guidelines), focusing on social and restructuring aid to airlines, which deal almost exclusively with the conditions for granting State aid to airlines.

2.4 The legislation

2.4.1 1994 Aviation Guidelines

Two major developments resulting from the changes in the European air transport market since the early 1990s built the ground for the much needed regulation on EU level. The emergence of low-cost carriers and the increased competition between airports, particularly the growing number of newly created regional airport infrastructure.¹⁹ Compared with traditional air carriers, the market share of low-cost airlines rose from 4,0 % in 1998 to 20,8 % in 2004.²⁰ In 2004, the three main low-cost airlines transported over 62 million passengers in the EU. In order to grasp the broad picture regarding State aid in the airline sector, the European Commission conducted a survey between 1992 and 1993 and concluded that State aid rules were frequent in the sector and that existing transparency requirements had not been properly implemented.

In 1993 the Commission set up the *Comité des Sages*, a panel of experts in the transport sector for creation of the further policy objectives. The Committee supported a stricter application of the Competition rules envisaged in the Treaty, particularly the application of State aid rules. The Committee was of the opinion that granting State aid to airlines could in fact be in the interest of the Community. However, it would have to be the part of a general program of restructuring for the purpose of stimulating the commercial footing and therefore increasing the overall competitiveness of the aviation sector. When drafting the 1994 Guidelines on the application of the state aid rules to the aviation sector²¹, the Commission did not exactly follow the demand of the Committee. It insisted on an absolute 'one time, last time' rule and it did clarify that a second injection of State aid will only be considered in the most exceptional

¹⁹ State aid granted to or by airports, the recent Commission decision in practice.

²⁰ 2005 Guidelines, para.16.

²¹ Community Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid to the aviation sector, *OJ C 350, 10.12.1994*.

cases and in the light of unforeseeable circumstances. The 1994 Aviation Guidelines were meant to respond to two main concerns, namely the completion of the internal market for air transport and the increase of transparency at the different levels of the state aid notification procedures.²²

Part I of the Guidelines concerns aid to air carriers, stretching over any activities linked to the transport by air, but excluding subsidization of aircraft production which is not related to aid airlines. On the other hand, aid granted to airlines in order to promote acquisition or operations of certain aircraft are covered.²³

Part II of the Guidelines refers to State investment in airport infrastructure. The relevant paragraph, declares that 'the construction of (airport) infrastructure projects represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid.'²⁴ Hence, such measures are excluded from the scope of the Guidelines, only as far as such funding does not constitute possible aid resulting from preferential treatment of certain undertakings, using the infrastructure.²⁵ In Paragraph 13 the Commission notes that since measures involving state intervention are not assessed on their effects, but rather on their aim, alleged fiscal or social character of aid, they cannot automatically lead to exemption from the application of Art. 107(1) TFEU. This line of reasoning might look contemporary in respect to the positive approach the Commission has towards social measures, yet such social measures may confer a competitive advantage to an airline as it could enable it to avoid costs, which would have been real under normal market circumstances, thereby preventing market forces from having their normal effect.²⁶

Part III of the Aviation Guidelines identifies two kinds of operating aid to airlines. The first involves Public Service Obligations (PSO) and the second, aid of social character. The Guidelines clarify that direct aid, which aims at covering operating losses, is in general not compatible with the internal market and may not be exempted. Yet, the Commission also declared that it would pay particular attention to the concern of the Member State to promote regional links with disadvantaged areas. As a consequence, the Guidelines establish that the

²² 1994 Guidelines para.7.

²³ *Ibid*, para.10.

²⁴ 2005 Guidelines, para.19.

²⁵ 1994 Guidelines, para 12.

²⁶ Case C-301/87, France v Commission [1990] ECR I-307, para. 41.

direct operational aid of air routes can in principle only be accepted in the case of a PSO and if the aid granted is of social nature.

Since the adoption of the 1994 Aviation Guidelines, the structure of the European air transport market has changed and there have been two major developments.²⁷ The Commission was of the opinion that the Guidelines do not cover all relevant and new aspects relating to financing of airports and in particular operating aid, in form of start-up aid, for new routes since they relate primarily to the privatization of flag carriers and leave issues of airport financing out of perspective.²⁸ Therefore, the Commission decided to address those remaining issues in a new legislation.

2.4.2 2005 Aviation Guidelines

With the emergence of low cost airlines and the new form of competition, particularly in respect of the importance the Commission placed on the role of regional developments, the Commission adopted the 2005 Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports (the 2005 Aviation Guidelines). The reasoning behind the new piece of legislation was to lay down the rules for the approval of public financing of airports and airlines under EU state aid law.²⁹

The 2005 Aviation Guidelines were a reaction to the legal and political dispute over the bilateral agreement between low-cost operator Ryanair and Charleroi airport on the reduction of charges and financial support to Ryanair in exchange for Ryanair's agreement to base aircraft at the airport, which will be addressed in more detail in chapter 4 of this paper. The 2005 Aviation Guidelines were intended to tackle air transport congestion in the main European airports and simultaneously secure the applicability of the competition rules. The Commission believed that State aid granted to airlines departing from regional airports can contribute to the creation of a critical mass of passenger traffic, rendering unprofitable infrastructures – profitable.³⁰

In this vein, rather than to replace the 1994 Guidelines, the new Guidelines were intended to contemplate the existing rules on the different measures of financing airports and start-up aid

²⁷ Arhold, 'European Airline Wars: German Courts Divided over Actions against Low-Cost carriers', *European State Aid Law Quarterly*, 2008.

²⁸ Background note on State aid to the air transport sector, MEMO/08/962, 12th November 2008.

²⁹ Squire et al., *European Commission consultation- shaping State aid for airports and airlines*.

³⁰ Review of the Community Guidelines on Financing of Airports and Start-up Aid to Airlines departing from Regional Airports, Questionnaire.

for airlines operating services from regional airports.^{31 32} The fact that the construction of an airport as infrastructure constitutes a measure of general economic policy, does not include aid resulting from preferential treatment of certain enterprises by Member States and neither does the aid resulting from preferential treatment of certain companies for the use of the infrastructure. Therefore, the 2005 Guidelines have to be considered as an add-up, where the Commission took account of the role of regional airports in the Union's policy.³³ The Guidelines express a positive approach towards developing regional airports, while at the same time they intend to ensure strict compliance with the principles of transparency, non-discrimination and proportionality. Accordingly, operating aid granted to airports or airlines will only be declared in compliance with the internal market in exceptional circumstances and under strict conditions in regions, which have been classified as underprivileged.³⁴ The framework specifies to what extent public financing for airports and State aid for starting up air routes will be assessed by the Commission in the light of the competition rules.³⁵ The Guidelines cover two areas in the aviation sector, which have gained importance ever since the liberalization package in the 1990s³⁶ – start-up aid for new air routes and the financing of airport infrastructure and operation.

The 2005 Aviation Guidelines attempt to meet the challenges of State aid in the air transport sector by contemplating the regulatory framework with the changing face of airline industry. Particularly external factors such as the terrorist attacks from 11th September 2001, led to the growth of low-cost carriers – the lower demand from established airlines led to lower fuel prices and lower airport charges, allowing for the entry of new competitors. The Guidelines also reflect the jurisprudence of the European Courts, that airport management and operation activities consisting in the provisions of airport services to airlines are economic activities. Yet, public authorities may consider that certain economic activities carried out by airports constitute a service of general economic interest. If this is the case, the authority imposes on the airport operator certain public service obligations in order to ensure that the general public

³¹ 2005 Guidelines, para.19.

³² Commission Communication, 9th December 2005.

³³ *Ibid.*

³⁴ 2005 Guidelines, para.27.

³⁵ *Ibid*, para. 24.

³⁶ Questions on State aid for Airports and start-up aid to airlines, MEMO/07/285, 10th July 2007.

interest is served.³⁷ All other transfer of State resources will be assessed in the light of the Private Investor Test.³⁸

a. Start-up aid

For the purpose of clarification it is necessary to draw light on the concept of 'start-up aid' as addressed in the 2005 Guidelines. In general, financial start-up incentives are understood to distort competition between companies and are thus subject to notification to the Commission, as they usually constitute State aid.³⁹ The regional airports grant start-up aid to the airlines, in order to open up new routes and destinations.⁴⁰ The Guidelines explain that often, the small regional airports do not have enough passenger volumes in order to reach the break-even point, while certain regional airports can in fact perform well when sufficient volumes of passengers are brought in by airlines as a matter of public service obligations. Nevertheless, most airlines prefer already established routes in economic appropriate locations, where they have an established passengers volume. Thus airlines do not have enough incentives to run the risk of opening new routes from untested and particularly regional airports. In this respect, the Commission will accept this operating aid as justifiable, provided that it is granted on a temporarily basis, so to reach the break-even point and only in respect to new routes departing from regional airports. Additionally, such aid cannot grant an artificial advantage to already established large airports.⁴¹ The possibility of start-up aid has much to do with the European Commission's aim to tackle congestion issues arising in the air transport industry. Large airports benefit from economies of scale, which help them to attract new routes by themselves, which in turn lead to the concentration of the market to a smaller number of airports and airlines, faced with major congestion problems.⁴² Allowing start-up aid to regional airports can thus be a response to stimulate economic development in the regions concerned. In view of the complexities arising from new routes, the Commission can only approve start-up aid if the criteria set out in the Guidelines are met. Thus, the recipient must have a valid EC operating license. Moreover, only routes connecting regional airports of category C or D to another EU airport are eligible for the aid. Next to that, aid will only be granted to the opening of new routes or new schedules, which shall increase the net volume of

³⁷ 2005 Guidelines, para.34.

³⁸ *Ibid*, para.42.

³⁹ *Ibid*, para.78.

⁴⁰ Commission Communication 2005.

⁴¹ 2005 Guidelines, para.74.

⁴² *Ibid*, para.75.

passengers. The aid concerned shall also not lead to a simple reallocation of traffic. The route must ultimately prove profitable without public funding in the long run. Therefore, start-up aid needs be regressive and limited in duration. The amount of aid granted must comply strictly with the additional start-up costs incurred in launching the new route. Considering the time limits, aid may be granted for a maximum of three years and may not exceed 50% of total annual eligible costs, and shall in total not exceed the average of 30% of eligible costs.⁴³ The aid granted must be linked to the net development of the number of passengers transported, overall the allocation of aid has to be made in a non-discriminatory manner, which demands publicity of any aid plans. Finally, the candidate airline also has to provide a business plan, showing the viability of the route after the time limit of the aid will lapse. The concerned Member State has to further ensure that a list of routes receiving aid is published annually for each airport.⁴⁴

b. Airport infrastructure aid

The Guidelines also addresses the concept of airport financing. The Commission draws a distinction between three different airport sizes, where funding granted to airports with less than one million passengers is unlikely to raise any competition concerns. Moreover, public service compensation in the form of state aid granted to airports with less than one million passengers with an aim of general economic interest, shall be exempted.⁴⁵ In principle, the Commission considers that any airport operator should be able to meet the ordinary costs, which arise from running and maintaining the airport infrastructure from its own resources.⁴⁶ Reference should be made here to the overall principle of the Guidelines, that airport management, operating activities consisting of providing airport services to airlines and different service providers in airports are regarded as economic activities. Yet, public funding of services of this kind may not constitute State aid if it is made as a compensation for public service in accordance with the *Altmark* judgment. Otherwise, the aid granted will be declared operating aid which the Commission may approve under strict conditions under 107 (3) TFEU or under 106(2) TFEU.⁴⁷ State aid given to airports for the compensation of a public service obligation granted to category D airports is deemed to be compatible with the internal market.

⁴³ *Ibid*, para.79 (f).

⁴⁴ *Ibid*, para.79 (j).

⁴⁵ Commission Communication 2005.

⁴⁶ 2005 Guidelines, para. 62.

⁴⁷ Arhold, op. cit., p. 33

The Commission will check whether the service of general interest and the aid therein are in fact necessary to cover the costs incurred, taking into account the respective beneficiaries and profit made.⁴⁸

c. Aid for airport service

An airport operator that provides ground-handling services may charge for them different rates if those rates reflect cost differences linked to the nature or scale of the service provided. Up to a threshold of two million passengers per year, an airport operator acting in its capacity as a service provider may offset different revenues and losses between purely commercial activities, excluding public resources granted to it as an airport authority or for a service of general economic interest. Although the Commission sets out that the 2005 Guidelines only add up to the 1994 Guidelines, both Guidelines do in reality not coincide.

After the introduction of the new Community Guidelines, Member States started to apply the new rules and the Commission adopted several decisions relating to the two main categories addressed in the 2005 Guidelines – the state aid to the airports and start-up aid to the airlines. Under Paragraph 83 of the Guidelines, Member States were obliged to adjust their existing schemes with the Guidelines by 1st June 2007. Yet the Commission received various complaints from competitors in the aviation sector, in respect of state aid, which has claimed to be in violation of the Guidelines. One of the cases involved the airport Tampere-Pirkkala in Finland and Ryanair, which will be addressed further in the following chapter.⁴⁹

In 2011 the Commission initiated a public consultation with regard to the 2005 Aviation Guidelines with the aim to adjust the rules to recent market developments and the existing and emerging business models for flag carriers. The Commission is once again of the opinion that the guidelines need to be amended in order to better address the importance of regional airports and to avoid sub-optimal usage of airports. It has planned to adopt revised guidelines in this respect by the end of 2013.⁵⁰

⁴⁸ 2005 Guidelines, para. 65.

⁴⁹ *Ibid*, p.34.

⁵⁰ European Commission Press Release, State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland, IP/12/833, 25th July 2012.

3. Ryanair: identification of an actor

Ryanair is an Irish low-cost airline, founded in 1985 by Christopher Ryan, Liam Lonergan and Tony Ryan. The airline initially started operating within English and Irish territory but with the growing number of Member States joining the European Union, it expanded over the whole territory of the EU. Therefore, two dates were critical for the expansion of the airline – 1997, when the EU regulated that any EU airline can operate anywhere within the territory of the Union without any restrictions and the major EU enlargement in 2004 when 10 new Member States joined the Union. Ryanair now operates in 28 European countries as well as in Morocco. In 2012, Ryanair's revenue was established at 4.325 billion euro.⁵¹ On the European air transport market, Ryanair is marked as one of the leading actors. In the Charleroi judgment, the European Union's Court of First Instance described Ryanair as '... Europe's original and largest low fares airline. It has pioneered in Europe the 'low cost' business model, which involves minimalizing costs and maximizing efficiency in all areas of its business so as to offer the lowest fares in every market and thereby attract high passenger volumes'.⁵²

3.1 Low-cost airline model

There are several principles that distinguish regular airlines from low-cost carriers. For the purpose of this paper, it is useful to identify those principles in order to fully understand the difference between the regular and low-cost airlines. With the ongoing expansion and popularity of air transport, we can observe a growing number of airlines applying the low-fare airline model to their flights, not necessarily functioning under the general low-cost scheme. Therefore, it is important to underline that Ryanair has been the first European carrier that has used this model effectively.

Low-cost airlines operate on a scheme implementing high-capacity seating, minimum legal crew, point-to-point traffic and fast turn-rounds in order to optimize the resources. In order to maximize the utilization of the aircraft, low-fare airlines usually fly only on routes that last no longer than two hours. They do not transfer any cargo. Regarding the services provided to its clients, low-cost airlines provide minimum standard, therefore any additional services are

⁵¹ Ryanair annual profits up 25% to 503m euro as traffic grows 5% to 76 m. Dividend of 0.34 euro proposed, available at <http://www.ryanair.com/doc/investor/2012/q4_2012_doc.pdf> (last visited 29.05. 2013).

⁵² Case T-196/06 *Ryanair Ltd. v. Commission of the European Communities* (supported by the Association of European Airlines ('AEA') Judgment, para. 1.

paid, for example: on board service, additional luggage or even the credit card payment. All those details enable low cost airlines to be the cheapest player on the air transportation market without maintaining substantial losses.⁵³ Moreover, they include single passenger class, single type of an airplane, unreserved seating and single fare scheme. Most importantly however, low-fare airlines such as Ryanair (as opposed to some other low-fare airlines like e.g. easyJet) rely solely on regional airports, which are usually located in cities nearby passengers' final destinations. There are several advantages to using secondary airports – firstly, the landing and service fees are usually lower. Secondly, regional airports are usually less congested than main 'hub' airports. That allows airlines to reduce turnaround times and therefore lead to higher daily efficiency. Finally, as the low-fare airlines generally fly to secondary airports, they only operate on a point-to-point route structure rather than hub-and-spoke network. The use of point-to-point structure allows airlines to reduce turnaround time by eliminating time spent waiting for passengers from connecting flights. In result, secondary airports entail much lower costs and facilitate quicker rotation than the primary airports. That results in reduced costs and improved aircraft utilization. The use of regional airports is however less appealing to the customers. As passengers do realize that the airports are located far away from their final destination (sometimes even over 100 kilometers), the company has to offer a competitive price for such an inconvenience.⁵⁴ As offering a 24-euro flight return cannot be remunerative, there have to be other ways of obtaining financial compensation for services. State aid is one of such means.

3.2 Ryanair beneficiary of State aid?

Ryanair has been the one of the most controversial airlines, not only with regards to its advertising campaigns, but more importantly, due to its continuous legal issues in the field of the EU's competition law. Since 2006, Ryanair has been involved in 11 procedures concerning alleged incompatibility of state aid granted to it with the internal market as well as 3 merger cases. The landmark case, not only for Ryanair but for the whole low-cost airlines sector was the Charleroi ruling from December 2008; this case will be analyzed further in the following chapter.

⁵³ Graham and Shaw, 'Low-cost airlines in Europe: Reconciling liberalization and sustainability', *Geoforum* 39, 2008, p. 1141.

⁵⁴ Sean D. Barrett, Ryanair and the Low-cost Revolution in: John Frankie O'Connell & George Williams *Air Transport in the 21st Century: Key Strategic Developments*, Ashgate, Surrey, 2011, p. 113-115.

The first decision rendered by the European Commission concerning state aid granted to Ryanair was a case with regard to aid granted to Ryanair by the French state for the purpose of air service operation between Toulon and London (500 000 euro per annum for 3 years). The Commission was notified about it in November 2005 and the decision was published in June 2006. In the decision, the Commission did not raise any objections with regards to state aid granted to Ryanair, as it was compatible with Art. 87(3)(c) TEC (now 107(3)(c) TFEU).⁵⁵

In 2006, the Commission has investigated alleged aid granted to Ryanair by the German state in the form of inadequate landing charges and passenger charges as well as a marketing agreement between the company and Lubeck-Blankensee airport.⁵⁶ The same doubts the Commission had in the case of Ryanair's agreement to operate on Frankfurt-Hahn airport from 2006⁵⁷ – in both cases Ryanair could have possibly benefitted from inadequate and/or discriminatory charges as well as marketing support. In both cases the Commission decided to initiate the formal investigation procedure based on Art. 108(2) TFEU. Both of the cases are still pending for the Commission's final decision.

In 2008, the Commission has rendered its decision in the case of possible state aid involving Bratislava Airport and Ryanair. The Slovak government (the shareholder of the airport) has granted Ryanair reduction in airport charges for new scheduled and existing destinations, therefore possibly resulting in an illegal state aid. In its final decision, the Commission has concluded that the agreement in question could make the airport more profitable, therefore a market investor would have agreed to conclude a similar agreement (for more about the Market Economy Investor Principle, consult chapter 4.3). Therefore, the cumulative criterion of Art. 107(1) TFEU were not met hence the agreement could not have constituted state aid within the meaning of that article. The case was therefore solved favorably to Ryanair.

The next case was initiated by a complaint made by one of a rival airline operators concerning alleged aid granted to Ryanair by Swedish authorities. In the case, Ryanair would benefit from substantially lower airport charges at Vasteras airport than the complaining party. The Commission decided therefore to initiate the formal investigation procedure based on Art.

⁵⁵ Authorisation for State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, *OJ C 204*, 26.08.2006.

⁵⁶ State aid C 24/07 *State aid to Flughafen Lubeck GmbH and Ryanair*. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, *OJ C 287*, 29.11.2007.

⁵⁷ State aid C 29/08 *Flughafen Frankfurt Hahn and Ryanair*. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, *OJ C 12*, 17.1.2009.

4(4).⁵⁸ The same procedure has been also started in case of alleged state aid from the German state through resources provided by Aeroport d'Altenburg Nobitz⁵⁹, as well as alleged state aid granted by the French government through the La Rochelle Airport⁶⁰ to Ryanair; by Austrian government through Klagenfurt airport⁶¹ and finally, by the Italian government through Aeroporto di Alghero⁶². In all those cases, the European Commission have initiated proceedings as lied down in Art. 108(2) TFEU. The proceedings are still pending and the Commission's final decision has to be rendered.

⁵⁸ State aid C172/07 –Alleged aid to VFAB and Ryanair Ltd – Invitation to submit comments pursuant to Article 108(2) of the TFEU, *OJ C 172*, 16.6.2012.

⁵⁹ Draft Letter to be Addressed to the Minister of Foreign Affairs of the Member State, State aid S.A. 26500 No 2012/C, C(2012) 173 final.

⁶⁰ State aid SA.26494 La Rochelle Airport. Invitation to submit comments pursuant to Article 108(2) TFEU. *OJ C 130*, 4.5.2012.

⁶¹ State aid SA.24221 – C/2011 Klagenfurt Airport – Ryanair and other airlines, C(2012) 1011 final.

⁶² State aid C 37/2007 SA.23098 – Aeroporto di Alghero, C(2012) 4221 final.

4. The Case of Charleroi/ Ryanair

4.1 Background

The case *Ryanair v. Commission* (hereinafter referred to as ‘Charleroi case’) involved a long awaited judgment. The two agreements in question, between Ryanair and respectively the Walloon Region of Belgium (owner of the Charleroi airport infrastructure) and the Brussels South Charleroi Airport (BSCA) (a public sector company managing the airport; controlled by the Walloon Region), were concluded in 2001. The final decision was rendered only in 2008, seven years after the agreement for the establishment of a base was concluded and it was one of the very first decisions concerning the state aid rules in the aviation transport industry.

Brussels South Charleroi Airport is a regional (Walloon) airport, located 60 kilometers from the capital of Belgium, Brussels. Shortly before Ryanair established its base, Charleroi operated less than 20 000 passengers a year, therefore having a loss-making outcome.⁶³ For comparison, in 2012 the airport had reached its maximum capacity of serving over 6 200 000 passengers.⁶⁴ Following Ryanair’s involvement with BSCA, other low-cost airlines decided to join and today Charleroi is being operated by 3 major airlines: Jetairfly (since 2010), Ryanair (established since 1997, base since 2001) and Wizzair (since 2004).

In January 2002, the European Commission received a complaint about allegedly illegal state aid granted to Ryanair by the Belgian state authorities from Virgin Express, a rival low-cost carrier. It is important to underline that the agreement drawn up between Ryanair and the two representatives of the Belgian state was not notified to the European Commission, contrary to the rules concerning state aid. Subsequently, the Commission started investigations in December 2002. By February 2004, the Commission decided that illegal state aid had been granted to Ryanair. Following the decision, Ryanair appealed from that decision to the Court of First Instance. The case took over five years before the final judgment was rendered. Should the case be further appealed to the European Court of Justice, the final verdict would have taken even more time.⁶⁵

4.2 Aid at stake

⁶³ Vincent, ‘Power, *Ryanair v. European Commission: The European Court of First Instance’s Judgment on Alleged State Aid at Charleroi Airport*’, *Issues in Aviation Law and Policy* 183(3), 2008-2009, pp. 184-185.

⁶⁴ Brussels South Charleroi Airport, *Annual Statistics*.

⁶⁵ Vincent, Power, op. cit., pp. 183-188.

The alleged state aid concerned benefits granted by two state-governed parties, BSCA and the Walloon Region to Ryanair. There have been two separate contracts concluded between the two parties and the Belgian authorities have committed to provide Ryanair with particular fares. In the agreement with the Walloon Region, Ryanair has been granted preferential rate for landing charges at the Charleroi Airport, estimated at 1 euro per boarding passenger, instead of the regular 2 euro standard rate laid down in an official Walloon legislature. Additionally, the Walloon Region agreed to compensate Ryanair for any losses that it might incur because of changes in the level of all airport taxes or airport opening hours between years 2001 and 2016. In the second contract, BSCA granted Ryanair several advantages:

- Preferential rate 1 euro per passenger (instead of 10 euro per passenger published in the official tariff) for ground handling services
- Initial incentive of 160 000 euro per each new route opened by Ryanair from Charleroi airport, for maximum of 12 routes (1 920 000 euro)
- 768 000 euro reimbursement for flight crew recruitment and training
- 250 000 euro reimbursement for hotel accommodation costs
- Payment of 4 000 euro for the purchase of the office equipment
- Availability of various premises for technical or office use at minimum or no cost
- Contribution to the promotional activities (4 euro per boarding passenger) for the period of 15 years, during which up to 26 flights will be carried out by Ryanair daily

No other airline has benefitted from any of the above-mentioned advantages but Ryanair.⁶⁶ In exchange, Ryanair committed itself to devote expensive assets (airplanes) to the little known airport of Charleroi for the period of 15 years. There was therefore a risk for Ryanair to get involved and a big chance of a possible success for the BSCA, which could finally become significant ‘on the map’, therefore attracting other major low-fare airlines.⁶⁷ Finally, Ryanair and BSCA jointly formed company ‘Promocy’, which had a main objective of promoting Ryanair’s promotional activities at Charleroi airport as well as promoting Charleroi airport

⁶⁶ Commission Decision of 12 February 2004, *OJ C 516, 30.4.2004*, para. 7-15.

⁶⁷ Vincent, Power, op. cit., pp. 185-186.

itself. Both actors agreed to contribute equally to the company's share capital by contribution of 4 euro per each departing passenger.⁶⁸

4.3 Market Economy Investor Principle

The MEIP is an essential principle in State aid law, which helps to determine whether there has been State aid granted or not. MEIP is an interpretation of Art. 107(1) TFEU, first and second criterion mentioned. According to MEIP, state aid can be declared compatible if a market economy investor would have acted the same way as a state did, namely made the same agreement on the same terms. If a market investor (bank, capital markets) would not be willing to grant such an advantage, it would be an indicator that there has been state aid granted. The purpose of MEIP is to determine if State actions are compatible with those acceptable to a commercial actor.⁶⁹ There are financial and economic modeling tools available for the determination whether MEIP is applicable. In simple terms however, the application of MEIP is relatively straight forward – where the cash inflows are higher than the cash outflows, it is unlikely to be a state aid. Therefore, in order to determine if there has been state aid granted in a particular case, it is necessary to compare the money invested by the state actor and the profit it would gain in the course of years that the state aid was granted for.⁷⁰

In the Charleroi case, the Commission decided that the MEIP test was not applicable as fees set up by the Walloon Region were a political legislation, not commercial prices. Therefore, they classify to be taxes, not commercial charges, which led to the inability to classify the agreement under the MEIP rule.⁷¹ This decision was nevertheless annulled by the Court of First Instance (for more information, see chapter 4.5).

4.4 European Commission's decision

In 2004, the European Commission rendered its decision in the Charleroi case. The decision was of dual nature, as it included both aid which was legal and illegal. The most important part of the decision is the procedural detail – the fact that the Commission did not analyze the aid granted by BSCA and Walloon Region jointly but rather separately. That was the biggest

⁶⁸ *Ibid*, p. 187.

⁶⁹ Kavanagh, Niels and Pilsbury, 'The market economy investor: an economic role model for assessing State aid', in E. Szyszczak, *Research Handbook on European State Aid Law* (Edward Elgar Publishing Limited, Massachusetts, 2011), pp. 90-91.

⁷⁰ Vincent J. G. Power, *op. cit.*, pp. 192-193.

⁷¹ Nysten, 'Report from the Aviation Battlefield: Case T-196/04 (17th December 2008) In re Ryanair', *Maastricht Journal of European and Comparative Law* 256(16), 2009, pp. 257-258.

inconsistency that was later entirely overturned by the Court of First Instance. Moreover, the Commission decided that the MEIP was inapplicable to the agreement with the Walloon Region given that the Region was acting as a public authority and not market a economy investor.⁷² Nevertheless, the Commission applied the MEIP to the agreement with BSCA and it found it defective. According to the Commission, no market economy investor would have offered Ryanair the same incentive as BSCA did as the risk of losses was much higher than a reasonable return on the investment. Therefore, the agreement between the BSCA and Ryanair should be considered as illegal State aid. Secondly, the Commission found it irrelevant that the airport expected that there would be other low-cost airlines operating at Charleroi. Thirdly, the Commission disallowed all passengers from full-fare airlines. Finally, the Commission claimed that the fire and maintenance costs should be covered by the BSCA rather than the Region. When it comes to assessing the actual state aid in question, the Commission found the following aid to be illegal:

- Reduction in airport landing charges granted by the Walloon Region to Ryanair was declared incompatible with the common market as it went beyond the tariffs published by the Walloon Region in the official decree
- Discounts on ground handling services granted by BSCA to Ryanair was declared incompatible with the common market
- One-shot incentives for the opening of new routes (e.g. staff recruitment, training and accommodation costs) provided were not justified as they do not take account of the actual costs of opening routes
- Aid provided for Dublin-Charleroi route is not new as it operated since 1997 therefore the aid granted as a start-up aid needs to be recovered
- All compensation guarantees granted by the Walloon Region to Ryanair in the event of losses suffered by the latter were declared void – the Walloon Region shall have all the necessary freedom in fixing airport charges, opening hours or other provisions of regulatory nature.⁷³

⁷² Vincent, Power, op. cit., p. 196-197.

⁷³ Commission Decision of 12 February 2004, *OJ C 516, 30.4.2004*, Art. 2-4.

Some advantages granted by the BSCA to Ryanair were agreed to be compatible with the common market, since they were considered to be start-up aid for new routes (see sub-chapter 2.4.2, paragraph a). Those are: marketing contributions, one-shot incentives and the provision of office space. Those advantages were however subject to numerous conditions, *inter alia*: the contributions must have related to the opening of new routes and must have been limited in time. The total sum of aid for new route benefits could not have exceeded 50% of start-up, marketing and one-shot incentive costs aggregated for two destinations in question. The marketing contributions must have been justified in a development plan complied by Ryanair and validated by the BSCA. Finally, Belgium was under obligation to set up a non-discriminatory aid scheme in order to ensure equal treatment for all airlines willing to develop new air services departing from Charleroi airport.⁷⁴ Any extra aid had to be repaid by Ryanair to the authorities that have granted it.⁷⁵

In its decision, the Commission provided quasi-legislation, giving a general overview of what constitutes lawful or unlawful state aid in the context of air transport and low-fare airlines.⁷⁶ Summing up, by its decision, the Commission established a new form of justifying operating aid, namely start-up aid, additionally it introduced several new conditions for granting state aid in case of low-cost airlines. First of all, the contributions made by publically owned airports for opening of new routes must be limited in time, for periods not exceeding the maximum of five years. Moreover, the contributions cannot exceed 50% of annual costs for maintaining the route. Finally, the contributions need to be proportional and incentive in its nature. With regards to granting the aid, the Commission has also established that the publically owned airport cannot provide benefits for opening a new route if it was opened as a replacement for a route previously closed at the same or similar size airport. Finally, when it comes to marketing contributions, they are allowed as long as they are justified in the development plan and are validated for each route concerned.

4.5 CFI's decision

Following the Commission's decision, Ryanair decided to refer the case to the European Court of First Instance in order to decide whether the Commission was right to find the state

⁷⁴ Griffin, 'State aid, the growth of low-cost carriers in the European Union, and the impact of the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports', *Journal of Air Law and Commerce* 341(71), 2006, pp. 358-359.

⁷⁵ Commission Decision of 12 February 2004, *OJ C 516, 30.4.2004*, Art. 2-4.

⁷⁶ Vincent, Power, op. cit., p. 196-197.

aid illegal and also to assess the Commission's decision making process. Ryanair argued that the Commission incorrectly treated BSCA and the Walloon Region as two separate entities and therefore failed to apply the MEIP principle. Ryanair also disagreed with the Commission's decision to treat the Walloon Region as a regulator instead of an economic agent. Thirdly, Ryanair stated that the approach taken by the Commission constituted discrimination between private and public airports. Following the Commission's decision, private airports would have an advantage of having a freedom of pricing, denied to public airports. Finally, Ryanair has stated in its appeal that the Commission did not fulfill its obligation to provide reasons for taking a decision.⁷⁷

In its judgment rendered in December 2008, the Court of First Instance has been much less rigid than the European Commission. It has annulled the Commission's decision entirely as it was based on an erroneous assumption that the Walloon Region and BSCA cannot be considered a single entity for the purpose of the assessment. From a legal point of view, the ruling in this case had a much greater significance – the judgment in the Charleroi case can be now considered as a 'wake up' call for the Commission, ordering it to stop scrutinizing alleged state aid at numerous airports across Europe.

First and foremost, the Court has ruled that the Commission should have considered BSCA and the Walloon Region as the same given that the Walloon Region has 96% shares in the BSCA and therefore it is clear that BSCA is economically dependent on the Region. Secondly, the CFI had to determine if BSCA together with the Region were acting as a public authority or within the scope of economic activity. The Court disagreed with the Commission and stated that the charges levied for remuneration for the services provided at the airport are charges for economic activities. Therefore, the Commission should have applied the Private Investor Principle also to the agreement between Ryanair and the Walloon Region. Finally, the Court has held that the commercial transactions between Ryanair, BSCA and Walloon Region should be considered as a single package, signed between 2 entities (Ryanair and Walloon Region together with BSCA). Hence, the Commission should have applied the MEIP to the Charleroi case. As the Commission in its contested decision made a clear error in law, the CFI decided to annul the decision wholly.⁷⁸

⁷⁷ Kavanagh, Niels and Pilsbury, op. cit., pp. 99-100.

⁷⁸ Nysten, op. cit., pp. 257-258.

The judgment by CFI provides a general clarification that management of airports contributes to an economic activity. Moreover, the court has ruled that the incentives to attract airlines to make use of particular airports are permissible, provided that they comply with the Market Economy Investor principle. CFI's judgment in the case was the first case when MEIP was applied in the aviation sector. Based on it, the incentives provided by the airports need to be limited in time (up to five years), have limited intensity (not to cover all costs) and be available on a non-discriminatory basis to all airline actors.

The conditions for granting start-up aid in respect of LCC's and regional airports, established by the Commission in its decision in the Charleroi case, have now been laid down in the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports 2005.

5. Impact assessment: the development of state aid in low-cost carrier cases

5.1 Impact of Charleroi judgment on the European aviation sector

Following the judgment in the Charleroi case, Ryanair called upon the Commission to annul all eight of the ongoing investigations concerning alleged state aid that were currently pending. That did not happen however; the Commission has decided not to appeal against the final judgment of the CFI.⁷⁹

The final decision in the Charleroi case has been aimed at promoting the activities of low-cost airlines and regional development as well as greater transparency into contractual relations between airlines and airports. As stated by the Committee of the Regions, the active use of secondary airports facilitates region-to-region connections, supports citizens' mobility, encourages economic development, stimulates employment growth, promotes tourism as well as aids the regeneration of peripheral and less-developed regions. Therefore, the general effect is a positive impact on economic, social and territorial cohesion in Europe.⁸⁰ We can easily envisage the profits that having a low-cost carrier bring to the regions such as the area surrounding the Charleroi airport.

The judgment in the Charleroi case also included other positive implications that establishing new low-cost routes can bring to the regional airports. Those positive features include establishing coherent airport development policy and secondly, it can lead to the reduction of saturation of the capacities of the major airports. Those are the two justifications used behind the start-up aid that are included in the 2005 Guidelines on financing of regional airports. Besides those two, the Commission has also mentioned in its decision the environmental benefits of encouraging the use of regional airports and the role of secondary airports in the development of competition between airlines.⁸¹

With the judgment in the Charleroi case, the Court has not only given clearance but has also paved the way for the new concept of start-up aid. Start-up aid, which constitutes an exception to the general rule that operating aid shall be prohibited, was subsequently introduced with the 2005 Aviation Guidelines. It is note worthy that at the time the Ryanair

⁷⁹ Nysten, op. cit., pp. 258-259.

⁸⁰ Own-Initiative Opinion of the Committee of the regions on Low-Cost Airlines and territorial Development, *OJ C 318*, 22.12.2004, p. 7-8.

⁸¹ Volcker, 'Start-up aid for low cost carriers – a policy perspective', *Competition Law Insight* 58, 2005, p. 3.

case was decided, BSCA had less than one million passengers annually and thus, would be a category D airport according to the Guidelines 2005. Considering this, one may raise the question whether the Guidelines came as a de facto response to the changing nature of the aviation industry, or whether the Commission ‘rushed’ into an adoption of the rules. It has been argued, that the Commission’s main concern when drafting the 2005 Aviation Guidelines was the prevention of excessive boosting of specific air carriers, rather than to trigger incentives for mobility and development.⁸² Thus, in its efforts to tackle the new developments and demands of the aviation industry, the Commission seems to have disregarded the specific market segment, especially considering the fact that State aid is meant to correct market failures. Therefore, had the 2005 Guidelines been already applicable to the case, the outcome would most likely be different.

There is no doubt that the introduction of the 2005 Guidelines is an expression of a modified and particular relaxed approach by the Commission, where the fast growth and success of the low-cost carrier models have been considered as not only a positive tool to enhance competition in the aviation sector, but also a potential competitive restraint for already established carriers. This ultimately forced the Commission to take a long-term view on the newly emerged business model.⁸³ The Charleroi case was a first indication for the Commission's modified approach (forced by the CFI), which was further expressed in the adoption of the 2005 Guidelines. The ruling of the CFI was the first case ever that the Court of Justice has decided to apply the MEIP in the aviation sector.⁸⁴ The emphasis placed on 107 (3) TFEU indicates that State aid policy is facing a transformation into not only maintaining a level playing field but also in explicitly promoting regional air transport.⁸⁵ The way the Commission has been assessing cases of State aid in respect to airports and airlines, is marked by inconsistency. It is interesting to note, that the assessment by the Commission in both cases involving Ryanair, differed remarkably in its assessment approach. Whereas the Commission left the issue of imputability of State aid out of the picture in its Tampere judgment, and mainly relied on the fulfillment of the MEIP test, the test was not applied in the Charleroi case, which yet was heavily criticized by the CFI in its later judgment. Following the CFI’s

⁸² Lykotrafiti, ‘Low Cost Carriers and State Aids_ A Paradox? Reflections on the Ryanair/Charleroi case’, *European State Aid Law Quarterly* 2008, p. 215.

⁸³ *Ibid.* p.214.

⁸⁴ Vincent, Power, op. cit., p. 215.

⁸⁵ Frühling, ‘The New European Commission's Guidelines on Aid to Airports and Air by Airports to Airlines’, *Air & Space Law*, 2006, p.119.

judgment in the Charleroi case, the Commission now will have to spend more resources as well as devote more time to the assessment of true economic characteristics, implications and consequences of the alleged aid. The CFI has provided the Commission with a judicial check – a clear instruction that economic dimension has to be addressed thoroughly when assessing cases of alleged state aid.⁸⁶ The Charleroi judgment can therefore be used as a compendium on how state aid rules will be applied to the aviation sector and in particular, how to apply the Private Investor Principle to airports.⁸⁷

The method of several smaller regional airports to attract a critical mass of airline traffic through preferential treatment, such as low charges, is a clear indication of the successful inter-relationship of LCC's and secondary airports. In this respect, agreements such as made between Tampere-Prikkala airport (see sub-chapter 4.2) or Charleroi and Ryanair constitute the backbone of low-cost carrier's business plans. Particularly Ryanair, as compared to other LCC focuses heavily on secondary airports, which enables the airline to maintain its low-cost base operational activities.⁸⁸ What can be deduced from the decision in the Charleroi case, is that the Commission has examined the agreement between Ryanair and the airport in a rather unorthodox way, while it essentially follows the 1994 Guidelines approach by first applying the MEIP test and in a second step whether the aid, if it does not fulfill the MEIP principle, is compatible with the internal market, under the derogations of Article 107 (3) TFEU.⁸⁹ While under the 1994 Guidelines operating aid can in principle only be exempted for the compensation of a public service obligation or for aid which is of social character, in the Charleroi decision the Commission legitimized a new alternative of how to grant a justification for operating aid, namely start-up aid. Considering this, it can be speculated that also the reason why the Commission did not go into a substantive analysis of the nature of the state aid granted in the Tampere case, had much to do with the fact that it did not want to discourage airport operators from wrong assumptions, in respect of possible state aid violations, thereby promoting business activities on airports for the development of regional airports. By this means, not only the Guidelines can be placed in a rather flexible picture, of how state aid rules in the aviation sector have developed but also the general approach of

⁸⁶ Vincent, Power, op. cit., pp. 215-216.

⁸⁷ Nysten, op. cit., p. 259.

⁸⁸ Lykotrafiki, op. cit., p. 221.

⁸⁹ 2005 Guideline, para.25.

competition law application in the sector, which aims to enhance mobility and regional development.

5.2 European Commission's decision in the Tampere-Pirkkala case

The Charleroi judgment had also a significant impact for the case law that followed the CFI's decision. One of the most recent cases concern alleged state granted by the Finish government to Ryanair through the Tampere-Pirkkala Airport (TPA). In that case, the Commission has decided that there had not been a breach of Art. 107(1) TFEU. TPA is owned and operated by Finavia, terminal 2 is rented out by Finavia to its 100% subsidiary Airpro, which operates the terminal and provides ground handling services at the terminal. Airpro concluded an agreement with Ryanair for the sole use of terminal 2 for a number of consequent years. According to the statements made by Finavia (a full public company, which also manages further 24 airports in Finland), negotiations were open to a number of airlines inviting them to consider using terminal 2. In 2003 an agreement was signed between Ryanair and Airpro, which sets out the operational and financial conditions under which operation of commercial flights to and from terminal 2 at TMP would be granted. The agreement set out that Ryanair would pay a single charge for each departure and arrival. This charge included the landing and taking off fee, lighting, noise and night fees, the terminal navigation fee, ramp and passenger handling fees and others.⁹⁰ The charges imposed, depended on the daily frequencies of Ryanair and Finavia indicated that all airlines using TMP airport pay the same charges for services of the same quality. In its decision, the Commission has concluded that financial arrangements concerning the implementation of a low-cost strategy by a former state enterprise at the Tampere-Pirkkala airport in Finland, and the agreement with Ryanair are in line with the general rules on State aid rules and hence do not constitute state aid. The Commission assessed the behavior of the airport in light of the MEIP and by this means also referred to its judgment in the Charleroi case.⁹¹ On the basis of an ex-ante business plan provided by Finland, the Commission found that Finavia and Airpro had in fact acted like market economy investors. In the absence of interest by cargo operators, the choice facing Finavia was only left to convert terminal 2 into a low-cost terminal, given the losses, it would

⁹⁰ Commission Decision SA.23324: Finavia, Airpro and Ryanair at Tampere-Pirkkala Airport, para.42.

⁹¹ *Ibid*, para. 80.

have faced, if they decided otherwise.⁹² The calculations established that the ex ante business plan had a positive impact on the income arising from the agreement. Thus the agreement was considered as an economical profitable investment, in line with the behaviour of a market economy investor.⁹³ In order to apply the MEIP the Commission referred to the Stardust Marine Judgment⁹⁴, the judgment which defines the imputability of the State and is essential for the assessment of payments or loss of revenue by a public enterprise in case of a state aid. Even though the case was not examined on the merits of Stardust Marine case, the Commission quoted it in the judgment. The fact that there was no State aid solely on the grounds that all arrangements between Finavia, Airpro and Ryanair were in line with the MEIP test, was reason enough for the Commission to not examine in depth the vital issue of State resources.⁹⁵ As one of the cumulative criteria provided by Article 107 (1) TFEU was not fulfilled, namely that the arrangements were free of any economic advantage that does not correspond to normal market conditions, led the Commission to its finding that there was in fact no State aid. The judgment can hence be understood in the general modified and rather lenient approach taken by the Commission.

⁹² *Ibid*, para. 84.

⁹³ *Ibid*, para. 89.

⁹⁴ Case C-482/99 *France v Commission* [2002] ECR I-04397.

⁹⁵ Phedon Nicolaidis, Airport Operators and Budget Airlines [Commission Decision SA. 23324: Finavia, Airpro and Ryanair at Tampere-Prikkala Airport.

6. Conclusion

Low-cost carriers emerged in the European aviation market since the mid-1980s. It was yet only until recently, a revised approach on how to tackle issues of alleged state aid in this particular sector has been provided. The Commission has given greater importance to the developments in the sector and thus introduced two crucial legislative instruments.

This paper has outlined the historical developments of European legislation in the field of air transportation, with a specific emphasis being put on the emergence of the low-cost airlines and regional airports. We have looked thoroughly into the process of the liberalization of the EU aviation market and the key pieces of legislation on State aid in the aviation sector. It was essential to analyze how the legislation was applied in practice and to what extent it could be considered as coherent and effective. Therefore we have concentrated on one particular airline – Irish low-fare carrier Ryanair, that has been involved in many cases of alleged violations of State aid rules. After providing a general overview of Ryanair as an alleged beneficiary of State aid, the authors have provided an analysis of the Commission decision in the Tampere-Prikkala case and the landmark judgment of the Court of First Instance in the Charleroi case from December 2004. By completely annulling the Commission's decision, the CFI has provided a judicial check for the European Commission and allows for a revised approach towards State aid to LCC's. We can dare to say that we have seen the first results of the Court's judgment – in the Tampere-Prikkala case, where the European Commission has undertaken a much more lenient approach than it used in the past.

Even though this paper has concentrated on one particular player – Ryanair, it is important to realize that there have been many cases brought to the European Commission's attention that involved other low-cost carriers. In 2000, the European Commission has investigated EasyJet as an alleged receiver of state aid; it has nevertheless found the aid in question to be compatible with the state aid rules.⁹⁶ In 2011, the European Commission decided to initiate procedures against granting of alleged state aid by the Irish authorities to another Irish low-cost carrier, Aer Lingus and Aer Arann. Interestingly, Ryanair has been the party complaining to the Commission about the possible infringement.⁹⁷ Also in 2011, the Commission decided

⁹⁶ Authorisation for State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, *OJ C 149*, 19.05.2001.

⁹⁷ European Commission Press Release, State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland, IP/12/833, 25th July 2012.

to open in-depth investigations into state aid given to the Romanian air transport sector, particularly to the Hungarian low-cost carrier Wizzair.⁹⁸ The three airlines are just a few examples. The extensive case law that involves a lot of different European low cost airlines proves that state aid infringement procedures are not only limited to Ryanair. Nevertheless, due to Ryanair's position as the biggest low-cost airline in Europe, it has been subject to a much larger number of state aid cases. That is why it was the most appropriate market player for this study.

This paper has shown how complex changes within one sector of the economy can influence law-making at the EU level. Before the CFI rendered its judgment in the Charleroi case, there has been hardly any indication on how the Commission should act in cases of alleged State aid received by low-cost carriers, particularly considering the fact that the aviation sector was long excluded from any competition concerns. The judgments in favor of Ryanair not only provided guidance for airport operators and LCC's, it also paved the way for the promotion of regional development by allowing the concept of start-up aid.

The introduction of the 2005 Guidelines is an expression of a modified and particular relaxed approach by the Commission towards operating aid in the aviation sector, where the fast growth and success of the low-cost carrier models have been considered as not only a positive tool to enhance competition in the aviation sector, but also a potential competitive restraint for already established carriers. The analysis has shown that what can be classified as rigid competition law regime under EU law, has also been heavily influenced in its practical application, by movements in different markets. The aviation sector, as an evolving market, demanded a new approach and more importantly a new reference point, with the emergence of low-cost carriers and the underestimated value given to regional airports in the past. Despite the success on behalf of LCC's such as Ryanair, the new approach followed by the Commission, seems nonetheless questionable in respect of how far market failure for regional airports has been addressed, particularly in respect of allowing start-up aid. The inconsistency in the assessment by the Commission support the idea, that Commission tends to relax the existing rigid competition regime in favor of sectorial needs, which could undermine the very

⁹⁸ European Commission Press Release, State aid: Commission opens in-depth investigations into State aid to Romanian air transport sector; approves aid for two regional airports in the UK and in Italy, IP/11/633, 24th May 2011.

essence of Article 107 TFEU in the long run, namely to avoid any artificial advantage given to certain undertakings out of public resources.

Yet, to finish on a positive note, one should not underestimate the importance of the low-cost carriers and the positive stimulus they can have on Member States' and EU's economy. As it was shown throughout the text of this paper, there are a number of advantages of low-cost airlines and there is no doubt that they have a positive economic, social and territorial impact on the cohesion in Europe. They allow the mobility of European citizens, promote tourism within the Union and encourage the economic development as well as stimulate employment growth, particularly in the peripheral and less-developed regions. Allowing a certain category of operating aid to be exempted from the general prohibition, marks an enormous step in the way, how European competition rules might be modified in certain sectors of the economy. In this regard the European Commission also acknowledged that regional airports often face a less favorable situation compared to larger hub airports, thus permitting start-up aid was a right tool to encourage regional development and respond to the rapid movements in the aviation market. The revision of the 2005 Guidelines seem to depict exactly this flexible approach towards State aid in the aviation sector, by trying to adjust to recent market developments and adapt to different flag carrier models, which can be essential for economic growth within the Union. In this respect, maintaining the guidelines in their current version could lead to a divide between the market reality in the air transport sector and the state aid provisions, which in turn would possibly create legal uncertainty. Considering this, it seems not only permissible to address certain market demands but unavoidable to adapt legal rules to such markets in a long run. We hence support the rather permissive approach in light of the dynamics of the aviation market, but stress the need to maintain a coherent regime applicable to the sector in order to maintain a level playing field for competition - as well as competition law.

Bibliography

Legislation and case law

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*

Authorization for State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, *OJ C 204, 26.08.2006*

Authorization for State aid pursuant to Article 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, *OJ C 149, 19.05.2001*

Case C-301/87, France v Commission {1990} ECR i-307

Case T-196/04 Ryanair Ltd. v. Commission of the European Communities (supported by the Association of European Airlines ('AEA'))

Community Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid to the aviation sector, *OJ C 350, 10.12.1994*

Community Guidelines on Financing of Airports and Start-up Aid to Airlines departing from Regional Airports, *OJ C 312, 09.12.2005*

Commission Decision SA.23324: Finavia, Airpro and Ryanair at Tampere-Pirkkala Airport

Commission Decision of 12 February 2004, *OJ C 516, 30.4.2004*

State aid SA.26494 – La Rochelle Airport. Invitation to submit comments pursuant to Article 108(2) TFEU. *OJ C 130, 4.5.2012*

State aid SA.24221 – C/2011 – Klagenfurt Airport – Ryanair and other airlines, C(2012) 1011 final

State aid C 37/2007 SA.23098 – Aeroporto di Algero, C(2012) 4221 final

State aid C 24/07 – State aid to Flughafen Lubeck GmbH and Ryanair. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, *OJ C 287, 29.11.2007*

State aid C172/12 – Alleged aid to VFAB and Ryanair Ltd – Invitation to submit comments pursuant to Article 108(2) of the TFEU, *OJ C 172, 16.6.2012*

State aid C 29/08 – Flughafen Frankfurt Hahn and Ryanair. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, *OJ C 12, 17.1.2009*

Books and journal articles

Christoph Arhold, European Airline Wars: German Courts Divided over Actions against Low-Cost carriers, *European State Aid Law Quarterly*, 2008.

Sean D. Barrett, Ryanair and the Low-cost Revolution in: John Frankie O’Connell & George Williams *Air Transport in the 21st Century: Key Strategic Developments*, Ashgate, Surrey, 2011.

Louise Butcher, *Aviation: European liberalization, 1986-2002*, House of Commons, Library.

Tiziana D'Alfonso et. al, Assessing the Impact of Competition on the Efficiency of Italian Airports, Technical Report no.1, 2013. Retrieved from:
http://eprints.bice.rm.cnr.it/4521/1/Assesing_the_Impact_of_Competition_on.pdf. Last visited May 29th, 2013.

Pierre Frühling, The New European Commission's Guidelines on Aid to Airports and Air by Airports to Airlines, *Air & Space Law*, 2006.

Brian Graham & Jon Shaw, Low-cost airlines in Europe: Reconciling liberalization and sustainability, *Geoforum* 39, 2008.

Ryan Griffin, State aid, the growth of low-cost carriers in the European Union, and the impact of the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports, *Journal of Air Law and Commerce* 341(71), 2006.

Leigh Hancher, et. al, *EC State Aids*, 2nd ed., London: Sweet & Maxwell, 1999.

James Kavanagh, Gunnar Niels & Simon Pilsbury, The market economy investor: an economic role model for assessing State aid, in: Erika Szyszczak, *Research Handbook on European State Aid Law*, Edward Elgar Publishing Limited, Massachusetts, 2011.

Debrah Johnson & Colin Turner, *European Business*, 2nd edit., New York: Routledge, 2006.

Antigoni Lykotrafiti, Low Cost Carriers and State Aids_ A Paradox? Reflections on the Ryanair/Charleroi case, *European State Aid Law Quarterly* 2008.

Jana Nysten, Report from the Aviation Battlefield: Case T-196/04 (17th December 2008) In re Ryanair, *Maastricht Journal of European and Comparative Law* 256(16), 2009.

Vincent J. G. Power, Ryanair v. European Commission: The European Court of First Instance's Judgment on Alleged State Aid at Charleroi Airport, *Issues in Aviation Law and Policy* 183(3), 2008-2009.

Trevor Soames & Alan Ryan, State Aid and Air Transport, *European Competition Law Review* 5, 1995.

Squire et. al., *European Commission consultation- shaping State aid for airports and airlines*, may 2011. Retrieved from: <http://www.squiresanders.com/files/Publication/e8cbcb90-348a-4d9d-aff9-003a923e2ff1/Presentation/PublicationAttachment/caa18cdd-f136-4eb9-9261-1704819f4253/SSH%20Client%20Alert%20-%20State%20aid%20in%20aviation%20guidelines%20consultation.pdf>. Last visited May 29th, 2013.

Sven B. Volcker, Start-up aid for low cost carriers – a policy perspective, *Competition Law Insight* 58, 2005.

Phedon Nicolaides, *Airport Operators and Budget Airlines [Commission Decision SA. 23324: Finavia, Airpro and Ryanair at Tampere-Pirkkala Airport]*. Retrieved from: <http://www.lexxion.eu/training/stateaidblog/2013/04/02/21-airport-operators-and-budget-airlines-commission-decision-sa23324-finavia-airpro-and-ryanair-at-tampere-pirkkala-airport>. Last visited: 29th May, 2013.

Other sources

Background note on State aid to the air transport sector, MEMO/08/962, 12th November 2008.

Brussels South Charleroi Airport, *Annual Statistics*. Retrieved from: <http://www.charleroi-airport.com/en/the-airport/statistics/index.html>. Last visited May 29th, 2013.

Draft Letter to be Addressed to the Minister of Foreign Affairs of the Member State, State aid S.A. 26500 No 2012/C, C(2012) 173 final. Retrieved from: http://ec.europa.eu/competition/state_aid/cases/243460/243460_1319041_310_2.pdf. Last visited May 29th, 2013

European Commission, Review of the Community Guidelines on Financing of Airports and Start-up Aid to Airlines departing from Regional Airports, Questionnaire. Retrieved from: http://ec.europa.eu/competition/consultations/2011_aviation_guidelines/elfaa_en.pdf. Last visited: May 29th, 2013.

European Commission Press Release, *State aid: Commission opens in-depth investigations into State aid to Romanian air transport sector; approves aid for two regional airports in the UK and in Italy*, IP/11/633, 24th May 2011. Retrieved from: http://europa.eu/rapid/press-release_IP-11-633_en.htm. Last visited May 29th, 2013.

European Commission Press Release, *State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland*, IP/12/833, 25.07.2012. Retrieved from: http://europa.eu/rapid/press-release_IP-12-833_en.htm. Last visited May 29th, 2013.

International Civil Aviation Organization, *European Experience of Air Transport Liberalization*, retrieved from: http://www.icao.int/sustainability/CaseStudies/StatesReplies/EuropeLiberalization_En.pdf. Last visited May 29th, 2013.

European Low Fares Airline Association, *Liberalization of European Air Transport: The benefits of Low Fares Airlines to Consumers, Airports, Regions and the Environment*. Retrieved from <http://www.elfaa.com/documents/ELFAABenefitsofLFAs2004.pdf> . Last visited May 29th, 2013.

International Civil Aviation Organization, 2013.
http://www.icao.int/sustainability/CaseStudies/StatesReplies/EuropeLiberalization_En.pdf .
Last visited May 29th , 2013

Own-Initiative Opinion of the Committee of the regions on Low-Cost Airlines and territorial Development, *OJ C 318*, 22.12.2004.

Ryanair, *Ryanair annual profits up 25% to 503m euro as traffic grows 5% to 76 m. Dividend of 0.34 euro proposed*. Retrieved from: http://www.ryanair.com/doc/investor/2012/q4_2012_doc.pdf, last visited May 29th, 2013.
Last visited May 29th, 2013.

State aid granted to or by airports, The recent Commission decision in practice. Retrieved from: <http://www.powershow.com/view/2014d->

[NDQ30/State aid granted to or by airports The recent Commission decision practice powerpoint ppt presentation](#). Last visited May 29th, 2013.

Questions on State aid for Airports and start-up aid to airlines, MEMO/07/285, 10th July 2007.