

**What is all this talk about Airport infrastructure?  
The gradual encroachment of the State Aid rules  
in the Aviation Sector.**

State aid & Public procurement in the European Union

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## **Abstract**

This paper consists of legal research that deals with the evolution and encroachment of the state aid rules in the aviation sector. The paper centres on the notion of what constitutes an economic activity and how this has evolved in parallel to the developments of the aviation market, specifically in relation to public funding of airport infrastructure. It will observe the landmark decisions of *Aéroport de Paris* and *Leipzig-Halle* and how the legal principles have transformed and affected public funding of airport infrastructure by reference to both the 2005 and 2014 aviation guidelines. This is done specifically in regard to the construction and operation of airport infrastructure that is subsequently commercially exploited. However, the legal ruling created in *Leipzig* extends beyond the aviation sector to infrastructure as a whole and therefore the question is whether the line has been drawn, between what is economic or non-economic, in the right place and what this has done for legal certainty for those states wishing to invest in public infrastructure. In response to this question, the findings of this paper suggest that the line has not been drawn in the correct place and that the distinction created by the Commission in relation to the public funding of infrastructure leads to legal uncertainty. Therefore it is recommended that the Commission either creates a more comprehensive block exemption in cases which fall outside its remit, or draws up a list of when states have exercised public powers, since this will create legal certainty for member states funding infrastructure projects. Moreover, the member state should in cases of uncertainty notify the Commission of the aid well in advance of undertaking a large infrastructure project where they believe it will be caught by the state aid rules, to avoid recovery of aid and time consuming investigative procedures.

**Keywords:** State aid, aviation sector, guidelines, infrastructure, economic activity

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## 1. Introduction

Linking people and regions, the aviation sector plays a vital role in the integration and the competitiveness of Europe, as well as its interaction with the world.<sup>1</sup> Currently, it accounts for more than 15 million annual commercial movements, 150 scheduled airlines, a network of over 440 airports and 60 air navigation service providers.<sup>2</sup> They carry about 40 per cent of the value of Europe's exports and imports, and transport 822 million passengers per year to and from Europe.<sup>3</sup> The EU's aviation sector has undergone fundamental changes, since the liberalisation of the airport transport sector by creating one aviation market in 1987. Previously airports were mostly managed as public infrastructures to ensure accessibility and territorial development; in recent years they have specific commercial objectives and are competing with each other to attract air traffic.<sup>4</sup> In only the past decade we have seen, on a large scale, conversions of old military or general airports into civil aviation airports. This was accompanied and supported by the emergence of low-cost carriers such as Ryan air, which has facilitated effective and growing competition and fostered economic growth and job creation.<sup>5</sup>

The state aid rules have developed in parallel to the changes of the aviation sector in relation to both airlines and airports. The landmark judgement in *Leipzig-Halle*<sup>6</sup> provided that the construction and financing of airport infrastructure, that was subsequently commercially exploited, constituted an economic activity. This subjected airport infrastructure to the state aid rules and caused waves of controversy across the sector. However, the ruling made by the

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<sup>1</sup>Commission Draft Communication of the EU guidelines on State aid to airports and airlines (2013), found at [http://ec.europa.eu/competition/consultations/2013\\_aviation\\_guidelines/aviation\\_guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_aviation_guidelines/aviation_guidelines_en.pdf) on 29/05/2014

<sup>2</sup> Commission Competition policy brief 'new state aid rules for a competitive aviation industry' issue 2 (2014) found at [http://ec.europa.eu/competition/publications/cpb/2014/002\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/002_en.pdf) on 29/05/2014

<sup>3</sup> *Ibid* p. 1.

<sup>4</sup> *Ibid*.

<sup>5</sup>Commission Draft Communication of the EU guidelines on State aid to airports and airlines (2013), found at [http://ec.europa.eu/competition/consultations/2013\\_aviation\\_guidelines/aviation\\_guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_aviation_guidelines/aviation_guidelines_en.pdf) on 29/05/2014 p. 2.

<sup>6</sup> Case C-288/11 *Mitteldeutsche Flughafen AG and another v European Commission and others (Arbeitsgemeinschaft Deutscher Verkehrsflughafen eV (ADV))* [2013] 2 CMLR 18.

court has implications for any public authorities, as well as public and private undertakings owning, operating and using infrastructure in the European Union<sup>7</sup>. This was reflected in the Draft Commission notice on the application of Article 107 TFEU (state aid article) that confirmed that the construction of any type of infrastructure that is meant to be exploited economically, such as a commercial airport runway, is an economic activity in itself, which means that State aid rules apply to the way in which it is funded<sup>8</sup>. Moreover, it illustrates the modernisation by the Commission of the state aid rules to align them with the priorities of the EU's growth strategy 2020. This wants the EU to become a smart, sustainable and inclusive economy<sup>9</sup>. This encroachment of the state aid rules on the aviation sector in relation to airports raises interesting questions on how this developed and affected the sector specifically. Furthermore, whether or not the court's reasoning is sufficient and has drawn the line in the right place will be analysed as well as the consequences for the public funding of infrastructure as a whole.

### *1.1. Methodology*

The research question is as follows:

‘In light of the encroachment of the state aid rules to the financing and construction of airport infrastructure, what is the impact of the ruling Leipzig-Halle on the aviation sector and other infrastructure generally, and has the line as to what constitutes an economic activity been drawn in the right place.’

This research question is split into two parts. The first part is descriptive and looks at the development of state aid rules and its application to the construction and financing of infrastructure before Leipzig-Halle. A look to past literature, aviation guidelines and Commission documents will be used to demonstrate the

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<sup>7</sup> Maier & Dietz, Public Infrastructure financing in the EU: A hot topic in State aid law , *Revue des droits de la concurrence*, Competition law journal, 2013 found at [http://www.mwe.com/files/Publication/763c311e-c9df-4787-9530-570cb76dc164/Presentation/PublicationAttachment/08c6a308-9138-4269-bf55-5fce5e7848e0/Concurrences\\_03\\_2013\\_State\\_Aid.pdf?PublicationTypes=d4366db4-cfb3-4a31-95e6-f18e3d273c8a](http://www.mwe.com/files/Publication/763c311e-c9df-4787-9530-570cb76dc164/Presentation/PublicationAttachment/08c6a308-9138-4269-bf55-5fce5e7848e0/Concurrences_03_2013_State_Aid.pdf?PublicationTypes=d4366db4-cfb3-4a31-95e6-f18e3d273c8a) on 29/05/2014.

<sup>8</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) found at [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf) on 29/05/2014.

<sup>9</sup> Europe 2020 found at [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm) on 29/05/2014.

state of affairs at that time. The second part will contrast the findings of the previous part in light of the ruling of Leipzig-Halle and analyse that case into exactly what has changed and its impact on the aviation sector. This will be done by looking to current literature, case law, Commission documents and the new aviation guidelines 2014. The final part is normative since it seeks to examine whether or not the court has, according to the reasoning of Leipzig-Halle, drawn the line in the correct place since it applies to infrastructure as a whole. The way that this question will be approached is by an examination as to what is and what is not classified as an economic activity in light of airports and whether or not this gives legal certainty to those in other sectors.

### *1.2. Structure*

This contribution will be split into three parts. Firstly, chapter 1 will look at the state aid rules and the development of what constitutes an economic activity in relation to financing and construction of airports before Leipzig-Halle. Secondly, chapter 2 will explore and examine the ruling in Leipzig-Halle. It will show the changes in the Commission's approach and how the financing of construction of airport infrastructure now comes within the remit of the state aid rules. Furthermore its impact on the aviation sector will be analysed in accordance with the new 2014 aviation guidelines. Lastly, chapter 3 will get to the heart of the debate concerning 'economic v non economic activity' and its significance for the financing of infrastructure and whether or not the Commission has drawn the line in the right place. This will be followed by a conclusion and any recommendations.

### *1.3. Scope*

Due to the interdisciplinary nature of state aid and the research question, the scope will be limited to the legal implications. The main focus will be on the state aid rules applied to the aviation sector and its affect on airports. Therefore the case law concerning low-cost airlines will only be touched upon. Moreover, the implications of the normative question will only make a suggestion for public infrastructure in general and not make a sector by sector analysis due to feasibility and time constraint issues.

## 2. Chapter 1 Situation before Leipzig-Halle

The state aid rules are enshrined in the treaties, specifically Article 107(1) of the TFEU. This defines state aid as any aid granted by a member state or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between member states. However, the centre piece of this article is connected with the notion of ‘undertaking’. Since the state aid rules only apply where the recipient of an aid is an ‘undertaking’. The definition of an undertaking is an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>10</sup> The legal status under national law is not decisive, only if it is carrying out an economic activity.<sup>11</sup> Therefore the notion of what constitutes ‘an economic activity’ is pivotal for the state aid rules to apply, since where an activity is not classified as economic then it will fall outside the state aid rules. An economic activity is considered to be any activity consisting in offering goods and services on the market.<sup>12</sup> However, due to political choice or economic developments, the classification of a given activity can change over time.<sup>13</sup> What is not an economic activity today may turn into one in the future, and vice versa<sup>14</sup>. This is true for the aviation sector and its development, which has allowed for the state aid rules to incrementally encroach upon it in accordance with the liberalisation of the market.

With regard to the state rules and the aviation sector, this comprises of two distinct, yet overlapping aspects: on the one hand is state aid to airlines, which consist of granting aid to low-cost carriers by providing incentives to create new routes or new schedules; on the other, is the financial support for airports granted by the public authorities, that were to promote, particularly in relation to regional airports, where the beneficiary is the operator of the airport

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<sup>10</sup> C-180/98 *Pavlov and Others* (2000) ECR I-6451.

<sup>11</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) found at [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf) on 29/05/2014 para 8.

<sup>12</sup> Case 118/85 *Commission v Italy* (1987) ECR 2599.

<sup>13</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) found at [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf) on 29/05/2014 para 13.

<sup>14</sup> *Ibid.*

itself. The distinction between these two and how the court applied the state aid rules during the liberalisation of the aviation sector was stark in the early 1990's. Specifically in relation to how the court classified the financing and construction of airport infrastructure. The financing and construction of airport infrastructure was considered to fall outside the ambit of the state aid rules, on the basis that it was considered a public interest task and not an economic activity. This reasoning was further reinforced in the 1994 guidelines on the application of the state aid rules in the aviation sector.

The 1994 guidelines covered several topics regarding the application of EU state aid rules in the aviation sector, but its predominant focus was on state aid to airlines or air carriers. For instance the guidelines covered activities that are accessory to air transport that may benefit airlines through direct or indirect subsidies i.e. flight schools, airport facilities, and duty free shops. The guidelines define the limits within which such subsidies could be granted<sup>15</sup> and also the subject of operational aid, in particular the subsidisation of operational aids for particular air routes.<sup>16</sup> Therefore the guidelines were specifically tailored for airlines.

However, the guidelines do discuss public infrastructure. Here they cover infrastructure such as airports, but also motorways and bridges. The guidelines provide a very brief and definitive answer. It provides that: "*the construction of enlargement of infrastructure projects [...] represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids.*"<sup>17</sup> However the guidelines go on to state that this principle applies only to the construction of infrastructure by member states. This reflected the Commission's view point that airport infrastructure does not fall under the notion of an economic activity and therefore not within the scope of the state aid rules. The guidelines did, however, leave open the possibility whether the operation and management of airport infrastructure constituted an economic activity and is therefore subject to the state aid and competition rules.

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<sup>15</sup> 1994 Guidelines found at [http://ec.europa.eu/competition/sectors/transport/1994\\_guidelines\\_aviation/en.pdf](http://ec.europa.eu/competition/sectors/transport/1994_guidelines_aviation/en.pdf) on 29/05/2014 para 10.

<sup>16</sup> 1994 Guidelines para 14.

<sup>17</sup> 1994 Guidelines para 12.



The court, however, invalidated the above reasoning that airport infrastructure was a measure of general economic policy with its judgment in *Aéroport de Paris* on the 21<sup>st</sup> December 2000.<sup>18</sup> It also clarified the issue concerning the uncertainty of whether or not the operation and management of an airport constitutes an economic activity, which was left open by the previous guidelines. Even though this case was classified as a competition ruling, it nevertheless was the turning point upon which the state aid rules began to encroach upon the realm of airport infrastructure.

## 2.2. Case analysis of *Aéroport de Paris*

The public cooperation Aéroport de Paris (hereinafter ADP), governed by French law, is responsible for the planning, administration and development of all the civil air installations which are centred in the Paris region. That seeks to facilitate; the arrival and departure of aircraft, to control traffic and to load, unload and handle passengers, goods and mail carried by air, and all associated installations. ADP concluded two concession agreements for the supply of catering services with Alpha Flight Services (AFS) and Orly Air Traiteur (OAT). The concession agreements contained a provision on a commercial fee to be paid by the companies to ADP which was calculated as a proportion of turnover. The commercial fee made a distinction between self-handling services on the one hand and ground handling services on the other, with the fee for self-handling services being lower. This differentiation in the calculation of the commercial fee led AFS to lodge a formal complaint with the Commission arguing that the fee applied to its turnover and the fee applied to the turnover of OAT were not equivalent and therefore gave rise to discrimination between suppliers. AFS claimed that this would constitute an abuse of a dominant position by ADP and therefore fall under Article 102 TFEU. The Commission took a decision confirming the alleged abuse of a dominant position by ADP.

In reaction to this, ADP brought an action for annulment against the Commission decision claiming that competition law is not applicable to the management and operation of airport infrastructure as the field of application

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<sup>18</sup>(T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929 confirmed by Case C-82/01 [2002] ECR I-9297.

*ratione personae* is not opened. For competition rules to be applicable there needs to be an undertaking.<sup>19</sup> The court defined an undertaking as an entity engaged in economic activity regardless of its legal status and the way in which it is financed.<sup>20</sup> An economic activity can be described as any activity consisting of offering goods and services on a given market.<sup>21</sup> The central question for the court was to determine whether the operation and management of an airport can constitute an economic activity. This was particularly relevant since the court ruled on it for the first time while the Commission had already adopted this approach in previous decisions.<sup>22</sup>

The court first of all made clear that the fact that ADP is a public cooperation placed under the authority of the Minister responsible for civil aviation and manages facilities in public ownership does not mean per se that it cannot be regarded as conducting an economic activity for the purpose of Article 102 TFEU. It further emphasised that it is necessary to determine what the relevant activities of ADP are and then to decide whether they constitute an economic activity. In its view a distinction must be made between ADP's purely administrative actions on the one hand and the management and operation of the Paris airports on the other. The commercial fees falling under the latter as they constitute an access charge paid in exchange for a licence to operate within the airport. The court pointed at the crucial role that ADP plays in determining the procedures and conditions on which suppliers of self-handling and ground handling services carry out their activities and puts a special emphasis on the fact that ADP levies the commercial fee. It went on stressing that such an activity cannot be classified as a solely supervisory activity.<sup>23</sup> Instead the court underlined that through its action, which consists of raising money in exchange

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<sup>19</sup> see Eilmansberger, in: Münchener Kommentar, EU Wettbewerbsrecht, Bd. 1, 1. Auflage 2007, Art. 82, para 60.

<sup>20</sup> C-41/90 *Höfner and Elser*.

<sup>21</sup> Notification of the Commission from 11th January 2011, ECJ judgment from 16th June 1987, case C-118/85, case C-35/96 *Commission v. Italy*, C-475/99 *Ambulanz Glöckner*. C-218/00 *Cisal/INAIL*.

<sup>22</sup> Commission Decision June 28 1995, Brussels National Airport, OJ 1995 L216/9, Commission Decision of January 14, 1998, Flughafen Frankfurt/Main AG, OJ 1998 L72/30, Commission Decision of February 10, 1999, Portuguese Airports, OJ 1999 L 69/31, Commission Decision of 10 February 1999, Immailulaitos/Luftfartsverket, OJ 1999 L 69/24.

<sup>23</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929 para 120.

for services, ADP performs an activity of an economic nature.<sup>24</sup> Furthermore, the fact that ADP operates and manages publicly-owned property does not exclude the exercise of activities of an economic nature.<sup>25</sup>

In addition to that the court made clear that the exercise of an economic activity is not called into question because of the fact that the agreements between ADP and the ground handlers were concluded under French law applicable for the occupation of publicly-owned property. In its reasoning it refers to *Italy v. Commission*<sup>26</sup> where it ruled that the management of public telecommunications equipment and the fact that the equipment was placed at the disposal of users on payment of a fee amounts to a business activity. A similar approach was adopted in *Deutsche Bahn v. Commission*<sup>27</sup> where it held that the provision of locomotives, traction and access to the railway infrastructure is to be regarded as an economic activity. Moreover it stated that the fact that an activity might be exercised by a private undertaking amounts to further evidence that the activity in question can be described as a business activity.<sup>28</sup>

Another crucial requirement for the exercise of economic activity is the existence of a market.<sup>29</sup> The market can be divided into a product and a geographical market.<sup>30</sup> In the judgement it declared that there is a product market for airport infrastructure management services and narrowed it down in this case to the market in management services in the Paris airports.<sup>31</sup> As manager of those airports, ADP is to be seen as the supplier on the relevant market, while the ground handlers, who need the licence issued by ADP and the airport facilities in order to carry out their activities, constitute the demand side of the market.<sup>32</sup>

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<sup>24</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* para 123.

<sup>27</sup> *Ibid* para 123.

<sup>28</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929 para 124, see in this regard also Case C-41/90, Höfner and Elser, para. 22., Case-475/99, *Ambulanz Glöckner*.

<sup>29</sup> N. Pauer, *Die Abgrenzung von hoheitlicher und wirtschaftlicher Tätigkeit im EU-Wettbewerbsrecht*, *Wirtschaft und Wettbewerb*, 4th November 2004.

<sup>30</sup> *Ibid.*

<sup>31</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929 para 137.

<sup>32</sup> *Ibid* para 137.

As regards the geographical market, this is defined as the territory in which all traders operate in similar conditions of competition with regard specifically to the relevant products.<sup>33</sup> In this regard the court dismissed the applicant's argument that all the buildings available in the Paris region must be taken into consideration.<sup>34</sup> Instead it highlighted that what is at issue is the terms, determined by ADP, on which access is granted to the airport premises for the purpose of supplying ground handling services. These services can only be provided in the airport and with ADP's authorisation.<sup>35</sup> It also dismissed the argument that the other large continental airports need to be taken into account by emphasising that for most passengers leaving or arriving in the Paris region, the air transport services using Orly and Roissy-CDG are not interchangeable with the services offered in other airports. Furthermore that competition between airports is important only in so far as an airport forms a transit point for other destinations.

In its submission, the court confirmed that not only is there a given product and geographical market on which ADP performs an economic activity, but the firm also has a dominant position under Article 102 TFEU. Even though, this finding by the court is important for the competition rules what is remarkable is that the court classified the operation and management of an airport infrastructure as an economic activity.

With this decision the court opened up the application of not only the rules on competition, but also the state aid rules to the management and operation of public infrastructure. At the same time it confirmed that not all activities of an airport are of an economic nature. Therefore activities that fall under State responsibility in its exercise of official powers as a public authority cannot be classified as an economic activity. These activities include air traffic control, police customs, fire fighting and activities necessary to safeguard civil aviation against acts of unlawful interference. The public-funding of such non-economic

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<sup>33</sup> Case T-38/91 *Tetra Pak v. Commission* (1994) ECR II- 755, para 91.

<sup>34</sup>(T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929. para 141.

<sup>35</sup> *Ibid* para 141.

activities is excluded from the application of state aid in so far as they are strictly limited to the costs to which they give rise.<sup>36</sup>

The implications of this judgement for what constitutes an ‘economic activity’ are particularly important; (i) firstly, it provides that whether there is an economic activity or not does not depend on the legal form of the institution, its organisation or the way in which it finances itself but solely on the activity of the institution on a market.<sup>37</sup> Therefore also public authorities can participate on the market<sup>38</sup>; (ii) secondly, a further criteria in order to determine whether there is an economic activity concerns the question if a private undertaking might exercise the same activity (private investor test) or whether the activity rather aims to serve the public interest.<sup>39</sup> For instance, in relation to the latter in *Poucet and Pistre*<sup>40</sup> the court made clear that public institutions which seek to serve social security and solidarity cannot be seen as undertakings<sup>41</sup>; (iii) thirdly, that the remuneration for the allocation of services is a strong indicator of an economic activity.<sup>42</sup> In this context it needs to be emphasised that the amount of the remuneration has to be freely determined by the contracting authority. If the remuneration is determined by law, this might speak against an economic activity.<sup>43</sup> Furthermore the intent to realise a profit is not a necessary condition for an activity to be classified as an economic activity<sup>44</sup> and; (iv) lastly, a strong indicator whether an economic activity is given is the existence of a market on which the public authority gets active.<sup>45</sup> If there is a given market it needs to be determined upon numerous factors according to the specific case.

However, despite the enumeration in *Aéroport de Paris* of certain aspects that need to be taken into consideration in determining an economic activity, a

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<sup>36</sup> N. Pauer, Die Abgrenzung hoheitlicher und wirtschaftlicher Tätigkeiten im EU Wettbewerbsrecht, WuW, 4th November 2013.

<sup>37</sup> *Ibid.*

<sup>38</sup> Lange/Herdecke, WuW 2002, p. 953.

<sup>39</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929, Case C-343/95 *Diego Cali*, Case C-24/86 *Bodson/Funebres*.

<sup>40</sup> Case C-190/91 *Poucet and Pistre*.

<sup>41</sup> Case in which the ECJ came to the same conclusion: C-264/01 *AOK Bundesverband v. Ichthyol*.

<sup>42</sup> (T-128/98) *Aéroports de Paris v Commission of the European Communities* [2001] ECR II-3929 para 210.

<sup>43</sup> *Ibid.*

<sup>44</sup> See, for example, Case C-70/95 *Sodemare/Regione Lombardi*.

<sup>45</sup> Case C-118/85 *Commission/ Italy*.

clear distinction between an economic and non-economic activity cannot be drawn in a general manner. It is recognisable that the court rather follows a case to case approach taking certain criteria like the activity of the institution on a given market and the market investor principle into consideration.<sup>46</sup> From a viewpoint of legal certainty this case by case approach is certainly not desirable.<sup>47</sup>

In conclusion it is important to note that the court in its judgment only classified the operation and management of an airport as an economic activity. It did not comment on the question whether the construction of an airport constitutes an economic activity as well. The *Aéroport de Paris* judgment is especially important in the light of the fact that the legal reasoning applied in this case is reflected in the Commission's 2005 guidelines and extended by the Court of Justice in the following. Therefore the judgment can be seen as the stepping stone for the court's future approach towards the financing of public infrastructure.

### *2.3. Impact on the aviation sector as shown in the 2005 guidelines*

In 2005 the Commission adopted new guidelines on the financing of airports and start-up aid for airlines leaving from regional airports. The new guidelines were drafted as a consequence of the Commission's *Ryanair* Decision.<sup>48</sup> The overall purpose of the guidelines was to clarify how state aid rules apply to the financing of airport infrastructure and in which cases certain categories of State aid to airports and airlines can be declared compatible.<sup>49</sup> In addition to that a further intention of the guideline drafters was to supplement and clarify the 1994 guidelines.<sup>50</sup>

As a starting point the 2005 guidelines make clear that an airport operator can carry out an economic activity, exceptions being made in cases where the State makes use of the exercise of its sovereign powers (hazard prevention, air

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<sup>46</sup> *Schwarze*, EuZW 2000, 613, 614.

<sup>47</sup> Commission Report, 27th November 2002, COM (2002), 636, 4.2..

<sup>48</sup> Decision of February 12, 2004, OJ 2004, L137/1- Charleroi Airport/Ryanair.

<sup>49</sup> 2005 Aviation Guidelines [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005XC1209\(03\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005XC1209(03)) para 19.

<sup>50</sup> 2005 Aviation Guidelines para 19.

traffic control, police, customs and fire-fighting).<sup>51</sup> In this context the guidelines undertake an explicit reference to the *Aéroport de Paris* judgement where the court clearly stated that the operation and management of an airport forms an economic activity. What is new in the guidelines compared to the court's decision in *Aéroport de Paris* is that they apply to the operation of regional airports as well.<sup>52</sup> Therefore the understanding as to what constitutes an economic activity relevant for the state aid rules has been sufficiently broadened, beyond large scale airports. Furthermore, the guidelines make clear that not all activities of an airport operator are necessarily of an economic nature. In this regard the guidelines provide that it is necessary to distinguish between the activities and establish to what extent its activities are of an economic nature.<sup>53</sup>

In *Aéroport de Paris* the court only addressed the question whether the operation of an airport can constitute an economic activity. However, it did not delve into the question whether the construction of an airport can be seen as an economic activity as well. In its 1994 Guidelines the Commission clearly stated 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.*'<sup>54</sup> In the 2005 guidelines a new approach towards the financing of airport infrastructure can be detected where, the Commission states that the construction of airport infrastructure falls under the scope of the application of the guidelines<sup>55</sup>. Furthermore, it goes on to declare that infrastructure is the basis for the economic activities carried out by the airport operator<sup>56</sup>. Any operator engaging in an economic activity should therefore finance the costs of using or building the infrastructure it manages from its own resources. Consequently, the provision of airport infrastructure to an operator by a member state with the intention to finance infrastructure can give the economic operator an economic advantage over its competitors. This possible advantage must be notified and examined in the light of the rules on state aid.<sup>57</sup>

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<sup>51</sup> 2005 Aviation Guidelines para 30.

<sup>52</sup> 2005 Aviation Guidelines para 11.

<sup>53</sup> 2005 Aviation Guidelines para 32.

<sup>54</sup> 1994 Aviation Guidelines para 12.

<sup>55</sup> 2005 Aviation Guidelines para 53.

<sup>56</sup> 2005 Aviation Guidelines para 56.

<sup>57</sup> 2005 Aviation Guidelines para 57.

This principle as developed in the 2005 guidelines does not only apply to large-scale airports but also to regional airports.

The Commission enumerates cases in which a presumption for state aid is given. These are cases where the infrastructure in question was allotted to a predetermined manager which gained undue advantage there from, or if an unjustifiable difference between the sale price and a recent construction price were to give the purchaser an undue advantage.<sup>58</sup> In particular, when additional infrastructure, which was not planned when the existing infrastructure was allotted, is made available to the airport operator, the operator must pay rent at market values commensurate with the costs of the new infrastructure and the duration of its use.<sup>59</sup> Moreover, if further development of the infrastructure was not provided for in the original contract, the additional infrastructure must be closely linked to the use of the existing infrastructure and the subject of the manager's initial contract must stay the same.<sup>60</sup> These are conditions for the measure not to be regarded as state aid exemplified in the Commission's guidelines.

The approach taken by the Commission in the 2005 guidelines have led to criticism. Firstly, that the 1994 and 2005 guidelines are 'self-contradictory' and thus create legal uncertainty.<sup>61</sup> Whereas the 1994 guidelines explicitly exclude the construction of infrastructure as an economic activity, the 2005 guidelines make it possible to classify the construction of airports as an economic activity as soon as the conditions are met.<sup>62</sup> The 2005 guidelines therefore go beyond a simple clarification of the 1994 guidelines and undertake a complete departure from the principles established therein.

Secondly, also with regard to the construction of infrastructure, it has been pointed out that the rules established by the guidelines go very far as no provisions in the Treaties explicitly allow the conclusion that the construction of

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<sup>58</sup> 2005 Aviation Guidelines para 59.

<sup>59</sup> 2005 Aviation Guidelines para 60.

<sup>60</sup> *Ibid.*

<sup>61</sup> U. Soltész, The new Commission guidelines on State Aid for airports- A step too far..., Publications Gleiss Lutz.

<sup>62</sup> *Ibid.*



infrastructure is an entrepreneurial activity.<sup>63</sup> On the contrary, the costs of state infrastructure measures generally have to be borne by the general public.<sup>64</sup> The approach adopted by the Commission would constitute an unlawful broadening of the word 'undertaking' and of the understanding of what constitutes an economic activity.<sup>65</sup>

Thirdly, the extension of the application to regional airports has been criticised. Regional airports often depend on the financing of their infrastructure by the state as it is very difficult to find private investors.<sup>66</sup> Furthermore, it needs to be borne in mind that, contrary to a market service which is only rendered to certain market players in return for consideration, the construction and enlargement of an airport supports the development of the infrastructure of the region in whose catchment area it is located. Ultimately, it can be argued that the provision of sufficient airport capacities is a task for economic and regional policy. This would also be in line with the approach adopted by the Commission in its 1994 guidelines. In the case of small and medium-sized airports public financing is very often the only possibility for obtaining financing at all as they often do not reach a threshold value of passenger volume that would render profitable operations possible without subsidies to infrastructure.<sup>67</sup>

Overall it can be noticed that with the broadening of the application of the state aid rules, the possibilities of control for the Commission have been extended. However, even though the guidelines allow for the construction of infrastructure to be classified as an economic activity and therefore falling under state aid control, they leave the possibility for a justification of the aid open. In order for the aid to the construction and operation of the infrastructure to be justified it needs to serve a clearly defined objective of general interest. Furthermore the construction aid needs to be necessary and proportional to the

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<sup>63</sup> *Ibid.*

<sup>64</sup> Heidenhain, *Handbuch des Europäischen Beihilferechts*, para. 24., hitherto this was also the approach taken by the Commission, OJ 2002 C 172/2, no. 14.

<sup>65</sup> U. Soltesz, *The new Commission Guidelines on State Aid for airports-A step too far...*, Gleiss Lutz publications.

<sup>66</sup> cf. Cranfield University, *Study on competition between airports and the application of State Aid rules (September 2002)* Vol I, 3-1.

<sup>67</sup> *see* U. Soltesz, *The new Commission Guidelines on State Aid for airports- A step too far...*, Gleiss Lutz publications.

objective which has been set and the infrastructure concerned needs to have satisfactory medium-term prospects for use.

Additionally, all potential users need to have access to it in a non-discriminatory manner and the development of trade is not affected to an extent contrary to the Community interest.<sup>68</sup> It can be observed that the conditions for the justification of aid have become stricter. In the 1994 guidelines the Commission only examined the question whether the infrastructure has been provided to all users without discrimination and that there is a direct line between the public financial support and the infrastructure measure.<sup>69</sup> The guidelines also deal with services of general economic interest. In this regard the guidelines state that some airport activities can be seen as a service of general economic interest such as the operation of an airport in a remote region.<sup>70</sup> The permissibility of compensation for the construction, enlargement or operation of airports has to be reviewed in light of *Altmark*<sup>71</sup>. According to which compensation payments for the rendering of services in the general economic interest do not constitute state aid.<sup>72</sup>

To conclude the 2005 guidelines have extended the Commission's powers in relation to the 1994 guidelines and introduced new constraints in the field of financing airport infrastructure. The guidelines go beyond what has been established by the court in its *Aéroport de Paris* judgement and now include not only the operation of an airport but also the construction of airport infrastructure. This new approach has been criticised because it broadens the notion of what constitutes state aid and not only supplements the 1994 guidelines but goes further. Especially the inclusion of regional airports can lead to new challenges as they depend to a large extent on the financing of the public purse.

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<sup>68</sup> see conditions set out in para 61 of the 2005 Aviation Guidelines.

<sup>69</sup> A. Bartosch, Wettbewerbsverzerrungen auf den Märkten für den Betrieb und die Nutzung von Flughafeninfrastrukturen, *Wirtschaft und Wettbewerb*, p. 3.

<sup>70</sup> 2005 Aviation Guidelines para 34, Dolde/Porsch, *ZLW* 2004, p. 3.

<sup>71</sup> Case C- 280/00, *Altmark Trans GmbH und Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*.

<sup>72</sup> 2005 Aviation Guidelines para 36.

### 3. Chapter 2 Leipzig-Halle & Beyond

The previous chapter has shown the incremental encroachment of the state aid rules applying to airport infrastructure and specifically, the operation of airport infrastructure constituting an economic activity. However, we now turn to the recent decision of *Leipzig-Halle* by the General Court<sup>73</sup>, which was confirmed by the CJEU upon appeal. This case built on previous jurisprudence and added as a further step the link between the exploitation of infrastructure as an economic activity and the construction for the purposes of its later exploitation. It stated that the economic or non-economic character of the later exploitation necessarily determines the character of the construction of the infrastructure.<sup>74</sup> Thus, the construction of infrastructure is an economic activity and constitutes state aid, if the infrastructure is commercially exploited. The following will provide a case analysis and draw out the principles that were relevant to the decision.

#### 3.1. Case Analysis of Leipzig Halle

The case concerned the financing of the new southern runway at Leipzig Halle airport. This financing came from a capital injection of 350 million Euros by Mitteldeutsche Flughafen AG and its subsidiary Flughafen Leipzig-Halle GmbH (collectively known as M) that operated the airport and whose shareholders were public bodies consisting of; the Lander of Saxony, Saxony-Anhalt, the cities of Dresden, Halle and Leipzig. An undertaking, DHL, which operated in the express parcel delivery sector, decided to move its European air freight hub from Belgium to Leipzig Halle. M and DHL entered into an agreement under which M was required to construct the new runway. The terms contained in the agreement provided for continuous access of DHL to the runway and an assurance that at least 90 per cent of flights made by or for DHL could be carried out from that runway. To assure DHL that M could guarantee this and M's financial performance, the agreement contained a warranty that M would pay compensation to DHL in the event that it was not longer able to use the airport as envisaged. The Commission Decision 2008/948 provided that the

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<sup>73</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG*.

<sup>74</sup> Note to DG Regio on the application of state aid rules to infrastructure investment projects (2011) found at [http://www.esfondi.lv/upload/00-vadlinijas/Note\\_on\\_State\\_aid\\_for\\_infrastructure\\_projects.pdf](http://www.esfondi.lv/upload/00-vadlinijas/Note_on_State_aid_for_infrastructure_projects.pdf) on 29/05/2014.

capital injection made by M's public shareholders constituted state aid, which was compatible with the internal market, but that the comfort letter and warranties provided in the framework agreement constituted unlawful state aid. This led to an appeal by M to the General Court, on a number of grounds, however, the most important, for our discussion, concerns the claim that the construction or extension of airport infrastructure was not an economic activity and therefore not state aid.

The arguments put forth by the applicant's were that the Commission was wrong to regard the financing of the southern runway, airport infrastructure, as state aid. This was based on two fundamental premises. Firstly, that it was not an economic activity since the construction of infrastructure was a part of the transport, economic and regional policy and the development of airports corresponded to the interests of the EU.<sup>75</sup> The applicant provided that the construction of infrastructure could not constitute an economic activity as a private investor would not engage in such an activity.<sup>76</sup> Since there is no possibility of the investment being profitable as the recovery of construction costs would not be recovered from the users of the airport via airport charges. Furthermore the German system prescribed that a private operator could only introduce such charges via authorisation from the airport authority of the Land and had no influence over the amount set.<sup>77</sup> Therefore the charges paid by users could not be consideration for the construction of that infrastructure nor would the transaction be profitable for a private investor, with the result that the activity does not constitute an economic activity, but rather a structural policy measure.

Secondly, the Commission failed to adhere to its practices by dissociating the construction of airport infrastructure necessary for its operation and the operation i.e. the management of that infrastructure. The applicant stated that they constituted two different activities, because the latter 'the management' was subject to the rules of state aid<sup>78</sup>, whereas the former wasn't as long as all potential users have equal and non-discriminatory access to it. It is for the

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<sup>75</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* para 73.

<sup>76</sup> *Ibid* para 74.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ryanair Ltd v Commission of the European Communities* [2009] 2CMLR 7.

Commission to adduce positive evidence that they are economic in nature in accordance with its previous case-law.<sup>79</sup> However, it failed by deducing the economic nature of the construction of the southern runway from the economic nature of the operation of the airport.<sup>80</sup> Consequently, the capital injection in the applicant's submission was not state aid.

The General Court's response to these two issues was somewhat surprising and reveals the change of approach towards public infrastructure funding and the application of the state aid rules. With regard to the first argument, that construction of infrastructure is not classified as an economic activity, but a part of the regional, economic and transport policy. It stated that Article 107(1) does not distinguish between the causes or objectives of state aid, but defines them in relation to their effects<sup>81</sup> and that the capital injection by public authorities must be assessed in light of the private investor test, regardless of social, regional and sectoral policy considerations.<sup>82</sup> These should instead form part of the assessment by the Commission in whether or not such aid is compatible with the common market. This was a correct statement by the court since the private investor test is there to examine the compatibility of the aid under Article 108 TFEU. The test examines whether or not a private market investor would have acted in the same way and granted the advantage i.e. acting upon the same terms and market conditions. Where a market investor would not grant such an advantage, this would indicate there has been state aid. The court reasoned that the airport sector had undergone developments, in particular its organisation and its economic and competitive situation as shown from previous case law.<sup>83</sup> This meant that it was no longer possible to exclude the application of the state aid rules to airports and take into account those developments and implications for Article 107 TFEU. In terms of the applicant providing that the construction of infrastructure was not

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<sup>79</sup> *Ibid.*

<sup>80</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* para 77 .

<sup>81</sup> Case 173/73 *Italy v Commission* [1974] ECR 709.

<sup>82</sup> Case T-20/03 *Kahla/Thuringen Porzellan v Commission* [2008] ECR II-2305.

<sup>83</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* para 105.

profitable. The court in response stated that an economic activity does not depend on the profitability of such an activity.<sup>84</sup>

Turning to the second point of dissociating the construction of airport infrastructure from the operation of that infrastructure, it also rejected this. It first confirmed that airport management is an economic activity by illustrating that operating Leipzig-Halle airport, M, is engaged in an economic activity.<sup>85</sup> This was based on several factors; (i) the management of airport infrastructure is an economic activity and since M provides airport services for money from airport taxes which are remuneration for the provision of services rendered by the holder of the airport and; (ii) the existence of a market is shown, by the fact that M competed with other regional airports to become DHL's European air freight HUB. Therefore this allows the operation of Leipzig-Halle airport by M to be classified as an economic activity, which the applicants did not dispute. It then turned to the construction of the new runway, and as the operation of the southern runway is part of M's economic activity, the southern runway is infrastructure which will be commercially exploited by M, since it will not make it available without charge to users in the common interest, but will charge users for its use. Airport fees will be the major source of revenue for financing the new southern runway.<sup>86</sup> The construction and development of that runway will thus permit M to increase its capacity and its economic activity as operator of Leipzig-Halle airport. This meant that the Commission had adduced enough evidence to substantiate such a link between the construction and the operation of the new runway.

The court rejected the idea of dissociation between the construction and development of the runway on the one hand and the operation on the other.<sup>87</sup> Instead the distinction was on the subsequent use to which the infrastructure was put and if it amounts to an economic activity. Upon this reasoning, the court considered a number of activities of airport operators that are not economic in nature and fall within the exercise of public powers. These were measures such

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<sup>84</sup> *Ibid* para 114.

<sup>85</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* para 93.

<sup>86</sup> *Ibid* para 94.

<sup>87</sup> *Ibid* para 95.

as those relating to security, police functions, public security measures, fire protection, air traffic control and meteorological service. It noted that the construction and development of the southern runway did not fall within this for the purposes of assessing the economic nature of M's activities.<sup>88</sup>In fact it found that the construction of the runway is inseparable from its operation and must be classified as an economic activity, because in so far as it operates the southern runway, M is engaging in an economic activity which cannot be dissociated from the activity of building that runway.<sup>89</sup>

In conclusion the ruling has established that the construction of airport infrastructure that is meant to be commercially exploited is an economic activity in itself, which means the state aid rules apply to the way that it is funded. This was upheld by the CJEU in the further appeal by the applicant that stated the receipt by an airport operator of capital contributions from its public shareholders to finance the construction of a new runway constituted unlawful state aid. This was on the basis that the airport in question was operating competitively and that the construction work was therefore an economic activity within the meaning of Article 107 TFEU.<sup>90</sup>Furthermore it showed that; (i) an activity does not need to be profitable for it to be economic; (ii) that the distinction between the exercise of state authority and economic activities has to be done on a case by case basis and; (iii) that only the construction of infrastructure that is not commercially exploited falls outside the scope of the state aid rules, because if the construction is linked to an economic activity, then it will be classified as one itself.

The consequences of the ruling is that it settled the previous uncertainty that the member states used to consider the financing of infrastructure not being subject to the state aid rules as the construction and operation were seen, in their eyes, as a public interest task<sup>91</sup>. The legal point is that infrastructure, which is later exploited for commercial use, extends well beyond airports and applies to all infrastructures that are publically funded such as sport stadiums, multipurpose

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<sup>88</sup> *Ibid* para 99 .

<sup>89</sup> Joined Cases T-433/08 *Freistaat Sachsen and Land Sachsen-Anhalt* and T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* para 100.

<sup>90</sup> (C-288/11 P) *Mitteldeutsche Flughafen AG v European Commission* [2012] 2 CMLR 18.

<sup>91</sup> Note to DG Regio on the application of state aid rules to infrastructure investment projects (2011) found at [http://www.esfondi.lv/upload/00-vadlinijas/Note\\_on\\_State\\_aid\\_for\\_infrastructure\\_projects.pdf](http://www.esfondi.lv/upload/00-vadlinijas/Note_on_State_aid_for_infrastructure_projects.pdf) on 29/05/2014 para 5.

public arenas and ports. This was confirmed in both the note to DG REGIO<sup>92</sup> and the new draft guidance on the application of Article 107 by stating ‘construction of any type of infrastructure’ and does not simply refer to just airports.<sup>93</sup> Therefore it has a significant impact upon how public bodies can invest in infrastructure and undertake direct development works. It applies not only to ERDF (European Regional Development Funds) awards but also to other projects funded through state resources.<sup>94</sup> The dividing line of whether new infrastructure serves by its nature or purpose, the exercise of an economic activity, rather than the exercise of state authority may be surprisingly thin. However, before we analyse if the court has drawn the line in the right place, we will first look at the impact that this ruling has had on the aviation sector.

### *3.2. Impact on the aviation sector in light of the 2014 Aviation guidelines*

The impact that the broadening of what constitutes as an ‘economic activity’, i.e. the construction of infrastructure that is commercially exploited, is reflected in the 2014 aviation guidelines. They show the constantly evolving approach and encroachment of the state aid rules by the Commission. In particular the Commission underlines the broader policy objectives of the EU’s sustainable growth strategy for the coming decade. This involves, on the one hand maintaining a competitive industry by channelling tax payer’s money where it is needed i.e. where the market does not supply the necessary services or infrastructure. On the other it seeks to align the sector to the agenda for state aid modernisation. It aims to fulfil the objectives of the common European interest by meeting the transport needs of citizens, but avoiding wasting public resources by distorting competition on market failures. This is in cases of duplications of unprofitable airports (ghost airports) and the creation of overcapacities, as shown in the recent Commission decision of aid to Gdynia airport.<sup>95</sup>

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<sup>92</sup> *Ibid.*

<sup>93</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) (see note 8) para 35  
[http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf).

<sup>94</sup> State Aid and Infrastructure Leipzig Halle Guidance ERDF-GN-1-010 (2013) found at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/88414/State\\_Aid\\_and\\_Infrastructure\\_Leipzig\\_Halle\\_Guidance\\_V1\\_22\\_02\\_13.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/88414/State_Aid_and_Infrastructure_Leipzig_Halle_Guidance_V1_22_02_13.pdf) on 29/5/2014.

<sup>95</sup> Commission Decision IP/14/138 (2014) found at [http://europa.eu/rapid/press-release\\_IP-14-138\\_en.htm](http://europa.eu/rapid/press-release_IP-14-138_en.htm) on 29/05/2014.



To summarise, the guidelines enshrined the judgements of both *Aeroporto de Paris* and *Leipzig-Halle* by restating that the building and operating airport infrastructure is an economic activity. This is followed by general exclusions that were also contained in the Commission's grids for public sector bodies applying for ERDF awards for infrastructure projects<sup>96</sup>. Exemptions from state aid are where; (i) activities were in the public remit and are considered non-economic in nature such as those falling under the state responsibility in the exercise of its official powers such as air traffic control and activities to safeguard civil aviation.<sup>97</sup> However, this is provided that the compensation paid by the public authorities does not exceed what is necessary; (ii) public funding that fulfils the market economy investor principle, based on a business plan and its foreseeable developments at the time that funding was granted and<sup>98</sup>; (iii) the project is entrusted as a service of general economic interest.<sup>99</sup> This is defined as services that exhibit special characteristics as compared with those of an economic activity.<sup>100</sup> However, to not be subject to state aid it must fulfil the criteria in *Altmark* that prescribes; the recipient undertaking must actually have a public service obligation to discharge and they must be clearly defined, the parameters of compensation must be calculated in advance, the compensation cannot exceed amount to cover the costs of providing the service and the selection of the provider must either be the result of a public procurement procedure or the result of a benchmark exercise with a typical undertaking.<sup>101</sup>

Turning to the more significant changes embodied in the aviation guidelines are the greater restrictions for investment aid of large airports, which are only applicable from now on. The distinction between large airports and small airports was made. Large airports, according to the Commission, can be privately funded and may in principle not receive state aid. Only in exceptional conditions can they receive state aid, which was not elaborated on in the

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<sup>96</sup> Infrastructure Analytical Grid (2012) found at [www.opvavpi.cz/filemanager/files/file.php?file=33764](http://www.opvavpi.cz/filemanager/files/file.php?file=33764) on 29/05/2014.

<sup>97</sup> Infrastructure Analytical Grid (2012) found at [www.opvavpi.cz/filemanager/files/file.php?file=33764](http://www.opvavpi.cz/filemanager/files/file.php?file=33764) on 29/05/2014 p. 5.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* p. 6.

<sup>100</sup> Case C-179/90 *Merci convenzionali porto di Genova* (1991) ECR I-5889.

<sup>101</sup> *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* [2003] 3 CMLR 12.

guidelines and only a reference to market failure subject to specific factors.<sup>102</sup> Consequently, aid to finance infrastructure is only allowed for airports with fewer than 5 million passengers per year, which excludes the likes of Frankfurt and Heathrow. This has received criticism in the Oxera report, submitted to the UK's Parliamentary Transport Committee, which stated large airports face great challenges since large investments in infrastructure are unlikely to be viable without state funding.<sup>103</sup> This was specifically in the case of London's South End Airport.

In contrast to this small airports have more flexibility for the financing of airport infrastructure. There are two possibilities, the first is the member state may grant investment aid if there is a genuine transport need and it is located in a geographically remote region and positive externalities for that region can established. The aid intensities can range from 75% to 25% of eligible costs depending on the size of the airport.<sup>104</sup> The Commission will naturally take into account other airports and modes of transport available in the region when assessing the aid and a business plan based on sound forecasts for passenger and freight traffic will be vital in this process<sup>105</sup>. Furthermore those small airports that are in a remote region may be able to exceed the 75% of aid intensity on a case by case basis<sup>106</sup>.

The second possibility is that the public funding of very small airports, that are necessary for the accessibility of certain regions, can be qualified as a service of general economic interest<sup>107</sup>. Meaning that investment aid will be deemed compatible for these small airports that have annual traffic below 200,000 passengers, but those above this threshold must be notified to the Commission.<sup>108</sup> The Commission's support of this goal for facilitating transport and those smaller airports in geographically remote regions was shown in its

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<sup>102</sup> 2014 Aviation Guidelines found at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:099:FULL&from=EN> on 29/05/2014 para 105.

<sup>103</sup> Oxera, would a new hub airport be commercially viable? Prepared for the Transport Committee (2013) found at [http://www.oxera.com/Oxera/media/Oxera/downloads/reports/Would-a-new-hub-airport-be-commercially-viable\\_1.pdf?ext=.pdf](http://www.oxera.com/Oxera/media/Oxera/downloads/reports/Would-a-new-hub-airport-be-commercially-viable_1.pdf?ext=.pdf) on 29/05/2014.

<sup>104</sup> 2014 Aviation Guidelines para 101.

<sup>105</sup> 2014 Aviation Guidelines para 72.

<sup>106</sup> 2014 Aviation Guidelines para 102-103.

<sup>107</sup> 2014 Aviation Guidelines para 72.

<sup>108</sup> 2014 Aviation Guidelines para 89(a).

recent decision approving investment aid for UK airports St Mary's and Land's End, that was important for connecting the remote archipelago of the Isles of Scilly with the British mainland, to the benefit of both residents and visitors.<sup>109</sup>

In conclusion the guidelines not only, as noted, show the development of state aid in the financing of infrastructure, but also their impact and that they are stricter in the field of financing the construction of infrastructure for airports. The Commission has adopted a more 'market oriented approach' by increasing on the one hand competitiveness, but on the other economic efficiency. According to the impact assessment by the Commission, no airports handling over 500,000 passengers will close.<sup>110</sup> Smaller airports may close if they fail to improve efficiency and increase revenues.<sup>111</sup> The new guidelines essentially provide rules that are smart, simpler and better tailored to the industry ensuring tax payers money is not wasted and is spent where it will benefit passengers and citizens the most.<sup>112</sup> This is done by limiting situations where infrastructure fails to be supplied by the market itself and ensures the distribution of state aid only occurs when needed. However, it is not without its difficulties as shown with the report concerning the 'south-end' airport and therefore will no doubt lead to some case by case assessments by the Commission which does nothing for legal certainty in those cases.

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<sup>109</sup> Commission Decision IP/14/533 07/05/2014 found at [http://europa.eu/rapid/press-release\\_IP-14-533\\_en.htm](http://europa.eu/rapid/press-release_IP-14-533_en.htm) on 29/05/2014.

<sup>110</sup> Commission Competition policy brief 'new state aid rules for a competitive aviation industry' issue 2 (2014) found at [http://ec.europa.eu/competition/publications/cpb/2014/002\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/002_en.pdf) on 29/05/2014 p. 6.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

#### **4. Chapter 3: Has the line been drawn in the right place?**

After an examination of the impact of the ruling on the aviation sector, we turn to the question of whether the line has been drawn in the right place of when infrastructure is considered economic and if this creates legal certainty. Firstly, an examination will be made as to when public financing of infrastructure is not considered state aid, in accordance with both the courts jurisprudence and the draft guidance on the application of Article 107 TFEU.<sup>113</sup> Then an analysis will be made as to whether or not this creates legal certainty for the member states, including our own observations and recommendations, followed by the concluding remarks.

##### *4.1. When is the public financing of infrastructure state aid?*

With regard to when the public financing of infrastructure is not subject to the state aid rules is when it is not commercially exploited in accordance with the court's ruling in Leipzig-Halle. This concerns those other general infrastructures that were contained in the 1994 guidelines and stated in the Commission guidance document on application of Article 107 such as public roads, bridges or canals, which are made available for use without consideration.<sup>114</sup> The meaning of without consideration is when something is open to the public without the user being subject to fees or a mandatory charge<sup>115</sup>, examples are toll roads. This latter point of the assumption that 'user financed' infrastructure is always an economic activity is of particular contention and will be examined below. The other main case is when the infrastructure that is intended for activities is classified as an exercise of the state's public powers and deemed non-economic. This covers a variety of cases such as air traffic control, security in the case of airports, but also lighthouses and other equipment for the needs of general navigation, police and customs-related infrastructure.<sup>116</sup>

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<sup>113</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) (see note 8).

<sup>114</sup> *Ibid* para 37.

<sup>115</sup> Comments by the Ministry of Transport to the draft Commission Notice on the notion state aid pursuant to Article 107(1) TFEU" (2014) found at [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_cei/dk\\_ministry\\_II\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_cei/dk_ministry_II_en.pdf) on 29/05/2014.

<sup>116</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) (see note 8) para 37.

Moreover, where there is a case of mixed infrastructure, if it used almost exclusively for a non-economic activity, its funding could fall entirely outside the state aid rules if it can be seen as ancillary.<sup>117</sup> This can be, for instance, in cases where research organisations occasionally rent out their equipment and laboratories to industrial partners.<sup>118</sup>

Turning to when the public financing of infrastructure is subject to the state aid rules, this encompasses cases where the construction of any type of infrastructure that is meant to be exploited economically, such as a commercial airport runway, is an economic activity in itself. This includes both the operation and construction of infrastructure as shown in the previous sections. However, it will also apply to those non-economic infrastructures that are later re-assigned to economic use and the costs of such a conversation will be taken into account with the state aid rules. In cases where infrastructure is used for both economic and non-economic purposes, public funding will only fall under the state aid rules insofar as it covers the costs linked to the economic activities. If it is possible to split, then the state aid rules will only apply with regard to the state support granted in excess of the amount covering the costs of the non-economic activities.<sup>119</sup>

#### *4.2. Has the Line been drawn in the right place?*

It appears from the above that the distinction is vital as to whether or not the public financing of infrastructure is considered state aid. There are two notable issues with it. Firstly, concerns the fact the Commission assumes all ‘infrastructure with consideration is an economic activity’ as stated in the new guidance document. However, this clashes with the court’s jurisprudence and is too general, which was one of the criticisms by the CJEU in the appeal of *Leipzig-Halle*. In fact, it is for the careful analysis of whether the nature and purpose of the infrastructure is an exercise of public powers or an economic activity. Therefore to assume that all user-financed infrastructures is an exercise

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<sup>117</sup> *Ibid* para 40.

<sup>118</sup> *Ibid*.

<sup>119</sup> Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014) (see note 8) para 39.

of an economic activity does not accord with the court's reasoning and creates more confusion since it is not, in every case, commercially exploited.<sup>120</sup>

Secondly, there is considerable overlap between economic and non-economic activities, as shown above, that specifically happens with large scale infrastructure, which creates legal uncertainty. Since the dividing line between both economic and non-economic is so thin, this can be a problem in cases like regulatory fire-prevention facilities. For example, if they can be linked by their nature and purpose to the exercise of an economic activity, then it will also be considered economic and caught by the state aid rules.<sup>121</sup> In fact this uncertainty between the two categories of economic and non-economic has been shown by the recent decision by the Commission concerning the public spending on land development in Germany.<sup>122</sup> Germany had requested the Commission to re-examine the scheme as a result of legal uncertainty on public sector spending in Europe as a result of the public funding for a runway in the *Leipzig-Halle* judgement. This demonstrates the level of uncertainty by member states in response to the classification of infrastructure and the court's reasoning as to where the dividing line is between an economic and non-economic activity. The decision confirms that land development by public authorities is part of the performance of public duties, namely the provision and supervision of land infrastructure in line with local urban and spatial development plans.<sup>123</sup> However, this only creates certainty in this particular area, but does nothing to add certainties in others.

In our submission it appears that the distinction created by the Commission in relation to the construction of infrastructure of economic and non-economic activities as well as the fact that it assumes all '*commercial exploited infrastructure*' is user based is not desirable. Especially, since the ruling of *Leipzig* extends to all public funding of infrastructure that is

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<sup>120</sup> [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_cei/dk\\_ministry\\_II\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_cei/dk_ministry_II_en.pdf)

<sup>121</sup> Sebastien Thomas, Is the financing of a transport infrastructure an economic activity subject to state aid rules? (2013) found at <http://europeanlawblog.eu/?p=1476> on 29/05/2014.

<sup>122</sup> Commission Decision IP/14/332 (2014) found at [http://europa.eu/rapid/press-release\\_IP-14-332\\_en.htm](http://europa.eu/rapid/press-release_IP-14-332_en.htm) on 29/05/2014.

<sup>123</sup> German land preparation scheme is not state aid, confirms Commission (2014) found at <http://www.out-law.com/en/articles/2014/april/german-land-preparation-scheme-is-not-state-aid-confirms-commission/> on 29/05/2014.

‘commercially exploited’. There are very few types of infrastructure where the financing falls outside the scope of state aid rules. The current uncertainty has led to, particular looking at it from all sectors, a specific assessment being made in each case. This will involve; whether or not it is open to all users on equal terms, how the organisation of the financing, construction and operation is set up, the distinction between economic and non-economic and if there is a transfer of state resources to ordinary economic activities. Moreover, they will need to determine whether or not the infrastructure is linked to any economic activities and if this is the case, then it will be categorised as such. It makes it incredibly difficult for the state to make an assessment of whether the public funding of infrastructure will constitute state aid. This is particularly problematic due to the modernisation approach by the Commission that now asks for member states to perform a self assessment of the existence of aid using the new package of guidelines and block exemptions. Since there is no list as to what is classified as acting or exercising public powers, as there is no agreement amongst the EU membership, this leaves the state relying on specific precedents to create certainty. This is an issue as the link between infrastructure and economic activities can take many forms. Therefore in our submission the current rules are unclear and create legal uncertainty in regard to the public financing of infrastructure after its classification as an economic activity, when it is commercially exploited, as the dividing line between economic and non-economic is too thin.

#### *4.3. Recommendations*

In terms of recommendations, for the member states considering major infrastructure projects, it is advisable to consult the Commission to assess the compatibility with the state aid rules and avoid having to redeem the aid since this could come at great cost to such projects. It is better for the member states to pre-notify the Commission of any aid well in advance of the construction and/or operation of infrastructure investments of the envisaged co-financing date, as the assessment of such projects within the obligatory formal notification procedure may be time consuming.<sup>124</sup> Turning to the Commission, given the application of

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<sup>124</sup> Note to DG Regio on the application of state aid rules to infrastructure investment projects (2011) found at [http://www.esfondi.lv/upload/00-vadlinijas/Note\\_on\\_State\\_aid\\_for\\_infrastructure\\_projects.pdf](http://www.esfondi.lv/upload/00-vadlinijas/Note_on_State_aid_for_infrastructure_projects.pdf) on 29/05/2014 para 11.

the rules to all infrastructure projects, it is advisable that they introduce new block exemptions that take into account the changes of the public financing of infrastructure and what aid they consider compatible with the internal market in the application of articles 107 and 108 of the TFEU. It is noted that they have recently introduced a new block exemption<sup>125</sup> that covers the fields of aid for; broadband, culture and heritage, sport and multifunction recreational structures and local infrastructures. However, this still does not cover all transport infrastructures like ports and airports that are susceptible to such risks. Therefore it is advisable that in those areas where the Commission has not explicitly included it in the general block exemption; they must update the guidelines in that sector or make a sector based block exemption to reinforce legal certainty. This will then leave only a few cases upon which an assessment will be needed and the member state will know exactly the risks of the aid being deemed non compatible. Alternatively, the Commission could draw up a list from its decisions and the Court's jurisprudence of what has constituted the exercise of public powers, which will enable any member state to use it as a reference when funding infrastructure projects. This should, therefore, facilitate legal certainty and minimise the grey area.

#### 4.4. Conclusion

The contribution has shown the piecemeal and incremental encroachment of what constitutes an economic activity in relation to the public financing of airport infrastructure and its scope extending to all infrastructure projects that are 'commercially exploited' or linked to an economic activity. It has gone from the early 90's where the construction or enlargement of infrastructure projects was seen as a public remit task and in the general interest, thereby not classified as an economic activity. In 2000 this reasoning was reversed in *Aéroports de Paris* that stated the operation of an airport constitutes an economic activity. This was shortly followed in 2012 where the CJEU confirmed the ruling of the general court in *Leipzig-Halle* that the construction of airport infrastructure that was subsequently commercially exploited is an economic activity in itself. The latest

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<sup>125</sup> Commission Draft Block Exemption on declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the treaty (2014) found at [http://ec.europa.eu/competition/state\\_aid/legislation/gber\\_regulation\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/gber_regulation_en.pdf) on 29/05/2014.



aviation guidelines and the Commission draft document on the application of Article 107 has confirmed this, and it illustrates one way in which the state aid modernisation program has been adopted in a specific sector. It shows that the Commission is stricter in the field of financing the construction of infrastructure for airports and has very narrow exceptions for when large airports can receive state aid and is more lenient on smaller airports.

In response to the research question of whether or not the line has been drawn in the correct place, it is submitted that, the distinction created by the Commission in relation to the construction of infrastructure of economic v non-economic activities and the fact that it assumes all 'commercial exploited infrastructure' is user based creates legal uncertainty. The link between infrastructure and economic activities can take many forms and only exacerbates the issue of legal uncertainty. Due to this lack of legal certainty it is desirable that the Commission creates a more comprehensive block exemption or a sector by sector guidance, in the cases which fall outside the latest block exemption. Furthermore if the Commission draws up a list of when states have exercised public powers, then this will show when aid is deemed compatible and adds an element of certainty. Alternatively, the member states should notify the Commission of the aid well in advance of undertaking a large infrastructure project where they believe that it could be caught by Article 107. Otherwise this could be a costly and time consuming process since until more decisions come to light it is likely that it will be dealt with on a case by case basis.

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