Faculty of Law

Globalization and Law- Corporate and Commercial Track

State Aid and Public Procurement

Period 5

State Aid and Air Transport: An Analysis of Case Law

Marianthi Spyropoulou (i6017318)

Victoria Stickelberger (i6038359)

Abstract

The paper deals with state aid in the aviation sector. It starts with an explanation of Article 107 TFEU which contains the conditions under which state aid is permissible. Reference is made to the 1994 Guidelines on the Rescuing and Restructuring of Firms in Difficulty, as well as to the 2005 guidelines which follow up and complete the 1994 guidelines. A thorough presentation of the *Ryanair Ltd. v. European Commission* case is offered; the decision of the Commission, as well as the decision of the Eighth Chamber of the Court which annulled it, are explained. Moreover, reference is made to the 'private investor test' which is applied in order to assess whether the aid offered constitutes state aid. Following, the four decisions issued in relation to the *Olympic Airlines* case are presented and the matter of recovery of illegal state aid is dealt with. In addition, the paper deals with the Notification procedure of Article 108 TFEU and refers in detail to the 'public service exception', according to which state aid is allowed. Finally, an assessment is made as to the problems and issues that arise in the domain of state aid and possible solutions are offered.

1. Introduction

State aid refers to a form of assistance from a public body, or publicly funded body, given to selected undertakings. An undertaking is considered to be any entity which puts goods or services on the given market. The aid given to such undertakings must have the potential to distort competition and affect trade between Member States of the European Union and thus give the undertaking an advantage over its competitors.

Therefore, the European Union generally prohibits state aid, unless it is justified by reasons of general economic development. In order to ensure that the prohibition on state aid is respected and the exemptions are applied in a uniform way across the European Union, the European Commission is in charge of watching over the compliance of state aid with EU rules. In doing so, the Commission concluded many Conventions dealing with the topic state aid.

General measures, such as general taxation measures or employment legislation, are not regarded as state aid, due to the fact that they are not selective and apply to all companies regardless of their size, location or sector.

This paper deals with state in the aviator sector. During the past decade, the aviation sector changed rapidly. New developments and concepts were invented and thus, the law had

to adapt to these new circumstances. Therefore, the European Commission had to deal with the general need for new convention and had to adjust old ones.

In the first part of this paper, a general overview of the European state aid rules with emphasis on the aviator sector will be given. This will be followed by the illustration of the *Ryanair v. European Commission* case and a description of the 2005 Guidelines. Afterwards, the *Olympic Airlines case* will be discussed. Finally, the paper closes with a general conclusion.

2. General Principles of State Aid

The general principle in the European Union concerning State Aid is that any support or protection of the interests of one or more particular undertakings shall be prohibited. According to art. 96 Treaty on the Functioning of the European Union (hereinafter TFEU), such support may only be accepted if it has been approved by the Commission.

More specifically, as far as transportation is concerned, art. 93 states that "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service"*. Aid given to air transport, although not falling within the scope of art. 93 is also allowed if it fulfills the conditions laid down in the respective guidelines.[1]

Firstly, we must assess when the *assistance constitutes aid*. That is the case when:
a) It confers an advantage to the undertaking: In order for the advantage to be classified as aid, it should be established that the undertaking in question would not and could not have obtained such an advantage under normal market conditions.[2] It should be a direct or indirect profit that the undertaking would not have otherwise obtained; for example the reduction of its operating or investment costs.[3] When the costs that the enterprise would normally have borne are reduced, then we do have an economic advantage.

[1] State Aid in the transport sector, Retrieved from www.eipa.eu on 28.05.2012.

[2] Nicolaides, *Essays on Law and economics of State Aid*, Maastricht University, (2008), retrieved from http://arno.unimaas.nl/show.cgi?fid=13483 on 28.05.2012, p. 41.

[3] Case 234/84, Belgium v Commission, 1986 ECR, at para. 22 (hereinafter "Belgium v Commission").

b) It stems from state resources: According to case law, state resources are those resources which are directly or indirectly under the control, or at the disposal of the state.[4] The concept of "state" has been interpreted widely to include all levels of public authority, including local authorities.[5] However, state resources can be considered as state aid only when they are imputable to the State. This means that the granting of the aid must have a budgetary consequence for the government.[6]

c) It favors certain undertakings (selectivity): Economic policy measures are divided in two categories; general economic policy measures and those economic policy measures which exclusively benefit, directly or indirectly, certain industries.[7] The first category of measures is not considered to be aid.[8] The aid must thus be 'selective' or 'specific'. The selectivity criteria will be satisfied where the aid is addressed to a specific industry or sector. However, a measure may be selective even if it is phrased in general terms.[9]

Secondly, once we have concluded that the assistance does in fact constitute aid, we must examine whether it *affects trade between Member States*. There is no definition nor any means of measuring such effect. It has however been established in case law, that aid may affect intra-Community trade even if it is of relatively small amount.[10] Thus, any aid is presumed to affect trade unless:

a) it is *'de minimis'*, meaning that any amounts which fall below the threshold of €200,000 are not considered to be state aid,

b) trade is affected only at national level, or

c) the situation is wholly outside the EC.

---

[4] Case C- 482/99, French Republic v Commission, 2002 ECR I-4397, at para. 38 (hereinafter "French Republic v Commission").

[5] Rodger, MacCulloch, *Competition Law and Policy in the EC and UK*, Taylor & Francis (2008), p. 345.

[6] Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 12.

[7] Rodger, MacCulloch, *Competition Law and Policy in the EC and the UK*, Taylor & Francis, (2008), p. 346.

[8] Nicolaides, *Essays on Law and economics of State Aid*, Maastricht University, (2008), retrieved from http://arno.unimaas.nl/show.cgi?fid=13483 on 28.05.2012, p. 44.

[9] Case T-55/99, Confederación Española de Transporte de Mercancias (CETM) v Commission, 2000 ECR II-3207, at para. 40.

[10] Case T-214/95, Het Vlaamse Gewest v Commission, 1998 ECR II-717, at para. 48- 49.

Thirdly, the aid granted must *distort competition*: In general, the effect on trade and the distortion of competition are inextricably linked.[11] Even small effects –actual or potential- are sufficient to lead to distortion of competition. Thus, anything that actually disturbs or threatens to disturb the conditions of competition between undertakings from different Member States is sufficient. In order to determine whether competition is affected, it is necessary first to define the market for the products or services concerned. The degree of interchangeability between products or services, the structure of supply and demand on the market and the competitive conditions are among the criteria.[12]

It should be stressed that the concept of State Aid is 'objective', meaning that the intentions of the granting authority do not matter when determining the nature of the measure.[13] The form of the aid is not limited to a positive benefit in the form of a subsidy, but it can also be any measure which mitigates the normal burden on the budget of an undertaking.[14] For example, tax credit schemes may also fall within the meaning of 'aid'[15].

i. Private investor test

When attempting to clarify whether an aid is compatible one should apply the *'private investor'* test. In this case we compare the behavior of the State in the situation in question with the behavior of private investors in similar circumstances.[16] If a rational private investor looking for profit would not have acted in the way the State did, then most probably the assistance will constitute state aid. If on the other hand a private investor would have taken the same decision in order to recover the sums owed to him, then there is no state aid involved. Thus, the investment of the State in a company suffering financial losses which

[11] Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, 2003 ECR.

[12] Nicolaides, *Essays on Law and economics of State Aid*, Maastricht University, (2008), retrieved from http://arno.unimaas.nl/show.cgi?fid=13483 on 28.05.2012, p. 50.

[13] State Aid in the transport sector, retrieved from www.eipa.nl on 28.05.2012.

[14] Case C-387/92, *Banco Exterior de España v. Ayuntamiento de Valencia*, 15 March 1994.

[15] Case C-6/97, *Italy v Commission*, [1999] ECR, I-2981,Para.15.

[16]Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 19.

would not survive without public money constitutes state aid, whereas repayment agreements with public creditors would not.[17]

ii. Exceptions provided for in art. 107 TFEU

However, there are some exceptions provided for in the Treaty itself. Article 107 (2) TFEU provides that aid having a social character and aid granted in order to make good the damage caused by natural disasters is automatically compatible with the common market. Article 107 (3) TFEU enables the Commission to consider the compatibility of certain aid with the common market, as long as a few conditions are met. Amongst others, when the aid is given to promote the economic development of areas where the standard of living is abnormally low, or where there is serious underemployment, or when the aid facilitates the development of certain economic activities or areas, then it is permissible.

iii. Permissible and non-permissible aid

Operating aid is the aid given to relieve the enterprise from the expenses it would have to bear for its day-to-day management and it is normally incompatible with the common market.[18] However, it is acceptable in two cases.

The first case is when the aid has a social character. Such aid is granted without discrimination as to the origin of the services to a specific group of individuals and must not benefit employers.[19] Thus, aid given to people living on an island, or to specific societal groups such as students or the elderly is permissible. The second case has to do with 'public service obligations'.

A typical example of such permissible aid is found in the aviation sector, in relation to remote areas. A remote area is characterized as such when it is far away from economic centers and there is lack of other adequate transport services. The other aspect of remoteness is that the market size is quite small and there is the need to travel in order to acquire business services

[17] Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 19.

[18] Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 40.

[19] Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 32.

which are not otherwise offered.[20] Therefore, many countries have taken adequate measures to offer regional links to these remote areas. They do so by subsidizing the air routes. The State obliges an air carrier to provide a service characterized by continuity, regularity, capacity and pricing; standards which the carrier would not assume were he only be considering his commercial interest and profit.[21] The Member State can reimburse the carrier for the services offered and as long as the conditions set forth in Council Regulation No. 2408/92 are complied with, this reimbursement shall not constitute state aid.[22]

Article 107 (3) provides for more exceptions according to which State Aid is permissible. The aid is considered to be compatible with the common market, if it does not cause detriment to other carriers and its goal is to restore the health of the airline so that most likely there will be no further aid needed in the future. Moreover, the State must not interfere more than it should in the management of the company and the aid is to be proportionate and used solely for the restructuring program.[23]

iv. Notification procedure

According to art. 108 TFEU, the Member State must notify the Commission of their intent to grant or alter state aid, so that the Commission may investigate ex ante whether the aid is permissible or not. Any aid granted without the Commission's approval is automatically considered to be 'unlawful aid'.[24] While the investigation is pending, the State may not put the aid into effect.[25] Third parties have very limited rights in the notification procedure.[26]

Companies that have received aid which was not notified to the Commission, or was not approved by the Commission will be obliged to repay it.[27] Articles 258 TFEU and 260 TFEU

---

[20] Williams, Bråthen, *Air Transport Provision in Remoter Regions*, Ashgate Publishing, Ltd. (2010), pp. 61-62.

[21] Article 2 (o) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra - Community air routes.

[22] State Aid in the transport sector, Retrieved from www.eipa.eu on 28.05.2012.

[23] State Aid in the transport sector, Retrieved from www.eipa.eu on 28.05.2012.

[24] *Competition as Public Policy*, American Bar Association (2010) p. 148.

[25] TFEU, Article 108 (3).

[26] *Competition as Public Policy*, American Bar Association (2010) p. 148.

[27] Council Regulation (EC) No 659/1999 of 22 March 1999 Laying down detailed rules for the application of Article 93 of the EC Treaty (hereinafter Council Regulation No 659/1999).

are the primary public enforcement mechanisms.[28] The goal of the repayment of unlawful State aid is to eliminate the distortion of competition that was caused by the competitive advantage afforded by that aid. The recipient forfeits the advantage which it had enjoyed over its competitors on the market.[29] The sanction of art. 260 TFEU is available only after an initial judgment of non-compliance has first been made by the Court and then only after a further lengthy procedure has been completed.[30] Article 260 (2) TFEU was amended by the Treaty of Lisbon. Nowadays, although the Commission can bring the case before the Court after giving the State in question the opportunity to submit its observations, there is no longer a requirement to issue a reasoned opinion nor the need - in the event of continued non-compliance- for a further time limit set by the Commission to expire before the Commission can bring an action before the Court. This will shorten and simplify the proceedings.[31]

v. Recovery of amounts unduly paid

Due to lack of Community provisions for the recovery of the amounts unduly paid, every State is entitled to recover the amount in question in accordance with the relevant provisions of national law.[32] The Commission is not required to fix the exact amount of the aid to be recovered. It may only include information which enables the recipient to calculate the amount himself without too much difficulty.[33] Although art. 260 TFEU states, that the Commission may impose a lump sum or penalty payment to be paid by the Member State, the term *or* must be interpreted to mean not that the two forms of payment will be alternatively imposed, but that they can also be imposed alternatively and cumulatively. The article must be applied in the light of the objective pursued. The Court thus concluded that simultaneous recourse to both types of penalty may be acceptable in cases where the breach of obligations

---

[28] D Sa, Drake, *Financial Penalties for Failure to Recover State Aid and their Relevance to State Liability for Breach of Union Law*, European State Air Law Quarterly (2010), p. 44.

[29] *Commission v Italy*, para. 120.

[30] D Sa, Drake, *Financial Penalties for Failure to Recover State Aid and their Relevance to State Liability for Breach of Union Law*, European State Air Law Quarterly (2010), p. 35.

[31] D Sa, Drake, *Financial Penalties for Failure to Recover State Aid and their Relevance to State Liability for Breach of Union Law*, European State Air Law Quarterly (2010), p. 35.

[32] Nebbia, *Do the rules on state aids have a life of their own? National procedural autonomy and effectivenesss in the Lucchini case*, E. L. Rev. (2008).

[33] Case C-209/00, *Commission v Federal Republic of Germany*, on 12 December 2002.

is continuous and likely to persist. The lump sum is intended to reflect the failure by the Member State in respect of non-compliance with the earlier judgment and the penalty payment acts as a further incentive to the Member State to bring the infringement to an end as soon as possible.[34]

The sanctions proposed by the Commission to the ECJ must be based on a method that is transparent and respects the principle of proportionality and of equal treatment between the Member States. It is therefore important for the Commission to have a clear and uniform method of justifying its calculation. The Commission and the Court agree on the criteria to be used when calculating financial penalties. These criteria are: a) the seriousness of the infringement, b) the duration of the infringement, which is to be assessed at the time when the Court assesses the facts and not when the case is brought before it and c) the ability of the Member State to pay. The Court decides on the financial penalties to be imposed on a case-by- case basis.[35]

vi. Aviation Sector Guidelines

Since transport by air was not covered by the EC Treaty, the Commission adopted the 1994 Guidelines after the completion of the liberalization program for Community air transport. The scope of the Guidelines covers any aid granted by Member States to air carriers. Due to development in the aviation sector, a new set of Guidelines was issued in 2005. These Guidelines do not replace the 1994 Guidelines, but add to them. They concern the financing of airports, as well as the start-up aid of carriers departing from regional airports.

3. Ryanair Ltd. v. European Commission case

i. Introduction

In the last couple of years, two new main concepts have emerged in the aviator sector, the low cost carriers and secondary airports.

Low cost carriers or low cost airlines are airlines that generally have lower ticket prices and limited service. In order to still make some profit, the airline may charge for extras like

[34] Case C-304/02, *Commision v France*, [2005] ECR 1-6263, para. 82.

[35] Case C-369/07 *Commission v Greece*,[2009] ECR, para. 111.

food, beverage, priority boarding, seat allocation and baggage. One example for such an airline is Ryanair Ltd[36].

Most of Europe's secondary airports were first built for military purposes, until some of them started to serve as regional airports. However, the frequency of regional flights was initially low and so they remained with idle capacity. This changed due to the fact that many low cost carriers have chosen secondary airports to establish their own bases. Low cost airlines have chosen secondary airports as their base, because these airports offer a better service for the airlines. Low cost carriers have different demands for airport services as incumbent full-service airlines. For instance, low-cost airlines prefer steps, instead of airbridges and demand for a quick turnaround time.[37] The secondary airport Brussels Charleroi had fewer than 20. 000 customers in 1997 and thanks to Ryanair, the threshold of two million passenger was passed in 2004.[38]

ii. Real Facts

The case *Ryanair Ltd. v. Commission of the European Community* involved three main participants, Ryanair, the Walloon Region and Brussels South Charleroi Airport (BSCA).[39] The Walloon region, is a regional public authority in Belgium and the owner of the airport infrastructure. Moreover, it controls the BSCA, which has a concession to manage the airport for a period of 50 years. BSCA is authorised to collect air traffic fees as well as fees for services provided, however, only 65% of the air traffic fees remain with BSCA and 35% are passed on to the Walloon region.[40]

In November 2001, Ryanair concluded two different contracts, one with BSCA and one with the Walloon region. The contract between the Walloon region and Ryanair contained a reduction of 50% of landing charges for a period of 15 years. Fees were not calculated based on the weight of the aircraft, but on the number of passengers. Furthermore, the Walloon

---

[36] Ryanair was established in 1985 and its headquaters is located at Dublin Airport.

[37] Turnaround time is the time between the landing and the next departure of the same airplane.

[38] Barbot, *Low-cost airlines, secondary airports, and state aid*, 12 Journal of Air Transport Management (2006), p. 197.

[39] Commission T-196/04, *Ryanair Ltd. v. Commission*, 12 February 2004.

[40] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) p. 369.

region guaranteed to cover the losses resulting from any changes in landing fees or hours of operation. The BSCA and Ryanair signed a contract, in which it was concluded that Ryanair would have to pay € 1 per passenger for ground handling fees instead of € 10 and that Ryanair would receive € 160.000 for each new route opened, which resulted in an amount of € 1.920.000. Moreover, BSCA paid € 250.000 for hotel costs and staff subsistence and € 768.000 for the costs of recruiting and training pilots and crew. In addition, Ryanair received € 4.000 for office equipment and BSCA offered free rental of office space and free hangar use. Moreover, Ryanair and BSCA agreed on forming a joint marketing company, which should finance all publicity in relation to the airline's activities at Charleroi. BSCA and Ryanair contributed the same amount of money to the operation of the company. Ryanair's obligations consisted of permanently basing two to four aircrafts at Charleroi and in operating at least three rotations per departing aircraft over a 15-year period. The reason why Ryanair had to constantly base aircrafts at Charleroi is that Charleroi could offer early morning and late night flights. Moreover, the low cost airline was obliged to repay BSCA expenditures connected with the opening of the base, in case it decided to abandon the base.[41]

iii. The European Commission's decision

For the Commission, there was no doubt that the Walloon region had used substantial funds in order to attract Ryanair to Charleroi airport. It had now to decide to what extent the subsidies violated art. 107 TFEU and would therefore have to be recovered from the airline. In its decision, the Commission distinguished between aid granted by the Walloon region and aid granted by BSCA.[42]

In case of the Walloon region, the Commission explicitly ruled that aid given to low-cost carriers by public authorities is not generally prohibited. Public authorities can set the level of airport taxes as low as they want, as long as the fees are calculated in a transparent and non-preferential manner. Incentive schemes in order to attract low-cost airlines have to be established on a legal basis, executed in a non-discriminatory manner and should be limited in time. The Commission did not apply the private investor test on the Walloon region, because

[41] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) p. 369.

[42] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) p. 370.

the test is not appropriate in this case, due to the fact that airport taxes formed part of the legislative and regulatory competences of the Walloon region. The Commission came to the conclusion that the Walloon region did not follow the rules of aid giving to low-cost airlines. The Walloon region gave preferential treatment to one company and did not grant a general reduction of fees. The Commission also did not follow the argument of Ryanair, that other airlines could have concluded similar agreements, because the deal was determined in a non-transparent manner, which proved the opposite. Moreover, the Walloon region did not act as a public authority, but entered into a private law contract, which should be in force for 15 years and not just for a short period of time. The Walloon region further claimed that the measures used were compatible with the Common Market according to art. 107 (3) c TFEU (ex art. 87 (3) c TEC) and based its argument on the fact that the Walloon region is a disadvantaged region. According to art. 107 (3) c TFEU (ex art. 87 (3) c TEC), aid is seen as compatible with the internal market, if it is given to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, the Commission ruled that art. 107 (3) c TFEU (ex art. 87 (3) c TEC) was not applicable because the aid granted was operating aid and there was no general scheme in place, but only ad hoc measures favouring one specific company. Finally, the Commission opined that the selective reduction of landing fees constituted illegal State aid with the rules of art. 107 TFEU (ex art. 87).[43]

When it came to the aid granted by BSCA, the Commission indeed applied the private investor test and examined whether a private investor in a market economy would have invested under similar circumstances. It came to the result that BSCA, due to its public ownership structure, was able to take risks that a private investor would not have taken. BSCA calculated its profit from the agreement with Ryanair too optimistically and took into account positive effects like economic development and job creation, which a private investor would not have done. Ryanair argued that it had concluded similar contracts with other, privately owned airports throughout Europe. However, the Commission ruled that even though the airports were privately owned, public money was involved in order to attract low-cost carriers. Therefore, BSCA has not acted like a private investor and the agreement between BSCA and Ryanair cannot be regarded as normal market result. Thus, the Commission ruled that the advantages are state aid, because all other state aid criteria were

[43] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) p. 370.

met. First, Ryanair had an economic advantage funded through public funds. Moreover, Ryanair was the only airline, which benefited from the advantage at BSCA. Finally, the aid distorted competition between airlines and has a negative impact on intra-Community trade.[44]

Nevertheless, the Commission also ruled that some advantages for Ryanair are compatible with the Common Market and are, hence, allowed. This is the case with the financing of the joint promotion and publicity undertaking between BSCA and Ryanair. According to the Commission, such financial support is necessary for the start-up of new air routes. This aid is fundamental for a better utilisation of regional airports and therefore, contributes to the aim of the Community to promote air transport. Nevertheless, there are certain conditions that have to be met. State aids for new routes must serve as a necessary incentive and must be proportional to the objective purposed. Furthermore, this aid must be granted in a transparent manner and any airline opening a new route at a regional airport has to be treated equally concerning start-up support. In addition, such state aids should be accompanied by a mechanism of penalties in order to punish the benefiting airline, if it does not transfer the promised traffic-volume. The amount given for start-up new routes has to be determined by the Commission and should not exceed the maximum intensity of 50% of the net start-up incurred. Finally, the aid must be granted for a limited duration only. This means five years in the case of point-to-point routes and not fifteen years as in the case of Ryanair.[45]

Finally, the Commission decided that Ryanair had to recover the difference between usual airport charges and the preferential charges. Moreover, Ryanair had to pay back the money earned from reduced ground handling fees and other financial support concerning staff recruiting, training, accommodation costs etc. as long as they were not related to costs resulting from the start-up of new routes.

iv. Criticism

The decision of the Commission has been heavily criticised by the parties involved in the case and by some authors.

---

[44] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) 370 p; Gröteke, Kerber, *The Case of Ryanair*, ORDO-Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft Bd. 55 (2004), pp. 6.

[45] Gröteke, Kerber, *The Case of Ryanair*, ORDO-Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft Bd. 55 (2004), p. 7.

According to *Gröteke* and *Kerber*, the argumentation of the Commission has severe flaws from an economic point of view.[46] Both authors criticise the fact that the Commission did not distinguish between competition among airports and competition among airlines and thus, it misinterprets the bilateral agreement between Ryanair and BSCA.

The preferential treatment of Ryanair by BSCA primarily constitutes price differentiation[47], which is non-discriminatory, since that BSCA has an advantage of the deal with Ryanair as well. Price differentiation is a normal market phenomenon, in order to have an effective competition on the market. State interventions attempting to prevent price discrimination would complicate the working of the price system, because it would be more difficult to attain equilibrium prices.

Therefore, the agreement between Ryanair and BSCA must be seen as a normal result of effective competition. In order to be taken seriously as a new international airport, BSCA needed to attract additional airlines for attaining a full utilisation of its capacities and attain several air routes and passengers. Having these needs in mind, a contract with a popular airline like Ryanair was highly attractive for BSCA. Moreover, the long-term agreement (15 years) is important for BSCA in order to establish the airport as an international airport.

The authors have argued that there is no distortion of competition among airlines, because every other airline, which had offered similar advantages to BSCA, would have received similar conditions. Ryanair offered a much higher amount of passenger traffic to Charleroi and each additional route strengthens the attractiveness of the BSCA as an international airport.

It is not reasonable to assume that BSCA or the Walloon Region has favoured Ryanair over other airlines. BSCA bargained with not less than 35 airlines before and after it concluded the contract with Ryanair. *Gröteke* and *Kerber* argued that, instead of concentrating on the alleged discrimination between airlines, one has to determine if the public funds giving to BSCA by the Walloon region can lead to distortion of competition among airports. There are a number of economically sound regional policy reasonings that justify public funding of infrastructure like airports.

---

[46] Gröteke, Kerber, *The Case of Ryanair*, ORDO-Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft Bd. 55 (2004).

[47] Price differentiation may be defined as the practice of a firm or a group of firms of selling at prices disproportionate to the marginal costs of the products sold or of buying at prices disproportionate to the marginal productivities of the factors bought.

According to *Gröteke* and *Kerber* the Commission wrongly decided to punish Ryanair and argued that this decision leads to principles for regulating airports, which effect competition more negatively than positively.

Furthermore, *Steinrücken* and *Jaenichen*claimed that Ryanair recognised municipalities' willingness to pay money and to reduce the price of local airport tariffs if real compensation was promised by the airline and not the municipality was going to Ryanair to offer some advantages. [48] What should be criticised are the unclear procedure and the lack of any official call for tenders, which would lead to compliance with uniform rules on competition between carriers. *Steinrücken* and *Jaenichen* are of the opinion that the decision of the Commission aimed to increase transparency regarding the general terms of the tender in order to guarantee a workable price competition between airlines.

Kristoferitsch argued that the Commission had failed to take the new business-model upon which low-cost carriers operate into account.[49] It did not recognise the fact that low-cost airlines need another service than the service provided by international airports. Why should a low-cost carrier, which does not need the same high standards as a normal airline, pay the same amount of money, although it does not use all the standards available?
Moreover, regional airports have to be supported, due to the fact that already existing international airports are reaching the limits of their capacity soon. Regional airports can help to overcome this problem by offering a wide range of destinations.

However, the Commission ruled that it is not acceptable that routes, which are already served by other airlines or by high-speed trains, receive start-up aid. This could lead to the maintenance of existing monopolies. Furthermore, due to the fact that rules on state aid only apply to subsidies granted by the state or by institutions controlled by the state, they indirectly favour private ownership of airports over public ownership of airports. This has as a consequence that we are going to face even greater numbers of airport-privatisations.

v. 2005 Guidelines[50]

[48] Steinrücken, Jaenichen, *Towards the Conformity of Infrastructure Policy with European Laws*, Intereconomics March/April 2004.

[49] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010).

[50] Community Guidelines on Financing of Airports and Start-up Aid to Airlines departing from Regional Airports, OJ 2005 C 312.

After deciding the Ryanair case on 12 February 2004, the Commission adopted new guidelines, addressing the issue of financing of airports and of contractual relations between airports and airlines, on 6 September 2005.[51]

The Guidelines are not legally binding for the Member States or individual parties, but can be considered as self-binding for the Commission. The Commission adopted these Guidelines in order to enhance predictability, as they indicate how the Commission will decide future cases. These Guidelines are additional to the 1994 aviator sector guidelines[52], which mainly deal with state aid given to airlines. However, the growths in the low-cost airline sector brought about a shift of attention towards state aid not only for airlines, but also for airports.[53]

In paragraph 15, the Commission distinguishes four different types of airports:

- Category A: large Community airports with more than 10 million passengers a year
- Category B: national airports, with 5-10 million passengers a year
- Category C: large regional airports with 1-5 million passengers a year
- Category D: airports with a passenger volume of less than 1 million.

The Commission ruled in paragraph 39 that public financing given to category A and B airports will normally be considered as distorting competition and affect trade between Member States. However, aid granted to category D airports does not distort competition to an extent contrary to the common interest. The interesting thing is, that at the time the Ryanair case was decided, BSCA had less than one million passengers annually and thus, would be a category D airport according to the new Guidelines. Therefore, had the Guidelines been already applicable to the case, the outcome would probably have been different.

The Commission considers airport management as an economic activity, but some specific activities, such as safety, air traffic control, police and customs, fall under the responsibility of the state in the exercise of its official powers as a public authority. These activities are not of an economic nature and therefore do not fall within the scope of the rules on state aid. The Guidelines apply to four different types of airport activities:

---

[51] Chassagne in Sànchez Rydelski, *The EC State Aid Regime* (2006), 402.

[52] Commission Guidelines on the Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector, 94/C350/07.

[53] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) 371 p.

a) the construction of airport infrastructure and equipment
b) the operation of airport infrastructure
c) the provision of airport services ancillary to air transport, e.g. ground-handling
d) the pursuit of other commercial activities.

When it comes to ground-handling activities, the Commission will apply the groundhandling-directive, which adopts a two million passenger threshold.[54] If this threshold is exceeded, cross-subsidisation between different airport activities is no longer permitted and activities covered by the directive have to be opened to competitors.

Furthermore, the Commission acknowledges the necessity for small airports to attract airlines by offering start-up-aid and will accept these subsidies under the conditions of paragraphs 77-81. Moreover, start-up-aids and start-up-schemes must be notified to the Commission without exception.[55]

vi. Appeal

Ryanair appealed the decision of the Commission and sought to have the European Court of First Instance (Court) annull it. Ryanair based its appeal on two grounds. It alleged an infringement of art.253 EC Treaty, arguing that the Commission did not state the reasons which led to its decision. According to art.253 EC Treaty acts adopted by the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions, which were required as obtainable pursuant to the EC Treaty. The second reason for appeal challenged the classification of the measures at issue as state aid and alleged an infringement of art.107 (1) TFEU.[56]

On 17 December 2008, the European Court of First Instance delivered its judgment. The Extended Eighth Chamber of the Court annulled the Commission decision in its entirety. The Court based its judgment, *inter alia*, on the fact that the Commission refused to examine the advantages granted by the Walloon region and the BSCA together and to determine

[54] Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ 1996 L 272/36.

[55] Kristoferitsch in Forsyth, Gillen, Müller, Niemeier, *Airport Competition: The European Experience* (2010) 372 p.

[56] Power, *Ryanair v. European Commisssion*, Issues in Aviation Law and Policy Vol. 8:2, 199 p.

whether, when taken together, the two entities acted as rational economic operators in a market economy.

The Court acknowledged that a distinction needs to be made between the obligations, which a Member State must assume as an undertaking exercising an economic activity and a public authority discharging its obligations and functions. Moreover, the Court stated that the Commission correctly applied the private investor test when the state acts in an economic capacity.

The Court argued that due to the fact that BSCA is an entity which is economically dependent on the Walloon region, the Commission should have considered the activities of both in combination and determined whether, when combined, they acted as rational operators in a market economy.

The Court ruled that the Walloon region carried out activities of an economic nature, by entering into the agreement with Ryanair. These were activities, which a private airport owner would have also undertaken. Specifically, fixing the amount of the landing charges and the granting of the indemnity amounted to activities directly connected with the management of airport infrastructure constituted economic activities. Thus, the region was exercising economic activities. The Court emphasised that the mere fact that the activity is carried out in the public sector does not mean that it can be categorised as the exercise of public authority powers. The Court based its finding on art. 295 EC Treaty, which provides that this Treaty shall in no way prejudice the national rules of Member States which concern the system of property ownership. Moreover, the Court was of the opinion that the mere fact that the Walloon region had regulatory powers in relation to the fixing of charges did not mean that a scheme reducing those charges ought not to be examined by reference to the private investor test, since such a scheme could have been put in place by a private operator as well. In applying the private investor test in the aviation sector, the Court confirmed that it is not lawful or appropriate to separate the provision of airport infrastructure from airport concession or management services. The Court ruled that both were economic activities and thus, the private investor test should be applied to both.[57]

The Court decided that the fact that the Commission's refusal to examine the advantages granted by the Walloon region in combination with those granted by the BSCA, as well as the application of the private investor test to the measures adopted by the Walloon

[57] Power, *Ryanair v. European Commisssion, Issues in Aviation Law and Policy* Vol. 8:2, 201.

region was vitiated by an error in law. Therefore, the Court annulled the Commission's decision.

4. The Olympic Airlines cases

i. Real facts

According to the 1994 and 1998 decisions of the Commission, aid that had been granted from the Greek State to Olympic Airways was compatible with the common market, provided that Greece met a series of commitments listed in the Decision. However, the Greek State never complied with the conditions set forth. With its 2002 Decision the Commission declared that the aid allowed by the 1994 and 1998 Decisions was misused and new illegal aid might have been granted.[58]

With its final negative Decision no. 2003/372/EC, the Commission found the aid to be incompatible with the EC Treaty, as Greece had failed to correctly implement the restructuring plan of Olympic Airways that had triggered the aid in the first place.

In addition, the Commission found that Olympic Airways had received additional new aid that was incompatible with the common market. More specifically, the Greek State tolerated the non- payment of certain social security payments, value added tax on fuel and spare parts, rents payable to airports, airport charges and a tax imposed on passengers departing from Greek airports known as '*spatosimo*'. The Decision required Greece to take the necessary measures to recover the aid that at the moment amounted to the sum of € 41 million, plus interest. In 2003 Olympic Airways brought an action challenging the Decision of the Commission before the Court of First Instance. Throughout this period of time, Greece had not yet taken any relevant steps in order to re-acquire the amount of the non-conforming aid. In 2005 the Court ruled in favor of the Commission declaring that Greece had failed to fulfill its obligations.

Article 260 paras. (1) and (2) of the TFEU states:

If the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

[58] C-372/03, Commission v. Greece, 11 December 2002, p. 1.

If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

The Commission decided to launch the procedure laid down in the TFEU, according to which if aid granted by a State or through State resources is not compatible with the internal market, the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.[59]

The grounds which triggered the procedure were the following:

1. The company's continuous failure to pay tax and social security contributions.

According to the 2002 Decision, the failure on the part of the Greek State to collect debts was found to constitute illegal State aid. The State was found to be Olympic Airways' principal creditor, since if it were not for continued State intervention the company would long since have ceased its operations.

2. The structural reorganization of the company.

Having failed to privatize Olympic Airways group as a whole, the Greek State decided to divide it into separate units, namely Olympic Airlines, which encompassed the legal divisions of the various companies within the group and Olympic Air Services, which encompassed the non-flight divisions. Olympic Airlines was established under law 3185/2003. This law conferred exemption from the provisions of Greek company law that would normally apply, freeing the new company (Olympic Airlines) from any debts of the original-parent company (Olympic Airways) which was indebted at the amount of EUR 207 million. Its intention was to enable the flight divisions of the Olympic Airways group, now absorbed into Olympic Airlines, to continue trading and to proceed to privatization.

3. The advance of € 130.312.450 to Olympic Airways.

[59] Art. 108, TFEU.

The Greek State set up an account that was to be credited with the proceeds of any sale within the framework of the privatization procedure. However, the account was credited by the State.

4. Non-payment of *spatosimo* and Athens International Airport (AIA) debts.

Olympic Airways owed a very high amount of money in respect of the special tax known as *spatosimo*, which was levied on passengers by the air carriers and was to be forwarded by the latter to the State. The State was thus obliged to find means to help Athens International Airport which was newly established and dependent on the '*spatosimo'*. The State paid the amount owed itself and imposed extra charges on other air carriers, obstructing thus competition among the market.

ii. Experts' conclusion on Olympic Airways after the restructuring

The experts conclusion concerning Olympic Airways after its restructuring shed light to the question whether the aid provided was conforming with the market or not.
As far as the tax and social security debts are concerned, the experts held that the underpayment of tax liabilities by Olympic Airways had provided a cash flow benefit to the company both before and after restructuring.

Secondly, concerning the amount of € 130.312.450 to Olympic Airways, the experts found that not only had the Greek government overvalued the assets transferred to Olympic Airlines, but also that Olympic Airways management appeared to have interpreted the concept of retirement and other restructuring expenses in the broadest possible sense, so as to cover any kind of spending by Olympic Airways in the period between the hive-off of Olympic Airlines and the completion of privatization.

Moreover, the Greek government had repaid part of an ABN AMBRO BANK loan that Olympic Airways had received, but even though the Greek tax authorities requested payment from the company, the amount was never paid.

In addition, the Greek State had made lease payments totaling € 11 774 684 as guarantor under two finance lease agreements with *Crédit Lyonnais* for two A340 aircraft. This amount, although requested for, was again never repaid.

Another direct funding that took place was that of the cash payment of € 8.2 million to Olympic Airways. This amount was never recuperated. Lastly, Olympic Airways had not paid to the state owned telephone company OTE the amount of € 4.5 million.

iii. Assessment of the aid

Whereas the restructuring of the company did lead to the creation of a new separate legal entity, its ultimate purpose was nevertheless to avoid the recovery of the incompatible aid which was ordered through the 2002 Decision.

With regard to tax and social security, Olympic Airlines, as a new company deriving from the Olympic Airways group, was found to have met its obligations and not have received any State Aid since it came into being. However, the company was found to have benefited from favourable terms from its suppliers in two respects.

Firstly, as far as the aircraft subleases are concerned, the rates were lower than those charged under the head leases concluded with the head lessors. The measure reduced the costs that Olympic Airlines would otherwise have to bear. Moreover, the measure was specific, since it was directed only to Olympic Airlines and it distorted competition, as Olympic Airlines operates in a fully liberalized air transport market.

Secondly, Olympic Airlines was allowed to build up debts during the winter season and then convert them to an eight month short term loan that was to be paid over the summer season. Thus, Olympic Airlines was provided with seasonal working capital financing. This, in combination with the fact that AIA tolerated continuous late payments on behalf of Olympic Airlines suggested that the company was receiving treatment that was not available to other companies.

Olympic Airways and Olympic Airlines were under the control of the state. The Greek State, being Olympic Airways' largest creditor undoubtedly had a dominant influence, directly and indirectly, over both undertakings. Therefore, the decision of Olympic Airways' decision to sublease aircrafts to Olympic Airlines with lower costs was not the act of an independent undertaking.

Furthermore, the cash advance amounting up to the sum of € 130.312.459, did constitute a transfer of State resources, since they came directly from the State budget, as they were withdrawn from the special accounts provided for under law 3185/2003 and it did constitute and individual measure, since it was directed exclusively at Olympic Airways.

A capital increase does not constitute State Aid as long as this amount is given to a company which is temporarily experiencing difficulties in order to help it return to

profitability through appropriate restructuring measures.[60] When the company has overcome its problems and it returns to profitability, it will also repay the money received. Moreover, there is no State Aid according to the Court of justice if the capital increase takes place on terms that would be acceptable to a private investor operating under normal market conditions.[61] In the specific case Olympic Airways would manifestly have been unable to recover the amounts that it owed to the Greek State, seeing that the debts continued to rise, whereas the assets that could have satisfied the debts disappeared. It would have been impossible to obtain a comparable cash advance from a private investor in the same situation. Therefore, the Greek State failed to pass the 'private investor' test.

Claims that the amount given constituted compensation from the Greek State to Olympic Airways for the assets that had been taken away and given to Olympic Airlines are null, since experts convincingly demonstrated that the assets were overvalued. The overvaluation is specific, as it expressly provides money directly to Olympic Airways and it confers an advantage on the company that is not conferred on its competitors. It thus distorts competition.

Having reached the result that Olympic Airways did in fact receive State Aid, the Commission proceeded to checking whether the Aid provided could fall under one of the exceptions listed in art. 107 TFEU.

None of the exceptions of art. 107 (2) TFEU apply since the aid does not have a social character, it is not granted to individual consumers, there was no damage caused by natural disasters or exceptional occurrences and apparently it does not concern issues relating to Germany.

In addition, there are a few exceptions listed under art. 107 (3) TFEU. The exceptions listed in paras. (b) and (d) do not apply in this case, as the funding was not given in order to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, nor was it used to promote culture and heritage conservation.

---

[60] 2004/C 244/02 Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, para. 15.

[61] Nikolaides, Kekelekis, Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, Kluwer Law International (2005), p. 19.

It would be possible to claim that the aid granted falls under the exceptions of paras. (a) and (c). Article 107 (a) TFEU concerns regional aid. That is, aid granted to specific areas where the standard of living is abnormally low or where there is serious underemployment. The aid is given in order to promote the economic development of such areas. Greece as a whole falls under the scope of art. 107 (a) TFEU. In the sector of aviation services, the Commission considers that the objectives of regional aid are as a rule achieved more easily through the imposition of public service obligations.

The Greek State imposes the obligation to air carriers which offer connections between islands or between the islands and the mainland to provide some 'thin' routes services, offering compensation in return. This was the case with the contracts operated by Olympic Aviation. Such compensation is, according to the Commission, necessary, targeted support and as long as the operator is chosen by a transparent and non-discriminatory procedure and does not receive overcompensation it does not as a rule constitute incompatible State aid. However, in the case of Olympic Airlines, the sums vested in the company by the Greek State are too high to be considered as compensation and thus cannot fall under the exception of para. (a).

Article 107 (c) TFEU concerns aid vested to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In order to figure out whether Olympic Airlines may fall under this exception, the Commission had to take under consideration the Guidelines on State Aid in the aviation sector and the Guidelines on State Aid for rescuing and restructuring firms in difficulty[62].

Paragraph 14 of the former set of Guidelines states that direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption, unless the subsidization is given as compensation to a public service obligation or when the aid has a social character and is granted to individuals. Neither the aid granted directly to Olympic Airlines via the low cost aircraft leases, nor the aid granted indirectly via Olympic Airways can fall within any of the two categories.

Moreover, it has been established in law that new aid cannot be compatible with the common market, if there was also aid given in the past and although it was held to be

[62] Community guidelines on state aid for rescuing and restructuring firms in difficulty [Official Journal C 244 of 1.10.2004].

unlawful and has not been repaid. The cumulative effect of the aid measures would be to distort competition to a big extent. As it has been demonstrated above, Olympic Airlines is indeed the successor of Olympic Airways. Thus, it is also the successor for the purposes of recovery. New aid to Olympic Airlines cannot be compatible, as long as the former unlawful aid is not repaid. Additionally, the granting of aid to Olympic Airlines consists an infringement of art. 1 (e) 1994 Decision, according to which, Greece undertook the commitment to not grant any further aid to Olympic Airways and by extension to successor companies.

5. Conclusion

It is evident from the above mentioned that the prevailing general principle within the European Market is that State Aid is not allowed, unless clearly defined conditions which are set out in the TFEU are met.

Due to lack of uniformity, transparency and concrete legislation, the Commission has wrongly interpreted the real facts in various cases. Even though Regulations and treaties do exist, there is still a lot of freedom provided to the Member States, as far as interpretation is concerned. Moreover, Member States tend to promote their own rules. In order to overcome these problems, new legislation, most of which is the outcome of experience gained through case law is being concluded.

The 1994 and 2005 Guidelines are a step towards the right direction. However, they only constitute soft law and are thus not binding for the Member States, but solely for the Commission. Moreover, the Lisbon Treaty resulted to the amendment of certain provisions, making several procedures faster, simpler and more easily accessible. For instance, the notification procedure has been simplified. As far as Regulations are concerned, it would be advisable to keep them up to date since provisions such as art. 107 (2) (c) TFEU, is completely outdated and irrelevant. On the contrary, there are contemporary needs which are not covered.

Even though decisions are delivered on a case-by-case basis, it is imperative for the Commission to establish concrete and uniform solutions to similar problems. In addition, we find it not only fair but also necessary for the Commission to introduce more stringent penalties, when it becomes obvious that a Member State continuously is not willing to abide by the decision delivered, either by the Commission itself or by the ECJ.

In the ever-evolving sector of aviation, it is the Commission's duty to react fast to the needs of the companies and the public and implement as well as amend relating legislation. A first step has been made with the aforementioned Guidelines; however, there still is much left to be done.

In our opinion, the most practical and accomplishable solution would be to implement new legislation via Directives, which combine the two most important conditions: predictability offered by hard law and adjustability provided by soft law.