State aid to airports and airlines

"EU State aid policy should not be a tool to curb regional development and economic growth"

CEMR response to the European Commission consultation on the draft EU guidelines on state aid to airports and airlines

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Draft EU guidelines on state aid to airports and airlines

CEMR Key Messages

1. Airports have a vital connectivity and regional development role. The Commission's approach to state aid assessment does not appear to give sufficient weight to the economic growth and job creation benefits of aviation as pursued in line with the Europe 2020 goals.

2. The proposed ban on operating aid after a transitional period has caused concerns across the EU. Many airports are vital to a region's survival and will always require an element of public support, even beyond the proposed transitional period. The Commission's proposals therefore appear unrealistic.

3. To avoid their closure, and to allow a more flexible regime for smaller airports, all airports with less than 1 million passengers per annum should be exempt from the guidelines as a whole. This can be achieved via a *de minimis* provision or a block exemption.

4. It is vital that local and regional authorities maintain the right to organise airports of all sizes as Services of General Economic Interest (SGEI) in line with Article 106.2 & Protocol 26 TFEU, bringing vital connectivity to local communities and businesses. SGEI designation is especially justified in remote or peripheral regions.

5. Democratically elected local and regional governments are best placed to decide on the use of their own taxpayers' funds in their own regions. In many cases the wider regional development benefits will far outweigh the cost of the public contribution to the airport – and will also contribute to an extended market.

6. The Commission's guidelines should therefore be much more strategic, much less detailed, and much more 'light touch', only focusing on those large scale aid cases which truly distort competition.

Introduction and General Comments

1. The Council of European Municipalities and Regions (CEMR) is the European umbrella organisation and largest association of local and regional governments in Europe. Its members are over 50 national associations of towns, municipalities and regions from 40 countries. Together, these associations represent some 150,000 local and regional authorities in Europe.

2. The draft guidelines were published on 3rd July 2013 just before the summer break. The deadline of 25th September 2013 for responses left stakeholders insufficient time to fully discuss these important proposals.

3. We recognise the role that EU competition policy plays in ensuring an effective internal market in aviation. Globalisation, rising demand, the maturing low cost carriers, aided by EU competition legislation and the removal of commercial restrictions for airlines, have combined to bring down the price of air transport and increased the number of airports and air routes in the EU.

4. We also note however the urgent need for Europe to boost its competitiveness in a global context. As Europe faces a delayed economic recovery, we see the rise of the Gulf carriers, and the enormous public investment into airports undertaken in emerging economies.

5. In terms of EU state aid policy to aviation we therefore see the need to strike a balance between ensuring an effective internal market on the one hand, and facilitating public investment and economic growth whenever possible on the other.

6. The draft guidelines are different from the current version in several respects, and therefore alter this balance. A restrictive approach to state aid diminishes the freedom of local and regional authorities to support airports and airlines and limits the associated economic growth. The economic crisis has shown that the EU's state aid policy should not be a tool for restricting public spending nor an instrument to curb valuable structural policies designed to support economic growth.

7. Local and regional authorities have a direct interest in aviation. 77% of Europe's airports are fully publicly owned, 14% are mixed public-private, and only 9% are fully privately owned.[1] In addition to airport ownership, public authorities can also help with operating costs and provide marketing support, rebates or other incentives to ensure their citizens have effective access to aviation. **In some cases access to an airport is vital to the very survival of a region.**

8. As the Commission notes, but then contradicts in the detail of its proposals, the vast majority of airports cannot currently be profitable and only remain on the market because of public support (point 53 of the draft guidelines).

9. **It is clear that without a public operating subsidy, after the proposed transitional period, many regional airports may not be able to meet their operating costs in future. The application of the new guidelines should not force the closure of any airports in the future which would otherwise be operational.**

[1] ACI Europe, the Ownership of Europe's Airports 2010, https://www.aci-europe.org/policy/fast-facts.html

10. With this in mind, we believe all airports with less than 1 million passengers per annum should be exempt from the proposals as a whole. This can be achieved via a *de minimis* provision or a block exemption.

Sub-national democracy and the territorial dimension

11. In addition to bringing vital connectivity improvements, airports and airlines also contribute €140bn to the EU's GDP and employ 2.3 million people. CEMR therefore also underlines the significant economic development and territorial cohesion benefits aviation can bring to regions.

12. These benefits are generally understated however in the draft guidelines. **It remains unclear what weight such regional development 'positive externalities' are given by the Commission when assessing aid cases** (as part of three criteria for proving the 'common interest' for investment aid assessment laid down in point 77 for example).
13. The competition regime should thus not only be a tool of state aid enforcement, but should be more growth-focused and contribute to Treaty objectives such as job creation and territorial cohesion whenever possible. **There is a strong relationship between air connectivity and economic growth and DG Regio should therefore be a closer partner in defining the Commission's aviation aid policies.** State aid intervention rates could receive bonuses according to a region's development classification for example as is the case with state aid to research infrastructures I.e. if the investment aid ceiling is 50%, it could be 55% in transition regions and 60% in less developed regions.
14. In some cases, publicly supported airports may need to be able to incur yearly losses in the same ways as private airports where the wider economic benefits of the airport to the region significantly outweigh any operating losses 'internal' to the airport. **Such determinations should be made by democratically elected local, regional, or national politicians in line with subsidiarity and the Member State's governance structures**.

15. The EU's state aid approach should therefore be a higher-level and less detailed one which focuses only on ensuring that sufficient safeguards are in place to be able to 'step in' and challenge national/sub-national decision making **only in those limited number of cases when airport duplication or long-term overcapacities seem likely, or where there is clear evidence of an unacceptable distortion of competition** (rather than a mere 'threat' of distortion).

Specific comments

16. We note the shortcomings of the current (2005) guidelines in light of the rise in the number of complaints and the relatively low level of notification of aviation state aid to the European Commission.

17. The draft guidelines could explain the 'basics' of the state aid to aviation regime more clearly right at the start of the document (rather than on pages 12-17). Particularly that in many cases **the guidelines may not even apply** due to either:
    - the public authority acting under the 'market economy operator' (MEO) principle, making its investment on a commercial basis and expecting a return at 'market' rate;

- or the public authority defines the airport(s) in question as a Service of General Economic Interest (SGEI) and thus applies the 'state aid to SGEI' regulatory package.

18. Similarly, the role that public service obligations (PSOs) can play and the relationship between these guidelines and Regulation 1008/2008 on the operation of air services will not be immediately clear to aid practitioners. Public service obligations can play an important role justifying additional public investment above and beyond what a private investor might commit to.

19. On top of these different 'pathways' allowing state support for aviation, practitioners are faced with three different types of aid: investment aid (for airports), operating aid (for airports), and start-up aid (for airlines), each with separate and detailed requirements in the draft guidelines. The four figures in Annex II and III are helpful in this respect and go some way towards summarising and better explaining a complex set of guidelines. However, as the Commission rightly points out (in point 75), Member States may want to develop additional guidance. Such guidance should also be developed in conjunction with local and regional authorities.

20. We note that the Commission adopts a much stricter state aid policy towards aviation than it does towards other modes of transport such as rail. **The reasons for this, reflecting environmental considerations and the Commission's overall transport policy, should be outlined and evidenced in the introduction to the guidelines.**

Investment aid to airports

21. We note that the Commission has for the first time defined specific maximum investment aid intensities according to the size of the airport, as measured by the number of passengers per annum (ppa).

22. We also note that investment aid will only be allowed in the form of a loan, rather than a grant, for airports over 3 million ppa, and that there will be a ban on investment aid to airports over 5 million ppa.

23. For the reasons outlined in points 1 to 14 of this paper (the need for a greater role for sub-national democracy; the need for greater recognition of the regional development benefits; the fact that a vast majority of airports are non-profitable) **CEMR believes the proposed investment aid intensity ceilings, based solely on a rigid ppa classification, are too blunt a tool.**

24. In scenarios where there is no displacement of services or no major distortion of competition, strong sustainable economic growth and increased connectivity across Europe and beyond, the annual volume of an airport's passengers should only be one factor considered, along with many others. Other indicators such as low population density; positive economic growth and job creation; minimal displacement of demand; proximity to an airport which is already at full capacity; and distance from other airports, should also be considered, and if necessary the aid intensity ceilings should be disapplied.

25. CEMR therefore proposes the alternative aid intensity ceilings below. Such ceilings still limit aid to ensure compatibility with the Treaty (Art.107.3c TFEU) but are more realistic and flexible in terms of allowing public support. The proposed ceilings

should be able to be disapplied when proven positive benefits overall can be shown in line with point 24.

26. Our proposal would also see grants allowed, rather than just loans, for larger airports (>3m ppa).

Size of airport avg. passengers per annum (ppa)	Max. investment aid intensity **Commission proposal**	Max. investment aid intensity **CEMR proposal**
>5 million	0% (no aid allowed)	up to 20% for loans or grants
3-5 million	up to 25% loans only, not grants	up to 40% for loans or grants
1-3 million	up to 50%	up to 70%
<1 million	up to 75%	exempt from guidelines, thus allowing aid up to 100%.

27. We note point 16 of the draft guidelines which references the 10 year transitional period in relation to investment aid, rather than operating aid. The guidelines should be absolutely clear that the proposed 10 year transitional period does not apply to investment aid at all, and that investment aid can be awarded at any point in an airport's development.

28. We would add that the Commission's approach to investment aid should take full account of the predicted increases in air travel, such as those highlighted by the recent EUROCONTROL study.[2] Such increases would appear to outweigh the spare capacity currently available in some airports. A certain capacity is also needed to attract airlines and it is important to ensure that assets are available for the future.

29. The Commission's rejection of overcapacity therefore seems out of touch with reality and the projected trends in the development of demand. The familiar examples of three or four under-utilised airports make the case that the vast majority of airports are needed. Again we note the significant investment emerging economies are undertaking in airport infrastructure, and the need to remain competitive in a global context.

30. The definition of the catchment area (within 100km or 1 hour's driving) in Annex I, needs to be treated flexibly, especially as regards the need to ensure **regional airports can be supported within the vicinity of large hub airports which are already operating at full capacity**. Such an approach will reduce air traffic congestion and also road traffic congestion leading to hub airports.

[2] EUROCONTROL,'Challenges of Growth', July 2013. http://www.eurocontrol.int/articles/challenges-growth

31. We note the CJEU Leipzig-Halle judgement (C-288/11 P), which ruled that public funding of airport infrastructure construction for subsequent commercial use, is an economic activity, and shall be considered prima facie as State aid to the operator. This is a stricter interpretation of the rules than previously and does not take sufficiently into account the fact that public sector participation is normally essential to ensure the success of large infrastructure projects.[3] **The Commission's state aid policy should therefore facilitate, rather than undermine, the institutional role of the state in supporting airport infrastructure projects.**

Operating aid to airports

32. We note the Commission's proposal to only allow operating aid to airports with less than 3 million ppa and only for a transitional period of a maximum of 10 years following entry into force of the guidelines, scheduled for the beginning of 2014.

33. The Commission furthermore proposes that the amount of aid allowed decreases by 10 percentage points each year, and that after this period no further operating aid will be possible: airports should finance the entirety of their operations from their own resources (section 5.1.2c).

34. **The goal that all airports should be profitable within a maximum of 10 years seems unrealistic given the current economic climate in Europe and given that the majority of airports are currently unprofitable without public support in the form of operating aid.**

35. **Smaller airports (<1m ppa) should therefore be excluded from the guidelines as a whole.**

36. Furthermore the Commission provides no accompanying strategy or policy initiative to support its operating aid proposals to ensure an entire sector can be structurally transformed so that all airports can reach profitability.

37. The provision allowing investment aid after 10 years where there is a 'genuine transport need' and 'positive externalities' (point 16), should therefore also apply to operating aid.

38. In short, the application of the new guidelines should not force the closure of any airports in the future which would otherwise be operational.

39. In addition, the proposal for a transitional period seems to force much of the 10 percentage points decrease per annum in operating aid onto airlines who may well in turn pass their increased costs onto passengers. **The likelihood of a negative impact on consumers is not discussed at all in the guidelines and is a significant omission.**

[3] The French Administrative Supreme Court recently ruled for example that subsiding the construction of an airport can be considered as compensation for public service obligations. Conseil d'État, No.347073 (13 July 2012), point 21 http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026198983&fastReqId=2129488089&fastPos=1

Aviation as a Service of General Economic Interest (SGEI)

40. CEMR underlines the general principle, in line with Treaty Protocol 26 that local and regional authorities have a 'wide discretion' to organise SGEIs themselves, and that **competition law, including state aid provisions, can only be applied if they do not obstruct the delivery of SGEIs (Art.106.2 TFEU).**

41. SGEIs, including those economic activities relating to airports and airlines, should therefore be defined by the Member States themselves, in conjunction with local and regional authorities. SGEIs should not be defined 'through the backdoor' by the Commission's state aid policy.[4]

42. **The guidelines should make it unambiguously clear that airports of all sizes should still be able to be supported under the SGEI regime whenever they contribute to vital links and connectivity for local communities and businesses.**

43. We note that the Commission's SGEI package should be applied to airports and airlines when public authorities seek to define aviation activities as SGEIs and compensate them with public funds. CEMR believes that compensation compatible with the four *Altmark* criteria should not then be subject to state aid considerations (point 61).

44. We also note the SGEI 'Decision' exempting airports with up to 200,000 ppa from the need to notify financial compensation to the Commission. **We consider this threshold to be too low for practical purposes and believe it should be raised to 1 million ppa.**

45. We also note the same exemption as regards air links to islands where the average annual traffic does not exceed 300,000 ppa. Again this threshold should be raised to 1 million ppa.

46. It is vital that the guidelines make clear that any small airport under these revised thresholds would automatically be covered by the SGEI aid regime.

47. Compensation to airports as SGEIs above these thresholds should still be able to be found to be compatible in line with the SGEI 'Framework'.

48. We also note that air transport services can be subject to public service obligations (PSOs) and should follow Regulation 1008/2008 on common rules for the operation of air services (point 63).

49. Clear exemptions must also be ensured in particular for air-ambulances, air medical services, disaster recovery and other essential public services reliant on airports.

Remote regions

50. CEMR underlines the essential need for a flexible treatment of isolated, remote, or peripheral areas. As recognised in the Treaty (Art.174 TFEU) areas with natural

[4] As has been the case with animal abattoirs in Germany and social housing in the Netherlands where the Commission denied the national designation of an activity as an SGEI.

handicaps such as the northernmost regions suffer particular disadvantages. In the peripheral countries and regions of the EU and the EEA, where there is no alternative high speed transport option, there is a great reliance on air travel. **SGEI designation is therefore particularly justified in these cases.**

51. In point 65 the Commission states that in addition to the outermost regions defined in Article 349 TFEU, SGEI designation may also be justified in the case of 'Islands or *other areas* of the EU'. The Commission should provide more detail here as to what may constitute an 'other area'. The aim should be that the provision covers all countries or regions that are peripheral to the European mainland and hence are very reliant on air links to ensure connectivity.

Start-up aid to airlines

52. We note the proposed regime to govern start-up aid to airlines:
    - only for airports with less than 3 million ppa
    - aid limited to only the first 24 months of the route's operation
    - aid intensity limited to only 50% of the start-up costs.

53. As with the other forms of aid, we believe that the proposals for start-up aid are unlikely to be sufficiently flexible to allow public authorities to ensure successful airports. **A longer period may be needed for the route to become profitable e.g. 36 months, and a 75%, rather than up to 50% aid intensity would allow public authorities to offer sufficient incentives to new airlines.**

54. As with investment aid, it is not totally clear if there will be a ban on start-up aid after 10 years following entry into force of the guidelines. Figure 2 annex II suggests this is the case, but this is not supported by a point in the text of the draft guidelines.

55. CEMR wishes to underline that notifications of aid to the Commission and their subsequent approval should be dealt with much more speedily. We understand the decision to allow start-up aid can take up to 18 months. This reduces the ability of the airport to attract new business and can be detrimental to the airport's success.

56. **Furthermore, notification requirements should be reviewed so that they are more proportionate to the size of airport concerned. Smaller airports, and smaller public authorities, have limited administrative capacity.**

Other provisions

57. CEMR notes that the current guidelines do not address in detail the issue of air connectivity to destinations beyond the EU. Such international links are increasingly important for the development of trade between the EU and existing/emerging markets globally. Such links deliver direct economic benefits to the EU.

58. Point 123 requires Member States to formally give their 'explicit unconditional agreement' to the guidelines. This is a strange requirement. Guidelines, if a non-legislative instrument, represent the Commission's approach and interpretation, and should not require the express agreement of Member States.

59. If the Commission believes the guidelines do indeed create a *de facto* Regulation which, in practice, binds public authorities, then it should issue the guidelines as a Regulation following the ordinary legislative procedure in co-decision with the European Council and the European Parliament. The agreement of the Member States would then be required formally as part of the legislative process in a transparent manner, rather than via the 'backdoor' as proposed by the Commission.

Final Remarks

60. Despite the Commission's stated goal of simplification of the state aid regime, the 35 pages of draft aviation aid guidelines still constitute a complex legal framework with a bewildering range of different possibilities: MEO, SGEI, and PSO exemptions; different approaches for operating aid, investment aid and start-up aid; each combined with different aid intensities, different thresholds, different timescales, and different assessment criteria; in addition to the need to reference other Regulations and other legislative packages. Whilst figures such as those in Annex II and III of the draft guidelines are helpful in summarising and explaining the guidelines, the interaction between all these different possibilities is still not easy to navigate and makes compliance a challenge.

61. **Greater use of horizontal or block exemptions across all aid types, and a use of a *de minimis* provision for airports of less than 1 million passengers per annum would therefore be beneficial and help the Commission to address the stated goal of simplification.**

62. Above all the future arrangements for aviation aid must be simpler, clearer and allow sufficient flexibility for local and regional authorities to make decisions regarding financial support to aviation in their regions.

63. Given the current economic climate the Commission should adopted a more flexible approach for the EU, as observed in all other major global blocs, to ensure the continuing operation of airports of all sizes. This would allow the Commission to instead give priority to promoting territorial cohesion, economic growth and job creation in line with the Europe 2020 goals.

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About CEMR

The Council of European Municipalities and Regions (CEMR) is the broadest organisation of local and regional authorities in Europe. Its members are over 50 national associations of municipalities and regions from 41 European countries. Together these associations represent some 150 000 local and regional authorities.

CEMR's objectives are twofold: to influence European legislation on behalf of local and regional authorities and to provide a platform for exchange between its member associations and their elected officials and experts.

Moreover, CEMR is the European section of United Cities and Local Governments (UCLG), the worldwide organisation of local government.

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