Air aid

The airport and airline state aid regime has been revised

by ***Julian Ellison****

As part of a wider programme to modernise and improve the state aid regime, the European Commission's long-awaited revised airport and airline state aid guidelines finally went public in February of this year.

So what, at 25,000 feet, has changed? Perhaps the single most obvious shock wave to hit the airport sector is the requirement that all regional airports receiving operating aid (designed to cover the "gap" between operating expenses and receipts) must reach a position of operational viability within a period of 10 years.

The Commission's policy brief issued on the same day as the new guidelines makes the background for this potentially draconian measure abundantly clear:

> "... regional airports present a dilemma ... public funding has often resulted in duplication of (unprofitable) airports in the same catchment area creating ghost airports and overcapacity ... while leaving the congestion of main airports unresolved ... the vast majority of regional airports do not cover their costs the capacity is and remains underutilised ... 42 per cent of European airports remain loss-making".

The second standout change in the revised 2014 guidelines is the introduction of a tighter assessment regime for investment aid (ie aid used to finance new or refurbished airport infrastructure). Most notable here is the introduction of a requirement that a candidate airport for investment aid must not be in the catchment area of a competing airport, and the introduction of aid intensity thresholds, limiting (subject to few exceptions) the maximum permissible levels of investment aid (the maximum is 75% for very small airports, scaling down to an "in principle" non-availability of investment aid for large airports).

This short summary aims to set out a practical checklist of steps that airport owners and operators can apply in order to assess what actions they need to take in the light of the new state aid guidelines.

What is the money being spent on?

First, identify what the public sector money (or potential state aid) is to be spent on. There are different rules for different types of aid:

- Is it investment aid? (ie aid for the construction or refurbishment of airport infrastructure such as terminal buildings).
- Is it operating aid? (ie aid to cover the operating deficit of an airport – the gap between receipts and expenses).
- Is it aid for security/safety? (eg aid for air traffic control, the fire brigade, police, customs, antiterrorism or equipment related to security/safety).
- Is it aid to support a service of general economic interest (SGEI)? (eg aid to finance an airport or route offering a vital transport link to an isolated region).
- Is it aid for a new airline route? (ie aid to assist an airline in introducing a new service).
- Is it aid of a social character? (ie aid for a particular category of passenger – the young, the old, the handicapped or passengers in a remote region).

Date of the aid

Second, identify when the aid was or is to be spent. In principle, all state aid should be cleared in advance of its expenditure. The date of expenditure of aid will dictate whether the 2005 or 2014 guidelines on state aid to airports and airlines will apply. The guidelines set out the framework and criteria that will be applied by the Commission (or a national scheme) in assessing the compatibility of aid under EU law. There are material differences between the old (2005) and the new (2014) guidelines. Consequently, the question of which guidelines will apply is an important one:

- Investment aid paid prior to March 2014 will be assessed under the 2005 guidelines, which, among other things, have no limits on the permitted intensity of the aid (ie the percentage of aid that is allowed as a percentage of the total project costs). Investment aid paid after March 2014 will be assessed under the 2014 guidelines (described further below).
- Operating aid paid prior to March 2014 will, in principle, be declared compatible as to its full amount for airports with up to three million passengers per annum (larger airports are, in principle, expected to be able to cover their operating costs). Operating aid paid after March 2014 will be subject to the new transitional rules for operating aid (described further below).
- Aid for airport security/safety elements, whenever paid, will in principle fall outside the state aid net.
- Aid for services that qualify as being in the SGEI, whenever paid, will in principle fall outside the state aid net (though a notification will in most cases be advisable).
- Aid for new airline routes, and aid of a social character, if paid prior to March 2014, will be assessed under the 2005 guidelines, and, if paid after March 2014, will be assessed under the 2014 guidelines (which introduces a simplified procedure, described below).

Relevant rules

Third, apply the relevant rules to the particular type of aid.

▌**Investment aid** under the 2005 and 2014 guidelines is subject to a compatibility assessment. This requires that the aid meets a number of specified tests set out in the guidelines and supported by the Commission's decisional practice and the case law of the Court. Note in particular that the aid must be proportional (and limited to the minimum). Under the 2005 guidelines, there was no prescription as to what would be considered "proportional" (ie, in principle, any amount or intensity of investment aid could be justified, up to 100% of the expenditure). The 2014 guidelines, in contrast, set out the

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maximum permissible aid intensities – that is to say, the permissible amount of aid as a proportion of total expenditure (linked to the size of the airport) – that will meet the proportionality requirement.

Thus, the following matrix applies:

Size of airport (passengers per annum)	Maximum investment aid intensity
>5m	0%
3m-5m	Up to 25%
1m-3m	Up to 50%
<1m	Up to 75%

Aid to an airport in a remote region and aid to large airport projects – for example, the upgrade or replacement of a major hub such as London Heathrow – may benefit from higher aid intensities but such cases will be subject to a second stage and in-depth state aid analysis, typically lasting more than 12 months.

The guidelines refer to the possibility of case-specific exceptions more generally to the above matrix, but it can be expected that these will be applied strictly.

▌**Operating aid** to airports before March 2014 was subject to the same basic assessment criteria as investment aid. However, and importantly, in the pre-2014 period, there was no set requirement for a percentage contribution to the operating deficit from the airport.

Operating aid to airports after March 2014 will be subject to the same basic assessment criteria as investment aid. However, in relation to the "appropriateness" of operating aid and the "proportionality" of the operating aid, the Commission has introduced clear and constraining criteria.

With regard to the question of "appropriateness", the Commission has stated that – although operating aid will, in principle, be approved for airports with up to three million passengers per annum – these airports will be subject to a 10-year transitional period (which started in March 2014 with the publication of the 2014 guidelines), during which time the airport must make a transition to full operational viability. No further operating aid after this 10-year period will be allowable.

Airport operators will be required to draw up detailed ex-ante business plans, identifying (among other things) the measures that will be taken to effect the transition to viability and the lump sum that will be required to be paid (either in a single payment or in instalments) during the transition period to cover the ongoing operating deficit.

With regard to the question of the "proportionality" of operating aid, the 2014 guidelines provide that the permissible intensity of operating aid during the transitional period is limited to 50% of the funding gap (ie the difference between receipts and payments). No aid above this intensity will be permitted and no aid beyond 10 years will be permitted (SGEI airports being the single exception). An operating aid intensity of 80% will be allowed for small airports of up to 700,000 passengers per annum for a period of up to five years. Thereafter, such small airports will be assessed on a case-by-case basis.

In order to reduce the number of individual business plans and operating aid payments notified for clearance purposes to the Commission in Brussels, member states are encouraged to design and clear with the Commission national schemes for operating aid payments to national airports. If in place, such schemes will offer an automatic clearance umbrella for operating aid. National schemes will be required to track the terms of the 2014 guidelines. At the time of writing, the UK has not confirmed whether and, if so when, it will put in place a national scheme.

▌**Services of general economic interest.** It is possible that the operation of an entire airport will amount to an SGEI service where that airport provides an essential transport link to a remote region. Similarly, it is possible that a part of an airport's operations (that relating to the provision of certain essential transport services) may meet the SGEI test. Because SGEI public sector payments will, in principle, fall outside the state aid net entirely, the Commission's approach to the analysis of SGEI airports and services is a restrictive and strict one.

▌**Start-up aid to airlines** is again subject to the same basic assessment criteria as investment aid and operating aid. With a view to the potential "need" for such aid, the Commission specifies in the 2014 guidelines that the aid category is limited to airports with up to three million passengers per annum. For airports with three to five million passengers per annum, exceptional circumstances would be required to use this aid category.

In relation to the "appropriateness" of this category of aid, an ex-ante business plan showing that the route will be profitable within three years will be required (or, alternatively, a commitment will be required by the airline to operate the route for at least as long again as the period covered by the initial start-up aid). In relation to "proportionality", the aid may cover up to but no more than 50% of the airport charges in respect of the new route over a three-year period. With regard to the impact upon "competition", if there exists alternative high speed rail or competing airline links in the same catchment area (broadly, within 100 kilometres or 60-minutes travel time by road or rail), then the route will not be eligible for aid.

▌**Aid of a social character** must benefit a defined category of end customer (the old, the young, the handicapped or, exceptionally, a geographically isolated population). Again, member states are encouraged to set up national aid schemes.

Conclusion

While we may be (in Churchill's famous phrase) at the "end of the beginning" in terms of the new state aid regime for airports and airlines, it is certainly too early (by some years) to say that this will be the beginning of the end for Europe's many regional airports. Within a year or so, however, it ought to be possible to begin to assess just how easily regional airports have been able to devise credible business plans for a transition to viability, starting (as many of them do) from a loss-making position, and being subject (as they undoubtedly all are) to the strength and speed of the recovery of the national and non-national economies upon which they depend.