assessment of market power and concludes that airports are often in competition with each other, trying to secure growth and development by attracting airlines and passengers. Competition should be replaced by regulation, only when it is evidenced that the latter outweighs the benefits of the former. A monitoring system is proposed instead of economic regulation, following the assessment of the market power of each airport concerned. Regulation may be needed only for certain type of dominant airports with significant market power (congested airports with limited capacity not substitutable by other airports).

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- Various airport taxes[42] as accruing directly from each government within the context of general taxation, identified as travel taxes, but with no relevance with or connection to the charges set by an airport operator.[43] The ICAO in its Doc 90/82 on airport charges clearly distinguishes between a charge and a tax, the latter being defined as a levy designed to *"raise national and or local government revenues which are generally not applied to civil aviation in their entirety or on a cost-specific basis."*
- Quarantine, health inspection charges or custom related charges.

§1.02 CONCLUSIONS AS TO THE DEFINITION OF AIRPORT CHARGES

From the above analysis it appears that the term "airport charge" encompasses the following:

- the imposition of a levy by an airport operator;
- the payment by a carrier of such charge to the airport operator;
- such payment is made in consideration of the use of the airport's installations and services rendered by the airport operator with respect to landing, parking, processing of passengers and cargo or other infrastructure or services charges, such as the security charge;
- airport charges are distinguished from airport taxes, ground handling or PRM charges, or from business activities performed by airports;[44]
- the structure of airport charges is dynamic and can be subject to variations, depending on a variety of factors, such as variations by time, origin or destination, transfer passenger discounts, or other discounts (incentive schemes or even volume discounts).[45]

42. As it confirmed in the *Charleroi* case, cited above at fn 12, the Court of the European Union made a distinction (par. 90) between "fees" which are set and collected by the airport operator against services rendered and taxes.
43. As stated in Recital 10 of EU Directive 2009/12 on airport charges, *"ICAO Council has considered that an airport charge is a levy that is designed and applied specifically to recover the cost of providing facilities and services for civil aviation, while a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost-specific basis."*
44. Provided that the concept applied is the dual-till system. As discussed below, under Chapter 2, airports can either use a *"single till"* system, where all revenues are combined or a *"dual till"* system, whereby aeronautical and purely commercial revenues are separated.
45. The differentiation on the application of airport charges is dealt below under Chapters 3 and 7.

CHAPTER 2

Factors in Determining Airport Charges and Regulatory Systems

London Heathrow has had the highest total charges in 2013 for the servicing of eight aircrafts among fifty airports surveyed worldwide: the total charges at Heathrow for eight aircraft amounted to 65,924 SDR.[46] The lowest total charges again for eight aircrafts were at Honk Kong airport at 14,755 SDR. Among EU airports, Helsinki had the lowest total charges at 22,091 SDR. As to major EU hubs, total charges were at 39,238 SDR at Amsterdam and 48,742 SDR in Frankfurt. London Gatwick is ranked 40th with airport charges for the servicing of eight aircrafts at 26,119 SDR, while Heathrow[47] located and operated at the same city, is ranked first.

In order to understand the differences among the above charges and pricing structures, there must be first identified the factors that determine or influence the setting of airport charges.

§2.01 THE INTERNATIONAL AIR LAW REGIME

Air transport has been largely shaped, developed and influenced by the international legal framework applied between States either on multilateral or bilateral basis.

46. SDR: Special Drawing Rights.
47. Airport Charges Index 2013. Total SDRs for eight aircraft: *London-LHR* 65,924, *Toronto* 57,800, *New Jersey-EWR* 55,330, *Athens* 50,410, *Vancouver* 49,777, *Frankfurt* 48,742, *Sydney* 48,622, *Osaka* 46,675, *Zurich* 46,392, *Budapest* 46,066, *Paris-CDG* 44,994, *New York-JFK* 43,825, *Moscow* 41,879, *Johannesburg* 41,612, *Madrid* 41,448, *Rome* 40,907, *Tokyo* 40,672, *Amsterdam* 39,584, *Vienna* 39,238, *Auckland* 38,264, *Milan Malpensa* 36,942, *Brussels* 36,706, *Washington* 36,294, *Beijing* 34,825, *Berlin* 34,510, *Dublin* 34,473, *Prague* 33,085, *Delhi* 32,841, *Copenhagen* 31,885, *Dusseldorf* 31,842, *Seoul Incheon* 29,782, *Lisbon* 29,678, *Bangkok* 29,187, *Los Angeles* 29,170, *Miami* 28,978, *Stockholm* 28,959, *Warsaw* 28,884, *Cancun* 27,650, *Mexico City* 27,124, *London-LGW* 26,119, *San Francisco* 24,989, *Oslo* 24,766, *Singapore* 23,850, *Sao Paulo* 23,554, *Helsinki* 22,091, *Jeddah* 20,925, *Mumbai* 19,241, *Dubai* 15,145, *Kuala Lumpur* 15,091, *Hong Kong* 14,755. Source: Leigh Fisher: *Airport Charges Review*, 2013.

In the beginning of the twentieth century significant advances were made in aircraft manufacturing technology and the art of flying. It was soon realized that aviation would become an important and vital instrument of policy and war.

As early as 1910 the International Air Navigation Conference,[48] was held in Paris which attempted unsuccessfully to establish basic principles of regulation of flights. Following the World War I and in view of the fact that aircraft could not naturally be contained within national boundaries, the potential and the importance of aircraft, not only as a military weapon, but also as a means of carrying passengers and cargo became apparent. European States such as France, Great Britain, Germany and the Netherlands, being colonial powers, created and heavily subsidized national carriers linking their colonies with the home country and facilitated the development of trade, passenger travel and national pride.[49]

In 1919 once again in Paris and within the context of the peace conference after World War I, an aeronautical EU Commission prepared a new Convention,[50] which was eventually adhered by thirty-eight States, excluding USA.[51] The Paris Convention reaffirmed the customary international law principle that every State has absolute and exclusive sovereignty over the airspace above its territory.[52]

The same principle would be repeated twenty-five years later at the Chicago Conference of 1944 and the subsequent Convention, which shaped the development of international aviation over the next decades and until today.

[A] The Chicago Convention

In Chicago in December of 1944[53] just before the end of the World War II and in a vastly changing world, States, that participated to that conference, agreed for the establishment of an international corpus of provisions applying uniformly in civil aviation.

As referred in the third recital of its preamble, the CC lays down *"certain principles and arrangements in order that international civil aviation, may be developed in a safe and orderly manner and that international air transport services may be*

48. *See*: ICAO: *The History The Beginning* at: http://www.paris.icao.int/history/history_1910.htm. At the Conference held in Paris more than eighteen States were represented.
49. In USA it was never established a national home carrier. Instead private airlines were allowed to operate either domestic or international routes, like Pan American, which solely operated international air services.
50. Convention relating to the Regulation of Air Navigation, October 13, 1919 Paris France at: http://www.spacelaw.olemiss.edu/library/aviation/IntAgr/multilateral/1919_Paris_coneventi on.pdf.
51. As a result of the development of air transportation and due to the non-adherence by USA and by other central and south American countries to the Paris Convention, a Pan American Convention was concluded on 1928 at Havana. *See* M. Varley: *An Aspect of Air Law, Some Observations on the Conduct of International Air transportation Including Air Service Agreements and Traffic Rights*, at: https://www.google.gr/?ion = 1&espv = 2#q = http:%2F%2Fhomepage. ntlworld.com%2Fr_m_g.varley%2FAir_law.PDF.
52. The origin of the principle of complete sovereignty over the air space may be referred back to the Roman law principle *"Cujus est solum ejus est usque ad coelom," (He who owns the land owns it even to the skies)*.
53. Convention on International Civil Aviation 1944 Chicago, USA at: http://www.icao.int/pu blications/Documents/7300_cons.pdf.

established on the basis of equality of opportunity and operated soundly and economically."

Central to the CC is the inclusion in Article 1 of the principle of the complete and exclusive sovereignty of a State over its airspace.

In fact the notion of State sovereignty is as old as the notion of the existence of a State itself.[54] It means independence,[55] and it certainly includes *"the right to exercise the functions of a State to the exclusion of other States in regard to certain area of the world."*[56] This applies to all States which are deemed to be equally sovereign[57] and therefore exclusively responsible for their own legislative, executive and judicial powers within their territory upon which they retain jurisdiction.

Article 1 of the Convention predetermines many aspects and sets the limits of the regulation of international air transportation. In other words the idea of sovereignty runs through the entire body of the CC. For example according to Article 6 the air space of every contracting State is closed for scheduled international flights, unless two or more Contracting States decide otherwise by granting a special permission or authorization and in accordance with the relevant terms included therein. Article 6 of the CC, as discussed below, inaugurated the era of bilateralism among States, at least regarding scheduled international flights.

According to Article 15 of the CC, all Contracting States must keep their airports open to international transport and airlines and apply uniform conditions as to the use of airport and air navigation facilities and services.[58] To comply with the above obligation, airports must be certified and provide facilities and services in accordance with the standards of the ICAO.[59]

Further, the above Article states that any charges that may be imposed for the use of such airports and air navigation facilities by the aircraft of any other Contracting State, shall not be higher than aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and, as to aircraft engaged in scheduled international air

54. C. Erotrocritou: *International Law Sovereignty Over Airspace, Current Challenges and Future Development for Global Aviation*, Student Pulse, Vol. 4, No. 05, 2012, at: *http://www.studentpulse.com/articles/645/sovereignty-over-airspace-international-law-current-challenges-and-future-developments-for-global-aviation*, where it is stated that *"The modern concept of sovereignty is often traced back to the Treaty of Westphalia which laid down the basic principles for the recognition of a State as being a sovereign State: territorial integrity, border inviolability, the supremacy of the State and supreme law making body within the territory."*
55. Prof Dr. P.M.J. Mendes de Leon: *Public Air Law*, Leiden University, 2013-2014.
56. *Kibris Turk Hava Yollari & CTA Holidays v. Secretary of State for Transport* (2009), EWHR1918.
57. *See* Article 2(2) of the Charter of the United Nations at: http://www.un.org/en/charter-united -nations/ where it is expressly stated that the *"Organization is based on the principle of the sovereign equality of all its Members."*
58. Subject to the limitation contained in the Convention and specifically in Articles 68 (designation of routes and airports), and of Article 89 (war and emergency conditions).
59. *See*: ICAO: *Assembly Resolution A35-14 on Air Navigation* at: http://www.icao.int/Training/ SiteAssets/A36_13_App_H.pdf. *see also*: ICAO Annex 14 on Aerodromes *Design and Operations*. 4th edn, July 2014.

services, than those that would be paid by its national aircraft engaged in similar international air services.[60]

Therefore Article 15 of the CC, even as early as in 1944, sets two fundamental principles for the use of airports and the imposition of airport charges:

(1) Application of uniform conditions as to the use of airports of a Contracting State by the aircraft of other Contracting States.
(2) The imposition of charges must not be discriminatory as to the aircraft of other Contracting States.

The CC has been ratified by all the European Union Member-States.[61] The European Union – hereinafter EU – is not itself a party to it, yet pursuant to paragraph 5 Article 3 of the Treaty of the European Union, – TEU – it shall, *inter alia*, contribute to the strict observance and the development of International law. Also according to Article 351 of the Treaty on the Functioning of the European Union – henceforth TFEU – *"the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."* As clarified by the CEU, the duty of the institutions of the EU not to impede the legality of the obligations of the Member-States stemming from the CC, does not bind the EU as regards the third States party to that agreement.[62]

It follows that when one or more acts of EU Institutions have the object of incorporating into EU law certain provisions included in an international agreement,

60. Article 15 of the Chicago Convention reads: *"Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation. Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, (a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services. All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon."*
61. *See*: List of countries that have ratified the Chicago Convention at: http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf.
62. Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* (2011) at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0366, p. 61.

which the EU has not itself approved, the proper basis is Article 100(2) TFEU, which States that the EU may adopt appropriate provisions on air transport.[63]

Within this context certain matters[64] falling within the CC have been covered by legislation adopted at EU level, including the EU Directive 12/2009 on airport charges in particular on the basis of Article 100(2) of TFEU.

[B] Bilateral Air Services Agreements

While before World War II international air services were not always provided on the basis of bilateral agreements,[65] postwar international air transportation largely relied and was shaped on the basis of bilateral agreements. Under the CC,[66] which as noted established the principle of complete and exclusive sovereignty over the airspace of the Contracting States, it was prohibited for foreign aircraft to perform international flights over the territory of other Contracting States, without their prior written consent. This prohibition was reflected in Article 6 of the Convention, whereby the exchange of any

63. Article 100 par. 2 of the TFEU, ex-Article 80 par. 2 of the EC Treaty, states: *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions."*
64. *See* for example, Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002 *on common rules in the field of civil aviation and establishing a European Aviation Safety Agency* (OJ 2002 L 240, p. 1) at: https://easa.europa.eu/document-library/regulations/regulation-ec-no-15922002; Council Regulation (EEC) 3922/91 of 16 December 1991 *on the harmonization of technical requirements and administrative procedures in the field of civil aviation* (OJ 1991 L 373, p. 4), at: https://easa.europa.eu/document-library/regulations/council-regulation-eec-no-392291 as amended by Regulation (EC) No 1900/2006 of the European Parliament and of the Council of 20 December 2006 (OJ 2006 L 377) at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006R1900.
65. Most pre-World War II bilateral agreements were concluded following the Paris Convention, and the first known scheduled international air service commenced on March 22, 1919 between Paris and Brussels. However, there were cases where international flights were performed without any formal agreement between the States concerned: Pan American operated air services in Latin America without formal bilateral agreements between the USA and the respective countries. As PPC Haanappel has noted, while at first most of the bilateral agreements were made between signatory States to the Paris or the Havana Conventions with States which were not signatory parties to either, gradually the conclusion of bilateral agreements proliferated between signatory States of either the Paris or the Havana Convention and traffic rights were exchanged only on the basis of reciprocity. For example, the first USA-Canadian bilateral agreement of 1929, did not refer to any route schedule, but it was agreed that if a Canadian aircraft was permitted to carry passengers and cargo in Canada, it could also provide such services between Canada and USA but could not provide air services between points within the USA. Exactly the same rights were enjoyed by aircraft licensed in the USA. In 1938 however, in the new bilateral agreement which replaced that of 1929, the operation of flights between the two States was subject to the prior approval of both parties. *See*: P.P.C Haanappel: *Bilateral Air Transport Agreements-1913-1980*, Maryland Journal of International Law, Vol. 5, No. 2, pp. 241-242.
66. As pointed out by P.S Dempsey, USA participated to the Chicago negotiations *"as the world's dominant aviation power, both in terms of aircraft production and technological expertise. The British had devoted their aviation industrial capacity building fighter planes while the US built most of the freighters. The war left the US with a tremendous fleet of long-range transport planes readily convertible to civilian use as well as a massive industrial infrastructure."* P.S Dempsey: *The Evolution of Air Transport Agreements*. Annals of Air and Space Law, Vol. XXXIII, p. 132.

multilateral rights between the Contracting States of scheduled international flights was excluded.[67]

The CC is more liberal regarding nonscheduled rather than scheduled international flights, by multilaterally exchanging – via Article 5 of the Convention – the first two freedoms[68] of the air, namely the freedom of over-flight and that of landing for

67. During the negotiations of the Chicago Conference the UK supported a system of free competition while the USA was in favor of "order in the air" by advocating for a system of regulation in the performance of international air services. As Prof Dr. P.M.J. Mendes de Leon refers: *"Those restrictions were related to the interests of the former colonial powers, dominating large parts of the world. Hence, on the one hand the US had suffered least from the consequences of the Second World War as far as aviation was concerned as it had been in a position to build transport aircraft during the period. That is why the US would benefit from bilateralism combined with strict application on the nondiscrimination principle. In any bilateral relationship the United States expected to be the strongest party as long as were no historical and political conditions affecting or pe-empting its strong position. The above policy objectives clashed with those of the British delegation at the same conference. Great Britain still was a colonial power and was suffering from the Second World War with little or no transport aircraft suitable for commercial air transport available." See*: Prof Dr. P.M.J. Mendes de Leon: *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands – US of 1992.* Air and Space Law, Vol. XXVIII/4/5, September 2002, p. 281.
68. According to ICAO doc 9626, part 4, at: http://www.icao.int/Pages/freedomsAir.aspx the freedoms of the air are the following:

> *First Freedom of the Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing (also known as a *First Freedom Right)*.
>
> *Second Freedom of the Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (also known as a *Second Freedom Right)*.
>
> *Third Freedom of The Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a *Third Freedom Right)*.
>
> *Fourth Freedom of The Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a *Fourth Freedom Right)*.
>
> *Fifth Freedom of The Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a *Fifth Freedom Right)*.
>
> ICAO characterizes all "freedoms" beyond the Fifth as "so-called" because only the first five "freedoms" have been officially recognized as such by international treaty.
>
> *Sixth Freedom of The Air* – the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (also known as a *Sixth Freedom Right*). The so-called Sixth Freedom of the Air, unlike the first five freedoms, is not incorporated as such into any widely recognized air service agreements such as the "Five Freedoms Agreement".
>
> *Seventh Freedom of The Air* – the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e., the service need not connect to or be an extension of any service to/from the home State of the carrier.

non-traffic purposes. Moreover and by virtue of the second par. of Article 5 of the Convention, commercial traffic rights, excluding cabotage, are exchanged between the Contracting States, subject to regulations, conditions and limitations imposed by the State concerned. This led to restrictive interpretations by the Contracting States, thus rendering to a great extent inapplicable the exchange of said rights.

Along with the CC, two other treaties were opened for signature, namely the International Air Services Transit Agreement[69] – hereinafter referred to as IASTA – and the International Air Transport Agreement[70] – hereinafter referred to as the Transport Agreement.

IASTA has so far been signed by 130 States,[71] whereby each Contracting State grants to the others the first two freedoms of the air, namely, the "privilege" as it is explicitly stated in Article 1 section 1 of IASTA *"to fly across its territory without landing"* and *"the privilege to land for non-traffic purposes."* IASTA concerns only scheduled international flights, whereas nonscheduled flights and domestic flights are not included within its scope of application.

The Transport Agreement, on the other hand, failed to achieve its goals, namely the multilateral exchange of traffic rights and in particular the third, fourth and fifth freedom of the air, since only twelve countries have become parties; practically it became *"a dead letter."*[72]

With the conclusion of The Chicago conference, the uncontested acceptance of the sovereignty principle, the fact that airlines were viewed as an extension of the States and public utilities and the subsequent failure of the Transport Agreement, which was an attempt to address the economic regulation of international air transportation on a multilateral basis, it became evident that bilateral arrangements between States would be the most viable solution for defining the manner of exercise of scheduled international flights particularly into rates, capacity, frequency and routes.[73] In that sense, control of tariffs, airport charges, capacity and frequencies was accepted as the sole legal framework for regulating air transport and inevitably bilateral

> *Eighth Freedom of The Air* – the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as a *Eighth Freedom Right or "consecutive cabotage")*.
>
> *Ninth Freedom of The Air* – the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a *Ninth Freedom Right* or *"stand alone" cabotage*).

69. The International Air Services Transit Agreement of 1944 at: http://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf.
70. The International Air Services Transport Agreement of 1944 at: http://library.arcticportal.org/1584/1/international_air_transport_agreement_chicago1944c.pdf.
71. See the list of countries that have signed the IASTA at: http://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf.
72. P.P.C Haanappel: *Bilateral Air Transport Agreements-1913-1980*, cited above under fn 65, p. 244.
73. According to Barry Diamond *"It was not the grant of the fifth freedom which was at issue because a modicum of fifth freedom rights are essential to the operation of an international air route network. Rather the crucial disagreement was over the regulation of capacity in relation to the fifth*

agreements[74] became legal instruments having a great impact on the development and evolution of international air transport.

Bilateral Agreements can be defined as *"international trade agreements in which governmental authorities of two sovereign States attempt to regulate the performance of air services between their respective territories and beyond in some cases"*[75] and can be divided into four main categories:

(1) Restrictive bilateral agreements.[76]
(2) The Bermuda I-type of bilateral agreements.[77]

freedom." Barry R. Diamond: *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, Journal of Air Law and Commerce, 1975, p. 42.

74. Depending on the legal system of each State, bilateral air services agreements can either take the form of treaties incorporated either by a separate bill or solely by the signing of the Treaty, or can take the form of an agreement or it can even be effected by exchange of diplomatic notes.
75. P.P.C Haanappel: *Bilateral Air Transport Agreements-1913-1980*, cited above under fn 65, at pp. 241-242. Prof. Dr. P.M.J. Mendez de Leon defines bilateralism as where *"two States agree to the terms and conditions upon which their respective airlines operate services between points located in the territories of the two countries". See* Prof. Dr. P.M.J. Mendez de Leon: *Public Air Law*, University of Leiden, 2013-2014, p. 103. H.A. Wassenbergh states that scheduled international air transport *"is nationally founded and expressed in bilateral air services agreements, resulting from a power struggle on a quid pro quo basis in bilateral negotiations." See*: H.A. Wassenbergh: *Towards a Flexible Worldwide Framework for Air Transport: An Anatomy of Airline Regulation*. Leiden Journal of International Law, Vol. 2, 1989, p. 143. Barry R. Diamond in considering bilateral agreements states: *"In considering bilateral agreements it is therefore essential to bear in mind the context in which these agreements exist: negotiations between States over granting to each other, mutually and reciprocally, certain rights and privileges on a mutual and reciprocal bilateral basis, in derogation of that most jealously guarded prerogative of States sovereignty." See*: Barry R. Diamond: *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, cited above under fn 73, p. 42. ICAO describes bilateral regulation as a *"regulation undertaken jointly by two parties most typically by two States, although one or both parties might also be a group o States, a supra State (i.e a community or other union o States acting as a single body under authority granted to it by its Member States) a regional governmental body or even two airlines (for example in the determination of capacity or prices)" See*: ICAO: *Doc 96/26: Manual on the Regulation of International Air Transport* at: http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf, p. 2.0-1.
76. As restrictive bilateral agreements can be defined all agreements concluded between States, whereby all aspects of the agreement from the designation of carriers to the determination of capacity, frequency the exact route paths and tariffs, are subject to the prior approval of the authorities of the two States concerned *See*: P.P.C Haanappel: *Bilateral Air Transport Agreements-1913-1980*, cited above under fn 65, p. 51.
77. The Bermuda I – type of agreement, which came to be the standard form of bilateral Agreements for more than thirty years following its conclusion in 1946 between the USA and the UK, shaped the evolution of air transport. With respect to the setting of rates, it is provisioned that the rates are subject to the prior approval of both the USA and British authorities and carriers may, in proposing their fares, use the rate-making mechanism of IATA. As to capacity and frequency, the levels are set freely by the carriers of each country concerned, subject to the general principle that each carrier in determining the exact capacity and frequencies in relation to air services offered by it, is obliged to take into account the interests of other carriers, and capacity must primarily correspond to the traffic demands of the country of nationality of the air carrier and the country of the ultimate destination and secondarily to fifth freedom rights. With respect to traffic rights, according to the Bermuda regime, each contracting State is free to designate unlimited destination routes and allows multiple designations of carriers. In case of disputes Bermuda I – type agreements provides for consultation; lastly each State may terminate the agreement upon one year prior notice. Overall, Bermuda I – type of bilateral agreements, which governed international air transportation for three decades, introduced a regime of controlled competition.

(3) Post Bermuda bilateral agreements[78] which can be further sub-divided into more restrictive or more liberal[79] in comparison with the Bermuda type of agreement.
(4) Open Skies bilateral agreements.[80]

See: Barry R. Diamond: *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements* cited above under fn 73, p. 420.

78. In 1977 there was signed Bermuda II Agreement, which again provided for liberal determination of capacity and frequencies as in the Bermuda I – type agreement. A difference with the Bermuda I was the establishment of a mechanism dealing with over capacity in the North Atlantic route. Another provision in Bermuda II, which differs from its predecessor Bermuda I, is that tariffs no longer need prior governmental approval or IATA's rate-making machinery. Moreover, in the Bermuda II agreement includes provisions for charter flights. *See*: P.S Dempsey: *The Evolution of Air Transport Agreements*. Annals of Air and Space Law, Vol. XXXIII, 2008, pp. 258-261.
79. As summarized by P.P.C Haanappel in Liberal bilateral agreements the following common characteristics can be identified:

- Unlimited multiple designation of airlines;
- A liberal route structure, i.e US airlines may serve foreign countries from any point in the USA via any intermediate point and to any beyond point;
- Free determination by the designated airlines of capacity, frequencies and type of aircraft to be used unhindered by the Bermuda I capacity clauses;
- No limitation on the carriage of sixth freedom rights;
- Encouragement of low tariffs set by individual airlines on the basis of the forces of the market place without reference to the rate making machinery of IATA;
- Minimal governmental interference in tariff matters; and
- Inclusion of provisions on charter flights i.e the availability of cheap charter air services is encouraged and charter worthiness is governed by the country of origin rule.

See: P.P.C Haanappel: *Bilateral Air Transport Agreements-1913-1980*, cited above under fn 65, p. 262.

80. The basic characteristics of Open Skies Agreements include the following:

- Multiple designations of airlines.
- Unrestricted and open entry to the airlines of each country to all routes. Each designated airline is entitled to perform flights between any point of the countries concerned, including any intermediate or any points beyond, including no restrictions as to change of gauge, or the carriage of fifth traffic right, subject to approval by the third States concerned.
- No capacity and frequency restrictions.
- Double disapproval system on setting of fares or free pricing subject to the application of competition rules of each State on predatory or excessive pricing.
- Liberal provisions on charter and cargo flights.
- Code-sharing arrangements.
- Unrestricted and not discriminatory access to Computer Reservation Systems.
- Provisions as to the conversion and remittance of air carriers' earnings.
- Antitrust immunity on airlines' alliances.
- Provisions on ground-handling options including the right of self-handling to the degree permitted under the laws of each State.
- Pro-competitive provisions for commercial opportunities.

See: Air Transport Agreement between the United States and the European Community and its Member-States (2007) at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=9021; also Agreement on Air Transport between Canada and the European Community and its Member-States (2009) at:http://ec.europa.eu/transport/modes/air/international_aviation/country_index/doc/canada_final_text_agreement.pdf.

CHAPTER 3

The EU Directive 12/2009 on Airport Charges

In agreement with economic theory, State imposed regulation is justified when competition is not efficient[248] and that is usually the case of natural monopolies or in the presence of externalities. Natural monopolies are characterized by high fixed costs and luck of competitive pressures. Externalities exist in utilities sectors as in the case of airports *"when users of airport infrastructures, impose a cost/benefit upon non-users ..[...].. In other words airport users are not are not bearing all the costs generated by the services they require."*[249] Externalities can be positive and negative, the latter when the utility industry is negatively affected by the product concerned (e.g., noise or scarce capacity in the case of air transport).

As referred by *Vogel* (2011)[250] airports have been regarded as transport infrastructure in the common interest and operated and funded by governments as nonprofit public utilities, characterized by costly infrastructure, including high sunk costs and economies of scale;[251] and while barriers to entry in the form of high costs have reinforced the view of airport monopolies, the argument about economies of scale has lost its relevance in recent years and is restricted to small and medium sized airports.[252]

248. W.K Viscusi, J.M. Vernon and J.E. Harrington: *Economics of Regulation and Antitrust*. The MIT Press, 2005.
249. O. Betancor & R. Rendeiro: *Regulating Privatized Infrastructures and Airport Services* cited above under fn 5, p. 10.
250. A. Vogel: *Shareholder Value in Natural Monopolies – The Case of Airports*, 2011, cited above, fn 2, pp. 1-25.
251. G. Wolszcrak: *Airport Charges Regulation: The Impact of the Institutional Structure on the Regulatory Process*. 2009 at: http://userpage.fu-berlin.de/~jmueller/gapprojekt/downloads/gap_papers/Airport%20Charges%20Regulation_05_2009.pdf, pp. 4-5.
252. According to Doganis, Lobbenberg and A Graham on a benchmarking of airport efficiency on twenty-five airports, as cited by V. Kamp and H.M. Niemeier on: *Can We Learn From Benchmarking Studies of Airports and Where do We Want to go From Here?* November 2005 at:

The Airport Charges Directive 12/2009 (henceforth the Directive) is essentially based on the assumption that airports enjoy considerable market power,[253] yet the EU Commission due also to the emergence of new airline business models, has also recognized that *"a shift in bargaining power between airports and airlines to the benefit of airlines can be observed at certain – generally smaller-airports with the growth of low costs carriers (LCCs). Such carriers due to their flexibility can not only switch the routes they serve but also switch the airports at which they base aircraft."*[254]

Indeed, and as discussed under Chapter 4, the air transport service can be competitive, in the sense that airport market power is constrained by the potential of airport substitution, surface transport airport, capacity and countervailing airline buyer market power.

For example, while LCC offer point-to-point services and have no interest in transfer passengers, legacy carriers, either by themselves or participating to airline alliances and located at hub airports, seek high standard of services and facilities and compete for the transfer passenger market.

The Directive recognizes the reality that airports have to be more flexible in their charging systems and establishes the following principles to achieve its objectives, namely the creation of a common framework regulating the setting of airport charges to all EU airports with more than 5 mppa (or the busiest airport at each Member-State):

(a) No discrimination in setting airport charges among airport users (Article 3).
(b) Annual consultation with airport users on the level of charges and of the quality of services (Article 5).
(c) Transparency of airport operators for setting charges (Article 7).
(d) Appeal procedure over disagreement with the outcome of consultation (Article 6).
(e) Consultation on prefinancing (Article 8).
(f) Establishment of airport network charging system (Article 5).
(g) Establishment of Independent Supervisory Authority in each Member-State (Article 11).
(h) Differentiation of airport services provided to airport users (Article 10).

http://userpage.fu-berlin.de/~jmueller/gapprojekt/downloads/gap_papers/Paper_VIE_2006_01_19.pdf, were found diseconomies of scale on airports with more five million passengers per annum.

253. Otherwise no need of any regulation would have been arisen.

254. *See*: EU Commission: *Report from the EU Commission to the European Parliament and the Council on the application of the Airport Charges Directive* Com 2014/0278, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0278, p. 2. *See also*: European Parliament: *Draft Report on the proposal by the EU Commission for a Directive on airport charges* 2007/0013 (COD).

§3.01 MAIN PROVISIONS OF THE DIRECTIVE

Article 1 paragraph 1 determines the scope of application of the Directive. It applies to any airport *"located in a territory subject to the Treaty and open to commercial traffic whose annual traffic is over five million passenger movements"* and *"to the airport with the highest number of passengers in the EU country."*[255] Seventy-five airports in Europe fall within the scope of the application of the Directive, while seventy are located within the EU and five in EEA/EFTA countries.[256]

The Directive establishes a common approach concerning only the imposition of:

- landing and take-off charges;
- lighting and parking charges;
- passengers and cargo processing charges.

Under the Directive, security charges and other airport charges applied at many airports and not included in landing, parking or passenger charges, such as infrastructure charges or charges related to the use of baggage handling system charges, or check in counter charges are not covered under the Directive. Further, the Directive expressly and by virtue of Recital 8 does not apply to charges collected for the remuneration of *en-route* and terminal air navigation services in accordance with Regulation 1794/2006/EC and ground-handling charges or PRM charges, referred to in Directive 96/67/EC and Regulation 1107/2006/EC, respectively.

Article 2 of the Directive defines an airport network as *"a group of airports duly designated as such by the Member State and operated by the same managing body."* The

255. The five million thresholds was the result of an amendment proposed by the EU Parliament proposed amendment. In the original text proposed by the EU Commission, the threshold was set at annual traffic of one million passengers. *See*: European Parliament: *Draft Report on the proposal by the EU Commission for a Directive on airport charges*, cited above under fn 254, p. 5.

256. The airports falling under the scope of the Directive are, in order of millions of passengers served the following: *London Heathrow, Paris – Charles De Gaulle, Frankfurt Main, Amsterdam, Schiphol, Madrid Barajas, Roma Fiumicino, Munchen, Barcelona, London Gatwick, Paris Orly airport, Zurich airport, Palma de Mallorca airport, Kobenhavin Kastrup, Wien-Schwechat, Oslo Gardermoen, Dusseldorf, Milano Malpensa, Stockholm Arbanda, Manchester, Bruxelles, Dublin, London Stansted, Berlin Tegel, Helsinki Vantaa, Lisboa, Athens, Hamburg, Genève, Malaga, Praha, Ruzyne Las Palmas, Gran Canaria, Nice Cote D'Azur, Alicante, Koln – Bonn, Stuttgart, London Luton, Edinburgh, Warszawa Okecie, Milano Linate, Budapest Ferihegy, Birbingham, Tenerife Sur/Reina, Sofia, Venezia Tessera, Lyon Saint-Exupery, Bergamo, Marseille Provence, Berlin Schönefeld, Toulouse Blagnac, Glasgow, Catania Fontana Rossa, Porto, Bologna/Borgo Panigale, Charleroi/Brussels south, Bristol, Napoli Capodischino, Ibiza, Faro, Arrecife Lanzarote, Bergen Fresland, Larnaka, Hannover, Iraklion, Liverpool, Riga International, Bucuresti Otopeni, Bale Mulhouse, Palermo Punta Raisi, Malta Luqa, Sofia, Keflavik, Tallinn, Luxemburg, Vilnius, Bratislava Ivanka, and Ljubljana Jose Pucnik.*

Seven airports, namely *Malta, Sofia, Keflavik, Tallinn, Luxemburg, Vilnius, Bratislava and Ljubljana* are under the five million passenger threshold, yet they are still subject to the provisions of the Directive as being the largest airports in the country concerned. Moreover, 39% of the above airports are parts of airport network and one sixth of airports account for some ¾ of total traffic. Source: EU Ecommission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013, cited above fn 199; also: Mathew Baldwin Director aviation and International transport affairs DG Mobility and Transport, Thessaloniki forum 13 June 2014 of airport charges Regulators.

insertion of said article is justified by that in some Member-States, namely in Spain, Portugal, Sweden and Finland, air transport is regulated and organized through airport groups, which operate either under the common shareholding scheme as in the case of Portugal where all airports as from 2013 are operated by a private principal airport operator[257] or under the auspices of each State concerned, which acts as the managing body of all airports, with the aim of securing access to all citizens and airlines to the entire airport network.[258]

As per Article 4 of the Directive, a managing body of an airport network is entitled to decide to introduce a charging system to cover the entire network in a transparent manner, whereas under Article 5 an airport managing body shall be authorized to apply a common and transparent charging system for airports serving the same city or conurbation.

As per Article 3, airport charges may be modulated for issues of:

- general and public interest; and
- environmental interest.

Article 6[259] of the Directive, introduces and formalizes regular consultations with carriers with respect to the:

- operation of the system of airport charges;
- level of airport charges and;
- quality of service provided.

The consultation, shall take place at least once a year, unless:

- agreed otherwise in the latest consultation;
- an agreement between the airport managing body and the airport users States otherwise.

Pursuant to paragraph 3 Article 6, in case of any disagreement over a decision on airport charges taken by the airport operator, airport users or the airport operator may seek the intervention of the Independent Supervisory Authority referred to in Article 11 of the Directive, which shall issue an interim decision within four weeks and a definite decision within four months of the matter being brought before it, as per paragraph 7 Article 11. The period may be extended by two months in exceptional cases in accordance with criteria and procedures established by each Member-State concerned and which must be transparent, nondiscriminatory and objective.

257. In 2013 the government of Portugal sold a 50-year concession *for Aeroportos de Portugal-ANA*, to the French infrastructure company Vinci Concessions. *See*: Robert W. Poole: *Annual Privatization Report. Air Transportation*. Reason Foundation (2014), at: http://reason.org/files/apr-2014-air-transportation.pdf, p. 6.
258. *See* above fn 199, p. 7.
259. In the proposed text by the European Parliament, the obligation of consultation was subject to any changes on the level of charges, while in the final text there was established the obligation of annual consultation as a regular procedure irrespective of any changes on the airport charges. *See* above fn 254, p. 8.

Article 7 creates for the first time an explicit obligation on the part of airport operators, to inform air carriers making use of their facilities about the components, serving as a basis for determining the level of charges, levied at each airport,[260] while, airport users (i.e., carriers), must also inform the airport managing body before every consultation on their forecasts, regarding their traffic and use of their fleet, as well as, their development projects at the airport concerned, including any requirements they may have.

Article 8 provides in a rather vague manner for prior consultation, *"before plans for new infrastructure projects are finalized"* and Article 10 contains an innovative provision, where the *"level of airport charges may be differentiated according to the quality and scope of such services and their cost..."* Differentiation of services and charges is allowed under Article 10 of the Directive, by varying the quality and scope of particular airport services, terminals or parts of terminals and by providing tailored services to airport users.

Lastly, Article 11 of the Directive requires Member-States to establish an ISA, ensuring the correct application of the Directive's provisions. The ISA must be legally distinct and functionally independent from any airport operator or airport managing body and must establish procedures for resolving disagreements between the airport managing body and airport users and to set the criteria against which disagreements are assessed by the ISAs.

§3.02 THE IMPLEMENTATION OF THE DIRECTIVE 12/2009 TO MEMBER-STATES

The Directive which had to be implemented by all Member-States by March 2011 has in fact been transported differently by Member-States. According to the EU Commission's Report (2013) – henceforth the Report – the Directive has indeed been implemented by all Member-States and significant issues, as shown below, remain unresolved, especially in large aviation markets in the EU.[261]

260. The information shall include:
    - the various services and infrastructure provided in return for the airport charge levied;
    - the methodology used for setting airport charges;
    - the revenues generated by the different charges;
    - any financing from public authorities of the facilities and services which airport charges relate to;
    - forecasts of the situation at the airport as regards charges, traffic growth and proposed amendments;
    - the actual use of the infrastructure and the equipment over a specific time period and the estimated outcome of any major proposed investment affecting airport capacity.
261. The shortcomings in the implementation of the Directive, have led the drafters of the EU Commission's report on airport charges to raise the question, whether the provisions of the Directive have been set for the benefit of the airlines, but also ultimately for their passengers. *See*:EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013, cited above under fn 199, par. 12.

In France, in the case of airports, that is, *Aéroports de Paris* (*ADP*) network airports and *Toulouse*, that have signed economic regulation agreements with the State, the level of charges and the conditions or any increase are included in the contract, whereas, in the case of other airports that fall under the scope of the Directive, there is no mandatory procedure, by which the airport charges are determined or approved by the French ISA, as per paragraph 5(a) Article 6 of the Directive, particularly in the case of disagreements following consultation with users.[262] Prefinancing is allowed, but under specific rules. Regarding the establishment of the French ISA which is department of the French Transport Ministry, there is ambiguity about the role of the State, which is a shareholder of both Air France with a stake of 15.9% and ADP with a stake of 51.2.%. This ambiguity had already been recognized in 2008 by the French Court of Auditors, which found lack of transparency and lack of independence of the French ISA compared to the requirements of Article 11 of the Directive.[263]

In Germany, prefinancing is allowed, while airport charges are subject to approval by the local competent regulatory authorities. The German ISA is not a single entity: rather the regional ministries that regulate airports also undertake the role of ISA of German airports, which in turn are mainly owned by local authorities. Thus, again is raised the issue of the legal and functional independence of German ISA is in line with the requirements of Article 11 of the Directive.[264]

In Italy the status of implementation of the Directive is even more unclear, especially regarding consultation and the threshold of five million passengers, because pursuant to the Italian national law, there is no formal threshold for an airport to come under the Directive's provisions.[265] The prevailing view is that the Directive applies to all airports that exceed 1 mppa, yet according to Italian legislation (law 122/2010) airports whose traffic exceeds eight million passengers are appearing to be exempted from the application of the Directive. As stated in the Report *"given the contradiction embedded in national legislation we have attempted to clarify this issue with the stakeholders involved and ENAC has responded that national law extended the threshold to all airports with the exception of those under I million passengers."*[266] Further, the legal and functional independence of the Italian ISA has been challenged by users, in the sense that the Italian CAA undertakes the role of ISA, while airport charges are approved by the Italian Government. Likewise is not clear whether prefinancing is allowed or not: although airport networks exist in Italy. For example, while *Aeroporti Di Roma* manages *Rome Fiumiccino* and *Rome Ciampino* airports and Società Esercizi Aeroportuali (SEA) manages *Milan Linate* and *Milan Malpensa* airports, an official list of airport networks has not been published.

262. EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013 as cited above under fn 199, p. 118.
263. Regarding the confusion of roles of the French ISA see the Report of the French Competition Authority (Authorité de la Concurrence), at http://www.autoritedelaconcurrence.fr/pdf/avis/10a04.pdf; *see also*: EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013, cited above under fn 199, par. 119.
264. EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013 as cited above under fn 199, p. 113.
265. *Ibid*, p. 127.
266. *Ibid*.

The Netherlands and the UK have been cited as the *"best in class."*[267] In the Netherlands, prefinancing is not allowed and consultations are regularly held at *Schiphol* airport. The tasks of the ISA have been undertaken by the Netherlands Competition Authority. In the UK, the CAA has undertaken along with other responsibilities such as regulation of safety, airspace policy and consumer protection requirements, the tasks of an ISA. Consultation is regular and information is provided as per Article 7 of the Directive.

In Spain, where *Aeropuertos Españoles y Navegación Aérea* (*AENA*) manages a network of forty-seven airports, stakeholders have raised several issues in relation to the application of the Directive. Concerning the requirement of transparency, pursuant to paragraph 1 Article 7 of the Directive and regarding cost relatedness, the main objection is related to the fact, that only a single consolidated account of cost and revenues for the airport network is published and users do not maintain separate information for each airport concerned, which is the basis for determining the level of charges at each airport. In addition, the establishment of the Spanish ISA has been criticized by airport users as not being legally and functionally independent.[268] Regarding annual consultation, airport users appear satisfied, even though it is limited only to airline associations.

In Portugal, as in Spain, airports are managed as a network by *VINCI*, by virtue of a concession agreement and the level of airport charges is determined and regulated in line to its provisions thereof and not by other authority. Prefinancing is not allowed and consultations are regularly held, yet according to some airport users' complaints the views of the users are not taken into account.

In Greece, with the exception of *Athens* airport, all other remaining thirty-seven airports are managed by the CAA. However, they have not been designated as airport network. As to the level of airport charges, those levied at Athens airport are in accordance with the provisions of the existing concession agreement between the airport and the State. ISA tasks are undertaken by the CAA which is also the managing body of all other airports; once again this raises the issue of the requirement for legal and functional independence of any managing body.[269]

In Belgium, Poland, Austria, Cyprus, Hungary, the Czech Republic, Denmark and Ireland the level of charges is subject to approval by the ISA of each State. Prefinancing is allowed and the establishment of an ISA has not led to objections as to its independent status.[270]

In Bulgaria,[271] airport charges are determined by the airport managing body, following consultations, and prefinancing is allowed. The ISA tasks are undertaken by the CAA. It is unclear whether the Bulgarian ISA satisfies the independence requirement of Article 11 of the Directive.

267. *Ibid*, par. 13.
268. *Ibid*, p. 141.
269. *Ibid*, p. 124.
270. EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013 as cited above under fn 199, pp. 110, 134, 109, 113, 125, 114, 115, and 126 respectively.
271. *Ibid*, p. 112.

In Estonia, Finland, Latvia, Luxemburg, Lithuania, Malta, Sweden, Slovakia and Romania[272] the level of airport charges is not subject to approval by the ISA of each Member-State and prefinancing is allowed.

§3.03 FINDINGS OF THE EU DIRECTIVE RESULTING FROM ITS IMPLEMENTATION

The main justification for the introduction of the Directive was to avoid discriminatory pricing to the detriment or advantage of certain carriers and to set minimum standards, concerning the levying of airport charges in compliance with ICAO's policies at EU airports, ensuring fair competition, while also respecting the different regulatory systems applied in the various Member-States.[273]

By early 2013, all Member-States had incorporated the Directive into their legal system. Further to the implementation, the EU Commission in its Report on the Evaluation of the Directive on airport charges and its report to the European Parliament and the Council, regarding the application of the Directive found that, *"a number of the main objectives of the Directive have already been achieved."* The Conclusion of the EU Commission is based on the findings of the above Report. Overall it found that:

(1) Consultations are now undertaken in most of the Member-States.
(2) EU airports have become more transparent as to the process of setting airport charges.
(3) ISAs have been established in the Member-States.[274]

Airports Council International (ACI) Europe being the European representative body of airports, in response to the report indicated *"the general successful implementation of the Directive across Europe..[...], but also stresses the need for airport regulation to evolve as to better reflect market reality"*.[275]

Conversely, airline representatives[276] expressing their views in the Forum organized in Thessaloniki,[277] asserted that airport charges are not low, that airports do not compete against each other, that transparency has not been achieved and that

272. *Ibid*, pp. 115, 116, 129, 130, 132, 142, 137 and 136.
273. Centre for Aviation: *Airport Charges: EC reports increased transparency in setting charges, but uneven implementation* at: http://centreforaviation.com/analysis/airport-charges-ec-reports-increased-transparency-in-setting-charges-but-uneven-implementation-171572.
274. The EU Commission identified the above as positive first steps in a process, where specific problems regarding the implementation of the Directive by the Member-States, as evidenced by the Report, must be resolved.
275. ACI Europe generally argues that the Directive is based on the assumption that airports are natural monopolies, while the development of airline business models like LCC or global hubs have shifted the bargaining power in favor of the airlines.
276. IATA, International Air Carriers Association (IACA), European Law Fares Airline Association (ELFAA), Association of European Airlines (AEA).
277. Forum of airport charges regulators held in Thessaloniki, June 2014.

consultations are limited just to the notification of information by airports and that further legislation is needed.

Below are presented the main findings regarding the Directive's implementation.

[A] Consultations

Views vary between airports and airlines when evaluating the Directive on consultations. Generally, they are directly opposed.

Large airports that is to say hubs, such as *Schiphol*, *Heathrow* or *ADP* are satisfied with the consultation process as provisioned in the Directive. Smaller airports operating in very competitive environment, as in the UK, believe that it is too formalistic and imposes upon them an administrative burden, combined with high risk of litigation or obstruction, while some airlines are much more active in challenging decisions than in engaging in real consultations. Further, airports are not satisfied with the participation of the airlines in the consultation process, because only a limited number thereof appear to be engaged to the process and the information they provide is limited. Examples of poor participation can be found in Portugal or Switzerland.[278]

The airline representatives at the Thessaloniki Forum took the exactly opposite position, complaining that consultations are limited to specific airlines or associations of airlines, but not both, decisions are made prior to consultation[279] and that the consultations are held in the national language only.

In both the Report and the airlines' presentation at the Thessaloniki Forum it was proposed that since aviation is international by nature, consultations should be held in English, and all airlines and their representative bodies must be invited. Moreover, in the Report, it is further recommended that there should be *"an increased level of granularity to the information provided"* in order for transparency to be improved. On the other hand, the Report also recognized that airlines should have stronger "incentives" to provide information to airports, yet the recommendation in this regard is vague, since it fails to define what should be proper incentive to airlines to provide information in the context of consultations.

In addition, the above airlines representatives at the Thessaloniki Forum[280] recommended that information should be provided upfront and that airlines' view should be dully considered before any decisions are reached by airports. The EU Commission deems this crucial since it is a legitimate and reasonable expectation that views are heard respected and taken into account.

278. EU Commission: *Report on the Evaluation of Directive 2009/12/EC on airport charges*, 2013 as cited above under fn 199, par. 3.42 at p. 68.
279. According to the IACA airlines still have no access to clear and useful data for making any judgments on how reasonably are the proposed charges, at http://www.iaca.be/php/press/press.php?doc_id=3709.
280. User's View on the Airport Charges Directive. Thessaloniki Forum, June 2014, organized by the EU Commission, on the implementation of the Directive.

CHAPTER 5

State Aid to Airports

§5.01 INTRODUCTORY REMARKS AS TO THE CONCEPT OF STATE AID

The notion of State aid has been developed in view of the distortion of competition due to the intervention of the State in the market by providing to an undertaking under many forms, an advantage over its competitors. The granting of such advantages is known as State aid and is generally prohibited under EU law, subject to specific exceptions where State aid is allowed for reasons of general social policy considerations.

State aid is governed by the TFEU under Articles 107, 108 and 109. The basic prohibition is included in paragraph 1 Article 107: *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

In the above definition:

(a) an advantage;
(b) which granted by Member-State or through its resources;
(c) that distorts or threatens to distort competition;
(d) by favoring certain undertakings or the production of certain goods; and
(e) affects trade between Member-States;

shall be deemed as State aid, unless it falls within one of the exemptions provided under paragraphs 2 and 3 Article 107, which introduces specific exceptions to the above rule, by rendering compatible with the internal market and the competition rules, *inter alia*, aid of a social character granted to individuals, aid to repair damage caused by natural disasters, aid to promote the execution of an important project of

common European interest, or aid to promote the economic development of territories where the standard of living is abnormally low.[511]

Although there is no definition of what constitutes State aid it has been outlined by the Court[512] as *"an economic advantage which it would not have obtained under normal market conditions."*

State aid granted by a Member-State to undertakings can generally take a variety of forms, such as State grants, guarantees, capital injections and tax or interest reliefs. Its concept is broad, wider than of a subsidy[513] and is determined not by its objectives or causes but by its effects.[514] As recently ruled by the Court, the concept of State aid is objective and the question as to whether there is an advantage within the meaning

511. Paras. 2 and 3 of Article 107 reads:

> *The following shall be compatible with the internal market:*
>
> *(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;*
> *(b) aid to make good the damage caused by natural disasters or exceptional occurrences;*
> *(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.*
> *3. The following may be considered to be compatible with the internal market:*
> *(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;*
> *(b) aid 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;*
> *(c) aid 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;*
> *(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;*
> *(e) such other categories of aid as may be specified by decision of the Council on a proposal from the EU Commission.*

512. Case 39/94, *SFEI v. La Poste* (1996) par. 60 at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri = true&uri = CELEX:61994CJ0039.
513. Case 30/59, *De Gezamenlijke Steekolenmijnen in Limburg v. High Authority of the European Coal and Steel Community* (1961) par. 19 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri = CELEX:61959CJ0030 where the Court defined the term subsidy and proceeded to a distinction between subsidy and aid as follows: *"Subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept which however places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."*
514. Case 173/73, *Italy v. EU Commission* (1974) par. 13 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri = CELEX:61973CJ0173.Case C-241/94, *France v. EU Commission* (1996) par. 20 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri = CELEX:61994CJ0241.Joined Cases T-304/04, *Italie and Wam v. EU Commission* (2006) par. 63 at: http://curia.europa.eu/juris/liste.jsf?language = en&num = T-316/04.

of Article 107 must be examined exclusively in the light of anticompetitive effects caused by the measure in question.[515]

The advantage must distort or threaten to distort competition by conferring an advantage and strengthening the position of an undertaking as compared to others competing in a given market. As the Court summarized in Case T-214/95:[516]

> Where a public authority favours an undertaking operating in a sector which is characterized by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article 92(1) of the Treaty [107 (1) TFEU] applies to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States.

In this respect, trade between Member-States can be affected not only as a result of a transaction having a cross-border character, but also due to the upheld of a public subsidy granted to an undertaking providing only local transport services, which nevertheless has an effect on trade between Member-States.[517]

The advantage capable of distorting competition must favor one or certain undertakings, either in one region or in an industry within a Member State.[518]

State aid must be assessed in the light of the private investor principle, leaving aside all social and regional policy considerations.[519] In other words, if a private investor would make the investment under the same conditions, guided by prospects of long-term profitability, then no State aid is involved.[520]

515. Case T-500-12, *Ryanair Ltd v. EU Commission* (2015) par. 65 at: http://curia.europa.eu/juris/document/document.jsf?text = &docid = 162087&pageIndex = 0&doclang = EN&mode = lst&dir = &occ = first&part = 1&cid = 18074.
516. Case T-214195, *Vlaamse Gewest v. EU Commission* (1998) par. 46 at: http://curia.europa.eu/juris/showPdf.jsf;jsessionid = 9ea7d2dc30d542e85957ad0141f8a52eaaa2abf5c4d6.e34KaxiLc3qMb40Rch0SaxuQbxb0?text = &docid = 43815&pageIndex = 0&doclang = EN&mode = lst&dir = &occ = first&part = 1&cid = 366988.
517. Case C-280/00, *Altmark Trans GmbH, and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* (2003) par. 77 at: http://curia.europa.eu/juris/showPdf.jsf?text = &docid = 48533&pageIndex = 0&doclang = EN&mode = lst&dir = &occ = first&part = 1&cid = 369219.
518. Case C-353195 P, *Tiercé Ladbroke v. EU Commission* (1997), par. 3 at: http://curia.europa.eu/juris/showPdf.jsf?text = &docid = 43537&pageIndex = 0&doclang = EN&mode = lst&dir = &occ = first&part = 1&cid = 295105; *see also* Case T-500-12, *Ryanair Ltd v. EU Commission* (2015) par. 68, cited above under fn 515, where the Court stated: *"For the purposes of applying Article 107(1) TFEU, the only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favor 'certain undertakings or the production of certain goods' within the meaning of that article as compared with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure at issue…".*
519. Case T-20/03, *KahlaThuringen Porzellan v. EU Commission* (2008) par. 242 at: http://curia.europa.eu/juris/document/document.jsf?text = &docid = 68566&pageIndex = 0&doclang = EN&mode = lst&dir = &occ = first&part = 1&cid = 185449.
520. Case C-301187, *France v. EU Commission* (1990) par. 39 at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri = true&uri = CELEX:61987CJ0301; In Case C-305189, *Italy v. EU Commission (Alfa Romeo)* (1991) par. 20 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri = CELEX:61989CJ0305, the Court held: *"It should be added that although the conduct of a private investor with which the intervention of the public investor pursuing economic policy*

Nevertheless, as noted above even when an advantage is identified the State aid may be found to be compatible with the internal market provided that one of the conditions contained under Article 107 paragraphs 2 and 3 of the TFEU can be found.

§5.02 THE EVOLUTION OF STATE AID RULES TO AIRPORTS: GENERAL OVERVIEW

The issue of State aid to airports has been the subject of an evolving process by the EU Commission and its decisional practice, largely in the light of the effects of the liberalization process and case law as it has been developed by the Court.

State aid to airports can distort competition in a twofold manner: First, it can distort competition in the airport services market by granting subsidies to airports; and second, it can also distort competition in the airline market by directing aid to specific airlines via lower airport charges or incentive schemes.

The precise range and extent of the notion of State aid to airports however, is directly related to the perception of the notion of "advantage" granted to undertakings acting in a given market; the more competitive a market is, the less an advantage can be justified under State aid rules. The notion of advantage is inherently linked to the behavior of a hypothetical market investor or operator, as this principle is adjusted in line with the development of the Court's case law. An illustrative example is the funding of an airport's infrastructure, which following the Court's ruling in the *Leipzig-Halle* judgment cannot be disassociated from its commercial exploitation and therefore can constitute an advantage within the meaning of paragraph 1 Article 107 TFEU.

The advantage can take various forms and can be granted from the State or through State-owned companies to airport operators through loans, as in the case of *Leipzig-Halle* (2)[521] and *Weeze*[522] airports in Germany, capital injections, as in the case *Gdynia-Kosakowo* airport in Poland[523] or even direct grants to the companies that

aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectorial – and guided by prospects of profitability in the longer term."

521. EU Commission: *Decision of 23.7.2014 in Case No SA.30743 (2012/C) (ex N 138/2010) – Germany Financing of infrastructure projects at Leipzig-Halle airport (2)* at: http://ec.europa.eu/competition/state_aid/cases/241012/241012_1647497_539_3.pdf; *See also* Case C-228, *Arbeitsgemeinschaft Deutscher Verkehrsflughäfen (Leipzing/ Halle airport) v. EU Commission* (2011), as confirmed on appeal by Case C-288/11 P, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v. EU Commission*, (2012) cited above under fn 195.
522. EU Commission: *Decision of 23.7.2014 on the measures taken by Germany with regard to Airport Niederrhein (Weeze) und Flughafen Niederrhein GmbH* SA.19880 and SA.32576 (ex NN/2011, ex CP/2011) at: http://ec.europa.eu/competition/state_aid/cases/243456/243456_1687851_880_2.pdf.
523. EU Commission: *Desission of 11.02.2014 on the measure SA.35388 (2013/C) (ex 2013/NN and ex 2012/N) – Poland Setting up the Gdynia-Kosakowo airport* at: http://ec.europa.eu/competition/state_aid/cases/249231/249231_1546151_152_2.pdf.

operate the airports in question as in the case of the financing of the *Tampere-Pirkkala* airport in Finland.[524]

While the application of the private investor principle must be guided by the prospect of profit, any commitments made by the airport operator must evidence the existence of reasonable profit within a reasonable timeframe, irrespective of any overall positive effects for the economy of an area or region.

Moreover, a factor central in determining whether aid applies is the selectivity of the measures. In this context, it must be examined whether the advantage granted concerns only one or certain undertakings in comparison with others. A necessary condition for the assessment on the selectivity criterion is the absence of any differentiation resulting from the market within which the undertakings compete. In the aviation sector, selectivity can arise either horizontally, i.e., an advantage granted to one or to certain airports, or vertically, between airports and a specific undertaking or certain other undertakings, usually airlines.

A measure can be granted only to one airport. In that case and irrespective of the final assessment of the measure in question the selectivity criterion is fulfilled. For example the investment program for the *Leipzig-Halle* airport case (2)[525] concerned only that airport. Likewise, the infrastructure program for the airports in *Thessaloniki* in Greece[526] was a selective measure concerning the respective airport.

On the other hand the aid scheme may not concern only one airport but it may be addressed to several other airports located in the same region. In the *Weeze* airport case in Germany,[527] the EU Commission found that irrespective of the fact that only the *Weeze* airport, was eligible to receive aid if all airports in the region had been eligible for the advantages granted by the German authorities, such sector-specific measures would still be regarded as selective since they would benefit certain airports in a certain region.[528]

As to selectivity of aid regarding relations between airports and airlines the case law developed by the EU Commission leaves room for different interpretations. In the EU Commission Decision of *Ryanair/Charleroi* airport[529] selectivity was based on the ground that the *Charleroi* airport concluded an agreement exclusively with *Ryanair* which concerned reductions in landing charges, without such reduction being automatically available to other airlines notwithstanding assertions that all the measures had been published and all reductions were available to any other airline generating

524. EU Commission: *Decision C (2013) 8448 on the Financing of airport infrastructure at Tempere-Pirkkala airport T2* at: http://ec.europa.eu/competition/state_aid/cases/248752/248752_1512944_157_2.pdf.
525. EU Commission: *Decision on Leipzig/Halle airport (2)* cited above under fn 521.
526. EU Commission: *Decision C (2012) 9427 on the modernization of the Makedonia airport in Greece* at: http://ec.europa.eu/competition/state_aid/cases/244257/244257_1360928_132_2.pdf.
527. EU Commission: *Decision with regard to Airport Niederrhein (Weeze)* in Germany cited above under fn 522.
528. *Ibid* par. 198.
529. EU Commission: *Decision 2004/393 (OJ. L 137) 30/04/2004 re Charleroi*, cited above under fn 12.

passengers volumes similar to those of *Ryanair*. Such approach was also confirmed in the Angoulême/*Ryanair* EU Commission decision[530] of 2008.

In the EU Commission Decisions in the cases of *Pirkkala airport/Ryanair*[531] and *Bratislava airport/Ryanair*[532] the agreements of those airports with *Ryanair* involving discounted charges were not viewed as selective measures but as not involving State a since they were profitable for the airports.

In addition in its *Lübeck* decision[533] the EU Commission expanded further the notion of selectivity by considering that the advantages provided to users of *Lübeck* airport were selective measures since they were not applied to other airlines using other airports. In its decision[534] the Court rejected the reasoning of the EU Commission about the selectivity of the measures given to *Lübeck users* by clarifying that:

(1) Since according to German law each airport manager is responsible for setting the precise level of airport charges, the applicable measure to the *Lübeck* airport concern only the users of said airport.
(2) The measures do not concern a particular sector but only the users of the *Lübeck* airport.
(3) Critical for deciding whether of the selectivity criterion is met is to assess whether "*all of the undertakings using or able to use that specific product or service and to examine whether only some of them obtain or are able to obtain a potential advantage.*"[535] Therefore selectivity is to be assessed only with regard to current or potential customers of the specific undertaking providing the advantage and not in relation to customers of other undertakings.

An advantage granted to a specific or to some airports or from airports to specific airlines is likely to distort competition if the position of the recipient undertaking(s) is strengthened in comparison with others[536] On the other hand evaluation of the catchment area of the recipient airport or the existence of neighboring airport infrastructure in terms of considering the prospects of profitability of any investment made

530. EU Commission: *Decision (EU) 2015/1226 of 23 July 2014 on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Service* at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1226.
531. EU Commission: *Decision of 25.07.2012 on the measure SA.23324 – C 25/2007 (ex NN 26/2007) – Finland Finavia*, Airport, at: http://ec.europa.eu/competition/state_aid/cases/220969/220969_1409148_139_2.pdf.
532. EU Commission: *Decision Case C 12/2008 (OJ L 27, 1.2.2011) Re agreement between Bratislava airport and Ryanair* at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011D0060.
533. EU Commission: *Decision of 2012 on State aid for Hansestadt Lübeck airport*, No SA.27585 and No SA.31149 (2012/C).
534. Case T-461/12, *Hansestadt Lübeck v. EU Commission* (2014) at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012TA0461.
535. *Ibid* par. 53.
536. Case C-99/02, *Italy v. EU Commission* (2004) at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=49072&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3451 at par. 65.

in the recipient airport is critical for the exemption of said airport under Article 107 paragraph 3 of the TFEU.

Historically during the 1990s the funding of airport infrastructure fell outside the scope of State aid rules. As from 2000, the EU Commission as the *Schiphol* Airport case suggests[537] though considering airport management as eligible for exemption under paragraph 2 Article 106 TFEU because it constitutes a Service of General Economic Interest (SGEI), also took into consideration the competition between *Schiphol* and other airports and found that the exemption of *Schiphol* airport from corporation tax constituted illegal State aid.

In 2002 the Court in its *ADP* judgment defined airports as undertakings exercising an economic activity and therefore subject to competition law; this was also confirmed in 2008 by the Court's judgment in the *Ryanair/Charleroi* airport case.

Legal developments as to the nature of the airports' activities were soon followed by the 2005 Guidelines on State aid to airports, where specific conditions were set for operating aid. Funding for airport infrastructure was accepted, subject to the fulfillment of specific conditions. In this context, the development and viability of regional airports was evaluated positively, enhancing connectivity within the EU.

In 2011 the Court in its judgment in the *Leipzig-Halle* case highlighted a major shift as to the financing of airports: Airport infrastructure cannot be disassociated from airport operations and its use by other undertakings, and therefore is subject to State-aid rules.

The EU Commission next issued its 2014 Aviation Guidelines where new strict conditions were adopted for investment aid: it is now limited to specific aid intensities, whereas operating aid is practically phased out, with the specific exception of small airports and for a period of ten years.

§5.03 THE 1994 GUIDELINES

Under the 1994 Guidelines[538] on the application of State aid provisions to the aviation sector – henceforth the 1994 Guidelines – State aid covers any aid granted by an EU Member-State to airlines, including any direct or indirect subsidization to airport facilities from which airlines could benefit.[539] *C Koening and Ana Trias*[540] (2009) consider that the 1994 Guidelines apply *rationae personae* to airlines and *rationae materiae* to airport infrastructure, to the degree that an airline may benefit therefrom.[541]

537. *Schiphol* airport exemption E 45/2000 – The Netherlands S (2001) DI. as cited by Granfield University in Competition between Airports and the Application of State aid Rules 2002, at: http://ec.europa.eu/competition/sectors/transport/reports/.
538. EU Commission: *Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector* (OJ C 350, 10/12/1994) at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_1994_350_R_0005_01&from=EN.
539. Par. 10 of the 1994 Guidelines.
540. C. Koening and A. Trias: *A New Sound Approach to EC State Aid Control of Airport Infrastructure Funding*. European State Aid Law Quarterly, 2009, p. 303.
541. *Ibid*, p. 303.

The EU Commission in paragraph 12[542] of the 1994 Guidelines introduces an exception to the above principle, by excluding the construction or enlargement of infrastructure projects from the application of State aid rules, because such projects represent a general measure of economic policy of transport of planning policy.

Nevertheless this exclusion from the application of the State aid rules is conditioned by two limiting factors:

(1) The construction of infrastructure must be undertaken and managed only by Member-States, irrespective of the ownership status of the airport.
(2) There is a clear distinction between the act of construction of infrastructure and its subsequent use; the latter may be subject to State aid rules resulting from preferential treatment to specific airlines when using the infrastructure. As a consequence, the use of said infrastructure must be open to all users without any discrimination.

In this context, in the *Aerelba* case the EU Commission held that the modernization of the airport located of the island of Elba did not amount to State aid, but it was as an infrastructure project representing a measure of economic policy open to all users.[543]

Likewise in the *Piedmont* Airports case[544] the EU Commission, in line with the 1994 Guidelines, considered the finance of infrastructure as a measure of economic policy which could also be justified under paragraph 3(c) Article 107 TFEU as a measure aiming at regional development.

In the *Manchester* airport[545] decision, the EU Commission clarified that the preferential use of airport infrastructure amounts to State aid, while discounts on airport charges and in particular on landing fees which:

542. Under par. 12 of the 1994 Guidelines:

> The construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the EU Commission under the Treaty rules on State aids. Infrastructure development decisions fall outside the scope of application of this communication in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.
>
> This general principle is only valid for the construction of infrastructures by Member States, and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure. The EU Commission, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines.

543. EU Commission: *Decision N. 638/98 Aerelba Italy* as cited by Granfield University in: *Study on Competition between Airports and the Application of State aid Rules*. A Study prepared for the EU Commission (2002), p. 5 of Chapter 2, at: http://ec.europa.eu/competition/sectors/transport/reports/airports_competition_1.pdf.
544. EU Commission: *Decision N 58/2000, OJ C 67, 2004 on the promotion of the Piedmont airport system*.
545. EU Commission: *Decision NN 109/98 of 14 June 1999, re Manchester Airport*.

(a) available to all airlines;
(b) objective in their eligibility criteria – in this case start-up services to new destinations; and
(c) limited in time;

are compatible with State aid rules.

§5.04 TOWARDS THE 2005 GUIDELINES

As explained by *A Lykotrafiti* (2008)[546] the 1994 Guidelines were issued at a time when the development of the liberalization process aimed at creating of a level playing field for the national flag carriers of that time, and their new adaptation to the new competitive environment. The emergence and fast development of LCC and their agreements for the use of infrastructure of regional airports in parallel with the developments of the Court's jurisprudence as to the nature of airports' activities, evolved and ultimately changed[547] the perspective and of the decisional practice of the EU Commission aiming now to the preservation of the competitive environment established in the EU.

The Court in its *ADP* judgments[548] – henceforth the *ADP* Judgments – ruled that the provision of airport facilities to users in consideration of a fee is an economic

546. A. Lykotrafiti: *Low Cost Carriers and State Aids: A Paradox? Reflections on the Ryanair/Charleroi Case*. European State Aid Law Quarterly, 2008, p. 226, as cited by C. Koening and A. Trias, above under fn 537.
547. This complete change in the EU Commission attitude is manifested under the 2014 Guidelines discussed below.
548. In Case T-128/98, *Aéroports de Paris v. EU Commission as cited under* fn 13 *above*, the Court in paras. 75-79 stated:

> In that regard, it must be borne in mind that, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, inter alia, Joined Cases C-159/91 and C-160/91 Poucet and fistre [1993] ECR I-637, paragraph 17). In order to determine whether the activities in question are those of an undertaking within the meaning of Article 86 of the Treaty, it is necessary to establish the nature of those activities (see, inter alia, Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43, paragraph 19).
>
> At paragraph 112 of the contested judgment the Court of First Instance drew a distinction between, on the one hand, ADP's purely administrative activities, in particular supervisory activities, and, on the other hand, the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover.
>
> At paragraph 120 of the contested judgment the Court of First Instance pointed out that the activity as manager of the airport infrastructures, through which ADP determines the procedures and conditions under which suppliers of ground-handling services operate, cannot be classified as a supervisory activity. Nor has ADP raised any argument on the basis of which it could be concluded that relations with suppliers of ground-handling services fall within the exercise by ADP of its official powers as a public authority or that those relations are not separable from ADP's activities in the exercise of such powers.

activity and therefore the airport operator so engaged in such activity is subject to the provisions of the competition law which also include State aid rules.

The decisional practice of the EU Commission in the *Ryanair-Charleroi* case represents the above evolution in the EU Commission's approach which was formally reflected in the 2005 EU Commission Guidelines – henceforth the 2005 Guidelines – on financing of airports and start-up aid to airlines departing from regional airports.[549]

Ryanair[550] concluded two separate agreements: one with the Walloon Region, which is the regional Belgian public authority, and one with the *Brussels South Charleroi Airport (BSCA)*, an entity wholly controlled by the Walloon Region and awarded a concession agreement to operate the *Charleroi Airport* for fifty years.

Under the agreement with the Walloon Region, a reduction of 50% on landing charges was granted to *Ryanair* for fifteen years, whereas under the agreement with *BSCA*, the airport operator *Ryanair* benefited a discount of 90% on ground-handling fees for a period of fifteen years, free office space and hangar use, plus payment of:

- EUR 160,000 for every new route operated by Ryanair, up to a total amount of EUR 1,920,000.
- EUR 768,000 for recruiting and training costs.

In addition, a marketing company was jointly formed by *Ryanair* and BSCA with the aim of financing all related publicity about Ryanair's operations from *Charleroi* airport.

In its findings, the EU Commission evaluated the specific character of the above agreements and concluded that they favored only *Ryanair* since no other company operated from *Charleroi* under similar conditions despite *Ryanair's* assertions about the absence of any selectivity since the agreements were not exclusive and were public, while similar reductions could be granted to other users and all other companies operating from *Charleroi* that were not competitors of Ryanair, but charter operators that did not even operate daily flights[551]

A critical factor in the EU Commission's decision was that the reduction of the landing fees was granted only to one carrier and it was not an exemption granted under

> The Court of First Instance was thus entitled to find, at paragraph 121 of the contested judgment, that the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, constitutes an economic activity.
>
> It is settled case-law that any activity consisting in offering goods and services on a given market is an economic activity (see, inter alia, Case C-35/96 EU Commission v. Italy [1998] ECR I-3851, paragraph 36 and Case C-475/99 Glöckner [2001] ECR I-8089, paragraph 19).

549. EU Commission: *Guidelines on financing of airports and start up aid to airlines departing form regional airports.*(C/312/01), 2005 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri = CELEX:52005XC1209(03).
550. EU Commission: *Decision 2004/393 (OJ. L 137) 30/04/2004 re Charleroi* cited above under fn 12.
551. *Ibid* paras. 70-72.

justified and objective economic factors.[552] In analyzing the absence of objective criteria the EU Commission relied on the fact that the reduction of landing fees or the compensation guarantee was not automatically available to other users but only to Ryanair through a separate agreement.

In order to further clarify its position, the EU Commission in its decision emphatically stressed that it is not opposed to granting reductions to airlines for new routes or to increase frequency under the conditions stated in the Manchester decision, namely that the reductions are short term and available to all users and that they do not come under the prohibition of Article 107, TFEU. Notwithstanding the fact that this position evolved and developed in future decisions[553] in its *Ryanair* decision the EU Commission seems to shape any reductions on airport charges upon two conditions:

(a) short term and;
(b) avoidance of any discrimination between users by making same openly available to all.

In the case of *Charleroi* airport the reduction of landing charges was granted by the Walloon Region for a period of fifteen years which along with the benefits granted from *BSCA* fulfilled the concept of advantage of Article 107 TFEU and rendered the application of the principle of private investor in a market economy inapplicable for two reasons:

(1) As to the reduction of landing fees granted by the Walloon Region, the EU Commission found that the local authority had confused its mandate, because it granted the reduction in the context of exercising its legal powers not in the context of pursuing economic activities. As pointed out by the EU Commission, "*the commercial need to attract Ryanair to Charleroi thus made it move outside the applicable framework in relation to fixing charges in Wallonia.*"[554] The above finding made per se inapplicable the principle of the private investor in a market economy. Paragraph 159 of the above conclusion however, seems to contradict the point made by the EU Commission, namely that the Walloon Region could legitimately establish and impose incentive schemes as to airport charges at *Charleroi* airport because such a mandate was provided in the regulatory powers of the authorities. In fact, the EU Commission underestimated the identical nature of both transactions, namely their economic and commercial nature and orientation, as well as the fact that even the establishment of an incentive scheme and its acceptance by a user creates a legally binding agreement between the airport authority and the user.

552. *Ibid* paras. 24 and 241.
553. For example *see*: EU Commission: *Decision (EU) 2015/506 of 20 February 2014 on the measures taken by Germany with regard to Flughafen Berlin-Schönefeld GmbH* and various airlines-SA.15376 (C 27/07, ex NN 29/07) (notified under document C(2014) 868) cited above under fn 303.
554. Par. 153 of the EU Commission Decision *Re Charleroi* cited above under fn 12.

(2) On the advantages granted by the *BSCA*, the EU Commission leaving aside any social considerations for the region concerned, evaluated them as inconsistent with the principle of private investor in a market economy, because the commitments made by the airport cannot generate profitability within a reasonable time and the public funds made available for public infrastructure are not part of the profitability calculations.

Having established that the advantages granted to *Ryanair* are State aid and that the principle of the private investor in a market economy is applicable the EU Commission considered whether the operating aid so granted to the above carrier could be considered as compatible with paragraph 3 Article 107 TFEU, specifically as concerns regional airports.

The analysis and the justification carried out by the EU Commission are in line with the trends of the time, which sought to boost the development of regional airports and are also reflected in the 2005 Guidelines[555] and the necessity as it was viewed back in 2004 to effectively use the available infrastructure.

To this end the advantages granted to Ryanair could be declared compatible with the State aid provisions provided that:

(1) They are part of a specific policy aiming at the profitability of underused or unprofitable infrastructure. Thus according to the justification provided by the EU Commission aid to small airports may be necessary because otherwise and depending on each case they could not survive.[556]
(2) Considering that distortion of competition may arise between regional airports or between large and regional airports aid to airlines must be granted only for opening of new routes or increasing frequencies.[557]
(3) Aid should not be granted for a route that is already operated[558] or for competing with another airline already operating the route.
(4) Aid must not be paid for a route which is operated in substitution of an old route to which aid has been granted.[559]

555. According to the EU Commission and based on the opinion of the Committees of the Regions as referred to in par. 286 of the decision regional airports are those servicing around 500,000 to 2,000,000 passengers annually and are characterized by:

- capacity surplus (terminal and runways use);
- capability and potential for point-to-point connections;
- development difficulties due to the policies undertaken by Member-States which wqere predominately focused to large airports or hubs;
- increase social and economic role and impact in Europe *See*: EU Commission Decision *Re Charleroi* cited above under fn 12, paras. 290-297.

556. *Ibid* par. 285.
557. *Ibid* par. 303.
558. *Ibid* par. 304.
559. *Ibid* par. 305.

(5) The aid must have an incentive effective, thus allowing the development of routes which would not have otherwise started or developed without aid.[560] This condition represents and explains the major concern and opposition of the EU Commission to the fifteen year agreement with *Ryanair*. According to the EU Commission aid to airlines and especially to LCC cannot exceed five years[561] since airlines can reach to profitability quickly.[562]
(6) The route however must prove profitable in the long run without aid and therefore aid must be limited in time.[563]
(7) The aid must be proportional in two ways: First, there must be a link between the aid and the aim of airport development via an increase in passengers' numbers and the aid granted to the airline. The key factor therefore in evaluating the aid must be calculated on the basis of passenger numbers. In the case of the marketing agreement between the *BSCA* and *Ryanair* marketing aid was calculated per departing passenger and therefore the link was established. On the other hand "one shot" incentives were not calculated per departing passenger and therefore proportionality could not be evidenced.
(8) The second condition of proportionality is related to the aid granted and the costs incurred by the beneficiary of the aid. According to the EU Commission's coverage up to 50% of start-up costs for five years is sufficient or as stated *"a significant duration-and-intensity coupling for star-up costs."*[564] In this context according to the EU Commission's view investments made on site or training costs could be eligible while more general costs for which BSCA has no competence at all as pilot training are not covered by the proportionality criterion.
(9) The aid must be transparent and objective criteria must be established as to the timeframe along with appeal procedures and sanctions in case the carrier concerned does not fulfill its obligations when the aid has been paid.

The EU Commission having relied on the fact that fixing landing charges fell within the Walloon Region's legislative and regulatory powers, and as such, did not constitute an economic activity decided all the discounts on landing charges was State aid. Likewise the compensation guarantees provided by the Wallon Region and the discounts on ground-handling fees granted by *BSCA* were deemed as incompatible State aid. One shot incentives or a period of five years and without exceeding 50% of the start-up costs and marketing contributions justified by a development plan for each route concerned were viewed as compatible State aid.

The EU Commission's decision was annulled in 2008 by the CEU, as it was vitiated by an error in law with respect to the legal analysis of the nature of competences in the Wallon region. The Court relied on its previous judgments in the

560. *Ibid* par. 311.
561. *Ibid* par. 313.
562. *Ibid* par. 314.
563. *Ibid.*
564. *Ibid* par. 320.

ADP judgments[565] according to which the provision of airport facilities to airlines is an economic activity, even if it is carried out by a publicly owned company and therefore subject to competition rules[566] and concluded that *"the airport charges fixed by the Wallon Region must be regarded as remuneration for the provision of services within Charleroi airport."*[567]

The adoption of that above-referred decisions by the EU Commission in 2004 as a result and in parallel with the:

- developments in the Courts jurisprudence as reflected by the ADP Judgments;
- the gradual effects of the liberalization process in the EU;
- the removal of all commercial restriction for flight within the EU by Community;
- the involvement of private sector in airport development and management[568] of airports;
- the emerge and development of regional airport; and
- the rapid development of LLCs;

eventually readdressed the issue of funding and the use of airport infrastructure in the 2005 Guidelines,[569] which qualified the notion of SGEI in accordance with the findings of the Court in the Altmark case.[570]

§5.05 THE 2005 GUIDELINES

In its 2005 Guidelines the EU Commission although recognized that the 1994 Guidelines are not replaced but are supplemented by the 2005 Guidelines, it also clarified that while State aid rules do not apply to the construction of airport infrastructure projects, since they represent a general measure of economic policy, preferential treatment resulting from the use of airport infrastructure is subject to State aid provisions.[571]

565. *See* Case T-128/98, *Aéroports de Paris v. EU Commission cited* above under fn 13.
566. As specifically stated in paras. 121-125 of the ADP Judgment, cited above, fn 13:

> It follows from that analysis that the activities in question carried out by ADP are economic activities, and although those activities are carried out on publicly owned property, they do not for that reason form part of the performance of a task conferred by public law." The provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, must be regarded as an economic activity. Similarly, the facilities within the Paris airports are essential, since their use is indispensable to the provision of various services, in particular ground handling. The management and provision of those facilities for the supply of such services constitute an economic activity.

567. Case T-196/04, *Ryanair v. EU Commission* (2008), cited above, fn 12.
568. Par. 11 of the 2005 Guidelines; *See also*: ACI-Europe: *The Ownership of European Airports* cited above under fn 10.
569. Communication from the EU Commission: *Community Guidelines on Financing of Airports and Start-up Aid to Airlines departing from regional Airports,* cited above, fn 549.
570. Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* (2003), cited above under fn 517.
571. Par. 19 of the 2005 Guidelines.

Notwithstanding the above, public funding to airports is qualified and constrained by the acknowledgment by the EU Commission of the *ADP* judgments[572] and the acknowledgment that the airport operator is in principle engaged in economic activity.

In this respect, public funding for airport infrastructure is moving from the area of general economic policy into that of competition, since the provision of funding by a Member-State to an airport operator irrespective of its legal status, may provide to the later a competitive advantage over its competitors, if such funding is granted without proper financial consideration; in other words, if the Member-State fails to act as private investor under normal market conditions, then State aid rules apply.

Pursuant to the EU Commission Guidelines of 2005 the application of State aid rules to airport infrastructure can be excluded provided that:

(1) The infrastructure funding is an SGEI under the condition that the criteria sent by the Court in the *Altmark* case are cumulatively satisfied.[573]
(2) Activities, such as safety, ATC police or customs, fall under the State responsibility in the exercise of its official or sovereign powers as a public authority; they do not constitute economic activities are not of an economic nature and therefore fall outside the scope of application of the State aid rules.[574]

572. Par. 31 of the 2005 Guidelines.
573. Paras. 34, 35 & 36 of the 2005 Guidelines.
574. Par. 33 of the 2005 Guidelines; *See also* Case C-343/95, Calì & Figli *v.* Servizi ecologici porto di Genova (1997), paras. 23-24 at: http://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX%3A61995CJ0343. According to the EU Commission, the financing of these activities must be limited to the costs incurred and must be used to fund other economic activities *See*: EU Commission: *Decision N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001*. EU Commission: *Decision N 438/2002 of 16 October 2002, in support of public authority functions in the port sector*, as cited by the EU Commission in par. 37 and footnote 23 of the 2005 Guidelines; Case C-118/85, *EU Commission v. Italy* (1987) paras. 7 and 8, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61985CJ0118; Case C-30/87, *Bodson/Pompes funèbres des régions libérées*, (1988) par. 18 at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0030; Case C-364/92, *SAT/Eurocontrol*, (1994) at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61992CJ0364, par. 30, where the Court held:*Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition;* Case C-113/07 P, *Selex Sistemi Integrati v. EU Commission*, (2009), at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=73630&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=188723, where the Court at par. 71 confirmed the Courts judgment on the Eurocontrol case and stated: *"In SAT Fluggesellschaft, the Court, while not specifically ruling on Eurocontrol's activity of assisting the national administrations, considered at paragraph 30 of that judgment that, taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space, which are typically those of a public authority and are not of an economic nature. The Court therefore held that Articles 86 and 90 of the Treaty (now Articles 82 EC and 86 EC) must be interpreted as meaning that an international organization such as Eurocontrol is not an undertaking for the purposes of those provisions"*; EU Commission: *Decision C (2012) 5071 2012 on the modernization of the Chania airport* at: http://ec.europa.eu/competition/state_aid/cases/244257/244257_1360928

(3) The aid although is not an SGEI, is a measure of general economic policy under the condition that the principle of Market Economy Investor Principle or MEIP[575] is met.
(4) Aid which is compatible with paragraphs 2 and 3 Article 107 TFEU.

[A] Service of General Economic Interest (SGEI)

The EU Commission in its 2005 Guidelines defined SGEI as the imposition upon an airport operator of a specific service obligation in order to ensure that the public interest is appropriately served;[576] the airport operator may be compensated for the additional costs deriving from the public service obligation. Even though the overall management of an airport may be considered in exceptional cases as an SGEI, activities not directly linked to the core activities of an airport, namely the commercial activities, cannot be part of the SGEI concept.[577]

In the *Altmark* case, the Court enumerated the conditions under which compensation for SGEI does not constitute State aid:[578]

_132_2.pdf where the EU Commission in par. 21 stated that *"the EU Commission notes that the investment into the control tower used for air traffic control tower amounting to EUR 6.6 million falls within public policy remit, and hence the financing of this measure does not constitute State aid in the meaning of Article 107(1) TFEU."*

575. In general the Market Economy Investor Principle test can be described as *"when a public authority invests in an enterprise on terms and in conditions which would be acceptable to a private investor, operating under normal market economy conditions, the investment is not a State aid." See*: Ben Slocock, Directorate-General Competition*: The Market Economy Investor Principle* at: http://ec.europa.eu/competition/publications/cpn/2002_2_23.pdf.
576. Par. 34 of the 2005 Guidelines.
577. Par. 53(iv) states that *"pursuit of commercial activities not directly linked to the airport's core activities, including the construction, financing, use and renting of land and buildings, not only for offices and storage but also for the hotels and industrial enterprises located within the airport, as well as shops, restaurants and car parks. As these are not transport activities, public financing of them is not covered by these guidelines and will be assessed on the basis of the relevant sectorial and general rules."*
578. Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* (2003) cited above under fn 517 paras. 89-94:

> First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings.
>
> Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty.
>
> Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the

(1) The airport operator must have clearly defined public service obligations.
(2) The basis of the compensation must be established in a transparent and an objective manner.
(3) The compensation cannot exceed what is necessary to cover all or part of the costs incurred for the discharge of the public service obligation.
(4) In case that the undertaking which is to discharge a specific public service obligation is not chosen pursuant to a public procurement procedure, the level of compensation must be determined on the basis of the cost analysis, taking into account relevant revenues and a reasonable profit.

The EU Commission in its decision on Angoulême airport of 2014[579] provided an extensive analysis of the scope of application of the SGEI concept under the 2005 Guidelines.

In 2006, *Syndicat Mixte des Aéroports de Charente* (*SMAC*), a State-owned entity, undertook the overall responsibility for the operation, fitting-out and maintenance of the local airport of *Angoulême*. According to the French authorities, the infrastructure investments in Angoulême airport, namely the extension of the runway by 50 meters and grant of public funds for safety and security equipment, should be evaluated on the basis of the 1994 Guidelines, and the airport should be regarded overall as an SGEI in accordance with paragraph 2 Article 106 TFEU.

In addition the French Government relied to the EU Commission's decision on the *Leipzig* airport[580] whereby it was ruled that certain infrastructure linked to public safety, security and firefighting does not come under economic activity and that the

> relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.
>
> Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
>
> It follows from the above considerations that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the conditions set out in paragraphs 89 to 93 above, such subsidies do not fall within Article 92(1) of the Treaty. Conversely, a State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning of that provision.

579. EU Commission: *Decision 2015/1226 of 23/7/2014 on State aid implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNG Lavallin, Ryanair and Airport Marketing Services* cited above under fn 530.
580. Case C-228, *Arbeitsgemeinschaft Deutscher Verkehrsflughäfen (Leipzing/ Halle airport) v. EU Commission* (2011), as confirmed on appeal by Case C-288/11, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v. EU Commission*, (2012) cited above under fn 12.