

COVID-19: public financial support for airports under state aid law

ROOM TO MANOEUVRE FOR THE PUBLIC SECTOR AND AIRPORTS

Executive Summary

- The public sector has the option to support German airports in the COVID-19 crisis as long as this is compliant with state aid law. Whether this will actually happen is primarily a question of political will. State aid law itself does not present any obstacles to this. It offers sufficient flexibility to help airports with public funding to overcome the COVID-19 crisis while respecting competition rules and the Single Market.
- The European Commission can authorise state aid for airports granted because of the COVID-19 pandemic on two different legal bases. The Guidelines on State aid to airports and airlines are not relevant in this respect. These types of financial aid can also get (larger) airports through the crisis, which have so far operated profitably and never needed help from the state.
- The Commission can authorise aid to airports under Article 107(2)(b) TFEU (Treaty on the Functioning of the European Union) “to make good the damage caused by natural disasters or exceptional occurrences”. On this basis, airports can receive compensation for damage/loss caused by the pandemic. The Commission’s existing practice can be used for the notification of such aid.
- For aid under Article 107(3)(b) TFEU, the Commission will decide in accordance with its “Temporary Framework” adopted on 19 March 2020. It allows in particular for airports to secure liquidity.

I. Introduction

Air traffic has come to an almost complete standstill due to the COVID-19 pandemic.¹ Planes are grounded, costs are still running. Member States are working to rescue airlines with public aid. However, airports are also affected by the loss of air traffic. Without take-offs and landings, airports cannot charge take-off and landing fees. Without passengers, airport retail also broke down and without income, airport tenants and leaseholders may stop paying rent to airport operators as well.² It is therefore just as understandable for airports to call for public support during this crisis as it is for their often public shareholders to wish to help them.

However, the question of whether and to what extent public funds may be made available to airports is a hot topic in state aid law and regularly moves back and forth between two arguments: on the one hand, public funding distorts competition but on the other hand the state has an interest in the adequate supply of this important transport infrastructure. The argument is mainly between the European Commission on the competition side and the Member States on the side of airports that have not been able to operate profitably. On the side-

¹ Outside of pure freight transport.

² Cf. for Germany Art. 5, Art. 240 EGBGB (Introduction to the Civil Code), Sec. 2 of the Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law of 27 March 2020, according to which rental and lease contracts may not be terminated until 31 June if tenants or leaseholders default on their payments due to COVID-19.



lines, the discussion also includes examination procedures, countless notification³ procedures, Article 56a of the General Block Exemption Regulation (GBER) and the Guidelines on State aid for airports and airlines (the Guidelines).⁴ And this argument is set to continue: originally, the Commission intended to begin consultations to revise the Guidelines in May 2020.



Currently, all this is being overshadowed, pushed aside or postponed by the COVID-19 pandemic and the loss of air traffic it caused. It is no longer just a question of keeping regional airports running. All airports will be affected, regardless of how successful and significant they were before March 2020. Having a strong foothold in the cargo business, only the airports are in a strong position in the face of the crisis, at least in economic terms.

It is good news for airports and their public shareholders that state aid law has shown a high degree of flexibility in the COVID-19 crisis. Thus, the usual discussion of aid to airports almost always revolves around Article 107(3)(c) TFEU, according to which 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 may be declared compatible with the Single Market. The Commission further specifies this provision in point 5 of the Guidelines.

Now, other legal bases are becoming more important when it comes to the state financially helping airports through the COVID-19 crisis, reducing the Guidelines' relevance for the support measures currently in focus to be taken in the face of the pandemic.

The main legal bases for airport state aid due to the consequences of the pandemic are

- first, Article 107(2)(b) TFEU and
- secondly, Article 107(3)(c) TFEU in conjunction with the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak⁵ ("Temporary Framework").

This GSK Update describes both of these Articles' requirements (II. and III. below) before summarising the basis on which COVID-19-related state aid to airports should be notified to the Commission (IV.). We then end our article with a conclusion and outlook (V.).

³ The last approval decision of the Commission before COVID-19 in Europe concerned operating aid for the Antwerp and Ostend-Bruges airports, COM, 12.11.2019, SA.45139 and SA.45140 (2017/NN).

⁴ Communication from the Commission – Guidelines on State aid to airports and airlines, OJ C 99/3 of 04 April 2014 in conjunction with the Communication from the Commission on the extension of the special rules on operating aid for airports with up to 700,000 passengers a year laid down in the Guidelines on State aid to airports and airlines (OJ C 456/27 of 18 December 2018).

⁵ Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak of 19 March 2020 (C (2020) 1863), amended on 03 April 2020 (C (2020) 2215).



II. Aid to make good the damage caused by natural disasters or exceptional occurrences (Article 107(2)(b) TFEU)

1. Applicability of Article 107(2)(b) TFEU to aid for airports

Under Article 107(2)(b) TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the Single Market.

On 12 March 2020, the Commission approved Denmark's state aid scheme on this basis. Under the scheme, Denmark may grant aid to event companies which are suffering from cancellations due to COVID-19.⁶ With this decision, the Commission recognised for the first time the spread of the coronavirus as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

A precondition for the application of Article 107(2)(b) TFEU is that the aid recipient is active in a particularly badly affected sector and that the losses were caused directly by the COVID-19 outbreak.

It can be assumed without any doubt that airports are directly affected in this sense, and the Commission's actions already prove this as well:

- For one, the Commission approved French state aid for airlines on the basis of Article 107(2)(c) in the context of the COVID-19 pandemic on 31 March 2020.⁷ This concerns an aid scheme enabling the French authorities to partially compensate for losses suffered by airlines licensed in France as a result of the pandemic. The aid consists of an interest-free

deferral of charges (*taxe d'aviation civil et taxe de solidarité sur les billets d'avion*) due between March 2020 and December 2020, which may be paid in a period from 2020 to the end of 2023. As the Commission recognises the impact of the crisis on airlines, the same must be true for airports, which generate a significant proportion of their revenue from airline charges.

- Secondly, the Commission mentions the transport sector in its Temporary Framework as one of the sectors particularly affected by the COVID-19 pandemic alongside tourism, culture, hospitality or retail and event organisation, and that is the sector in which airports operate.
- ### 2. Notification of aid to airports to compensate for damage caused by COVID-19

For the notifying Member State or the airport, these notifications are largely the same as other aid notifications. Nevertheless, we recommend taking the following into account:

The Commission has by now provided a template for the notification of aid under Article 107(2)(b) TFEU in the context of the COVID-19 pandemic.⁸ It sets out in broad terms the requirements Member States must fulfil when notifying COVID-19-related aid and indicates what they can do formally and in terms of content to enable the Commission to decide quickly. For aid in the transport sector compensating for damage caused by COVID-19, the Commission specifies additional information required for this sector in Annex 1 of the template. An important condition for the approval of the aid is that the aid is being granted because of COVID-19 (causality).

⁶ COM, 12 March 2020, SA.56685, Denmark – Compensation scheme for cancellation of events related to COVID-19.

⁷ COM, 31 March 2020, SA.56765 COVID-19 *Moratoire sur le paiement de taxes et redevances aéronautiques en faveur des entreprises de transport public aérien sous licences d'exploitation délivrées par la France*.

⁸ COM: "Notification under Article 107 (2)(b) TFEU", available (24 April 2020) at https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf.



This will usually be easy to prove, but in the case of individual aid to specific airports, an explanation will be required in view of the cessation/partial cessation of operations at the airports concerned due to the COVID-19 pandemic.⁹

While the other examination priorities the Commission applies in notification procedures for aid under Article 107(2)(b) TFEU are also worth considering – these can be derived from the template mentioned above –, the Commission’s actual decision-making practice seems even more revealing to us.

First, the Commission’s decision-making practice is based on the mentioned decision of 31 March 2020 on the moratorium on charges for French airlines¹⁰. Secondly, we can interpret the Commission’s practice from an older decision from 2011. This concerned state aid compensating for damage suffered by Slovenian airports in the wake of the eruption of the Icelandic volcano Eyjafjallajökull and the resulting closure of European airspace in April 2010.¹¹

The examination priorities for the notification procedures on the basis of Article 107(2)(b) TFEU all go back to the fact that aid must be appropriate for the Commission to approve it:

- **Detailed description of the type of damages compensate:** Article 107(2)(b) TFEU is an exceptional provision. It must therefore be interpreted narrowly. From this, the Commission derives the require-

ment to determine the damage caused as precisely as possible.¹²

- In terms of content, this means that the costs and the loss in revenues caused by the pandemic must be precisely identified and presented in detail. A general reference to “economic losses due to the COVID-19 outbreak” is not sufficient.¹³ Loss of income must be explained per service, just like additional costs incurred by the airport due to COVID-19. Conversely, saved expenses must be deducted when determining¹⁴ the damage.
- In order to determine the extent of the damage, a counterfactual analysis should be used to determine how income and expenditure would have developed without the COVID-19 outbreak. To this end, a comparison is to be made with an appropriate reference period. In its decision of 31 March 2020¹⁵, the Commission accepted the determination of damages for 2020 on the basis of the value added (“*valeur ajoutée*”) of 2019.
- **Exclusion of overcompensation:** the aid must be limited to compensation for damage. It must not overcompensate airports or even serve to reduce economic problems unrelated to COVID-19. The Commission made this particularly clear in its decision on Slovenian airports in 2011¹⁶. To quote the Commission’s own words:

⁹ See the explanations on the restriction of air traffic in France in view of the pandemic in the Commission’s decision of 31 February 2020, (see Fn 7), para. 2 and 34 et seq.

¹⁰ See above under II. 1.

¹¹ COM, 01 August 2011, SA.32163, Slovenia – Rectification of consequences of the damage caused to air carriers and airports by earthquake activity in Iceland and the resulting volcano ash in April 2010. The Commission makes explicit reference to this decision in Annex 1 of its template.

¹² COM, 31 March 2020, (see Fn 7), para. 40: “*Eant donné que l'article 107(2)(b) est d'interprétation stricte, une évaluation aussi précise que possible des dommages subis est nécessaire.*”

¹³ See footnote 6 of the above-mentioned template.

¹⁴ COM, 31 March 2020, (see above Fn 7), para. 44.

¹⁵ COM, 31 March 2020, (see above Fn 7), para. 44.

¹⁶ COM, 01 August 2011, (see above Fn 7), para. 35.



“[...] Moreover, any aid granted must be non-discriminatory and it should neither result in over-compensation of the damage suffered nor be used as a circumvention of the Commission’s policy on rescue and restructuring aid. It should in no way be used to remedy undertakings’ problems unrelated to the relevant events.”

However, in the case under examination there, over-compensation could be ruled out relatively easily because the past losses could already be quantified. This is not yet possible for the damage airports are incurring from the COVID-19 pandemic, because no one can predict how long the pandemic will last and how long and how severely it will affect the economic situation of airports. One possible solution we can imagine is estimating the damage for the year 2020, for example, and initially compensating it either in full or proportionately¹⁷ based on the estimated amounts. At the same time, a mechanism should be provided for which the aid provider can apply once it can be clearly established whether and to what extent the aid granted exceeds the actual losses incurred by the airports.



¹⁷ COM, 01 August 2011, (see above Fn 11), para. 46. The Commission noted here that the limitation of the aid to 60% of the damage suffered would help to exclude over-compensation.

III. Aid to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU) in conjunction with the Temporary Framework

Under Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may be declared compatible with the Single Market. On 19 March 2020, the Commission presented the Temporary Framework for State aid, on the basis of which it approves aid under Article 107(3)(b) TFEU in view of the COVID-19 pandemic. Since that date, the Commission has taken more than 50 decisions on Member States’ state aid schemes on that basis. In doing so, the Commission amended and extended the Temporary Framework on 03 April 2020.¹⁸

Under the Temporary Framework, airports are eligible for three main types of aid: (1) government grants and tax reductions, (2) public guarantees (sureties) and (3) interest subsidies. The Temporary Framework sets out in detail, for each form of aid, the exact way it needs to be set up in order for the Commission to approve it. The most important requirements are the following:

- **Government grants** are limited to EUR 800,000 (see 3.1 Temporary Framework).
- **Public guarantees** require the payment of a minimum guarantee sum, a maximum duration of the secured loan of six years, a general limit of twice the annual wage bill of the aid recipient and 25% of its total turnover in 2019, and the state guarantee is limited to 90% of the loan amount or to 35% of the loan amount in the case of first default guarantees (see 3.2 Temporary Framework).

¹⁸ See our GSK update “The new COVID-19 State Aid Law” of 06 April 2020 (n German): available at: <https://www.gsk.de/de/das-neue-covid-19-beihilferecht>



- **Interest subsidies**, for example in the case of state loans, require an agreement on a defined minimum interest rate, a maximum duration of the loan of six years and a general limit of the loan amount to twice the annual wage bill of the aid recipient and 25% of its total turnover in 2019 (see 3.3 of the Temporary Framework).

All three types of aid must have been granted by 31 December 2020 at the latest. They may not be granted to firms which were already in difficulty on 31 December 2019.¹⁹

The Commission did actually approve the first aid granted to airports in Europe in response to the COVID-19 pandemic under the provisions of the Temporary Framework. On 24 March 2020, Belgium notified the Commission of the deferral of concession fees to be paid by the operators BSCA – Brussels South Charleroi Airport S.A. and Liège Airport S.A. The deferral applies to all concession fees for the year 2020. The Commission approved the deferrals on 11 April 2020²⁰ under the Temporary Framework.²¹ This is based on the assumption that it classified the deferral as an interest subsidy under the Framework. It was important to the Commission that

¹⁹ Whether a company was “in difficulty” must be assessed in the light of Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the Single Market in application of Articles 107 and 108 TFEU (OJ L 187, 26 June 2014, page 1).

²⁰ COM, 11 April 2020, Belgium - SA.56807 COVID19 - *Mesures de soutien en faveur des aéroports wallons - Moratoire sur les redevances de concession*. The decision has not yet been published, but there is a press release of 11 April 2020: IP 20/645.

²¹ It should be noted that Belgium has so far been the country to gather the most intensive experience among the Member States in a state aid dispute with the Commission to support concessionaires in the face of a crisis. As a result of the Lehman crisis, for example, the Port Authority of Antwerp reduced for 2009 contractually owed compensation payments for two concessionaires operating in the port. Following a complaint from a competitor, the Commission initiated proceedings and only years later, after the conclusion of the main examination procedure, did it come to the conclusion that the Port Authority of Antwerp had acted like a market economy operator in reducing the compensation payments and that the case did not actually involve any state aid. See COM, 15 January 2016 and 23 November 2018, SA.35905, Concessionaires active in the Port of Antwerp.

the airport operators pay a minimum remuneration to the grantors of the concession for the deferral, as provided for in the Temporary Framework.

IV. Two possible legal bases – which one applies for what?

It should therefore be noted that airports and their aid providers are in the fortunate position of having, in principle, two independent legal bases that allow granting aid to airports to address the economic consequences of the COVID-19 pandemic. The objective of the aid determines which legal basis is to be cited.

- If the primary objective is to compensate airports for damage and losses caused by the crisis, Article 107(2)(b) TFEU is the correct *caluse*.
- If the primary objective is to ensure the liquidity of airports in the crisis, the correct legal basis is Article 107(3)(b) TFEU in conjunction with the Temporary Framework.

It should first be noted that the two justifications overlap both ways. A swiftly granted subsidy, compensating COVID-19-related losses in whole or in part, naturally also secures an airport’s liquidity. Conversely, under the Temporary Framework, a grant can also be used to compensate for a loss of revenue of up to EUR 800,000.

Secondly, it should be noted that airports may receive aid even under both legal bases. The Commission explicitly mentions this in clause 15 of the Temporary Framework.



V. Conclusion and outlook

The public sector has the option to support German airports in the COVID-19 crisis as long as this is compliant with state aid law. Whether this will actually happen is primarily a question of political will. State aid law itself does not present any obstacles to this. It offers sufficient flexibility to help airports with public funding to overcome the COVID-19 crisis while respecting competition rules and the Single Market.

The Commission can approve aid to compensate for losses under Article 107(2)(b) TFEU and as liquidity support under the Temporary Framework. The Guidelines on State aid to airports and airlines are not relevant in this respect.

These types of financial aid can also get (larger) airports through the crisis, which have so far operated profitably and never needed help from the state.

The COVID-19 pandemic will make it more difficult or even impossible – as the Commission has until now been demanding in its guidelines – for thus far unprofitable regional airports to survive without operating aid until 2024. In the forthcoming revision of the guidelines, the Commission should therefore take into account that

- the pandemic has in the past partially undermined the economic consolidation efforts of regional airports,
 - the duration of the restrictions due to the pandemic remains unknown and is time lost for further consolidation
- and that
- the continuation of consolidation after the crisis will most likely face different economic conditions than before the crisis.

If the Commission wants to contribute to the saving regional airports, it must give them more time and extend the permitted duration of the partial financing of their operation by the state. This also means that state aid requirements safeguarding competition and the Single Market should only be tightened when and if airports have largely overcome the consequences of the crisis .

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