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Beware: Regional development benefits with State aid implications

Attracting low-cost airlines to regional airports is a popular way to spur regional development. Competition is fierce among regional airports and airlines take advantage of this competition to demand reduced rates under the threat of moving their flights to other airports. Unfortunately, providing incentives to airlines can be considered as State aid.

Legal Considerations

General Rule

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits support that:

- is granted by the State or through State resources;
- favors certain businesses or the production of certain goods;
- distorts or threatens to distort competition; and
- affects trade between Member States.

Therefore, if a regional airport is State controlled or receives resources from the State, any unequal support or incentives that it provides to airlines could be considered State aid. Additionally, airports, regardless whether they are State controlled, must also consider the applicability of other competition rules, especially Article 102 of the TFEU, which prohibits abuse of dominant position by discriminating between customers.

Exceptions

General exceptions to the State aid rule are found in Articles 107(2) and 107(3) of the TFEU and are clarified in the 2005 guidelines, including:

- private investors (would a private investor in a market economy provide similar incentives)
- State activities (activities not necessarily of an economic character and generally within the realm of the State, such as safety, air traffic control, police and customs)
- small airports (start-up aid to airports with less than 1 million passengers per year)
- airport services (different rates if they are linked to the nature or scale of services)
- new routes (new routes or schedules increasing passenger volume).

Practical Application

The Commission has investigated a number of aviation industry State aid cases, some involving incentives.

In 2008 the Commission investigated the agreement between the Bratislava Airport and Ryanair. The Commission focused on whether a private investor operating under normal market conditions would have entered into a similar commercial arrangement. The Commission conducted a detailed analysis of the conditions at Bratislava Airport and benefits of the relationship with Ryanair, including diversification of the risk of a competing airline that offered most of the routes to the airport. It ultimately concluded that Bratislava Airport's decision to enter into the agreement was rational based on a cost-benefit analysis, so the arrangement did not constitute State aid.

Commercial Considerations

Airports must continuously grow their portfolio of destinations, leading to increased direct, retail and ancillary, revenues. To do so, an incentivizing tool to entice airlines to open new connections is essential.

Airports are always subject to key route development factors: attractiveness of the region and passenger demand. However, low cost airlines generally look for advantageous pricing in terms of landing fees, passenger tax and handling services. Thus, regional attractiveness sometimes becomes secondary to these low price/low cost operating goals.

From an airport's perspective, incentives usually provide a minimum guaranteed volume. This normally improves passenger statistics and enhances retail opportunities. However, airports have rather limited maneuvering space in creating an incentive program that is equal for all airlines. Aviation is an extremely competitive sector where general incentive schemes that are not individually tailored can only be provided by a few wealthy and busy airports. Every airline has special requirements that usually involve up-front marketing fees to offset the airline's risk. So, how can an airport adhere to EU regulations yet still satisfy the requirements of uncompromising airlines? Unfortunately, the options are limited.

A commercially ideal scenario is to obtain financing from private entities, such as tourist boards, who share similar regional development goals. However, any support provided by these entities, whether directly or indirectly, must be carefully analyzed to avoid State aid implications.

Otherwise, for a State controlled airport, the key is managerial expertise of the network development and commercial teams to craft and sell commercially viable incentive schemes. Generally, from a commercial perspective, airports should stress deep and proactive analysis of the language, purpose and principles of an incentive scheme. At a minimum, the scheme should be sufficiently flexible to satisfy various commercial needs of individual airlines yet sill respect legal requirements. Additionally, a proper and strong cost/benefit analysis should back each and every incentive program, be it a volume commitment or just a special price for a limited time.

Conclusion

In a strictly commercial setting, it is natural to offer incentives and benefits to maintain important clients. However, when viewed in the context of State support and regional development, these same incentives could amount to State aid. Regardless of the regional development benefits, both airports and airlines should carefully and pre-emptively consider the State aid implications of incentives, as the risks of State aid infractions could outweigh the expected benefits of the commercial arrangement.

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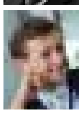

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