State aid analysis of EU financing to regional airports

The rise of regional airports: inconsistencies in EU State aid rules or in the EU’s regional funding policy?

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This article conducts a legal research focused on the phenomenon of the multiplication of regional airports following the liberalisation of the airline industry. It aims at shedding light on the way the construction of airport infrastructure has been financed and how State aid rules apply to such financing. More specifically, it will also include an analysis of the EU investments made in airport infrastructure. The Court of Auditors published in December 2014 a whistle blowing report regarding an audit of EU financing of airport infrastructure, where it proved that much of the EU investments, amounting to 4.5 billion Euros for the period 2000-2013, were not invested appropriately and the granting in some cases was “not needed at all”. Is that because of the fact that the industry is witnessing a substantial change since its liberalisation in the early nineties? Was the regulatory framework lax? Or is it because of a governance problem involving the EU, the Member States and the regional and local authorities as regards the allocation, management and supervision of the European aid? Such are questions that this article aims to address.

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I. INTRODUCTION:

Today, the airline industry is an essential part of the European Union’s economy. It carries over 40% of EU value in imports and exports, and approximately 822 million passengers are transported to and from Europe.\(^1\) Within the EU, about 150 scheduled airlines, 60 air navigation service providers and about 450 airports operate.\(^2\) After the liberalisation of the airline industry, and following the enactment of key legislation by the EU\(^3\), the territory of the European Union counted more and more airports, attracting different types of airlines and aviation companies.\(^4\) The airline industry in the European Union underwent a substantial change during the last two decades, following the rise of the Low-Cost Carrier model\(^5\) (LCC) and an economic downturn after the financial crash of 2009.\(^6\) Companies such as Ryanair thrived by providing a service that the National Flag Carriers (NFCs) were not offering: frequent point-to-point flights on short-haul routes to regional airports with convenient transportation to major population centres for substantially lower fares\(^7\). Nowadays, such companies constitute nearly half of intra-community traffic\(^8\). But while these changes brought lower fares for consumer benefit and regional development, it also led to an uncontrolled multiplication, by normal market standards, of regional airports which main reason for survival is the financing received through public resources. And a significant amount of regional airports have made use of subsidies for the construction of airport infrastructure, which then proved not to be needed.

The emblematic case is Ciudad Real Airport. With billion-euro infrastructure capable of handling very high passenger flows, Europe’s largest runway (where an Airbus A380 can easily land) and a connection to the high-speed rail network; the airport supposedly had all it needed to succeed. However, it was operational for no more than two years, serving only a limited amount of flights a week and filed for bankruptcy in 2012. Recently, it was reported in the news channels that

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1. European Commission; *Competition Policy Brief. Issue 2, February 2014. ISSN: 2315-3113*, p.1
2. *idem*
5. O. Sutton; *What makes low-cost carriers low-cost?* Interavia Business & Technology, Mar/Apr 2003, Vol. 58, p.2
8. More specifically: 45%; retrieved from Aéroport de Paris, *A proposal to promote the competitiveness of the air transport sector to the benefit of passenger, local areas and employment*. 201, p.3
the airport would be sold, in a bankruptcy auction, for €10,000 when the total investment is valued at approximately €1,1 billion (so 100,000 times less than it had cost to build). The investments had been made by private investors, the Spanish state and, indirectly, the EU. As regards the share of public investment in the project, it constitutes tax money profligacy on an incredible scale.

In its Competition Policy Brief, the Commission notes that

“Public funding to airport infrastructure has often resulted in duplication of (unprofitable) airports in the same catchment area, creating ghost airports and overcapacity at regional airports, while leaving the congestion problem of main airports unsolved.”

Being aware that previous legislation set in place at that time did not refrain the building of ghost airports throughout Europe, the Commission introduced in February 2014 the new Guidelines on the Financing of Airport and Airlines. However, as the rules governing the granting of public financing from Member States to struggling airports has been the focus of extensive debate and research, this article will innovate by analysing another type of public financing to airport infrastructure projects.

As regards airport infrastructure, some terminals and cargo hubs have been financed with the help of European Union funds. The manner in which these funds are granted and the shortcomings in previous rules and guidelines have permitted that, in some cases, this money ended up being invested in projects that were not profitable (and will not be in the near/long future). A special report from the Court of Auditors (“the Report”), entitled EU funded infrastructure: Poor value for money emphasises that the European Union (EU) spent more than 4.5 billion Euros in investments related to airport infrastructure through the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the Trans-European Network for Transport (TEN-T) fund during the 2000-2013

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9 Comisión Nacional de la Competencia; III informe anual sobre ayudas públicas en España, octubre 2011, p. 63
11 Financial Times; Spanish ghost airport costing €1 billion attracts offer of just €10,000. 17th of July 2015 (written by T. Buck)
12 European Commission; Competition Policy Brief. Issue 2, February 2014. ISSN: 2315-3113, p. 2
13 It is important to stress that financial support from a public source does not immediately constitute “State aid” within the meaning of 107 TFEU. For the sake of clarity, only aid that fulfils all the elements of article 107 (1) TFEU and which does not fall within the ambit of article 107(3) TFEU can be referred to as “State aid” which is unlawful and needs to be recovered. Other aid given to private and public entities through state resources can also be referred as aid but does not legally amount to “State aid” in the light of EU competition law. This will be further explained in chapter 2.A.
15 European Court of Auditors; EU Funded infrastructures: poor value for money? Special report, 2014
period. The report provides an account of an audit of the Court of Auditors of 20 airports scattered across the European Union, which in total received 666 million Euros in aid from the EU finances. In its report, the Court established that in 9 of the 20 airports analysed, 28% (totalling 128 million Euros) of the total investment were used for projects that were “not needed at all” and therefore represented a waste of taxpayers’ money.

In one article, professor Nicolaides stated:

“The unavoidable conclusion is that occasionally projects are undertaken because Structural Funds have to be absorbed. Whether public money should be invested in these projects seems to be of secondary concern.”

The Report is especially interesting as it questions the effectiveness of the EU regional funding policy and highlights that, although the liberalisation of the industry has brought advantages and more economic welfare, regulators must keep being vigilant to prevent the squandering of public resources. Changes in the industry did lead to fiercer competition between airlines and necessarily also brought about a more competitive and dynamic EU airport market. However, the risks that unbridled National or European aid to economically unviable airport projects, such as the ones described in the Report, bring about for the competitive environment of that industry are significant. The previous model, where significant amount of aid was granted to inefficient flag-carriers and overcrowded central air transport hubs, must not be replaced by another model where underused regional airports only reason for survival is aid from public resources, to the benefit of Low-Cost Carriers. LCCs benefit as regional airports compete with each other and with main airport hubs to attract mainly LCCs (and eventually also NFC) traffic by offering the lowest landing fees or handling charges as it was clearly illustrated in the 2008 Charleroi ruling by the Court of First Instance. Many other Commissions’ investigations were made, under the suspicion that illegal aid were granted to the LCCs by regional airports.

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16 Ibid, p. 7
17 Ibid, p. 14
18 The Economist, Europe’s regional airports: Runway or another. Business section of the printed edition, 19th October 2013, p.1
example thereof being the Commission’s decision involving Girona’s and Reus’ airports supposedly granting (illegal) benefits to Ryanair.23

This is highly relevant, given the fact that the airline industry’s traffic, and especially LCC traffic, is forecasted to double by 2030.24 Moreover, from an EU Competition law perspective, it seems odd to think that funds granted through EU coffers could actually be considered illegal or incompatible by the Directorate General Competition of the Commission. If that would be true, the EU would give25 with one hand but take with the other.

In a report, the European Economic and Social Committee stated that:

“The conception of the airport as an economic driver of economic development for the region has been fostered by the increasing direct (financial) disengagement of the State, transferring to regions and other local authorities the duty to supervise, manage and finance these essential infrastructures. Regional authorities more and more consider the airport as one of the major tools for developing the local economy.”26

And as it has become evident, the system in place regarding the allocation, the management and the supervision of the funding seemed to be flawed due to a governance gap between the EU, the central governments of the Member States and the regions, to which the powers mentioned are delegated.

Therefore, many questions come to mind as regards the topic of the public financing of airport infrastructure. But this article will focus on the following question: With regard to the multiplication of unused airport infrastructure financed by public funds, will the EU have to change the regulatory framework governing State aid to airports or will it rather need to review its regional funding policy in order for EU investments in airport infrastructure projects to be spent in a consistent and accountable way?

The first chapter will provide the reader with an explanation of the phenomenon of the multiplication of regional airports. The next chapter conducts an analysis on the rules that apply to public financing to airports, ranging from the Treaty

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23 SA 33909, Alleged aid to Ryanair and to other airlines and possible aid to Girona and Reus airports, 2013
24 cf Court of Auditors (n 15) p. 6
25 By giving, it is meant that EU funds are used for the funding of infrastructure projects. However, they flow through Member States public bodies: central or regional. The manner in which the funds are granted and distributed will be analysed in chapter III.
provisions and the Commission’s Aviation Guidelines to case law. This analysis is important, as it will determine, regarding the investments made with public funding, whether the Guidelines that the EU has put in place can shape the Member States’ aid schemes coherently. If by the end of this chapter, it is concluded that the regulatory framework appropriately deals with the problem of unused infrastructure and corrects the shortcomings of the previous rules, it would mean that a revision of EU’s regional policy may be necessary to correct the system of allocation, management and supervision of the funding.

In order for the reader to understand the EU’s regional aid policy, the third chapter will provide a roadmap through the labyrinth of EU funding. This knowledge is essential, as it will help the reader understand how the various EU funds end up being used for investments in regional airport infrastructure. Thereafter, it will be argued that a revision of the EU’s regional aid policy is necessary to prevent that more funding ends up being invested in “white elephant” infrastructure projects. The choice in the order of the chapters has been chosen so as to strengthen the conclusion of this article that the regulatory part of the problem has been dealt with the introduction of the 2014 Guidelines, but that policy review should be considered.

II. THE MULTIPLICATION OF REGIONAL AIRPORTS

The clustering of the European continent with all kinds of regional airports is a recent phenomenon. It represents the actual result of several waves of liberalisation efforts that have been carried out from the late 80’s onwards by the European Institutions. These efforts include the three so-called ‘Liberalisation Packages’ enacted respectively in 1988, 1990 and 1992. This brought undeniable advantages to a considerable amount of people across the Union but the way deregulation affected the industry also gave rise to new challenges. This chapter will provide the reader with an insight into the phenomenon of the development of regional airports. This knowledge is essential so as to grasp the rationale behind the efforts to regulate public financing to airports.

The multiplication of regional airports, sometimes also referred as ‘secondary’ or ‘tertiary’ airports compared to the main primary transport hubs, is a modern phenomenon and has further shaped the airline industry in Europe since its liberalisation. The advantage perceived by LCCs in using secondary

27 For the purpose of clarity, a white elephant is possession which its owner cannot dispose of and whose cost, particularly that of maintenance, is out of proportion to its usefulness.

airports include lower landing and handling fees charged by the airports secured through negotiations between the airport management and the company directors, but also less air traffic congestion meaning faster turn-around times for planes. This is one example of how the LCCs strive to achieve cost efficiencies in every area of their business. On the demand side, customers of LCCs are still prepared to travel to more remote areas for the sake of low fares. In any case, these secondary airports are mostly located and linked within 2 hours range (by car, train or bus) from major metropolitan areas, making it still attractive for a major customer base and still competitive against main transport hubs that are often more strategically located.

The phenomenon of the multiplication of regional airports is an interesting phenomenon from a EU competition law perspective, as it has changed the nature and the scale of competition in the airport market. The competition between major, traditional airports and secondary airports as well as the competition between the secondary airports among themselves to attract LCCs traffic is perceived as the most active in the business. But how are secondary airports able to attract LCCs with lower operational charges when considering the fact that economies of scale of major airport hubs should make operational costs more bearable? Forsyth explains this by analysing several elements: greater efficiency by the secondary airports, the presence of subsidies, lower input costs and differential service quality. Moreover, other incentives are competitive taxi and turn-around times or accessible airport infrastructure due to low congestion.

Greater efficiency in the operational management of a small regional airport could mean that the overall costs for a LCC in its operation would outweigh the economies of scale of a less efficient major airport. Furthermore, as the secondary airport is located in remote areas, it will in most cases entail that land prices are lower, thereby making overall operational costs more bearable, and the building of the required infrastructure or the offering of services such as car-parking cheaper. Major airports require close proximity to the metropolitan area, which inherently means that land costs (amongst other things) will be higher.

More importantly, secondary airports are able to attract LCCs with low operational charges because they are themselves subsidized by a regional or local authority. Many regional public authorities are actively supporting regional airports in their efforts to attract LCC traffic, as it was the issue in the Charleroi

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29 cf Forsyth (n 14), p. 78
30 Ibd, p.81
The argument is that a regional airport could bring development and attract investments, stimulate tourism and lead to job-creation. Moreover, funding that the EU makes available through its regional funding policy programs allows the granting of public financing to infrastructure projects supporting these regional airports. But such incentives for the promotion of regional airports do raise competition law issues as intra-airline and intra-airport competition could be disrupted as it essentially can constitute “State aid” within the meaning of article 107 (1) TFEU. Yet, such aid (that can be seen as unlawful) may be pardoned when it falls within the scope of article 107(3) (c) TFEU, justifying the subsidies for the sake of economic development in certain regions.

Therefore, the phenomenon of the multiplication of the regional airports is intrinsically linked to the public financing element. Indeed, it is quite clear from the report of the Court of Auditors that a great number of secondary airports that compete for LCC traffic in the EU could not have existed without some sort of subsidies granted from public funds, either at EU or at Member state level. This article’ next chapters will analyse which rules apply to such financing and finally how these (EU) funds flow to the regional airport infrastructure projects in question.

III. II. PUBLIC-FUNDED AIRPORTS: THE STATE AID RULES AND CASE LAW

The phenomenon described in the previous chapter did not happen by chance. It happened as several market participants took advantage of the economic and legal opportunities. The framework in question relates to the main legal instruments that governed the public financing to airports before the introduction of the new set of Aviation Guidelines i.e. the 1994 and the 2005 Aviation Guidelines. This chapter’s objective is to provide the reader with an overview of the regulatory landscape surrounding public financing to airports, with a particular focus on airport infrastructure. This will help in answering part of this article’ research question regarding whether the EU had to change the regulatory framework governing public financing to airports or if it had succeeded in addressing the inconsistencies of its predecessors. The method used to present all the legal instruments will be the step-by-step test that the Commission carries when analysing the legality of any type of aid.

33cf Court of Auditors (n 15)
A. State aid analysis

This subsection is aimed at presenting all the important legal instruments that regulate public financing to the aviation industry. The first that ought to be mentioned are the core articles of the Treaty: articles 107 and 108 TFEU. As aid may distort the fair competition between market participants, the Commission must be made aware when Member States (including its regional and local communities) grant public financing. Article 108 (3) TFEU therefore sets a mandatory notification requirement on Member States unless the aid granted is covered by a Block Exception, it does not exceed the maximum of 200,000 € over three fiscal years or finally when the aid is granted through a scheme that has been approved by the Commission in the past. When the Commission is notified, it may request more information from the parties and it will analyse a particular case following the conditions of article 107 (1) TFEU. When the aid fulfils the criteria, it may be referred to as “State aid”. However, it is not yet incompatible State aid as it still needs to fail the compatibility test of article 107(3) TFEU, which will be explained more in detail in the following subsection. It is important to point out that the Guidelines are a supportive legal instrument which explains the view of the Commission regarding important elements in both procedures, the State aid analysis under 107 (1) and the compatibility test under 107 (3) (c) TFEU. Three different conclusions can be taken from this analysis: that there is no aid, that the aid is compatible with EU rules or that serious concerns arise due to the aid granted. In the last case, the Commission will open a formal procedure under 108 (2) TFEU. There is only talk of unlawful State aid when the Member State failed to notify it under article 108 (3) TFEU, or when it breached the so-called stand-still obligation, which means that the Member State which grants the aid must wait until the Commission takes a decision over the notified aid under article 108 (3) TFEU. This “standstill obligation” is directly effective and therefore often used by market participants against other competitors.

Article 107 TFEU goes as follows: “Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring 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.” By dissecting all the important concepts of article 107(1) TFEU, many questions arise. What is the meaning of aid in accordance with EU competition law? What

34 See section 2.2 (1) of the Guidelines, under definitions
35 See for instance sections 3 and 5 of the 2014 Aviation Guidelines.
36 Case C-284/12, Deutsche Lufthansa v Flughafen Frankfurt-Hahn GmbH, [2013], Judgment of 21 November 2013
are Member States’ resources? Does EU funding fall into that category? When is competition distorted? Or when is the trade between Member States affected?

All the elements of the sentence play an important role in determining how and to whom the aid is given as regards airport infrastructure, and also to see if the aid is lawfully granted. The first step consists in finding all the potential beneficiaries of public funding. In the case of the regional airport phenomenon, the first beneficiaries from the funding granted were, and still are, the airports themselves. These airports have traditionally been run as a public undertaking but the wave of privatization meant that nowadays, quite a significant number of airports are operated as private businesses. Also detrimental for the competitive situation of the airline industry is the fact that LCCs indirectly benefit from the subsidies granted to airports. With the abundance of airports competing to attract LCC traffic, these airlines enjoy the advantage of being able to choose between which airport offers the most profitable alternative in terms of landing fees, ground handling fees etc. State aid rules however apply, separately, to both the intended beneficiaries and the unintended ones.

The second step consists of determining if indeed there has been a transfer of state resources to the market participant. A state resource is any form of funding or support which derives from any form of public source, either directly or indirectly. The scope of “public sector” bodies includes regional and local authorities and the funds these authorities manage. When such a public body enjoys the discretion over the allocation of the funds, they will be considered as being in control. As regards EU funds, the shared responsibility for the EU spending is shared between the Commission and the Member States’ managing authorities. This means that even if the European Regional Development Fund (“ERDF”) or the Cohesion Fund (“CF”) financing flows from the EU coffers, they can still be considered as “State Resources” as it is ultimately up to the Member States’ public body to decide where those funds will be invested. Article 107 (1) TFEU defines a transfer may occur “in any form whatsoever”, so a direct grant from a public fund will be covered in any case. It is important to highlight that the Commission distinguishes how the state resources are invested. Was it for the construction of the infrastructure (investment aid), its later operation (operative aid) or is the aid aimed at the airlines which use the infrastructure?

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38 Ibid, p. 2
39 United Kingdom government, Department of Business, Innovation and skill, State Aid: The basic Guide. BIS/15/427, 2015, p. 3
40 cf Court of Auditors (n 15), p. 9
41 Cf United Kingdom Government (n 39), p. 2
each case the Commission will study it differently but in all three it will still be seen as a transfer of state resources.\textsuperscript{42}

Thirdly, in the process of establishing whether or not unlawful public financing was granted to a market participant, thereby distorting competition, it is necessary to analyse if the transfer was made to a particular undertaking. In European competition law, following the case \textit{Höfner and Elser v. Macotron}, an undertaking is understood as being any entity, which is engaged in an economic activity.\textsuperscript{43} The concept of ‘economic activity’ is further defined “consisting in the offering of goods and services on the market”.\textsuperscript{44} This concept being flexible, what nowadays does not constitute an economic activity may become one in the future, and vice versa.\textsuperscript{45} Concerning the airline industry, such economic activity can be split in two major categories: the airline economic activity (consisting in delivering transportation services) and the airport economic activity. In order to determine if indeed the provision of airport services (and this includes the building of airport infrastructure so as to provide these services) constitute an economic activity, it is relevant to mention that in the Commission’s 1994 Aviation Guidelines, the provision of services related to the building of airport infrastructure were not falling under the scope of “economic activities” but under the scope of “general measure of economic policy”\textsuperscript{46} which are outside the reach of the Commission’s State aid rules.\textsuperscript{47}

Nowadays, as regards the provisions of airport services, no doubt remains after a series of important judgements that airports carry out an economic activity which is governed by the EU State aid rules.\textsuperscript{48} In the \textit{Aéroports de Paris}\textsuperscript{49} case, the European Court of Justice (“ECJ”) ruled that the operation of an airport aiming at providing services to airline companies and to the various services providers constitutes an economic activity. The ECJ however did not elaborate on the question whether the construction of airport infrastructure in itself constituted an economic activity. The 2005 Aviation Guidelines, which complement the 1994 ones, do include rules for the financing of airport

\textsuperscript{42} European Commission, \textit{Analytical Grids on the application of State aid rules to the financing of infrastructure projects}. 2012, p. 6 retrieved via: \url{http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf}
\textsuperscript{43} Case C-41/90, Höfner and Elser v Macotron GmbH [1991] ECR 1-1979, § 21
\textsuperscript{44} Case C-118/85, Commission of the European Communities v Italian Republic [1987] ECR 2599.
\textsuperscript{45} Communication from the Commission; Draft Commission Notice on the Notion of State Aid pursuant to article 107(1) TFEU. 2014, p.5
\textsuperscript{46} A. Bartosh, \textit{distortion of competition on the markets for the operation of airport infrastructures}. Etsal 4/2005 p.622
\textsuperscript{47} 1994 guidelines on State aid to airports and airlines, §14
\textsuperscript{48} Save some services falling under the public authority scope such as traffic control, police, customs etc.
infrastructure, as seen in section 4.1. In paragraph 56 of the 2005 Guidelines, the Commission acknowledged that: “the infrastructure is the basis for the economic activities carried out by the airport operator” and continues by stating that any operator that is involved in the running of an airport’s operations should “finance the costs of using or building the infrastructure it manages from its own resources”. This applies to all kinds of airports, including regional ones.

The Leipzig/Halle airport judgement defined that the operation of an airport, including the construction of airport infrastructure, constitutes an economic activity. The claimant contended that the construction of airport infrastructure could never be considered as an economic activity, as a private investor would not invest in such a project. It was argued that it rather could be classified as a matter of regional, economic and transport policy.

The General Court ruled that the qualification of the construction of airport infrastructure as an economic activity depends on the use that infrastructure will have in its later exploitation. The ruling is important as it established clearly that the financing of the construction of airport infrastructure, depending on its later operation, was an economic activity and not as the Member States often considered, a public task. Besides, the judgement has a significant importance as its conclusion became applicable to public financing supporting various types of infrastructure under construction (ports, stadiums etc.) and this affected the way grants from the ERDF had to be awarded to projects. We can therefore conclude that airports (and the building of the infrastructure necessary for its operation) can be classified as an undertaking carrying out an economic activity, falling within the scope of application of article 107 (1) TFEU. Public funding for the building of infrastructure may be considered as State aid on the basis of article 107(1) TFEU.

So far, it was established that the aid given did have beneficiaries (the airports being undertakings), that the aid constituted a transfer of State resources and that the building of airport infrastructure was seen as an economic activity. The following step consists in determining if the measure at hand provided a certain advantage to the beneficiary against its competitors. Under the EU State aid

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50 European Commission, Community guidelines on financing of airports and start-up aid to airlines departing from regional airports. 2005/C312/01, p. 9
51 ibid, §§ 56-57
54 O. Hateley et. al; What’s all that talk about airport infrastructure: the gradual encroachment of State Aid Rules in the aviation sector. Maastricht Center for European Law, student papers 2013-2014, p. 24
rules, any advantage which the recipient undertaking would not have received under normal market conditions could potentially constitute State aid. So the question is: would a market economy investor (“MEI”) have provided funds to the projects expecting a remuneration on the capital invested under the same conditions as a public authority intends to do? Funding of airport infrastructure usually entails an important capital injection which can only prove to be good investments after a significant amount of time. Moreover, this kind of investment should not be seen on purely economic considerations as more factors come into play. Hence the difficulty to prove that a public authority did not act as a MEI would have, as regards the funding of a particular project.

This difficulty was much debated in the Charleroi56 case, when the ECJ annulled a Commission’s decision, which declared some advantages granted by the Walloon Region and Brussels South Charleroi Airport incompatible with State aid rules.57 However the source of the MEI test remains. In connection with public funding of airport infrastructure: “it is considered free of aid if in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectorial considerations, would have granted the same funding.”58

The list of airports that were audited by the Court of Auditors for its report clearly show that most of these were (and still are) loss making and would most probably not have attracted a private investor having carried out a thorough due diligence process. The Charleroi case proved that the Commission got it wrong in its application of the MEIP59 as regards possible State aid to Ryanair through subsidized discounts offered by the Brussels South Charleroi Airport. Indeed, the Charleroi airport became the base for Ryanair’s operation in continental Europe, servicing 6.7 million passengers in 2013 (in 1999, it only received 20,000).60 Any investment in that project (and this includes building infrastructure) would certainly have proven attractive for any private investor. However, the audited airports mentioned in the Court of Auditors’ report do not offer great potential for growth as too many of these airports were in the same catchment area and the building of airport infrastructure was often not needed and/or oversized.61

A serious private market investor would not put his own money at stake to fund

56 Case T-196/04, Ryanair v Commission [2008] ECR II–3643 Note that in the judgement, the funding of airport infrastructure was not the issue.
58 Cf Colangelo & Zeno (n 55), p. 75
59 MEIP stands for Market Economy Investor Principle
61 Cf Court of Auditors (n 15), p. 38
airport infrastructure which does not generate profits and will continue to be loss-making in the future. Therefore, the Private Investor test highlights that there are strong indications of an advantage granted by the funding from public resources.

The selectivity in the advantage is obvious. Selectivity entails that only a limited amount of market participants benefit for the funding in question. In other words, the aid is not a horizontal initiative which benefits all the competitors in the market. The airports are often selected individually for the funding. In some cases, the selected airports have won tenders that are in principle open to other applicants, and as winners are selected for funding. More difficult to determine are the following steps in the State aid analysis. It involves assessing whether the funding by state resources may potentially distort competition and secondly whether the trade between Member States is affected.

If the other elements of article 107 (1) TFEU are fulfilled, the last step has to be clarified: the article states that for aid to have distortive effects, it must have the “propensity to affect trade between Member States”. The cause of concern is confirmed in point 106 of the 2014 Guidelines which stipulates that the duplication of unprofitable airports or the creation of additional unused capacity in the catchment area of existing infrastructure might have distortive effects. According to established case law, the notion of “trade” encompasses cases where agreements and practices affect the competitive structure of the market. Practices that affect such structure inside the Union by eliminating or threatening to eliminate a competitor operating within the Union may be subject to EU competition law rules. As regards the propensity (“may affect”) the ECJ has implied that it must be “possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states”. Also important is the fact that it is sufficient that such a practice is “capable” of having such an effect. Important state and EU funding to support the construction of regional airport infrastructure definitely has the propensity to distort competition by affecting the trade between Member States considering the fact that the market share of the LCC (which as explained earlier on are the main users of the regional airports’ facilities) surpassed the one of the incumbent airlines for the first time.

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62 European Commission, Guidelines on State aid to airports and airlines, 2014/C 99/03, point 106
63 European Commission, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. 2004, point 20
64 Ibid, point 23
in 2011, at 42.4%.\textsuperscript{65} By fulfilling all the elements in the criteria of article 107(1) TFEU, the aid will then be legally categorized as “State aid”.

The 107 (1) TFEU test having been developed, it would be interesting at last to analyse very important instruments (that were mentioned before) in the State aid analysis of public financing to the aviation industry: the 1994, 2005 and 2014 Guidelines on State aid to Airports and Airlines. What is the legal nature of these Guidelines? The EU Commission can decide to execute its substantive policy by using either formal legislation or through the use of informal rule making. When using its discretion with regard to State aids, the Commission may use the second option and set up guidelines that will have to be implemented and followed as long as that the guidelines do not depart from the Treaty rules.\textsuperscript{66} These Guidelines provide market participants with transparency, accountability and legal certainty and helps create legitimate expectations that their behaviour is in line with EU regulation. As to their legal nature, the guidelines are a communication from the Commission. This means that such instruments could be categorized, as it is often the case in academic literature, as "soft law". In the \textit{Archer Daniels Midlands} judgement of the court of First Instance, EU guidelines were defined as " capable of producing legal effect. Those legal effects stem not from an attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. [By doing so] ... the Commission imposes a limit on its own discretion, it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations."

The guidelines set by the Commission can have a binding effect, depending on how they are drafted and to whom they apply. In \textit{Ijssel-Vliet}\textsuperscript{68}, the ECJ ruled that the Commission's Guidelines applicable to a Dutch aid scheme were binding on the Dutch state.\textsuperscript{69} As regards the aviation industry, the Guidelines set out the conditions, which the Member States’ aid schemes have to comply in order to be in line with EU competition law. So they are a highly important legal instrument.

With the help of the treaty articles, the Guidelines and the case-law, the test of article 107 (1) TFEU can be completed. Now, the aid will be legally qualified as “State aid” and such aid will be tested for possible justifications on the basis of article 107(3) (c) TFEU.

\textsuperscript{65} Cf EU Commission (n 12), p. 1
\textsuperscript{66} Cf Craig & de Burca (n 37) p. 108
\textsuperscript{67} Case T-59/02, Archer Daniels Midlands [2006] ECR 3627, §43
\textsuperscript{68} Case C-311/94 Ijssel-Vliet Combinatie BV v Minister van Economische Zaken [1996] ECR I-5023
\textsuperscript{69} Cf Craig de Burca (n 37), p. 1086
B. Justification of the aid under article 107(3) (c) TFEU

Any public financing granted which potentially could fulfil the criteria of article 107 (1) TFEU has to be notified to the Commission according to article 108 (3) TFEU. In point 109 of the 2014 Guidelines, notification of aid schemes is encouraged when it is aimed at airports whose traffic amounts up to 3 million passengers. Point 101 on the other hand compels the notification of infrastructure aid in several cases. The most relevant being when the aid is directed at an airport, which has passenger traffic of more than 3 million and in case the investment aid is for the creation of a new airport that is located within a 100 km or 60 minutes range from another airport.

When notified, the Commission shall scrutinize the aid and consider whether the aid scheme could be justified under 107(3) (c) TFEU. The new 2014 Guidelines on State aid to airports and airlines offer a clear set of indications as regards the compatibility of aid schemes from the Member States in section 5. If the aid program put in place by the Member State complies with the Guidelines, then it cannot be declared as unlawful aid as it is justified under 107 (3) (c) TFEU.

As regards the building of airport infrastructure, any aid received will be considered compatible under article 107(3) (c) TFEU if it is in accordance with provision 83 of section 5 of the Guidelines. That provision refers back to provision 79 of the Guidelines where the Commission explains the cumulative conditions that have to be met in order for infrastructure aid to be declared compatible. The first condition, found in provision 79(a), refers to that the aid must be a contribution to a well-defined objective of common interest. This is also sometimes referred to as the principle of “compensatory justification”. This means that if aid is granted for the construction of infrastructure of an airport which may increase the mobility of Union citizens, the connectivity of regions, regional development or may combat traffic congestion at major transport hubs in the Union, it may fall in the safety net of article 107(3)(c).

Secondly, there must be a need from the aid contribution to bring about a material improvement that the market itself cannot deliver.

The 2014 Guidelines stress the fact that regional airports handling up to a maximum of 1

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70 European Commission (62), point 111 (a)
71 Ibid, point 111 (f)
72 cf Craig & de Burca (n 37), p. 1141
73 Ibid, p. 1085
75 cf 2014 Guidelines (n 62),point 84
76 Ibid, Point 79(b)
million passengers per year may have difficulties attracting private financing for the construction of any infrastructure.\textsuperscript{77}

The second step in the State aid to airport infrastructure analysis is to determine the appropriateness of the measure as a policy instrument. The Member states must indicate how they intend to administer the (EU) aid to the recipient and they are encouraged to set up a framework scheme where the principles governing the aid program are laid out and its most relevant features are presented.\textsuperscript{78} The Commission will further insist in conducting a proportionality test in order to determine whether the airport in question is asking for public financing for the financing of the right kind of infrastructure project (“eligible costs”)\textsuperscript{79} and whether the maximum aid intensity is proportional to the airports needs considering the infrastructure project and the number of passengers that transit its premises. For a complete aid proportionality scheme, point 101 of the Guidelines provides for a clearer picture.

To avoid the construction of infrastructure for so-called ghost airports, the Commission also sets out that any aid for airport infrastructure should not have any undue negative effects on competition and trade. Doubts would arise as to the compatibility of an investment into airport infrastructure if the airport requesting the aid is located in the same catchment area of existing airports which do not operate at or near full capacity. This is indeed a crucial point as the audit from the Court of Auditors revealed that many airports that the EU (indirectly) bankrolled were actually located within the catchment area (of 100 km – one-hour drive) of one or, in some cases, several other airports in the vicinity.\textsuperscript{80} The “negative effects” test also puts emphasis on the requirement that the airport must be open for all potential market participants.

If the Commission, during the 108 (3) procedure, takes a negative decision, the aid is declared incompatible and cannot be granted to the market participants requesting it. If the aid has already been granted, it is declared unlawful and needs to be recovered without delay.

This is how the Commission will proceed when scrutinizing a State aid scheme to airports under EU competition law rules. However, as this article aims at analyzing whether the EU needs to change the regulatory framework governing State aid to airports, it is pertinent to study if the new 2014 Guidelines can provide a coherent set of rules to achieve that aim.

\textsuperscript{77}Ibid, Point 89
\textsuperscript{78} Ibid, Point 92
\textsuperscript{79} Ibid, point 97
\textsuperscript{80} cf Court of Auditors (n 15), p. 34
C. State aid to airports: a coherent European regulatory framework?

As it was explained before, previous State aid to airports had to be justified under article 107(3) c TFEU using the 1994 and 2005 Aviation Guidelines. Yet these instruments did not achieve to stem the tide of public\(^{81}\) money flowing to economically unviable airport infrastructure projects as the ones described in the Court of Auditor’s report.

The 1994 Guidelines were enacted in the context of the liberalisation of the airline industry. These were complemented by another instrument, the 2005 Guidelines which were adopted amidst the rise of the LCC model, and witnessed the phenomenon of multiplication of regional airports (as described in the previous chapter). Apart from the ghost airport infrastructure problem, public consultations regarding the suitability of the then applicable Guidelines also revealed that stakeholders were often confronted with legal uncertainty, little transparency and no active enforcement of the applicable rules.\(^{82}\) It is therefore not a surprise that since the introduction of the 2005 Guidelines, the Commission had to adopt more than 60 State aid decisions.\(^{83}\) But what drove the Commission to adopt in 2014 its new Guidelines on State aid to airports and airlines are the very problems its two predecessors, the 1994 and the 2005 Guidelines, failed to avert.\(^{84}\) The new Guidelines gave particular attention to the regional airport dilemma, acknowledging that

\[…public\ funding\ to\ airport\ infrastructure\ has\ often\ resulted\ in\ duplication\ of\ (unprofitable)\ airports\ in\ the\ same\ catchment\ area,\ creating\ ghost\ airports\ and\ overcapacity\ at\ regional,\ while\ leaving\ the\ congestion\ problem\ of\ main\ airports\ unsolved\].\(^{85}\)

They did not provide clear rules on overcapacity and on the duplication of airport infrastructure.\(^{86}\) And during the due diligence process, the actual financing need and the maximum permissible aid intensity cap were left open. Under the 2005 Guidelines, no framework was set up as to determine which airport would qualify for investment aid.\(^{87}\) Moreover, the 2005 supplemented the 1994

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81 This includes EU funding
82 European Commission Memo; State aid: Commission adopts new guidelines on state aid to airports and airlines. Brussels, February 2014, p.2
83 European Commission; State aid: Commission consults stakeholders on State aid rules for the aviation sector. IP/11/445, Brussels, 7th April 2011
84 European Commission Memo; State Aid: Further details on Commission decisions regarding public financing of airports and airlines in Germany, France and Austria. Brussels, July 2014
85 cf European Commission (n 12), p. 1
86 cf EU Commission (n 12), p. 4
87 J. Ellison (Mayer & Brown), the new airport and airline State aid regime – the enemy at the gate or a benign move to better aid? Infrastructure investor, June 2014
Guidelines principles such as the one where the construction or enlargement of airport infrastructure was still considered

“to be part of the exercise of public functions, serving the realization of the Member States’ transport policy”.  

Only after the Leipzig-Halle judgement was it established that the construction of airport infrastructure with a view to its subsequent commercial use is an economic activity and shall be prima facie aid to the operator. Before that the Court ruled, this principle was not yet abided and the supervision of the construction of such buildings, less stringent. The 2005 Guidelines stated in point 32 that funding granted to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest. However, the LCC business model relied explicitly on the use of such airports for their intra-Union flights. Therefore, the funding for the expansion of infrastructure of small regional airports was not considered as being distortive aid. This enabled small regional airports to expand and try to attract LCC traffic by offering brand-new, publicly financed infrastructure.

Moreover, the 2005 Aviation Guidelines have not pushed for national schemes to specify precisely the requirements under which aid could be given, or for the identity of the grantor and beneficiary to be disclosed and perhaps, worryingly, from the few cases where the aid was notified and which led the Commission to initiate a formal procedure, the decision-making process was perceived to be slow by stakeholders, giving rise to a certain element of impunity or laissez faire.  

Which improvements did the 2014 Guidelines then bring about? The 2014 Aviation Guidelines are an important legal instrument as it aligned the State aid regime with the developments that have impacted the sector of the aviation industry. Their introduction substantiates the efforts by the Commission to increase the clarity and transparency of the rules and moreover, the Guidelines encourage the Member States to set up their own national aid schemes for aid granted to small airports, thereby speeding up the State aid analysis-making process.

As regards investment aid, the 2014 Guidelines categorize airports according to size, and the entitlement to public financing will eventually depend on the

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88 cf Bartosch (n 46), p. 623  
89 At Paragraph 95 of Joint Cases T-455/08 Flughafen Leipzig Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission and T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt/ Commission  
90 Cf European Economic and Social Committee (26), p. 3  
91 cf 2014 Guidelines (n 62), point 92  
92 Size being the total number of passengers per year, see cf 2014 Guidelines (n 65), point 101
category each individual airports falls in. On top of categorizing airports on annual passenger numbers, the 2014 Guidelines also define specifically what the State aid intensity caps for each category are.\textsuperscript{93}

Even if the Commission acknowledges that some small airports will have difficulties to survive in a competitive environment without public financing, the new 2014 Guidelines aim at preventing that needed aid for small airports is invested in so-called “white elephant” infrastructure projects. The report of the Court of Auditors was published seven months after the enactment of the new Guidelines, but dealt with investments made with EU funds that took place before the enactment of the new Guidelines.\textsuperscript{94} Its report denounced just what provision 85 aims to prevent, that significant amounts of public funding (from the EU also) went to projects that remained underused after completion.

The new Guidelines set in place rules that aim at a better targeted investment aid and will allow investments only if “\textit{there is a genuine transport need and only when the positive effects are clear}”.\textsuperscript{95} Pursuant to point 101 of the Guidelines, the size of the airport will also play a role as certain aid intensity ceilings will be set depending on the amount of passengers that use the premises of the airport.

Last but not least, the 2014 Aviation Guidelines also require that the Member States disclose publicly, in an easily accessible manner, information regarding the granting authority, the beneficiary, the amount of aid granted and the expected benefits of such aid.\textsuperscript{96} This should provide accountability and control over public financing given and end the \textit{laissez faire} environment described above that the previous guidelines left unscathed.

This leads to the conclusion that the new Guidelines do provide clearer and stricter rules regarding the public financing of airport infrastructure and really aim at correcting the loopholes that its predecessors left open. But the problem didn’t only rise because of lacunae in the previous State aid regulatory framework. The fact that EU funds were also able to flow to so-called “white elephant” airport infrastructure projects stems from the governance problem affecting the EU’s regional funding policy, which involves the EU, its Member States and the regional authorities. How EU funds are distributed and what precisely is the governance problem which affects the EU funding will be the topic of the following chapter.

\footnotesize{\textsuperscript{93} Idem  \\
\textsuperscript{94} In the 2000-2013 period, see Cf Court of Auditors (n 15), point 7  \\
\textsuperscript{95} Cf EU Commission (n 12), p. 4  \\
\textsuperscript{96} Ashurt Brussels, \textit{new EU State aid guidelines on the aviation sector}, February 2014, p.3}
IV. III. INS AND OUTS OF EU FUNDING OF REGIONAL AIRPORTS

A. The labyrinth of EU funding:
The phenomenon of the multiplication of regional airports in Europe would not have been possible, or at least would not have had such an impact on the aviation industry, without the availability of EU funding for all kinds of projects. However, the manner in which these funds are eventually transferred to the entity that runs the airport project in need of funding remains quite blurry. Therefore, this chapter will aim at clarifying the main sources of EU funding and it will discuss whether there is in fact a governance problem affecting the EU’s regional funding policy.

European Union funds flow to different projects all across Europe through three main channels: the European Regional Development Fund, the European Social Fund ("SF") and the Cohesion Fund. The European Regional Development Fund and the European Social Fund are also referred as the Structural Funds as they aimed at investing into social and economic restructuring across the EU. By doing so, they attempt at reducing gaps in development between European regions, notably in terms of infrastructure and employment. Alongside with the Cohesion Fund and other funds, they form the European Structural and Investment Funds (ESIFs). The ESIFs are the financial tools supporting the EU’s regional policy and form, together with the Common Agricultural Policy, the bulk of EU budget expenditure. For the 2014-2020 period, the ESIFs will have at their disposal an allocated budget of €322 billion as stated in article 91 of Regulation No. 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, of which € 60 billion will be spent on improving network infrastructure in transport and energy.

Even though one has to remember that Member States are still the principle entity in charge of creating and maintaining transport infrastructure, the ESIFs are a vital source of funding for regional airports. EU regional policy is indeed vital for granting financial assistance for projects which in normal market conditions would maybe not be funded as generously by private market

97 For the purpose of this article, that Fund will not be addressed.
98 European Commission; The European Union explained: Regional Policy. Luxembourg, Publications Office of the European Union, 2014, p.6
99 Which are not relevant for the purpose of this article
100 In cf Court of Auditors (n 15), it is referred as “Cohesion Policy funds for infrastructures”
101 European Commission, European Structural and Investments Funds: Data. 2015, retrieved via: https://cohesiondata.ec.europa.eu/overview
102 Regulation 1303/2013 which lays down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.
investors. On the other hand, the manner in which regional policy funding has been managed has come, in particular during the economic crisis of 2008, under pressure for reform. The former EU Commissioner for Regional Policy, Johannes Hahn, stated in September 2013: “More than ever before the policy framework is encouraging investments in line with the "better spending" principle. We have a duty to ensure that taxpayers’ money is invested in an efficient and effective way. We have to ensure that we make the best use of these funds. This is even more imperative at these times of tight fiscal constraints. (... The emphasis is on results and not on spending”.

However, the report of the court of Auditors shows otherwise as the audit lays bare that of the 20 EU-funded airports audited, 7 were not profitable and may face closure unless financed by public money for a long period of time.

Interestingly enough, the investments made within the framework of EU regional funding policy are not going directly from the EU treasury to the recipients of the funding. The investments are operated through a shared management system, which includes the European Commission, national, regional and even local authorities. The Commission sets up guidelines for the planning of operational programmes (OPs), and consults, accepts and supervises the carrying out of the OPs proposed by the managing authorities in the Member States. So the management and the delivery of the programs is delegated to the Member States authorities (at governmental, regional or local level). EU funding is paid indirectly to the beneficiaries through EU-accredited national and regional bodies, which in turn will make direct and individual payments to the beneficiaries of EU funding. In practice however, many problems have arisen regarding the management and the supervision of these funds, as will be described in the next sub-chapter.

B. The governance gap

As described above, the management and supervision of the funds flow from the EU to the Member States’ public authorities. Of course, such authorities have to work with the Commission as regards funding approval and oversight of the projects but they do have a considerable amount of discretion, following the decentralization trend that has had an impact on European policy-making. A report from the Advisory Council on International Affairs identifies a “shift in

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103 Informal ECOFIN; remarks by Johannes Hahn: Commissioner for Regional Policy. Vilnius, 2013, p. 2
104 cf Court of Auditors (n 15), p.5
105 ibid, p. 09
106 cf The EU Explained (n 99), p. 7
107 ibid, p.9
governance” and stresses that the EU Commission should strive to adapt itself to the ongoing decentralization, also when adopting legal instruments.  

However, the EU does not seem to have adapted accordingly to that trend as it allowed the authority to grant such an important source of funding to be delegated to regional and local entities which in a lot of cases do not possess the relevant set of tools nor the political power and independence to effectively choose which projects to fund, and how they should be monitored once funded. The authority to allocate such grants should be based on the capacity to choose among several projects, and independently assess its merits. That capacity is certainly hindered when the regional and local authority has a particular interest in seeing a project being completed, as a region or local community can benefit greatly from the opening (or widening) of an airport nearby, creating the expectation of enormous economic opportunities. It seems that in this case the regional managing authorities are both umpire and player. As Blom-Hansen points out:

“EU control mechanisms are weak and that the goals formulated at the EU level are likely to be remoulded in the implementation process in order to suit the preferences of the implementing actors at the national level.”

The 2014 Guidelines do impose on the Member States transparency and monitoring requirements. In point 162 of the Guidelines, Member States either at national or regional level must make public the relevant information regarding State aid to airports, including the full text of the approved aid scheme, the identity of the granting authority and the identity of the individual beneficiary. Point 164 further stipulates that the Member States must keep detailed records of all the measures involving the granting of public financing, so as to establish that the compatibility conditions have been observed. However, already in 2005, the Court of Auditors published another report on the Commission’s internal control and management system of EU investments made in the context of the trans-European network for transport (TEN-T). There it found that in relation to investments made through ERDF and the CF:

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110 Ibid, p. 625

111 The Court of Auditors, Special Report No 6/2005 on the Trans-European Network for Transport, 2005
“The Commission’s project monitoring tools are insufficient. The different reports on projects status and progress submitted by beneficiaries do not always provide sufficiently relevant information to the project officers who in addition do not systematically carry out on-site inspections and ex post impact assessments.”

Moreover, the report adds that “the coordination of Community funding to transport infrastructure projects do not allow the Commission to detect all cases of over or double funding”.112

This seems to have gone by largely ignored as seen with the manner the EU funding has been invested in regional airport infrastructure after the publication of that report. The regional bodies which allocate the funding enjoy a substantial amount of leeway and discretion as to how they will spend the funds granted for the different programs and are wary of any kind of supervision by a higher authority (e.g. the central government). As we can see in Member States (such as Belgium, Spain or Germany) which have a strong federal or regional devolution of power from the central government, any kind of rules or guidelines as to how the allocated funds ought to be spent could be considered as a breach of their regional prerogatives. There is therefore a governance problem. That leads to what The Court of Auditors denounces in its report:

“EU funding is not well coordinated by the Member States and, in particular as regards major projects and cohesion fund projects, is insufficiently supervised by the Commission (...).”113

If the EU Member States are unwilling or reluctant to exercise a stricter control on the use of EU funds for Regional Development, the Commission should take up this role. It ought to set in place a mechanism that effectively coordinates EU funding and establishes a stricter selection and supervision criteria, not only on the central governments but also at regional level, so as to determine more clearly which project should be funded and which shouldn’t.

Moreover, in order to prevent further distortion of the market, the aid granted for the construction of airport infrastructure, that later appeared to be not necessary, must be recovered. A precedent can be found with State aid114 granted by the municipalities of Gdynia and Kosakowo to Gdynia airport of a total amount of approximately 21 million Euros.115

112 Ibid, p. 3
113 cf Court of Auditors (n 15), p.5
114 In this case, the funding did not seem to come from the EU’s resources
115 IP/14/138, State aid: Commission orders Poland to recover incompatible State aid from Gdynia airport, 2014. The negative decision was revised on the 26th of February 2015 but still resulted in a negative decision.
V. CONCLUSION

The liberalization of the airline industry has had many impacts on the EU’s economy. The changes mentioned affecting the airline and airport industries have brought many benefits, such as customer welfare and regional development, but they also resulted in new types of challenges. One of these challenges comes from the fact that in order to compete with other regional airports located in the same catchment area as well with traditional airport hubs to attract LCC traffic, many have expanded or duplicated their infrastructure. The core of the problem lies in that much of the regional airport infrastructure was built with the help of public financing, flowing either from the Member States’ own resources or from the EU funds. There is therefore a competition law concern as aid from public authorities can threaten the fair competition inside the EU airport industry.

As regards the regulatory framework in place in relation to the public financing of airport infrastructure projects, several legal instruments were studied. Apart from the core treaty article, 107 and 108 TFEU, other legal instruments such as the Commission’s 1994 and 2005 Guidelines on State Aid to Airlines and Airports were also of relevance. These Guidelines set the substantive rules that Member States’ aid schemes (through which EU funding also flow) have to follow in order to comply with EU State Aid rules. Yet these instruments did not achieve to stem the tide of public money (including EU funding) going to economically unviable airport infrastructure projects. However, as the newly introduced 2014 Guidelines on State aid to Airports seem to be a coherent legal instrument, succeeding in correcting the inconsistencies left by its predecessors. The 2014 Guidelines did provide a satisfactory solution to the problem.

On the other hand, the Commission will need to review its regional funding policy as regards the manner in which EU funds are invested in airport infrastructure projects. The need stems from the fact that the management and scrutiny over EU structural funding to regions is delegated to the Member States’ central government who in turn sub-delegates such responsibilities to regional/local authorities. Even if these regional authorities have to follow the Commission and its Guidelines when allocating EU funding, there still seems to be an inherent policy problem as these regional authorities are given significant amount of EU money to invest without maybe having the necessary tools or experience to effectively choose where to invest the EU funding. The Member States seem unable or unwilling to ensure the oversight. And on the Commission side, the seems to be a lack of oversight capacity to effectively organize the cooperation between the public authorities granting, managing and supervising the funding, so as to prevent the squandering of EU taxpayer’s money.
Therefore, there seems to be a governance vacuum involving the EU, the central government of the Member States and the regional authorities regarding the manner in which funds from the EU flowed to the regions without proper scrutiny over the management of these funds. In order for the EU to completely address the problem of the building of redundant regional airport infrastructure, in part financed with EU funds, it should strive to combine a regulatory solution, brought by the introduction of the 2014 Guidelines, with a governance one addressing the shortcomings of the present regional funding policy.