



FACULTY OF LAW
Lund University

Yan Dai

The European Union's State Aid to airports and its
compatibility in the light of services of general economic
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Supervisor: Eduardo Gill-Pedro

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SUMMARY

The development of air transports is more and more important in the EU, and the EU air transport policy is also experiencing a transitional period. In the context of the EU special state aid policy and services of general economic interest policy, the public funding to airports in the EU should be paid more attention.

In order to explain how EU state aid rules are specifically applied in the area of airports and when the public funding is compatible with the internal market if the state aid exists. So, the key questions of the thesis are: Under what conditions will public funding to airports be classified to state aid; If so, when the public funding will be compatible with the internal market; Finally, what is the way in which state aid rules apply in the field of airports in light of the objectives of the EU?

The thesis argues that to constitute state aid to airports, the requirement of “undertaking” and four conditions under the EU state aid rules need to be satisfied. The Union uses the state aid control to develop the EU single market and competition in it. Then, if state aid exists, it can be compatible if it meets the four-condition SGEI test or the requirements under Article 107(2) and (3) TFEU. The compatibility rules aim to reconcile the competency conflict between the EU and the Member States.

ABBREVIATIONS

CJEU	Court of Justice of the European Union
EU	European Union
GBER	General Block Exemption Regulation
MEO	Market Economy Operator
SGEI	Services of general economic interest
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
THE CHARTER	Charter of Fundamental Rights of the European Union

1.INTRODUCTION

1.1 Background

Air transport has been more and more important in the current society because of its efficiency, convenience, and economy. In the European Union, it also plays a significant role. To make solidarity, the connection is established from different perspectives such as economic, political, cultural, etc. Among these perspectives, transport is definitely a considerable one. Under PART TWO and PART THREE of TFEU¹, the free movement of goods, services, citizens and workers shall be protected to make sure the EU internal market could be established and developed. Development of transports for passengers and ferries between the Member States is helpful for the development of all of these elements. Therefore, it is important to improve air transport services in the EU and the most basic thing is that applying and interpreting relative rules linked to the EU air transport services.

However, under the market economy, operation of airports is not as favorable as imagine. Sometimes the market may fail. For instance, airports cannot attract enough airlines and passengers and then they cannot get enough payment from providing air transport services. In addition, some airports could be very important to certain groups of consumers or all citizens. But if the market works well, the airports will be given up by the market because of its poor profitability. The consumers possibly have considerable difficulties in living, working and free access to other areas of the EU. Accordingly, in these situations, either to remove a market failure or help certain groups of consumers, supports for airports are necessary. And the supports could be state aid under the meaning of Article 107(1) TFEU which are prohibited as the article says. So, the issues that when the support to airports is state aid and whether it is possible to let the supports permissible under EU state aid rules are worth being discussing.

¹ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJC202/47.

Moreover, after the Brexit, the relation between the European Union and the Member States could be an issue. Whether the control of EU is too broad and intensive and how the conflicts between the EU and the Member States run are problems. Accordingly, in the process of examining the application of EU state aid rules in the field of airports, the possible conflicts and the aims of the Union will be discussed meanwhile.

1.2 Purpose and Addressed Questions

The purpose of the thesis is to explain how the EU state aid rules are applied specifically in the area of airports and when the public funding is compatible with the internal market if the state aid exists. Besides, what are the EU's objectives by applying and interpreting the state rules in the current way is another researching object of the thesis too.

So, the addressed questions are:

Under what conditions will public funding to airports be classified to state aid.

If so, when the public funding will be compatible with the internal market?

Finally, what is the way in which state aid rules apply in the field of airports in light of the objectives of the EU?

1.3 Method

The methods applied in the thesis are doctrinal research which means the research process to identify, analyze and synthesize the content of the law² and teleological interpretation which means the Union has to be understood as a system for achieving certain objectives.³ Doctrine means “a synthesis of rules, principles, norms, interpretive guidelines and values” which “explains, makes coherent or justifies a

² Dawn Watkins and Mandy Burton, *Research Methods in Law* (eds, Routledge 2013) 9

³ Mark Atew, ‘*Teleological Interpretation and Land Law*’ (1995) 58 *The Modern Law Review* 696.

segment of the law as a part of a larger system of law.⁴ Therefore, under the EU law, the targets of using doctrinal research mainly include the Treaties⁵ which are primary law; regulations, directives, decisions, and other secondary legislation; cases and other related legal documents.

For instance, when the questions linked to state aid are discussed, Article 107(1) TFEU is important as a primary law. And Regulation (EC) No 69/2001 and Regulation (EU) No 651/2014 are also taken in to account as secondary legislation. At the same time, a lot of cases like *Altmark*⁶ are included too.

Collecting related documents is a beginning to organize the thesis after the fundamental idea was built. For the author, checking the Treaties⁷ and the Charter⁸ which are primary law is always the first step. They are the most fundamental and directive resources for analyzing and are normally the origin of principles and legal norms. Everything in the Treaties and the Charter shall be the start point of application and interpretation because they own a primary position and the provisions normally provide guidance on how rules should be applied. However, how to interpret the provisions is not necessarily in the same way. At least, before the European Courts' explanation, there is an open space for the EU institutions and national courts to interpret the provisions, as long as they do not breach current rules. After it, related secondary law and guidelines are searched. These documents usually can be supplementary to help

⁴ Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange 2002) 1; Deryck Beyleveld and Roger Brownsword, 'Methodological Syncretism in Kelsen's Pure Theory of Law' in S.L. Paulson and B.L. Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press, Oxford 1998).

⁵ TFEU; Consolidated version of the Treaty on European Union [2016] OJ C 202/13; Charter of Fundamental Rights of the European Union [2016] OJ C 202/396

⁶ Case C-280/00 *Altmark* [2003], ECR I-07747.

⁷ TFEU; TEU

⁸ Charter of Fundamental Rights of the European Union [2016] OJ C 202/396

interpret EU law. Cases are also always essential in legal research. So, the next step is to find related cases. Searching them on the case website is one way of doing it, another efficient way is to collecting related case in the process of reading an authorized textbook in which generally important cases are included. And in the process of analyzing, it is necessary to repeat reading and understanding those documents and compare the words under them to find the objectives of the legislators about how to apply and interpret them. Because after reading the documents the first time, there are so many legal notions in mind at the same time and it is easy to mix or misunderstand some of them. So, it is important to look back and read again and again.

Moreover, in the process of the repute, deeper objectives of the legislators may be found too. A word, a phrase or a provision can be tools of the legislators to express themselves. For instance, the words “distort competition” under Article 107(1) TFEU which prohibit state aid may show that the Union’s objectives to protect competition and market efficiency in the internal market. The use of teleological interpretation reflects the fact that the scope of Community action is defined by the objectives set out in the EC Treaty.⁹

1.4 Outline

Chapter 2 concerns the EU state aid rules including definition, characteristics, and reasons for controlling it under the EU background first. These are basic knowledge to help explain the specific application of state aid rules in the field of airports. And then it will apply the state aid rules, especially the application of its definition to examine under what conditions will the public funding to airports be classified to state aid under the meaning of Article 107(1) TFEU.

Chapter 3 provides an insight into the services of general economic interests(SGEI) and focus on the application of Article 106(2) TFEU, and then uses the SGEI test on public

⁹ Attew (n 2). 696

funding to airports in order to explain when the funding will be compatible with the internal market in the light of SGEI rules.

Chapter 4 refers to the specific application of state aid rules and SGEI rules to airports and explore what are the objectives behind it. Followed by Chapter 5 which is the conclusion of the thesis.

2. STATE AID

The purpose of this Chapter is to explain the application of EU State aid rules in light of the airports. This chapter starts with a general application of state aid rules as a basis to help understand the application of it to airports. And then the aid to airports is examined. The key point of this chapter is the test of the presence of state aid.

2.1 Definition of State Aid

There is no concrete definition of state aid under the Treaties of the EU. It is still relatively open to the application of it. However, under Article 107(1) TFEU and secondary legislation and the European Courts' case-law, there is some interpretation of it. Article 107(1) TFEU which is the most important provision of the definition state aid provides:

Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market.

Accordingly, there are several elements to check the definition of state aid and examine whether it exists. In the development of the EU Court case-law, the elements of the presence of state aid are :

A. Economic advantage obtained by the recipient undertaking¹⁰

B. State resources¹¹ and imputability to the State¹²

C. Selectivity¹³

D. No distortion to competition and no effects on trade between the Member States¹⁴

According to Article 107(1) TFEU, state aid is automatically incompatible with the internal market if it exists although it may be defined compatible after the compatibility tests. State aid cannot be found if not all conditions under Article 107(1) TFEU are satisfied.¹⁵

2.2 History and Current Context of State Aid

In the history of the development of the state aid legislation in the EU, it has experienced a long and tough process. There are several reasons for explaining it. Unlike the development of competition law, which is addressed to private actors, state aid shows the action by public actors. Although the Member States showed their willingness to be integrated into the solidarity, an action by the States was still excluded in EU rules in a long time. And after the establishment of the common market in EEC, more attention was paid to the development of a single market within the EU from an

¹⁰ Altmark, paras 83–4

¹¹ Case C-379/98 PreussenElektra [2001] ECR I-2099, para 58

¹² Case T-358/94 Air France v Commission [1996] ECR II-2109, para 55

¹³ Case C-200/97 Ecotrade [1998] ECR I-7907, para 40

¹⁴ Case C-372/97 Italy v Commission [2004] ECR I-36, para 55

¹⁵ Case C-56/93 Belgium v Commission [1996] ECR I-723, para 79

economic perspective.¹⁶ The purpose of competition policy is also improving the common market. The state aid was easy to be ignored.

The first rule of state aid was set out in the Treaty of Rome in 1957 which was later than the first competition rule 40 years.¹⁷ After that, in TEC and TFEU, state aid rules almost maintained the same content. The EU started to change their attitude towards state aid because of market failure and financial crisis. Development of state aid rules got a turning point in 2005 when SAAP was published. The commission found it was necessary to reform state aid policy at that moment because of new challenges. Apparently, the EU paid more attention to internal market concerns than political economy concerns of state aid until SAAP was established.¹⁸ This is also a conflict lasted in the whole process of development of state aid policy.

Now, the basic legal framework of state aid consists of Article 107 to Article 109 TFEU. Article 107(1) TFEU prescribes several criteria to constitute state aid. Once a state action falls within Article 107(1) TFEU, it should be treated as state aid and is *ex ante* forbidden because it is incompatible with the internal market. Article 107(2) and (3) TFEU rule the derogations of Article 107(1) TFEU under which state aid is permitted because of compatibility with the internal market. Then Article 108 TFEU shows procedural issues of state aid. Notification of state aid before implement is necessary under Article 108 TFEU. And it shows the Commission has broad discretion on the application of state aid rules. Article 109 TFEU gives the Council power to intervene in the process of solving state aid problems under Article 107 and Article 108 TFEU by making regulations.

¹⁶ Michael Blauburger, 'From Negative to Positive Integration: European State Aid Control Through Soft and Hard Law' [2008] SSRN Electronic Journal 8 <<http://www.ssrn.com/abstract=1660981>> accessed 1 May 2019.

¹⁷ Hussein Kassim and Bruce Lyons, 'The New Political Economy of EU State Aid Policy' (2013) 13 Journal of Industry, Competition and Trade 1, 3.

¹⁸ Kassim and Lyons (n 16).

2.3 Why Does the EU Need to Control State Aid?

Maybe there are only limited categories of state aid which are defined in EU law. The distinction between economic services and non-economic services (or public services) probably leads to it.¹⁹ Nevertheless, with the development of those market connected to non-economic services, more and more state actions will probably be covered by EU state aid rules.

2.3.1 Why Member States act state aid?

The premise to deal with why the EU controls state aid is to explicit why state aid exists. The reasons why state aid exists include economic reasons, social reasons, and political reasons. First, under a perfect market, every economic element runs well, and it is a successful market. Unfortunately, more often markets fail because of all kinds of deviation. Therefore, states may intervene the market failure as an external actor to protect market efficiency and other factors. As far as public funding to airports, the quantity and quality of air services provided by airports to the airlines and other consumers may be inefficiently low or high and thus has an adverse impact on the operation of the airports as well as the efficiency of the EU market. Providing state aid by the Member States could remove those failures and restore the air services provided in the failed market.

Second, the unfair distribution of welfare is present sometimes even the economic market runs well. Because under the market competition, the distribution of social welfare is influenced by the competition between different market participators. The more competitive an entity is, the more resources it may receive. But social stability problems may occur. This problem could be solved by state actions when it grants the actors who have a disadvantage spot in wealth distribution and then the social welfare is protected. Maximize welfare is also easier to achieve by doing so. This social consideration often provides the main rationale behind regional aid and certain types of

¹⁹ Kelyn Bacon, *European Union Law of State Aid* (Third edition, Oxford University Press 2017) 8.

aid for services of general economic interest.²⁰ In terms of airports, for instance, some isolated areas or islands may get fewer opportunities to provide air services according to their low competitiveness in the market. But those airports is possibly significant to citizens. State aid can resolve those problems through a redistribution of social resources.

Third, state aid could be used as a political tool for helping special interest group of stakeholders. And it can help a government to intervene in national economics and then help to achieve benefits. And in the field of airports, in order to increase the profitability, state aid may be granted to airports which can make profits in the market to expand its market power.

However, not all of these aids above are allowed, according to EU state aid rules. As mentioned before, the general situation for state aid is assumed incompatible with the internal market under Article 107(1) TFEU. Absence of state aid and exceptions of the prohibition of state aid can prove the public funding is permissible. The exceptions are ruled in Article 107(2) and (3) TFEU. In addition, Article 106(2) TFEU also provides compatibility for state aid in the light of services of general economic interests. And Article 108 TFEU authorized the power for the Commission to apply the review of existing state aid. For example, compensation for public service, like the compensation in *Altmark*, it is a good reason to make the public funding compatible with the internal market which is in accordance with the social reasons of Member States. Because the general interest of the public is a significant social consideration of Member States. On the contrary, it is hard for the aid to a champion undertaking from a public authority to be approved compatible with the internal market because it breaches the running rules of a market.

2.3.2 Why does the EU control state aid?

²⁰ *ibid* 9.

As an opposite dimension, why does the EU control state aid? The reasons for the control also can be analyzed from an economic perspective and a political perspective. From an economic perspective, when the Member States have too much discretion on intervening their economics, it is easy for them to take their domestic economic benefits into account first. The benefits of other Member States involved in the same internal market may be damaged. This is against the objective of the establishment of the internal market. Besides, competition may be distorted by the aid because of its help to some participants in the market and the relative market share or market position of them could be changed. In order to keep competition vigorous, maintain an efficient market and thus protect the benefits of the internal market, the EU needs to control state aid which may have a negative impact on the economic market.²¹ This is also in accordance with the EU's single market policy.

From a political perspective, there are stakeholders holding different economic purpose and different economic influence under the EU market. The consequences of the situation are that their achievement from public spending is different.²² State aid could be a tool to cope with the problems to reconcile the wasteful public spending between different stakeholders by resisting pressure from special interest groups of stakeholders. And then it attributes to a more efficient economic outcome in the EU market. For the EU, state aid is a powerful tool and put the EU integration to move forward. In addition, subsidy races having an adverse impact on the EU market perhaps occur if national governments have considerable discretion of application of state aid. Accordingly, state aid control is useful for avoiding wasteful subsidy races which could potentially distort competition in the EU market ignite market inefficiencies.²³

²¹ Bacon (n 18), 5

²² Tony Joris and Marc Jegers, 'State Aid Policy in the EU Member States' [2013] European State Aid Law Quarterly 330

²³ James Langenfeld and Christopher Alexander, 'State Aid and Supply-Side Geographic Market Definition' [2013] European State Aid Law Quarterly 362.

The conflicts like the competency conflict between the Member States and the EU under the EU law have already occurred. These conflicts penetrate the whole procedure of the establishment and development of EU integration.

Not only general elements but also the EU transport policy is important to explain the application of state aid rules applied in the area of airports. Article 4 TEU explicit that the competence of transport is shared between the EU and the Member States. In TFEU, TITLE VI refers to provisions related to transport services in the EU. Although they apply to transport by rail, road and inland waterway²⁴, rather air transport, they still can be a reference to EU's objective on the transport sector. For example, Article 93 TFEU rules "aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligation inherent in the concept of a public service", it shows the Union's willingness to take Member States' benefits on transport services into account to some extent.

Moreover, the Commission held "the paramount goal of European transport policy is to help establish a system that underpins European economic progress, enhances competitiveness and offers high-quality mobility services while using the resource more efficiently."²⁵

Accordingly, state aid policy is connected to internal market policies, competition concerns, political concerns, and transport policy when applying in the area of air transport.

2.4 Characteristics of State Aid under EU Law

Because the EU is a special community having its special aims on EU integration, the EU's state aid system based on its special objective is also unique. Connected with the

²⁴ TFEU, Article 100

²⁵ Commission, Roadmap to a Single European Transport Area—Towards a competitive and resource efficient transport system, (White paper, 144, 2011). Para17

reasons why the Union control state aid above, the state aid policy is linked to the internal market, competition concerns and political concerns. From the EEC (European Economic Community) in the Treaty of Rome, the objectives included the establishment of a common market.²⁶ Now, Article 26 TFEU rules the aim of the Union is to establish the internal market and in PART TWO and PART THREE the freedom of goods²⁷, services²⁸, establishment²⁹, workers³⁰ and citizens³¹ are regulated too. This is one of the EU's special objectives which is linked to state aid policy. Besides, the EU state aid rules is a part of competition rules in TFEU. Therefore, the EU's competition rules shall be taken into account when the state aid policy is established. In addition, how to balance the competence between the Union and the Member States runs through all EU rules including state aid rules. So, it is a factor needs to be considered in state aid policy too. Accordingly, the EU state aid rules are characteristic under the EU context. That is why Article 107(1) TFEU sets out a *prima facie* prohibition of state aid if it distorts of competition and has effects on trade of the Union. In addition, that is also why state aid under Article 107(2) and (3) and Article 106(2) could be permissible after assessment.

Compared with the US where there are no state aid provisions but only cases, the EU's state aid system has not only Treaty provisions, but also regulations, and guidance initiated by the Commission. Besides, unlike some Member States' legislation which does not distinguish the motivation of state aid, the EU does that. This confirmed in *Altmark* in which case the Court said that a compensation granted by a government is not a state aid if it satisfies four conditions.³² The reason why the EU state aid is special

²⁶ Treaty of Rome, article 2

²⁷ TFEU article 34-36

²⁸ TFEU article 56

²⁹ TFEU article 49

³⁰ TFEU article 45

³¹ TFEU article 21-21

³² Caroline Buts, Marc Jegers and Tony Joris, 'Determinants of the European Commission's State Aid Decisions' (2011) 11 Journal of Industry, Competition and Trade 399.

in the international context is that the system is linked to the internal market policies, competition policies, and political elements.

In the field of airports, in addition to the objectives in White paper mentioned before³³, the Commission holds state aid policy in the area of aviation services aims to secure a level playing field among airports in EU while recognising the importance of regional airports for local development and accessibility of remote regions³⁴. Consequently, special policy in the area of air services is necessary to be taken into account when understanding the EU state aid policy in the field of airports.

2.5 Relation Between State Aid Rules and SGEI Rules

First, both of SGEI and state aid has economic character. Second, they have different policy aims. While the state aid policy connected to the internal market, competition concerns, the aim of SGEI is to protect essential social welfare interest³⁵. According to Article 107(1) TFEU, state aid shall be prohibited, but Article 106(2) TFEU rules that state aid to SGEI could be lawful if certain conditions are satisfied. This shows the reconciling of different interests between the Union and the Member States. Article 106(2) could be seen as a reconcile provision.

Some SGEI could be operated without special support from the Member States, but some SGEI can be operated only when financial support exists. There is a coincident area where SGEI and state aid exist together and that is the highlight under this paper.

Besides, SGEI is one of the compatibility of state aid. The balance between SGEI and state aid shows the willingness of the Union to reconcile Member States' interests with

³³ the paramount goal of European transport policy is to help establish a system that underpins European economic progress, enhances competitiveness and offers high quality mobility services while using resource more efficiently.

³⁴ Communication from the Commission — Guidelines on State Aid to Airports and Airlines [2014] OJ 99/5(Aviation Guidelines); Bacon (n18) 278.

³⁵ Bacon (n18) 114

the EU's. Therefore, SGEI rules are significant to understand EU state aid policy and the objectives behind it.

2.6 State Aid Analysis

With the development of state aid case-law under the European Courts, state aid analysis is formed to check when public funding to airports is state aid under the meaning of Article 107(1) TFEU and if so, when it is compatible with the internal market. The first step is to explain under what conditions public funding is state aid. After that, the second step is to check whether the action is compatible with the internal market if it is subject to state aid rules.

2.6.1 Undertakings

First, what is state aid? What kind of state action is covered by Article 107(1) TFEU which is automatically forbidden? The legal foundation of state aid under the Treaties are basically Article 107 to Article 109 TFEU. Like mentioned before, Article 107(1) rules a basic definition of state aid which is *per se* incompatible with the internal market and derogations which are compatible with the internal market. And under Article 107(1) there are several conditions to meet for identifying a state action subject to state aid rules.

According to the case-law mentioned before which interpret Article 107(1) TFEU³⁶ and Notice on the notion of State aid by the Commission³⁷, the conditions consist of A) economic benefits or economic advantages condition; B) state resources condition; C)

³⁶ Case C-280/00 Altmark [2003] ECR I-7747, paras 83–4 ;Case C-379/98 PreussenElektra [2001] ECR I-2099, para58; Case T-358/94 Air France v Commission [1996] ECR II-2109, para 55 ; Case C-200/97 Ecotrade [1998] ECR I-7907, para 40 ;Case C-372/97 Italy v Commission [2004] ECR I-3679 para55

³⁷ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1

certain undertaking or selectivity condition, and D) competition distortion condition. In addition to these four conditions which are normally acknowledged, recipients or beneficiaries of the state aid is an important element too.

These criteria are not alternative to each other, rather, it is a cumulative result of satisfying all of them to account for state aid. In other words, a state aid within Article 107(1) TFEU has to meet all these conditions above³⁸.

In addition to the four conditions above, the word “undertakings” in Article 107(1) needs to be explained here. Because of the characteristic of the EU state aid rules which are connected to the EU competition rules, the interpretation of the word undertaking shall be understood in accordance with the one under competition law. Accordingly, the end of the aid granted by the Member States should be “undertakings” under Article 107(1). Similar to the meaning under competition law, “undertakings” in the context of state aid means entities engaged in economic activities and the legal status of the entity is irrelevant³⁹, rather, the content undertakings are operating is relevant. There is no distinction between private and public undertaking under the state aid rules only if they are doing the economic operation. This is confirmed in *Enirisorse*⁴⁰ and *Westdeutsche Landesbank*.⁴¹ In addition, it means entities which are not acting as market participators are not covered by Article 107(1) TFEU.

As far as airports, to constitute state aid under the meaning of Article 107(1) TFEU, the “undertakings” requirement needs to be satisfied so that the airports fall within the application of EU state aid rules. To examine whether airports are “undertakings”, the key point is not the form of airports rather the content of its activities.

³⁸ Bacon (n 18) 18.

³⁹ Case C-41/90, *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, para 21

⁴⁰ Cases C-34-38/01 *Enirisorse* [2003] ECR I-14243; SA.25338

⁴¹ Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, paras 193 and 266.

Whether do the airports operate economic activities? According to Aviation Guideline, “airport” means an entity or group of entities performing the economic activity of providing airport services to airlines.⁴² Therefore, airports are “undertakings” operating economic activities and fall within Article 107(1) TFEU and it may accept funding from public authorities to operate itself. This is confirmed by the Union Courts in *Aéroports de Paris*, the Court held the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity and a public-owned airports placed under the authority of the Minister does not mean that it cannot be regarded as an undertaking.⁴³ And in a later case *Leipzig-Halle airport*, the general Courts has confirmed it and held that operating the airport is economic activities because it provides airport services for money.⁴⁴

However, not all the activities of an airport are necessarily in economic nature.⁴⁵ For example, activities such as air traffic control, police, customs, activities necessary to safeguard civil aviation against unlawful interference and investments relating to the infrastructure and equipment necessary to perform those activities are considered a non-economic nature.⁴⁶ Therefore, state aid rules are applicable to the operating airport services, but not applicable to airports when the character of the airports is an entity or entities operating non-economic activities.⁴⁷ It is necessary to distinguish different activities as well as the extent of their economic nature operated by airports⁴⁸. A guided criterion is that the activities are economic ones if an airport provides services to airlines in exchange for payment.⁴⁹

⁴² Aviation Guidelines (n 34).para25

⁴³ Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-03929, para107-109.

⁴⁴ *Flughafen Leipzig-Halle GmbH (T-455/08) v European Commission*. [2011] ECR II-01311, Para93

⁴⁵ Aviation Guidelines (n34), para98

⁴⁶ *Ibid.* para35

⁴⁷ *Ibid.*para36

⁴⁸ *ibid.*para34

⁴⁹ *ibid.*para31

2.6.2 How to define state aid

After explaining why the Member States grant aid to undertakings and why the EU wants to control state aid, how do the state aid rules work and how to define a state aid and thus make it fall within Article 107(1) TFEU? After the development of EU case-law, as mentioned before, in order to constitute state aid, except the undertaking requirement, four conditions of state aid under the meaning of Article 107(1) TFEU shall be tested. And according to Article 107(1) TFEU, if the conditions are met, the state measure accounts for state aid and falls within Article 107(1) TFEU.

A. Economic advantage condition

To meet this condition, it is necessary for a Member State to grant measures “by favoring” certain beneficiaries and after the granting decision, the beneficiaries get an advantage.

A general principle of testing the advantage condition is Market Economy Operator (MEO) principle which was published and developed by the Commission.⁵⁰ It means a test to examine whether the benefits to certain recipients would have granted by a private investor under normal market conditions and thus the benefits fall within the state aid rules. This is confirmed in *Westdeutsche Landesbank* in which, the Court held that it must take account of the question whether an informed private investor, in the place of the public investor would have accepted the return.⁵¹ Therefore, if public funding would have been granted under normal market conditions by a private investor, the funding is not state aid.

⁵⁰ Notices from European Union Institutions, Bodies, Offices and Agencies [2016] OJC 262/17

⁵¹ Cases T-228 and 233/99 *Westdeutsche Landesbank v Commission* [2003] ECR II-435, para 270.

To become a measure which could be called a state aid, it is necessary for the recipients to get some improvement in their economic position.⁵² Accordingly, an action granted by a Member State could not trigger the EU state aid rules if the decision of granting is made under normal market conditions and there is no improvement of the recipients' economic or financial spot. This is connected to the distortion condition too. Because a state action towards the EU market's economic actors may have a distortion influence on the market and the influence is more likely to be triggered under abnormal market behaviors.

However, there is a problem that whether the MEO principle really applicable and how? Actually, from the author's understanding, the MEO principle is a hypothetical principle. That means, whether an informed private investor or the beneficiaries under normal market conditions exist is not sure. Maybe they do exist in the real market or they would have existed in some situations, but it is not a fixed answer. Besides, the MEO principle could be used only when state conducts are treated as economic activities in the market and the state is viewed as a market participant in order to compare the investors under an economic market. Accordingly, to make use of the MEO test to find a state aid, the distinction between the State's measure as a public entity and as a market actor is necessary.⁵³

However, there is a paradox between this test and the meaning of state aid itself. The body who can make state aid is definitely the states holding public power and sovereignty. On the contrary, the market economy actor principle requires the states to be market participants as other investors. This shows the EU state aid policy is, to some extent, complex.

⁵² Cases T-425/04 France and France Télécom v Commission [2010] ECR II-2099, para 231; Cases C-399 and 401/10 P Bouygues and Bouygues Télécom v Commission EU:C:2013:175

⁵³ Case T-196/04 Ryanair v Commission [2008] ECR II-3643, para 84; Cases T-268 and 281/08 Land Burgenland and Austria v Commission EU:T:2012:90, paras 128–9

And how does the application of the MEO principle work? It is an *ex ante* evaluation of whether the economic advantages exist, which means that the timing of applying the MEO principle is before the decision of the aid. Compared with the State's decision, a private investor under normal market conditions normally take profit into account. So, the relationship between benefits and cost is significant. This is connected to why the State has to be viewed as a market participant when using MEO principle. The application of the private investor test is confirmed in *EDF*⁵⁴ case too.

Consequently, to trigger the state aid rules, the economic advantage condition needs to be met. And state aid could be found if a private investor would not have operated the funding under normal market conditions and the recipient could get an economic advantage.

In the field of airports, to become a state aid, funding to airports needs to meet the economic advantages condition too. This is confirmed in *Ryanair*, the Court held that national law is not a factor when deciding whether the public authority acted in accordance with the private investor principle or granted an economic advantage.⁵⁵

As explained before, in the field of airports, meeting the economic advantage conditions means state funding to airports would have not been granted if it is decided under normal market conditions, and thus there is an advantage. The MEO principle which checks whether a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations⁵⁶, would have granted the same funding under normal market condition⁵⁷ is a key to check

⁵⁴ Case C-124/10 Commission v EDF EU:C:2012:318 , para34

⁵⁵ Case T-196/04. Ryanair Ltd v Commission, [2008] ECR II-03643, para98

⁵⁶ Cases T-129/95, T-2/96 and T-97/96 Neue Maxhütte Stahlwerke and Lech Stahlwerke v Commission, [1999] ECR II-17, paragraph 120; Case C-40/85, Belgium v Commission, [1986] ECR 02321, paragraph 13.

⁵⁷ Aviation Guidelines (n34), para49

whether the condition is met. In this test, public authorities are pretended to play a role of market participants, rather than public administrators.

It should be paid attention again to the MEO test shall be interpreted under the timing when state funding is decided, rather any future moment after the state decision.⁵⁸ The *ex ante* analysis approach of MEO test is also required here.⁵⁹ In other words, whether the airports could make enough profitability shall be considered in advance when the decision is made. But whether the relevant airports can really do it in the real world is irrelevant. The *ex ante* profitability analysis is the most relevant criterion⁶⁰ for the assessment of the MEO test. There are many elements required to be taken into accounts, such as the costs of the airports, the avenue of the airports including non-economic activities, and future opportunities for the airports, etc. When the MEO test is satisfied, there is no economic advantage, and the state funding to airports is not state aid.

B. State resources condition

The background of this condition was not so clear before. State resources condition has been debated for a long time about whether it should be a filter of state aid and what it concludes. And the words “aid granted by a Member State or State resources” is not clear either. Through the word “or” used in Article 107(1) TFEU, it seems that the state resources are viewed as an alternative requirement of the State’s grant.

The CJEU has explicated its position in case *PreussenElektra*, it held that both advantages directly granted by the States and those granted by a public or private body designated or established by State are needed.⁶¹

⁵⁸ Aviation Guidelines (n34) para48; Case T-360/04 Stardust Marine [2007] ECR II-00092, paragraph 71; Case C-124/10P European Commission v EDF, [2012], not yet reported, para 84, 85 and 105.

⁵⁹ Aviation Guidelines (n34), para51

⁶⁰ *ibid.* para61

⁶¹ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para58

Like the relation between economic advantage condition and state resource condition, the economic burden is required, and it is a cumulative result with the State's grant. And both direct and indirect state resources transfer account. The CJEU held even some potential burdens on the State like loan amount to economic burden.⁶² The definition "state" is also interpreted in a broad way. Not only the central government but also regional and sector governments are "states".⁶³ Consequently, a grant by a regionally public authority on which there is an economic burden could be a state aid if the "undertakings" requirement and other three criteria of state aid under Article 107(1) are met. And a further test is whether the states actually have the burden rather undertaking controlled by the states is necessary too.

In terms of airports, this condition needs the funding to airports is transferred from state resources and it is imputable to the states at the same time. To constitute state resources as a condition to find state aid to the airports, the presence of actual exercise of controlling the resources is required and in the field of public undertaking's resources, the actual control could not just be presumed when the states are in a position to control a public undertaking.⁶⁴ Several examples of state resources within the state aid test may be in the form of direct grants, tax rebates, soft loans to airports.⁶⁵

C. Selectivity condition

Under Article 107(1) TUEU, "certain undertakings" implies that the recipients of state aid need to be selected ones rather all undertakings. To meet this criterion, the favorable treatment of certain undertakings shall occur. Although the selectivity condition is always associated with the economic advantage condition, it is necessary to distinguish them. Because the situation is simpler when the aid is granted to an individual

⁶² Cases C-399 and 401/10 P *Bouygues and Bouygues Télécom v Commission* EU:C: 2011:551, para55

⁶³ Case 248/84 *Germany v Commission* [1987] ECR 4013, para 17; Cases T-267 and 279/08 *Région NordPas-de-Calais v Commission* [2011] ECR II-1999, para 108.

⁶⁴ *Aviation Guidelines* (n 34), para39

⁶⁵ *ibid.* para38

undertaking where the selectivity condition is usually presumed.⁶⁶ However, it is more difficult to find the selectivity out when state aid is granted to a group of undertakings. Because the comparators are more likely unsure and putting the aid in a “comparable legal and factual situation” with its comparators is significant.⁶⁷ In practice, this criterion is a difficult one among all state aid conditions. Because there are different types of selectivity and the factors involved are considerable and tough. It should be examined case by case.

D. Effect on competition and trade condition

In addition to the three conditions above, Article 107(1) TFEU also includes a requirement that the aid “distorts or threatens to distort competition” and “affects trade between the Member States”. The affection of competition and trade seems to be similar, but they are different. Although they usually occur in the same case, they can be covered in different cases too. According to the development of the test of this criterion, the timing should be the moment when the aid decision was made “even if the measure in issue is an unnotified aid which has already been implemented”⁶⁸. So, it is an *ex ante* evaluation.

About the test of competition, it is important to compare the recipient’s financial position with the situation before an aid, and the market structure. When the test is implemented, the actual effect is not essential, a likely effect on the distortion of the market is enough.⁶⁹ And about the test of effect on trade, the extent of the effect requires to intra-EU level in order to make the state measure under the EU sovereignty. Like

⁶⁶ Case T-499/10 Commission v MOL Magyar [2013] appeal under Case C-15/14, para 60

⁶⁷ Case C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, para 41

⁶⁸ Bacon (n18) 83.

⁶⁹ AG Fennelly in Case C-83/98 P France v Ladbroke Racing and Commission [2000] ECR I-3271, opinion, para 31; Cases C-57 and 61/00 P Freistaat Sachsen and Volkswagen v Commission [2003] ECR I-9975

mentioned before, domestic issues in a Member State do not fall within the scope of the EU law.

In the area of airports, this criterion could be seen as an overall analysis of state funding to airports because all of these state aid conditions end in the distortion of the common market. And it is the hardcore of implementing the Union and Member States' function at the same time.

To assess competition between airports, a good criterion is the choice of airlines, in particular by comparing factors such as the type of airport services provided and clients concerned, population or economic activity, congestion, the level of charges and other factors.⁷⁰ Among these factors, the charge level is a key one⁷¹, because the charge is easily affected by public funding. Therefore, a strengthening of an airport's competitive position in the internal market and the distortion of competition could be defined if obviously more airlines choose the airport, who is the recipient of a state funding, to receive its airport services. The internal market is connected by all kinds of factors under it, once the competition is affected, it is hard to maintain the trade stable like before. They normally happen with each other. Moreover, even public funding to a local or regional airport can affect trade between the Member States.⁷² Therefore, it could be concluded that the distortion condition is relatively easy to rely on to define a state aid under the meaning of Article 107(1) TFEU and it corresponds to the objective of the Union that establishing a common market.

Accordingly, public funding to airports constitutes state aid under the meaning of Article 107(1) TFEU if the undertaking requirement and the four conditions mentioned above are satisfied. And this is the first step of the analysis of state aid. After it, the state aid may be decided compatible with the internal market according to special

⁷⁰ Aviation Guidelines (n 34).para43

⁷¹ *ibid*.para43

⁷² *Ibid*. para45; *Altmrk*(n 5), para77-82

reasons. Of course, the presence of state aid could be found only after the conditions under *Altmark* are not met.

2.6.3 What is not state aid?

The reason why the author is trying to find the absence of state aid is that the kind of public funding is not state aid which falls within the Article 107(1) TFEU, and thus could not be controlled by the Union. It could be seen as a method for the Member States to avoid being controlled by the Union.

First, *de minimis* Regulations⁷³ published by the Commission imply that some aid falls outside Article 107(1) TFEU. It published the first regulation in 2001 which was revised by the Commission in 2006, and then a new regulation published in 2013 is valid now. Under *de minimis* Regulation, all sectors of state aid are covered except some special ones.⁷⁴ The regulation is applied when aid is within a small amount which does not over a fixed period and the recipient of the aid is a small-scale entity. The reason why the Commission does that is that in these situations, the effect on competition and trade condition is not satisfied.

Second, in *Altmark*, the economic advantage condition is involved. The Court held that a state measure which is a compensation for the public service obligation carried out by the recipient undertaking is not state aid and falls outside Article 107(1) TFEU because there is no financial advantage after the compensation⁷⁵ and the economic advantage condition mentioned before is not satisfied. The test in *Altmark* to find whether the state activity is state aid has been used to now, including four criteria which

⁷³ COMMISSION REGULATION (EU) 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance [2013] OJL 352/4 (de minimis Regulation)

⁷⁴ Ibid, Article 1

⁷⁵ *Altmark* (n 5), 87.

are similar to the ones under Article 106(2) TFEU. These two tests show the objective of the EU to reconcile the conflict of power between the EU and the Member States.⁷⁶

Accordingly, the state measure caught by *de minimis* Regulation and *Altmark* is not state aid and the related situation will not trigger Article 107(1) TFEU. However, it does not avoid another EU law coming into play.

2.6.4 Compatibility of state aid

If there is state aid, the next step is to clarify whether the aid is compatible with the internal market, but the aid still needs to be notified to the Commission and let the Commission decide whether it is compatible. Therefore, the state aid, which is compatible with the internal market, is still under the control of the Union. There are several legislations relative to the compatibility of state aid. Article 107(2) TFEU establish the aid deemed compatible while Article 107(3) TFEU covers the aid may be compatible. These two paragraphs are the exception of the prohibition under basic rules in the first paragraph.⁷⁷ Another Treaty provision Article 106(2) TFEU rules that certain measures including services of general economic interest may be allowed. In addition to the two Treaty provisions, the Commission has laid down a General Block Exemption Regulation⁷⁸ which rules certain categories of state aid could be permissible even if every condition under Article 107(1) TFEU is met. And these aid under GBER does not to be noticed to the Commission like general state aid under Article 108 TFEU.

2.6.5 Notification of state aid

According to Article 108 TFEU which is the procedural provisions of state aid, all aid meeting the conditions in Article 107(1) TFEU in the Member States shall be informed

⁷⁶ Case C-202/88 France v Commission EU:C:1991:120, para 12

⁷⁷ Bacon (n 18), 92.

⁷⁸ Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ('GBER') [2014] OJ L187/1.

to the Commission by the relevant Member States before enforcement. The only exceptions of notification are regulated in GBER and De minimis Regulation⁷⁹ where it is not necessary to meet the notification requirement under Article 108(3) TFEU. And the power of granting or altering state aid is under the Commission. An aid measure could not be implied as long as it is not granted and informed by the Commission.

2.7 Enforcement of State Aid Rules

The basic entities involved in the enforcement of state aid rules are the Commission, the European Courts, and the National Courts which are the principal stakeholders of state aid rules.

Among them, the author thinks that the function of the Commission in enforcing state aid rules is the most notable one. The Commission plays an important role in applying the compatibility rules of state aid; guiding the application of state aid rules through adopting legal documents. It has exclusive jurisdiction to determine whether aid is compatible with the internal market⁸⁰ and national courts have to safeguard the jurisdiction of the Commission through the so-called “standstill clause”⁸¹ as well as enforcing Commission decisions.⁸² The Commission could be understood as a bridge between the European Court and the National courts and it links to both of the two other stakeholders closely. The function of the Commission in the enforcement of the state aid rules is being noticed of state aid measure and executing investigations of the measure and making the decisions. Also, the Commission is responsible to take cases before the European Courts when the Member States do not comply with state aid rules

⁷⁹ De minimis Regulation (n74)

⁸⁰ Case C-354/90 FNCEPA v France [1991] ECR I-5505, para 14; Case C-39/94 SFEI v La Poste [1996] ECR I-3547, para 42;

⁸¹ Case 120/73 Lorenz v Germany [1973] ECR 1471, para 8; Case C-354/90 FNCEPA v Commission [1991] ECR I-5505, paras 11–12

⁸² Case 77/72 Capolongo [1973] ECR-00611, para 6

obligations well.⁸³ The legal basis of the Commission's exclusive rights of doing above is Article 108 TFEU and Procedural Regulation⁸⁴, Implementing Regulation⁸⁵, And Simplified Procedure Notice⁸⁶ and the European Courts' case-law. Accordingly, the Commission has broad discretion when implementing the state aid rules.

The European Court is addressed two main characters. First, like mentioned above, it is entitled to deal with the cases taken before it by the Commission against the Member States when they do not comply with state aid obligations well, according to Article 108(2) TFEU. Besides, the same issues may be taken by the Member States against the other Member States. Secondly, reviewing the state aid decisions made by the Commission is the European Court's another responsibility under Article 263 TFEU.⁸⁷

National courts control non-state-aid measure which falls outside Article 107(1) TFEU and enforces state aid rules, especially, Article 107 and Article 108 TFEU. And it is national courts' burden to prove their activities are outside Article 107(1) TFEU. In order to avoid their action being controlling by the EU Court and the Commission, the National Courts need to use non-state-aid rules to make those action controlled by themselves or use the compatibility rules to make the aid permissible which still need to be noticed to the Commission. A conflict between the EU's competence and the national courts can be found here.

3. SERVICES OF GENERAL ECONOMIC INTEREST

⁸³ Bacon (n 18), 499

⁸⁴ Council Regulation (EU) 2015/1589 of laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[2015] OJL 248/13

⁸⁵ COMMISSION REGULATION 2015/ 2282 Amending Regulation (EC) No 794/ 2004 as Regards the Notification Forms and Information Sheets[2015] OJL 325 /3

⁸⁶ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJC 262/3

⁸⁷ Bacon (n 18), 499.

3.1 Definition of SGEI

In view of the objective, what Article 106(2) TFEU pursues is essential social welfare interests.⁸⁸ There is no clear and precise regulatory definition of the concept of an SGEI under EU law⁸⁹. However, the SGEI Communication provides a reasonable definition that a task, or a set of tasks, assigned to one or more undertakings, the performance of which is for the benefit of all citizens or in the interests of society as a whole, and which undertakings would not perform without the State's intervention.⁹⁰

Member States has broad discretion on the definition of SGEI⁹¹ except for manifest error⁹². But the discretion is not unlimited.⁹³ The objective pursued by SGEI mentioned above needs to be taken into account. Therefore, the extent of defining an SGEI by the States shall be limited to the activities would have not been provided by others under normal market conditions.⁹⁴ Moreover, although compared to the wide discretion of

⁸⁸ Bacon (n18), 114

⁸⁹ Bacon (n18), 114; Case T-289/03 BUPA v Commission [2008] ECR II-81, para 165

⁹⁰ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest Text with EEA relevance [2012] OJ C 8/4(SGEI Communication) ; Bacon (n18) 114.

⁹¹ SGEI Communication, para 46; Commission Staff Working Document-Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest [2013](SGEI Guide), para 23–4; Case T-17/02 Olsen v Commission [2005] ECR II-2031, para 216

⁹² SGEI Communication, paras 46 and 48; European Union framework for State aid in the form of public service compensation (SGEI Framework) [2012] OJ C8/15, para 13; Case C-320/05 P Olsen v Commission EU:C:2007:573, para 216; Case T-289/03 BUPA v Commission [2008] ECR II-81, paras 166 and 169

⁹³ Case T-289/03 BUPA v Commission [2008] ECR II-81, para 168.

⁹⁴ SGEI Communication, para 48

Member States, the Commission only has limited scrutiny in the definition of SGEI⁹⁵, the States' behavior still under the review of the Commission.

3.2 Legal framework of Services of General Economic Interest

3.2.1 SGEI package

“To clarify the key concept underlying the application of the State aid rules to public service compensation”⁹⁶, the Commission published an SGEI Decision, SGEI Framework, and SGEI Communication in 2011 which is call SGEI package. Later, the Commission adopted *de minimis* Regulation in 2012 and SGEI Guide in 2013 as additional to the SGEI package. As mentioned earlier, the SGEI Decision set “safe harbor” rules for SGEI under which SGEI is automatically compatible with the internal market and does not need to go to the notification step.

3.2.2 SGEI provisions in the Treaties

In addition to Article 106(2) TFEU in which SGEI is brought out directly. Article 14 TEU, Article 36 the Charter also refer to SGEI. Actually, these primary EU provisions contain a considerable consideration to balance the conflict between entities in the Union. The relation between SGEI and state aid is also implied in the application of conditions of *Altmark* and Article 106(2) TFEU.

3.3 Article 106(2) TFEU

Application of Article 106(2) is one of the compatibility tests of state aid under Article 107(1). Aid to SGEI under Article 106(2) is compatible with the internal market after the presence of state aid is found out. Conditions of the test under Article 106(2) are

⁹⁵ Case C-280/00 *Altmark* [2003] ECR I-7747, para 89; Case C-320/05 *P. Olsen v Commission* EU:C:2007:573, para 141

⁹⁶ SGEI Communication, para 3.

similar to the ones under *Altmark*. But the purposes of them are different.⁹⁷ While the aim of *Altmark* test is to determine whether services of general economic interest meet the economic advantage of state aid⁹⁸, the aim of SGEI test is to permit the state aid compatible with the internal market and reconcile the interest between the Union and the Member States. Although the conditions are similar, the failure of application on the conditions of *Altmark* does not preclude the application of conditions in Article 106(2).⁹⁹ Therefore, this chapter will look at conditions under the tests first, and then compare the two tests, and the specific application to airports is discussed too.

3.3.1 Conditions under *Altmark*

In *Altmark* where the compensation for a public service does not amount to state aid because of a lack of economic advantage, a four-limb test was adopted. The compensation is not state aid if four conditions are met. The aim of the test is to check whether the would-be aid is decided “under normal conditions”.¹⁰⁰ In the judgment of *Altmark*, the four conditions are:

First, clearly defined public service obligations: the recipient undertaking must actually have public service obligations and the obligations will be examined whether clear or not.¹⁰¹

Second, objective parameters: the parameters of calculating the compensation must be established in advance in an objective and transparent manner to avoid it conferring an economic advantage to the recipient undertaking.¹⁰²

⁹⁷ Case T-125/12 *Viasat Broadcasting UK v Commission* EU:T:2015:687, paras 62–3 and 85–6

⁹⁸ *Ibid*, paras 57 and 83

⁹⁹ *Ibid*, paras 90-92

¹⁰⁰ Case T-125/12 *Viasat Broadcasting UK v Commission*[2015] ECLI:EU:T:2015:687, paras 57 and 83

¹⁰¹ *Altmark* (n 5), para 89

¹⁰² *ibid.* para 90

Third, necessity: the compensation cannot exceed necessity so that it does not give any advantage which distorts or threatens to distort competition.¹⁰³

Fourth, efficient undertaking comparator: the recipient undertaking shall be chosen either pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community or on the basis of an analysis of the costs which a typical and well-run undertaking.¹⁰⁴

In this case, the public funding satisfying these four conditions is not state aid and does not under the control of the Commission.

3.3.2 Conditions under Article 106(2) TFEU

Article 106(2) TFEU is one of the compatible situations of state aid which means the state measure is compatible with the internal market even if the state aid conditions are satisfied. However, like all of the derogations of EU rules, it needs to be interpreted strictly.¹⁰⁵ Furthermore, this Article 106(2) test have been always closely linked to the first three conditions under *Altmark* test.¹⁰⁶ According to the SGEI package, the EU Court's case-law, and the Commission's practice, 5 conditions of application of SGEI has been settled down. Those conditions under Article 106(2) separately are:

First, genuine SGEI: SGEI should really exist. However, as mentioned before, there is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission.¹⁰⁷ Therefore, Member States have broad discretion on defining SGEI and proving its

¹⁰³ *ibid.* para 93

¹⁰⁴ *ibid.* para 93; Bacon (n18), 57

¹⁰⁵ Case 127-73, BRT and SABAM [1974] ECR-00051, para 19

¹⁰⁶ Bacon (n 18) 114.

¹⁰⁷ Case T-289/03 BUPA v Commission [2008] ECR II-81, para 165.

existence¹⁰⁸ which is not unlimited¹⁰⁹. SGEI Communication explained the social welfare under SGEI.¹¹⁰

In the field of airports, although Member States has broad discretion on the definition of SGEI, public service obligations shall be in accordance with Regulation (EC) No 1008/2008¹¹¹ which regulates the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services.¹¹² According to the Regulation, public services obligation on airports can only be imposed with regard to a specific route or group of routes¹¹³ which is “scheduled air service” under the regulation. This shows some lines for Member States to define SGEI in the field of airports.

Second, entrustment: the operation of an SGEI must be entrusted special task by the State to one or more undertakings.¹¹⁴

As far as airports, like the general requirement under the SGEI test, SGEI needs to be enforced by a public authority to the undertakings too.¹¹⁵ This is the certificate for the airports to operate SGEI. Compared with this requirement, the requirement of necessity

¹⁰⁸ SGEI Communication, para 46; SGEI Guide, pp 23–4; Case T-17/02 Olsen v Commission [2005] ECR II-2031, para 216

¹⁰⁹ Case T-289/03 BUPA v Commission [2008] ECR II-81, para 168.

¹¹⁰ SGEI Communication, Paras46-50

¹¹¹ Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community [2008] OJL 293/4

¹¹² Ibid, article 1

¹¹³ Aviation Guidelines (n 34).para70; see Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community [2008] OJL 293/4, article 16.

¹¹⁴ SGEI Communication, Para 51; Cases T-204/97 and T-270/97 EPAC v Commission [2000] ECR II-2267, para 126; Case T-17/02 Olsen v Commission [2005] ECR II-2031, para 186; Case T-289/03 BUPA v Commission [2008] ECR II-81, para 181.

¹¹⁵ Case T-289/03 British United Provident Association Ltd (BUPA) v Commission [2008], ECR II-81, paragraphs 171 and 224

and trade of intra-Union are more important. Therefore, the state aid to airports is possibly compatible with the internal market under Article 106(2) TFEU if the public service obligation is entrusted to airports by public authorities.

Third, necessity: Because Article 106(2) derogates from the State aid rules, the derogations only to the extent what is necessary¹¹⁶ for the undertaking to perform the SGEI under economically acceptable conditions.¹¹⁷ Here, Member State also has a broad margin of testing the necessity, the Commission can intervene only when the States has a manifest error.¹¹⁸

In terms of airports, state aid is allowed to grant to them only when the need from the public cannot be met by another kind of transports.¹¹⁹ And state aid to airports most likely to compatible when such public funding to special routes is necessary to prevent certain areas from being isolated to the whole Union and has some adverse impact on social and economic development.¹²⁰ In particular, this embodied in the connection with some isolated area and islands.¹²¹

Fourth, proportionality is also a normal condition of derogation rules: the compensation is set on the basis of objective and transparent criteria¹²² and the amount is within the proportionate scope¹²³ and any other appropriate elements which are under the broad discretion of Member States again.

¹¹⁶ Bacon (n 18) 117.

¹¹⁷ SGEI Communication, para 47-48; Cases C-147–148/97 *Deutsche Post* [2000] ECR I-825, para 49; Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917, para 96.

¹¹⁸ *ibid.* para 48, see *Stardust Marine* judgment, paragraph 71. Case C-124/10P *European Commission v EDF*, [2012], not yet reported, paragraphs 84, 85 and 105.

¹¹⁹ *Aviation Guidelines* (n 34), para70

¹²⁰ *ibid.*para72

¹²¹ *ibid.*para72

¹²² Case T-137/10 *CBI* [2012] ECLI:EU:T:2012:584, paras 189–92

¹²³ SGEI Communication, para 21

Fifth, development of trade: like measures under competition law and state aid rules, aid to SGEI shall not affect the development of the trade of the Union too. The interest of the Union is paid attention to.

3.3.3 Comparison between *Altmark* test and Article 106(2) test

<i>Altmark</i> criteria	106(2) criteria
Clearly defined public service obligations	Genuine SGEI and entrustment
Objective parameters of compensation	Proportionality
No overcompensation	Necessity and Proportionality
Efficient undertaking comparator	Development of trade

Diagram 1

Although the *Altmark* conditions are similar to the relevant conditions under the SGEI test in the process of application, such as Member States' wide margin and avoiding overcompensation, etc, they are still different. From the author's understanding, the most two important differences are: first, the aims of these two tests are different which is explained before in this chapter; second, the conditions under *Altmark* is not as strict as the ones under Article 106(2). For instance, a contractual act may suffice the condition of the public act under *Altmark*,¹²⁴ but it does not meet the entrustment condition of SGEI.¹²⁵ Besides, when taking account of the amount of the funding, the

¹²⁴ Case T-137/10 CBI v Commission EU:T:2012:584, para 109

¹²⁵ Case T-461/13 Spain v Commission EU:T:2015:891, para 71.

Altmark test takes costs and revenues into account¹²⁶ while Article 106(2) test also examines the authenticity of the so-called revenues.¹²⁷

4. EU'S SPECIFIC APPLICATION OF STATE AID RULES AND COMPATIBILITY RULES IN THE FIELD OF AIRPORTS

Through the application of the EU state aid rules, SGEI rules and the specific application on airports, this chapter explores what are the objectives behind the application on airports and how does EU specifically interpret the rules in the field of airports. As a basis to understand, the objectives of state aid policy and SGEI policy and the impacts of them are reviewed first, and then the chapter focus on how those rules are applied in the area of airports and what are the objectives behind Aviation Guidelines.

4.1 Under State Aid Policy

In the increasing development of state aid policy, the objectives of the EU shall not be separated. As mentioned before, the EU state aid policy has its own characteristics because of the special position of the EU and the context in the EU. The EU's legislation of state aid is inherently political. It restrains the ability of democratically elected governments to invest and subsidize as they wish.¹²⁸ The author considers the restrains is to highlight the central power of the EU in order to meet its objectives of maintaining political power. And the words in Article 107(1) TFEU obviously show the willingness of the EU to protect the internal market and competition in it.

¹²⁶ *Altmark*, para 92; Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497, para 84; Case C-399/08 *Commission v Deutsche Post* [2010] ECR I-7831, para 43; SGEI Communication, paras 60–1.

¹²⁷ Decision 2008/136/EC *Dutch public broadcasters* [2008] OJ L49/1, paras 125–6, upheld in Cases T-231 and 237/06 *Netherlands v Commission* [2010] ECR II-5993.

¹²⁸ Kassim and Lyons, '*The New Political Economy of EU State Aid Policy*' [2013] *Journal of Industry, Competition & Trade*, 1

The impacts of the EU state aid policy could be seen from two aspects: first, state aid, under the meaning of the EU state aid rules, is proved that has the ability to distort markets and undermine competition; second, it produces legal clashes as the EU's legal order confronts established national laws and historic policy settlements.¹²⁹ The effect on social policy of national governments is also included when state aid policy affect the competence between the EU and the Member States' and this was coordinated by the EU through SGEI policy. The tension between the EU and the Member States is caused by the state aid policy because the state funding measure could under the control of the EU but the control may influence the Member States' competency, especially on social sectors. However, the treaty provisions governing state aid are complex.¹³⁰ Article 107 TFEU settles the prohibition of state aid and the exceptions but does not explicit how to apply them. Therefore, it is hard for the Commission and national governments to implement the rules in the same way and the tension may be intenser.

4.2 Under SGEI Policy

As confirmed in a series of case law, the Union has taken a mitigated approach to apply SGEI rules which allows the Member States to prove the compatibility of the state aid rather prohibiting everything. It is, to some extent, a favorable approach for the Member States because it shows that the Union would like to comply with the fundamental principles under Article 2 and Article 3 TEU by giving respect to Member States' competence.

According to SGEI Communication, the relation between the Union and the Member States on how to utilize their competence was manifested: The Union leaves a large discretion to the Member States to set what kind of services are under the notion of SGEI.¹³¹ At the same time, the Commission, as an EU institution, could intervene only

¹²⁹ *ibid.*2

¹³⁰ *ibid.*4

in a manifest error.¹³² The broad discretion of the definition of SGEI owned by the Member States shows the EU's respect for the competence of Member States. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally. The role of the Commission is to ensure that the means employed are compatible with Community law"¹³³ In *Corbeau*¹³⁴ and *Almelo*¹³⁵, the Court held "The question which falls to be considered is, therefore, the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions." It could be concluded that the Court's aim was to give a broad interpretation of the compatibility of SGEI so that the justification under Art106(2) TFEU could be applied and so that to reconcile the interests between the Union and the Member States.

Under the analytical approach of the Union, its proportionality test is also important to look at the Union's attitude and its policy behind it. Compared with other proportionality test developed in other EU market rules like free movement rules, the one under Art106(2) TFEU has a special characteristic. That is "the Court's test under Article 106(2) TFEU, is that it is 'softer' than the three-pronged proportionality test"¹³⁶. The feature shows the measures which are incompatible with competition rules do not need to be the most efficient one, instead, just merely need to be an appropriate and

¹³¹ SGEI Communication, para45. "the concept of services of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned".

¹³² SGEI Communication para48; Case C-124/10P European Commission v EDF, [2012], not yet reported, paragraphs 84, 85 and 105.

¹³³ SGEI Communication, para46.

¹³⁴ C-320/91 Criminal proceedings against Paul Corbeau [1993] ECR I-2533, paras. 13–20.

¹³⁵ C-393/92 Gemeente Almelo and ors. v. Energiedrijf Ijsselmij NV [1994] ECR 1477, paras. 46–50.

¹³⁶ Wehlander Caroline, *Services of General Economic Interest as a Constitutional Concept of EU Law* (T.M.C Asser Press, 2016) 124

necessary one. As the proportionality test normally requires the measure which restricts free movement need be the most efficient one. In other words, there are no measures else which are less harmful could reach the same result. Regarding the judge in *Albany*¹³⁷, the proportionality test under SGEI rules do not as strict as the normal one. It suggests that, in the field of SGEI, the Union respect the competence of the Member States under Art106(2) TFEU. Thus, regarding the nature and predictability of the Court's approach under Article 106(2) TFEU, the CJEU has consistently construed Article 106(2) as a reconciliation test rather than a true proportionality test¹³⁸.

The exemption on SGEI implies has a balanced effect on the relationship between the EU and the Member States. The author considers the EU may take account of the integration of the EU in a long-term way through governing relative competences and respecting the States' political authority to maintain the stability of the EU's society as a whole one. The compatibility to SGEI also shows the EU's preference for economic efficiency, rather political integration.

4.3 Under Aviation Guidelines

4.3.1 Background

The background of the specific application of the state aid rules and SGEI rules in the field of airports is the objectives and the impacts of state aid policy and SGEI policy. Like explained above, the EU aims to protect the internal market and competition in the market through controlling the states' measure which amounts to state aid. Meanwhile, the EU intends to reconcile the Member States' interests with the EU's, especially from a social perspective by using the compatibility test under SGEI policy. However, the complex treaty content and unclear interpretation of the state aid and

¹³⁷ Case C-67/96 *Albany* [1999] ECR I-05751, para105.

¹³⁸ Cruz Julio Baquero, *Beyond competition: services of general interest and European community law*.

De Búrca G (ed) *EU law and the welfare state*. Oxford University Press, Oxford 2005)

SGEI rules bring problems. As far as to state aid to airports, there is less specific interpretation in the area. Moreover, air services are going through a transformation period.¹³⁹ Therefore, the interpretation of the application of the state aid rules and SGEI rules in the field of airports is necessary. The key questions when applying state aid rules and SGEI rules are: first, under what conditions will public funding to airports be classified to state aid. Second, if so, when the public funding will be compatible with the internal market? Third, what are the EU's objectives under the specific application of state aid rules and SGEI rules in the light of airports?

Besides, by enforcing state aid rules and SGEI rules, the legal position of the Commission is significant. Under Article 108 TFEU, the Commission has the exclusive rights to decide whether state aid under Article 107(1) is compatible with the internal market. In the area of air services, the Commission has been successful in putting in place a comprehensive range of measures to establish a single market in aviation.¹⁴⁰ In addition, the Commission has a regulatory role as a competition authority, which means it does decisions and policy with respect to state aid control.¹⁴¹ In the competition area, including state aid, the Commission acts in a quasi-judicial capacity.¹⁴² Accordingly, the Commission and its legal documents have a profound effect on the application of state aid rules in the field of airports. And the jurisprudence of the European Courts has tended to support the Commission.¹⁴³ Although the Guidelines only limit the behaviors of the Commission itself, it can be substantive after the provoking by the Union Courts. And its function is as a basis for the exercise of discretion.¹⁴⁴ Accordingly, it is

¹³⁹ Kassim Hussein, *Air Transport and the European Union-Europeanization and its limits* (Palgrave Macmillan 2009), 253

¹⁴⁰ *Ibid*, 129

¹⁴¹ *Ibid*, 182

¹⁴² *Ibid*, 183

¹⁴³ *Ibid*, 207

¹⁴⁴ Joint case C-189/02 P Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others

important to explore the objectives of the Commission and the EU by looking at the interpretation under Aviation Guidelines.

4.3.2 Application of state aid conditions

To fall within the scope of state aid under the meaning of Article 107(1) TFEU, the Guidelines provides the assessment of the presence of state aid, especially the application of economic activities and MEO test. The operation of airports is an economic activity,¹⁴⁵ and an airport or airports could be economic entity or entities which in accordance with the “undertakings” under Article 107(1). For airports, they can also constitute economic units, the Guidelines explicit it in para32. For the definition of economic units of airports, the Commission held significant involvement in airports’ commercial strategy could constitute an economic unit.¹⁴⁶ And this argument was adopted by the Union Court in *Ryanair Ltd v Commission*¹⁴⁷. Consequently, the direct conclusion of agreements with airlines or the setting of airport charges would constitute a strong indication that the relevant entity performs the economic activity of operating the airport.¹⁴⁸ As mentioned in Chapter 2, the requirement of undertakings is one of the conditions to constitute state aid. Therefore, the broad scope of economic entities shows the Commission’s aim to make it easier to define a state aid to airports which can fall within the control of the EU.

Then, the economic advantage condition is also included by the Guidelines, especially the MEO principle. The Commission verifies the private investor principle is applicable under the MEO principle in the field of airports.¹⁴⁹ The Commission will examine

[2005] ECR I-05425; Case C-397/03 P Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commissio [2006] ECR I-04429.

¹⁴⁵ Aviation Guidelines (n 34), para 27

¹⁴⁶ *ibid.*para32

¹⁴⁷ Case T-196/04 *Ryanair Ltd v Commission*, [2008] ECR II-3643, paragraph 88.

¹⁴⁸ Aviation Guidelines (n 34), para27

¹⁴⁹ *ibid.*para49

whether the public funding to the airport would have been granted by a private investor, under the same normal market conditions. If the MEO principle is applied which means the public funding to airports would be granted under normal market conditions by a reasonable investor, the funding is not state aid. Besides, the MEO test is assessed on the basis of the timing of the decision of the funding, rather later situation, this is an *ex ante* profitability test.¹⁵⁰

In conclusion, the specific application of “undertakings” and economic advantage condition under state aid rules is explicated under the Aviation Guidelines. It shows the Commission’s willingness to strengthen the application of state aid in the field of airports and thus promote the development of a single market in the field of the airport through making the enforcement rules clearer and narrow the scope which could be implemented differently by the national governments. Under the Aviation Guidelines, the Commission’s competence in controlling the state aid is better-funded and more powerful.

4.3.3 Application of compatibility test

According to Aviation Guidelines¹⁵¹, the Commission uses a balanced and neutral vis-a-vis approach when dealing with the funding to airports. The balanced approach is in accordance with the one under the SGEI test which aims to reconcile the EU’s interests with the Member States’. Indeed, a lot of elements need to be taken into account and some elements are, to some extent, contrary. In order to promote the development of the whole market of the Union, those common interests of the Member States need to be respected. Because every formation of a unit, especially a large unit, the benefits of every party shall be given up or transferred to the administrators of the unit. However, at the same time, the necessarily private welfare of every party in this unit shall be

¹⁵⁰ *ibid*, para 48-51

¹⁵¹ Commission Decision (EU) 2016/152 Zweibrücken Airport [2016] OJ L34/68, para 391.

protected too. The balanced point in the process is significant. It is why the Union needs to use a balanced approach and analysis aid issues case by case.

When the Commission applies the approaches of assessment of compatibility, it rules the concrete maximum amounts of the aid could be granted to airports and special requirements to large airports and small airports.¹⁵² The application of SGEI definition is also be explained in the same way. The SGEI which could be provoked by the Member States to prove the state aid is compatible is only limited in a narrow scope. Such an obligation can only be imposed with regard to a specific route or group of routes, and not with regard to any general route originating from a given airport city or region.¹⁵³ As a result, the competence of the Member States to apply public services which comfort to national social goals is difficult to meet, and the discretion to define compatibility of state aid is limited, thus the Commission can take a more positive place when making decisions.

In addition to SGEI, the balanced approach is also embodied in the application of necessity and proportionality test under compatibility. Every balanced approach needs to take positive and negative effects into account and chose a position which is more suitable for the overall result. In the application of SGEI rules in airports, it also needs to be considered in the same way.

¹⁵² Aviation Guidelines(n34), para17

¹⁵³ Ibid,para70

Positive Effects	Negative Effects
Contribution to an objective of common interest	Avoidance of Undue negative effects on competition and trade between the Member States
Need for state intervention	
Appropriateness of aid	
Incentive effect	
Proportionality	

Diagram2¹⁵⁴

From para 84-105, the Guidelines specifies the concrete application of the compatibility of state aid to the airport which refers to the size of the airport, the annual number of customers, etc. It shows the Commission's purpose to reconcile the Member States' interest with the EU's. However, the details which leave narrow scope for the Member States to interpret also shows the willingness of the Commission to control the compatibility test and leave limited space to Member State to provoke.

Accordingly, in the field of airports, the Union balanced approach is corresponded to the balanced approach, to some extent, of the SGEI policy. However, the Commission's purpose of establishing and developing a single market in the field of airports is more obvious by setting down a limited scope of SGEI and details of the compatibility test.

5. CONCLUSION

¹⁵⁴ Schattat Kristina and Budzynska Natalia 'The Balancing Test for Operating Aid for Airports under the Aviation Guidelines 2014' [2018] European State Aid Law Quarterly 399, 402

The thesis explains how EU state aid rules and SGEI rules are applied specifically in the area of airports and the objectives of the EU behind it, after reviewing the fundamental knowledge related to the EU state aid rules and SGEI rules.

To constitute state aid under the meaning of Article 107(1) TFEU, public funding to airports need to meet an undertaking requirement and four state aid conditions. According to Aviation Guidelines, airports mean an entity or group of entities performing the economic activity of providing airport services airlines. It meets the undertaking requirement, which means the entity operating economic activity in the market, of state aid. But it is necessary to differentiate the non-economic activities of the airport from the economic ones. For example, air traffic control and police customs are not airports' economic activities. Then, state funding needs to satisfy four conditions to find a state aid which falls within Article 107(1) TFEU. A. Economic advantage condition requires the funding would not have been granted under normal market conditions. The MEO test always helps check whether the economic advantage exists. B. State resource condition needs the public funding to airports is transferred from state recourses and imputable to the state. C. Selectivity condition requires only certain airports, rather all airports are the recipient of the public funding. D. Effect on competition and trade conditions needs the public funding to airports has a distortion effect on competition and has an effect on trade of the internal market. If public funding to airports satisfies the undertaking requirement and four conditions above, it accounts for state aid under the meaning of Article 107(1) TFEU and it is *prima facie* prohibited unless it can be proved compatible with the internal market.

Therefore, the public funding to airports constitutes state aid under the meaning of Article 107(1) TFEU, if the undertaking requirement and four state aid conditions are satisfied. And the funding is not state aid if four conditions in *Altmark* are met. Besides, the EU's objectives behind the state aid control in the field of airports are to protect the internal market, competition in it and the central power of the EU. The application of state aid rules in the field of airports is more limited than general sectors because the

interpretation of undertaking is broader and easier to meet. Besides, the *ex ante* profitability test is explicated clearer, so the Union has a clearly wide margin, to define state aid in the area of airports than general.

However, the state aid to airports could be compatible with the internal market if it meets the conditions of compatibility under Article 107(2) and (3) and 106(2) TFEU. Except Article 107(2), the Commission has broad discretion on the decision of compatibility. The compatibility approach is a balanced approach to reconcile the Member States' social interests with the EU's. The application of SGEI test under Article 106(2) TFEU is a key. To constitute an SGEI, it is necessary for state aid to airports to meet five conditions. 1) A genuine SGEI: there must be a presence of SGEI. The condition is related to the definition of SGEI, the general interest of all citizens is the core of an SGEI. 2) Entrustment: the aid to airports needs a public act from a public authority. 3) Necessity: the aid to airports is necessary when the transport services cannot be provided by other transport ways. 4) Proportionality: when the public authority considers the state aid, it needs to decide it on the basis of objective parameters and avoid overcompensation. 5) Development of trade: the state aid to airports shall not reach the extent to affect the trade of the EU's internal market.

Accordingly, state aid to airports is compatible with the internal market, if the aid meets the requirement under Article 107(2) or 107 (3), or Article 106(2) TFEU. Under Article 106(2) TFEU, the aid to airports is compatible with the internal market, if it satisfies the five SGEI conditions. However, it is pretty hard for airports to meet the SGEI conditions because the limited scope is settled down in Aviation Guidelines. Thus, the balanced approach applied in the compatibility test in the field of airports has corresponded to the objective of EU which reconciles the interest between the EU and the Member States. Nevertheless, the Commission's interpretation still pays more attention to the Union's central competence and developing the single market in the field of airports.

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