

STATE AID IN THE TRANSPORT SECTOR

One of the exceptions to the general prohibition on state aid as laid down in Article 87 (1) EC apply to the rail, road and inland waterway transport sector. Aid in this sector is, pursuant to Article 73 EC, considered to be compatible with the Community's state aid regime if it is granted for coordination of transport purposes or if it concerns public service obligations.

Aid to maritime and air transport, though not falling within the scope of Article 73 EC, is also allowed if it fulfils the conditions laid down in the respective guidelines.

The purpose of this paper is to give an overview of the legislation and Commission's policy in cases concerning transport measures. It begins with a short introduction of the concept of state aid as interpreted in transport cases and then turns to a description of Article 73 EC and the regulations based thereupon. Its second and its third part cover the guidelines for maritime transport and transport by air.

1. CONCEPT OF STATE AID

Article 87 (1) EC declares state aid to be incompatible with the common market. This means that in principle state aid is prohibited unless it can benefit from some of the exemptions in the Treaty.

The Concept of State Aid is 'objective'; the aim or intention of the granting authority does not matter for determining the nature of a measure. The Commission will only examine whether there is;

- transfer of state resources,
- economic advantage: the aid reduces the costs normally borne in the budgets of the beneficiary undertakings,
- selectivity: the aid favours certain undertakings or the production of certain goods,
- distortion of competition, and
- affect on trade between the member states.

A 'transfer of state resources' entails the use of funds belonging to, or being controlled by and imputed to public authorities. The form in which this transfer takes place does not matter. In *Italy v Commission*, Italy argued that a tax credit scheme applicable to Italian road haulers could not, by its nature, be classified as a state aid. The Court rejected this stating that "*the concept of aid embraces not only positive benefits (...) but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (...)*".¹

¹ Case C-6/97, *Italy v Commission*, [1999] ECR, I-2981, Para.15.

Whether an economic advantage has been conferred upon the beneficiary by a member state depends on whether the state did not act in the same way as a private investor would have acted. This test can, *i.a.*, be satisfied by proving that the state's measure coincides with "*a significant capital contribution on the part of a private investor made in comparable circumstances*".

In 1996 Italy granted restructuring aid to Alitalia in the form of a capital injection. After receipt of the Commission's decision, Alitalia filed a case with the ECJ in which it pointed out that the employees of the Italian State finance company responsible for the recapitalisation of Alitalia had agreed in the capital increase. According to the Court, this did not satisfy the private investor test because the motivation of the employees differed from the motivation which drives a private investor in a market economy. While the latter would act on the basis of profitability, the former were, according to the Court, driven by the fear of losing their jobs.²

The advantage that is conferred must be selective, *i.e.* it must apply to certain undertakings. Therefore, a measure which is of a general nature does not constitute state aid. However, if the application of a measure which is not aimed at a specific addressee is subject to such criteria that it can only be granted to certain undertakings the measure will be classified as selective.³

It must, also, be established that the aid is able to distort competition and that it can affect the trade between member states. In this context it does not matter whether the amount of aid is very small. According to the ECJ a small amount of aid "*is liable to affect competition and trade between Member States where there is strong competition in the sector in which undertakings receiving that aid operate*".⁴

Moreover, trade between member states may be affected even if the beneficiary is an undertaking which does not provide transport services in another state than the state of origin. The Court argues that a public subsidy may maintain or increase the supply of transport services by the beneficiary and it may, therefore, decrease the chances of undertakings which are established in other member states to provide transport services in the beneficiary's domestic market.⁵

² Case T-296/97, *Alitalia*, [2000] ECR, II-3871, Paras.80-84.

³ Case T-55/99, *CETM*, [2000] ECR, II-3207, Para.40. See also, Case C-351/98, *Spain v. Commission*, [2002] ECR, I-8031, Paras.39-45.

⁴ Case C-531, *Spain v. Commission*, [2002] ECR, I-8031, Para.63. See also, Case T-214/95, *Vlaams Gewest*, [1998] ECR, II-717.

⁵ Case C-280/00, *Altmark*, [2003] ECR, I-7747.

2. RAIL, ROAD AND INLAND WATERWAY

The legal basis for the European Community's transport policy in the area of transport by rail, road and inland waterway is laid down in Articles 70 – 80 EC. Article 73 EC gives member states the right to grant state aid to these types of transport if the aid:

- “meet[s] the needs of coordination of transport”, or
- “represent[s] reimbursement for the discharge of certain obligations inherent in the concept of a public service”.

Within the context of the coordination of transport, member states may grant aid for transport by rail, road and inland waterway in the following cases: for costs which undertakings have to bear for the use of certain infrastructure, for research and development, and the elimination of excess capacity causing serious structural problems.

Member states are required to terminate public service obligations but, certain exceptions are allowed. In case a member state decides to maintain a public service obligation falling within one of the exceptions, compensation must be granted for the costs the undertaking has to bear because of the public service obligation.

Although Article 73 EC allows for certain exceptions to the prohibition on state aid, it does not replace the general state aid regime as laid down in Articles 87 and 88 EC. Subject to certain exceptions, aid measures falling within the scope of Article 73 EC will have to be notified under Article 88 (3) EC, and the Procedural Regulations⁶ are applicable.

When Article 73 EC cannot serve as a basis to declare the aid to be compatible with the common market, the Commission has the possibility to examine it in the light of section 2 and 3 of Article 87 EC, and the block exemption regulations⁷(with the exception of the Employment regulation).

Member states may, *i.a.*, grant aid for transport by rail, road and inland waterway for certain types of investment aid, research and development the elimination of excess capacity causing serious structural problems, and the normalisation of the accounts of railway undertakings.

Moreover, although member states are, in principle, required to terminate public service obligations, certain exceptions are allowed.

⁶ Council Regulation (EC) No 659/1999 of 22 March laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty, OJ L 83, 27.03.1999, p.1; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.04.2004, p.1.

⁷ Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.01.2002, p.20.; Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises, OJ L 10, 13.01.2001, p.33.

2.1. Coordination of Transport

Coordination of transport is “government intervention in the market for reasons of transport policy”⁸ involving “some form of planning by the State”⁹.

An important indication that the aid meets the needs of coordination of transport is the degree of liberalisation of the sector. The further a sector is liberalised the smaller the need for coordination measures by member states in a sector. In a more liberalised market, the market itself will, to a certain extent, be able to achieve the required coordination.¹⁰

2.1.1. Council Regulation (EEC) No 1107/70

On the basis of Article 73 EC, a set of secondary legislation has been adopted which further specifies the exceptions laid down in this article. With respect to coordination of transport measures, Regulation No 1107/70 on the granting of aid for transport by rail, road and inland waterway¹¹ specifies, *inter alia*, the cases and circumstances in which they are compatible with the Community’s state aid regime.

Commission Decisions suggest that for an aid to fall within the scope of the regulation it does not only have to fall within one of the cases laid down in its Article 3 (1) but it will also have to fulfil the following conditions:

- the state contribution to the overall financing has to be necessary for achieving the project or the activity in the interest of the Community;
- the aid must be granted on non-discriminatory terms;
- the aid must not give rise to distortion of competition to an extent contrary to the common interest.¹²

Four circumstances allowing for an exception to the general prohibition on state aid are identified in the regulation.

2.1.1.1. Compensation to Railway Undertakings for Extra Financial Burdens

⁸ Commission Decision of 9 July 2003, 2004/261/EC, Italy – *aid in favour of certain heavy goods vehicles designed for the carriage of goods by road in order to divert heavy goods traffic from trunk road 33 from Lake Maggiore to the A26 Motorway*, OJ L 81, 19.03.2004, p.80.

⁹ Commission Decision of 24 June 2003, 2003/879/EC, Netherlands – *HVC*, OJ L 327, 16.12.2003, p.39.

¹⁰ Commission Decision of 4 May 1999, 1999/590/EC, Italy – *restructuring of road haulage and the development of intermodality*, OJ L 227, 28.08.1999, p.12; Commission Decision of 1 July 1998, 98/693/EC, Spain – *Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles* OJ L 329, 05.12.1998, p.23; Commission Decision of 9 June 1993, 93/496/EEC, Italy – *tax credit for professional road haulers*, OJ L 233, 16.09.1993, p.10.

¹¹ OJ L 130, 15.6.1970, p.1.

¹² Commission Decision of 14 July 2004, N 88/2004, Belgium – “*Steun aan de binnenvaart voor de behandeling van containers in de haven van Antwerpen*”; Commission Decision of 9 February 2001, N 597/2000, The Netherlands – “*Subsidieregeling bedrijfsgebonden vaarwegaanluiting*”.

Aid may be granted to railway undertakings¹³ with the aim of compensating them for financial burdens which they have to bear themselves and which are not borne by other transport undertakings.

Compensation must fall within one of the categories listed in Annexes I to XV of Regulation No 1192/69 which, *inter alia*, refers to certain payments in respect to family allowances, retirement and pensions and certain allowances payable to staff. They all concern costs imposed upon the railway undertakings by law, regulation or administrative action based on the special nature of the railway sector.

2.1.1.2. Infrastructure Costs

Article 3(1) (b) of Regulation No 1107/70 refers to certain infrastructure costs. As long as no common rules on the allocation of these costs exist, state aid may be granted to undertakings bearing expenditures, which other undertakings do not have to bear, and which relate to the infrastructure used by them.

The fact that this article only refers to the users of infrastructure excludes the application of this article to aid for, e.g. rail infrastructure investment.¹⁴

Various Commission Decisions seem to suggest that at least 50% of the infrastructure costs have to be borne by the beneficiary itself.¹⁵

2.1.1.3. Research and Development

Aid intended for the promotion of research and development of transport systems and technologies which are more economic for the community are permitted, in general, if they are restricted to the research and development stage.

2.1.1.4. Elimination of Excess Capacity causing serious Structural Problems

Aid for the coordination of transport may be granted if it aims at the elimination of excess capacity causing serious structural problems and if it is granted as an exceptional and temporary measure which is part of a reorganisation plan.¹⁶

¹³ Article 3 (1) (a) of Regulation No 1107/70 only applies to railway undertakings which do not fall within the scope of Regulation No 1192/69 on common rules for the normalisation of the accounts of railway undertakings (OJ L 156, 28.6.1969, p.8).

¹⁴ Commission Decision of 19 September 2001, N 500/2001, United Kingdom – *Network grants to licensed heavy rail infrastructure managers*.

¹⁵ Commission Decision of 8 September 2004, 2005/164/EC, Belgium – *investment aid in favour of Stora Enso Langerbrugge*, OJ L 053, 26.02.2005, p.66; Commission Decision of 18 August 2002, N 308/2002, Germany – *“Richtlinien über die Gewährung von Zuwendungen zur Förderung von Investitionen zum Erwerb, Erhalt, Bau und Ausbau von Eisenbahninfrastrukturen im Land Sachsen-Anhalt”*; Commission Decision of 9 February 2001, N 597/2000, The Netherlands – *“Subsidie-regeling bedrijfsgebonden vaarwegaansluiting”*.

¹⁶ In Commission Decision 98/182/EC of 30 July 1997, Italy – *Aid to road haulage companies in the Friuli-Venezia Region*, OJ L 066, 06.03.1998, p.18 the Commission considered that Article 3 (1) (d) of Regulation No 1107/70 did not cover the aid measure in question because there was rather an under

2.2. Public Service Obligations

The second category of aid considered to be compatible with the EC Treaty by virtue of Article 73 EC concerns public services. States are allowed to reimburse rail, road or inland waterway transport undertakings for the discharge of obligations inherent to the concept of a public service.

2.2.1. Council Regulation (EEC) No 1191/69¹⁷

2.2.1.1. Termination of Public Service Obligations

Article 2 of Regulation No 1191/69 defines public service obligations as “*obligations which the transport undertaking in question, if it were considering its own commercial interest, would not assume or would not assume to the same extent or under the same conditions*”.

While requiring the member states to terminate all public service obligations thus defined which are imposed on transport by rail, road and inland waterway, the regulation permits the conclusion of public service contracts with transport undertakings in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passengers.

Urban, suburban and regional passenger transport services can be excluded from these obligations in two ways:

First, member states may exclude any undertaking whose activities are confined exclusively to the operation of urban, suburban or regional services from the scope of the regulation in which case the obligation to terminate public service obligations does not apply.

In the *Altmark* case the Court held that Article 1 (1) of the regulation not only confers a right upon the member states to exclude urban, suburban or regional scheduled services completely from the scope of the regulation, but it also entitles member states to exclude only certain urban, suburban or regional services. In order to satisfy the requirement of legal certainty, member states should, however, “*clearly delimit the use made of that option of derogation, so as to make it possible to determine the situation in which the derogation applies*”.¹⁸

capacity than an excess capacity in the concerned sector. It, furthermore, believed the fact that the aid involved an increase in capacity to be contrary to the spirit of this Article.

¹⁷ Council Regulation (EEC) No 1191/69 on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 156, 28.06.1969, p.1.

¹⁸ Case C-280/00, *Altmark*, [2003] ECR, I-7747, Paras.57-58.

Second, in case a member state decides not to exclude these undertakings from the regulation's scope it may still decide to maintain or impose public service obligations on the basis of Article 1 (5) of Regulation No 1991/69.

Finally, member states may decide not to apply the obligations to terminate public service obligations to the transport rates and conditions imposed in the interest of one or more particular categories of persons, as well as exclude the possibility to conclude public service contracts concerning these rates and conditions.

2.2.1.2. Compensation

If a transport undertaking suffers financial disadvantages because of public service obligations it may apply to the competent national authorities for the termination of whole or part of the obligation in question.

The ECJ stated in *Kainunn Kiikenne Oy* that “no provision of [Regulation No 1991/69] obliges the Member States to grant [an application to apply for the termination of all or any part of a public service obligation], even if the undertaking shows that maintaining it involves economic disadvantages within the meaning of Article 5 of the Regulation”.¹⁹

The decision which the competent authority takes with respect to the request will provide for compensation for the financial burdens resulting from this decision.

Although the regulation exempts the compensation thus paid from the state aid notification procedures, it contains a binding procedure for the granting of compensation and it requires member states to forward to the Commission details of compensation payments made.

The regulation's compensation procedure aims mainly at ensuring that the companies in question receive an appropriate compensation without being over-compensated.²⁰

2.2.2. Article 3 (2) of Council Regulation (EEC) No 1107/70

Aid granted for the purpose of compensating undertakings for public service obligations will also be declared to be compatible with the EC Treaty if it falls within one of the categories listed in Article 3 (2) of Regulation No 1107/70.

Subject to the condition that no relevant Community rules exist, the reimbursement of the discharge of public service obligations will be authorised if it concerns:

- Tariff obligations which are not “*obligation[s] imposed upon transport undertakings to apply, in particular for certain categories of passengers, for certain categories of goods, or on certain routes, rates fixed or approved by any*

¹⁹ Case C-412/96, 1998 ECR I -5157, Para.26.

²⁰ Commission decision of 19 February 2003, N 588/02, United Kingdom – *Grant for long-distance coach services*.

public authority which are contrary to the commercial interest of the undertaking and which result from the imposition, of, or refusal to modify, special tariff provisions” (Article 2 (5) of Regulation No 1191/69).

- Transport undertakings or activities which are not covered by Regulation No 1191/69. Accordingly, where a member state has excluded urban, suburban or regional transport services from the scope of that regulation, compensation for the discharge of public service obligations which are granted to these undertakings might possibly be declared to be compatible with the EC Treaty by virtue of Article 3(2) of Regulation No 1107/70.

2.3. Normalisation of Railway Accounts

The aim of Regulation No 1192/69 on common rules for the normalisation of the account of railway undertakings²¹ is to compensate railway undertakings for the financial burdens which are imposed on them by national law and which other economic operators, including other transport undertakings, do not have to bear.

‘Normalisation of accounts’ is defined as “*the determination of the financial burdens borne or benefits enjoyed by railway undertakings, by reason of any provision laid down by law, regulation or administrative action, by comparison with their position if they operated under the same conditions as other transport undertakings*” and “*payment of compensation in respect of the burdens or benefits disclosed by [this] determination*”.

The regulation specifies the following classes of financial burdens or benefits:

- Classes I – IV: Classes to which normalisation of accounts shall be applied.
- Class XV: Financial burdens or benefits to which normalisation may be applied.
- Classes IX – XIV: Financial burdens or benefits which were in existence at the time of entry into force of the Regulation and to which normalisation may be applied.
- Classes V – VII: Financial burdens or benefits which at the time of entry into force of the Regulation were in existence and had to be terminated by 1 January 1971.
- Class VIII: Financial burdens or benefits in existence at the time of entry into force of the Regulation which had to be abolished by 1 January 1973.

Compensation paid on the basis of this regulation does not have to be notified.

2.4. Cases Falling outside the Scope of the Regulations

2.4.1. Direct Application of Article 73 EC

By virtue of Regulations No 2255/96 and No 543/97, Regulation No 1107/70 no longer applies to investment aid for inland shipping and aid for combined transport. In the past the Commission argued that in cases in which aid for the coordination of transport or for

²¹ OJ L 156, 28.6.1969, p.8-20.

public service obligations did not fall within the scope of the Regulation, Article 73 EC could be applied directly. In this way, certain types of aid which could not be authorised on the basis of Regulation No 1107/70, could, under certain circumstances, be directly authorised on the basis of Article 73 EC.²²

Since the *Altmark* case²³, this position no longer holds. In reply to the preliminary question whether Article 73 could be applied without taking into account Regulation No 1191/69, the Court referred to Article 3 of Regulation No 1107/70 which provides that “*without prejudice to the provisions of Council Regulation (EEC) No 1192/69 ... and of Council Regulation (EEC) No 1191/69 ... , Member States shall neither take co-ordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 [now Article 73] of the Treaty except in the following cases or circumstances*”. From this the Court derived that Article 73 cannot be relied on “*outside the cases referred to in secondary Community legislation*”.

In recent decisions the Commission complied with the *Altmark* case and Article 73 EC is not applied directly anymore.²⁴

2.4.2. Article 87 EC

In *Commission v. Belgium*,²⁵ Belgium argued that an aid falling within the scope of Article 73 EC could no longer be considered to fall within the scope of Article 87 EC on the basis that the first paragraph of Article 3 (2) of Regulation No 1107/70 specifies that it is applicable “*save as otherwise provided in this Treaty*”.

The ECJ did not follow this interpretation. It rather pointed out that Article 2 of Regulation No 1107/70 specifies that “*Article 92 [now 87] to 94 [now 89] of the Treaty shall apply to aids granted for transport by rail, road and inland waterway*”.

Accordingly, in cases where the Commission comes to the conclusion that the aid is not covered by Regulation No 1191/69, Regulation No 1192/69 or Regulation No 1107/70, it will proceed by assessing the aid on the basis of Articles 87 EC.²⁶

3. MARITIME TRANSPORT

²² Commission Decision of 24 June 2003, 2003/879/EC, The Netherlands – *HVC*, OJ L 327, 16.12.2003, p.39; Commission Decision of 19 September 2001, N 500/2001, United Kingdom – *Network grants to licensed heavy rail infrastructure managers*; Commission Decision of 5 January 2000, N 412/98, Italy.

²³ Case C-280/00, *Altmark*, [2003] ECR, I-7747; Commission Decision of 19 September 2000, N 208/2000, The Netherlands – *SOIT*; Commission Decision of 20 June 2001, N 219/2001, Austria – “*Umweltprämie für die Binnenschifffahrt*”.

²⁴ Commission Decision of 16 November 2004, N 344/2004, Belgium – “*Verlenging van regeling N 550/2001 inzake publiek private samenwerking voor laad- en losinstallaties*”.

²⁵ Case C-156/77, *Commission v. Belgium*, 1978 ECR 1881

²⁶ Commission Decision of 16 November 2004, N 344/2004, Belgium – “*Verlenging van regeling N 550/2001 inzake publiek private samenwerking voor laad- en losinstallaties*”.

In 2004 the Commission adopted the Community Guidelines on state aid to maritime transport²⁷ which revise the 1997 Guidelines and aim to increase transparency and support the maritime interest of the Community.

3.1. Scope

Any aid granted by a member state or through state resources in favour of maritime transport is covered by the Guidelines. This includes transport of passengers or goods by sea

- “between any port of a member state and any port or off-shore installation of another member state”, or
- “between the ports of a member state and ports or off-shore installations of a third country”.²⁸

In a Commission Decision of 30 June 2004 concerning a series of tax measures which Belgium planned to implement for maritime transport²⁹ the Commission stresses that the eligibility of an activity under the Guidelines, depends on whether the activity is “*intrinsically linked with maritime transport*”.

Through the analysis of measures under a flat-rate taxation scheme the Commission reached the conclusion that the sale of luxury articles and gambling, gaming tables and casinos on board “*could not be intrinsically linked with maritime passenger transport*” while such a link could be established for the sale of advertising space on board passenger ships since it considered this activity to be a “*normal activity of a company engaged in maritime passenger transport*”.³⁰

3.2. Flag Link

Aid should only be granted to ships flying the flag of a member state. Exceptions are permitted if the aid is granted in respect of ships entered in registers under point (3) of the Annex to the Guidelines, and if at least the following conditions are fulfilled:

- the ships must comply with the international standards and Community law, including those relating to security, safety, environmental performance and on-board working conditions,
- the ships are operated from the Community,

²⁷ Commission Communication C(2004) 43, OJ L 13, 17.1.2004, p.3.

²⁸ Article 1 (4) (a) and (b) of Council Regulation No 4055/86. See also Article 2 (1) of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364, 12.12.1992, p.7.

²⁹ Commission Decision 2005/417/EC of 30 June 2004, OJ L 150, 10.06.2005, p.1.

³⁰ Commission Decision 2005/417 EC of 30 June 2004, OJ L 150, 10.06.2005, p.1, Paras.133 and 138.

- the ship-owner is established in the Community and the member state concerned demonstrates that the register contributes directly to the objectives of the Guidelines.

3.3. Permissible Aid

Aid measures which may be granted under the Guidelines are fiscal measures, labour-related costs, crew relief, investment aid, regional aid, training aid, restructuring aid, public service obligations and contracts, and aid to short sea shipping.

3.3.1. Fiscal Measures

The Commission recognises the need for an improvement of the member state's fiscal climate in the light of many ship-owners flagging out their vessels and considering corporate relocation to third countries with a fiscal climate which is more attractive than the one in the member state. It, therefore, allows for tax relief measures as well as tonnage tax³¹ - both of which are classified as state aid – which aim at supporting the objectives of the Guidelines and which are supportive of the Community's maritime transport interests.

The total amount of aid granted should not be higher than the total amount of taxes collected from shipping activities, and special accounts should be held in all cases where the beneficiary also carries out activities which do not qualify for aid

3.3.1.1. Ship-Management Companies

While the above-mentioned fiscal measures can generally be granted to ship-owning companies, their application to ship-management companies is restricted; aid may only be granted for those vessels for which the ship-management company has been assigned the entire crew and technical management, responsibility for the vessel's operation has to be assumed in full by the ship-managers who also have to take over from the owner all the duties and responsibilities imposed by the International Safety Management (ISM) Code³².

3.3.1.2. Towage and Dredging

Towage only falls within the scope of the Guideline if the maritime transport activities make up for more than 50% of the activities effectively carried out by a tug during a given year.

³¹ The ship-owner pays an amount of tax, which is payable irrespective of the company's actual profits or losses, and which is linked directly to the tonnage tax operated. Member states currently applying a tonnage tax system are, for example, the United Kingdom, the Netherlands, Denmark, and Ireland. See, *i.a.*, Commission Decision of 2 August 2000, N 790/99, United Kingdom – *UK tonnage tax*; Commission Decision of 11 December 2002, N 504/2002, Ireland – *Introduction of a tonnage tax*.

³² Adopted by the IMO in 2002 (http://www.imo.org/HumanElement/mainframe.asp?topic_id=287).

However, towage activities carried out in, *i.a.*, ports or consisting in assisting a self-propelled vessel to reach a port are not considered to be “maritime transport activities” and derogation from the flag link is not possible in relation to towage activities.

Dredging activities are, in principle, excluded from the scope of the Guidelines. An exception may be made in cases where the company is registered in a member state and where more than 50% of their operational time consists in “*the transport at deep sea of extracted materials*”.

3.3.2. Labour Related Costs

In addition to the exemptions provided for in Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 EC to state aid for employment, aid to employment in the maritime transport sector is also permitted if it concerns reduced rates of income tax or of contributions for the social protection of Community seafarers employed on board ships registered in a member state in as far as they “*directly stimulate the development of the sector and employment rather than provide general assistance*”.

Seafarers are:

“- *Community/EEA citizens, in the case of seafarers working on board of vessels (...) providing scheduled passenger services between ports of the Community,*
- *all seafarers liable to taxation and/or social security contributions in a Member State, in all other cases*”.

In case a “*clear link*” to contributions for social protection or income tax can be established, a member state may also choose to reimburse ship-owners for the costs arising from the levies in stead of reducing the rates. Besides the existence of a “*clear link*” the Guidelines also require the system to be “*transparent and not open to abuse*” as well as without an element of overcompensation.

3.3.3. Training Aid

While aid granted with a view of ameliorating and updating Community officers’ skills³³ and aid for the professional retraining of high-sea fishermen who would like to work as seafarers may be allowed, financial contributions for on-board training can only be paid in cases where the trainee is not a member of the crew.³⁴

A member state can also grant aid for research and developments which focus on quality, productivity, safety and environmental protection.

³³ This aid may be granted during their whole career.

³⁴ See for example Commission Decision of 16 November 2004, N 376/2004, Germany – “*Ausbildungsbeihilfen für deutsche Seeschiffahrtsunternehmen – bundesdeutsche Richtlinie zur Förderung der deutschen Seeschiffahrt vom 23 April 2004*”.

Finally, aid to training is covered by Commission Regulation No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 EC to training aid³⁵.

3.3.4. Public Service Obligations and Contracts

Article 4 of Council Regulation No 3577/92³⁶ provides that public service contracts may be concluded or public service obligations may be imposed “*as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from an between islands*”, and it states that “*where applicable, any compensation for public service obligations must be available to all Community shipowners*”.

The Guidelines require the duration of public service contracts to be limited to a “*reasonable and not overlong*” period.³⁷

3.3.5. Short Sea Shipping

Short-sea shipping means the transport between ports in the territory of the member states. Aid for this activity is allowed if it aims at decreasing the launching costs of short-sea shipping services in order to promote these services.

The aid will only be authorised if the beneficiaries are ship-owners, and if it fulfils all the conditions laid down in the Guidelines. Derogation from the flag link is not possible.

4. TRANSPORT BY AIR

4.1. 1994 Guidelines

The 1994 Guidelines concerning the application of Articles 92 (now Article 87) and 93 (now 88) of the EC Treaty and Article 61 of the EEA Agreement to state aid in the aviation sector were adopted after the completion of the liberalisation programme for Community air transport. In the light of an increased competition it became necessary to ensure a more stringent application of the Communities’ state aid regime in the aviation sector, which is characterized by a high level of state intervention and bilateralism. Accordingly, while the Commission seems to be more flexible when it comes to state aid in the maritime transport area, the 1994 Guidelines advocate a stricter application of the Article 87 EC state aid regime in the air transport sector.

4.1.1. Scope

³⁵ OJ L 10, 13.1.2001, p.20.

³⁶ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within member states (maritime cabotage), OJ L 364, 12.12.1992, p.7.

³⁷ This should normally not be more than 6 years.

Measures covered by the Guidelines concern aid granted by the member states to air carriers, including any activities linked to transport by air (e.g. duty free shops and air port charges), but excluding subsidization of aircraft production which is not related to aid airlines may receive to promote the acquisition or operation of certain aircraft.

4.1.2. Permissible Aid

4.1.2.1. Operating Aid

Although operating aid is generally not compatible with the common market, the Commission believes that in the light of promoting regional links with disadvantaged areas operating aid may be authorised or is not considered to be state aid if it concerns public service obligations or aid of a social character and if the respective conditions are complied with.

This is for example not the case, if the aid can neither be classified as a ‘public service obligations’ nor as an aid having a social character.³⁸

4.1.2.2. Public Service Obligations

A public service obligation is “*any obligations imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its commercial interest*”.³⁹

A member state can reimburse an air carrier for a public service obligation imposed upon it under the following conditions:

- the access to the route concerned can be limited by a member state, for a period of three years, to only one carrier⁴⁰, and
- the air carrier entitled to operate air services on that route has been selected on the basis of a public tender procedure as described in Article 4 of Council Regulation No 2408/92.

The reimbursement granted to the air carrier thus selected does not constitute state aid if the maximum level of compensation does not exceed the amount of deficit as laid down in the bid, in conformity with the relevant provisions of community law.

³⁸ Commission Decision 98/337/EC of 21 January 1998, Belgium – *Aid granted by the Flemish Region to the company Air Belgium and the tour operator Sunair in connection with the use of Ostend Airport*, OJ L 148, 19.05.1998, p.36.

³⁹ Article 2 (o) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.08.1992, p.8.

⁴⁰ Article 4 (1) (d) of Council Regulation No 2408/92 provides that this must concern a route on which “*no air has commenced or is about to commence scheduled air services (...) in accordance with the public service obligations which have been imposed on that route*”.

In case the above-mentioned conditions are not complied with, the reimbursement is likely to fall within the scope of Articles 87 EC.

4.1.2.3. Aid having a Social Character

Article 87 (2) (a) EC provides that aid having a social character shall be compatible with the common market if the aid is granted without discrimination as to the origin of the services.

Aid measures which have been identified as having a ‘social character concern, for example:

- Aid granted to persons living on an island⁴¹, or
- aid granted in cases where the beneficiaries are persons belonging to a certain age class, students under a certain age or families⁴².

4.1.2.4. Article 87 (3) EC Exceptions

Aid is authorized under the same conditions as those applying to the other sectors.

With respect to restructuring aid the Commission will examine:

- whether the aid is part of a restructuring programme aiming at restoring the health of the airline, so that it can, within a reasonable period, be expected to operate viably⁴³;
- whether the aid is self-contained in the sense that no further aid will be necessary for the duration of the programme and that, given the objectives of the programme to return to profitability, no aid is envisaged or likely to be required in the future;
- in case restoration to financial viability and/or the situation of the market require capacity reductions whether this has been included in the programme;
- whether the programme’s objective does not increase the capacity and the offer of the airline concerned, to the detriment of its direct European competitors;
- whether the Government does not interfere in the management of the company for reasons other than those stemming from its ownership rights, and whether it allows the company to be run according to commercial principles;

⁴¹ Commission Decision of 20 April 2005, NN 25/2005, France – “*Régime d’aides à caractère social, dit “passeport mobilité”, instauré au bénéfice de certaines catégories de passagers des liaisons aériennes reliant la France métropolitaine aux départements d’outre-mer*”; Commission Decision of 20 April 2005, N 516/2004, France – “*Régime d’aides à caractère social instauré au bénéfice de certaines catégories de passagers des liaisons aériennes reliant la Martinique à la France métropolitaine*”.

⁴² Commission Decision of 5 March 2003, N 26/2003, France – “*Régime d’aides individuelles à caractère social concernant la desserte aérienne entre Paris et la Corse*”; Commission Decision of 2 March 2001, N 638/200 and 639/2000, France – “*Aide à caractère social au profit de certaines catégories de passagers sur les liaisons aériennes entre Ajaccio et Bastia d’une part, et Montpellier, d’autre part et entre Ajaccio, Bastia, Calvi et Figari, d’une part, et Lyon, d’autre part*”.

⁴³ In Commission Decision 2003/372/EC of 11 December 2002, Greece – *aid granted by Greece to Olympic Airways*, OJ L 132, 28.05.2003, p.1, the Commission considered a restructuring aid to be not compatible with the common market, because, *inter alia*, “*the long term viability of the company, (...), has never been achieved*”.

- whether the aid is solely used for the purposes of the restructuring programme and whether it is not disproportionate; and
- whether the company refrains from acquiring shareholding in other air carriers for the period of the restructuring.⁴⁴

If these conditions are fulfilled aid will be considered to be compatible with the common market.

In January 2006, however, the Commission published a notice on the website of the DG Transport in which it stated that since 1991 several airlines had received restructuring aid which was approved by the Commission as an “*exceptional measure to support restructuring of the airlines concerned in preparation for liberalisation of the European market*”. The Commission argued that, since most of the airlines concerned had now completed the process “*state aid is no longer necessary and that there is no longer any reason for it*”⁴⁵

4.1.2.5 Exclusive Rights

In the event a State or the entity entrusted with the operation of an airport infrastructure grants an exclusive concession for activities which are accessory to air transport to an airline for a price lower than the actual market value of the concession state aid may be involved.

4.2. 2005 Guidelines

Due to developments in the aviation sector the Commission issued a new set of Guidelines in September 2005.⁴⁶ The Guidelines, which are not intended to replace the 1994 Guidelines but to add to them, concern the financing of airports and start-up aid to airlines departing from regional airports.

The transfer of airports from State to regional control and their operation by public or private companies has forced the Community’s airport industry to undergo fundamental organisational changes leading to greater diversification and complexity of the functions undertaken by airports. Depending on their size⁴⁷, airports are affected differently by this

⁴⁴ The 1999 Community Guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 288, 09.10.1999, p. 2, which do also apply to aid for transport in the aviation sector, furthermore require that the “*firm must qualify as a firm in difficulty within the meaning of these Guidelines*” (point 30). In a Commission Decision of 19 March 2003, N 428/2002, Germany – “*Hilfe zur Umstrukturierung der Luftfahrtgesellschaft LTU*”, the Commission first examined whether the aid fulfilled the conditions laid down in the 1994 Guidelines concerning transport in the aviation sector where after it proceeded to assess whether LTU could qualify as a ‘firm in difficulty’.

⁴⁵ http://europe.eu.int/comm/transport/air/rules/state_aid_en.htm, (02.02.2006).

⁴⁶ Commission Communication 2005/C 312/01, Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312, 09.12.2005, p.1.

⁴⁷ The Commission divides airports into the following categories:

- category A – “large community airports”: airports with more than 10 million passengers a year;
- category B – “national airports”: airports with an annual passenger volume of between 5 and 10 million;

development and the influence of one airport's activities on that of other airports and on trade between Member States, therefore, varies greatly.

Furthermore, while the Commission acknowledges that air transport can have an impact on the success of local economies and on maintaining local services and while their role in the integration of the outermost regions of Europe may be important, high-speed train connections also constitute an important factor for the social and economic cohesion in the EU. Rail/air inter-modality should, therefore, be promoted.

Finally, the rise of low-cost airlines calls for a clear legal framework defining the rules applicable to the practices used by the low-cost airlines to obtain aid from public authorities.

The new Guidelines specify the application of competition rules to the financing of airports and to start-up aid for airlines leaving from regional airports.

4.2.1. Start-Up Aid

Temporary public aid providing airlines with the necessary incentive to create new routes or new schedules from regional airports and attracting the passenger numbers which will enable those airports to break even within a limited period can be accepted if the following conditions are fulfilled:

- The recipient of the aid is a carrier with a valid operating license granted by a member state in accordance with Council Regulation No 2407/92.⁴⁸
- The aid is paid for routes linking a regional airport (either a "large regional airport" or a "small regional airport") to another EU airport. In very exceptional cases aid may also be granted for routes between national airports.
- The aid applies to the opening of new routes or new schedules leading to an increase in the net volume of passengers.
- The route in question must ultimately prove profitable. The start-up aid must, therefore, be degressive and of limited duration.
- The amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running.
- Degressive aid may be granted for a maximum period of three years and the amount of aid in any one year may not exceed a ceiling specified in the Guidelines.

Moreover, certain conditions with respect to transparency must be fulfilled, cumulation with other types of aid granted for the operation of a route is not possible, and start-up aid

-
- category C – "large regional airports": airports with an annual passenger volume of between 1 and 5 million; and
 - category B – "small regional airports": airports with an annual passenger volume of less than 1 million.

⁴⁸ Council Regulation (EEC) No 2407/92 on licensing of air carriers, OJ L 240, 24.08.1992, p. 1.

cannot be granted when access to a route has been reserved for a single carrier under Article 4 of Regulation No 2408/92 on access for Community air carriers to intra-Community air routes.⁴⁹

5. DE MINIMIS AID

Article 1 of Council Regulation No 69/2001 on the application of Articles 87 and 88 EC to de minimis aid⁵⁰ excludes the transport sector from its scope of application because of the assumption that the specific rules applicable and the economic features of this sector, even a small amount of aid could distort competition between transport companies and, therefore, meet the criteria of Article 87 (1) EC.

The Commission recently adopted a revised proposal reviewing the de minimis Regulation No 69/2001. It widens the scope of the Regulation to include the transport sector with the exception of the road transport.⁵¹

⁴⁹ OJ L 240, 24.08.1992, p.8.

⁵⁰ OJ L 10, 13.1.2001. p.30-32.

⁵¹ http://ec.europa.eu/comm/competition/state_aid/overview/dm2_en.pdf (25.09.06).