

“BETTER AIRPORTS” PACKAGE: EU LEGISLATIVE TREND IN THE AIRPORT SECTOR

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Abstract

Through this paper we aim to illustrate the latest proposals within EU legislation regarding airports, which are facing some difficulties in the EU legislative iter of approval. Airports, due to the liberalization and deregulation process, shifted from an appendix facility of air transport into a self-standing industry. The whole process was imprinted by the massive privatization and is leading now into a competitive and common market, at least in EU level. These proposals, regarding slot allocation, groundhandling and procedure for restriction of the noise related operations, are to be considered as a serious effort for a comprehensive regulation. In our view, *de lege ferenda* it is a welcome initiative which yet represents difficulties in reaching uniformity within Union airport market. Furthermore, it is time for the Commission to launch new package related to the State Aids in the Air Transport sector and specifically, those which deals with airports.

Keywords: Airports, regulation, uniformity, EU legislation

Introductory considerations

As in regard to the EU legislation it is pacific that airports are considered entrepreneur and that they are subject to regulation and to market rules. In the first case it is important to mention the competition for the market through the concession by a public evidence procedure. Furthermore, the transformed concept of groundhandling services as connected to the airport managing body has led to a different position of the nature of airports. The creation of a separated market of groundhandling, has definitively changed the classic concept of airports as a natural monopoly.

The renovated concept of *public service* and *provider of a public service* has brought airports to a more market driven environment. In the last 20 years the sector was interested by a large process of liberalization, deregulation and privatization. Nevertheless, there are findings that airport privatization does not always mean a more efficient management of airports

and it is related to regulatory issues¹. This process started due to an “almost uncontrollable growth in demand for air transport services has prompted countries across the world, ... , to consider seriously the selling of their airports to private entrepreneurs”². Achieving these public goals through private entities has brought air transport in the ground in new market based scenarios. These new scenarios need a more efficient and effective regulation, and maybe in a future a common legislative framework which will grant a common and competitive market. But, at the end of these considerations, we should bear in mind that the uniform legal framework is a *conditio sine qua non*.

The European agenda on regulating airports

The European Commission in the last 5 years has been active in the field of airport regulation. After achieving liberalization in the skies, through several legislative and policy intervention, the focus of the European policymakers shifted in the ground. A fully liberalized air transport market³ hardly matches with a heavily regulated airport industry. The European action started with the adoption of a regulatory package early in 2007, including a Communication on airport capacity, efficiency and safety in Europe⁴, a proposal for a Directive on airport charges⁵ and a report on the application of the Directive 96/67/EC on Groundhandling services⁶. This Package intended to address problems such as capacity and efficiency in a safety environment, promoting co-modality and intermodality between several ways of transport. Furthermore, the European legislator, aware of the need for a common framework in levying airport charges, set out a list of general principles as non-discrimination, *ex ante* consultation and cost based taxes only⁷. Part of this Package dealt with the need for a comprehensive study on the application of the Directive on Groundhandling, when its main

¹ See T. H. OUM, N. ADLER, C. YU, *Privatization, corporatization, ownership forms and their effects on the performance of the world's major airports* in *Journal of Air Transport Management*, 12, (2006), 109-121. Authors suggest that an effective measure might be the removal of bureaucratic control or the duplication of administrative proceeding, and the possibility of airport managing body to outsource some operations. (ID., p. 120)

² R. ABEYRATNE, *Airport business law*, Authorhouse, 2009, p. 17

³ Implemented through the so-called Third Package of 1992.

⁴ COM (2006) 819 final, 24 January 2007 An action plan for airport capacity, efficiency and safety in Europe.

⁵ COM(2006) 820 final, 24 January 2007 Proposal for a Directive of the European Parliament and of the Council on airport charges.

⁶ COM(2006) 821 final

⁷ A positive comment on the measure is expressed in A. CHARLTON, *Airport regulation: Does a mature industry have a mature regulation?* in *Journal of Air Transport Management* 15 (2009), p. 116-120. The Author believe that “the new European Airport Charges Directive shows that the airport industry has matured to a remarkable extent” (ID., p. 120)

concerns regards prices, quality levels and an effective competition in the market in accordance to the spirit of Directive 96/67/EC. Nevertheless, as in regard of the instruments through which the Package intended to address such issues, and their effectiveness, serious doubts were presented from scholars⁸.

A second step taken by EU Commission should be considered the “Better Airports Package” of December 2011, which aim is to deal with the capacity problems and offer a comprehensive and final regulation framework on Groundhandling and Slot allocation, as well as new proposal on noise-related restrictions. Furthermore, this package contains a Communication on “Airport policy in the European Union – addressing capacity and quality to promote growth, connectivity and sustainable mobility”, which emphasize the two challenges of community airports: capacity and quality⁹. In our opinion, the proposed package represent a real milestone for a new approach toward the regulation of airports, as entities which are to be considered in their social, economic and strategic position inside the air transportation market, which is oriented toward competition¹⁰. In an early assessment document the Commission stressed the importance of a common policy for the airport infrastructures through the redefinition of slot allocation; environmental measures; airport charges; passengers right inside airports; intermodality with the railway network¹¹.

The Commission legislative proposals, based on general old-fashioned principles like subsidiarity and proportionality, are an efficient instrument of intervention. Through the subsidiarity the Community pursues

⁸ Critically in doctrine see M. PEETERS, *The European Commission Airport Package in Air and Space Law*, 2008, n. 3, p. 275. The Author remarks that “[i]f capacity really is the issue of the future then the package doesn’t look particularly well armed to fight this battle” because it lays mostly on technical issues and offers less on the regulatory side. Despite of this the Author is aware of the difficulties for regulating the airport sector through EU Regulations.

⁹ COM(2011) 823.

¹⁰ See P. FORSYTH, D. GILLEN, J. MULLER, H. NIEMEIER (eds.) *Airport competition. The European experience*, Ashgate, 2010; S. D. BARRETT, *Airport competition in the deregulated European aviation market* in *Journal of Air Transport Management* 6 (2000), 13-17

¹¹ The COM(2001) 370 def. See S. ZUNARELLI, *Il Libro Bianco sui trasporti: elementi di novità e di continuità della politica dell’Unione europea nel settore dei trasporti* in *Diritto dei Trasporti*, 2002, p. 463 e ff. In regard to intermodality the Community Observatory on airport capacity, which was set up under the 2007 Action Plan (COM(2006) 819 final), has proposed in November 2013 recommendations and a detailed report in order to further promote the intermodality rail-airports proposing integrated scheduling and ticketing. Available at:

http://ec.europa.eu/transport/modes/air/airports/doc/observatory/an_aviation_stakeholders_v_iew_on_intermodality_29-11-13.pdf (Last access 30/11/2013)

its main goal of the creation of a competitive market. Hence, the EU legislation can affect internal national legislation in their own traditional sphere of competences (descending vertical subsidiarity) like property, security, public services which particularly concerns port or airport sectors, where mainly remarked is the conflict between public interest and liberalization¹². It is time to shift the attention from the uniform policy toward uniform legislative provisions¹³.

The “Better Airport Package”

The common European legislative framework in the airport regulation lays basically in the Regulation 95/93/EC, which is to be considered the most successful legislative intervention, on Directive 96/67/EC, on Directive 2002/30/EC and on Directive 2009/12/ EC.

Nevertheless, for some aspects, airports are seen as facilities for granting air transport and it is not evidenced their importance as a stand-alone industry, due to its ontological being as a contiguous market related inseparably to air transport. The today airports should be considered even as “a shopping center, a business center, indeed a small city, ..., such commercial centers will be powerful economic engines for regions they serve”¹⁴ not only competing with each other for traffic but impact the regional economies they serve.

Groundhandling and the proposal of a Regulation

The European uniform regulation lays on Directive 96/67/EU. The abundant clarifying jurisprudence of the Court of Justice permits us to criticize the effectiveness of this instrument¹⁵. It represents a mixture of

¹² *Amplius* on subsidiarity principles regarding infrastructure regulation S. M. CARBONE, F. MUNARI, *Principio di sussidiarietà e disciplina comunitaria di porti, aeroporti ed infrastrutture del trasporto* in *Diritto dell’Unione Europea*, n. 3, 2002, p. 431 e ff.

¹³ In these years the EC Commission and the Council had committed several studies and issued different communications on the importance of airports and the addressing of their capacity crunch that culminated with COM(2011) 144 final the White Paper on “*Roadmap to a Single Transport Area – Towards a competitive and resource efficient transport system*” and COM(2011) 823 final on “*Airport policy in the European Union - addressing capacity and quality to promote growth, connectivity and sustainable mobility*”.

¹⁴ P. S. DEMPSEY, *Airport planning and development handbook. A global survey*, McGraw-Hill, 2000, p. 402

¹⁵ See CJEU, case C-363/01, *Flughafen Hannover – Langenhagen GmbH v. Deutsche Lufthansa AG* in 2003 *ECR I - 11893* ; CJEU, case C-386/03 *Commission v. Germany* in 2005 *ECR I-06947*; CJEU, case C-181/06, *Deutsche Lufthansa AG and ANA v. Aeroportos de Portugal SA*, in 2007 *ECR., I-05903*; CJEU, case C-460/02 *Commission v. Italy* in 2004 *ECR, I – 11547*. It emerges from these cases that the interpretation of the Directive by the Court of Justice not always was correct and its decisions were not sufficiently clear and according to the spirit of the Directive.

several national interests¹⁶, which is confirmed even by the assessment of the Commission¹⁷. The liberalization process of the groundhandling market has roots in the airport privatization process¹⁸, shifting the State's position into a supervisor for ensuring safety and security of the operations and guaranteeing the protection of the right of mobility of the passengers, through the supervision of the liberalized market. This process of liberalization was performed with a Directive, fixing only programmatic and principle provision, creating "several" types of liberalization¹⁹. A classic example is the adoption of the social protection clause disposed in article 14 of the D. Lgs. 18/1999 which regulate the case of a handling operator subentry to each other which was considered as an obstacle for an effective liberalization and its benefits for consumers. This article was rewrite by the Italian Legislator, due to the Court of Justice judgment in case C-460/02²⁰, conducing to a new empty provision only to formally comply with the Directive²¹.

It was into the Commission intention to perform such process gradually²² and to provide limitation and exemptions regarding its scope of application (article 9 Dir. 96/67/EC) which has mitigate the liberalization and competition effects in the market, shifting from a monopoly regime into a oligopolistic situation. Particularly these problems are faced in the management of the centralized infrastructures which still remain under a monopolistic regime where there is evident a lack of transparency and cost-related price for the services. The Court of Justice has sought the correct application of the Directive in this sector in the light of the essential facilities

¹⁶ S. CRAS, *Liberalization of ground-handling services in community airports: recent developments of council directive 96/67/EC* in A. MASUTTI (ed.), *La liberalizzazione dei servizi di handling aeroportuale: atti del convegno*, Clueb, Bologna, 2002, p. 47-48.

¹⁷ There were findings of a slow transposition of the normative into national legislation as well as dilatory actions of the national authorities COM(2006) 821 final

¹⁸ R. ABEYRATNE, *Ground handling services at airports as a trade barrier* in *Journal of World Trade*, 42(2), 2008, p. 276-277

¹⁹ Airport Research Center, *Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007*, 2009, p. 162

²⁰ The originary imposition of the provision was incompatible with the article 16 and 18 of the Directive when provides the obligation of the subentry handling operator to guarantee the engagement of the employees of the previous operator which operated in the airport.

²¹ G. MASTRANDREA, *Handling e protezione sociale: Una vicenda non chiusa* in *Diritto dei Trasporti*, 2007, p. 381. This provision, as rewrite by art 23 of law no. 13/2006, pursue "a line of aseptic and formal respect of the communitarian dictates", due to the fear for incurring in another infringement procedure by the Commission, adopting "only a merely procedural provision, that has nothing to do with social protection, then without a substantive content" (ID., p. 368)

²² X Recital of Directive 96/67/EC

doctrine stating that the managing body of an essential facility cannot impose discriminatory conditions for the access of such infrastructures²³.

The Commission after assessing the impact of the Directive in the market through several studies²⁴, committed researches on the future development of the sector²⁵ as well as enable the consultation procedure for the stakeholders²⁶. From these studies and consultations emerges the necessity for modifying the legislative framework which should be achieved through the instrument of Directive or Regulation²⁷. The latest was found as the best solution in the opinion of the Commission, recognizing handling services as fundamental for the correct functioning of air transport within EU in the light of the subsidiarity principle, because “in achieving a true internal market for air transport, the EU’s added-value should consist of implementing measures that take into account the situation of different airports while, at same time, ensuring that the competition between operators is not hindered. Airlines operate in a Single Aviation market, groundhandling companies also operate on a European/International market. A level-playing field remains necessary at European level. The framework for groundhandling services cannot be addressed at a lower level of regulation. Any individual action at the Member State level would potentially prejudice the functioning of the internal market”²⁸.

²³ CJEU, case-82/01 P, *Aéroports de Paris v. Commission and Alpha Flight Services SAS* in 2002 ECR I-09297

²⁴ SH&E, *Study on the quality and efficiency of ground handling services at EU airports as a result of the implementation of Council Directive 96/67/EC*, Final Report, 2002; AIRPORT RESEARCH CENTER, *Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007*, 2009. This last report finds that “[b]esides the regulatory framework the European ground handling markets are subject to a wide range of influencing variables, which affect growth, competition and structural changes. As the ground handling market is a very dynamic sector, it changes frequently and gathered information could change its validity very fast. Furthermore, deviating legal frameworks and provisions at national levels affect the impacts of the Directive. Considering these limiting factors; changes, developments, trends and tendencies were highlighted”. (ARC, cit., p. 171)

²⁵ STEER DAVIES GLEAVE, *Possible revision of Directive 96/67/EC on access to the groundhandling market at Community airports*, Final report, 2010.

²⁶ Point 3 of COM(2011) 824 final. These consultations identify as problematic: inefficiencies of handling services due to entry barriers and the presence of operators; the quality of services is not having the pace of the needs for reliability, elasticity, safety, security and environmental protection

²⁷ STEER DAVIES GLEAVE, *Possible revision*, op. cit., p. 165. It is remarked that “Guidelines can be used to provide clarification but this would severely limit the extent of change. The choice of Directive or Regulation is likely to depend on the Commission’s objectives, time and costs to implement. As there should be no need to “harmonize” national legislation, and as a Regulation is more certainly directly effective, the case for a Regulation is stronger”

²⁸ SEC(2011) 1439 final, p. 24

Basically, this draft Regulation intends to definitively regulate the groundhandling sector proposing: the full liberalization of self-handling and the number of operators in three at each largest airports; the mutual recognition of national certificates of handlers; a better regulation and management of the centralized infrastructures; the legal separation (unbundling) of the airport managing body from handling operators; improvement of public evidence procedure for selection of operators; clarifying sublicensing rules; enhancing the role of the airport managing body as a coordinator of groundhandling services in order to improve the quality of the services. The new Regulation consist in 45 articles which mean, compared to 24 article included in the Directive, a more incisive and clear regulation.

The proposal is now submitted to the evaluation and consultation in the Council of Ministers and the final decision is attended by the end of 2013. The consultation process within Council of Ministers seems very articulated²⁹ and, furthermore, it had raised the reaction of the stakeholders³⁰. Despite of all, it is in the intention of the Member States to approve the proposal as it is presented by the Commission because “further changes to the Presidency compromise text would upset the overall balance between a market-based and a regulatory approach to groundhandling, which had been reached throughout the proposal with great effort”³¹, leading the Presidency to the decision that the proposal of the Commission should not be modified, despite some concerns expressed by some Member States.

²⁹ Assessment of the Council on 16/03/2012, Document 7704/12 *General approach on Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at the Union airports and repealing Council Directive 96/67/EC*. The most debated problems and doubts were: fixing prices of services by a member State when the procedure of public evidence fails and it remains in a monopoly situation (non in case of a duopoly as modified by Corrigendum, Document 7704/12 COR 1 of 19/03/2012); the qualification of services as centralized by the airport managing body passing through a consultation procedure and the right for appeal by the operators in front of a “national authority”, which has the right to issue the final decision on the determination of centralized infrastructure and the tariffs (Czech Republic and Poland disagree with this proposal because it would levy a onerous administrative burden, meanwhile the UK has risen doubts regarding the celerity of this procedure, four weeks, because in their opinion it is not sufficient to guarantee a due process)

³⁰ See Joint Press Release ACI-ETF-ASA, 01.12.11. They assert that this proposal “will negatively impact the efficient provision of quality Ground Handling services at European airports, put at risk jobs and employment and jeopardize fair competition not only in the sector - but also in the wider aviation market. In addition, it fails to tackle important shortcomings of the current Directive to improve the passenger experience as well as safety and security at European airports.”

³¹ *Id.*, p. 3

Returning to the above considerations on the implementation of the Groundhandling Directive we can assert that the leading role expect to the Court of Justice, which compared with a more clear legislative act than a Directive can assure an important contribute to the correct and direct application, granting a uniform application in the European common groundhandling market. Furthermore, through this legislative draft the EU Commission will not achieve only the common market on groundhandling sector but it aims to improve the service quality and low prices for final consumers, the EU citizens.

The slot allocation procedure Proposal of revision

The reshape of the procedure of slot allocation moves from a different background representing a less problematic issue. Actually, it is regulated uniformly within the EU and it is driven by principles of non-discrimination, transparency and fair competition. As it is recognized in the proposal of the new regulation the slot allocation cannot generate additional capacity but it contribute to allocate better the existing scarce capacity and it aims to “ensure strengthened and effectively implemented slot allocation and use” and “enhance fair competition and competitiveness of operators”³². In the public consultation of stakeholders different position emerged, where mostly of the air carriers supported the current version of the Regulation supporting that a change will not be able to address capacity shortages and, in the other hand the airport operators are more likeable to the modifications, which would mean a larger involvement of these subjects to the procedure of allocation³³.

The Commission proposed three different models of intervention which range was from the simple improvement of the current Regulation without any substantive change to the current nature of the mechanism of slot allocation to a package which includes the secondary trading of slots and the withdrawal of the ‘grandfather’ rule’ proposing the auction of slots³⁴, considering the latest as an market based mechanism for allocating a scarce resource such as slots. After the impact assessment it was proposed an intermediate package of measures which basically include the improvement of the current slot allocation procedure³⁵, the inclusion of the market based

³² COM(2011) 827 final, p. 4

³³ STEER DEAVIS GLEAVE, *Study on the impact assessment of revisions to Regulation 95/93*, 2011, section 8

³⁴ On the concept of auction of slots see M. BARTLIK, *The impact of EU law on the regulation of international air transportation*, Ashgate, 2007, p. 233 ff.

³⁵ By strengthening the transparency of the slot allocation procedure and independence of the coordinators, their cooperation at an European level basis and in a second stage the creation of an European coordinator for all the European airports. The proposal also includes

mechanism for trading of slots³⁶, the revision of the new entrant definition³⁷ and a stricter rule for applying the so-called ‘grandfather’ rule³⁸. Furthermore, an innovative provision consist in raising the minimum length of the slot series from 5 slots requested to 10 (15 for the summer session) slots in the same time of the same day in an airport.

Proposal for the introduction of a mechanism on applying noise-related operating restrictions at Union airports

The Commission proposal aims to create a common mechanism for applying operational restrictions within EU through the so-called Balanced Approach³⁹. The issue currently is regulated by the Directive 2002/30/EC, which in the opinion of the Commission is to be considered as the first step of the harmonization within the Union, even through the ECJ jurisprudence⁴⁰. Thus, this proposal does not offer a comprehensive and uniform regulation of noise parameters but offers only a common mechanism for assessing and reaching noise-protection goals in the most cost-effective and balanced way by each Member State⁴¹. The proposed instrument is a Regulation because it will offer a fully harmonized noise assessment method and, in the view of the Commission, this method is very flexible and will not

for the first time the notion of “network airport” which is not a scheduled facilitated, nor a coordinated airport but consist in an airport which is important for the European network when sudden problems related to its traffic can affect the allocation of slots in other European airports. COM(2011) 827 final.

³⁶ The new article 13 of the Proposal of Regulation is clearly rubricated as “Slot transfer and exchange” withdrawing the unclear notion of “Slot mobility”

³⁷ The Commission proposes to enlarge (from less than 5 slots and not more than 5% of the total slots into less than 9 slots and not more than 10% of airport traffic rights in the interested airport) the concept of ‘new entrant’ because of the ineffectiveness of the current rule which is very strict and time limitative for airlines. See art. 2.2. of the Prop. Reg.

³⁸ The proposal intends to grant priority for the next session allocation when in the precedent session is used at least 85% of slot series instead of the 80% of the actual rule.

³⁹ See ICAO Doc. 9848 which refers to the resolution ICAO A35/5, appendix F. The ICAO Assembly has adopted the resolution A36/22, which in repealing resolution A35/5 reaffirm the principle of “Balanced Approach” which means a range of measures: noise reduction at source; land-use planning and better management; noise abatement operational procedures; operating restrictions.

⁴⁰ COM(2011) 828 final, p. 2

⁴¹ In jurisprudence see ECJ Case C-120/10, *European Air Transport SA vs. Collège d’environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale* where the ECJ clarify the meaning of “operation restrictions” and ruling that in the case the restrictions adopted by Belgium were not to consider a prohibition of access but a noise-related restriction and as such compliant with the Directive 2002/30/EC and with the principle of “Balanced Approach”

cause any prejudice to the single Member State goals and thresholds of protection⁴².

Final remarks

The EU Commission is very keen in assuring comprehensive regulation regarding airports within Europe but, nevertheless, it is far from uniformity, at least in sector like groundhandling. If the proposal concerning slot allocation has not included the “grandfathers’ right” withdrawal, which in my opinion is correct, I don’t understand the refrain of the Commission in proposing only the mutual recognition of the groundhandling certificates and not the adoption of a EU Groundhandling certificate for all operators. This would have been a real step toward uniformity. Currently, the “Better Airports” Package proposal is still in the European Council hands in order to obtain legal power. A consistent period of time has passed from their last effective discussion and the final approval is attended by the end of 2013. This package of measures is more ambitious than the 2007 “Airport Package” which concluded with the approval of Directive 2009/12/EU on airport charges. The approval of these proposals confirm us that policy-makers are more aware regarding the need of a comprehensive regulation for this market and maybe that further steps will lead toward a regulation with proper instruments, like Regulations. *De iure condendo*, the airport industry needs a serious and uniform set of rules.

Furthermore, we illustrated this sector as highly concerned by legislative and regulatory proposals and it is quite difficult to address such topics with a high grade of certainty regarding what should be done. Not always more regulation means better regulation but in the case of transport infrastructure we should move our considerations that an industry related to a basically international sector like air transport should consider uniformity, not only within EU common market.

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⁴²COM(2011) 828 final, p. 7

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