

THE IMPACT OF A COMPANY OWNERSHIP STRUCTURE ON MANAGING AIRPORT FUNCTIONS

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ABSTRACT

This study analyses the problems of privatisation in the aviation industry by comparing airport ownership structures. In the context of the global perspective, this study focuses on airports located in the EU. Due to the supremacy of EU law over national legal systems, these airports function in a comparable legal environment. The analysis considered the following as main airport functions: investment capacity, environmental impact, public service provision, and ensuring security. The EU law refers to all entities regardless of their ownership structure and location. Moreover, public financing is submitted to provisions concerning state aid. This article shows that ownership structure does not influence airport functions. There are several regulations granting this, and the case study of ECJU rulings has proved that these regulations are effective. Their effectiveness for the future, if the participation of private capital increases, should be the subject of further auditing. From this study arises the question of the effects of possible deregulation of the aviation market. This study can potentially help aviation industries look at ownership issues, specifically those of airports, through the perspective of regional, public welfare, and local economy. This changes the motivation of airports as nodes of global commute from a local perspective. It is also a voice in the discussion about the consequences of possible privatisation in the aviation market.

KEYWORDS

airports, privatisation, aviation market, competition

1. INTRODUCTION

This article used the public debates over the privatisation of airports, centred around France, to discuss the process of privatisation in the aviation industry. Keeping the global perspective in context, it focuses on the cases in the EU to understand the conflicts in various methods of ownership structures.

Currently, there are several parallel processes of privatisation happening in Europe, but the literature in this field is insufficient. Therefore, the research question is whether these changes pose a risk of creating safety hazards or environmental risks, lead to non-realisation of public interest, or violate fair competition rules.

This study can potentially help aviation industries look at the ownership issues, specifically of airports, through the perspective of regional, public welfare, and local economy. This changes the motivation of airports as nodes of a global commute from a local perspective.

2. MATERIAL AND METHODS

First, the study primarily analysed EU law concerning the aviation market. The acts were grouped into four categories: general, airport functioning,¹ airport financing and state aid,² environment and public information,³ and the latest updates resulting from the Covid-19 pandemic.⁴ The impact of these regulations was analysed in the case study based on rulings by the Court of Justice of the European Union (CJEU). The jurisprudence analysed for this study consisted of cases with the keyword ‘airport’. The ten judgements – most relevant and most impactful on EU policy towards airports were chosen for further analysis. They were inter alia the landmark judgement regarding the activities concerning airport infrastructure,⁵ public access to airport connected decision-making process,⁶ incompatible with common market state aid and infringements of competition.⁷

Second, I have monitored the current discussion concerning ongoing processes of privatisation. In these discussions, I considered different points of view represented by the Airports Council International (ACI) and the International Air Transport Association (IATA). Policy briefs on

1 Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 Sept 2008 on Common rules for the operation of air services in the Community [2008] OJ L 293.

2 Communication from the Commission 2005/C 312/01 Community guidelines on the financing of airports and start-up aid to airlines departing from regional airports [2005] OJ C 312/1; Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] OJ C 99/3.

3 Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] OJ L 124; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17; Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

4 Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic [2020] OJ L 165/1; Commission delegated regulation (EU) 2020/2114 of 16 Dec 2020 amending Regulation (EC) No. 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to the selection of ground handling service provider [2020] OJ L 426/1; Commission delegated regulation (EU) 2020/2115 of 16 Dec 2020 amending Regulation (EC) No. 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences [2020] OJ L 426/4.

5 Judgement of CJEU T-128/98 EU:T:2000:290.

6 Judgement of CJEU C-182/10 EU:C:2012:82, 80; Judgement of CJEU in joined cases C-128/09 to C-131/09, C-134/09 and C-135/09 EU:C:2011:319.

7 Judgement of CJEU T-165/15 EU:T:2018:953; Judgement of CJEU T-165/16 EU:T:2018:952; Judgement of CJEU T-818/14 EU:T:2018:33; Judgement of CJEU T-8/18 EU:T:2020:182; Judgement of CJEU T-716/17, EU:T:2020:181; Judgement of CJEU T-607/17 EU:T:2020:180.

privatisation questions⁸ and reports⁹ gave an overview of the ACI's attitude towards privatisation. On the other hand, IATA's attitude can be analysed in the resolution of airport privatisation.¹⁰

A rich political and social debate, in which main arguments were presented by François Ecalte¹¹ and Bernard Perret,¹² has flared up in France as a result of the attempt to privatise Groupe ADP. Managing certain French airports shows that the ownership structures of the airport's operator should not be underestimated. An analysis of the ownership structure was aimed at indicating trends. To set the frames for this article, I analysed the structure of the world's ten biggest airports, the ten biggest airports in the EU, and all Polish airports as a reference. All Polish airports are in public hands-state's or municipal, while the rest of the analysed airports have different ownership structures. The list of the biggest world and EU airports was created on the basis of the lists published by the Airport Council International¹³ and the Port Authority of New York and New Jersey¹⁴ and based on the number of passengers per year. The data from 2019 were taken into consideration since it was the last year before the COVID-19 pandemic which resulted in serious disruptions in air traffic.

2.1. THE WORLD'S BIGGEST AIRPORTS

Among the world's biggest airports, four are in the USA: Hartsfield-Jackson Atlanta International (ATL), Los Angeles (LAX), Chicago O'Hare International (ORD), and Dallas/Fort Worth (DFW). Two are in Europe: London Heathrow (LHR) and Paris Charles De Gaulle (CDG). The rest are in Asia: Beijing Capital International, China (PEK), Dubai in the United Arab Emirates (DXB), Haneda Airport, Japan (HND), and Shanghai, China (PVG). In the largest USA airports, cities own them or they are municipally-owned enterprises. Ownership of Asian airports is more complicated: in China, the ownership is split among different public companies, which is held in the state's hands. This is the case of PEK, which is operated by Beijing Capital International Airport Co., Ltd., whose shares are divided between its parent company Capital Airports Holding Company (56.61%) and public investors (43.39%). In the case of PVG, operated by Shanghai International Airport Services Co. Ltd., the joint venture is divided between Shanghai International Airport Co. Ltd., Shanghai Airport Authority, Hong Kong Airport Services Ltd., and Air China, which are owned by several public shareholders.

A similarly complex situation is in Japan, where HND is divided into Domestic and International Passenger Terminals. The international terminal is operated by Tokyo International Air Terminal Corporation (TIAT), whose shares are owned by thirteen other companies with a complicated shareholders structure. One of TIAT's major shareholders is Japan Airport Ter-

8 'Privatization can provide a viable solution to global airport infrastructure gap. New ACI World policy brief provides guidance for governments and policy makers' (2018), <<https://aci.aero/2018/06/19/privatization-can-provide-a-viable-solution-to-global-airport-infrastructure-gap>> accessed 29 Apr 2020; 'Policy Brief. Creating fertile grounds for private investment in airports' (2018), <<https://store.aci.aero/form/policy-brief-creating-fertile-grounds-for-private-investment-in-airports>> accessed 03 May 2020.

9 O Jankovec, 'Of Airport Privatization and Airline Fantasies' (2018) ACI World Report News and Events from the Voice of the World's Airports 18 – 19, <<https://aci.aero/news/aci-world-report>> accessed 9 May 2020.

10 'Resolution on airport privatization and corporatization' (2018), <<https://www.iata.org/contentassets/008e4f88f59941c0b6df782d16d1b75c/resolution-airport-privatization-agm2018.pdf>> accessed 1 Jun 2020.

11 F Ecalte, 'Faut-il privatiser Aéroports de Paris?' [Should Aéroports de Paris be privatized?] (2020), <<https://www.fipeco.fr/fiche/Faut-il-privatiser-A%C3%A9roports-de-Paris-%3F>> accessed 11 Nov 2022.

12 B Perret, 'Pourquoi privatiser ADP?' [Why privatize ADP?] (2019), <<https://esprit.presse.fr/tous-les-numeros/le-sens-de-lecole/881>> accessed 11 Nov 2022.

13 'Top 30 European Airports 2019', <<https://www.aci-europe.org/44-industry-data/40-airport-traffic.html>> accessed 11 March 2020.

14 'Number of Passengers, Worldwide 2020' (2020) *Airport Traffic Report*, 30, <https://www.panynj.gov/content/dam/airports/statistics/statistics-general-info/annual-atr/ATR_2020.pdf> accessed 11 March 2020.

minal Co., Ltd., which operates the Haneda Airport Domestic Terminal and has a complex shareholder structure comprised of eleven major shareholders and 3,248,108 shares of treasury stock (which are not included in the calculation of the shareholding ratio). Some shareholders own stock in both terminals, but the actual proportions of private and public ownership demand further examination of this structure.

However, there are no doubts in the case of DXB, which is fully owned by the Emirate of Dubai, and HKG which is fully owned by the Chinese government.

2.2. THE MAIN AIRPORTS IN THE EUROPEAN UNION

Among the ten world's biggest airports there are two European airports, LHR and CDG. Heathrow Airport Holdings Limited is privately managed on behalf of its shareholders.¹⁵ CDG, like Paris Orly (the 10th biggest airport in Europe) and many airports in France, are operated by Groupe Aéroports de Paris (ADP). Most shares in ADP (50.6%) are owned by the state. The remaining shares are divided between institutional shareholders (21.90%), VINCI (8%), Dutch Royal Schiphol Group (8%), and Crédit Agricole Assurances/Predica (5.10%). The individual shareholders and employees represent less than 6% of shares. The relationship between ADP and Royal Schiphol Group—which operates the third biggest airport in Europe (AMS) Amsterdam—is worth discussing. While the Royal Schiphol Group owns 8% of ADP shares, ADP owns 8% of the Royal Schiphol Group, a publicly owned company (69.77% of shares are owned by the State of Netherlands, 20.03% by the Municipality of Amsterdam, and the remaining 10.2% by the Municipality of Rotterdam). The second shareholder of ADP is VINCI, the major shareholder (50.01%) of Gatwick Airport Limited. VINCI is controlled by institutional investors from all over the world (North America 22.90%, France 17.10%, United Kingdom 11.70%, the rest of Europe 15.70%, and the rest of the world 5%) and employees who own 8.30% of shares. The two biggest Spanish airports, Madrid (MAD) and Barcelona (BCN) – 5th and 6th largest respectively in Europe – are operated by Aena SME S.A., which is controlled by ENAIRE, a public business entity attached to the Ministry of Public Works (51%). The remaining shares (49%) are in the free market. The biggest German airports, Frankfurt (FRA) and Munich (MUC) – (the 4th and 7th largest in Europe – are operated by entities controlled by the State and Municipality. The Dublin Airport (DUB), which is operated by the fully state-owned Dublin Airport Authority, also has a similar situation. Among the ten biggest European airports,¹⁶ only the airport in Rome is fully private since the operating enterprise, Aeroporti di Roma S.p.A. is controlled by Atlantia S.p.A. (99.38%). A total of 45.76% of their shares are in the free market held by Europeans (42.40%) and non-Europeans (37.30%), and the controlling package is held by Sintonia S.p.A., which is controlled by Edizione S.p.A.

2.3. AIRPORTS IN POLAND

All Polish international and main regional airports are publicly owned either by state, regional, or municipal companies. The main company managing airports is the Polish Airport State Enterprise (PLL). It has shares in ten out of thirteen airports, and in four of them, PLL is a unique or majority shareholder. The distribution of shares is shown in the table.

15 The shares are divided as follows: 25% FGP Topco Limited (the company is fully owned by Ferrovial S.A.), 20% Qatar Investment Authority, 12.62% Caisse de dépôt et placement du Québec, 11.20% GIC Asset Management, 11.18% Alinda Capital Partners of United States, 10% China Investment Corporation, which is a state-owned investment fund, 10% Universities Superannuation Scheme.

16 See fn 13.

Table 1. Polish airports ownership structure

Airport	Shareholder	Volume of shares
Chopin Airport in Warsaw	PLL	100%
International Cracow Jana Pawła II Airport	PLL Małopolskie voivodeship Municipality of Zabierzów	76.19% 22.73%
Szczecin-Goleniów Airport	PLL Zachodniopomorskie voivodeship Municipality of Szczecin	48.94% 20.62% 35.04%
Poznań-Ławica Airport z o.o.	PLL Municipality of Poznań Wielkopolskie voivodeship	39% 37% 24%
Wrocław Airport S.A.	Municipality of Wrocław Dolnośląskie voivodeship PLL	49.25% 31.01% 19.74%
Gdańsk Airport S.A.	Municipality of Gdańsk Pomorskie voivodeship PLL Municipality of Gdynia Municipality of Sopot	33.63% 32.85% 29.09% 2.23% 2.19%
Rzeszów-Jasionka Airport S p. z o.o.	Podkarpackie voivodeship PLL	55.46% 44.65%
Mazowiecki Airport Warszawa-Modlin Sp z o.o	Mazowieckie voivodeship Military Property Agency PLL Municipality of Nowy Dwór Mazowiecki	35% 32.04% 28.28% 4.48%
Katowice-Pyrzowice Airport	Węgłokoks S.A. Śląskie voivodeship Municipality of Katowice PLL	42.49% 34.88% 4.89% 17.30%
Mazury Airport in Olsztyn	PLL Energopoltrade S.A. Municipality of Szczytno	33.53% 21.76% 20.74%
Łódź Władysław Reymont's Airport Sp z o.o.	Municipality of Łódź Łódzkie voivodeship	95.51% 4.49%
Airporty Bydgoszcz S.A.	Kujawsko-Pomorskie voivodeship Municipality of Bydgoszcz	71.42% 22.92%
Zielona Góra Airport/Babimost Sp z o.o	Lubuskie voivodeship	100%

Sources ►

Sources: Business group (2020), <<https://www.polish-airports.com/en/business-group.html>> accessed 11 March 2020; Nadzór właścicielski [Corporate governance] (2020), <<https://www.krakowairport.pl/pl/lotnisko,c94/firma,c96/o-spolce,c97/nadzor-wlascielski,a285.html>> accessed 11 March 2020; Port lotniczy Szczecin-Goleniów sp. z o.o. [Szczecin-Goleniów Airport Ltd.] (2020), <<http://bip.rbip.wzp.pl/artukul/port-lotniczy-szczecin-goleniow-sp-z-oo>> accessed 12 March 2020; Informacje o podmiocie i organach spółki [Information about the entity and the company's governing bodies] (2020), <<https://www.airport-poznan.com.pl/pl/bip/informacje-o-podmiocie-i-organach-spolki>> accessed 12 March 2020; Wrocław Airport. Władze spółki [The shareholders of Wrocław Airport Co.] (2020), <<http://airport.wroclaw.pl/lotnisko/spolka/>> accessed 12 March 2020; Władze spółki [Managment Board] (2020), <<https://www.airport.gdansk.pl/lotnisko/wladze-spolki-p29.html>> accessed 12 March 2020; Struktura i własności [Structure and properties] (2020), <<https://bip.rzeszowairport.pl/3/struktura-i-wlasnosci>> accessed 12 March 2020; Struktura własnościowa [Ownership structure] (2020), <<https://www.modlinaairport.pl/lotnisko/struktura-wlasnosciowa>> accessed 11 March 2020; O firmie. [About Company] (2020), <<https://www.gtl.com.pl/pl/ofirmie>> accessed 11 March 2020; Port Lotniczy "Mazury" sp. z o.o. [Mazury Airport Ltd.] (2020), <<http://www.krs-online.com.pl/msig-1627-21597.html>> accessed 11 March 2020; Moje lotnisko. O firmie [About Airport. About Company] (2020), <<https://www.airport.lodz.pl/pl/moje-lotnisko/o-firmie>> accessed 15 March 2020; Port Lotniczy Bydgoszcz S.A. [Bydgoszcz Airport SA] (2020), <<https://bip.plb.pl/?cid=91>> accessed 15 March 2020; Wykaz spółek, w których udziały bądź akcje posiada województwo lubuskie [List of companies in which the Lubuskie Voivodeship holds shares] (2020) <https://bip.lubuskie.pl/system/obj/46644_wykaz_spolek_BIP_30.01-2020.pdf> accessed 15 March 2020.

3. THEORY

3.1. GLOBAL TRENDS OF AIRPORT OWNERSHIP STRUCTURES

Almost 75% of total European passenger traffic is handled by airports governed by the private sector or public-private partnerships. But on the same time, as was shown before, only two of ten biggest European airports are managed by private entities. A similar ownership structure is in Latin America, the Caribbean Region, and Mexico region, where 60% of their traffic is handled by the airports governed by the private sector or public-private partnership. In contradiction, nearly all airports in the USA are owned by state or local governments.¹⁷

Notably, 55% of all the world's airports are managed by companies which are themselves shareholders of more than one airport and create the airport network.¹⁸ For example, ADP has shares in 125 airports in 50 countries and Vinci Airports owns shares in 52 airports in 11 countries. The airports managed by such companies handle an annual traffic volume of 3.7 billion passengers, which is 42% of global passenger traffic.¹⁹ Especially small, regional airports may benefit from this because 94% of loss-making airports around the world handle fewer than one million passengers and half of all small airports are operated by airport networks.²⁰ The operator is, therefore, able to recover costs, generate returns for shareholders, ensure sustainable operation, and facilitate the sharing of best practices.²¹

17 'Airports' license to invest is a prerequisite for decarbonisation' (2019), <<https://www.aci-europe.org/media-room/2019-airports-license-to-invest-is-a-prerequisite-for-decarbonisation.html>> accessed 30 Apr 2020.

18 'Policy brief on airport networks. Airport networks contribute to sustainability of global communities' (2019), <<https://aci.aero/news/2019/11/06/airport-networks-contribute-to-sustainability-of-global-communities>> accessed 9 May 2020.

19 Ibid.

20 Ibid.

21 Ibid.

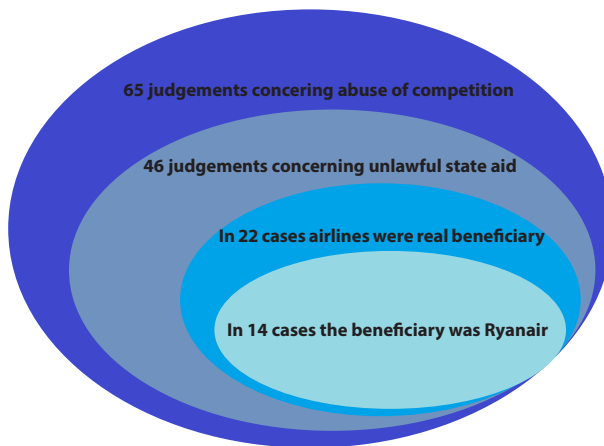
3.2 MAIN AIRPORTS' FUNCTIONS AND VULNERABILITY TO THE CHANGES IN OWNERSHIP STRUCTURE

3.2.1 Economic growth of the region

Aviation supports between 6.1²² to 62.6 million jobs globally²³ and almost 1.2 billion jobs related to the entire aviation sector.²⁴ It also generates 3.5% of the global Gross Domestic Product (GDP), with a \$2.7 trillion economic impact.²⁵ Airports impact regional trade, tourism, and foreign investment,²⁶ which could be one reason why local authorities want an airport in their region, even when it does not seem economically feasible. In Europe, this is especially visible in the outermost regions (e.g., the Azores), areas affected by economic crisis (e.g., Charleroi), or less developed regions (e.g., Rzeszów-Jasionka).

The case study of the CJEU judgements shows the willingness of local authorities to support an airport with regard to local or regional considerations rather than market considerations and ex-ante profitability prospects which are often the source of law infringement in the EU. In the years 1994-2021, there were over 100 cases concerning airports presented before the CJEU and more than half of them concerned abuse of competition (see Graph 1).

Graf 1. Analysis of ECJ cases concerning airports



Sources: Summary prepared by author, based on the data provided by European Court of Justice. The list of cases which were analyzed to prepare the graph was result of the following searching criteria: “Case status – All cases”; “Court – Court of Justice”; “Documents - Documents published in the ECR – Judgements, Documents not published in the ECR – Judgements, From – 1994 – 2021”; “Text – Airport(s), Airline(s)”; “Period or date – Date of delivery”; “Subject-matter – Competition, Consumer protection, Internal market – Principles, Transport”. InfoCuria Case-law. Search form, <<https://curia.europa.eu/juris/recherche.jsf?language=en>> accessed 2 Feb 2022.

22 ‘The impact of COVID-19 on the airport business: preliminary assessment’ (2020) 23, <<https://aci.aero/wp-content/uploads/2020/03/200323-COVID-19-Impact-on-Airport-Business-Presentation.pdf>> accessed 29 Apr 2020.

23 See fn 17.

24 See fn 22, 23.

25 See fn 17.

26 ‘Policy Brief. Creating fertile grounds for private investment in airports’, 5, <<https://store.aci.aero/form/policy-brief-creating-fertile-grounds-for-private-investment-in-airports>> accessed 3 May 2020.

In most cases, the airport concerned was a little regional airport as Pau-Pyrénées Airport²⁷ and the Altenburg-Nobitz.²⁸ The first is the only airport in the region, distanced from other airports in Bordeaux and Toulouse by about 200 km, and the second is a small regional airport, situated about 90 km from the larger Leipzig airport. As the case study show, the public ownership regarded as the possibility to get direct support from public financing without shareholders' remuneration is no longer adequate due to the European Union's State Aid rules.

3.2.2. Security

Due to repeated terrorist threats and incidents, airports in close cooperation with state governments, regulators, and international organisations are working on improving their security policies. They are implementing innovations such as smart security pilots, automated screening lanes, central image processing, queuing management, assistance from canines to detect explosives, and more. From the ACI report, we can learn that these have already been implemented in American airports such as ATL, LAX, Harry Reid International Airport, Las Vegas (LAS), ORD, and John F. Kennedy, Jr. International Airport, New York City, (JFK).²⁹ Moreover, globally available special programmes promote safety and security among airports (APEX, Smart Security, etc.).³⁰ Activities such as air traffic control, police, customs, and firefighting, are safeguarding civil aviation against acts of unlawful interference, and investments in the infrastructure and equipment necessary to perform those activities are considered the state's responsibility. It is regarded as an exercise of official powers of a non-economic nature,³¹ regardless of the ownership structure.

3.2.3. High-Volume investment activity

The ACI World estimates that in the last five years, airports with private sector participation invested 14% more than their public counterparts and 12% more than the global average.³² In this regard, airport privatisation not only meets the level of investment, which is critical to the global economy and connectivity but also is a source of revenue and a way to reduce public debt without depending on taxpayers.³³

Despite this, most regions have a vertical integration between airports, airlines, and public financing. This approach is compatible with budgetary constraints, fiscal discipline, and stringent state aid rules adopted in the EU, where privatisation introduces higher transparency in financing airports.

In the EU, there are several examples of airports developed with public funds. One of them is Charleroi Bruxelles-Sud (CRL), where the July 2000 agreement funded the construction of a new passenger terminal for EUR 113.74 million, including subsidies. From 2000 to 2013, traffic at CRL increased from approximately 200,000 passengers to nearly 7 million, with Ryanair's

²⁷ Judgement of CJEU T-165/15.

²⁸ Ibid.

²⁹ A Gittens, 'Civil Aviation International AVSEC Standard and Recommended Practices. Conferences' (2018), 4, <<https://aci.aero/news/2018/03/16/civil-aviation-international-avsec-standard-and-recommended-practices-conferences-angela-gittens-director-general-aci-world>> accessed 3 May 2020.

³⁰ Ibid.

³¹ Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] 35.

³² 'Privatization can provide a viable solution to global airport infrastructure gap'.

³³ 'Time for airlines to come to terms with the 'user pays' principle & end their double-speak on capacity' (2018), 1, <<https://www.aci-europe.org/media-room/>> accessed 2 May 2020.

share amounting to 70-80%. The aid granted by the authorities was subsequently subjected to the Commission Decision 2004/393/EC and finally CJEU judgement T-818/14³⁴ which concluded that the subsidies were actually granted to Ryanair rather than CRL and therefore constituted state aid. The subsidies granted to Ryanair were found to be ‘discriminatory, unlawful under Belgian law and contrary to the principle of proportionality’.³⁵ The Commission drew a distinction between investments and services of an economic nature and those regarded as of a non-economic nature (subsidies to fire protection and security). While the measure’s non-economic nature could not be regarded as state aid, the ones considered to be of economic nature were subject to examination. The Commission applied the market economy operator test and concluded that under similar circumstances, a private operator seeking a return on investment would not have participated in such operations. Although the aid for CRL was granted to facilitate regional development and had a positive impact on its economy and employment, it was necessary to forego all social, regional, and sectoral policy considerations in favour of the requirements of a private operator test. From an economic point of view, the CRL’s prospects were insufficient to justify the investment. Moreover, the aid significantly distorted competition by affecting the increase of passenger numbers at the Brussels-National Airport.³⁶ More importantly, according to Point 119 of the Guidelines on State Aid to Airports and Airlines, to be eligible for operating aid, the traffic of the airport cannot exceed 3 million passengers.³⁷ As a result, the Commission concluded that only the measures implemented before 3 April 2014 were compatible with the internal market, while those implemented after that date were not.³⁸ This was confirmed by the CJEU Judgement on 25 January 2018, and the referred aid was to be recovered.³⁹ If we take into consideration that the distortion of competition was between two Belgian Airports, both staying in public hands⁴⁰ it may look controversial and the question if the Commission’s intervention was needed arises. The main concern is what kind of rights exactly were secured here and if there is a real competition between the entities held in public hands.

On the other hand, there are situation when there is only one beneficiary of the aid but due to the fact it is open to other participants of the market it is still considered legal and not to the benefit of the airline as was in case T-894/16⁴¹.

That breakthrough judgement, which considered the activities of developing and managing airport infrastructure⁴² as an economic activity, came from Aéroports de Paris.⁴³ As the court stated: Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, which is specific in nature, applies only to activities directly relating to the supply of air transport services. Activities that do not directly

34 Judgement of CJEU T-818/14.

35 Commission Decision (EU) 2004/393 of 12 Febr 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi [2004] OJ L137/47, points 239–266.

36 Commission Decision C (2014) 6849 final of 1 Oct 2014 concerning measures, concerning measures SA. 14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair C (2014) 6849 final, <https://ec.europa.eu/competition/state_aid/cases/132112/132112_1834484_1762_2.pdf> accessed 8 Marz 2021.

37 Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] 119.

38 Commission Decision C (2014) 6849 final.

39 Judgement of CJEU T-818/14.

40 On 1st April 2021 the public share in SOWAER managening CRL was 51,68% and BSCA shares on 31 Dec 2021 were owned in 48,32% by Belgian Airports (Groupe SAVE) and SOAWER 35,87%.

41 Judgement of CJEU T-894/16 EU:T:2019:508, point 40.

42 Except these which normally fall under State responsibility, in the exercise of its official powers as a public authority – author note.

43 Judgement of CJEU, T-128/98.

relate to such services fall within the scope of Regulation No 17, which is general in nature.⁴⁴

The Commission explained that applying the regulation concerning State aid is possible if the beneficiary is engaged in economic activity. If an airport engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 87(1) of the EC Treaty, and the Treaty rules on State aid will therefore apply.⁴⁵ Competition need not be distorted; the mere fact that aid is liable to affect trade and distort competition is enough to determine that the state aid was incompatible with EU rules. The Commission elaborated detailed guidelines for the air transport sector.⁴⁶ This approach was confirmed in Cases T-8/18 *EasyJet Airline Co. Ltd v Commission*, T-716/17 *Germanwings GmbH v Commission*, and Case T-607/17 *Volotea SA v Commission*, 13 May 2020.⁴⁷ Important role of the national courts should be highlighted here. As the article 108(3) has direct effect individuals can invoke it before the national court (even if the project of aid was not notified to the Commission) which should provide adequate protection for those harmed by the infringement (remedies available include preventing the payment of unlawful aid, recovery, interest, damages, and interim measures).⁴⁸

3.2.4. European regulations concerning public service obligations

As in the Commission Decision 2004/393, the ‘airport always fulfils a public function, which explains its general submission to certain types of regulations even if it belongs to and/or is managed by a private company. Private airport managers can be subject to this regulation and their fee-fixing powers are often contained within the framework of national regulators’ instructions because of their monopolistic position. The airports’ position of strength in relation to their users can thus be controlled by the national regulators who fix fee levels that must not be exceeded, known as ‘price caps’. Asserting that a private airport is free to fix its fees without being subject to certain forms of regulation is in any case inaccurate’.⁴⁹ The framework of the obligations required from the air service operator is pointed out in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on Common rules for the operation of air services in the Community. According to this act, chargeable transport services in the EU can be granted only by undertakings with the licence to carry air passengers, mail, and/or cargo for remuneration. To obtain the licence, the establishment must fulfil certain requirements, inter alia the principal place of business located in an EU Member State, and/or nationals of Member States must own (directly or indirectly) and effectively control more than 50% of the undertaking. Access to routes is also regulated, thus limiting the possibility to operate intra-community air services to entitled carriers.⁵⁰

The regulation also provides principles for public service obligations. If it is vital for the economic and social development of the region, Member States may impose a public service

⁴⁴ Ibid point 1.

⁴⁵ Communication from the Commission 2005/C 312/01, point 3.2.1 (30); Communication from the Commission 2014/C 99/3, 30.

⁴⁶ Ibid 11.

⁴⁷ Judgement of CJEU T-8/18, points 228-229; Judgement of CJEU T-607/17, points 155-156; Judgement of CJEU T-607/17, point 184.

⁴⁸ Opinion of Advocate General Mengozzi on 27 June 2013, C-284/12 EU:C:2013:442, point 13-14, 16.

⁴⁹ Commission Decision (EU) 2004/393, point 156.

⁵⁰ Regulation (EC) No 1008/2008/, Art. 3.

obligation of operating on a certain route.⁵¹ To ensure that the obligation is imposed only to the necessary extent, there are several rules to follow. There is a demand of informing the Commission and consult the Member State concerned, the airport and the air carriers operating the route in question. The obligation itself should not extent the necessary minimum and set in a transparent and non-discriminatory way. The abovementioned rules refer to all airport service providers, without distinction, if they are in public or private. The main problem is lack of precision of the term ‘minimum provision’ what constitutes the cause of disputes between parties.

3.2.5. Environmental protection policy

European Union takes special care about the natural environment issues and pay very great attention to the environment protection, inter alia significant reduction of the CO₂ emission. Also other questions as landscape and animal protection, noise emission levels and emissions are in details regulated. All of the regulation concerning environment are subject to public supervision as EU law guarantees public scrutiny on decisions having a significant influence on the environment, personal health, and well-being of its citizens. It considers the opinions and concerns of the public, according to inter alia Directive 2003/35/EC, which provides public participation in drawing up plans and programmes relating to the environment,⁵² Directive 2011/92/EU, on the assessment of the effects of certain public and private projects on the environment, and the Convention on access to information, public participation in decision-making, and access to justice in environmental matters (then called Aarhus Convention).⁵³ It confirms the value of the environment protection and the validity of the former acts concerning environmental policies. It also guarantees the access to environmental information, regulates the collection and dissemination of environmental information and assures public participation in decisions on specific activities (inter alia construction of the airport whose runway is at least 2100 m), plans, programmes and policies relating to the environment, the preparation of executive regulations and/or generally applicable legally binding normative instruments.⁵⁴ Additionally, in Case 82/10, the CJEU confirms that even if the project was adopted by a specific legislative act, the legislative process must have fulfilled the requirement of public participation in the decision-making process, by inter alia preparatory documents or parliamentary debates.⁵⁵ Public and judicial control are relevant, even if the project is realised in the public interest. According to the CJEU judgement in Case 275/09, in complex, multi-stage projects the assessment of the environmental effects should be completed either in the consent procedure or when the operating permit is to be granted.⁵⁶

⁵¹ Ibid Art. 16.

⁵² Directive 2003/35/EC, points 17–25.

⁵³ Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] 4–20.

⁵⁴ Ibid Art. 6, Annex I, point. 8.

⁵⁵ Judgement of CJEU C-182/10, 58.

⁵⁶ Judgement of CJEU C-275/09 EU:C:2011:154, point 39.

3.3. INFLUENCE OF COVID-19 ON THE AIRPORT INDUSTRY

3.3.1. Public aid during the COVID-19 pandemic

The COVID-19 pandemic put the financial sustainability of the airport industry under serious threat. Unprecedented declines in aircraft movements and passenger traffic hindered airports' ability to meet their operating costs and their fixed capital expense obligations. Governments had to ensure that airport operators facing short-term liquidity problems had access to finance, whether through government loans or support on loan premia.⁵⁷

3.3.2. Public service regulations during the COVID-19 pandemic

Special emergency measures were undertaken due to the COVID-19 pandemic. On 28 May 2020,⁵⁸ Regulation 008/2008 of the European Parliament and of the Council was amended by adding article 24a according to which Member States could (without Commission agreement) refuse, limit, or impose conditions on the traffic if this action was necessary to address the pandemic threat. Such action had to respect the principles of proportionality and transparency and be based on objective and non-discriminatory criteria. The Commission and other Member States must be informed, without delay, of such action.⁵⁹ Additional amenities were introduced by the Commission delegated Regulation 2020/2114 of 16 December 2020 regarding the selection of ground handling service providers and by the Commission delegated Regulation (EU) 2020/2115 of 16 December 2020 regarding operating licences till. These special measures predicted till 31 December 2021 were designed to help to avoid the continued liquidity problems of Union air carriers and was important from the point of view of their further functioning.

4. RESULTS AND DISCUSSION

4.1. GLOBAL ORGANISATIONS' ATTITUDES TOWARDS THE PRIVATISATION OF AIRPORTS

The world's biggest organisations operating in the air transport sector – ACI, IATA, and International Civil Aviation Organization (ICAO) – claim a neutral position regarding airport ownership. They agree there is no one-size-fits-all model, and local governments are better positioned to see where the private sector is likely to add the most value to their airports.⁶⁰

The ACI argues that privatisation may finance infrastructure investments, and in return increase airport capacity⁶¹ – a move that was successful in many countries such as Greece).⁶²

57 A Gittens, 'COVID-19: Economic policy responses to the global health crisis' (2020) 1, <<https://blog.aci.aero/covid-19-economic-policy-responses-to-the-global-health-crisis/>> accessed 27 Apr 2020.

58 Regulation (EU) 2020/696.

59 Regulation (EC) No 1008/2008, Art. 21a.

60 'Privatization can provide a viable solution to global airport infrastructure gap' 1; A Gittens, 'Airport infrastructure development must keep pace with air service growth' (2019), 1, <<https://aci.aero/news/2019/09/10/airport-infrastructure-development-must-keep-pace-with-air-service-growth>> accessed 9 May 2020; D Reece, T Robinson, 'Airport ownership and regulation' (2016) *IATA Guidance Booklet Infrastructure*, <<https://www.iata.org/en/pressroom/pr/2016-11-29-01/>> accessed 15 Jun 2020.

61 A Gittens (2020) 1; O Jankovec.

62 A Gittens, 'Meeting global air service demand requires a coordinated global response', <<https://aci.aero/news/2018/12/03/meeting-global-air-service-demand-requires-a-coordinated-global-response>> accessed 9 May 2020.

Nevertheless, the IATA highlights that other privatisation outcomes have not truly met expectations,⁶³ and there are other ways to finance investment and increase capacity and effectiveness.⁶⁴ It seems that, despite the declaration of neutrality versus ownership structure, representatives of the airports' interest are in favour of privatisation, while airline representatives prefer leaving airports as publicly-owned entities.

4.2. Does ownership structure influence an airport's functioning?

The airports play a critical role in ensuring sustainable economic growth in cities, countries, and regions; create employment; and pay a large amount of local, provincial, and national taxes around the world what make them one of the most important part of the infrastructure. There is a tendency, caused by the pressure of environmental lobby, to substitute them by the high-speed trains where possible, but as for now, the aviation seems the most critical for many regions sector of transport.

The analysis shows the EU's tendency is to treat airports as all other businesses. The airport engaged in economic activities, regardless of its legal status or financing source, constitutes an undertaking within the meaning of Article 87(1). Its turnover which institutes the economic activity consist of revenues from two primary sources: aeronautical and non-aeronautical activities. The financial and transparency requirements applying to it are similar as those applying to all other enterprises. Nevertheless, in some cases (for example in remote regions), the overall management of the airport can be considered as services of general economic interest⁶⁵. The airports, similarly as all public enterprises (which beside activity in general economic, public or national interest are exercising the economic activity) must fulfil additional requirements (for example more complex accountancy) to obtain the sufficient level of financial transparency of its relation with the State. It entail additional costs and airport as such is high-cost activity.

The benefits from having the airport in the region often lead authorities to financially support them, what often turns out to be incompatible with the internal market public aid regulations. The case study of the CJEU rulings shows that all cases of state aid are thoroughly monitored and limited regardless of the airport's ownership structure. The forms of the aid differs, and the most common are – reduction of the landing charges and financial support for the investment. Regardless the form, the real beneficiary of the aid may be the airport (as in Case T-894/1666) or the airline (as in Case T-818/1467). As the analysed CJEU rulings has shown if the real aid beneficiary was the airline, in most cases it was the low-cost, private airline and the competition among airlines was in most cases distorted. In cases where the competition was distorted between airports, it is sometimes questionable, especially if two, competing airports are situated in one country (or even region) and both are held in public hands (as was in Case T-894/16). In this case it seems that it is rather the question of regional policy, especially as one is a busy airport in the city center serving regular airlines and the other is in suburbia and serving low cost airlines. The target of these airports is different both when it comes to the airlines and passengers.

The provisions of the Guidelines on State Aid to airports and airlines from 2014 (and their previous version from 2005) which regulate those questions are not sufficiently precise (due to the large number of exceptions). The tools implemented there does not seem efficient (for example due to very

63 'Infrastructure, Taxes & Charges, Consumer Protection, Security Top Agenda at AACO' (2016) <<https://www.iata.org/en/pressroom/pr/2016-11-29-01/>> accessed 15 Jun 2020.

64 See fn 10, 2.

65 Communication from the Commission 2014/C 99/03, point 34.

66 Judgement of CJEU T-894/16, point 40.

67 Judgement of CJEU T-818/14.

long transitional period) to provide the satisfactory level of transparency in the aviation market. This reflects in the large number of the cases before CJEU. The improvement in this field is necessary to provide sustainability to the aviation market. Last, but not least, the Commission has no powers of compulsion in relation to the recipients of the aid and for this reason the central role of the national courts should be strengthened. It seems even more important if we take into consideration the length of the procedures which is on average 10 years or more between the adoption of the measures questioned by Commission and the final judgement.

On the other hand, also the airport in private hands may benefit from other than their own source of revenues. Especially airports which are part of the airport network managed by the international company (as for example ADP or Vinci). It let the airport which cannot offer to their passengers the large range of airlines and connections, to take the advantage of the significant economies of scale (as happens for example in case of smaller French airports).

Airports are critical infrastructure important for national security and gathering public services. The legislation adopted in the EU sufficiently secures the realisation of public service and refers to all entities concerned, no matter whether publicly or privately owned. Thus, in ensuring the realisation of public service, there is no threat resulting from privatising the establishment governing the airport. The same refers to national security as the same level of security must be granted to both publicly and privately managed airports. However, privately owned airports managed by big, international companies may benefit from the higher level of investment in this field (hi-tech innovative solutions are more accessible for small airport which is a part of a network than the similar airport governed by local, public authority). In such airports it is also easier to implement best practices.

When it comes to environmental issues, there are many provisions governing environmental policies of the EU, which must be obeyed by both public and private enterprises, and by EU citizens and governments. In this context, it seems irrelevant whether the airport is in public or private ownership. Public participation in the decision-making processes is common and granted, as well as the access to information. The airport has significant environmental impact on the surroundings and that is why its construction was listed as one of the activities demanding public consultancy and involvement in decision-making process by the Aarhus Convention.⁶⁸ The public authority must take public opinion into due account in decision-making, inform of the final decisions and its justification. The infringement of this obligation gives the right to challenge public decisions. Unfortunately, it does not make such decision void. The effectiveness and the real causative power of public will is then doubtful. What is more, as important countries as USA and Canada and many smaller which didn't sign it or has signed it with reservations, the Convention influence for the world's environmental policy is questionable. Moreover, practical implementation of its resolutions to different national legal systems may pose problems or even be impossible. Fortunately, not numerous cases before the CJEU concerning environmental rules breach by the airports suggest that the awareness of the airports managing entities in this field is satisfactory, what does not mean that their activity does not cause environmental damage.

5. CONCLUSIONS

This research focused on EU airports as those operating in a similar legal environment. Because the law in the Member States must be consistent with supreme EU law, the main provisions the concerning functioning of the airports are common. This is what made their situation comparable.

⁶⁸ Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] Annex 1, point 8.

EU regulations refer to all entities, regardless of the ownership structure. This leads to the conclusion that the ownership structure is irrelevant to how an airport functions. The increasing involvement of the private sector will lead to an audit if the existing regulatory framework remains efficient and effective in the future. These questions remain, however: how would the deregulation influence the situation of the airport, and to what level is deregulation possible and safe?

On the contrary, airports not situated in an EU Member State are not subject to EU limitations which means they can possibly benefit from unlimited public financing if it is in accordance with local regulations. The influence of public financing in such cases may be the subject of further research. What is more, it leads to the question, what influence (if any) would it have on the airports deprived of public financing?

This study can potentially help aviation industries look at airport ownership issues from the perspective of regional, public welfare, and local economies. This changes the motivation of airports as nodes of global commute, from a local perspective. This study is also part of the discussion about the consequences of possible privatisation in the aviation market.

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