

Polish Airports in the European Union

– Competitive Challenges, Regulatory Requirements and Development Perspectives

Edited by
Filip Czernicki
and Tadeusz Skoczny

Warsaw 2013



Polish Airports



University of Warsaw
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**Polish Airports
in the European Union
– Competitive Challenges,
Regulatory Requirements
and Development Perspectives**

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Contents

PREFACE.....	7
CHAPTER I	
Airport services in light of the legal and economic conditions that govern them; assumptions and research results (<i>Filip Czernicki, Tadeusz Skoczny</i>).....	11
CHAPTER II	
Competition law in relation to airports in the European Union and Poland (<i>Agata Jurkowska-Gomułka, Elżbieta Krajewska, Tadeusz Skoczny</i>).....	29
CHAPTER III	
EU state aid regime for the construction of aviation facilities and airport operations (<i>Agata Jurkowska-Gomułka, Elżbieta Krajewska, Tadeusz Skoczny</i>).....	59
CHAPTER IV	
Access to airport infrastructure for aircraft take-offs and landings – noise restrictions (<i>Igor Komarnicki</i>).....	89
CHAPTER V	
Airport charges (<i>Dariusz Kaliński</i>).....	105
CHAPTER VI	
Allocation of time slots for take-offs and landings in EU airports (<i>Michał Kozłowski</i>).....	125
CHAPTER VII	
Groundhandling services at European Union airports (<i>Anna Żebrowska-Dreger</i>).....	153
CHAPTER VIII	
Airport Security Controls: A Fundamental Rights Perspective (<i>Maciej Bernatt</i>).....	179

CHAPTER IX

Strategies realized by medium-sized European Airports (<i>Tomasz Ludwicki, Michał Mijał, Aleksandra Wąsowska</i>)	205
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CHAPTER X

Airport Cities – a fashion or a necessity? (<i>Filip Czernicki</i>)	247
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CHAPTER XI

PPL's ownership policies and plans for new enterprises (<i>Filip Czernicki</i>)	265
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Preface

At the heart and source of our research project, carried out jointly by „Polish Airports” (“Porty Lotnicze” – PPL) and the Centre for Antitrust and Regulatory Studies (CARS) of the Faculty of Management of the University of Warsaw, lay two parallel streams of aims and activities, both practical and theoretical. The results are presented in the within publication.

In 2007 the Polish Air Navigation Services Agency (PANSAs) spun off from PPL. Following the internal remodelling, the company has seen widespread investment in Warsaw Chopin Airport infrastructure. In addition, the Ministry of Transport is drawing up commercialization plans for the enterprise. These developments have brought about the need for PPL to redefine its fundamental aims and the tasks in front of it. As a result the company has undertaken extensive work to elaborate an official strategy and a Master Plan for Warsaw Chopin Airport. At the same time it has prepared a comprehensive investment plan for the upcoming years.

All these works have required and still require strong support in the form of credible analyses and detailed studies. PPL has been able to draw on the expertise potential and research results of its own employees, and should continue to do so. Nevertheless, the scope and scale of development plans is so broad and far-reaching that external sources of expertise had to be consulted as well, allowing PPL to obtain professional and independent verification along with a theoretical justification of the company’s aims and plans to expand its offer of airport services and re-organize airport management.

Taking into account its crucial role in both the national economy and the airport services market, PPL requires expert counseling and consultation with respect to competition law and the regulatory regime governing the

airport services sector, particularly with regard to the rights and duties of managing bodies of airports in the broadest sense of the term, including both infrastructure and all services offered. Such knowledge would prove helpful not only in addressing relevant EU bodies and Polish authorities, but also in guiding the enterprise guide it through the web of new activities and strategies aimed at further development of the airport and changing management form.

The Faculty of Management of the University of Warsaw, being one of the leading scientific and didactic institutions in the area of entrepreneurship, business and public management, carries out, in accordance with its charter and research objectives, its own scientific research in various sub-areas connected with the overall purpose. Its **Centre for Antitrust and Regulatory Studies (CARS)** has brought together a group of lawyers, economists and management specialists to carry out research into, *inter alia*, the regulation of public infrastructure sectors, including particularly the area of air transportation and airport services. CARS also makes available its work, to a great extent published, to regulatory authorities and businesses engaged in highly regulated activities.

On 9 July 2009, **PPL and Faculty of Management of the University of Warsaw** (then headed by Prof. Dr. Alojzy Z. Nowak) entered into a **Cooperation Agreement**, in which the parties declared their mutual readiness to jointly carry out research projects, publish scientific work (books and other materials presenting research results), organize national and international conferences, workshops, and seminars, create opportunities for PPL to participate in post-graduate study programs organized and supervised by the Faculty of Management, and create internships in PPL for students of the Faculty. This Cooperation Agreement is coordinated by Professor Tadeusz Skoczny of University of Warsaw, on the part of the Faculty of Management, and on the part of PPL by the Ownership Supervision Bureau, represented by Filip Czernicki, Deputy Manager of the Analyses and Projects Division.

The first step in the collaboration came as early as in 2009, involving a research project titled “**Airport services in the European Union and Poland – conditions imposed by competition law and airport regulations.**” The project was the result of joint efforts by selected PPL employees and members of the Faculty of Management of the University of Warsaw. It showed that apart from knowledge and experience, PPL also has professional and competent staff, skilled in carrying out research activities. The key role of participants from the side of the Faculty of Management, mainly from CARS, was to identify certain real issues in the areas of law,

economy and management related to PPL's area of activity (airport services) and, with the help of PPL members, carry out a scientific analysis of these issues. The output from this project was a book (in Polish) entitled: *Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe (Airport services in the European Union and Poland – competition law and airport regulations)*, a joint work edited by Filip Czernicki and Tadeusz Skoczny and published in 2010 by the Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego (*University of Warsaw Faculty of Management Scientific Publishers*).¹

Both the project and the publication generated great interest on the part of a number of professional institutions and circles and public authorities, from the Polish Ministry of Infrastructure to the Civil Aviation Office to airport managers and operators throughout the country. As a result, PPL and the Faculty of Management of the University of Warsaw, represented by CARS, decided to continue and tighten their cooperation in the area of research and publication of research results. On the basis of their Cooperation Agreement, PPL and the Faculty of Management commenced a new research project, which resulted in another publication (also in Polish), this time entitled: *Usługi portów lotniczych w Unii Europejskiej i w Polsce II – wybrane zagadnienia (Airport Services in the European Union and in Poland part 2 – selected issues)*, a joint work edited by Filip Czernicki and Tadeusz Skoczny and published in 2011 by the same publishing house.²

A number of important conclusions can be drawn from the above-described research projects and resultant publications. Generally, these include conclusions *de lege lata* (primarily with respect to the application of competition law to airport activities) and *de lege ferenda* (particularly with respect to conditions imposed by the regulations on access to airport infrastructure and the methods of computation of airport charges, but also in the sphere of provision of airport security). These conclusions, based on a comparative analysis of the relations between the ownership of airports and the management of airports (the first project), as well as the efficiency of the operation of selected airports (the second project), have been directly applied by PPL in the implementation of management strategies and the elaboration of its strategy for the future.

This book summarizes the results of a two year research by a large team comprising scientific experts and employees of both PPL and the Faculty of Management of the University of Warsaw. It presents the most valued

¹ Also available in electronic version at: www.cars.wz.uw.edu.pl/publikacje/.

² Also available in electronic version at: www.cars.wz.uw.edu.pl/publikacje/.

work concerning selected legal and economic issues connected with the functioning of airports in Poland as well as in the EU and in given Member States. The book is directed at current and possible future partners of PPL, in particular non-EU operators. We hope and believe that this volume will find many readers, being a valuable combination of theoretical and cognitive knowledge with practical experience and providing very useful comparative analyses.

Warsaw, 31 March 2013.

Michał Marzec
General Director
of "Polish Airports"

Prof. Dr. Jan Turyna
Dean of the Faculty of Management
of the University of Warsaw

Chapter I

Airport services in light of the legal and economic conditions that govern them; assumptions and research results

1. Aims and scope of the research project

Two research projects, the results of which were published in Polish reports in separate editions and are published in English in the within volume,¹ encompassed selected problems connected with the functioning of airports, understood as encompassing the total sum of all infrastructure (premises, objects, and equipment) as well as services rendered within them or with the use of airport infrastructure or airport services. The subject of both projects was focused however primarily on the most

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** Prof. Dr. Tadeusz Skoczny – lawyer, head of the Independent Chair on European Economic Law at the Faculty of Management of the University of Warsaw; head of the Centre for Antitrust and Regulatory Studies.

¹ See: *Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji regulacje lotniskowe* [Airport services in the European Union and Poland – competition law and airports regulations]. A joint work edited by Filip Czernicki and Tadeusz Skoczny. Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2010; *„Usługi portów lotniczych w Unii Europejskiej i w Polsce II – wybrane zagadnienia* (Airport services in the European Union and Poland II – selected issues). A joint work edited by Filip Czernicki and Tadeusz Skoczny. Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2011. Both works may be accessed in electronic version at: www.cars.wz.uw.edu.pl/publikacje/.

important public law and other legal conditions governing the economic activities of specific entities (mainly companies) whose main business is to provide airport services. This (limited) subject matter was analyzed and assessed not only from the point of view of selected conditions grounded on legal provisions and the individual solutions applied by administrative organs and courts as well as reports being part of the airport package of 2007, but also selected conditions of a strictly economic and managerial nature.

The subject of the research analysis was focused above all on two types of (public law) conditions concerning the rendering of airport services – conditions arising from the rights and obligations of competition law, and conditions arising from sector-specific regulation.

Conditions which had their source in competition law are based on the global application of the rules protecting competition and the individual decisions of the administrative organs charged with protecting competition, issued in instances of infringement of existing competition laws by undertakings and subject to judicial control and review. Such public intervention is usually of an *ex post* character, the prevention control of concentrations of undertakings being an exception to this general rule, although even in this case the analysis, assessments, and conclusions reached by the controlling organ are based primarily on historical records and data.

Conditions arising from sector-specific regulation derive from the provisions and regulations concerning a particular sector (in this case mainly from laws and regulations concerning the functioning of airports) and also from the individual decisions of organs of general public administration and organs charged with regulatory tasks (in this case mainly concerning the civil aviation authorities), which are also subject to judicial control and review. Interventions by these organs are usually of an *ex ante* nature – they take actions designed to set the conditions for future market operations (in this case of companies offering airport services) by way of the granting of permits, licenses, certificates, etc. The actions usually involve placing limits on the freedom of operation of undertakings, rights which arise from basic aviation freedoms guaranteed under international law (primarily the Chicago Convention) and which are aimed at securing other values, such as the right to undistorted competition (pro-competitive regulation), the full guarantee of services vested with a public function, and the protection of consumers (pro-consumer regulations).

In carrying out this research particular attention was given to the conditions arising from European Union law, both competition law and aviation law (often developed according to established international norms),

which has been fully and unconditionally binding in Poland since it acceded to the European Union on 1 May 2004.

The most broadly understood aim of the project was the identification, presentation, and analysis of the conditions – arising from both competition law and regulation of the civil aviation sector – for service provision to, for, and by airports in Poland, including the “Polish Airports” (“Porty Lotnicze” – PPL). For PPL competition law is of special importance, taking into account its dominating or even monopolistic position in certain geographical aviation markets in Poland (defined both in terms of production and territory). PPL is also an addressee of regulatory conditions, including the conditions imposed by the President of the Civil Aviation Authority (CAA). Thus the summaries and conclusions at the end of each chapter in the book are devoted particularly to answering the questions laying at the heart of the project: what are the conditions governing the functioning of PPL which arise from competition law and civil aviation regulations binding on the European Union and Poland?; what are the accompanying sanctions in the event of their violation or infringement?; what restrictions or limitations do they place on freedom of (business) establishment?; and which activities are necessary or possible with the aim of protecting PPL’s economic interests and realizing its economic goals in accordance with the above-mentioned conditions?

The research carried out in both projects should permit the formulation of a number of conclusions or assumptions. Above all these are conclusions *de lege lata* (mainly with respect to the application of competition rules to the activities of airports) and *de lege ferenda* (mainly with respect to the conditions governing access to airport infrastructure and the principles governing airport charges, including those aimed at providing airport security).

The results of the comparative analysis carried out concerning the effectiveness and efficiency of airports has been incorporated by PPL into the framework of its realization of actual strategies of the company or the construction of new developmental strategies. Thanks to this the company has recently received a number of national and international awards and distinctions for being a credible and trustworthy partner for foreign companies and has built up a reputation and valuable public image among Polish firms, making it one of the strongest business brands in Poland and distinguishing it among the airports in the Central and Eastern European region, both for its marketing activities as well as its consistent and consequent realization of its company policies and strategies, making it a leader among the most dynamic and effective enterprises in Poland.

Undoubtedly however, the results of the research carried out can also be applied by other airport managing bodies and/or companies offering airport services. This concerns both the results of our research into the legal competition norms applicable to airports and into the sector-specific regulation regimes applied in the area of civil aviation, both of which were a primary focus of the research project and are presented in this book. Our research led to critically important findings, both in terms of theory and cognition as well as practical application, including: the principles governing the application of competition law to the provision of services in Polish and EU airports; the principles governing the application of EU law in the area of state aid in the construction and operation of airports; and analysis of the activities carried out by managing bodies of EU airports in light of EU regulations concerning access to airport infrastructure for take-offs and landings of aircraft, airport charges, groundhandling services, as well as control over airport security (in particular taking into account passengers' human rights); developmental strategies realized by medium-sized European airports; and investments into airport cities.

2. Competition law in relation to airports in the European Union and Poland

The first thematic area of research of both the implemented research projects concerned the application to airport activities of EU competition provisions – mainly those contained in and arising from the provisions of Articles 101-109 of the Treaty of the Functioning of the European Union (TFEU), Regulations of the European Council, European Parliament, and European Commission, as well as so-called *soft law* acts. Considered here were also Polish competition provisions, mainly the Competition Protection Act of 2007 (CPA 2007) and executive regulations issued pursuant thereto. In this thematic area research tasks were defined and carried out with respect to: the definition of relevant products and geographic markets concerning airport services, the status of airports as addressees of competition laws, prohibited practices restricting competition and control of concentrations in this sector.

Based on our research, it can be unequivocally concluded that the area of relevant markets defined by products, as regards airports, are distinguished by the market for aeronautical services, including access to infrastructure and groundhandling services, as well as the market for commercial services. Our research showed also that in the current stage of development of civil aviation a key question in terms of defining the markets of airport

services is: do regional airports belong to the same relevant geographical market as large airports? The answer is, basically, no. The strengthening of the market position of low-cost carriers has brought about the situation whereby regional airports compete among themselves for those carriers providing low-cost services and the passengers using them, while the large airports compete for long-distance connections and transit flights (in the case of airport *hubs*). This conclusion is fully reflected in the practice of the European Commission in concentration cases. The Commission has unequivocally distinguished four types of relevant geographical markets: hub markets (transit markets), with airports providing flights of not more than two hours duration to hub airports; airport markets serving international flights in a catchment area of 300 km; airport markets serving regional connections in a catchment area up to 100 km; and airport markets limited to a particular airport or system of airports, sometimes enlarged by its direct surroundings.

It may be regarded as established by official decisions that managing bodies of airports are ‘undertakings’ within the meaning of competition law. The days when airports were regarded exclusively as institutions vested with a public mission have receded to the past. Today airports are regarded as enterprises acting for the purpose of making a profit by catering to demand on the part of both passengers and carriers. The liberalization of airport activities (mainly as a result of national implementations of the Groundhandling Directive 97/96) has brought about a situation whereby the managing bodies of airports (including, in Poland, PPL as well as the managing bodies of regional airports) are obligated to comply with the existing provisions of competition law prohibiting practices which restrict competition.

However, the undertakings managing airports (managing bodies of airports) may engage in – either collectively or unilaterally – practices which in light of Articles 101 and 102 of the TFEU and Articles 6 and 9 of the Polish CPA 2007 are deemed to be practices restricting competition, to the extent that such practices are not specifically excluded from competition law for enterprises entrusted with rendering services in the general economic interest (Article 106(2) of the TFEU). Our research confirmed that decidedly most often such anti-competitive practices were committed unilaterally, in particular abuse of dominant market position by the imposition of unfair prices as well as unfair discrimination (mainly against clients). The highest level of market power appears in aeronautical markets where so-called ‘hard infrastructure’ is being used. The activities of airport operators which indicate they are conducting anti-competitive

practices might, however, be judged in many situations to be objectively (economically) justified. Competition protection rules enforced *ex post* also do not extend to areas covered by pro-competitive sector-specific laws. Our conducted research confirmed the thesis that managing bodies of airports are exposed to a “double risk” of being accused of engaging in prohibited practices: at the national level (in Poland based on Articles 6 and 9 of the Polish CPA 2007), as well as at the EU level (Articles 101 and 102 of the TFEU). Both national and EU legal regimes may be applied in parallel by national competition authorities (including in Poland).

Our research into the application of EU law on preventive control of concentrations (EC Regulations 4064/89 and 139/2004) to the airport services sector confirmed that it may be said the “movement” towards changes in the property and management structures of airports already began since 2002. Nonetheless, only in one of 21 instances of concentration was such concentration prevented (via an intervention by the British national competition agency, to which the European Commission sent a case for appraisal). In all other investigations the proposed concentrations were not deemed to create any anti-competitive effects, and since they primarily took the form of financial sector investments attention was given to the opportunities to obtain profits available to the managing bodies of airports and their need to obtain direct and immediate financial returns on the invested capital. Thus large and complicated concentrations, threatening competition in the airport services sector, would seem to still lay ahead of us.

3. EU state aid regime for the construction of aviation facilities and airport operations

Both projects engaged also in an analysis of *acquis communautaire* with respect to the prohibition of anti-competitive and anti-integration public assistance (state aid) and the application of Articles 107-109 TFEU to the construction of airport infrastructure and support for the operational activities of airport, as well as the conditions applicable to any such support or aid arising from the 2005 “Community guidelines on financing of airports and start-up aid to airlines departing from regional airports” and the Polish Act of 2009 concerning specific principles for the preparation and realization of investments into airports of public use.

Our research indicated that in recent years there has been a significant increase in EU activity in the sphere of state aids for airports. This confirmed our initial assumption that, while public support for the development of

airport infrastructure does not usually raise concerns in the European Commission (EC) about its legality in the light of Article 107(1) TFEU, public aids aimed at airport development which subsidizes air carriers or the current operating costs of airports raises decisively more doubts in the EC under the same provisions of the TFEU and is frequently subject to detailed review and analysis within the framework of state aid proceedings before the European Commission. That organ's policy in this area can be characterized as 'friendly' to co-financing the construction of airport infrastructure, but 'critical' towards public support for operational activities. The legal entities forming the managing bodies of airports have a good chance of successfully defending their business enterprises aimed at developing their airport's infrastructure ('suspected' of being used to obtain illegal state aid) above all by using the test of private investor (TPI). Most frequently, if the airport can prove it was acting like a private investor, its investment activities are not deemed to constitute state aid. If it doesn't meet the TPI, then the public support for regional airports serving less than five million passengers annually must be notified to the EC and may be adjudged as incompatible with the internal market of the EU. The greatest risk of receiving a negative decision from the EC arises in cases when the direct recipient of state aid is an air carrier.

As regards Poland, as a rule the support offered by Polish public bodies which meets the criteria set forth in the regulation on assistance for infrastructure projects for airports within the framework of PO Infrastructure and Environment for the years 2007–2013 has been adjudged to be consistent with the EU internal market.

4. Access to airport infrastructure for aircraft take-offs and landings, including noise restrictions

The public law provisions concerning the air transport sector is very broad in scope. In the EU the aims of such regulation include pro-integration, pro-competition, and others (for example the security of air traffic and passengers). Initially EU air transport law was aimed at air transport services. Over time, it was widened to include the regulation of airport services, in particular with respect to ensuring their pro-competitiveness (i.e. creating conditions for the development of competition on the market), on which to a large extent the development of the EU's internal air market depends. The basic areas subject to such regulation concern the conditions governing access to airport infrastructure and services, including: the division

of air slots between airports and the conditions governing access to the infrastructure necessary for aircraft take-offs and landings (taking into consideration reasonable limitations aimed at environmental protection, in particular noise restrictions at airports and in the surrounding areas); the imposition of airport charges; division of flight operation times; and the provision of groundhandling services.

The first set of regulated conditions which was chosen as a research topic for our projects concerned the possibilities for the administrative division of air traffic between airports functioning in large agglomerations, which as a rule is connected with the overburdening of one or several airports (overcrowding) while at the same time another airport or airports has unused infrastructure (airport capacity). In the first of our projects we initially examined the conditions according to which the EU Member States could divide up air services in a non-discriminatory fashion, in accordance with EC Regulation 1008/2008.

Our research indicated that the administrative division of air traffic can only occur when the flight schedules between airports located in the same city or conurbation do not regulate themselves in a natural manner, based on the differences in airport charges and rates in the respective airports or in differences in the quality, comfort, and convenience of the infrastructures. An administrative division of air traffic between the Warsaw Chopin Airport and the suburban Warsaw-Modlin Airport would be permissible if the infrastructure at one of the airports was not in sufficient use (i.e. unused airport capacity) while the other was overburdened, or if for example the air traffic at the Warsaw Chopin Airport would need to be restricted for environmental reasons (e.g., over-exposure of the surrounding inhabitants to noise).

In the case of allowing access to an airport's infrastructure for aircraft take-offs and landings a particularly troublesome problem arises in guaranteeing such access under conditions of noise limitations imposed on airport authorities, which places the airport managing body in the difficult position of seeking a compromise between its obligation to assure the proper functioning of the airport and complying with the growing demands made on it – particularly by local authorities – with respect to noise protection at the airport and surrounding area. Our research indicates that Polish aviation law, in implementing Directive 2002/30/EC, failed to correct the prevailing situation with respect to the minimalization of air traffic noise, inasmuch as it does not regulate the issue of permissible restrictions on aircraft which meet the ICAO norms and standards with respect to noise emission. In particular, it does not envision the introduction of operating

restrictions which could reduce air traffic without the need to divide up take-off and landing slots, for example the prohibition of the noisiest aircraft for nighttime take-offs and landings. Placement of noise limitations on aircraft other than those which are marginally functional is possible however according to Polish law. They are allowable as permissible noise levels which can be imposed on the basis of environmental protection law as well as the direct application of Regulation 95/93/EC in Poland. They also envision the possibility to modify such levels by the introduction of restricted flight areas in a given airport. If the demand for air services is connected with exceeding noise levels, then it becomes necessary to coordinate flight schedules as envisioned in Regulation 95/93/ECC. Following the introduction of such coordination the specific principles governing the allocation of slots should be established by the Coordination Committee and confirmed by the President of the Civil Aviation Authority (CAA). Hence the introduction of coordinated flight schedules is the only means practically accessible for keeping noise emissions within allowable limits during nighttime hours at the Warsaw Chopin Airport. The only other options theoretically available but unrealistic in practice would be self-regulation by air carriers or totally shutting down the airport.

Our research also yielded a number of practical recommendations directed to the managing authorities of airports, particularly in terms of short-, medium-, and long-term plans to alleviate noise emissions caused by the exploitation of an airport (introduction of *Collaborative Environmental Management*), constant monitoring of the state of the environment using available instruments, as well as taking part in broad-based consultations between the users of airports, the managers of air traffic, and local representatives of the outside surrounding community.

5. Airport charges

Both research projects analyzed also EU regulatory provisions governing airport charges, contained in Directive 2009/12/EC. The comparison of the systems for establishing airport charges in Poland and in other EU Member States turned out to be of particular importance. Our research confirmed our hypothesis that Polish regulatory solutions give too much power to airport authorities entrusted with many tasks which, in the market economy of an EU Member State, would be better left to market forces. Hence the current Polish regulations weaken the competitiveness of Polish airports on the European market, requiring not only that they receive

approval for changes in airport rates and fares, but also for discounts or other promotions or systems aimed at encouraging air carriers to use the services of Polish airports. Appropriate systems for the regulation of airport charges should protect users (passengers) against abuses by airport operators of their monopolistic positions by unreasonably raising charges or undertaking discriminatory actions, without tying the hands of operators and users by depriving them of one of the most basic components of free market operations, i.e. the establishment of charges for services rendered. Notwithstanding the foregoing, our further research indicated that the regulation of differentiations in airport charges set forth in Directive 2009/12/EC is actually quite advantageous for all participants in air transport systems, including PPL as the only enterprise in Poland to which the provisions contained in the Directive apply. Not only does the Directive clarify questions and issues which previously raised doubts, such as the modulation of charges or their establishment in relation to the costs incurred and the scope and quality of the services provided, but in addition it does not in any way restrict the possibility for airport operators to differentiate charges with respect to the state of affairs existing prior to the entry into force of the Directive. It also allows operators to differentiate charges on the basis of other criteria, so long as such differentiation does not violate existing EU competition law principles.

Our research also provided substantiation for the view that the current principles for computing and accounting for airport and navigational costs in relation to the establishment of charges should be kept in place, at least until such time as large and necessary investment projects are realized. The mechanisms currently in use increase the possibilities of obtaining funds to finance investments. Looking ahead to the year 2020, one may envision modification of the current system to include the pro-efficiency principle RPI – x, which is currently used in some of the most developed EU countries.

6. Time allocation for air carriers' operations

The scope of our research projects also led to a focus on the next important element, to wit, the reasons, effects, and tools available for resolving the so-called 'capacity crunch.' The unprecedented growth in recent decades of the amount of air transportation traffic (of both passengers and goods) has carried with it some negative consequences. One recurring problem is the inability to maintain punctuality in airport operations, which

is connected with issue of securing capacity, both with respect to airports and air space, and also with the efficiency of various types of aviation services. Hence a number of legal provisions have been introduced regulating the principles for allocating time slots to air carriers for the execution of their operations in airports, which is intricately intertwined with flight scheduling. Of key importance in this regard are the frequently-amended provisions of Council Regulation (EEC) 95/93 on common rules for the allocation of slots at Community airports.

Our research has shown, however, that the actions undertaken and legal solutions introduced have not been wholly effective in that they have not brought about the expected outcomes, and indeed have even contributed to the creation of new problems. The practical problems associated with the implementation of the legal solutions arise mainly from both the ambiguous nature of some of the obligatory provisions as well as gaps in the stipulated legal regimes (for example the lack of a definition of airport capacity), and in the way they are interpreted in practice. Other problems arise from the significant restrictions placed on some activities of the managing bodies of airports with respect to certain processes and procedures (for example security controls and protection against acts of illegal interference, or management of the flow of air traffic), as well as the parameters imposed, and the characterization and configuration of certain infrastructural elements involved in air traffic (for example the structuring and division of air space).

These problems can only be resolved to a limited extent by qualitative improvements to the governing legal regimes and to the practical application of their provisions. Our research demonstrated that the issue of increasing importance, to which solutions are being sought at the international level rather than through specific legal regimes, is how to assure punctuality in air transport operations. A leading role in this process is played by Eurocontrol (operating under an appropriate EC mandate), which is implementing two key programmes in this respect: Airport Collaborative Decision Making (CDM) and Airport Airside Capacity Enhancement (ACE).

7. Provision of groundhandling services

Our research covered also issues surrounding the de-regulation of the groundhandling services market in EU airports, being carried out on the basis of Council Directive 97/96, as well as the envisioned amendments to this directive, already submitted as proposals as part of the so-called

Airport package of 2007. Our research indicated unequivocally that, on one hand, the EU regulations have contributed to the opening up of the groundhandling services market in the EU Member States. Increased competition is visible in the sector as a result of the appearance of increasing numbers of independent undertakings, which has brought about tangible benefits to air carriers in the form of reduced groundhandling costs. On the other hand, however, the liberalization of this market has also produced negative consequences, such as decreased quality of the services provided, lack of necessary investments owing to the short time period for granting licenses to the agents of groundhandling service providers, a palpable worsening of the socio-economic conditions of the employees carrying out operational services, and connected therewith a lowering of the professional qualifications of employees (mainly as a result of constant rotation of personnel), a lowering of the parameters concerning airport capacity, etc. Analogous effects of the liberalization of the groundhandling services market can be expected to appear in Poland as well, in part because the existing Polish executive regulation on groundhandling services raises many interpretative doubts, and some of the solutions contained in the Regulation are not directly derived from Council Directive 97/96.

Problems connected with access to airport infrastructure with the aim of carrying out groundhandling services also arise from the fact that, both with respect to Council Directive 97/96 and Polish law, it is not clear if the managers and operators of the airport's centralized infrastructure are to carry out the tasks assigned to them by the managing bodies of airports or the agents representing groundhandling operators. Based on a review of European practices, it is possible to interpret the provisions of the applicable laws such that the managing bodies of airports – on the basis of confirmed organizational, technological or security circumstances – could decide that the enterprises providing groundhandling services are required to use not only certain elements of airport infrastructure, but also to use the services provided in connection with such elements, which services may be provided by employees of the managing bodies themselves. Such services must be classified as services connected with the centralized management of airport infrastructure, and not as activities carried out by groundhandling operators. This may be a problematical solution in Poland when the amended Aviation Law enters into force and any requirement that operators use centralized infrastructure will, on the basis of Polish law, need to be confirmed by an official decision of the President of the Civil Aviation Authority.

8. Airport security and safety

The second of our research projects identified and analyzed (legal and economic analysis) regulatory conditions concerning the security of airports operations in the take-off and landing phases as well as airport safety within the airport premises.

In the first of these two spheres, dominated by international regulations, national legal solutions can only support the international and EU regulations. Nonetheless, in light of the competitive challenges from the part of other European agencies of navigation services there is an urgent need for more flexible legal provisions governing the Polish Air Navigation Services Agency (PANSNA), granting it more flexibility in the conduct of its affairs in the non-aeronautical sphere, as well as a need for the creation of detailed legal regulations concerning the requirements that employees of air traffic control organs at particular airports have the appropriate ATS or AFIS certification. In this respect a major role is played by the National Programme for Civil Aviation Security.

The regulatory conditions governing the provision of security services within airports constituted an entirely new topic within the second of our realized research projects. Our research confirmed that the fundamental changes which have taken place in recent years with respect to international regulations safeguarding civil aviation have forced airport managers and operators to change the existing standards concerning the provision of security services at airports. Of particular importance for airport managers are those legal provisions which allow for vesting the security and protection of passengers and airport users in private security agencies.

The research conducted within the framework of our second research project also investigated and analyzed the conditions governing control of airport security which arise from international and constitutional law. This research was based on two fundamental assumptions. First, that all airport security operations involving public interventions into individual spheres, including security checks of passengers in airports, must be conducted with respect for individual privacy rights and the basic individual freedoms (including, among others, the freedom of belief). Secondly, any restriction on or invasion of individual rights or freedoms must be carried out in accordance with the proportionality principle.

Operating on these two assumptions, our research indicated that manual searches of passengers undoubtedly constitute the most invasive form of intervention in terms of the individual's right to privacy, and should be used only when all other means to determine the cause of a scanning gate

alarm have been exhausted. Manual searches should always be conducted by individuals of the same sex as the person being searched. The provisions in the amended Polish Aviation Law concerning the use of body scanners do not provide sufficient guarantees against possible abuses and violations of individual rights to privacy and fundamental freedoms. These concerns are of critical current importance given the fact that it remains unclear whether body scanners will be permitted to be installed in European airports.

Our research also established that the legal regulations, including those contained in Regulation 185/2012, do not directly require disrobing, within the context of security controls, of those elements of clothing which have a religious significance to the person subject to control (for example, a turban). What's more, security searches cannot be motivated by concerns of ethnic origin nor based on physical or external appearances associated therewith (skin color, hair color, facial features, manner of dress, etc.).

Generally speaking, the provisions regulating individual searches should be, including from the point of view of their effectiveness, more precise and universally accessible. This approach would be guaranteed to the greatest extent if they were included in legislative acts, and not in regulations issued by lower organs. This requirement particularly concerns provisions making criminal sanctions available for obstruction of security control operations. Both the acts constituting obstruction and the penal sanctions for such acts should be precisely described in detail (in accordance with the principle of public notice). Finally, our research allows us to draw the conclusion that any and all private persons/entities to whom the state delegates the authority to carry out security control operations should be subject to strict supervision (in Polish conditions, by the Border Control authorities) over their methods and the level of the services they provide. The state's positive duty to exercise such supervision results from the European Convention of Human Rights, which requires states to guarantee in practice defined minimum levels of protection of the rights and freedoms of individuals.

9. Strategies realized by medium-sized European Airports

While legal analyses dominated the methodologies used in both our research projects, economic analyses, in terms of the strategic management of airport development, also had their place. In the first of our research projects we analyzed the issue of ownership of airports vs. their management. It was assumed that the division between ownership interests and

management concerns are becoming deeper and clearer. Our research into this issue covered five of the largest airport markets in Europe: Great Britain, Spain, Portugal, Germany, and France. The ownership structure of selected airports in these countries was investigated using a dynamic approach, i.e. researching the ongoing processes of property ownership transformation (communalization, commercialization, and privatization) since at least the year 1990. Our research aimed at finding answers to the question: upon what conditions can and do enterprises take on the task of airport management?

Our research awaited the issuance of national reports. The formulas contained in various national reports made it possible for us to present the wide-ranging differentiation in the solutions adopted in selected European airport service markets, while at the same time focusing on airport management models adopted in selected countries. Our research clearly indicated, however, that there is no single or even dominating model, neither with respect to property ownership transformations of airports nor as regards a business model for the operation and management of airports. Nevertheless we were able to classify ownership transformations into basic types: transfer from public ownership to private ownership (e.g. Great Britain); from public ownership to local ownership (e.g. Great Britain and Germany); maintenance of public ownership together with privatization plans to transfer minority shares to private ownership via public offerings or the creation of public-private partnerships (e.g. Portugal and Spain).

Our research also confirmed the hypothesis that, even though the process of privatization of public airports was inevitable in Europe, it has taken place incrementally and relatively slowly. As a result of the ongoing processes, airports began to independently manage their affairs and accounts, aiming their activities at turning a profit and focusing ever more on economic efficiency and effectiveness. This is an evident common denominator to all the various types of privatization and business management models contained and described in the national reports. In general terms it could be seen that the major business approaches (models) applied to airport management include instruments such as: outsourcing, granting of concessions, increasing revenues and income from commercial activities within airports, and building 'airport cities'.

Our conducted research also confirmed the appearance, in contemporary practice, of three basic models establishing the relations between the owners and managers of airports. In the "ownership and management" model, the enterprise/entity which owns the airport is also the enterprise/entity which manages it. The "management and investment" model (*BOT – build, operate*

and transfer) operates according to the basic formula that the owner(s) sign contracts for management of the airport with an outside investor, leasing the entire airport area and making the contracting investor responsible for modernization of and investments into airport infrastructure. In the “management contract” model, the owner(s) hire an airport management company and pay them a fee for their services. The authors of this research also concluded that the most appropriate model for Poland would be a solution dividing the roles of owner(s) and airport manager as follows: the owner, as starter and founder of the airport, remains the owner of its infrastructure and is responsible for financing its maintenance and modernization; the airport manager (managing company) conducts the business of the airport in its own name, but in a fiduciary relationship with the owner, according to which all business profits, both from airport operations and non-aeronautical operations, are divided between the owner(s) and manager, the manager carrying out its duties in strict accordance with a long term contract (for example, a 25-year contract).

The last of our research tasks having an economic character consisted of a comparative analysis of the operating effectiveness of selected EU airports; Budapest and Prague as the nearest competitors of PPL, as well as Copenhagen, Vienna, and Zurich, as more distant (intermediate) competitors. Our conducted research fully confirmed the thesis that airports are serviced by branches which are characterized by very high initial investments necessary to their functioning, and further investments aimed at correcting demand or in response to changing regulations (e.g. concerning protection of competition or of the natural environment). Airport service providers also include branches which operate in conditions of a monopoly linked with competition. Such situations were encountered in our analysis of the airports selected for our research. Our research results indicated that the nearest geographical competitors of PPL carry out various developmental strategies – for example integrating the activities of airport operators with airlines (the combining together into a single company of the Ruzyně airport in Prague with the Czech national airline CSA), building a port (hub) on the same scale as the central airport, or employing a specialization strategy, or concentration, such as that implemented by the HOCHTIEF AirPort from the moment of its takeover of the airport in Budapest. The results of our comparative analysis allowed us to formulate concrete conclusions with respect to the future of the Warsaw Chopin Airport, including in particular the postulate of maximalization of income from non-aeronautical revenues as well as the need to invest in the construction of a so-called ‘airport city.’

10. Airport Cities – a fashion or a necessity?

The conclusions outlined just above were fully confirmed by the results of our final research task in the second of our research projects. They clearly demonstrated that an apparently irreversible trend in the world air transport market is directed toward the construction of airport cities, where the focal point of operations is the airport and its infrastructure, with accessibility replacing location as the key feature. The traditional planning strategy of locating airports away from city centers is being replaced by a new strategy of integrating airports into the cell systems of cities (including even inhabitants). Together with the development of airport technologies airplanes are becoming ever less noisy and more ecological, and inhabitants of cities will become accustomed to the fact an intensive transportation system exists over their heads.

The rapid increase in passenger air travel, observed worldwide, while temporarily derailed by the economic crisis, is expected to quickly rebound and expand. This encourages investors to consider investments into the aviation branch, accompanied by investment into non-aeronautical projects such as the construction of airport cities. Taking into account the capital intensiveness of investments into airport cities and their relatively slow pace of development, such investments must be considered as quite long term, unable to produce a yield on invested capital in the short or medium term, and maybe not for a number of years. However, sooner or later all airports will be faced with the need to diversify their sources of income and increase non-aeronautical profits. Income from real estate rentals can be viewed as a stable and long-term source of income, independent of the existing market conditions in air travel, which can fluctuate rapidly based on the prices of oil, the outbreak of an epidemic, a terrorist attack, or even the emission of volcanic ash.

Thus the conversion of sections of airport terminals into commercial and gastronomical centers cannot guarantee the same level of future income as would investments into the territory surrounding airports. The project Chopin Airport City perfectly fits in with the world trend towards airport cities and constitutes a good example of responsible and balanced airport development.

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Chapter II

Competition law in relation to airports in the European Union and Poland

1. Introduction

The dynamics of development of air transport has led to a revision of the traditional view, i.e. that airports constitute a natural monopoly and consequently an analysis of the competition between them is not justified. In fact airports and the services provided by them are, at least to some extent, interchangeable with each other, which entails competition between them and means that those managing airports should be required to comply with competition law. In a broad sense, competition law includes the following:

- 1) prohibitions on restrictive practices (restrictive agreements and abuse of dominant position),
- 2) supervision of the activities of providers of services of general economic interest,

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- 3) control of concentrations between undertakings,
- 4) principles regarding state aid.

The necessity of assessment of the activities of airports under competition law was confirmed by the Court of Justice of European Union (ECJ) in one of its decisions.¹ However, the application of competition law is partially limited by the existence of other rules governing the sector (mainly the Groundhandling Directive² and Directive 2009/12/EC on airport charges³).

The activities of airports in EU Member States are governed by two systems of competition law – the national and European Union system. What separates them is the condition of effect on trade between EU Member States of the potential anti-competitive practice. If the anti-competitive practice affects trade between EU Member States, then EU competition law applies. Interpretation of the condition of “effect on trade between Member States” has been made by the European Commission in Guidelines⁴ specifically devoted to that point. As far as the operation of airports is concerned, the case law analysis leads to the conclusion that the primary criterion for determining the potential impact on trade between EU Member States is the intensity of international air traffic at a given airport.⁵ It should be noted, however, that in relation to Article 107 of the Treaty on the Functioning of the European Union⁶ (TFEU) concerning the prohibition of anticompetitive state aid, EU jurisprudence takes the position that state aid in each case affects trade between EU Member States. Thus national law does not apply in cases of state aid.

EU substantive competition law is set forth in Articles 101–109 of the TFEU (formerly Article 81–89 of the TEC), and – in terms of merger control – in Council Regulation (EC) 139/2004.⁷ These primary laws are accompanied by numerous secondary and supplementary laws (regulations, guidelines etc.) establishing procedures for their implementation.

¹ Case C-82/01 *Aéroports de Paris v European Commission* p. 21–24. [2002] ECR I-9297.

² Directive 96/67/EC of 15.10.1996 on access to the ground-handling market at Community airports (OJ 1996 L 272)

³ Directive 2009/12/EC of the European Parliament and of the Council of 11th March 2009 on airport charges, (OJ 2009 L 70).

⁴ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101).

⁵ M. Negneman, M. Jasers, R. Wezenbeek, J. Stragier [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, Oxford University Press 2007, Nb 14.242.

⁶ Treaty on the Functioning of the European Union (OJ 2010 C 83).

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24).

Polish competition law is laid down in the Competition Protection Act (CPA) 2007.⁸ It should be emphasized that the Polish rules, with respect to both substance and enforcement, to a great extent follow the EU law. Thus a simultaneous analysis of both legal systems, as well as numerous references to the case law of EU bodies, seems justified. If a particular behaviour of an individual undertaking or a couple of undertakings appears to meet the condition of effect on trade between EU Member States, the parallel application of national and EU competition law is possible in relation to restrictive practices.

2. Basic conditions for the application of competition law

2.1. Relevant market

Airport management, as well as other services provided at airports, constitute an economic activity in a specific market, which designates the boundaries of competition. In order to resolve any problem in the area of competition and regulatory law, the first step is designation of the relevant market on which a competitive process takes place.

The “relevant market” is defined in at least two dimensions: product and territory. These definitions have been developed in EU law⁹ and are also used for a complex (multi-dimensional) definition of the relevant market in Article 4(9) of the Polish CPA 2007, according to which a relevant market is “a market of goods, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in an area in which, by reason of their nature and characteristics, the existence of market access barriers, consumer preferences, and significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous.”

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, due to their nature, prices and intended use. It needs to be stressed that the **market for air transport services** is separate from the **market(s) for airport services**, even though these markets interact with each other and may have, vis-à-vis each other, the status of neighbouring markets (at least

⁸ Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2007, No. 50, item 331).

⁹ Commission notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372).

when it comes to the market of transport services and the aeronautical services market). In fact the demand for airport services is a derivative demand – it is dependent on demand for air transport services.¹⁰

The Commission has made only a general categorization of the market for airport services, highlighting the following segments:¹¹

1) **providing aeronautical services**

- a) **providing infrastructure services** (e.g. airstrips, aircraft parking positions);
- b) **providing groundhandling services** (e.g. check-in of passengers and baggage, fuel supply, aircraft maintenance);

2) **providing commercial services** (e.g. catering, car parks, car rentals, running duty free shops and other retail shops).

In the area of groundhandling services, the Commission also considered possible narrower product markets such as: **cargo handling in sheds in the London Airport System**¹²; **passenger service market** (including check-in and handling of passengers and their luggage in the airport terminal), **passenger, ramp and cargo ground handling market** (due to the fact that it requires special know-how and experience and may be provided by different entities¹³); as well as **cargo handling, ground handling and technical services market**.¹⁴ In the end the Commission has so far defined only one specific relevant product market of groundhandling services, which is the **in-flight catering services market**¹⁵.

It should be pointed out that airports compete, above all, on the primary services markets (markets for aeronautical services), where the risk of violation of competition law is the largest. The likelihood of restrictive practices in breach of EU law is substantially smaller on the commercial services market – practices on these markets do not often affect trade between EU Member States, which is a prerequisite for application of the provisions of the Treaty. However, they may still be subject to national competition regimes.

The **relevant geographic market** is defined as the territory on which all entities operate under similar competition conditions in relation to

¹⁰ Lack of competition between airports leads to distortion of competition between airlines. Airports compete for passengers through competition for airlines and their services (development of travel frequencies and destinations).

¹¹ Case No IV/M. 1035 *Hochtief/Aer Rianta/Düsseldorf Airport*, p. 11.

¹² Case No IV/M.1165 *Lufthansa/Menzies/LCC*, p. 1 and 4.

¹³ Case No COMP/M.1913 *Lufthansa/Menzies/LSG/JV*, p. 5.

¹⁴ Case No COMP/M.4399 *LBO France/Vinci Airport Services*, p. 2.

¹⁵ *Ibidem*.

specified goods or services.¹⁶ In the case of the airport services' market the location of the airport is crucial, as well as the determination to what extent passengers, airlines (and to a far lesser extent other undertakings and service providers) are able to select another airport. Airports located in the same urban area are the strongest competitors.¹⁷ Depending on the determination of the relevant product market (and the services it covers), the relevant geographic market may potentially include: a couple of airports (not necessarily neighbouring), only one airport, or a part of one airport (e.g. one of the terminals), as well as the territory outside the airport (for example in relation to commercial services, such as the rental space for providing food services). In practice, the competition authorities generally consider the relevant geographic market as the area of one airport, especially when it comes to airports offering regular international connections.¹⁸

At the current stage of development of air transport one key problem appears to be resolved: whether regional airports belong to the same relevant market as the other major airports. The strengthened presence of low-cost carriers on the market has brought about a situation whereby regional airports compete with each other only for low-cost carriers, while major airports do not compete with regional airports, but with each other for long distance flights, carried out at hub airports.

The Commission believes that the most important factor in the definition of the relevant geographic market vis-à-vis airports is the potential number of passengers, which is the result of population density in the area around the airport. In its opinion, there are also differences in the geographic market coverage between scheduled and chartered flights. In particular business passengers, who use the regular lines, are more sensitive to travel time to and from the airport than tourists, who mainly use charter flights. When it comes to determination of the relevant geographic market for hub airports (hubs), according to the research conducted by the Commission it was found that **the same geographic market can include connecting airports, to which passengers can be transported from other airports within no more than two hours.**¹⁹

¹⁶ Case T-128/98 – *Aéroports de Paris v Commission*, p. 140 [2000] ECR II-03929.

¹⁷ “Study on Competition between Airports and the Application of State Aid Rules. Final Report” (report prepared for European Commission DG Energy and Transport), Cranfield University, Cranfield 2002, p. 4–6.

¹⁸ Decision No 2000/521/WE *AENA* p. 35; Decision No 1999/198/WE *Ilmailulaitos/Luftfartsverke*, p. 29; Decision No IV/34.801 *FAG-Flughafen Frankfurt/Main AG*, p. 56.

¹⁹ However, geographically relevant markets were not generally defined in the above cases. The presented segmentation is based more on specific criteria suggested by the parties to the concentration than the Commission' determination.

As far as narrower definitions of market are concerned, generally speaking the Commission recognizes that in the case of groundhandling services (as well as business services) the relevant geographic market is limited to area of the airport or system of airports in the area (e.g. the London airport system), sometimes increased by their immediate environment.

The **relevant temporary market** is determined when the characteristics of the product market change due to significant seasonal fluctuations in demand. It would be possible to define a relevant market in time if, for example, the severity of air traffic at a given airport located in the mountains was connected with ski season, or in case of an airport located in coastal towns was the largest in the summer.

2.2. Airports as “undertakings” in the light of competition law

Infringement of competition law may be committed only by the undertaking. The interpretation of the term “undertaking” under EU and national competition law goes beyond the definition used in commercial law. In terms of competition law, such criteria as the legal form of running an activity, ownership status, or source of financing are not decisive. The undertaking can be a natural person, joint-stock company, or a state-owned company. It can be either a private or public entity. Hence the main criteria for determining the status of undertaking is running an activity on a distinct market (relevant market) for goods or services.²⁰ The status of airport managers as undertakings has been repeatedly confirmed in the jurisprudence of EU bodies.²¹

At the same time, the established jurisprudence recognizes that an entity is not engaged in economic activity within the meaning of Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 TEC) if it runs an activity in the public interest, exercising part of the essential functions of the state (i.e. belonging to the prerogatives of a state). In this context, ensuring the safety of persons at the airport and the passengers of airlines is not recognized as an economic activity. As a consequence, activities associated with managing an airport which are aimed at ensuring the safety of persons and passengers will not be judged in the light of competition law, even if the exercising of those tasks (maintaining security, checkpoints for passengers) is entrusted to a private company. Other “state prerogatives” are perceived to include: the activities of police and

²⁰ Decision No 2008/948/WE *DHL-Lipsk/Halle* p. 167.

²¹ Case T-128/98 *Aéroports de Paris v Commission*, p. 125.

customs officials, activities in the field of fire protection, safe operation of airport infrastructure, and commitments towards national meteorological services.

3. Restrictive agreements with the participation of the airports

3.1. General remarks

Restrictive agreements are collective practices restricting competition prohibited by Article 101(1) of the TFEU (formerly Article 81(1) of TEC) and Article 6 of the Polish CPA 2007. The prohibition on restrictive agreements includes both horizontal agreements, i.e. interactions between undertakings active on the same level of economic activity (such as an agreement between airports), and vertical agreements, i.e. interactions between undertakings operating at different levels of economic activity and which are not competitors (e.g. agreements between airports and airlines, or between airports and service providers operating in the airport²²). Horizontal agreements are considered as the much greater threat to competition, as they are concluded between undertakings competing directly with each other.

Prohibited restrictive agreements under Article 101(1) of the TFEU and Article 6 of the CPA 2007 require that the same conditions be fulfilled:

- 1) the practice must be adopted by at least two undertakings;
- 2) the existence of an agreement must be proved, though the agreement can take the form of either a written or verbal agreement, decision by an association of undertakings (trade association), or so-called concerted practice(s);
- 3) the object or effect of the agreement is a potential or actual restriction on competition;
- 4) the restriction on competition can have any range (total elimination, partial restriction, or distortion of competition);
- 5) the restriction on competition must take place on a specific relevant market;
- 6) the restriction on competition must be appreciable. The **concept of appreciability of the effect on** competition incorporates both a quantitative

²² M. Simelane, *Anti-competitive practices*, Competition Commission – South Africa (accessible on the website at: [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Menzi+Simelane.prn.pdf/\\$FILE/Conferences_CompetitionPolicyTanz_Menzi+Simelane.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Menzi+Simelane.prn.pdf/$FILE/Conferences_CompetitionPolicyTanz_Menzi+Simelane.prn.pdf)).

element (the size of the market and shares of the participants to the agreement²³) and a qualitative element (list of clauses that constitute appreciable restrictions – irrespective of the size of the market share, e.g. horizontal price agreements or vertical agreements on territorial protection);

7) in case of Article 101(1) of the TFEU, the effect of the agreement on trade between EU Member States must also be proved.

As regards the first of the abovementioned conditions, it should be noted that competition law has developed a **single economic unit** concept, which postulates that when several entities with close economic relations (e.g. within the same capital group) make arrangements concerning their market strategy, such agreements are not perceived as violating *per se* the prohibition against anticompetitive agreements. Thus, arrangements made between airports providing services to the same city or conurbation and grouped within the same system are not automatically subject to the prohibitions contained in Article 101(1) of TFEU or Article 6 of the CPA 2007. The single economic unit concept is also reflected in the solutions adopted in Directive 2009/12/EC on airport charges,²⁴ where the Article 4 stipulates that the introduction of a common system of airport charges within the airport network is allowed.

3.2. Exemptions from the prohibition against restrictive agreements

The prohibition against agreements restricting competition is relative, and there are some exemptions from this prohibition. These may take two forms:

- **block exemption** (on the basis of a Regulation of the Commission, or of the Council of Ministers in the case of Polish national law); or
- **individual exception** (on the basis of a self-assessment, which must take into account fulfilment of the conditions laid down in Article 101(3) of the TFEU or Article 8(1) of the CPA 2007).

²³ An exemption for agreements of minor importance in EU law shall include horizontal agreements concluded between entrepreneurs whose collective market share does not exceed 10%, and vertical agreements, where none of the participants has a market share larger than 15%; see Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (OJ 2001 C 368). Under Polish competition law these values are 5% and 10% respectively.

²⁴ See footnote 3.

As of now there is no applicable block exemption regulation (sector-specific exemption) as regards the aviation sector, neither in EU law nor in the national law of any EU Member State. However, agreements concluded by airports which potentially restrict competition may be able to benefit from an individual exception. In such a case it is necessary to satisfy two positive and two negative conditions. The positive conditions are:

- 1) contribution to improving production or distribution or to promoting technical or economic progress (e.g. agreement of regional airports contributing to the boosting of economic growth in the region, or an agreement aimed at modernization of airport infrastructure);
- 2) a fair share of the benefits resulting from the agreement must be passed on to consumers (the following could be considered as a benefit for consumers: reduction of airport charges that are reflected in the prices of airline tickets, improvement of conditions in the passenger terminal, acceleration of passenger or cargo handling).

The negative conditions which must be satisfied are the following:

- 3) lack of restrictions on competition that would go beyond what is necessary to achieve the “positive” objective of the agreement;
- 4) competition is not eliminated with respect to a substantial part of market (i.e. an agreement involving all airports in a country probably could be challenged).

It needs to be emphasized that at present there is no possibility to obtain a legal confirmation *a priori* from a competition authority that the above-mentioned conditions have been fulfilled. Therefore evaluation needs to be carried out by the airports themselves. However, it is widely accepted that hard-core restrictions on competition (*hard-core cartels*) do not satisfy the above conditions.

A verification of compliance with the above mentioned conditions by a competition authority could be made only during the course of an antitrust investigation, initiated either by the Commission or the President of the Polish Office of Competition and Consumer Protection (OCCP), in the event of suspected violations of competition law. Under the CPA 2007 such proceedings can be preceded by a preliminary investigation, during which undertakings are required to provide information on various aspects of their business. At this stage the airports participating in a “suspected” agreement (in light of a prohibition resulting from Article 101(1) of the TFEU or Article 6 of the CPA 2007) may submit data and information demonstrating that the agreement under question meets the conditions for an individual exemption.

3.3. Strategic alliances in relation to the prohibition against restrictive practices

Neither the case law of the EU, nor Polish jurisprudence, provide concrete examples of anti-trust assessments of agreements between airports. Such an assessment, however, could be made with respect to strategic alliances which are widely known (albeit rare) in the functioning practice of the aviation sector in the world. Strategic alliances are understood as long-term cooperation agreements between the airports on all or selected markets on which the participants are active.

Alliances between airports do not necessarily violate the prohibition against agreements restricting competition. Joint actions in the area of marketing or the standardization of rules usually remain neutral for competition (provided that participants do not reveal between themselves pricing or cost policies, which would raise concerns from the perspective of prohibited coordination of market behaviour²⁵). The objective and effect of joint activities under a strategic alliance may be a cost savings for participants, but it is notable that, in order for the alliance agreement to benefit from the exception, the benefits cannot be limited solely to cost reduction. It is also necessary to grant additional profit to entities outside the agreement (i.e. the consumers). Thus an agreement between airports, on the basis of which management agrees on the level of airport charges (unless such arrangements are permitted on the basis of Directive 2009/12/EC on airport charges) or to a division of the market (e.g. airport X cooperates with airlines A, B, C, and airport Y – with airlines D, E, F) would not be an exception from prohibition. Agreements of this kind, known as price cooperation or market sharing, are considered to be among the most serious restrictions on competition (so-called hard-core restraints) and are strictly prohibited.

Another “negative effect on competition” of airport alliances can result if the participants achieve – through a coordination of their activities – market power (i.e. collective dominance), which poses the threat of abuse of dominant position. It has been suggested that competition policy towards horizontal co-operation between airports should be fairly rigorous, due to the fact that cost savings resulting from such collaboration are relatively small compared to the risk of its participants achieving a market power

²⁵ Point 146 of the Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Text with EEA relevance (OJ 2011 C 11).

that threatens competition.²⁶ On the other hand, it should be noted that there are some experts who predict that cooperative agreements of airports (alliances) will not play a significant role in the development of the sector.

Strategic alliances are also possible between airports and airlines (without every contract between these parties needing to be labelled as an “alliance”). In these types of alliances the cooperation between airports and airlines goes beyond the traditional schemat of service provider– client/customer; it is in fact aimed at developing a competitive advantage to serve each of the participants in relation to its direct competitors. Vertical cooperation between airports and airlines is carried out mainly in three areas: capacity, marketing, and security.²⁷ It can also be realized through financial participation in investments of the airport (as in case of cooperation between Lufthansa and the Munich Airport – München GmbH).

In principle, these alliances do not raise competition concerns. A possible violation of competition law would take place if the object or effect of the agreement was of a discriminatory nature (e.g. resulting in a policy whereby an airport would favour, on the basis of subjective criteria, a particular air carrier), or if it would result in the elimination from the market of other carriers not covered by the agreement. Agreements of this kind are expressly prohibited by Article 101(1) of the TFEU and Articles 6(1)(4) (discriminatory agreements) and 6(1)(6) (agreements restricting access to markets) of the CPA 2007. The fact that the market for air transport services and the market for airport services are neighbouring markets also poses the risk that alliances between airports and airlines could also strongly affect the air transport services market.

Also, there is no prohibition on agreements commonly referred to as “revenue -sharing agreements.” These are arrangements (usually implemented via a memorandum of understanding) entered into by airports and airlines with respect to airport charges. While profit-sharing agreements bear all the characteristics of prohibited price agreements, their express authorization by public authorities excludes the possibility of them being evaluated in light of competition law. The existence of such agreements is

²⁶ P. Forsyth, H.M. Niemeier, H. Wolf, *Airport Alliances and Multi Airport Companies – Implications for Competition Policy*, Hamburg Aviation Conference, 11–13 February 2009 (accessible on the website at: <http://www.hamburg-aviation-conference.de/pdf/present2009/Session-IV-Dr-Hans-Martin-Niemeier.pdf>).

²⁷ S. Albers, B. Koch, Ch. Ruff, “Strategic alliances between airlines and airports – theoretical assessment and practical evidence”, *Journal of Air Transport Management* 2005, V. 11, No 1, p. 56.

not contrary to Directive 2009/12/EC, provided that the fees are applied on the basis of criteria specified in this Directive – which concern mainly transparency and non-discrimination.

4. Abuse of dominant position by airport operators

4.1. General comments

Given the fact that airports often have a dominant, if not monopolistic, position on the relevant market (i.e. face little or no competition), there exists a large potential to distort competition through abuse of dominant position. Practices of this kind are prohibited by Article 102 of the TFEU (formerly Article 82 of the TEC) and Article 9 of the Polish CPA 2007. In order to establish abuse of dominant position, the competition authority (the EC or the President of the OCCP) is obliged to prove that the following conditions have been fulfilled:

- 1) the airport has a dominant position;
- 2) the dominant position is abused (resulting in a restriction on competition);
- 3) in the case of Article 102 of the TFEU, it is also necessary to prove an effect on trade between EU Member States.

While EU law does not provide a legal definition of dominance, interpretation of this term can be drawn from the well-established jurisprudence of the ECJ.²⁸ The Polish definition, contained in Article 4(10) of the CPA 2007, also refers to that line of jurisprudence. There are two relevant criteria necessary to ascertain a dominant position in a relevant market: quantitative (market share) and qualitative (ability to prevent effective competition by acting independently of competitors, contractors, and consumers²⁹). The essence of abuse of dominant position is that economic activity which otherwise would be regarded as normal will constitute an abuse within the meaning of Article 102 of TFEU or Article 9 of the CPA 2007 due to the market power (dominance) of the undertaking providing such activity. While the prohibition against abuse of dominant position is generally non-conditional, nevertheless certain defensive strategies on the

²⁸ Case 27/76 *United Brands Continental BV v Commission (Chiquita Bananas)*, [1978] ECR I- 207; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR I- 461.

²⁹ Case 27/76 *United Brands Continental BV v Commission (Chiquita Bananas)*, p. 65 and 66; T-30/89 *Hilti v Commission* [1991], ECR II-1439 p. 90; Case C-82/01 *Aéroports de Paris v Commission*, p. 147.

part of dominant companies (thanks to which certain market behaviours are not subject to the prohibition), have been accepted in the case law, both in the EU and in Poland.

Case analysis leads to the conclusion that airports are often regarded as entities possessing a dominant position on the relevant market, which automatically makes them subject to an evaluation of their activities according to the provisions of Article 102 of the TFEU or Article 9 of the CPA 2007. A dominant position can be held by an individual entity (market position of one airport) or collective entity (collective dominant position, in the case of a system of airports). Dominant position can be possessed both by airport managing companies and providers of various types of services. However, it is not the market position of the entrepreneur *per se*, but the nature of his activities that constitutes a breach of competition law. In other words, existence of dominant position is not a breach of competition law; its abuse is.

Analysis of the existing case law confirms that airports often abuse their dominant position by imposing unfair prices and discriminatory practices. It is important to bear in mind that a single market behaviour may fulfil the conditions of two or more prohibited practices, each of them constituting a violation of competition law.

4.2. Abuse of dominant position by imposing unfair prices

The practice of imposing unfair prices or other unfair contract terms is expressly prohibited by Article 102(a) of the TFEU (formerly Article 82 (a) of the TEC), and Article 9(2)(1) of the CPA 2007. The “imposition” of prices and contract conditions means that the counterparty of the dominant entity is ‘forced’ to accept something or agree to a specific behaviour. The source of this duress is usually the lack of other alternatives on the market, which in turn is a consequence of the domination of one (or several) entities. This imposition can be executed directly (e.g. through unfair contract provisions) or indirectly (when the dominant entity influences other suppliers by his own behaviour, both forcing and encouraging them, for example, to use a specific price or include specific terms in contracts concluded by the supplier). The examples from case law usually involve the imposition of prices by airports in a direct form. Imposing unfair prices within the meaning of Article 102(a) of the TFEU and Article 9(1)(1) of the CPA 2007 involves: too high prices (*excessive prices*) or too low prices (*predatory pricing*). When it comes to airports, they are generally accused of excessive pricing.

In light of the EU case law unfair prices are considered to be those which demonstrate no rational relation to the economic value of the goods or services delivered.³⁰ Thus, it is necessary to examine whether the difference between costs actually incurred and the price charged is not excessive, and if the answer is positive, whether the requested price is unfair in itself, or in comparison to competing goods.³¹ It is widely accepted in the case law that airports may compose in different ways the scope of services encompassed by the fees charged. Thus the differences in prices between various airports may result from:

- 1) lack of full equivalence as regards type, scope and quality of services provided at various airports;
- 2) significant differences in the costs of providing services in different Member States;
- 3) differences in quality and value of services rendered in the old airports as compared to the new or recently modernized airports.

Therefore, a simple comparison of the level of fees charged by various airports cannot be regarded as a sufficiently persuasive argument to establish the imposition of unfair prices.

A fee, the obligation to pay of which is established by law (and thus the fee can be considered as a tax) cannot be considered as an unfair price, even if the fee is charged (technically) by the entity managing the airport. There is an example of such a fee in European case law. The *Spatosimo* fee, from which the income was allocated to the Airport Development Fund and all passengers over five years of age departing from Greek airports were obligated to pay, was imposed by Greek Law No 2065/1992.

The likelihood of accusations of excessive pricing with respect to fees for aeronautical services also decreases when the airport's fees are subject to Directive 2009/12/EC. However, it cannot be completely excluded that the rates approved by the national regulatory authority may be questioned in connection with their possible violation of competition law: the legislature has stipulated that "the Directive should be without prejudice to the Treaty, in particular Articles 81–89 thereof [now Articles 101–109 of the TFEU]."³²

³⁰ Case 27/76 *United Brands Continental BV v Commission*, p. 250.

³¹ *Ibidem*, p. 252.

³² Under Polish competition law, the provisions of Article 3 [of the CPA] do not provide the basis to limit the statutory authority of the President of the OCCP by the law being in force within other proceedings [...] such as proceedings concerning energy, telecommunications or the rail transport sector [...]. Thus, President of the OCCP is vested with general competence in all those cases in which there is a restriction of competition.

Airports may abuse their dominant position not only by imposing excessive prices, but also other contract terms (e.g. imposing a distant payment deadline) which, however, was not subject to antitrust decisions issued by the Commission or any Member State.

4.3. Abuse of dominant position by discrimination

Unilateral discriminatory practices are prohibited under Article 102(c) of the TFEU and Article 9(2)(1) of the CPA 2007. The essence of a discriminatory practice is an economically unjustified action favouring one contractor in relation to another, even though these contractors are in a similar market situation. Abuse of dominant position occurs when the behaviour of an undertaking meets all the conditions of the so-called **discrimination test**, which include:

- 1) **similarity (equivalence) of the transactions** executed by the dominant undertaking with privileged/discriminated entities (such as licensing agreements for the provision of certain services, ground handling);
- 2) **differentiation of contractual conditions** for entrepreneurs entering into similar transactions with the dominant undertaking;
- 3) **creating non-equivalent and burdensome conditions of competition** in the market (by varying the terms of contracts for contractors).

The similarity of the transaction is determined primarily by the object and purpose of the contract (e.g. the provision of certain services related to passenger handling). The fact that the name of the service which is the subject of the contract is formulated in a somewhat different way in comparable contracts does not determine that the contracts are not similar. On the other hand, commercially similar contracts (i.e. having the same object) may not be equivalent if they pursue different economic goals. Their similarity can be assessed not only in relation to contracts already executed, but also at the stage of execution of the contract (e.g. when the entities with whom the contract is to be executed are selected not by tender, but on the basis of vague criteria³³). This situation usually occurs when competition – due to the nature of economic activity – is limited to the submission of tenders.

The non-homogenous terms of the transaction may concern either pricing (**price discrimination**) or other terms and conditions (**non-price**

³³ Judgment of the Court of Competition and Consumer Protection as of 12.09.2002, case number XVII Ama 101/01; Journal of Law of Office of Competition and Consumer Protection 2003 No 1 sec. 24.

discrimination). Price discrimination can refer to both the amount of the final price offered to contractors, as well as other elements of prices (rebates, discounts, margins, etc.) Non-discriminatory prices however do not necessarily mean equal prices for two or more comparable units. Prices that are different may be non-discriminatory, provided that the price differentials are objectively justified (e.g. by a different quality or different scope of services provided).

Traditionally under competition law quantity discounts (applying different prices in proportion to the volume of purchases) are permissible, as objectively reasonable; while discounts for loyalty are usually regarded as prohibited. These kind of discounts are granted to permanent contractors of the dominant entity, regardless of the quantity of goods or services purchased. As regards airports specifically, the Commission denied the possibility of using loyalty rebates in the decision of the Brussels National Airport. As a result of quantity discounts larger purchasers of goods or services can generally benefit from lower average prices and higher average reductions than smaller recipients of goods or services.

The criteria for non-price discrimination include:

- 1) **quality** – e.g. the management of an airport may provide entity X, supplying aeronautical services, with an airport infrastructure of poorer quality than in case of entity Y, supplying similar services;
- 2) **time** – e.g. prolonged negotiations with one of the suppliers of certain categories of groundhandling services may result in that supplier gaining access to the market later than his competitors;
- 3) **quantity** – e.g. the airport imposes on a given contractor the exclusive provision of certain types of services to a specific customer.

Non-equivalent and burdensome conditions are regarded as those which affect the competitiveness of the relevant market. The competition authorities are required to prove that the conditions applied by a dominant undertaking are not equivalent and (possibly) burdensome, but they are not required to differentiate which conditions among the particular facts of the case would be recognized being not in violation of the prohibition against abuse of dominant position.

It is worth recalling that the diverse competitive conditions are assessed in relation to the relevant market. As a result, the competitive conditions are not required to be perfectly homogeneous. It is sufficient if they are “similar” or “sufficiently homogeneous.”³⁴

³⁴ Case T-220/94 *Deutsche Bahn v Commission* [1997] ECR I-1689, p. 92.

A prohibited differentiation of competitive conditions can occur by the implementation of different criteria. The following criteria are considered to be economically unjustified as a basis for discrimination against different service providers:

1) **the origin of the service provider.** For example, if an airport offers more favourable contract terms for domestic airlines or domestic service providers,³⁵ this practice will certainly be a violation of Article 102 of the TFEU due to the effect on trade between EU Member States, by limiting (even potential) competition;

2) **the market position of the contractor.**

The prohibited differentiation of the competition conditions exists only in relation to entities with a similar market situation. Different treatment of a contractor undergoing bankruptcy proceedings, or a contractor providing services of a much lower standard than its competitors, may be taken into consideration.

Among the criteria identified in the case law of the EU and Member States as indicative of discrimination, the following should be noted:

1) **the scope of services provided by the discriminated/preferred entities.**

In general, there is no justification (i.e. economic reasons), for different treatment by the entity managing an airport (dominant operator) of ground-handling service providers within the so-called self-handling and handling by third parties. From the perspective of the subject of the contract, both of them offer the same service – management of airport services.³⁶

2) **the type of flight according to its destination (domestic or international flight).** Differentiation in the conditions of a contract between domestic and international flights, if said differentiation is not justified by an operating cost differential between both types of flights, has been held to be an abuse of dominant position.

3) **the frequency of flights.** The Commission has concluded that the frequency of flights has no influence, for example, on the cost of services associated with aircraft landing and take-offs – each start and landing (regardless of whether this is the first, tenth or hundredth in a defined unit of time, e.g. within the month) requires exactly the same activities.³⁷ Such a differentiation may be discriminatory against airlines operating

³⁵ A. Graham, *Managing airports. An international perspective*, Elsevier, Amsterdam 2003, p. 98.

³⁶ Case C-82/01 *Aéroports de Paris v Commission*, p. 33.

³⁷ Decision No 2000/521/WE, *AENA*, p. 49 and 52.

larger aircraft, as usually they make fewer flights over a given time period than smaller aircraft.³⁸

A refusal to supply goods or services, or denial of access to infrastructure, especially if it has the nature of *essential facility*, is usually deemed to be a discriminatory practice. Certainly airport infrastructure can be regarded as an *essential facility*. However, a denial of access to the runways at the airport will not constitute an abuse of dominant position if it is necessary for safety reasons or environmental protection.

The discriminatory practices must affect the relevant market on which the dominant company operates (e.g. market of management of access to the infrastructure of the airport, when the dominant undertaking is the entity managing an airport), or related /neighbouring markets (in this case – groundhandling services’ markets or the market for air transport services). In the doctrine of competition law it is stressed that “on vertically integrated markets there is much stronger economic motivation for the infrastructure administrator to apply discriminatory fees, and support in this way the operator associated with him, than on vertically non-integrated markets.³⁹”

5. Penalties for breach of the prohibition against restrictive practices

Penalties for violation of the prohibition against restrictive practices, both in EU and Polish competition law, are of both an administrative and civil character. Civil penalties mean that legal acts constituting restrictive practices or connected with them are null and void. The sanction of nullity is provided in Article 6(2) and Article 9(3) of the CPA 2007, as well as Article 101(2) of the TFEU. (It might be noted that although Article 102 of the TFEU does not contain a corresponding provision, it is assumed that those legal acts constituting abuse of dominant position are also null and void). Furthermore, private claims arising in connection with violations of these provisions also need to be taken into account. This so-called “private enforcement” is performed before the ordinary courts (in the case of infringements of EU law, before the national courts) and can take the form of a damage compensation claim or different claims for restitution.

³⁸ Decision No 95/364/WE, *Brussels National Airport*, p. 13.

³⁹ P. Këllezi, “Abuse below the Threshold of Dominance. Market Power, Market Dominance, and Abuse of Economic Dependence”, [in:] M.O. Mackenrodt, B.C. Gallego, S. Enchelmaier (ed.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanism?*, Springer, University of British Columbia, Vancouver 2008, p. 79–80.

Among the major administrative penalties are orders for cessation of the use of restrictive practices (Article 10 of the CPA 2007, Art. 7(1) of Regulation 1/2003), and financial penalties (Article 106 of the CPA 2007, Article 23(2)(a) of Regulation 1/2003). Article 10 of the CPA 2007 does not provide for the issuance, by the President of the OCCP, of a decision ordering the cessation of the use of restrictive practices which would also define the conditions of this cessation. In other words, under Polish law there is no possibility of issuing a decision ordering a division of a business, or the selling of certain of an undertaking's assets. On the other hand Article 7(1) of Regulation 1/2003 gives the Commission – within the confines of an order requiring the cessation of the use of restrictive practices – the possibility of imposing two types of corrective measures: **behavioural remedies** (order of specific positive behaviour of undertaking); and **structural remedies** (measures aimed at restoring a competitive market structure, for example through the sale of business assets (divestiture).

6. Airports as public enterprises

In the context of the activity of airports, in addition to the substantive law establishing the prohibition against restrictive practices, Article 106 of the TFEU (formerly Article 86 of the TEC) plays an important role in establishing the methods of applying competition law to public undertakings. Article 106(1) of the TFEU lays down the methods of application, while Article 106(2) of the TFEU, a special exemption from these rules for undertakings entrusted with providing services of general economic interest as well as entities that are tax monopolies.

Article 106 of the TFEU applies to the following categories of companies:

- 1) **public enterprises** (Article 106(1) of the TFEU), which include businesses on which public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership, possession of share capital, or because of the rules that govern them. The above definition comes from Article 2(b) of Directive 2006/111/EC⁴⁰ (Directive on transparency);
- 2) **companies which have been granted special or exclusive rights** (Article 106(1) of the TFEU). These 'exclusive rights' – also contained in the Directive on transparency – are defined as “rights granted by Member States in favour of one company by means of any instrument of

⁴⁰ Commission Directive 2006/111/EC of 16 November 2006 on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) (OJ 2006 L 318).

a legislative nature, which reserves on behalf of the company the right to provide services or activities within a specific geographical area.”

EU authorities repeatedly stated that the **entities managing airports have the status of public undertakings⁴¹ or undertakings granted with special or exclusive rights⁴²** within the meaning of Article 106(1) of the TFEU;

- 3) **undertakings entrusted with services of general economic interest** (Article 106(2) of TFEU);
- 4) **companies that are tax monopolies** (Article 106(2) of TFEU).

These undertakings are not required to comply with Article 106(1) of the TFEU since this provision is addressed to the Member States. In fact, the practices constituting an infringement of Article 106(1) of the TFEU are simultaneously practices restricting competition. The difference lies in the fact that such practices restricting competition arise out of the behaviour of a state. (i.e. the setting and/or approval of tariffs or airport charges by public authorities).

This derogation from the general prohibition provided in Article 106(2) of the TFEU can be applied if two conditions are fulfilled:

- 1) the power to provide services of general economic interest was granted to the company by the public authorities;
- 2) the application of EU law would make it difficult to exercise certain activities of a company.⁴³

The non-application of EU competition law may not, however, lead to such distortions of trade as to be contrary to the interests of the European Union. If all conditions of the discrimination test from Article 102(c) of the TFEU are satisfied, the dominant company can justify its behaviour only on the basis of Article 106(2). However, it needs to demonstrate that all conditions for the application of Article 106(2) have been fulfilled. An analysis of the decisions issued and put into practice by the Commission in the context of Article 106 of the TFEU leads to the conclusion that the maintenance of the airports and ensuring their on-going operations does not preclude the application of competition law. As a consequence airport managers cannot effectively rely on Article 106(2) in order to justify actions which otherwise appear to constitute practices restricting competition.

⁴¹ Decision No 95/364/WE, *Brussels National Airport*, p. 7; Decision No 2000/521/WE *AENA*, p.28 .

⁴² Case C-163/99 – *Portugal v Commission*, p. 45–47; Decision No IV/35.703 *Portuguese Airports*, p. 12; Decision No 2000/521/WE, *AENA*, p. 41.

⁴³ Case C-82/01 *Aéroports de Paris v European Commission* p. 227; Case C-179/90 *Merci Convenzionali Porto di Genova v. Siderugica Gabrielli SpA*, p. 26 [1991], ECR I-5889; Case C-163/99 *Portugal v Commission*, p. 73.

7. Control of concentration between undertakings

Unlike practices restricting competition (anticompetitive agreements or abuse of dominant position), which are statutorily prohibited in almost all jurisdictions and subject to prosecution *ex post facto*, concentrations of undertakings are reviewed *ex ante*. The objective of examining proposed mergers & acquisitions is to prevent harmful effects on competition. This assumption underlies the control of concentrations between undertakings as it is conducted both in the EU and in Poland.

The legal framework applicable to merger control consists of **Council Regulation 139/2004**, which replaced the **Council Regulation 4064/89**⁴⁴ on the control of concentrations between undertakings. In Poland the legal framework governing control of concentration between undertakings is contained in the above-mentioned CPA 2007. In opposition to the prevailing practices restricting competition, the legal regulatory frameworks on merger control (i.e. the EU and Polish ones) do not apply in parallel, but rather each is exclusively applicable to concentrations being notified to the Commission or to the President of the OCCP respectively, in accordance with the provisions of either the EU or Polish law. However, both legal regimes are becoming ever more compatible as regards their substantive elements (especially in the field of competition tests applied in the assessment of the notified intention of concentration). The substantive law of both regimes specifies the following:

7.1. Subject matter of the examination

Under EU law the subject matter of the examination encompasses only permanent changes in control resulting from: (a) the merger of two or more previously independent undertakings or parts of undertakings; or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more companies, of direct or indirect control over all or part of one or more other undertakings, whether by purchase of securities or assets, by contract, or otherwise (Article 3(1) of Regulation 139/2004). Also subject to examination is the creation of a *joint venture*, on the condition that it “performs on a lasting basis all the functions of an autonomous economic entity” (Article 3(4), in conjunction with Article

⁴⁴ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395).

3(1)(b) of Regulation 139/2004). Under Polish law the following proposed actions are subject to examination:

- 1) the merger two or more independent undertakings;
- 2) taking over, by acquiring or taking stocks, other securities or shares, or in any other way, the direct or indirect control over one or more undertakings by one or more undertakings;
- 3) creation by undertakings of one joint undertaking;
- 4) acquisition by an undertaking of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded, in the territory of Poland, the equivalent of EUR 10 000 000 (Article 13(2) of the CPA 2007).

7.2. Scope of the examination

Under EU law only **concentrations with a Community dimension** are reviewed, which means those exceeding the (high) turnover thresholds specified in Article 1(2) and (3) of Regulation 139/2004 (Article 3(1) of the Regulation). Under Polish law every intention of concentration is reviewed by the President of the OCCP, provided that:

- 1) the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1.000.000.000; or,
- 2) the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50.000.000 (Article 13(1) of the CPA 2007).

A range of other, albeit not essential, differences exist with respect to procedural issues prevailing in the EU and Polish systems of examination.

The starting point for examination of a notified transaction is the definition of the relevant market(s) which may be affected by a given concentration. As mentioned above, determination of the relevant market always requires the definition of at least its two dimensions – product and geographic market (see section 2.1 above).

7.3. The concept and criteria of the competition test

Under EU law, concentrations within the scope of Regulation 139/2004 shall be appraised in accordance with the set of objectives that includes the following:

- a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.⁴⁵

Articles 2 and 3 of Regulation 139/2004 specify the criteria of the competition test⁴⁶ to be performed in order to examine **whether the proposed concentration would not significantly impede effective competition within the common market or a substantial part thereof**, in particular by creating or strengthening a dominant position; or **whether the concentration would significantly impede effective competition in the common market or a substantial part thereof, in particular by creating or strengthening a dominant position**. The same test is currently applied to Polish markets under Polish law.⁴⁷

7.4. Admissibility of *ancillary restraints*

In accordance with Article 6(1)(b) and Article 8(1) of Regulation 139/2004, the Commission is also required to assess the admissibility of **ancillary restraints**. These are restrictions on the parties to the agreement which do not constitute the primary object of the agreement, but are directly related and necessary for the proper functioning of the objectives envisaged by it, and directly related and necessary for the implementation of the concentration. Once the conditions of the competition test are met, a decision approving the proposed concentration involves granting approval to those restrictions on competition. A detailed basis for the assessments

⁴⁵ Article 2(1) of Regulation 139/2004.

⁴⁶ Starting from 1 May 2004 the competition test used for assessment of concentrations was changed.

⁴⁷ Competition test in the Polish competition law was changed in the same way under the amendment to the CPA 2000, which became effective from 1 May 2004.

of these restraints is laid down in the Commission Notice on restrictions directly related and necessary to concentrations.⁴⁸

8. Control of concentrations in the airport services sector in the EU – general characteristics

A review of the available documentation of concentration procedures in the airport services markets in the EU reveals 23 notified and examined cases in the years 1997–2011. With only one exception,⁴⁹ all of them were recognized – after an initial examination (phase I) – as not raising competition concerns and consequently compatible with the common market under Article 6(1)(b) of Regulation No 4064/89 (11 cases, including one case in the simplified procedure) or Regulation 139/2004 (12 cases, including eight in the simplified procedure and one case with proceedings in phase II). Therefore it can be concluded that concentrations in the airport services market are generally deemed not to produce anticompetitive effects. It is also characteristic that none of 23 concentrations reviewed by the Commission involved a merger of companies (as defined in Article 4 in conjunction with Article 3 of Regulation No 4064/89 and 139/2004). All were cases of acquisition of control. Among them only four cases were classified as acquisition of exclusive control, and the other 19 as acquisition of joint control, which is in fact the most common form of concentration in the airport services market. Within that group 12 notifications were direct (straight) acquisition of joint control i.e. through the acquisition of shares in the company being acquired, while seven other cases constituted acquisition of joint control via a special purpose vehicle (SPV).

Given that most of the concentration cases reviewed by the Commission were acquisitions, by two or more companies, of joint control over the entity which has led an airport, managed it (i.e. mainly to provide infrastructure services), or provided other airport services (handling or commercial), the key in the presented cases was to assess the extent to which the creation of a joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent. Such coordination was/is evaluated on the basis of Article 101(1) and 101(3) of the TFEU. When making that assessment, the Commission must in each case take into account, in particular:

⁴⁸ Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C 56/24).

⁴⁹ Case No COMP/M.3823 – *MAG/Ferrovial Aeropuertos/Exeter Airport*.

- a) whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture, or in a market which is downstream or upstream from that of the joint venture, or in a neighbouring market closely related to this market,
- b) whether the coordination which is the direct result of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services concerned (Article 2(5) of Regulation 139/2004).

As regards ancillary restraints, most frequently the Commission has had to assess the non-competition clauses which were part of the agreements with the partners – the merging parties involved in the acquisition of joint control over an existing or newly created joint venture. Most often they were considered to be directly related and necessary for the intended concentration, sometimes, however, such restrictions were regarded as disproportionate to the objectives for which they were intended to serve, and thus unnecessary.

Analysis of the concentrations studied allows for distinguishing three categories of participants:

- 1) entities over which the control was acquired (target companies);
- 2) entities from which the control was acquired; and – most importantly –
- 3) entities which acquired control.

Entities over which control was acquired through the notified concentrations were, above all, the companies which owned airports and managed them (directly or indirectly). In the other examined concentrations control was acquired over companies providing ground-handling services and others,⁵⁰ or being a holding company that managed companies providing such services⁵¹. Many of these companies were joint ventures.⁵²

The entities from which control was acquired were almost exclusively (the only exception was the British Airports Authority plc) entities belonging to “public hands.” It needs to be underscored that the control was transferred in some instances completely (e.g. in the cases of *Flughafen Berlin I*⁵³ and *Flughafen Berlin II*⁵⁴), and in others only partially. In the *MAG/Ferrovial/Exeter Airport case* investors, selected by public tender, purchased only

⁵⁰ Case No IV/M.1165 *Lufthansa/Menzies /LCC*; London City Center Ltd (LCC).

⁵¹ Case No IV/M.1124 *Maersk Air/LFV Holdings*.

⁵² Case No COMP/M.1913 *Lufthansa/Menzies/LGS/JV*; Case No IV/M. 1269 *LSG/Onexcorp/Sky Chefs/Caterair*.

⁵³ Case No IV/M.1255 *Flughafen Berlin*.

⁵⁴ Case COMP/M.2262 *Flughafen Berlin (II)*.

a certain (undisclosed in the decision) part of shares in EDAL. Due to the fact that some part of the shares was retained by the Devon district, the intended concentration had to be treated as a joint acquisition of control over EDAL – through the corporate vehicle SWALE – by MAG, Ferrovial, and EDAL. Also, the Belgian state sold only a portion of the shares owned by the Brussels International Airport Company (Zaventem), replacing its exclusive control with joint control.⁵⁵ This phenomenon is also observed on the market of ground-handling services, where the vendor of shares often retained joint control, or contributed its shares to a newly formed joint venture.⁵⁶

Those acquiring control can be divided into two groups: (1) industry investors, and (2) financial investors. Between the two one may find “sector-specific” companies, being part of the cross-industry conglomerates or financial groups operating (solely or primarily) in the airport services markets, which fall into one of the above two groups.

Industry investors. In the case of acquisition of control over companies operating and managing airports it can be easily observed that industry investors and sector-oriented companies belonging to business conglomerates played (and play) a central role. In five such cases, the acquiring party – usually in connection with other industry and non-industry investors – were the companies from the *Aer Rianta group* (AR), including AR subsidiary – *Aer Rianta International* (ARI) and the joint-stock company *Flughafen Frankfurt am Main Aktiengesellschaft* (FAG).⁵⁷

Financial investors. The second group of investors participating in acquisitions of control over entities managing airports were financial investors, such as *Bankgesellschaft Berlin Aktiengesellschaft* (BBA), *NatWest Ventures* (NWW)⁵⁸ or *Quebec*.⁵⁹ Non-industry and non-financial investors,

⁵⁵ Case No COMP/M.3646 *MABSA/Belgian State/BIAC/JV*.

⁵⁶ Case No IV/M.1124 *Maersk Air/LFV Holdings*, p. 1 and 5–6; Case No COMP/M.1913 *Lufthansa/ Menzies/ LGS/JV*, p. 1 and 6; Case No IV/M. 1269 – *LSG/ONEXCORP/ SKY CHEFS/ CATERAIR*, p. 1 and 4–14.

⁵⁷ FAG runs an airport in Frankfurt am Main and has shares in other German airports.

⁵⁸ NatWest Ventures (NWW) is provider of venture capital and ultimate subsidiary of National Westminster Bank plc, which is an international banking and financial services group. Case No IV/M.786 *Birmingham International Airport*, p. 4.

⁵⁹ A leading financial institution in Canada, managing public and private pension funds, insurance funds and private investment funds and operating on the real estate market. Quebec also has a non-controlling stake in the airports of Athens, Düsseldorf, Hamburg and Sydney.

such as *Immobilienkonzern (IVG)*⁶⁰ and *ABB Energy Ventures BV (ABB EV)*⁶¹ also participated in the acquisition of control over companies from the airports sector. They do not operate on the airport services market, but provide capital, mainly for the construction or expansion of airports.

The division of entities into industry investors⁶² and financial investors⁶³ can also be applied to the concentrations on the ground-handling services markets, although the role of the latter is definitely smaller here. In the group of industry investors the following can be distinguished: independent companies,⁶⁴ and companies providing ground handling services which belong to major European airlines groups (companies).⁶⁵ In the latter group companies from the *Lufthansa Group* were particularly active.

9. Summary

The liberalization of airports' activities has resulted in the fact that those managing airports are required to comply with competition law, including, *inter alia*, the prohibition against restrictive practices. Entities managing airports are exposed to infringements of competition law both at the national level (in Poland primarily under Articles 6 and 9 of the CPA 2007) and the European Union level (Articles 101 and 102 of the TFEU). Both legal systems (national and EU) can be used simultaneously by the national competition authority (in Poland, the President of the Office for Competition and Consumer Protection). Their task is simplified by the similarity of competition rules in both national and EU law. However, in the case of EU law an additional condition needs to be fulfilled, i.e. an effect on trade between EU Member States. Although possession of a dominant position in the domestic market does not automatically mean that the business activity of the dominant affects trade between Member States

⁶⁰ Immobilienkonzern (IVG) manages and develops office properties held by IVG in its own portfolio, as well as offering investment products for private and institutional investors.

⁶¹ ABB EV belongs to the ABB group, whose main areas of activity are the generation, transmission and distribution of energy and the creation of technical activities in transport, industry and construction.

⁶² Case COMP/M.5581 *Euroports Holding/Benelux Port Holdings*, p. 1–2.

⁶³ Case COMP/M.4399 *LBO France/Vinci Airport Services*, p. 2.

⁶⁴ Case No IV/M.1165 *Lufthansa/Menzies/LCC*, p. 2; Case No IV/M.1124 *Maersk Air/LFV Holdings*, p. 1 and 4 (LFV is a Swedish Public Company).

⁶⁵ Case No IV/M.1124 *Maersk Air/LFV Holdings*, p. 1 and 3.

of the EU, such an entrepreneur should be especially aware of restrictive practices, as they may potentially affect competition in the EU dimension.

Unfortunately, it is not possible to create an abstract strategy that will eliminate practices restricting competition: companies can carry out such practices both intentionally and unintentionally (i.e. by creating an anti-competitive effect without the prior intention to do so). Whether anti-competitive effects occur depends largely on the definition of the relevant market in a given case. Under these circumstances, any action belonging to airport management should be analysed in terms of the prohibition against restrictive practices. This analysis must begin by defining the relevant market (product and geographic, and in some cases a temporary market). To minimize the risk it is advisable to take the narrowest possible definition of the market. The next step should be the analysis of each condition of each prohibited practice. In competition law, it is helpful to refer to the patterns exhibited in the decisional practice of the antitrust authorities and the judicial decisions. In the case of agreements, the last stage of the analysis – undertaken only if the result of the previous stage appears to indicate that an agreement may have anti-competitive effect – should be the analysis of whether any of the conditions for an exemption from the prohibition of agreements restricting competition may be applicable. In the case of abuse of dominant position it is possible to search for circumstances that constitute an objective justification for anti-competitive dominant behaviour.

Competition law does not apply where pro-competitive regulation exists. However, if the regulator leaves a certain area of discretion for the entities managing airports, there is still a risk of competition law infringement.

In the area of merger control (control of concentrations) it should be noted that none of the concentrations involving airports which have so far been subject to review concerned the merger of two independent companies (airports), and only a few (four) related to the acquisition of exclusive control. The subject of almost all notified concentrations were intentions to take control of existing businesses or start-up companies having the form of joint ventures. In most cases the control was taken from the companies already operating and managing airports (mainly providing infrastructure services), often made in the framework of the privatization process, and was triggered by investment needs. In this area a special role was played by industry investors from the German *Hochtief* company and Spanish *Ferrovial* group. On the ground handling services' markets, companies from the German *Lufthansa* group were particularly active.

However, the most notable fact is that all of the concentrations notified and reviewed by the Commission were considered to be compatible with the common market and therefore met the conditions of the competition test laid down in Regulation 139/2004. This means that the intended concentrations did not affect competition because they were made on different product markets, did not overlap geographically, did not cause negative effects on the associated vertical upstream or downstream markets, and also did not create other anti-competitive effects. It seems then that the largest, most complex and most threatening competition concentrations in the airport services sector are still ahead of us.

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Chapter III

EU state aid regime for the construction of aviation facilities and airport operations

1. Introduction

The common legal framework for the internal market and free competition in the European Union (EU) may be affected by actions of Member States granting state aid to companies, which is in fact one of the most effective forms of state intervention in the economy. This support is often necessary and justified from the perspective of a particular Member State. However, if it violates the principle of equality between companies (especially in the context of nationality) and adversely affects trade between EU Member States, it may be unacceptable from the competition law perspective.

Rules for preventing or correcting distortions of competition caused by Member States through state aid are laid down in Articles 107–109 of the TFEU (formerly Articles 87–89 of the TEC). It is important to note at

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the outset that these provisions do not stipulate an absolute prohibition of state aid. Article 107(1) of the TFEU prohibits only instances when a “state aid is incompatible with the common market”. Undoubtedly, however, that provision provides for a relative (conditional) prohibition of anti-competitive state aid that affects trade between EU Member States. Article 107 of the TFEU establishes two types of exemptions from this prohibition: types of state aid allowed *ex lege* (paragraph 2), as well as types of state aid allowed by way of decision of the EU bodies (paragraph 3). Apart from that state aid for entrepreneurs providing “services of general economic interest,” referred to in Article 106(2) of the TFEU can also be exempted from the general prohibition contained in Article 107(1) of TFEU.

The general rules for state aid specified in Articles 107-109 of the TFEU also apply to any assessment of potential support for airports. Airports may be a direct aid beneficiary (e.g. investment aid for the construction of airports) or indirect aid beneficiary (for example support for low-cost carriers as an incentive to use a specific airport).

Thus each national (including Polish) program or project of state aid in the airport industry is subject to examination in accordance with the above-mentioned rules of EU primary law, as follows:

- a) Article 107(1) of TFEU (formerly Article 87(1) of the TEC), prohibiting anticompetitive and anti-integration state aid;
- b) Article 107(2) of TFEU (formerly Article 87(2) of the TEC), specifying an *ex lege* exemption from the prohibition of certain types of public aid,
- c) Article 107(3)(a),(b),(c) of the TFEU (formerly Article 87(3) (a),(b),(c) of the TEC), laying down the grounds for exemption of certain types of state aid by way of acts of EU bodies;
- d) Article 106 (2) (formerly Article 86(2) of the TEC), setting forth an exemption from the prohibition of Article 107 (1) of TFEU to enterprises providing public use services.

2. General prohibition of state aid

In accordance with Article 107(1) of the TFEU, subject to other provisions of the Treaty any aid granted by a Member State, or through state resources in any form, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market insofar as it affects trade between Member States. Therefore, on the basis of Article 107(1) of TFEU the following is prohibited: (1) state aid, (2) that favours selected beneficiaries,

(3) has an anti-competitive character, and (4) affects trade between EU Member States. The above-mentioned four prerequisites (conditions) need to be fulfilled cumulatively.¹

Interpretation of each of those conditions can be found in the case law of the Court of Justice of European Union (ECJ) and a number of documents issued by the European Commission. In the first place they address the issue whether a specific financial transfer from state resources to companies constitutes state aid, or whether it concerns:

- a) **activity of the state as owner of a public company**² (e.g. an airport), which is responsible for taking care of its interests. In order to resolve this problem, EU law and jurisprudence has developed a special test (i.e. concept or rule) to be applied to a private investor operating in a market economy (the so-called ‘market economy private investor’, or MEIP),³ abbreviated as the **test of private investor (TPI)**. Under the TPI state aid is considered to be only the difference between the conditions under which a state (or public company) has provided a public company (another company) with certain public funds (mostly capital injections, loan guarantees, or tax reductions or exemptions) and the conditions which a private investor operating under typical market economy conditions would need to fulfil in order to be able to offer the same funds (resources) to a comparable private company;
- b) **compensation for the costs incurred in connection with providing services of general economic interest**, which do not bring the entrepreneur rendering such services any economic benefits. The ECJ determined in its *Altmark* decision⁴ that subsidies to firms which only compensate them for business expenses incurred, and involve conduct which they are legally bound to engage in, does not constitute unlawful state aid.

¹ A. Ryan, T. Soames, State aid and air transport, *European Competition Law Review*, 1995, Vol. 16, No 5, p. 293, 297–298.

² Article 2(1)(b) and 2(2) of the consolidated text of the Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, amended by the Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2005 L 312).

³ Case C-305/89 *Italy v. Commission* [1991] ECR I-1603; Case C-39/94 *SFEI and Others v. La Poste* [1996] ECR I-3547.

⁴ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht (Altmark)* [2003] ECR I-07747.

However, in order to treat this kind of compensation as allowable, four conditions need to be fulfilled:

- 1) the responsibilities of the beneficiary must be clearly defined and effectively imposed on it;
- 2) the method of calculation of compensation must be determined objectively and transparently prior to the imposition of duties on it;
- 3) compensation shall not exceed the cost of carrying out public duties, taking into account the revenues from this activity and a reasonable profit;
- 4) if the company carrying out public duties is not selected by way of public procurement, the level of compensation is determined based on a cost analysis of a “typical, well-run company.”

In practice the application of *Altmark test* is problematic. Firstly, there is no publicly available data that would allow a company concerned to establish the operating costs of a “typical company”. Secondly, in the sphere of public services it is difficult to speak at all of a “typical” company. These difficulties significantly limit the usefulness of the *Altmark* test for potential beneficiaries and donors.

What is crucial to the determination of a specific activity as state aid is not the status of the entity providing the support, but the origin of the funds (whether they come from public sources). Thus the list of entities granting state aid is potentially unlimited – even private entities, providing that they dispose of public funds, may be entities granting unlawful state aid under Article 107(1) of the TFEU. The essence of the evaluation of these arrangements remains the above-mentioned private investor test (TPI), which allows for taking into account the benefits arising from the activities of the public company and deeming them permissible so long as the neutrality of the relationships between public and private companies is maintained. The TPI should be used primarily when an entity administering public funds (such as a public company) makes an investment in a specific project together with private companies. By way of example, the city of Amsterdam supported broadband (fibre-to-home) networks in a situation where the other investors were private entrepreneurs (for instance ING Retail) with whom Amsterdam authorities formed a partnership for the implementation of a specific economic project.⁵

In such a case, the evaluation carried out under the TPI involves four steps:

⁵ Decision C 53/2006 (ex N 262/05, ex CP 127/04) *Citynet Amsterdam – investment by the City of Amsterdam in a fibre-to-the home (FTTH) network*.

- 1) assessment whether the investors participating in the project are private investors (market investors) and whether the investment of private investors has actual economic importance (in relation to the total investment and in relation to the financial strength of the individual private investors);
- 2) assessment whether investment project is executed by all investors (public and private) at the same time;
- 3) assessment whether the conditions for the investment are the same for all participants;
- 4) assessment of the external (to the investment project) relationships of participants to the investment (public entity, other private investors), for example those possessing a state guarantee.⁶

The best proof of fulfilment of TPI is to demonstrate not only that the investment conditions would be accepted in the market economy by private investors, but also that such investors would have made the same investment on the same terms.⁷

The detailed benchmarks of TPI are: (a) the attitude of a rational private investor; (b) the cost policy of a well-run company; (c) structural disadvantage of competitors from the private sector.⁸ As a consequence, the assessment of the investment of the public enterprise in the activities of another undertaking (e.g. through a capital injection) requires consideration, within the TPI analysis, of the following: (a) a forward-looking perspective (*ex ante*); (b) the interaction between risk and return on investment; (c) the opportunity cost of capital; and (d) profitability margins.

The private investor test (TPI) has been developed (and modified) in case law to also create the private lender test (**Market Economy Lender Principle – MELP**), under which a loan to another entity on conditions that would be acceptable to a commercial (private) lender does not constitute unlawful state aid. Another test, also arising from and based on TPI, is the private creditor test (**Market Economy Creditor Principle – MECP**), developed in an ECJ decision.⁹ The ECJ held that redemption, relief or deferral of repayment of a loan, if the same would also be used by a private creditor,

⁶ N. Gaál, I. Padiás, A. Riedl, Citynet Amsterdam: an application of the market economy investor principle in the electronic communications sector, *EC Competition Policy Newsletter* 2008, No 1, p. 83–84.

⁷ B. Slocock, The Market Economy Investor Principle, *EC Competition Policy Newsletter* 2002, No 2, p. 24.

⁸ H.W. Friederiszick, M. Tröge, The Market Economy Investor Principle – Lessons Learned from the German Landesbanken cases, *EC Competition Policy Newsletter* 2006, No 1.

⁹ C-342/96 *Tubacex* [1999] ECR I-2459.

does not constitute state aid. This leads to a more general conclusion that credit-servicing mechanisms do not constitute state aid if they are granted in connection with a debt that in itself does not constitute state aid.

Summing up, it needs to be emphasized that the TPI is first conducted by the company engaging in a public project on a self-assessment basis, but the final decision on the admissibility of support (state aid) is vested with the Commission. It may happen however that the Commission will not consider reported or challenged public assistance as state aid within the meaning of Article 107(1) of TFEU due to the fact that it does not meet one of the above-mentioned cumulative pre-requisites for prohibition. This was the case with respect to state aid granted to the Italian company *Aerelba* in order to support the construction of an airport in Marina di Campo on the Island of Elba. The Commission found that the state aid granted did not distort competition.¹⁰ It also happens that certain public funds are not considered to be state aid (within the meaning of Article 107(1) of the TFEU) in proceedings where other funds involved constitute such prohibited state aid. That happened in a case where the beneficiary of funds was *Olympic Airways*. The Commission concluded that the compensation offered for the cost of relocation to a new airport in Spata did not constitute prohibited state aid.¹¹

3. Exemptions from the prohibition of state aid

3.1. Allowed state aid under Article 107(2) of the TFEU

Article 107(2) of the TFEU provides an exhaustive list of types of aid that meet all the conditions laid down in Article 107(1) of TFEU justifying prohibition thereof, but are exempted because they are *per se* “compatible with the common market”. Unlike state aid allowed under Article 107(3) of the TFEU, the types of state aid referred to in Article 107(2) are exempted

¹⁰ Decision N 106/2003 – *Italia. Contributi straordinari [Della Regione Toscana] alla provincia di Livorno e Aerelba SpA per la realizzazione di interventi a favore dell'aeroporto di Marina di Campo Nell'Isola d'Elba*, C(2004)3475 fin.

¹¹ Decision C 19/2002 *Aid granted by Greece to Olympic Airways* (JOCE 2003 L 132/1). The procedure for examination of these measures was initiated on 6 March 2002 as a result of complaints filed by HACA in October 2000 and July 2001. See: Press Release IP/02/1853 as of 11.12.2002.

automatically, so the Commission has no right to assess whether the state aid is subject to exemption.¹²

Article 107(2) of TFEU recognizes three types of public assistance as compatible with the common market and thus permissible *ex lege*:

- a) **aid having a social character** granted to individual consumers, (provided that such aid is granted without discrimination related to the origin of the products concerned);
- b) **aid to make good the damage caused by natural disasters or exceptional occurrences;**
- c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

However, in light of Article 108(3) of the TFEU (formerly Article 88(3) of the TEC), “Member States concerned shall not put their proposed measures into effect until the procedure has resulted in a final decision.” This means that programs and projects of permissible state aid should nevertheless be notified. However, the requirement to notify such state aid may be difficult to satisfy in the case of emergency state aid (107(2) of TFEU).¹³ A comparison of the two above-mentioned characteristics of EU law (i.e. that state aid may be exempted automatically, and the exclusive right of the Commission to examine any assistance) leads to the conclusion that under relevant procedures, the Commission can check whether a notified program or project meets the conditions for exemption set out for this type of state aid. This exemption is, therefore, automatic only insofar as the Commission determines, by a declarative decision following a mandatory notification, that a given assistance falls within this automatic exemption provision.

3.2. State aid allowable under Article 107(3) of TFEU

Article 107(3) of TFEU lists four types of anti-competitive state aid (points a-d) that may be considered “to be compatible with the common market” by way of Commission decision taken within the procedure laid down in Article 108 of the TFEU (formerly Article 88 of the TEC). Article

¹² The so-called „mandatory exemptions” according to A. Ryan, T. Soames, *State aid...*, op. cit., p. 298–299.

¹³ M. Bo Jaspers, *Emergency Aid: An Analysis of the Commission’s Practice with Regard to Article 87(2)(b) of the EC Treaty, in Particular in Light of the Air Transport Insurance Cases Post September 11*, *European Competition Law Review* 2004, Vol. 25(9), p. 546–557.

108 assigns to the Council the power to allow (by means of decision taken by qualified majority at the request of the Commission) other types of state aid (Article 108(e) of TFEU). However, the Article 107(3) exemptions are not automatic and obligatory; on the contrary they optional and discretionary.¹⁴ The Commission and Council may therefore refuse to grant an exemption if they consider that a given state aid:

- does not implement the objectives of Article 107(3) of TFEU;
- does not meet the criteria of the so-called compensatory justification principle inasmuch as it is not necessary to attain a given objective, i.e. it can be shown that the objective can be achieved by way of other market actions;
- goes beyond the scope that is necessary to achieve the objectives set out in Article 107(3) of the TFEU (i.e., violates the **proportionality principle**) and the granting of which does not lie in the interest of the EU.

Article 107(3)(a-d) of the TFEU provides an exemption from the prohibition of Article 107 (1) of TFEU for the following types of state aid:

- regional aid (Article 107(3)(a) of TFEU);
- pro-development aid (Article 107(3)(b) of TFEU);
- aid for certain economic activities or regions (Article 107(3)(c) of TFEU); and
- aid for the protection of culture (Article 107(3)(d) of TFEU).

Article 107(3) (a) of the TFEU allows for the exemption of state aid aiming to “**promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.**” On the basis of Article 107(3) (c) of the TFEU “aid to **facilitate the development** of certain **economic activities** or of **certain economic areas**, where such aid does not adversely affect trading conditions to an extent contrary to the common interest” is deemed to be compatible with the common market. Thus on the basis of Article 107(3)(a) and 107(3)(c) of the TFEU three main types of exemptions from the prohibition of Article 107(1) of TFEU have been formulated, namely the exemptions for regional, sector and horizontal aid.

3.3. State aid in the aviation sector – illustrated by the case of *Ryanair/Charleroi*

As far as the airport services sector is concerned, the problem of assessment of state aid has become topical due to the rapid development

¹⁴ The so-called „discretionary exemptions” according to A. Ryan, T. Soames, *State aid...*, op. cit., p. 299.

of the so-called low cost carriers and the aid granted to them by regional authorities which are the owners of regional airports. Some cases of such assistance have already been assessed by national courts¹⁵ and by the Commission in the proceedings of *Ryanair/Charleroi*¹⁶ and *Intermediación Aérea SL*.¹⁷ The decision in the former is illustrative of the practical application of EU competition rules. Moreover, the principles developed in that decision formed the basis for the issuance of the 2005 Aviation Guidelines.

At the core of the proceedings in the *Ryanair/Charleroi* case were two agreements, the aim of which was the establishment by Ryanair of its first continental European base of operations at the airport of Brussels Charleroi. The agreement reached by Ryanair with the Walloon Region, under which the carrier received a 50% discount from the published fees for landing and the Walloon Region committed to cover any potential losses due to changes in taxes and airport operating hours during 2001–2016, was challenged and evaluated. Also assessed was an agreement entered into by Ryanair and a public company owned by the Walloon Region airport in Charleroi (*Brussels South Charleroi Airport*, hereinafter BCSA). This agreement stipulated groundhandling service fees (check-in fees) at the level of 10% of tariff rates and provided that BCSA share in various costs of Ryanair associated with the establishment of its base and opening new routes. In return, Ryanair made a 15-year commitment to maintain up to four aircraft at the Charleroi airport and provide a significant number of passengers.

When assessing the case, the Commission first determined that the state aid granted to Ryanair met all the conditions of prohibited state aid set forth in Article 107(1) of the TFEU, namely that:

- 1) Ryanair benefited from both the Walloon Region and the BCSA company, whereas BCSA – according to the Commission – did not act as a private investor in a market economy (the EC applied the TPI test only to the activities of BCSA);

¹⁵ R. Errera, Decision of the Strasburg Chamber of Commerce to sign two contracts with Ryanair under which sums would be paid to the company in exchange for a marketing plan for Strassbourg and Alsace, *Public Law* 2004, p. 448–450.

¹⁶ 2004/393/EC Decision of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment in Charleroi (OJ 2004 L 137) .

¹⁷ Decision of 20 October 2004 concerning the aid scheme implemented by the Kingdom of Spain for the airline Intermediación Aérea SL (notified under document number C (2004) 3938) (OJ 2005 L 110/56).

- 2) the benefits were financed from public funds;
- 3) the state aid affected trade between Member States;
- 4) the state aid distorted competition.

Consequently, the following aspects of Belgian state aid were found to be incompatible with the common market: (a) the non-tariff reduction of landing charges (Article 1 of Decision), (b) non-tariff discounts for check-in fees (Article 2 of Decision). Belgium was also required to calculate the amount of unlawful state aid and ensure its return (Articles 2 and 4 of Decision).

However, European Court of First Instance (CFI) annulled the Commission's decision in its judgment of 17 December 2008.¹⁸ Ryanair claimed that the Commission's determination that the activities of the Walloon Region and BCSA constituted prohibited state aid was in violation of Article 107(1) of the TFEU. It argued that BCSA and the Walloon Region are one and the same entity and thus should be subject to a private investor test (TPI) as a whole. The CFI agreed with this position, pointing out that "in the application of the private investor test (TPI) what must be considered is a commercial transaction as a whole, so that it was possible to verify whether the state and an entity controlled by the state, taken together, acted like rational entities in terms of the market economy." (point 59 of the judgment). According to the CFI the "economic connections between the Walloon Region and BCSA are not irrelevant to the extent that it cannot be *a priori* excluded that the Walloon Region not only took part in the activities carried out by BSCA [...], but also received for the granting of state aid in question a financial consideration" (point 60 of the judgment).

With regard to the activities of the authorities of the Walloon Region, the Commission concluded that the calculation of airport charges is part of their exercise of legislative and regulatory powers, and thus that the Walloon Region operates here as a regulator, not as a private company. In addition, according to the Commission "the Walloon Region infringed the relevant national regulations by granting a reduction to Ryanair by means of a contract under private law and thereby placed itself in a situation of 'confusion of powers'" (point 83 of the judgment; Articles 151 to 153 of the contested decision).

When considering Ryanair's claims, the CFI held that:

- a) "Application of the private investor principle must be excluded when the State acts as a public authority. In that event, the conduct of the State can never be compared to that of an operator or private investor in a market economy." (point 85 of the judgment);

¹⁸ T-196/04 *Ryanair v Commission*, [2008] ECR II-3643.

- b) “The fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of airport infrastructure, which is an economic activity.” (point 88 of the judgment);
- c) “The provision of airport facilities by a public authority to airlines, and the management of those facilities, in return for payment of a fee the amount of which is freely fixed by that authority, can be described as economic activities. [A]lthough such activities are carried out in the public sector, they cannot, for that reason alone, be categorized as the exercise of public authority powers. Those activities are not, by reason of their nature, their purpose, or the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority.” (point 91 of the judgment);
- d) “Whether the conduct of an authority granting aid complies with national law is not a factor which should be taken into account in order to decide whether that authority acted in accordance with the private investor principle or granted an economic advantage in contravention of Article 107(1) of the TFUE. It does not follow from the fact that an activity represents, in legal terms, an exemption from a tariff scale laid down in a regulation that the activity must be described as non-economic.” (point 98 of the judgment).

Finally, the CFI concluded that „**The mere fact that, in the present case, the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle**, since such a scheme could have been put in place by a private operator.” (point 101 of the judgment).

According to the CFI, the failure to conduct a comprehensive examination of the activities of the Walloon Region and BCSA from the perspective of the private investor principle (TPI), despite the economic ties connecting these entities, constituted a violation of law by the Commission and could be the basis for annulment of the decision.

Despite the wide-ranging explanatory nature of the Court’s considerations, legal experts and commentators argue that the CFI judgment has limited practical relevance, since the CFI considered the failure to apply the TPI principle as a whole as an error of law, without providing substantive considerations as to whether the Commission correctly applied, or applies, TPI.¹⁹

¹⁹ G. Niels, *Overruled: the state aid case against Ryanair and Charleroi Airport*, January 2009, Oxera, London 2009, p. 5 (http://www.oxera.com/cmsDocuments/Agenda_January09/The%20Ryanair%20case.pdf).

4. Community guidelines on the financing of airports and start-up aid to airlines departing from regional airports

At the outset it should be noted that the scope of application of the exemptions referred to in Article 107(3) of the TFEU results, to a small (but growing) extent, from the generally applicable provisions of EU law. The community guidelines on financing of airports and start-up aid to airlines departing from regional airports (hereafter cited as the “**2005 Aviation Guidelines**” or “**Guidelines**”) were published in order to restrain the discretion of the Commission and increase legal certainty for the business community. They also serve as a statement of the Commission’s policy with respect to state aid in the aviation sector.

4.1. Scope and legal basis

In its 2005 Aviation Guidelines the Commission: (1) elaborated the rules for the financing of airports; and (2) extended the permissibility of direct state aid to airlines, which can include start-up aid for the airlines aiming to run activities on the basis of regional airports. The scope of the Guidelines relies heavily on the definition of “regional airports” in relation to other airports, especially compared to the category of “large Community airports” (category A) and “national airports” (Category B). The Commission divides “regional airports” into “large regional airports” (from 1 to 5 million passengers – Category C) and “small regional airports” (up to 1 million passengers – Category D).

The 2005 Aviation Guidelines cover all types of state aid (national, regional and local) for airports, managing bodies of airports, and airlines. Undoubtedly, if the financial benefits concern investments planned by a private investor acting under a normal market economy, they do not constitute state aid and thus the Guidelines do not apply to them. Insofar as the financing of airports constitute state aid, the Guidelines concern both large and small regional airports as well as domestic airports.

State aid covered by the Guidelines will be examined on the basis of Article 106(2) of the TFEU and Article 107(3)(a), (b), (c) of the TFEU – (a) regional aid; b) pro-development aid, including aid for projects of trans-European networks; and c) sector aid.

4.2. Financing of airports

The Commission notes that only state aid affecting the “business activity” of managing airports (and not the exercise of the powers of public

authorities) lies within the scope of the 2005 Aviation Guidelines, including the provision of services of general economic interest (in this respect, state aid can be identified only when such state aid goes beyond so-called ‘compensation’; see below). Therefore, on the basis of Article 107(3) and Article 106(2) of the TFEU, state aid supporting the following types of business activities is examined: (a) the construction of airport infrastructure and equipment; (b) the operation of the infrastructure; and (c) the provision of airport services.

With respect to the **construction of airport infrastructure** by public authorities (runways, terminals, aprons, control tower etc.), the Commission maintains its previous position expressed in the earlier 1994 Aviation Guidelines,²⁰ according to which state aid will not be treated as prohibited unless it violates basic principles of EU law, including for example, non-discrimination of other than the main users of infrastructure, the principle of proportionality, non-discrimination and transparency of procurement procedures, concession and privatization, or the separation of accounting procedures for different types of activities.²¹ The 2005 Aviation Guidelines exempt from the notification requirement state aid for the construction of infrastructure for small, regional (including isolated) airports.

The Commission formulates the following conditions, fulfilment of which is necessary in order for state aid to be considered as compatible with the common market:

- 1) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);
- 2) the infrastructure is necessary and proportional to the objective which has been set;
- 3) the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure;
- (4) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

²⁰ Guidelines on the application of Articles 92 and 93 [now Articles 107 and 108 of TFEU] and Article 61 of the EEA Agreement to State aid in the aviation sector.

²¹ There is a dispute as to whether the Guidelines from 1994 and Guidelines from 2005 are complementary - opinion of Ch. Koenig, A. Trias, A New Sound Approach to EC State Aid Control of Airport Infrastructure Funding, *European State Aid Law Quarterly*, 2009, Vol. 3 – or “Guidelines from 2005 replace de facto Guidelines from 1994” – opinion of U. Soltész, The new Commission Guidelines on State aid for airports – A step too far..., *European State Aid Law Quarterly*, 2006, Vol. 4.

5) the development of trade is not affected to an extent contrary to the Community interest. (point 61 of the 2005 Aviation Guidelines).

State aid for the **operation of infrastructure** will be considered as prohibited, especially when it constitutes so-called operating aid (i.e. used to cover operating costs). The relatively wide range of such state aid can, however, be regarded as compensation or authorized support for providing services of general economic interest (Article 106(2) of the TFEU). Particularly in the case of Category D airports, the 2005 Aviation Guidelines introduced an exemption from notification and considered aid granted to the same airports for providing services of general economic interest to be allowable state aid compensation. This also applies to such support which does not satisfy the *Altmark* criteria, and thus is otherwise considered to be state aid.

The exemption from the notification requirement is conditional upon the fulfilment of the criteria set out in Commission Decision 2005/842/EC of 28 November 2005.²² The terms of admissibility of state aid contained therein relate to:

- a) the content of the act under which the undertaking is obliged to provide services of general economic interest (Article 4 of the Decision);
- b) the amount and components of the compensation (Article 5 of the Decision).

State aid for small regional airports which does not conform to the *Altmark* criteria or meet the conditions specified in the above decision is subject to notification.

The case law of the ECJ shows that activity falling within State responsibility in the exercise of its official powers does not – being an activity devoid of an economic nature – constitute state aid. Point 33 of the 2005 Aviation Guidelines lists among such activities those related to safety, air traffic control, police, customs service, etc. The catalogue of these activities is open and explanatory only. Also, while the EU jurisprudence in this area is neither conclusive nor exhaustive, the notable trend is toward a rather restrictive interpretation of the scope of official powers of a public authority which are regarded as devoid of an economic nature. Evaluation of the nature of the activity is carried out, including all accompanying legal, economic and financial conditions, and the provisions of national law are not conclusive in this respect. Even if national law treats a specific sphere

²² Community framework for State aid in the form of public service compensation (OJ 2005 C 297).

as falling within the powers of public authority, this does not necessarily prevent the application of EU competition law.

Analysis of the case law leads to the conclusion that providing for the direct personal safety of passengers at the airports against external threats (such as terrorism or crime)²³ is considered to be a non-economic activity. However, activities aimed at securing the safe operation of an airport by its users (airlines and passengers), i.e. protection against the dangers arising from the air traffic as such as well as from airport operations (the so-called security “infrastructure”) are not considered to fall within public authority powers. Thus the EU authorities appear to believe that providing security in this area (e.g. security of aprons) is an inherent part of the economic activity of an airport. However, even though funds aimed at ensuring the safe operation of airports can be considered to be state aid, they are not usually subject to opposition by the Commission.

Support for the provision of airport services, including ground handling services, by means such as discounts on the cost of such service will, as a rule, constitute prohibited state aid to airports over 2 million passengers, in which the market for such services was opened to competition under Directive 96/67/EC and where there is more than one operator. An airport management body may, however, charge a fee for access to airport installations in an amount that includes some profit margin.²⁴

In a situation where there is only one operator on the market or when one of the operators is the manager of the airport, such state aid may be anti-competitive, especially if it is granted in a non-transparent manner. For airports below the threshold of 2 million passengers annually, such discounts are not prohibited, and in case of small (isolated) airports they may even be considered as compensation in accordance with the *Altmark* test (see above).

4.3. Start-up aid

The development of regional, small (often isolated), and medium-sized airports, including the achievement by them of the break-even point (measured by the number of passengers handled and considered to be about 1.5 million), is not usually possible without support for the launch of new

²³ Decision N 309/09 - *Aviation security – Compensation for costs incurred following the attacks of 11 September 2001* (JOCE 2003 C 148/7). The decision on matters of additional security and costs of airline passengers after the attacks of September 11, 2001.

²⁴ Case C-363/01 *Flughafen Hannover-Langenhagen v Deutsche Lufthansa AG* [2003] ECR I-11893.

routes from these regional airports, which are carried out mainly by low-cost air carriers and possibly charter airlines. Such state aid does not distort competition in the air transport and airport services markets, provided that it meets the several conditions required under the 2005 Aviation Guidelines. State aid on the opening of new routes or new schedules that will lead to an increase in the net volume of passengers traveling from the airport is likely to receive the approval of the Commission. This kind of support however needs to be an incentive, decreasing and proportional, its intensity may not exceed 50% of total eligible costs for a year, and further total aid may not exceed an average of 40% of eligible costs. It must also be calculated in a transparent manner based on the number of passengers transported etc. (points 77–79 of the 2005 Aviation Guidelines).

It is worth noting that the first reactions to the draft of the 2005 Aviation Guidelines were critical, especially in relation to the above-mentioned conditions placed on the eligibility of state aid to assist in the opening of new routes. It was argued that the assumption that such state aid can be legally granted only in the cases of opening new routes or new frequencies, and that such aid must be limited in time and intensity, would have negative consequences for the competitiveness of air transport in the EU.²⁵ According to a Ryanair representative, the 2005 Aviation Guidelines multiply the mistakes emanating from the Commission's *Ryanair/Charleroi* decision.²⁶ Thus the judgment of the CFI annulling that decision constituted an additional justification for the viewpoint that the 2005 Aviation Guidelines, which had just been issued, were already in need of revision (see chapter 7).

5. Decisional practice of the Commission after issuance of the 2005 Aviation Guidelines

5.1. State aid for airports

The Commission has issued several decisions based on the 2005 Aviation Guidelines, concerning both state aid for airports as such (infrastructure and operations), as well as related to the launch of new routes by low cost carriers. In the first area the Commission approved, without objection, state aid for:

- The construction of infrastructure (e.g. reconstruction of the terminal, improving sewage systems and electricity, construction of hangars,

²⁵ Ibidem, p. 442–444.

²⁶ See J. Callaghan, op. cit., p. 442.

construction of a new control tower) and the purchase of land for the use of the Newquay Cornwall airport;²⁷

- Cleaning and lighting of airstrips, construction of site management for the purpose of building terminals and protection against noise at the airport in Augsburg;²⁸
- Developing and providing for the safety of airstrips, the purchase of safety equipment, modernization of the computer system handling information boards for passengers in the City of Derry Airport;²⁹
- Construction of new and enlargement of existing infrastructure and improvement of safety measures at the airport in Lodz (e.g. lengthening of airstrips, enlargement of Terminal 2, and the purchase of equipment for handling aircraft);³⁰
- Reconstruction and widening of the airstrip at the Dresden airport;³¹
- Construction of security infrastructure at the airports in Tuscany;³²
- Construction of airstrips at the Kassel-Calden airport;³³
- Development of airport infrastructure in Lithuania (Vilnius, Kaunas, Palanga) in order to increase capacity and meet safety requirements.³⁴

State aid for the creation of a European distribution centre of the DHL company at the airport in Leipzig was not approved by the Commission (decision *DHL-Lipusk/Halle*).³⁵ The Commission questioned three measures: 1) a capital contribution of 350 million euro intended to finance the construction of a new southern airstrip at the airport;

²⁷ Decision N 303/2007 – *Newquay Cornwall Airport Development* (OJ 2007 C 319/1); Letter to the Member State – doc. C (2007) 4316 final.

²⁸ Decision N 619/2006 – *Entwicklung des Flughafens Augsburg* (OJ 2007 C 133/7); Letter to the Member State – doc. K (2007) 649 endgültig.

²⁹ Decision NN 21/2006 – *City of Derry Airport* (OJ 2006 C 272/13); Letter to the Member State – doc. C (2006) 1843 final.

³⁰ Decision N 741/06 i N 743/06 – *Port Lotniczy im. Wł. Reymonta Łódź (The Reymont Airport in Lodz)* (OJ 2007 C 157/2); Letter to the Member State – dok. K(2007) 1420 final version.

³¹ Decision NN 4/09 (ex N 361/08) – *Flughafen Dresden* (OJ 2009 C 125/3); Letter to the Member State – doc. K(2009) 2010 endgültig.

³² Decision N 45/2009 – *Italia Progetto relativo a interventi integrati per il sistema aeroportuale Toscana* (OJ 2009 C 125/4); Letter to the Member State – doc. C(2009) 2462 definitivo

³³ Decision NN 14/2007 i N 112/2008 – *Deutschland Flughafen Kassel-Calden* (OJ 2009 C 97/50); Letter to the Member State – doc. K(2009) 1084 endgültig.

³⁴ Decision NN 9/2009 – *Assistance for a development of airport infrastructure capacity and the introduction of security requirements* (OJ 2009 C/271) Letter to the Member State – doc. K (2009) 7095 galutinis.

³⁵ Decision No 2008/948/EC – *DHL-Lipusk/Halle* (OJ 2008 L 346/1).

- 2) a commitment (in agreement with DHL) on the part of the Leipzig airport to build a new southern airstrip and to respect, for a period of several years, further commitments, including ensuring the continuity of aviation operations in the southern airstrip 24 hours a day, seven days a week;
- 3) a guarantee issued by the Land of Saxony to the Leipzig Airport and DHL to indemnify against claims for damages in the event that DHL would be deprived of the possibility of using the airport according to the plan (e.g. due to an administrative ban on night flights).

The Commission considered that the TPI test was not properly applied to the proposed arrangement. According to its decision, the application of the TPI rule “is not excluded by the mere fact that the private sector is not involved in the financing of the airport infrastructure”. What’s more, a “difficult economic situation does not relieve the public investor from the obligation to make reasonable decisions; the behaviour should be comparable with private investor behaviour in the same situation.”³⁶

5.2. Support for airlines in the context of new routes

The Commission has approved state aid to airlines that offer new routes from airports. Decisions granting such approval of state aid include the following:

- to airlines departing from the airport in Grosseto;³⁷
- to a plan of development of new routes from the airports in Malta;³⁸
- to a new connection Toulon-London, served by Ryanair;³⁹
- to the development of new connections in the north-east and north-west of England and Wales;⁴⁰
- to the creation of a development fund for the Swedish Norrköping airport⁴¹ (agreements with new aviation operators). The fund is managed by a marketing company in which 50% of its shares are owned by

³⁶ Ibidem p. 193.

³⁷ Decision N 194/07 – *Start-up aid to airlines departing from Grosseto airport* (OJ 2007 C 284/4); Letter to the Member State, C (2007) 4529 def.

³⁸ Decision N 640/06 – *Air Route Development Scheme for Malta* (OJ 2006 C 90/140); Letter to the Member State – doc. C(2006)5490 final.

³⁹ Decision N 563/05 *Aid to Ryanair for the air service between Toulon and London* (OJ 2006 C 204/40); Letter to the Member State – doc. C(2006)2333 final.

⁴⁰ Decision N 303/2005 – *Scheme for Route Development Funds* (OJ 2006 C 272/11); Letter to the Member State – doc. C (2006) 1844 final.

⁴¹ Decision N 791/06 – *Business Case Norrköping* (OJ 2007 C 227/6); Letter to the Member State – doc. K(2007) 3274 slutlig.

municipalities and the remaining 50% of shares by private companies. The Commission concluded that in general the contributions did not constitute state aid.

The Commission had some doubts as to the compatibility of the state aid with the common market in the following cases:

- Contract for the exclusive use by the airline easyJet of Terminal B at the Schönefeld Airport for a monthly rent amounting to less than 8 thousand euro with the contract concluded without the announcement of a tender;⁴²
- Granting to easyJet of preferential rates (in relation to other carriers) for reduced airport charges. The agreement with easyJet was concluded for 20 years, while agreements with other carriers were only for 4 years, and the agreement also provided for the specific condition of constant reductions in fees;⁴³
- A system of expansion of new and existing connections used by the airport in Dortmund that offered lower airport charges for low-cost carriers. The fees were not sufficient to cover the operating costs of Flughafen Dortmund GmbH relating to the provision of airport services; the losses were not covered by commercial services for passengers; additional discounts were exclusively for the benefit of companies with established market position and thus were not in any way associated with any start-up costs;⁴⁴
- Use of unsuitable landing charges and passenger charges (or combined charges) and state aid in the form of a marketing agreement in the relationship between the airport and Ryanair in Lübeck;⁴⁵
- Preferential treatment granted to Ryanair at the airport in Aarhus by means of a reduction of passenger service charges, charges for departing and arriving flights, and ground handling charges.⁴⁶

⁴² Decision C 27/07 (ex NN 29/07) – *Berlin Schönefeld Airport* (OJ 2007 C 257/16); Ryanair lodged an appeal from this decision (T-496/08), but based on arguments of a procedural nature.

⁴³ Ibidem.

⁴⁴ Decision C 26/07 (ex NN 28/07) *NERES –Dortmund Airport* (OJ 2007 C 217/25).

⁴⁵ Decision C 24/07 (ex NN 71/06) – *State aid to Flughafen Lübeck GmbH and Ryanair* (OJ 2007 C 287/27).

⁴⁶ Decision C 5/08 (ex NN 58/07) – *Illegal subsidy arrangements granted by Aarhus Airport Ltd to Ryanair* (OJ 2008 C 109/15); Ryanair lodged an appeal against this decision (T-494/08), but based on arguments of a procedural nature.

5.3. Examination of certain types of state aid

For the sake of completeness it is also worth analysing various forms of state aid that have been regarded as compatible with the common market. As in any other sector, state aid for airports can be granted directly or indirectly. The former category includes the following:

- **direct subsidizing of investments** – subsidies can come from national budgets, regional budgets, as well as EU structural funds (as in case of Polish airports). State aid approved by the Commission includes the following: expansion of the airport in Kassel/Calden;⁴⁷ improvements in infrastructure to protect the environment and improve airport security in Riga;⁴⁸ expansion of airport infrastructure in Falconara;⁴⁹ rebuilding the infrastructure of the airport Newquay Cornwall;⁵⁰ and the construction, reconstruction, and repair of airport facilities in Poland;⁵¹
- **capital injections** into entities managing airports by public shareholders in order to support investment in airport infrastructure⁵²;
- **contributions in kind** - It should be emphasized that in the case of capital injections and making contributions in kind to small airports (category D) the Commission approved an aid intensity amounting to 100%;⁵³
- **loss coverage** of the ground handling service provider⁵⁴ or the manager of the airport⁵⁵.

State aid may also take an indirect form, such as in the following instances:

- **reduction of fees for take-off and landing as well as passenger charges** - in the form of a diminishing reduction as compared to the costs (including advertising) incurred by a carrier in connection with the launch of a new

⁴⁷ Decision N335/2010 – *Finanzierung des Ausbaus des Verkehrslandeplatzes Kassel-Calden* (OJ 2011 C/23) Letter to the Member State – doc. K(2010)9523 endgültig

⁴⁸ Decision N41/2010 – *Development of Airport Infrastructure of Airport “Riga”* (OJ 2010 C/143) Letter to the Member State – doc. C(2010)2539 galigā redakcija.

⁴⁹ Decision No N657/2009 Modification N 12/09 – *Marche Region – Public funding of investments in infrastructure at the airport of Falconara* (OJ 2011 C/23) Letter to the Member State – doc C(2010)932.

⁵⁰ Decision No N269/2009 – *Newquay Cornwall Airport Development* (OJ 2009 C/204).

⁵¹ Decision N196/2008 – *Investment aid in airports in the frame of Regional Operational Programmes Brussels*, (OJ 2009 C 204/1) Letter to the Member State K(2009)5516.

⁵² Ibidem.

⁵³ Ibidem.

⁵⁴ Decision C 14/2010 SA.21420 – *Aide présumée octroyée à la société SEA Handling S.p* (OJ 2011 C/29).

⁵⁵ Decision C 20/10 (ex N 536/08 e NN 32/10) – *SOGAS – Società per la gestione dell’aeroporto dello Stretto* (OJ 2010 C 292/30).

connection and increased frequencies (Decision No N114/2010). State aid for airlines launching new routes can cover the difference between passenger fees paid and the amount of four euro per passenger in the first year; 6 euro per passenger in the second year; and 8 euro per passenger in the third year. In addition the airline may be exempted from paying fees for take-off and landing or parking fees associated with the new route for the first three years. At the same time, the airline is obliged to invest part of the funds obtained as a result of state aid on actions to launch a new route (at least 50% in the first year, 30% in the second, and 10% in the third year). However, the total amount of aid is limited to 30% of such costs. Aid aimed at increasing frequencies (in relation to those in the adopted reference year) is exempt from charges for take-off/landing and parking fees, and state aid aimed at increasing the number of passengers is exempt from charges for the use of the infrastructure necessary to serve passengers. Subsidization cannot cover regular operating costs, but only those costs associated with the launching of new routes or an increase in frequency/number of passengers on existing routes. Financing is based on airline invoices documenting the expenses incurred by the airline. In another decision envisioning the launch of new connections to the airports of Turin and Cuneo, the Italian authorities assumed that the subsidies would be paid in instalments - at the beginning of each year the airline would receive only a portion of the envisaged support for a given year (e.g. 20%), while the remaining instalments would be paid quarterly on the basis of data collected on the actual number of passengers carried.⁵⁶

- **guarantees for the bank loans** (Decision N63/2010). In order for these guarantees to be allowed, the principles set out in the Commission guidelines on the application of Articles 87 and 88 to aid in the form of guarantees⁵⁷ need to be observed. The guarantee will not be considered as state aid if the following cumulative conditions are fulfilled:
 - the borrower does not have financial difficulties,
 - the scope of the guarantee shall be specified,
 - the warranty does not cover more than 80% of the loan or other financial obligation,
 - the fee for the guarantee is market based.

⁵⁶ Decision N 590/2009 – *Start-up aid to airlines departing from Torino and Cuneo airports* (OJ 2010 C/108) C(2010) 684.

⁵⁷ Commission guidelines on the application of Articles 87 and 88 to aid in the form of guarantees (OJ 2008 C 155/10).

When assessing the guarantees provided for the construction of an airport in Murcia, the Commission considered that these guarantees constituted state aid, inasmuch as they covered 100% of the value of the loan (80% of the project – 200 of 250 million euros). In addition, the Commission believed that when all financial obligations are guaranteed by the state, the lender has less incentive to ensure that the risks associated with lending money are properly assessed and minimized. Nonetheless, the Commission considered the state aid granted as permissible under Article 107(1) of the TFEU. Among the arguments for a positive evaluation was the fact that the loan was granted for five years only, meaning that the risk borne by the state was limited in time. Moreover from the facts of the particular case it followed that state support was necessary, because private entities would not have been interested in financing an investment reserved for public purposes.

- **guarantees and commitments of the airport operator to provide facilities under certain conditions** – this type of state aid was granted to DHL (DHL Hub Leipzig GmbH) with respect to the airport Leipzig-Halle. On the basis of a Framework Agreement the airport was required to provide access to DHL's new southern airstrip, 7 days a week, 24 hours a day (the so-called night clause), as well as ensuring that DHL or others acting on its behalf, are able to exercise 90% of the flights on this airstrip (the so-called 90% clause). Non-fulfilment of the agreement by the airport would result in liability for damages to DHL. In Decision 2008/948/EC the Commission considered the state aid to be prohibited under Article 107 of the TFEU and ordered its repayment.⁵⁸

6. New guidelines

In 2011 the Commission launched public consultations in order to invite all stakeholders to provide feedback on the application of the 1994 and 2005 Aviation Guidelines, as well as any comments and proposals regarding the public financing of airports and airlines.

When reviewing the Guidelines, the Commission stipulated that it would not prejudice any future regulation on state aid for airports, and three options were to be considered: (1) the continuation of the existing guidelines in their original form, (2) the adoption of revised guidelines, (3) the waiver of provisions relating to state aid in the aviation sector. From the airport

⁵⁸ Decision concerning DHL-Lipsk/Halle, see footnote 35.

managers' point of view, it would be justified to maintain the act, even in its current form of *soft law*, as it gives a greater degree of legal certainty than relying solely on the case law (especially with respect to quantitative criteria and the categorization of airports indicated in the guidelines). The introduction of new guidelines would be entirely justified however, especially taking into consideration that since 2005 there has been a radical change in the market of air transport services and airport services.

Moreover, it is strongly recommended to clarify the legal situation with respect to the 1994 and 2005 Aviation Guidelines and determine the roles and relative positions of the two documents. It is recommended to merge the two, which may also be considered as a general "waiver" of the 1994 Aviation Guidelines.

The Commission also questioned whether there was a need for the establishment of a block exemption for state aid to airports, which would be based on volume criteria. (i.e. an exemption for small airports). This could be justified in light of the previous decisional practice of the Commission – in most state aid notifications concerning aid to airports the Commission raised no objections to the proposed project and the vast majority of them concerned small airports (category C or D). If, however, a block exemption for subsidizing certain categories of airports is adopted, the criteria for the designation of those airports should be considered. The Commission suggested including, apart from the number of passengers, indicators such as tons of air cargo, the number of take-offs and landings of aircraft etc. In the end however, a revolution in the methodology of determining the relevant market is not to be expected in the form of revised guidelines.

Voices calling on the Commission to change the eligibility rules for state aid to airports are not infrequent. Among them, the Forum of European Regional Airports (FARE) proposes:

- a) changes to the classification system of airports so that the category of "regional airport" covered more European airports (handling up to 10 million passengers per year);
- b) exempting small airports from the notification obligation, which would reduce the administrative burden;
- c) the designation of certain investments excluded from the notification obligation (e.g. key operational investments);
- d) improvement of the notification procedure by shortening it and introducing more transparency.⁵⁹

⁵⁹ *Regional Airports Call for Greater Flexibility of State Aid Rules*. Position Paper, FARE, 11.12.2008 (<http://www.regionalairports.eu/fare/files/documents/FARE%20PP%20>)

7. The legal framework for the support of investments in airports in Poland

7.1. Act of 12 February 2009 on Special Principles for Preparing and Implementing Investments Regarding Public-Use Airports

The basic legal act at the statutory level relating to investments in airports in Poland is the Act on Special Principles for Preparing and Implementing Investments Regarding Public-Use Airports, dated 12 February 2009,⁶⁰ (hereinafter in this section ‘The Act’) This Act applies only to “public use airports” within the meaning of Article 54(2) of the Aviation Law, with the exception however of public use airports listed in Article 4 of the Act of 7 September 2007 on preparations for the final tournament of the European Football Championship UEFA EURO 2012.⁶¹

The Act regulates the terms and conditions governing the preparation and execution of investments concerning public use airports, carried out by the owners of the airports, airport managers, and the Polish Air Navigation Services Agency (Article 1(1)(1)), as well as the principles concerning the purchase of property for investment in public use airports by these entities (Article 1(1)(2)). The Act is in force for only a limited period of time (until 31 December 2015).

Some regulations of the Act (Chapter 2) are devoted to procedures preceding the launch of construction works. In accordance with Article 3 of the Act the decision to authorize investment into public use airports is issued by a regional governor (województwo). The Act comprehensively specifies the content of the application requesting such a decision, indicating in Article 6 the list of required attachments, which include the opinions of many public authorities. The Act then specifies the required content of the decision authorizing an investment in public use airports (Article 8), and defines the relationship of the decision to other administrative acts (e.g. decisions on land use and building permits – Article 14) as well as civil law (i.e. in accordance with Article 9(3) the decision constitutes a basis for making official entries in the court land register). In Chapter 3 (Articles 20–26)

State%20Aid.pdf). See also A. Lepière, *The 2005 guidelines on the financing of airports and start-up aid to airlines. Practical experiences*, 8.09.2009, Brussels; Ch. Köppchen, *The guidelines and regional airports*, 8.09.2009, Brussels – both presentations were made during the conference *EU guidelines for state aid for regional airports. A chance for regional development*, Brussels, 8.09.2009 (<http://www.aer.eu/events/regional-development/2009/regional-airports-conference.html>).

⁶⁰ Polish Official Journal No 42, item 340.

⁶¹ Polish Official Journal No 173, item 119, as amended.

the Act sets forth the rules and procedures for the public expropriation of property for airport construction and the enlargement of public use airports.

In effect the Act regulates primarily the organizational and technical aspects of the investment process (including the purchase of necessary properties). These kinds of organizational and technical rules, which govern the course of administrative proceedings to which the beneficiaries are all potentially interested in establishing a public use airport, do not constitute – by their nature – state aid within the meaning of Article 107(1) of the TFEU.

The provisions of the Act which govern the rules for financing investments in airports for public use could, however, be potentially problematic in terms of state aid rules. Article 31 of the Act provides that “the costs of purchasing real estate for investment in airports for public use, including compensation, are financed by the Treasury (Article 31 (1)) or by the local government units in case a local government body or a local government organizational unit establishes an airport.” (Article 31(2)). The acquisition of real estate may also be financed by Polish Air Navigation Services Agency (Article 31(3)). However, the properties purchased are still owned by those who finance their purchase, and therefore there is no risk of breach of the prohibition of state aid.

The actions of the Treasury provided for in Article 28(1), according to which those setting up the airport for public use may “under law receive, free of charge, in perpetual use, properties owned by the State Treasury or local government,” could however be considered to constitute state aid. This rule, however, is addressed only to entities already having the status of public authority or state or local government organizational unit. The provisions of Article 28(1) shall be applied therefore to non-entrepreneurs, which excludes the possibility that the “gratuitous transfer in perpetual use” could be considered to be prohibited state aid within the meaning of Article 107(1) of the TFEU.

There is, however, a risk of violation of the prohibition of state aid when those setting up an airport are neither a public authority or a state or local government organizational unit, but an “other entity” (i.e., potentially a private entrepreneur). Then, according to Article 30(1) of the Act, the State Treasury or local government unit is obliged to conclude with such entity a lease for a period of not less than 30 years, the subject of which is the property being purchased by the State Treasury or local government unit. Lease payments “shall be equal to those typical at the given region” (Article 30(2) of the Act). The establishment of rent at a level which is substantially lower than provided for in the Act could be construed as

unlawful state aid, for which the entrepreneur obtains an unauthorized benefit at the expense of the diminution of public resources.

However, Article 30(5) of the Act stipulates that a lease agreement entered into in violation of Article 30(2)-(4) is (*ex lege*) null and void. This provision suggests that there is no need to assess the above-mentioned practices (e.g. undervalued rent) from the point of view of the prohibition of state aid, because the Act on Special Principles of Preparing and Implementing Investment Regarding Public-Use Airports itself punishes such actions via the civil law sanction of nullity.

6.2. The Regulation on support for infrastructure projects in the field of airports within the “Operational Programme for Infrastructure and Environment for 2007–2013”

Undoubtedly, public support (from the EU and national resources) granted under the Operational Programme for Infrastructure and Environment constitute state aid. Rules for granting this support are specified in the Regulation of the Minister of Infrastructure of 25 February 2009 on support for infrastructure projects in the field of airports within the Operational Programme for Infrastructure and Environment 2007–2013 (hereafter referred to in this section as the Regulation).⁶² This Regulation was issued on the basis of Article 21(3) of Act of 6 December 2006 on the principles of development policy. The very first paragraph (§ 1) of the Regulation specifies that allocated resources shall be considered as state aid.

The assistance is envisioned for managers of airports located in the trans-European transport network (TEN-T). State aid cannot be granted or paid to entities which are subject to an outstanding obligation to repay the funds, following from the Commission’s decision declaring state aid to be incompatible with the common market, nor to entities in a difficult economic situation within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty⁶³ (§ 2 (2) of the Regulation). Aid is granted on the basis of individual projects submitted by potential beneficiaries, who must meet the conditions laid down by the Regulation (§ 4) as to the purpose and object of the investment, eligibility of the expenditure, and the intensity of the aid. An aid beneficiary is obligated to provide access to the airport to all stakeholders on an equal, non-discriminatory basis (§ 4(4)) as well as to use the financed equipment

⁶² Polish Official Journal No 35, item 273.

⁶³ Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244).

or facilities solely for the purposes of air transport (§ 4 (6)). In addition, the aid beneficiary cannot make significant modifications to the project for at least five years from its completion date.

The Regulation specifies that allowable public aid may be allocated only to finance infrastructure dedicated to the provision of aeronautical services (§ 5). Aid may be used for the construction, reconstruction or repair of: airport infrastructure (including purchases of equipment, vehicles, and systems); infrastructure of airport systems (including the purchase or repair of necessary equipment); airport facilities (including passenger terminals); as well as the technical and operational base for airport infrastructure handling. Aid may also serve in the realization of environmental projects. It can also be allocated to design work and documentation relating to investments as well as for works related to project implementation and the management thereof. However, state aid cannot be granted for infrastructure dedicated to the rendering of commercial services by an airport which are not directly connected with the airport's core activities (i.e. the construction, reconstruction, and renovation of land and buildings for offices and warehouses, hotels, shops, restaurants, and car parks).

The maximum aid intensity was determined at 30% of all eligible expenses for the Warsaw Chopin Airport, and 50% for other airports (§ 8 of Regulation). State aid with respect to the same expenditure is cumulative (§ 9(1) of Regulation). Cumulated state aid may not exceed 30% of eligible expenses for the Warsaw Chopin Airport, and 75% for other airports (§ 9(2) of Regulation). Beneficiaries are required to inform the authority granting aid of any other aid received to implement the same project. The assistance permitted on the basis of the Regulation is also in force for the same limited period as the Regulation itself (until 31 December 2015).

The conditions set forth in the Regulation for granting state aid to airports in Poland are compatible with the 2005 Aviation Guidelines, both when it comes to the conditions (point 62 of Guidelines) and the objective of public support (point 55 of Guidelines). State aid programs under this Regulation have been notified to the Commission and approved in its Decision of 11 February 2009 (N 472/08).⁶⁴

⁶⁴ Decision N 472/08 – *Investment aid for the airports under Infrastructure and Environment Operational Programme* (OJ 2009 C 79) Letter to the Member State – K(2008) 689 wersja ostateczna.

7. Summary

While to date the case law in the area of state aid to airports is not overly large, in recent years an increase in this field can be observed, which is reflective of the dynamic development of the aviation sector in Europe.

Analysis of the Commission's decisions issued after the 2005 Aviation Guidelines leads to the conclusion that generally state aid for the development of airport infrastructure does not raise concerns as regards its compatibility with the common market under Article 107(1) of the TFEU (we are not aware of a case in which the Commission raised objections to the notification of such aid after 1.01.2006 – since that time no proceedings have passed into the phase of a thorough investigation). On the other hand state aid for carriers, connected with their development as well as in the form of financing their current operations, much more often raise concerns with the Commission under Article 107 of the TFEU and become the subject of detailed investigation and research. Therefore – in relation to cases of state aid which are not covered by an assistance program – the following recommendations can be formulated:

- 1) if the airport acts as private investor, its activities are not considered to be a state aid;
- 2) if the TPI test is not applicable, the notification of state aid is necessary (state aid to regional airports below 5 million passengers per year). Public support dedicated to investments in airport infrastructure bears only a small risk of incompatibility with the common market if the aid fulfils the conditions of the “test of the legality of aid.” However there is still an obligation to notify such state aid to the Commission (subject to the provisions of the national Act of 30 April 2004 on proceedings in matters relating to public assistance);
- 3) state aid, the direct beneficiary of which is a carrier running an activity that contributes to the development of an airport, bears a much higher risk of being in non-compliance with the common market. Any plan for this kind state aid should be subject to an initial self-assessment of the entity intending to grant state aid on the basis of the test contained in 2005 Aviation Guidelines. Particular attention should be paid to observing the criteria of transparency and the non-discriminatory nature of both the assistance provided and the procedures for the granting thereof (e.g. by use of tendering procedures). In this case the notification obligation needs to be complied with;
- 4) Aid granted under an aid scheme is relatively “safe” in terms of the prohibition of state aid. For instance the Regulation on support for

infrastructure projects in the field of airports within the Operating Program Infrastructure and Environment 2007–2013 constitutes such an aid scheme. Fulfilment of the criteria laid down in this Regulation provides, in principle, for the compatibility of state aid with the common market. Therefore individual cases of granting aid under this program do not require notification.

Chapter IV

Access to airport infrastructure for aircraft take-offs and landings – noise restrictions

1. The principle of open access for all users of public-use airports – general comments

Open access to public-use airports¹ is one of the fundamental principles of civil aviation. In accordance with the act of 3 July 2002, Article 54 – Aviation Law² (hereinafter: Aviation Law), a “public-use airport is an airport which is open for all aircraft within time limits set and made public by the manager of the airport”. According to Article 62(2) of the Aviation Law, a managing body of a public-use airport has the authority to deny an aircraft permission to land only in the event of exceptional circumstances related to the operation of the airport which make the safe landing of the aircraft impossible.

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¹ ‘Public-use airport’ is an airport which can be used without earlier consent, cf. <http://www.transportation-dictionary.org>. This term can be found in Article 15 of the Chicago Convention (The Convention on International Civil Aviation, signed in Chicago on 7 December 1944) but it is not defined as such therein and its meaning is based solely on common understanding. According to the abovementioned regulation ‘every airport in a contracting State which is open to public use by its national aircraft shall likewise (...) be open under uniform conditions to the aircraft of all the other contracting States’.

² Polish Official Journal of 2006 No. 100, item 696 as amended.

However, the above-mentioned Article does not constitute the only possible restriction on open access to public-use airports.

First of all, aircraft users can be refused landing at a coordinated public-use airport if they have not acquired permission from a **Flight Schedule Coordinator** in accordance with Council Regulation 95/93/EEC of 18 January 1993 on common rules for the allocation of slots at Community airports.³ According to Article 14 of the Regulation 95/93/EEC, in such an instance a flight plan may be rejected by the competent air traffic control authorities. Owing to the fact that in practice air traffic control authorities rarely apply this Article, insertion of a special provision which would allow a managing body of an airport to deny permission to land in such cases is currently under consideration.⁴

Secondly, 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 Community⁵ provides for a number of possible restrictions on open access to public-use airports.

Introduction of principle of distribution of air traffic between airports⁶ pursuant to Article 19(2) of the Regulation 1008/2008 means that the use of one or several airports may be restricted in accordance with the distribution conditions and principles specified therein. If a public service obligation is imposed on a given route, under Article 16 of the Regulation 1008/2008, access to air services on this route is limited with respect to air carriers on whom the abovementioned obligation was not imposed. Also, in accordance with Article 20(1) of the Regulation 1008/2008, elaborated in point 1.4, EU Member States may limit or even refuse the exercise of traffic rights (including the right to use public-use airports in a given country) if serious environment-related problems occur. A Member State may also decide to do so pursuant to Article 21 (emergency measures) in order to “deal with sudden problems of short duration resulting from unforeseeable and unavoidable circumstances.”

³ OJ EC L 14 of 22 January 1993, as amended.

⁴ Cf. point 8.117, Steer Davies Gleave report, *Impact assessment of revisions to Regulation 95/93*, commissioned by the European Commission in 2011, www.ec.europa.eu/transport/air.

⁵ OJ EU L 293 of 31 October 2008.

⁶ Full details are given in: I. Komarnicki, *Podział ruchu lotniczego między porty lotnicze [Distribution of air traffic between airports]* [in:] F. Czernicki, T. Skoczny (ed.), *Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe [Airport services in the European Union and Poland – competition law and regulation of airports]*, Warszawa 2010, p. 175.

Thirdly, Directive 2002/30/EC of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports⁷ is yet another legislative document which contains provisions allowing for the introduction of restrictions on the use of airports.

2. Noise limits in accordance with European law

As regards excessive noise emission, European law provisions merely set basic rules of airport use, while the fundamental issues are left for settlement by the Member States. Directive 2002/49/EC of the European Parliament and Council of 25 June 2002 relating to the assessment and management of environmental noise⁸ also applies to noise emitted as a result of airport operations. According to Article 1 of the Directive, its aim is “to define a common approach intended to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. To that end the following actions shall be implemented progressively:

- a) the determination of exposure to environmental noise through noise mapping by methods of assessment common to the Member States;
- b) ensuring that information on environmental noise and its effects is made available to the public;
- c) adoption of action plans by the Member States, based upon noise-mapping results with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can induce harmful effects on human health and to preserving environmental noise quality where it is good.”

The Directive also introduces noise indicators common for the EU, i.e. L_{day} and L_{night} .⁹ However, determining the limit values of these indicators, as well as time brackets for particular times of day and night (day, evening, night) is left to the discretion of the Member States. Member States have

⁷ OJ EC L 363 of 13 December 1989, p. 27; OJ EU Polish special edition, chapter 7, vol. 1, p. 284.

⁸ OJ EC 2002 L 189/12.

⁹ According to the Directive, L_{day} is the A-weighted long-term average sound level as defined in ISO 1996-2: 1987, determined over all the day periods of a year. L_{night} is the A-weighted long-term average sound level as defined in ISO 1996-2: 1987, determined over all the night periods of a year.

also been authorized to use their own supplementary noise indicators for monitoring or controlling acoustic environmental conditions.¹⁰

Directive 2002/30/EC on establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports provides a wide framework for Member States' actions. In the first place, Directive 2002/30/EC points out that it is necessary to use the Balanced Approach rule developed in an ICAO Resolution.¹¹ According to this rule, in order to reduce noise emission the following measures need to be taken in the first place: limiting noise from aircraft at airports, spatial planning and management, as well as operational procedures for reducing noise. Only if the above measures appear to be insufficient is it permissible to introduce operating restrictions.¹² Operating restrictions are defined in Directive 2002/30/EC as "noise related actions that limit or reduce the access of civil subsonic jet airplanes to the airport; it also includes operating restrictions aimed at the withdrawal from operations of marginally compliant airplanes at specific airports, as well as operating restrictions of a partial nature affecting the operation of civil subsonic aeroplanes according to time periods." For the most part, the Directive refers to restrictions regarding marginally compliant airplanes (Articles 6, 8, 9 and 12). These rules, implemented in Polish law in Articles 71a-71e of the Aviation Law enable the President of the Civil Aviation Authority (hereinafter: CAA) to introduce restrictions or bans on operations at a particular airport by so-called marginally compliant airplanes, i.e. those emitting noise close to the limits laid down in ICAO standard¹³. Article 119(5) of the Aviation Law also provides that the Minister competent for transportation matters, in agreement with the Minister competent for environmental matters, can

¹⁰ Cf. W. Piechota, *Ochrona środowiska/hałas [Environmental protection/noise]* [in:] F. Czernicki, T. Skoczny (red), *Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe [Airport services in the European Union and Poland – competition law and regulation of airports]*, Warszawa 2010, p. 277 and following.

¹¹ Resolution A33/7 of the International Civil Aviation Organisation.

¹² Cf. point 25 of the EU Court of Justice of 8 September 2011 – *European Air Transport SA*.

¹³ Pursuant to Article 71(2) of the Aviation Law, "marginally compliant aircraft" shall mean aircraft with a cumulative margin of not more than 5EPNdB (Effective Perceived Noise in decibels), whereby the cumulative margin is the figure obtained by adding the differences between the certificated noise level and the maximum permitted noise level as defined in the aircraft noise certificate at each of the three reference noise measurement points as defined in the said certification limits; maximum permitted noise level and reference noise measurement points are defined in Chapter 3, part II Volume I of Appendix 16 to the Convention on International Civil Aviation signed at Chicago on 7 December 1944.

issue a regulation introducing restrictions or bans on flights of aircrafts not complying with environment protection requirements regarding protection against noise. The Minister of Infrastructure issued the Regulation of 19 May 2004 banning the flights of aircrafts not complying with environmental protection requirements regarding protection against noise, in which he banned, as a matter of principle, operation of aircrafts non-compliant with the ICAO¹⁴ regulations.

It needs to be underscored that the regulations on restrictions concerning marginally compliant aircrafts are not a very major component of current operating restrictions regarding airports (including Warsaw Chopin Airport), since the percentage of such aircrafts is small,¹⁵ not to mention aircrafts non-compliant with noise requirements. The critical issue is the possibility to introduce operating restrictions regarding noise standards for airports with respect to aircraft other than marginally compliant ones. As regards this issue, the Directive provides merely general rules for the introduction of any operating restrictions with a view to noise abatement (especially at night time) regarding the use of airports by civil supersonic jet aircraft.¹⁶ Firstly, according to Article 3 of Directive 2002/30/EC, EU Member States shall ensure that competent authorities are established responsible for the issues included in the Directive. Member States shall adopt a balanced approach in dealing with noise problems (Article 4). When a decision on operating restrictions is under consideration, the information specified in Annex II shall be taken into account (Article 5). Member States shall ensure that procedures for the consultation of interested parties are established for the introduction of restrictions (Article 10), and that other Member States and the Commission are informed about any restrictions introduced (Article 11(2)).

A Proposal has been formulated to replace Directive 2002/30/EC with a Regulation of the European Parliament and Council on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions.¹⁷ According to the Proposal for a Regulation, it will

¹⁴ I.e. requirements set out in Chapter 3, part II, Volume I of the Appendix 16 to the Convention on International Civil Aviation.

¹⁵ Cf. point 11 of the Report from the Commission to the Council and European Parliament of 15 February 2008 *Noise Operation Restrictions at EU airports (Report on the application of Directive 2002/30/EC)*, see also: W. Piechota, *Ochrona środowiska/halas*, [in:] F. Czernicki, T. Skoczny (ed), *Usługi portów lotniczych...*, p. 294.

¹⁶ Cf. point 5 of the Report from the Commission – „*Noise Operation Restrictions at EU airports...*”

¹⁷ Cf. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of rules and procedures with regard to the

provide more details to the definition of restrictions¹⁸ and procedures for the introduction of these restrictions in relation to the definition contained in the Directive. The proposed Regulation shall also include general rules governing the noise assessment process, rules for the transfer of information regarding noise emission, rules for exemptions from the restrictions for marginally compliant aircrafts, and empower the Commission to issue delegated acts.

The proposed regulation will not change the rule – based on Directives 2002/49/EC and 2002/30/EC – that Member States are left with wide discretion to define the criteria and forms for the introduction of restrictions.¹⁹ Firstly, each state applies different noise indicators to define permitted and banned noise levels. Also, Member States regulate these permitted noise levels in a different way. Finally, restrictions introduced in particular Member States may also vary. There are a number of possible operational restrictions aimed at noise abatement.²⁰ One might consist of closing an airport to air traffic for a specific period of time, especially

introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC of the European Parliament and of the Council, COM/2011/0828.

¹⁸ Pursuant to Article 2 of the proposed regulation ‘operating restrictions’ means a noise-related action that limits the access to or reduces the optimal capacity use of an airport, including operating restrictions aimed at the withdrawal from operations of marginally compliant aircraft at specific airports as well as operating restrictions of a partial nature, affecting the operation of civil aircraft according to time period.’

¹⁹ This is confirmed and explained in point 33 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions according to which “The proposal complies with the proportionality principle. Whilst a regulation strictly harmonises the method to follow, it allows Member States to take into account airport-specific situations with a view to developing appropriate solutions to the noise problems on an airport-by-airport basis. The proposals do not prejudice the desired environmental objectives or the concrete measures taken.”

²⁰ Extensive information on the ways of introducing noise restrictions in European countries include reports prepared for the European Commission: CE, *Sound noise limits. Options for a uniform noise limiting scheme for EU airports*, 2005, www.ec.europa.eu/transport/air and European Commission, *Study on the different aspects of Noise Limits at Airports, Final Report*, 2004, www.ec.europa.eu/transport/air. Cf. also <http://www.boeing.com/commercial/noise/listcountry.html>. According to the information included in point 8 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports, the following restrictions have been introduced at the 224 EU airports assessed for this report: 116 curfews, 52 noise limits, 51 restrictions targeting aircraft of the noise standard ‘Chapter 3’, 38 noise quotas and 7 noise budgets.

at night (“curfews”). Exceptions to this restriction are also possible, e.g. enabling particular types of operations, such as scheduled delayed flights, at night. An example of an operational restriction is the limitation or ban on the operation of aircraft emitting, according to their technical specifications, noise over a given level (“most noisy aircraft restrictions”). A commonly found restriction includes defining a permitted single movement noise level and holding the aircraft operator responsible for exceeding it (“noise level limits per movement”), usually via the imposition of a fine. Another restriction may consist of setting movement limits, e.g. 40 movements per night (“quotas in terms of activity”), or noise limits which all movements together cannot exceed over a particular period of time (e.g. day, year, flight schedule season) (“noise volume limit over a time period”). These restrictions may be based on a noise indicator; it is often expressed in the form of a Quota Count system, in which a particular type of aircraft is assigned a particular quota depending on the noise emitted by such aircraft (e.g. 1). In addition, the total quota which can be used at a given airport over a particular period of time (e.g. 1000) is defined. Additionally, high noise-related charges for night flights or for the noisiest aircraft, being an impediment to airport access, may also be considered as restrictions. Finally, noise restrictions can be and often are a combination of measures of various nature.

3. Noise limits according to the Polish environmental protection law

Pursuant to Article 113 of the Act of 18 May 2005 – Environmental Protection Law (hereinafter: Environmental Protection Law)²¹ the Minister competent for environmental matters, in agreement with the Minister competent for health matters, shall establish, via a regulation, environmental noise limits taking into account the type of facility or activity which is the source of noise. Restrictions on noise emission with respect to the operation of airports were introduced by the Minister of Environment in the Regulation of 14 June 2007 on environmental noise limits.²² According to this regulation, environmental noise limits are expressed by the indicators $L_{Aeq\ D}$ i $L_{Aeq\ N}$ applied to establish and control the conditions of operating in the environment with reference to one day and one night, and by the

²¹ Polish Official Journal of 2008 No 25, item 150 as amended.

²² Polish Official Journal No 120, item 826.

L_{DWN} i L_N indicators introduced by Directive 2002/49/EC applicable to long-term noise-protection policies.²³

According to the Regulation, environmental noise limits resulting from take-offs, landings and flights of aircrafts expressed by the $L_{Aeq D}$ i $L_{Aeq N}$ indicators are as follows:

No	Type of area	Noise limit in db			
		Aircraft take-offs, landings and flights		Power lines	
		$L_{Aeq D}$ referential period of time equaling 16 hours	$L_{Aeq N}$ referential period of time equaling 8 hours	$L_{Aeq D}$ referential period of time equaling 16 hours	$L_{Aeq N}$ referential period of time equaling 8 hours
1	a) Protection zone „A” Health resorts b) Hospitals and welfare centre areas c) Built-up areas for permanent or temporary stay of children and youth.	55	45	45	40
2	a) Single and multi-family built-up areas as well as homestead and multi-apartment residential built-up areas b) Recreational and holiday areas c) Housing and services areas d) City centre areas of cities with over 100.000 residents	60	50	50	45

²³ For more information see: W. Piechota, *Ochrona środowiska...*, op. cit., p. 280 and following.

Pursuant to Article 135 of the Environmental Protection Law, the above limits can be lifted or increased through the introduction of an area of restricted use, by the *Sejmik Województwa*. According to the above provision, if an environmental review, assessment of environmental impact, or post-completion analysis indicates that, despite the application of available technical and organizational solutions, environmental quality standards cannot be complied with outside the plant or other facility, then areas of restricted use will be created for some facilities (including airports). Establishment of areas of restricted use involves the introduction of restrictions on property use; at the same time owners of properties located within this area are entitled to compensation according to rules set out in Articles 129 and 136 of the Environmental Protection Law, and may even demand the repurchase of a property if using it in the way it has been used to date or for which it was intended is impossible or substantially restricted.

Owners of properties located within areas of restricted use might be, for example, deprived of the right to designate them for residential purposes or for a long-term stay of children and youth. They may also be obligated to increase the acoustic insulation of rooms in the building; however they cannot be required to reduce the noise if it does not exceed the assumptions adopted while creating the area. This provision of the Polish Environmental Protection Law referring to restricted use has a two-fold nature: on the one hand, as regards areas of restricted use it is an element of urban planning; and on the other hand, it can be deemed as restricting noise-related activities. Environmental noise limits cannot be exceeded within the area of restricted use (Article 174(3) of the Environmental Protection Law). It needs to be assumed that within the designated area, noise levels adopted in the assumptions, being the basis for determining a given area boundary, and established restrictions in use of the property should not be exceeded. If the area has been divided into zones, the internal boundary of which is determined by the maximum noise level for a particular zone, then this level should not be exceeded within this zone. With respect to airports, environmental noise limits constitute an obvious restriction on airport management. If the demand for services at a given airport would result in exceeding the permitted noise limits, and if other measures appear to be insufficient, then in order to make the airport's operation compliant with the law it will be necessary to restrict air carriers' operations in the airport. Also, any extension of an area of restricted use has its limits, for both economic and social reasons. In the light of above, noise limits for airports provided by Polish law may be considered as a restriction within

the meaning of Directive 2002/30/EC²⁴ if it results in the necessity to restrict air carriers' operations in airports.

4. Operational restrictions in Polish law

The next question arises: who, and by means of what instruments, shall impose restrictions on airport traffic when the noise limits are exceeded? In other words, how is an airport restriction expressed in noise limits per day and night transformed into a restriction directly applicable to air carriers? In considering this issue, it needs to be underscored that achievement of a given noise level (limit) may be done using a variety of operational restrictions²⁵. At one extreme is the drastic measure of closing the airport, especially during the night-time. Most of the time, however, keeping operations within maximum noise levels (limits) can be achieved by partial operational restrictions. Firstly, the number of airport movements may be restricted (up to e.g. 40). The advantage of this solution is its simplicity. It does not, however, take into account the differences in noise emission of particular aircraft. If the movements included within the limits established are by aircraft which are noisier than the adopted assumptions, noise standards may be exceeded; while if the movements are by quieter aircraft, the limits might not be fully used up. Therefore, in establishing the operational limits, it is the level of noise emitted by particular aircraft that is usually taken into account (included in the above-mentioned Quota Count system). However, it may be noted that take-offs and landings may be treated in a different way, since they differ in terms of noise emission. Airport management is left with a noise restriction, if established, per day and night (separate for daytime and night-time) which might not be exceeded outside the area owned by airport management or outside the restricted use area. If the levels referred to above cannot be maintained by means of available operational measures (e.g. restricting the noise of take-offs and landings) or economic measures (e.g. higher airport charges for night-time flights), there is the problem of how to introduce the operational restrictions referred to above in such a way as to maintain noise within the established limits. In my opinion, airport management may

²⁴ According to the EU Court of Justice judgment of 8 September 2011 – *European Air Transport SA*, determining a maximum noise measured on earth may, in some circumstances, have the same effects as a ban on access to an airport and consequently be an operational restriction as defined by Directive 2002/30/EC.

²⁵ Cf. e.g. point 3.3.2. *Sound Noise Limits...*

close the airport during particular times. The European Commission deems closure of an airport at night-time as a noise restricting measure included in Directive 2002/30/EC.²⁶ It may therefore seem that such a decision should be taken by a Member State authority in accordance with the procedure set out in the Directive. However, there is no European law provision in place that requires a public-use airport to be open all day and night. The Polish legislation, in its definition of a public-use airport (Article 54 of the Aviation Law) expressly leaves an airport's operating hours to the discretion of the airport managing body.

With respect to the imposition of partial air traffic restrictions if noise limits are exceeded, the definition of a public-use airport does not grant to the managing body of an airport any special empowerment in this regard. It would also be difficult to find any public body expressly empowered with such a competence by the provisions of Polish law. Article 195c(3) of the Aviation Law, introduced by the Act of 13 June 2011 amending the Aviation Law, provides that the Minister competent for transportation matters may restrict carriers' operational rights (i.e. the exercise of such rights) by way of administrative decision, based on the principles referred to in Article 20 of Regulation 1008/2008. This does not seem to resolve the issue however. Pursuant to Article 20(1) of Regulation 1008/2008 – “When serious environmental problems exist, the Member State responsible may limit or refuse the exercise of traffic rights, in particular when other modes of transport provide appropriate levels of service. The measure shall be non-discriminatory, shall not distort competition between air carriers, shall not be more restrictive than necessary to relieve the problems, and shall have a limited period of validity, not exceeding three years, after which it shall be reviewed.” The rather detailed regulation of the principles for introducing this measure seem to exclude the fact that it might refer to restrictions more generally regulated in Directive 2002/30/EC. It seems unacceptable that a Regulation of the Commission provides more detail than the principles of a Directive addressed to Member States. On top of this, a “measure” referred to in Article 20(1) of Regulation 1008/2008 may only refer to carriers' rights exclusively in intra-community traffic.²⁷

Also, it would be difficult to presume that a method for restricting airport traffic could be determined by an environmental protection authority pursuant to Article 362 of the Polish Environment Protection Law, according to which, if an entity operating in an environment negatively

²⁶ Cf. Report from the Commission – „*Noise Operation Restrictions at EU airports...*”, p. 5.

²⁷ Cf. Article 1 paragraph 1 of Regulation 1008/2008.

affects the environment, then the environmental protection authority may, among other solutions, impose an order on the offending entity to cease negatively affecting the environment and putting it at risk. As regards airports, the environmental restrictions are already in place, the question is which operational requirements should be applied to meet such restrictions. This seems to be beyond the competences of the environmental protection authority. Under Polish law environmental protection authorities would seem not to be included, pursuant to Article 3 of Directive 2002/30/EC, as an authority responsible for the issues included in the scope of the Directive.

5. Noise restrictions vs. flight schedules coordination

When answering the question of on how to maintain noise limits, it is necessary to refer to the above-mentioned Regulation 95/93 on common rules of allocation of time slots for take-offs and landings in EU airports. First it needs to be recognized that the above Regulation is also applicable to airport capacity restrictions related to environmental concerns. The Preamble to this Regulation implies that its main aim was to define the rules for using overloaded airports whose infrastructures do not allow for meeting the demand for services at such airports. Nonetheless, the Regulation also refers to environmental restrictions – Article 3(3) expressly provides that capacity analysis should take into account all constraints as regards capacity, including environmental restrictions. It also needs to be noted that the IATA manual on coordination²⁸ lists environmental restrictions as equal to elements of infrastructure in terms of their impact on airport capacity. In accordance with this approach, even small airports may be obligated to coordinate flight schedules and bear the related costs if they are the vicinity of residential areas (i.e. raise environmental concerns). This is not, however, a sufficient argument to assume that problems related to compliance with environmental restrictions should be dealt with on grounds other than the provisions of Regulation 95/93. Hence, even if environmental restrictions (especially noise standards during night-time) are the only problem regarding airport capacity, it is the provisions of Regulation 95/93 on introducing coordination and appointing a coordinator that become applicable. On the other hand, environmental restrictions do not directly fall under Article 3(5) of Regulation 95/93, according to which an airport is defined as coordinated if capacity constraints are so serious

²⁸ IATA *Worldwide Scheduling Guidelines*, 2011, point 1.1.

that the airport cannot prevent major delays and solve these problems in a short period of time. Environmental restrictions will not always cause delays. However, in the case of environmental restrictions that define a set noise level (limit) which cannot be exceeded in a given period of time (e.g. in a day or night), it needs to be assumed, in the light of Article 3(5) of Regulation 95/93, that an airport should be coordinated if environmental standards are substantially exceeded and it is impossible to solve these problems in a short period of time.

6. Local guidelines on noise restrictions

If – as pointed out above – more details concerning noise restrictions are not provided by Polish law nor are measures counteracting it left to the discretion of state authorities²⁹ or airport management, then the question arises whether a coordinator or coordinating committee can impose necessary restrictions? In my opinion, Regulation 95/93 yields the answer to this question. Pursuant to Article 5 of the Regulation, the tasks of the coordination committee include, among others things, submitting proposals for “local guidelines for the allocation of slots or the monitoring of the use of allocated slots, taking into account, inter alia, possible environmental concerns, as provided for in Article 8(5).” Article 8(5) of this Regulation provides that “the coordinator shall also take into account additional rules and guidelines established by the air transport industry world-wide or Community-wide as well as local guidelines proposed by the coordination committee and approved by the Member State or any other competent body responsible for the airport in question, provided that such rules and guidelines do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity.”

Therefore, if the environmental standards binding for the airport are too general for direct application by the coordinator then, in the light of the fact that no other authority is competent in this respect, they shall be developed by coordination committee and approved by a relevant state authority – in Poland this would be the President of the Civil Aviation Authority who, pursuant to Article 21(2a) of the Aviation Law, executes the competences of the Member State provided for in Regulation 95/93. It

²⁹ It needs to be assumed that coordination parameters defined by a Member State pursuant to Article 6 of Regulation 95/93 include only information on noise restrictions, but do not present any solutions as regards operational restrictions.

should be noted that a comparable situation exists in the British airports, where the Ministry of Transportation defines a noise limit (*noise quota*) for an airport. The way of distributing this limit is defined in the local guidelines (*local rules*) established by a coordination committee.³⁰ It seems, however, that according to Polish law, local guidelines may only define the rules of distributing movements within noise limits among all interested parties. Yet, the local guidelines cannot be the grounds to, e.g. ban a given type of movement during the night-time (or permit only given movements), nor to ban use of the airport by given aircraft, e.g. those emitting noise over given limits. According to Polish law, therefore, such restrictions are not acceptable.³¹

7. Conclusions

Although the rules of civil aviation are strongly harmonised and consolidated in European law, it is national law that plays a major role in noise standards and noise-related operational restrictions. According to Directive 2002/49/EC and Directive 2002/30/EC Member States are, in principle, free to set the criteria and forms for the introduction of restrictions. So first, particular countries may set a variety of noise indicators which are the basis for defining permitted and banned noise emission levels. Permitted emission levels are also regulated by the Member States in a variety of ways. It is assumed that due to the huge variety of noise-related airport issues (operational, economic, social, etc.), the basic issues in question should be settled by national law or even on an airport-by-airport basis. As a consequence, a variety of restrictions can be found in European airports. In particular these can be: curfews, restrictions on the most noisy aircraft, noise level limits per movement, quotas in terms of activity, noise volume limit over a time period, or a Quota Count system.

It is difficult to find in Polish law provisions that would expressly constitute the implementation of Directive 2002/30/EC as regards restrictions (with the exception of the possibility to restrict the operations of marginally compliant aircraft). Nonetheless, it is not impossible to introduce such restrictions according to Polish law. One can however argue that the repertoire of

³⁰ See e.g. *Heathrow night movement and quota allocation procedures*, available on the website www.acl-uk.org.

³¹ Subject to the restrictions discussed above, accepted by Article 71a–71e and Article 119(5) of the Aviation Act regarding marginally compliant aircraft and aircraft non-compliant with environmental protection requirements.

measures which can be applied to abate airport-related noise is really quite limited. The state can set noise limits that an airport may generate in one day and night, or separately for a daytime and night-time. If these limits are exceeded due to the demand for airport services and no other measures can prevent this, then the airport traffic should be limited, especially via the application of rule quotas in terms of activity or a Quota Count system. Some solutions applied in European airports are unacceptable according to Polish law, e.g. noise level limits per movement or restrictions on the most noisy aircraft (with the exception of restrictions on marginally compliant or non-compliant aircraft). On top of this, the measures available according to Polish law when meeting the demand for airport services would result in exceeding noise limits require the coordination of flight schedules, which generates additional costs.

Chapter V

Airport charges

1. Introduction

The establishment of charges at airports is not done entirely according to market principles. The charges are subject to public regulation, imposed in part based on the public perception that the management bodies of airports have a monopolistic position on the market. Public regulation is designed to prevent the abuse of this position.

One of the most important legal acts in international law supplying public legal norms to the issue of international air transport is the Chicago Convention.¹ In accordance with Article 15 of this Convention access to airports designed for public use by both national and foreign aircraft should be subject to uniform conditions and charges (with the possibility of distinguishing between charges for regular flights and charges for irregular flights).² In addition to this general declaration of the principle of equal rights, Article 44 directs airports to “avoid discrimination” between the contracting states, and the signatory nations are prohibited from providing preferential treatment to national airlines.

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¹ Chicago Convention on International Civil Aviation, signed at Chicago on 7 December 1944 r. (taken from Dz. U. [Polish Official Journal] 1963 together with subsequent changes).

² M. Żylicz, *Prawo międzynarodowego transportu lotniczego (International law of air transport)*, Wydawnictwa Uniwersytetu Warszawskiego (University of Warsaw Publishing House), Warsaw 1995, p. 55–59

The general principles governing the establishment of airport charges are contained in the documents of the International Civil Aviation Organization (ICAO).³ The provisions of these documents do not have binding legal effect in the signatory states. They are only recommendations. But taking into account the basic purposes of membership in the ICAO, the contracting parties are obliged to make every effort to apply the principles contained in the documents to the maximum possible effect. Many public regulations concerning airport charges, including EU and Polish regulations, make specific reference to these principles. The ICAO principles are based on six key concepts:

- the need to assure effective consultations with users;
- clarity and transparency in the establishment of all charges;
- maintaining a fair relationship between charges and the costs of providing services;
- efficient, fair, and non-discriminatory treatment of users;
- avoid discouraging the use of services, or compromising safety, by the imposition of high charges;
- basing charges on healthy economic and accounting principles.⁴

2. Legal regulation of airport charges

2.1. Preliminary remarks

The issue whether there is a need for separate regulations concerning airport charges raises controversy. Differing positions are taken by the airport operators and air carriers. Low cost airlines, while agreeing with the necessity to regulate charges in order to avoid excessive rates, are against extending the scope of such regulations to the secondary and regional airports which they primarily make use of and with which they frequently negotiate advantageous conditions. In their opinion the competition between

³ The major documents of the ICAO concerning issues connected with the economic infrastructure of air transport, including airport charges, include:

- ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO doc. 9082/9 2012;
- Airport Economics Manual, ICAO doc. 9562/2 2006

⁴ D. Kaliński, *Uwarunkowania kształtowania opłat lotniskowych (Conditions for the formulation of airport charges)* [in:] Instytut Handlu Zagranicznego i Studiów Europejskich (The Institute of Foreign Trade and European Studies) SGH. Scientific seminar held during the academic year 2006–2007, SGH, Warsaw 2007, p. 54–55.

these airports is sufficient to control costs by market mechanisms, and regulation only adds additional administrative barriers and increases costs.

The adherents of regulation of airport charges are primarily the traditional air carriers. They consider the introduction of an EU directive in this matter⁵ as only a first step, not yet sufficient to provide governing norms concerning all situations. They emphasize that there continues to be a lack of clear principles concerning the charges imposed by airports and their relation to the parameters concerning the efficient functioning of airports. In Poland, traditional air carriers point out the appropriateness of regulating charges for small airports and the need to extend the scope of the Directive on airport charges to include small airports. They also postulate extending the scope of Polish law concerning matters not regulated in the Directive.⁶

2.2. Characteristics of the regulation of charges in Polish airports

The regulation of airport charges was only introduced into Polish law in 2002 together with the passage of a new Aviation Law,⁷ and has been supplemented by the Regulation issued by the Minister of Infrastructure of 2004 concerning airport charges.⁸ The Aviation Law of 2002 contains general principles, such as the principle of non-discrimination. It also establishes the range of charges which may be collected by the managing body of an airport, as well as the scope of activities which must be provided free of charge, and specifies the procedures and methods which must be followed in the case of imposition of charges, directing that in such cases the managing body of an airport must obtain the opinion of representatives of air carriers making permanent use of the airport. Documents submitted in connection with obtaining said opinions, and later in support of the imposition of charges, must list all elements of such charges, including standard and additional charges, discounts and rebates, together with a justification for the principles

⁵ Directive of the European Parliament and Council Nr 2009/12/EC of 11 March 2009 on airport charges. (Official Journal of the EU 2009 L 70/11); hereinafter cited as Directive on airport charges.

⁶ Report on the consultations held concerning the new system for setting airport charges in Poland. CAA 2009 (available at): http://www.ulc.gov.pl/_download/regulacja_rynku/oplaty_lotniskowe/opplot_rap0609.pdf .

⁷ Report on the consultations held concerning the new system for setting airport charges in Poland. ULC (CAA) 2009 (available at): http://www.ulc.gov.pl/_download/regulacja_rynku/oplaty_lotniskowe/opplot_rap0609.pdf).

⁸ Regulation of the Minister of Infrastructure of 29 April 2004 concerning airport charges (Polish Official Journal 2004, nr 103, item 1083).

underlying the establishment of such charges. The President of Poland's Civil Aviation Authority (CAA) has the right to refuse to approve such airport charges or order modifications thereto, if he or she determines that they are not in compliance with the principles contained in the Aviation Law or applicable provisions of international law.

The Regulation of 2004 concerning airport charges contains detailed provisions concerning the scope of allowable charges and the procedures and methods used to establish and approve them. In the first place, all charges must be given in Polish currency. The general principles underlying the calculation of such charges must be set forth, which include ease in the calculation of charges as well as in checking the calculation of such charges by users, securing that the charges remain stable in a calendar year, and non-discrimination in their application.

Since the entry into force of the 2009 EU Directive on airport charges Poland has been under the obligation to adapt its law to the requirements contained in the Directive. Thus the CAA elaborated a project outlining the assumptions underlying a new system for regulating airport charges, which has been submitted to the social consultation process. The imperative to fundamentally revise the current system for assessing and collecting charges stems not only from the provisions of the EU Directive on airport charges, but perhaps above all from the number of imperfections which have become visible in the present system.

The proposed legislative changes to the Aviation Law of 2002 are presently being examined by legislative committees in the Polish Parliament (Sejm).⁹ They contain provisions implementing the EU Directive on airport charges for airports with an annual turnover of more than 5 million passengers, as well as establishing the principles for setting airport charges in smaller airports. At the same time a project for a new Polish Regulation concerning airport charges¹⁰ has been elaborated based on the Aviation Law of 2002, prior to the proposed changes thereto stemming from the issuance of the EU Directive on airport charges.

Thanks to the opening of the Polish airport market and the current situation on the European airport market, the position of air carriers has been significantly strengthened vis-à-vis the managing bodies of airports, which are in a position of having to seek new airlines and new connections.

⁹ Regulation of the Minister of Infrastructure of 29 April 2004 concerning airport charges (Polish Official Journal 2004, nr 103, item 1083).

¹⁰ Governmental draft Amendment Act to the Aviation Law of 2002. Parliamentary Document No 739 of 18 September 2012, further citations as Draft Amendment to the Aviation Law of 2002.

This concerns both small and large (on the Polish scale) airports. The days when airport managing bodies could take advantage of their strong market position have come to an end. Under the new conditions, Polish airports will have opportunities to increase their flexibility and reduce the role of government in the management of the airport. Years of practice in a number of economic areas have illustrated that excessive governmental intervention hampers development and decreases the competitive position of airports. Thus the scope of regulation of airport charges in Poland should be restricted to the minimum level required by international law.

2.3. Regulation of airport charges in the European Union

For a long time airport charges were not subject to separate regulation in the EU. The EU Directive on airport charges came into effect on 15 March 2009, and Member States had until 15 March 2011 to adapt their law to the provisions of the Directive. In Poland this deadline has not been met.

The provisions of the Directive on airport charges are rather general, and leave a great deal of freedom to the Member States to adopt specific solutions. Among the most important provisions should be mentioned:

- The principle of non-discrimination, which does not exclude the modulation of airport charges so long as the criteria used for such a modulation shall be relevant, objective and transparent;
- Member States may allow the airport managing body of an airport network to introduce a common and transparent airport charging system to cover the airport network;
- Member States shall ensure that a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users is established with respect to the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. The airport managing body shall submit any proposal to modify the system or the level of airport charges to the airport users, together with the reasons for the proposed changes, no later than four months before they enter into force;
- Airport managing bodies shall have the possibility of entering into multi-year contracts with carriers;
- Member States shall ensure, in respect to disputes, that measures are taken to establish a procedure for resolving disputes and determine the conditions under which a dispute may be brought to the independent supervisory authority, which shall issue a final decision as soon as possible, and in any case within four months of the matter being brought before it.

2.4. Regulation of other charges for the use of airport infrastructure

In addition to the issuance of the Directive on airport charges, another important occurrence in the economic regulation of European airport infrastructure was the issuance of Regulation Nr 1107/2006/ of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, which went into effect in July 2008.¹¹ Prior to this Regulation taking effect, the air carrier was charged with full responsibility for the treatment of its disabled passengers. Now airport managing bodies have an obligation to provide assistance to disabled persons and persons with reduced mobility from the moment they enter the airport premises until such time as they are in their seats in an airplane, and vice versa in the case of landings. In exchange for this additional responsibility, the airport managing authority may impose a special charge.

The principles governing the establishment and collection of such charges are set forth in detail in the Regulation. The charges must be of a non-discriminatory character, and they must be strictly connected to the costs incurred by the airport and established in a transparent manner by the airport managing body in consultation with airport users. The charges should be divided among carriers in proportion to the overall number of passengers that each carrier takes into and out of a given airport. Disabled persons and persons with reduced mobility have the right to make use of such services without additional charge. The purpose of this financing method is to avoid past situations where carriers obstructed travel of disabled passengers, who could not be charged extra, in order to avoid having to bear the additional costs themselves.

Issues connected with additional charges for the provision of airport security, in the sense of prevention of outside acts (such as terrorist attacks), are not covered by the Directive on airport charges and are the subject of a project for a separate Directive, which to date has not been ratified. This project establishes a general framework for the setting of such costs, and the principles set forth duplicate most of the principles contained in the Directive on airport charges. This Directive is supposed to apply to all EU airports, a requirement which has been criticized by the managing bodies of airports, who contend that the scope of the proposed Directive should be

¹¹ EC Regulation Nr 1107/2006 of the European Parliament and European Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Official Journal of the UE 2006 L 204/1).

analogous to that of the Directive on airport charges.¹² Charges for security may be imposed exclusively to cover costs established in accordance with the prevailing accounting principles in a given Member State. The issue whether an airport can take into account the cost of equity is not specified in the proposed Directive, which in the event of its passage in its present form could cause interpretational problems in the future.

Currently the Polish 2004 Regulation on airport charges envisions the possibility for managing bodies of airports to establish separate passenger charges for the provision of security services, obviously taking strictly into account the actual costs for the provision of such services. The amended Aviation Law of 2002 placed most of these costs on the managing bodies of airports. The imposition of responsibility for security on airport operators significantly increased their operating costs and brought about the necessity to place some or all of the costs on carriers and passengers. The project for a new Polish Regulation on airport charges gives managing bodies of airports the right to establish and collect charges for the provision of security services based on their actual costs incurred, taking into account their cost of equity limited to the interest rates for ten-year treasury bonds.

3. Basic elements in the regulation of airport charges

3.1. The subject matter and scope of regulation

Poland has accepted the principle that airport charges must be approved by the President of the CAA and that such charges must detail the following components which comprise them: the standard rate, as well as additional charges, discounts and rebates, and a detailed procedure for computing and collecting the charges. The President of the CAA may refuse to approve charges or direct that certain changes be implemented with regard thereto, if in his or her opinion such charges are not in compliance with applicable provisions of Polish or international law. In Germany federal law directs that airport charges must be approved prior to the undertaking by the managing bodies of airports of the activities giving rise to such charges, but it does not establish the methods of regulation, standards to be applied, nor the criteria which must be met to justify specific airport charges.¹³

¹² ACI Europe position on the proposal for a Directive on Security Charges (COM (2009) 217) June 2009.

¹³ F. Müller, C. König, J. Müller: *Regulation of Airport Charges in Germany*. German Airport Performance (GAP) 2008.

The EU Directive on airport charges is applicable only to airports which service 5 million passengers annually, as well as to the largest airport in each Member State in terms of passenger movement. The Polish regulations apply to all airports, hence they may be deemed significantly more restrictive. However the Directive itself allows for the possibility of expansion of its scope in the individual Member States, as well as for the application of such methods of economic supervision by Member States such as granting approvals to systems of charges and the applicable rates, including methods of collection based on incentive systems, as well as the fixing of maximum charges.

The approval of airport charges by government authorities is justified by the need to avoid practices restricting competition on the part of managing bodies of airports. In some European countries general prohibitions against practices restricting competition are deemed sufficient, while in others approval of specific charges and rates is deemed to be the best way to protect competition. Nonetheless a government cannot take over the management functions of an enterprise and decide one of the fundamental instruments of enterprise management in a given market, i.e. pricing policies. On the other hand, a government may place restrictions on pricing where no market exists to regulate prices. Hence the main criterion justifying price regulation in the airport market must be a strong market position on the part of managing bodies of airports and limited market activities.

Governments should be charged with the task of monitoring airport charges in order to avoid excessive pricing. While in the era of market economies governments should not introduce price controls, in those airports where there exists the possibility of abuse of dominant position on the market the government is within its rights to set or approve maximum prices. On the other hand decisions to reduce charges, if they are based on sound economic principles and in the commercial interests of an enterprise accountable for its profits, should be left to the domain and risk of the enterprise concerned, without interference by government officials, who do not possess the possibilities and capabilities to carry out an expert analysis of such decisions. A second role and task of government is to assist in the creation of a free and open market for airport activities, based on non-discriminatory principles. Regulating bodies should be authorized to issue decisions prohibiting the introduction and collection of charges which are contrary to the above principles.

The EU Directive on airport charges allows for even more restrictive regulation, i.e. the establishment or approval of airport charges or maximum prices by an independent regulatory body. On the other hand, it also

allows for a less restrictive procedure, whereby a regulatory authority of a Member State may analyse, either on its own initiative at regular intervals or on the basis of a request submitted by an interested party, whether free competition conditions are maintained at a given airport. Only in the event of a negative assessment would the government decide whether to establish an independent regulatory body to approve airport charges or establish maximum prices.

The Polish legislative package of proposed changes to the Aviation Law of 2002 proposes that airports be divided into two groups vis-à-vis the degree of regulation of their charges, i.e. one with more regulation and one with less, based on the criterion of annual passenger traffic in a given airport. The criterion proposed is, like the EU Directive, 5 million passengers per year. In effect this would mean that, at least for the foreseeable future, the only Polish airport subject to the more restrictive regulation would be the Warsaw Chopin Airport.

As regards smaller airports, the proposed degree of regulation is significantly less restrictive. While the President of the CAA is still vested with the authority to conduct appropriate investigations into whether an airport's charges and tariffs are in compliance with existing laws and regulations, such investigations and analyses can be conducted *ex post facto*, that is after the charges and rates have already been introduced. Carriers would also have the right to submit any disputes to the CAA.

The proposed regulatory mechanisms with respect to larger airports, i.e. those which meet the annual passenger threshold of 5 million, are much more restrictive. They restrict the airport's freedom to engage in economic activities to an extent which does not seem justified taking into account the real competitive position of such an airport on the European air traffic market. The time-consuming procedures for approvals will overly restrict the airport's flexibility to react to rapidly changing market conditions and will create obstacles to the implementation of a flexible marketing plan adapted to the needs of the carriers using the airport. In effect the Warsaw Chopin Airport will be in a much worse bargaining position than the airports of Germany, Czech, and the remaining Polish airports.

The most appropriate solution would be acceptance, in accordance with the EU Directive on airport charges, of the principle of establishing maximum airport charges. Other elements and components of airport charges should be subject to the *ex post facto* review procedures envisioned for smaller airports. Managing bodies of airports should have the freedom to introduce lower charges than those approved, offer discounts, and make corrections to the principles for collecting charges and the payment conditions. The current

proposal would create a situation whereby the managing body of an airport would be unable to modify existing charges and conditions related thereto in reaction to practical problems which may naturally arise after the approval of a system of charges. Such a situation is burdensome and disadvantageous, both to the management authorities of the airport and the carriers making use thereof. The economic supervision of an airport should not involve the approval of specific charges using an elaborate procedure of approval which makes it difficult to make changes once approval has been secured.

3.2. Definition of airport charges

The Polish Aviation Law of 2002 does not provide a precise definition of airport charges. Article 75 provides that an airport managing body may collect charges for services offered in connection with take-offs, landings, and positioning and parking of aircraft, servicing of passengers and their baggage, aircraft and crew (airport charges), for groundhandling services as well as other services rendered in connection with the activities and operation of the airport. Airport charges may be collected exclusively by the managing body of an airport; no other entity has the right to do so.

The Aviation Law of 2002 does not specify from whom airport charges may be collected. It uses the phrase “users of an airport”, but does not further define the term, which could raise significant doubts and uncertainty. In addition the Aviation Law of 2002 also uses the ill-defined term “users of aircraft”, which it describes as the owner(s) thereof, or other persons listed in the official aircraft register as users thereof. In practice the actual possessor and user of an aircraft is frequently a lessee who uses the aircraft based on a leasing agreement, and maybe another legal user who is neither the owner nor listed in the official aircraft register as a user. For this reason “Polish Airports” introduced, for the purposes of airport charges, the concept of a “service recipient”, i.e. customer.

On the other hand, the EU Directive on airport charges defines airport users as any natural or legal person responsible for the air transport of passengers, post, or freight from one airport to another. This definition raises a different set of questions, in particular whether it applies to subjects making use of airport facilities but not carrying out transport services (i.e. general civil aviation, providers of other services, recreational flying, etc.). If airport charges are supposed to be imposed on and collected from the defined users, is it legal to collect such charges from other entities making use of an airport’s services but who are not ‘users’ according to the definition contained in the Directive?

The Polish legislative package proposing changes to the Aviation Law of 2002 provides a much more precise definition of ‘users of airports’ who may be subject to airport charges.

The scope of airport charges was elaborated in detail in the Polish Regulation of 2004 on airport charges. Airport charges include:

- charges for take-offs or landings connected with servicing such start and departure operations;
- passenger fees – connected with providing passenger terminals;
- parking fees – connected with the provision of parking space and hangars to aircraft;
- goods fees – connected with access to cargo terminals.

Airport charges related to environmental protection, provision of security, and other additional services are also allowed. Charges for the delivery of services mandated by Regulation No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air are not considered as airport charges, even though until recently there was controversy over this point. Charges for security services give rise to a similar controversy, since such charges are excluded from the EU Directive on airport charges.

The definition of airport charges was clearly formulated in the above-mentioned EU Directive. Article 2 thereof provides that an airport charge means “a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight.” Based on this definition it may be postulated that the basic criterion for an airport charge is that it be for a service exclusively provided by an airport managing body concerning provision of airport’s infrastructure, facilities and services.

3.3. The non-discrimination principle

The principle of non-discrimination is a supreme principle when it comes to making use of airport services and establishing the charges therefore. In and of itself the principle does not give rise to any controversy, although the specific solutions devised for its implementation may create doubts about its application in practice. The frequently-formulated criteria of relevance, objectivity, and transparency are difficult to interpret, and sometimes solutions applied which grant privileges (for example reduced charges or discounts) but seem to meet the non-discrimination criteria are questioned

by air carriers which do not meet the criteria. This arises most frequently with regard to differences between the treatment of traditional air carriers and low-cost carriers, which operate according to different business models and have different expectations with respect to the various solutions applied vis-à-vis airport charges. The representatives of traditional airlines criticize the reduced charges available to low-cost carriers based on the number of operations carried out at a given airport, number of passengers served, or offering premiums for increases in either of the above categories. On the other hand, airport charges for servicing transit passengers do not give rise to any particular controversy among traditional airlines, as these are characteristic of the business model used by them.

The conditions set forth in the regulations concerning airport charges leave little room for the use of such charges for marketing purposes. Nonetheless the managing bodies of certain airports make efforts to use the charges for marketing purposes, which are frequently subject to question however by the regulatory authorities.

3.4. Means for regulating airport charges

3.4.1. Mechanisms of regulation

In those countries which regulate airport charges two regulatory mechanisms are most frequently used – cost formulas and mechanisms for controlling price increases. The basic principle underlying cost formulas involves a method for establishing prices which will recover costs, including financing and investment costs, and allow airport managing bodies to obtain a reasonable return on their capital investments, as established by the regulators. The mechanism for controlling price increases involves the establishment of maximum allowable price increases, related to increases in consumer price indexes and reduced by an established percentage (the so-called RPI – X formula). It should be noted that this type of regulation is related to the level of prices, not profits. Price control regulations should offer the management bodies of airports the possibility to increase their profits by other means, but at the same time it exposes them to greater risks inasmuch as their projections as to costs and levels of profit may be subject to greater uncertainty.

A critical and widely-discussed issue concerns the basis for establishing airport charges and setting airport fees. Use of the so-called “single till” principle requires that all revenue to an airport managing body – including non-aeronautical revenues – should be taken into consideration in the

establishment of price levels. The “dual till” principle, on the other hand, requires that both the revenues and costs of an airport operator be divided into aeronautical and non-aeronautical activities. Airport charges should be based on the costs related to the provision of aeronautical services. Non-aeronautical activities are not subject to regulation and airport managing bodies should be free to earn additional profits by such activities.

During the first phase of European regulation of airport charges the “single till” principle was predominant, however in many countries there has been an evolution in favour of the “dual till” principle. The EU Directive on airport charges does not demonstrate a preference for either method, although an analysis of the legislative preparatory works accompanying formulation of the Directive indicates that the “dual till” principle had more adherents among the framers of the Directive. In Poland the regulation of airport charges is based on the costs associated with the provision of the services giving rise to such charges; however there is no mention in the Polish legislation of returns on capital investments. An analysis of the Polish mechanisms for regulation indicates that they are based on the ‘dual till’ principle.

3.4.2. The cost basis and profit-making nature of airport operator business

One of the most burdensome aspects of the 2004 Regulation concerning airport charges concerns the methodology to be used in the establishment of allowable charges. The Regulation provides that airport costs are to be determined based on the costs incurred in the financial accounting year previous to the year in which the charges are to be imposed. In practice this leads to a complete lack of flexibility in the establishment of airport charges, making the final accounting quarter – from 1 October to 31 December – the only feasible period for the introduction of new charges. In light of the rapidly changing economic conditions in the dynamic air transport market, this situation is difficult for airport managing bodies to accept. What’s more, the CAA refuses to approve interim changes in airport charges. Thus the only path available to introduce even minor changes in the charges system is to prepare a full set of documentation and go through the entire procedure for the establishment of charges *de novo*, and that within the time period restrictions described above.

Airport operators cannot take into consideration costs of premises, installation, or infrastructure for the current accounting period in which they are put into use. This puts them in jeopardy of severe financial losses, particularly when a new investment carries with it significant increases in

current costs. To further complicate matters, the Regulation is unclear whether, in the cost calculation, the movement of passengers, post, and freight serviced should be calculated for the year in which the costs are incurred or the year in which the new charges will take effect. In the meantime, changes in the air transport market may produce a significant deviation from the costs planned and the costs actually incurred following the approval of the CAA.

Fortunately these numerous burdens and difficulties are planned to be eliminated in the new legislative proposal for amendment of the Aviation Law of 2002, which proposes that costs be calculated on the basis of planned costs. This legislative proposal also introduces the possibility to modify specific airport charges without the need to modify the entire approved package.

The EU Directive on airport charges is based on the principle, already applied in Poland, of calculating airport charges based on the costs of services provided to support the activities for which charges are sought to be imposed. It does not directly require however that national legislation be adapted to this system. It only refers in its preamble to the ICAO principle of “cost-relatedness” between the provision of services and charges therefore.

Another related issue concerns the allowable level of profits which an airport managing body may retain in exchange for its provision of services. In accordance with the Polish Regulation of 2004 concerning airport charges, allowable profit levels are determined taking into account the profit-making nature of the activities of the airport managing body, however no specific allowable amount of profit is established nor is a methodology proposed for the determination of allowable profits. The major topic of controversy is whether the managing body of an airport can make a profit which exceeds the costs of its equity. The Regulation’s declaration that the profit-making nature of the activities of an airport managing body should be taken into account would seem to suggest that its profits may exceed the costs of its equity. Placing a restriction on allowable charges in the form of a prohibition of a profit margin above the cost of equity would mean that an airport management body would be limited to recovery of the face amount of its own capital investment only and would not be able to earn a profit on its investment. The EU Directive provides no detailed scheme regulating this issue.

The planned Polish project for a new Regulation concerning airport charges (to replace the 2004 Regulation) envisions the possibility to take into account an airport’s cost of equity or a reasonable profit margin thereon when examining a cost report in support of new or revised airport charges.

This way of framing the issue in the alternative seems inappropriate. Only by receiving a profit margin above the cost of equity can the managing body of an airport obtain a real economic gain, i.e. a real positive return on equity. The proposed wording of the Polish Regulation is also inconsistent with the principles established by the ICAO, where Point 30, section 1 refers to a full recovery of costs taking into account capital investments, and section 8 of Point 30 speaks of a reasonable return on assets which would allow an airport managing body to obtain credit on the financial market on reasonable terms in order to invest into infrastructure and obtain an adequate return on the investment for the owner of the capital.

It should also be noted that the work in progress on the EU Directive on airport charges eliminates the current requirement that the managing body of an airport must present to the airport users information on income and costs concerning each charge individually. Instead, it will suffice if airport users receive information on the various charges and the overall costs connected with the provision of services giving rise to such charges. This can be viewed as allowing an airport managing body to develop a different system of airport charges than one based strictly on costs incurred for the provision of the particular services on which such charges are based. The ICAO principles do not require that each charge be based on a separate cost analysis related thereto. Instead it refers to overall costs.

3.4.3. Differentiation of charges

In Poland charges for access to the services of public use airports may be differentiated only with regard to the type of aircraft involved and the character of the airport operation. The provisions of Article 67 of the Aviation Law of 2002 are not ironclad however. While understood literally they would prohibit any flexibility in the establishment of airport policies related to charges, at the same time they leave open a wide range of interpretation with regard to the type and characteristics of aircraft and the nature of airport operations, since these terms are nowhere defined in the act. If one adopts the narrow interpretation, discounts would be impermissible, even if they passed the non-discrimination test. The narrow interpretation would not allow, for example, for distinguishing between daytime and night-time landings, since the time of operations is neither a ‘characteristic of an aircraft’ nor in the “nature of an airport operation”.

Polish regulations specifically refer to the costs of services offered, hence it may be concluded that lower quality services could be offered at lower cost, assuming that they do result in a cost reduction. The principle of correlating costs with charges would seem to indicate that the same

fee should be charged for the same service. This issue of the allowable differentiation in the airport charges, in particular as concerns discounts and rebates, has long been a controversial issue grounded in general principles of European law. A number of the typical business activities carried out by airports, which in principle are qualified as occupying a dominant position on the market, could be seen as abuses of dominant position.

In the EU Directive on airport charges the issue of differentiations in charges is touched upon in Articles 3 and 10. Article 3, dealing with non-discrimination, allows for the “modulation of airport charges for issues of public and general interest, including environmental issues. The criteria used for such a modulation shall be relevant, objective and transparent.”

As regards environmental issues the matter seems clear enough. Airport charges could be assessed, for example, if used for the purposes of reducing noise generated by an airport’s activities, particularly during night hours, or to cover other additional costs associated with noise reduction. In the same vein, additional charges could be levied against the loudest aircraft. However, in accordance with Point 38 of the ICAO principles – which are directly referred to in the Directive’s preamble – increased charges levied on specific aircraft cannot constitute an insurmountable barrier which *de facto* prohibits the operation of such aircraft.

In the glossary attached as an annex to the ICAO principles, the term ‘modulated charges’ is defined as charges adjusted to particular times or situations related to the use of airport infrastructure or services (for example peak periods/non-peak periods, times of congestion, noisy periods, or places of reduced air quality on an airport’s territory). The term “modulation of charges” used in the Directive on airport charges should be understood in a similar way. It seems reasonable to differentiate between charges if the differentiation has the aim of reducing air traffic during a peak period. Such a reduction of traffic has a significant effect on the operational and economic efficiency of airport management and can help avoid coordination of flights as well as improve the overall climate of airport operations. Too high an intensity of activity during a given time frame leads to delays, and also has a negative effect on the environment in light of the increased noise and carbon emissions caused by airplanes waiting to take off or land. Reducing the intensity of operations during peak hours also has a positive effect on airport security. On the other hand, such differentiation in costs is considered by some to be discriminatory with regard to carriers building a transit flight network in a particular airport. A number of other critics consider such differentiation to be ineffective in terms of achieving the stated aims.

Article 10(1) of the Directive allows “the airport managing body to vary the quality and scope of particular airport services, terminals or parts of terminals, with the aim of providing tailored services or a dedicated terminal or part of a terminal. The level of airport charges may be differentiated according to the quality and scope of such services and their costs or any other objective and transparent justification.”

It should be noted particularly that the above provision allows for the differentiation of charges not only according to the quality and scope of services and their costs but also for “any other reason”, so long as the reason is supported by an objective and transparent justification. In addition, the legislative history with respect to this provision indicates that the aim was to permit differentiation in charges for reasons other than the public interest or differences in the services offered, including the possibility to differentiate between charges in order to provide economic incentives (such as quantity rebates, discounts for opening up new routes, etc.). The main restrictions on offering discounts and rebates thus stem not from the EU Directive on airport charges, but rather from EU competition law.

The approach of the proposed new Polish Regulation concerning airport charges seems controversial with respect to its method of special treatment enabling the spreading out of additional charges relating to environmental protection and the provision of security services. The regulatory proposal is based on the concept that charges relating to environmental protection and the provision of security services can be established using different principles than other costs. In order to avoid greater rigor, an airport operator may introduce a separate noise or security charge by providing different landing charges for different aircraft based on noise emissions, or increase passenger charges based on increased security costs, without introducing separate charges. In this way it can avoid the detailed regulations governing such charges. The introduction of more rigorous provisions would not obtain the desired effect of special treatment of such charges, unless such a division of charges was mandatory.

Differentiation in the charges imposed for passengers travelling within the Schengen area and outside the Schengen area is deemed to be justified by the additional costs incurred in connection with the mandatory provision of passport and customs control services. On the other hand there is no justification for differentiation in the charges charged for national and international flights, unless the same are serviced in different terminals. Up until the end of the 1990s differentiation in the charges for servicing national and international flights was quite common. The European Commission commenced a series of proceedings investigating this practice. Despite the

best efforts of the representatives of the Member States, no one was able to come up with an objective explanation explaining the cost differential which would support such a practice. It should also be noted that in its judgment of 17 December 2010 the Appellate Court in Warsaw, upholding the 27 October 2009 judgment of the Competition and Consumer Protection Court, found that the differentiation contained in the Polish Aviation Law which, up until 2005, allowed for the distinction between airport charges for international flights and charges for in-country flights, gave rise to an abuse of dominant position and constituted a practice restricting competition, prohibited by the 15 December 2000 law on the protection of competition and consumers. In its justification for its ruling, the Court declared that a differentiation in charges assessed to contracting parties could not be approved unless it was based on an economic justification, in particular related to differences in the cost of the services or goods provided.

The issue of quantity discounts has also been the subject of a decision by the European Commission as well as a ruling by the ECJ. It is difficult to justify such discounts and still fulfil the non-discrimination requirements. Rebates based on several thresholds, the crossing of which lead to significant discounts in the calculation of charges, violate the non-discrimination requirement. As regards the principles underlying discounts, the ECJ held that an entity having a dominant position can offer rebates or discounts which increase linearly in proportion to the level of turnover if such rebates/ discounts can be justified by economies of scale. As regards airport charges, however, such rebates are difficult to justify from an economic perspective inasmuch as charges are based on the services provided to a single carrier and not on any grouping thereof, hence it is difficult for the managing body of an airport to point out any economy of scale in the handling of groups of aircraft. Ease of invoicing has been alleged, but it was determined to be of marginal value.

In light of the EU Directive, in principle discounts based on the opening of new connections are allowable, so long as the principle of non-discrimination is adhered to. Neither the content of any such discounts nor the scope of the application in specific airport circumstances can lead, however, to a situation whereby only a limited number of airport users can make use of such discounts.

Based on European law the allowability of every discount must be examined individually. The principles of the ICAO, to which the EU Directive refers in its preamble, may be of assistance. They provide that a differentiation in charges may not lead in effect to the imposition of charges for services provided to one airport user by other airport users. If

differentiation of charges is designed to encourage carriers to expand their offers of service, such differentiation must be of a temporary nature. The principles of the ICAO do not provide any indications as to what length of time may be considered 'temporary,' but in practice it has come to be accepted that incentive discounts may be offered for a maximum period of up to 5 years. This same time frame is part of the Polish project for a new Regulation concerning airport charges.

The provisions of the EU Directive on airport charges with respect to regulating differentiations in charges must be assessed positively. In the first place, they do not affect differentiations in charges which were already in place prior to the Directive taking effect. Secondly, they clarify some issues which previously had given rise to controversy, such as the possibilities to modulate charges or to differentiate charges in connection with costs incurred, the scope of services offered, and their quality. They also grant to airport management bodies the right to differentiate charges based on other criteria, so long as European competition law principles are observed.

Chapter VI

Allocation of time slots for take-offs and landings in EU airports

1. Introduction

The dynamic developments in the construction of air carriers and aircraft, as well as the modernization of airports, has been accompanied by an equally dynamic increase in the demand for air transport services, and as a consequence in the demand for airport groundhandling and support services for air transport. At the same time, the constantly growing numbers of cargo and passenger flights has also produced other unforeseen, this time negative, consequences. **Problems with punctuality of flight schedules** in the operation of airports has increased, as well as problems with securing air traffic capacity both in terms of airport services and use of airport space, allocation of air space, and with **the efficiency of airport groundhandling and support services** in general. The problem of airport congestion¹ in crowded and overburdened airports has risen dramatically in importance, a reflection of the fact that the demand for air transport services exceeds

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¹ “Congestion” refers to a situation of common use of limited resources by a number of users, which can lead to difficulties and waste of time caused by temporary limitations on the use of such resources, reducing the flow of movement of objects and, as a result, decreasing the average speed of such movement. See J. Leszczyński, *Modelowanie systemów i procesów transportowych (Modelling of systems and transport processes)*, Oficyna Wydawnicza Politechniki Warszawskiej, Warszawa 1999.

the current capacity of many airports. The effects felt by passengers are manifested in overcrowding and flight delays. The effects on air carriers are manifested in difficult and limited access to essential airport infrastructure, including access to runways, taxiways, and stands, and significant delays in the servicing of aircraft, passengers, their baggage, and freight.

In order to address and combat these growing problems, a number of international agencies and organizations, in collaboration with national governments, have undertaken various actions at a variety of levels and with various scopes. New legal regimes have been introduced regarding the principles for allocating time slots for take-offs and landings and related services to air carriers, and flight schedules have undergone significant revision. Undoubtedly a key role in this process is played by Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports² (together with subsequent amendments). In addition, a number of other projects are in the early implementation phase (among others: Airport Collaborative Decision Making – A-CDM; Airport Airside Capacity Enhancement – ACE; Air Traffic Management Airport Performance – ATMAP; A-SMGCS). Their full implementation at the operational level is aimed at increasing the efficiency of cooperation between airport management, airline carriers and their representatives, and representatives of groundhandling staff. A review of the Eurocontrol Report indicates that positive results from the operation of these programs are already visible. According to the data published in the Central Office for Delay Analysis of Eurocontrol, in 2011 the average delay for each flight operation was:

- departures: 10.2 minutes, representing a 31% decrease from 2010;
- arrivals: 10.3 minutes, representing a 31% decrease from 2010.

The average delay calculated by Air Traffic Flow & Capacity Management was 1.8 minutes for each operation, representing a 38% decrease from 2010, despite an overall increase in operations of 3.1%. This same data indicates that the overall delay in airport operations at the Warsaw Chopin Airport was reduced by 3.6 minutes for each departure.

However, despite the number of legal and operational initiatives undertaken, the problem of overcrowded and overburdened airports and the accompanying congestion remains a concern. The activities undertaken in connection with the introduction of new legal regimes have not proven

² Official Journal of the European Union 1993 L 14/1 (also contained in a at: OJ UE. Polish special edition chapter 7, B. 2, p. 3); cited hereinafter as Regulation 95/93 concerning the allocation of time slots for takeoffs and landings.

to be fully successful, nor have they brought about the expected results. Based on practical experience as well as the expert opinions obtained from international consultations, it may even be said that the application of the provisions of the Regulation 95/93 has brought about the existence of new, unforeseen problems.³ This chapter is concerned with precisely the above-mentioned assessments. The issue will be viewed from the perspective of a Polish managing body of an airport, upon which the existing legal regulations place certain obligations concerning the allocation of take-off and landing slots in airports. The practical problems associated with their implementation, and in particular the vagueness of some of the obligatory provisions and the lack of any unequivocal interpretation thereof, taken together with the total lack of and/or limited nature of possibilities for airport managers to influence certain processes (for example managing the flow of air traffic overall) or to establish certain parameters, characteristics, and the configuration of certain elements comprising the system of air transport (for example the structure and division of airspace, or the environmental protection requirements legally circumscribing the conditions under which airports may operate), require detailed examination with an aim toward developing solutions.

2. Legal foundations

2.1. European Union Law

Regulation 95/93 on common rules for the allocation of slots at Community airports plays a key role in the EU legal framework concerning the principles for allocating time slots with regard to take-offs and landings in overburdened airports. The main purpose behind the issuance of this Regulation was to create conditions to combat the increasing contradictions brought about by the dynamic development of air transport services and the principles by which airport infrastructures are to be made available to airlines. Having the aim of assuring that airport flights could be conducted and serviced in a consistent manner, provisions were introduced regulating the access to overburdened airports by the allocation of time slots for take-offs and landings. By defining the rights and principles governing the access of air carriers and other aircraft to airport infrastructure and

³ See: Communication (COM 2011/823), Proposal (COM 2011/827), Assessment (SEK 2011/1444).

services, the negative consequences attendant upon the overburdening of airports are to be reduced.

The particular aims of the Regulation 95/93 were/are:

- a) to secure the capacity sufficient to support and service air transport in the airports of the European Union;
- b) to introduce, in appropriate circumstances, coordination within the airports of the EU;
- c) to assure that the allocation of time slots at congested airports are based on neutral, transparent and non-discriminatory rules;
- d) to assure that the principles of fair competition are observed.

The appropriate allocation and division of operational times between air carriers in congested airports is supposed to resolve the problem of overcrowded airports and to help ensure that existing capacity and infrastructure is used optimally, a result of which should be a reduction in delays and in the overall congestion of airports. It is also assumed that airports with insufficient capacity which cannot be expanded in the short term require coordination. Decisions in these matters are to be taken by the Member States of the European Union. The Regulation emphasizes that the application of objective criteria in decision-making is necessary to assure that the principles of neutrality and non-discrimination are respected. These same principles are applicable to choosing those qualified natural or legal persons who will be designated to fulfil the functions of schedules facilitator and/or coordinator. The Regulation requires that the allocation of time slots be based on neutral, transparent and non-discriminatory rules, which should have the result of assuring a fair distribution of take-off and landing slots. The Regulation also requires that the principle of transparency be applicable to all information which is taken into account to assure the fair and neutral distribution of take-off and landing slots. With respect to new air carriers (entrants) who will offer their services on routes within the territory of the European Union, it is recommended that they strengthen the provision of adequate air services to regions, increase potential competition on intra-Community routes, and not be discriminated against by third-sides governments, i.e. governments of countries which are not EU Member States, and that these objectives require strong support for air carriers who intend to start operations on intra-Community routes. This assumption is in accord with the aims of the International Civil Aviation Organization (ICAO) as set forth in Article 44 of the Convention on International Civil Aviation (also called the Chicago Convention because its final draft was completed in Chicago on 7 December 1944).

Regulation 95/93 on common rules for the allocation of slots at Community airports has been **amended on a number of occasions** in connection with specific situations which have arisen, based on assessments and commentary by experts and practitioners in the field, as well as on the basis of an official assessment of the results it achieved for the functioning of international air transport.

Regulation (EC) No 894/2002 of the European Parliament and of the Council of 27 May 2002, amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports,⁴ was issued in response to the terrorist attack on the USA of September 11, 2001. As a result of that event, the demand for air carrier services significantly declined. In order to secure to carriers the right to a rational allocation of slots for take-offs and landings in the upcoming flight scheduling season, the carriers retained their previous rights, despite the fact that were not used in the summer 2002 and winter 2002/2003 flight scheduling periods (which otherwise would have caused them to lose such rights).

Regulation (EC) No 1554/2003 of the European Parliament and of the Council of 27 July 2003, amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports⁵ was issued in response to the war activities being conducted in Iraq as well as the SARS epidemic. Together these events reduced the demand for air carrier services at the beginning of the flight schedule period summer 2003. In order to secure to carriers the right to a rational allocation of slots for take-offs and landings in the upcoming scheduling season, the carriers retained their previous rights, despite the fact that were not used in the summer 2003 scheduling period.

Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004, amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports⁶ introduced essential changes to Regulation No 95/93, particularly with respect to giving air carriers permission to access airport facilities for landing and take-off at specific dates and times for the duration of the period for which the permission is granted, as well as giving current carriers the opportunity to re-establish permission to access the airport facilities for landing and taking-off at specific dates and times according to so-called “grandfather rights”. **Grandfather rights** relate to a series of slots and refer to the right

⁴ Official Journal of the European Union 2002 L 142/3.

⁵ Official Journal of the European Union 2003 L 221/1.

⁶ Official Journal of the European Union 2004 L 138/50.

of a carrier to a balanced distribution of slots for take-offs and landings in an upcoming scheduling season, provided that such carrier made use of at least 80% of the earlier designated slots. In the event the carrier does not meet this condition, the take-off and landing slots are returned to the slot pool and distributed among the remaining applicant carriers. This grandfather rights provision is aimed at assuring regularity in airline operations in coordinated airports. Any deviation from the conditions attached to this provision must be of an exceptional nature and concern unforeseen circumstances, like for example a terrorist attack or an epidemic.

Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009, amending Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports⁷ was issued in connection with the effects stemming from the serious **economic and financial crisis**, which brought about a reduction in demand for air carrier transport in the flight scheduling periods of winter 2008/2009 and of summer 2009. Regulation No 545/2009 guarantees that allocated take-off and landing slots which were not used during these scheduling periods will not bring about a loss of rights to said slots. It also provides that, on the basis of a thorough and complete analysis of the eventual effects of the crisis on competition and consumers' behaviour, the legal framework of the regulation may – based on an appropriate petition from the European Commission – be extended to the scheduling period of winter 2010/2011. It should be noted however that the aforementioned petition must be part of an overall review of Regulation 95/93 on the allocation of time slots in Community airports. This review must have as its purpose improvement of the efficiency of the allocation of time slots for take-offs and landings in light of the overall aim of making optimal use of airport capacity at congested airports.

In assessing the regulations referred to above and future legal regulations issued by the European Union, it needs to be kept in mind that the subject is intricately connected with the mandated process of cyclical review, assessment, and consultations concerning the effects of existing regulations.

January 2007 saw the issuance of **Commission Communication of 24 January 2007** to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions entitled “An action plan for airport capacity, efficiency and safety in Europe” (COM 2006/819). In this communication the Commission explained that “[i]f air traffic continues to increase at the current rate, Europe will be faced with

⁷ Official Journal of the European Union 2009 L 167/24.

a shortfall of infrastructure ... threatening the efficiency of the entire air transport network. Congestion will also have a negative impact on the environment and on safety.” The Commission went on to explain that the crisis concerned airport capacity in terms of both runway, taxiway, stands for passenger flights, and airport terminal infrastructure, and that the crisis is intricately connected with the disproportion between the demand for air carrier services and airport capacity. It was emphasized that the problem is highly complex and that no “golden mean” existed for its resolution. Between September 2005 and the beginning of 2006 the European Commission conducted a series of wide-ranging consultations with interested parties – EU Member States, airline carriers, managing bodies of airports, representatives of the staff of airline carriers, competent Air Traffic Management authorities, as well as environmental experts and organizations – aimed at finding a solution to the problem of airport under-capacity. The most important result of the consultations was unanimous agreement on the existence of the problem and the need to find market-based solutions which are environmentally-friendly. As a result of the consultations, the European Commission announced five key actions:

- 1) make better use of existing airport capacity (by, among other things, creating a data base of the capacities of European airports, and implementing projects such as Air Traffic Management Airport Performance – ATMAP⁸ and Airport Collaborative Decision Making – A-CDM);
- 2) develop a consistent approach to air safety operations at airports (including the establishment and implementation of common regulations, such as EGNOS/Galileo certification and the inclusion of GNSS to ATM procedures within the Framework of SESAR⁹);
- 3) promote “co-modality”, the integration and collaboration between modes of transport (development of inter-modal transportation networks and their connection to airport terminals, with possible financial support coming from projects such as TEN-T, EFRR, and EFS);
- 4) improve the environmental capacity of airports and the planning framework for new airport infrastructure; develop and implement cost-efficient technological solutions (having reference to the principle of a ‘balanced approach’ agreed upon at the ICAO assembly in 2001);

⁸ See: *Eurocontrol ATM Airport Performance (ATMAP) Framework*, December 2009; Eurocontrol ATMAP project Phase II, 2nd General meeting, Brussels, 2 February 2010.

⁹ See: Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (Official Journal of the European Union of 31 March 2004, L 96).

5) develop and implement cost-efficient technological solutions (implementation of A-SMGCS¹⁰ and systems of electronic-activated boarding passes and baggage tickets¹¹).

On 23 January 2007 the European Commission began consultations with, among others, Member States, airline carriers, managing bodies of airports, coordinators of flight schedules, and Eurocontrol focused on the functioning of Regulation 793/2004. The purpose of the consultations was to gather opinions and conclusions concerning the practical application (and effects) of the operation of the Regulation. As a result of these consultations, on 15 November 2007 the Commission published its “Communication on the application of Regulation (EC) 793/2004 on common rules for the allocation of slots at Community airports” (COM 2007/704). In this communication the Commission noted the assertion by the Member States and airline carriers that, despite the lack of a precise definition of “the effective use of airport capacity”, nonetheless they were “of the opinion that it has significantly improved, even if it is difficult to measure its effect in terms of efficiency of airport use.” It was also noted that “a number of new or modified provisions in the Regulation have contributed to more efficient use of airport capacity: the new definition of what constitutes a series of slots, the further strengthening of the use-it-or lose-it rule and the stricter rules on force majeure.”

The airports highlighted “the potential value added of the Regulation as it allows the introduction of local rules to improve the slot allocation process in a more flexible manner. This benefit is currently regarded as being limited however, and the provisions could be further strengthened by raising the slot usage rate under the use-it-or-lose-it rule and by allowing airports to introduce a slot reservation fee which would serve as an incentive for air carriers to commit to the actual use of allocated slots. The fee would be paid in advance for every allocated slot and be forfeited when the slot is not used.”

On 20 November 2009 the European Commission issued a “Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at community airports.” (COM 2009/634) The aim of this proposal was/is to “to undertake a codification of Council Regulation (EEC) No 95/93 of 18 January 1993...”, with the proposal of fully

¹⁰ See: *Manual of Surface Movement Guidance and Control Systems (SMGCS)* ICAO doc. 8476.

¹¹ This should significantly improve the punctuality of airport operations, since 10% of all delays are caused by passengers who pass through passport and customs control but do not arrive at the boarding area on time.

preserving “the content of the acts being codified.” It was further stressed that the proposal “does no more than bring them together with only such formal amendments as are required by the codification exercise itself.”

It should be underscored that, taking into consideration that no substantive amendments may be introduced in the codification process, the Parliament, Council, and Commission, in reliance on the inter-institutional memorandum of understanding of 20 December 1994, agreed on the adoption of an accelerated procedure which would allow for a quick ratification of the Acts which emerged from the codification process.

The process of revising the Commission’s further regulations issued under Regulation No 95/93 and the evaluation of their effects continued in the following years, and as a result the Commission submitted, on 1 December 2011, two Communications to the European Parliament and Council. The first was a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, containing a proposal for an “Airport policy in the European Union – addressing capacity and quality to promote growth, connectivity and sustainable mobility” (COM (2011) 823). Legislative proposals submitted by the Commission are to be discussed and approved by the European Parliament and the Council in order to become Community law. The Commission simultaneously issued on 1 December 2011 a Communication entitled “**Airport package**: Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports” (COM (2011) 827).

EC Communication 2011/823 begins by referring to the Declaration adopted at the Bruges Aviation Summit in October 2010, referring to the “need to reform EU rules to foster the competitiveness of European airports and eliminate capacity bottlenecks, so as to enhance the efficiency of each link of the aviation transport chain (e.g. airport operators, carriers, other service providers) and give travellers and companies more value for money.” The Communication goes on to identify the two major challenges facing European airports: **capacity and quality**. The Commission proposal outlined in **Communication 2011/827** contains concrete propositions for landing and take-off slot allocation mechanisms, elaborated based on the justifications outlined in the proposal, which in turn are based on consultations and assessments with key stakeholders and experts, taking into consideration the political, economic, and technological changes which have occurred since the issuance of Regulation 95/93. The need for the proposal is based on the judgment that the current distribution of take-off and landing slots at airports, and hence airport capacity, significantly deviates from the optimal solution.

2.2. Polish law

The Polish Aviation Law of 1962 (Act of 31 May 1962) did not directly regulate the principles for defining the status of airports, designating coordinators or flight schedule facilitators (called “organizers” in Polish law), and allocating time slots for take-off and landing. Only on the basis of a delegation of authority contained in the Act (Article 52(4)) did the Ministry of Transport and Maritime Economy (MTME) issue, on 28 January 1994, a regulation concerning the operation of international flights and the permanent status of Polish air carriers abroad and foreign air carriers in Poland,¹² which gave the Minister the right to designate a “coordinator or coordinators” vested with the authority to distribute the allocation of time slots to air carriers operating in Polish airports according to a method to be determined by the Minister, unless the interested parties themselves agreed to such a distribution (§ 12(3)). The MTME Minister exercised this authority as early as on 31 January 1994 and issued “Principles for the allocation of time slots for the operation of air carriers in Polish airports,” a document which provided it would be applied until such time as an appropriate legal act was passed. Today, the basic national (Polish) regulation of legal relations in civil aviation, including among others the organization and coordination of flight schedules in airports and the activities of coordinating committees and the process of consultation between airports, is established by the **Act of 3 July 2002 – Aviation Law**.¹³

Even before Poland became an EU Member State, in accordance with Article 67 (3) of the Aviation Law the Ministry of Infrastructure issued, on 30 April 2004, a **Regulation concerning the creation and activities of committees and the cooperation and consultation at airports**.¹⁴ The provisions of this regulation are aimed at implementing Council Directive 96/67/EC of 15 October 1996 on access to groundhandling services market at Community airports.¹⁵ This Directive regulates in detail the principles for establishing and operating a coordination committee (or committees), as well as the consultation process and cooperation between air carriers and their organizations with respect to the coordination of flight schedules in Community airports. After Poland became a Member State of the EU, i.e. when the provisions of EC Regulation 95/93 were obligatory in Poland, on 27

¹² Polish Official Journal 1994, No 14, item 49.

¹³ Polish Official Journal 2012 No 0, item 933; hereinafter cited as the Aviation Law of 2002.

¹⁴ Polish Official Journal 2004, No 103, item 1087.

¹⁵ Official Journal of the European Union 1996, L 272/36.

June 2006 the Ministry of Transport, acting on the basis of Article 67g of the Aviation Law of 2002, issued its Regulation with respect to the coordination and organization of flight schedules.¹⁶ This regulation is of key importance to the subject matter of this chapter. In accordance with its provisions, the flight schedule coordinator is to have guaranteed financial and institutional independence from any party which could have an interest in the effects of his/her activities. This guarantee of independence also extends to the organizer(s) of flight schedules (“schedules facilitator” in EU terminology). This means that flight schedule coordinators and organizers must maintain official independence from any and all interested parties (airline carriers, managing bodies of airports, representatives of groundhandling services, etc.), including even governmental administrative authorities. Their financial independence must be guaranteed, and to this end the Regulation provides that no single source of financing of the work of a coordinator may exceed 50% of the total operating income of the coordinator. In accordance with the EU law requirement that each Member State shall take steps to ensure that the activities of the coordinator are carried out in a neutral, transparent, and non-discriminatory fashion, the Polish Regulation entrusts supervisory oversight of the coordinator’s activities to the President of the Civil Aviation Authority (CAA).

The Regulation outlines in detail the special procedures for nominating a coordinator and/or organizer of flight schedules, done in such a way as to permit interested subjects to influence the choice of coordinator/organizer. The Regulation also regulates matters concerning the relationship between coordinators/organizers and the subjects financing their activities, in particular at the stage of budgetary preparation (which constitutes the basis for determining the costs of coordination and/or organization of flight schedules), and which must be carried out in consultation with the managing bodies of airports and air carriers.

3. Practical aspects of the allocation of time slots in airport operations

3.1. Preliminary remarks

The legal basis for all the practices, principles, and procedures governing the **allocation of time slots for take-offs and landings at European Union airports** derive from the legal frameworks described above. In addition,

¹⁶ Polish Official Journal 2006, No 112, item 768; hereinafter cited as the Regulation of 2006 concerning the coordination and organization of flight schedules.

applicable practices and principles are set forth in appropriate international publications, among which the most important are the manuals issued by the International Air Transport Association:

- Worldwide Scheduling Guidelines – concerning the establishment of flight schedules;
- Airport Development Reference Manual – concerning, among other things, an analysis of airport capacity;
- Guidelines for the Establishment of Airline Operators Committees – concerning the activities of coordination committees in airports.

3.2. Specific conditions concerning the activities of coordinators and flight schedule organizers (schedules facilitators) and coordination committees in airports

3.2.1. *Qualifications and obligations of coordinators and schedules facilitators/organizers*

According to European Union law, “[t]he Member State responsible for a schedules facilitated or coordinated airport shall ensure the appointment of a qualified natural or legal person as schedules facilitator or airport coordinator respectively after having consulted the air carriers using the airport regularly, their representative organizations and the managing body of the airport and the coordination committee, where such a committee exists.” The same schedules facilitator/organizer or coordinator may be designated to work at more than one airport.

At the request of an interested Member State of the EU or the European Commission, a coordinator must submit an annual activity report, concerning in particular slot mobility for take-offs and landings and their application, as well as indicating all complaints received concerning the allocation of time slots for take-offs and landings, the slot pool for take-offs and landings submitted to the coordination committee, and a description of activities undertaken to resolve any problems which arose or were indicated. Under Polish law, a natural person (who may be a representative of a legal entity) who is to be nominated by the CAA President as coordinator must fulfil the following conditions: (a) possess a higher education diploma and have knowledge or experience in planning flight schedules or communication flow charts; (b) have mastery of the Polish and English languages; (c) have no convictions or court judgments against him/her for any deliberate acts in any of the following areas: criminal; treasury; acts against security in communications, public security, property, economic activities, financial or securities transactions; intentional interference with the rights of employees or the authenticity of documents (encompassed by the right to a good

reputation); (d) have no economic connections to or financial interest in, nor be in debt to or subject to the control of, any managing body of an airport or airline carrier; (e) submit an (official) account for his or her previous activities connected with carrying out an official function.

The CAA President must announce the commencement of a procedure to appoint a coordinator at a given airport by placing a communiqué in the Polish Official Journal (*Dziennik Urzędowy*). It should be noted that in the event of liquidation of the function of flight schedule organizer (schedules facilitator) in a given airport and the simultaneous introduction of the function of flight schedule coordinator, the person acting as flight schedule organizer will become the interim flight schedule coordinator, and in the event of liquidation of the function of flight schedule coordinator in a given airport and the simultaneous introduction of the function of flight schedule organizer, the person acting as flight schedule coordinator will become the interim flight schedule organizer.

3.2.2. Consultations and the activities of coordination committees in airports

According to law, civil aircraft and air carriers have equal rights to the use of airports; the conditions and payments for use may be differentiated only with respect to the type and characteristics of the aircraft well as the nature of the airport operation. Thus, having the aim of appropriate consultations and proper representation of all parties, it is envisioned that airports will create appropriate committees and organizations, with the participation of the management bodies of airports, air service providers, users of airports or organizations representing them, and groundhandling services' representatives.

A **committee of air carriers** may be created by carriers operating regular flights to a given airport or a series of irregular flights. The activities of such a committee should encompass the initiation of enterprises or projects, commenting on proposals for enterprises or projects which are aimed at improving the quality of passenger service and goods handling, and the provision of training in the aforementioned areas. The committee also has the right to take official positions or stances on issues with respect to the conditions of access or use of a given airport, airport fees, or matters connected with the functioning or operation of groundhandling services.

In the event coordination of flight schedules is introduced into a given airport, a **coordination committee** must be created. Participation in such a committee is open to carriers operating regular flights to or from a given airport as well as representatives of their organizations, the managing body

of the airport, the competent Air Traffic Management authorities, as well as representatives of irregular civil aviation making regular use of a given airport.

The committee's functions include, in particular, submission of proposals and the offering of advice to the coordinator with respect to increasing airport capacity or improving the use of existing capacity, coordination of parameters, methods of monitoring the allocation of slot times for take-offs and landings, providing information on local conditions affecting the allocation of slot times for take-offs and landings, monitoring the allocation of slot times with respect to their environmental impact, improvement of the flow conditions in a given airport, and raising or discussing issues of importance concerning new entrants.

Membership in the committee is voluntary, and the Polish CAA President as well as the coordinator may participate in the committee's proceedings as observers. The managing body of an airport is obligated to ensure that the committee has adequate premises and organizational support, but its activities shall be financed from its own funds.

In a coordinated airport, appropriate **coordination parameters** must be established twice annually. These parameters must be submitted to the coordinator sufficiently in advance prior to his or her preparation of the preliminary allocation of slots for take-offs and landings, which will be presented at the conference on flight schedule planning. The elaboration of coordination parameters, together with the methodology used and any proposed changes, should be discussed at the coordination committee meetings.

Airline carriers using (or intending to use) a given airport must timely submit to the organizer or coordinator all essential information in appropriate formats and in accordance with pre-established deadlines, with particular consideration given to whether a particular carrier will be applying as a new entrant with regard to the allocation of time slots for take-offs and landings. It should be underscored that organizers and/or coordinators as well as the competent Air Traffic Management authorities must exchange all information essential to the conduct of their duties with respect to planning flight schedules.

3.2.3. Coordination costs in airports

The costs of coordination in airports (in particular the costs associated with the ongoing activities of coordination, procurement of appropriate premises and equipment, and remuneration for the coordinator and his or her staff) are covered from a coordinator's own budget, which is 50%

supplemented by contributions of air carriers (in proportion to their respective use of a given airport's services in the two previous flight schedule periods) and 50% by the contributions of airport management body/ies (also in proportion to the number of airport operations subject to coordination in the previous two flight schedule periods).

The coordinator's proposed budget, elaborated after obtaining the opinion of the management body of the airport and air carriers or a committee representing airline carriers and taking into account economic assumptions, is presented by the coordinator to the CAA President no later than two months prior to the beginning of a financial accounting year, or in the case of a newly-nominated coordinator, no later than two months from the date said coordinator began his or her duties. Following approval of the budget by the CAA President, the coordinator must immediately deliver to the airport management body and air carriers or the representative of air carriers a copy of the President's decision as well as a copy of the approved budget. At that time **the management body of the airport will deposit an advance payment to the coordinator's budget** in an amount equal to 30% of the airline operations which constituted the basis for the establishment of the coordinator's costs.

3.3. The introduction/implementation of coordination or organization (schedules facilitation) and the designation by the coordinator or organizer of the approved flight schedule for Polish airports

In accordance with the Aviation Law of 1962 and the "Principles in the coordination of time slots for airline carriers in Polish airports" issued by the Ministry of Transport and Maritime Economy on 31 January 1994, the Minister appointed – to act as coordinator in the allocation of time slots – the Department of Flight Schedules for the Polish Airlines LOT S.A. (PLL LOT S.A.), or in other words, the airline carrier with a dominant position on the flight market into and out of Poland. A full and appropriate regulatory framework with respect to the coordination or organization of flight schedules for Polish airports was implemented by the Act of 28 July 2005 amending the Polish Aviation Law.¹⁷

On 5 May 2006 the CAA President issued decision No 577 concerning the organization of the flight schedule for the Warsaw Chopin Airport, which was based on the conclusions contained in a report submitted by "Polish Airports" State Enterprise (PPL) analysing airport capacity. On

¹⁷ Polish Official Journal 2005, No 180, item 1490.

that same day the CAA President also issued his decision with respect to the interim appointment of an flight schedule organizer for the Warsaw Chopin Airport. The nominated individual was an employee of the Civil Aviation Authority.

As a consequence of the subsequent report analysing airport capacity, on 27 October 2006 the CAA President issued decision No 65 concerning the liquidation, as of 31 October 2006, of the organized flight schedule for the Warsaw Chopin Airport, in response to the projected deterioration in the flow of airport activity and overburdening of infrastructure services for the upcoming flight schedule period. On that same day the CAA President issued decision No 66 concerning the dismissal, as of 31 October 2006, of the individual (the employee of the Civil Aviation Authority) who had been acting as interim flight schedule organizer for the Warsaw Chopin Airport, which was based on the resignation tendered by said individual on 13 October 2006.

Together with the increase in airport activity and air carrier traffic serviced in the Warsaw Chopin Airport, problems arose with respect to meeting the acoustical environmental standards, as well as the appearance of temporary blockages in air traffic. The results of the analysis described in the 2001 reports – **Ecological Review of the Warsaw Chopin Airport and Complex Analysis of Airport Capacity at the Warsaw Chopin Airport** – served as the basis and justification for the petition submitted to the CAA President by the PPL in April 2011 requesting the introduction of coordinated flight schedules for the Warsaw airport. The CAA President addressed a request to the management bodies of Polish airports (and other competent organs) to carry out an analysis of airport capacity and to consult with each other with respect to the readiness of Poland's airports to service the UEFA EURO 2012™ football tournament.

The activities commenced in April 2011 led to the issuance of a decision by CAA President in September 2011 concerning the implementation of coordination of flight schedules for a limited period of time in the airports of Poznań, Gdańsk, and Wrocław, which were host cities of the UEFA EURO 2012™ tournament, as well as the permanent coordination of flights schedules for the Chopin Airport in Warsaw, based on the environmental restrictions as well as it being a host city of the UEFA EURO 2012™ Football Championship.

As a consequence of the above-mentioned decisions, the CAA President commenced procedures (publishing of a prior official announcement and consultations) for the nomination of a coordinator, which resulted in the

November 2011 decision¹⁸ to nominate Airport Coordination Limited as the coordinator for the above-mentioned airports.

3.4. Obligations of the management body of an airport with respect to the allocation of slots for take-offs and landings in airports

3.4.1. *Take-off and landing operations of aircraft as one element in the process of managing an airport*

The tasks and duties of the management body of an airport associated with the allocation of time slots for airport operations derive from the legal acts already described above in this chapter. Management of an airport is one of the forms of economic activity carried out in civil aviation, and involves the administration and management of an airport's infrastructure as well as coordination of and control over the activities of various service providers operating in a given airport. As a result of having legal status of a public utility,¹⁹ a management body of an airport cannot base its decisions solely on commercial interests. Among other things, it is required to make its decisions based on the principle that all air carriers are granted equal access to airport infrastructure. Airport infrastructure is divided into two elements or systems: flight services²⁰ and groundhandling services.²¹ Each of these elements of airport infrastructure are to be devoted to servicing air carrier operations, with the distinction being between (a) take-off and landing operations as well as the parking and positioning of airplanes, and (b) groundhandling services.²²

In addition, a number of other processes take place in airports which are aimed at providing security for airport services, including among others:

¹⁸ See: the Decision of the CAA President No ULC-LER-5/418-0035/01/11 of 14 November 2011.

¹⁹ In accordance with Article 2(17) of the Aviation Law of 2002, an airport is a classified as a aerodrome of public use for commercial flights.

²⁰ In accordance with Article 2(6) of the Aviation Law of 2002, part of an airport must consist of a permanent area designated for takeoffs and landings of aircraft and control of air traffic, together with the equipment necessary to exercise such control, to which access must be monitored.

²¹ In accordance with § 2(9) of the Regulation of the Minister of Infrastructure of 25 May 2009 concerning groundhandling in airports (Polish Official Journal) 2009 No 83, item 695), centralized infrastructure consists of those elements of infrastructure and equipment in airports which are used to provide groundhandling services, the complexity, cost, or environmental influence of which does not allow for division or duplication.

²² The category of groundhandling services is defined in Article 176 of the Aviation Law of 2002.

maintenance of the technical aspect of exploitation of infrastructure systems, protection against illegal acts of interference, protection of national borders, and protection against the spread of epidemics and phytosanitary threats.

3.4.2. *Analyses undertaken concerning airport capacity and the delineation of coordination parameters*

All of the above-described processes, taken together, determine **airport capacity**, which according to the theory of transport systems and processes is understood as **the ability of a specific service to handle a given intensity of movement in a specified time period**. Similar to other terms which are key to our study, such as “effective use of airport capacity” or “environmental constraints”, there is no universally accepted definition of the concept of capacity or method for the measurement of “**airport capacity**.” In fact the government of Poland called attention to this in its response of 30 December 2011 to the proposed Commission communication 2011/827.²³ The definition of the concept and the methodology of analysis thus become relative, and are determined having in mind the aim of the analysis and the intended usage of the results stemming from the analysis.²⁴ One can find a number of definitions in the professional literature including, among others:

- a) **theoretical capacity of an airport**, or the maximum number of operations which may be carried out in a given time period given specific conditions concerning air traffic and passenger servicing, freight (goods and post), and the number of take-offs and landings;²⁵

²³ “Nonetheless the Government of the Republic of Poland does not, at the present time, see a clear need for deeper systemic changes in any direction. Eventual changes should mainly concern the clarity of certain provisions. Taking into account the inconsistency in interpretations, it would be recommended to more precisely identify the methods and standards used for analyzing airport capacity as well as to define such terms as ‘environmental limitations.’ This would increase the coherence of application of the regulations in all the Member States of the EU”; in the Position of the Government of the Republic of Poland concerning EC proposal COM 2011/87.

²⁴ See: Airport Development Reference Manual (9th Edition IATA 2004); M. Leško, op. cit.; J. Skorupski, A. Stelmach, M. Kozłowski, *Problem ustalania deklarowanych przepustowości portu lotniczego (The Problem with establishing declared airport capacity)*, 11th International Conference „Computer Systems Aided Science, Industry and Transport”, Zakopane 2007; A. Świątecki, P. Nita, P. Świątecki, *Lotniska (Aerodromes)*, Wydawnictwo ITWL, Warszawa 1999; J. Leszczyński, *Modelowanie systemów i procesów transportowych (Modelling of systems and transport processes)*, Oficyna Wydawnicza Politechniki Warszawskiej, Warszawa 1999.

²⁵ Za: M. Leško, *Porty lotnicze, pola wlotów i urządzenia nawigacyjne (Airports, landing areas and navigational equipment)*, Wydawnictwo Politechniki Śląskiej, Gliwice 1991.

- b) **practical capacity of an airport**, or the number of operations which may be carried out in a given time period given specific conditions concerning air traffic and passenger servicing, freight (goods and post), and the number of take-offs and landings, **taking into account the average time of delays which would be acceptable.**²⁶

In specific circumstances or instances (defined by the legal acts earlier described), the managing body of an airport is required to carry out an analysis of airport capacity and to define coordination parameters.²⁷ In accordance with the applicable legal provisions, such analysis of airport capacity must be based on “**generally recognized methods**” and should indicate any and all deficiencies in airport capacity taking into account various time periods. This analysis should constitute the basis for developing possible solutions to the issue of how to secure airport capacity, in particular by new or modified infrastructure, operational changes, and any other modifications, as well as delineate the time frame for introducing such changes. It should also identify **all essential limitations or constraints related to technical, operational, or environmental issues**, indicating their influence on airport capacity as well as any changes envisioned with regard thereto. The results of this analysis constitute the basis for consultations concerning airport capacity, which consultations must include representatives of: the managing body of an airport, air carriers regularly using the infrastructure of an airport, the competent Air Traffic Management authorities, and representatives of groundhandling services.

In the event problems with airport capacity occur in at least one flight scheduling period, the EU Member States must assure that the airport is designated as a coordinated airport only in that period when the problems are of such a magnitude that the airport management body is not in a position to avoid significant delays and doesn't have the available resources to resolve the problem(s) in the short term. It should be noted however that the legal prescriptions described above **do not clearly define the measurable criteria requiring that the coordination of flight schedules be introduced at a specific airport**. The government of Poland, in its response of 30 December 2011 to the proposed Commission Communication 2011/827, noted that this ambiguity exacerbates the existing problems with airport capacity.²⁸

²⁶ Ibidem.

²⁷ Ibidem.

²⁸ *“In the opinion of the Government of the Republic of Poland, with regard to the above challenges related to air transport it is necessary to place more emphasis on developing concrete activities aimed at both monitoring as well as actually increasing airport capacity over*

The term “airport capacity” is frequently confused with “punctuality”, which creates additional problems in the consultation process and in taking the decision whether to introduce the organization (schedules facilitation) or coordination of flight schedules. The legal provisions described above relate to problems which arise as a result of insufficient airport capacity. Obviously such problems will be reflected in longer delays. However, it is necessary to distinguish between delays resulting from insufficient airport capacity and delays resulting from failures of subcontractors to timely or efficiently carry out their duties, for example with regard to groundhandling services.

Having regard to the difficulties in delineating a proper methodology for analysing airport capacity, the CAA President issued an order in August 2007 requiring the use, in the analysis of the airport capacity at the Warsaw Chopin Airport in, of the computer systems used by the European Commission and international organizations (IATA, ACI) based on mathematical computation models of airport infrastructure and the intensity of air traffic operations. The management body of the Warsaw Chopin Airport in is in possession of such computer programming and has used it in its analysis of, among other things, the preparations for organization of the of the UEFA EURO 2012™ tournament. It should be underscored, however, that the efficient and accurate use of simulated computer models requires proper training of the cadre using them as well as a proper data base, which must be obtained through appropriate consultations and agreements among stakeholders.

3.4.3. Payment of an advance deposit to the coordinator’s (or organizer’s) budget

Another duty placed on the management body of an airport, as has been mentioned in point 3.2.3 of this chapter, is the payment of an advance deposit to the coordinator’s (or organizer’s) budget. This amount, calculated at the level of 30% of the total air traffic operations subject to coordination,

the long term. In particular this includes modernization and development of existing airport infrastructure, the construction of new infrastructure, as well as development of financing mechanisms aimed at ensuring balanced and sustainable growth in the air transport sector in the EU over the long term. For these reasons it is also recommended to take decisive action aimed at the acceleration of the process of creating new common methodologies for analyzing airport capacity at the EU level, as well as conducting comprehensive analyses of EU airports. These actions should be related to planned investments as well as concrete activities at the EU level and at the Member State level with regard to identifying projects related to the building of new infrastructure, their implementation, and means of financing.”

– position of the Government of Poland issued on 30 December 2011 with regard to EU communication 2011/823.

may constitute a significant burden on the budgets of the managing bodies of airports which execute a large number of air traffic operations. Thus it is necessary that the decision to introduce organization or coordination of an airport's flight scheduling be preceded by an appropriate process of consultation and information exchange which would enable an airport managing body to properly prepare for making the required advance deposit.

4. Summary

4.1. International projects can help secure punctuality, quality, and increase in airport capacity

Based on the experiences to date, the analyses conducted, and consultations among stakeholders it may be postulated that the purposes and aims underlying the issuance of the Regulation 95/93 have not been effectively met. This results from both the inadequate legal provisions as well as their practical application. The lack of clarity of a number of provisions, as well as the financial burdens associated with their implementation, has led to a search for more effective ways to secure the punctuality of air transport. Eurocontrol (with an appropriate mandate from the European Commission) plays a leading role in this process, in particular overseeing the implementation of two key projects: Airport Collaborative Decision Making (A-CDM) as well as Airport Airside Capacity Enhancement (ACE).

The concept underlying collaborative decision making (CDM) is based on maintaining direct operational collaboration and cooperation in airports between the services controlling air traffic and the CFMU, the managers of operational services at airports, air carriers, and representatives of groundhandling services. The concept of CDM is based on the following principles: (a) creation of an integrated platform for managing information flow; (b) securing the quality and coherence of data; (c) elimination of indefinite elements; (d) elaboration of common principles for operational cooperation; and (e) establishment of a process for taking common operational decisions in the shortest possible period of time. The operational advantages of the implementation of CDM have been verified in practice, i.e. improvements in punctuality and a reduction in airport congestion.

The methodology of the Airside Capacity Enhancement (ACE) program is supposed to secure the identification and systemization of those factors which limit the field of maneuver concerning improvements in airport capacity, as well as an analysis and elaboration of principles aimed at improving capacity. The program is based on the concept of minimizing

the average time on take-off runways, which in turn will allow for more take-offs and landings.

Another project currently being implemented by Eurocontrol in collaboration with the competent Air Traffic Management authorities, airline carriers, and airport managing bodies (from almost all European countries) is ATMAP. The aim of this project is to increase the efficiency of the European Air Traffic Management System (EATM) by introducing a comprehensive, transparent, and independent system for analysing the results of airport operations, allowing for the establishment of future goals. This project builds on the first packet of regulations, adopted in 2004, by the first Single European Sky (SES I) project,²⁹ as well as the second packet adopted in 2009 (SES II), taking into consideration the aims and problems relating to safety, capacity, quality, and environmental protection.

The ATMAP project also examines and assesses the adequacy, consistency and coherence of the provisions of Regulation 95/93 concerning the common allotment of time slots for take-offs and landings in EU airports, as well the provisions of Regulation 549/2004 laying down the framework for the creation of the Single European Sky.

4.2. Potential directions and methods of action to improve quality and encourage practices aimed at quality improvement

As has been indicated above, the scope and content of the legal acts concerning the allocation of time slots for airport operations require additional elaboration. This needs to be done in the following areas:

- a) systematizing (i.e. making uniform) existing legal regulations;
- b) expanding the scope of existing legal regulations (for example, introducing uniform definitions) and making them more precise (for example, setting forth clear, measurable criteria for introducing the coordination or facilitation of flight schedules);
- c) definition of a single method and its uniform application for analysis of airport capacity as well as the procedures for implementing the coordination or organization of flight schedules in airports;
- d) carrying out a comprehensive assessment of the capacity of EU airports using a single methodology;
- e) tightening the connection between and application of regulations aimed at securing airport safety and those aimed at environmental protection.

²⁹ See: Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (Official Journal of the European Union of 31 March 2004 L 96).

Undertaking the above-described actions should go a long way toward eliminating, or at least significantly reducing, the current problems associated with air transport. The adoption of a common approach (harmonization) to issues concerning capacity, quality, airport safety and environmental protection (efforts have begun in this regard) should lead to an increase in the appropriateness and efficiency of activities undertaken with regard to these issues. It is also highly desirable that efforts be undertaken to introduce close collaboration between the planning for expansion and development of airport infrastructure and land use regulations, especially taking into account the long term. Supplying coordination and a common direction to activities addressing these issues should significantly increase the competitiveness of EU airports and reduce and/or mitigate the current constraints with respect to airport capacity, all of which would lead to increasing the quality and efficiency of the European air transport system. This has already been laid out in the work of the European Commission, which assumes an optimal use of the European network of airports in order to stimulate the potential of the single market and produce economic growth – one of the key elements of the “Europe 2020” strategy, which aims at securing balanced growth thanks to a more competitive and resource-efficient economy. All of these goals are consistent with the plan to open up a Single European Transport Area,³⁰ a key element of which is recognized to be access to high quality air transport markets.

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³⁰ See: White Paper - Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system COM (2011) 144.

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Chapter VII

Groundhandling services at European Union airports

1. General characteristics of Council Directive 96/67

Until the mid-1990s groundhandling services in European airports were not subject to separate regulation by the European Union. However, in light of the constant development of the market, and in particular the dynamic development of air carrier services, caused in part by the significant liberalization of the sector which took place in the early 1990s, as well as by the growing demand and access of passengers to air carrier services, including freight and post, the increased mobility of European society, as well as the encouraging macro-economic climate, more and more voices could be heard warning of the need to regulate the principles and norms in place applicable to the operators carrying out activities related to groundhandling services, with the overall aim to secure healthy competition and equal access to the groundhandling services market in Community countries.

The issuance of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports¹ represented a continuation of the activities of the European Union Council aimed at the further development of and competition in the air carrier services market, as well as marking the opening up of the groundhandling market

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¹ Official Journal of the European Union 1996 L 272/36; hereinafter cited as Council Directive 96/67/EC.

in Europe. Directive 96/67, issued as a harmonizing instrument, contains legal norms aimed at securing that the freedom of establishment grounded in EU law (Article 50(1) of the Treaty on the Functioning of the European Union, TFEU, formerly Article 44(1) of the TEC) is applied to a specific type of economic activity – the implementation of groundhandling services in community airports. It is applicable to all commercial airports on the territories of the Member States of the EU, although its scope of application is closely related to the range and number of activities carried out in a particular airport. With respect to groundhandling services supplying third parties, it is applicable to airports whose annual traffic is not less than 2 million passenger movements or 50 000 tons of freight. Each year the Official Journal of the European Union publishes a list of the airports subject to the Directive. Airports with a limited passenger and cargo flow or located on islands of the same geographic region may be exempt from the application of the provisions of Directive 96/67. The managing body of an airport is obligated to comply with the Directive even if it is also subject to the supervision or control of a national body.

The **main aim** of Directive 96/67 is **to ensure that access to airport installations be guaranteed to suppliers authorized to provide the ground-handling services necessary to the proper functioning of an airport.**

Among the assumptions underlying the ratification of the Directive were implementation of the following specific aims: (a) increasing the efficiency of activities in the groundhandling services sector; (b) reduce the operating costs of airline companies; (c) improving the quality of services provided to airport users; and (d) liberalization of access to the groundhandling services market in airports, having the aim of increasing the number of enterprises offering such services, thus guaranteeing to air carriers a greater freedom of choice in choosing partners.

The Directive regulates, above all, areas such as: (a) access to the groundhandling market and principles whereby, for certain categories of groundhandling services it may be necessary to limit the number of authorized suppliers of such categories. in terms of the number of companies offering such services to third parties or directly to the airports themselves; (b) principles of access to airport equipment and centralized infrastructure, whether for the purposes of rendering services to third parties or to the airports themselves; (c) procedures for selecting companies offering groundhandling services; (d) principles for consulting with airport users when it comes to selecting suppliers of ground-handling services, and to arrange for the representation of airport users and their consultation by setting up a committee composed of their representatives; and (e) the

establishment of uniform accounting principles with regard to the rendering of groundhandling services.

The Annex to Directive 97/67 introduces a detailed classification of groundhandling services, specifying eleven categories of such services based on IATA standards, as follows: Category 1. Ground administration and supervision; Category 2. Passenger handling; Category 3. Baggage handling; Category 4. Freight and mail handling; Category 5. Ramp handling; Category 6. Aircraft services; Category 7. Fuel and oil handling; Category 8. Aircraft maintenance; Category 9. Flight operations and crew administration; Category 10. Surface transport; Category 11. Catering services.²

2. The Directive's influence on the market for groundhandling services in the EU

On a number of occasions the European Commission has commissioned studies aimed at assessing the effect of the Directive on the groundhandling services sector in the Member States of the EU. The first comprehensive analysis was carried out by the firm SH&E International Air Transport Consultancy (SH&E) in 2002. Its report³ contained the following general observations: (a) "It is widely acknowledged that the prices of groundhandling services have gone down across the board in nearly all Member States since the adoption of the groundhandling Directive and this decrease is deemed to be more visible in those Member States which had handling monopolies or a highly regulated market before 1996"; (b) "The Directive has also had its effect on the degree of competition at EU airports as for almost all categories of groundhandling services the number of service suppliers in the market has gone up"; and (c) "The changes in the level of quality seem to have varied at the different airports. Stakeholders have different views, mostly from the perspective of their respective competitive positions in the market before and after the Directive became applicable."⁴

² In the most recent amended version of the Polish Aviation Law (30 June 2011) the categories contained in the Annex to Directive 96/67/EC are mirrored in Article 176, albeit with the use of differing terminology for categories 7 and 11.

³ SH&E Limited, *Study on the quality and efficiency of Groundhandling services at EU airports as a result of the implementation of Council Directive 96/67/EC*, Report to European Community", London 2002

⁴ The detailed results of the studies carried out by the firm SH&E International Air Transport Consultancy were summarized by the European Commission in its *Report from the Commission on the application of Council Directive 96/67/EC of 15 October 1996*, which can be accessed at: http://ec.europa.eu/transport/air_portal/airports/doc/2007_groundhandling_report_en.pdf

A second comprehensive analysis of the effects of Directive 96/67 was carried out in 2008–2009. This time the study was commissioned to the firm Airport Research Center in collaboration with MVV Consulting. This study was conducted having in mind an actual assessment of the effects of the Directive, taking into account the dynamic changes in the market, in particular the expanded scope of the Directive connected to the expansion of the European Union from 15 to 27 Member States. A number of interesting and detailed conclusions were reached as a result of the study carried out, in particular: (a) in the years 1996–2007 the number of operators offering groundhandling services to third parties and the number of operators engaged in self-handling increased by about 42% in categories 3, 4, and 5 (i.e. by 78 operators)⁵ and by about 8% in category 7 (i.e. by two operators); (b) in the years 1996–2002 an overall decrease of 12%⁶ in prices for groundhandling services could be observed in the territories of the 15 Member States, as well as significant decreases in the so-called “new Member States” of the Union; (c) in most EU Member States “visible changes” in the quality of services could be observed after 1996, although the direct relationship between such changes and the implementation of the Directive cannot be definitively established. In June 2010 the firm Steer Davies Gleave, commissioned by the EC, completed yet another comprehensive assessment of the influence of the Directive on the activities of the groundhandling services sector and suggested possible modifications to its provisions.⁷ This analysis incorporated the results of previous studies, including the effects of liberalization in the sector on overall employment,

⁵ Based on data collected from selected representative airports and analyzed in the research carried out by the firm Airport Research Center, published as *Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007, final report, February 2009*. Taking into account however all airports which participated in the study – the number was almost twice as high and encompassed 155 entities, including 44 additional entities providing services to third parties in Category 3 and 4 carriers engaged in self-handling, while in Category 4 there were 28 entities providing services to third parties and 5 carriers engaged in self-handling, and in Category 5 there were 49 entities providing services to third parties and 18 carriers engaged in self-handling.

⁶ Airport Research Center *Study on the Impact of Directive 96/67/EC on Ground Handling Services 1996-2007 final report*, February 2009, s. 87; details available at: http://ec.europa.eu/transport/air/airports/ground_handling_market_en.htm http://ec.europa.eu/transport/air/airports/ground_handling_market_en.htm.

⁷ Steer Davies Gleave, *Possible revision of Directive 96/67/EC on access to the groundhandling market at Community airports*, June 2010; available at: http://ec.europa.eu/transport/air/studies/airports_en.htm.

work conditions and wages,⁸ general trends in the groundhandling services market, the identification of problems with the practical application of the Directive, the results of consultations with all interested parties and stakeholders with respect to their expectations vis-à-vis future modifications to the Directive, as well as an overview of the various scenarios which might accompany eventual changes, such as: (a) maintaining the Directive in its present form; (b) the introduction of guiding principles as well as so-called “best practices” to the Directive; (c) the introduction of new legal provisions aimed at improving the quality and social conditions in the groundhandling sector; and (d) introduction of legislative changes aimed at improving and expanding activities in connection with the further opening of the groundhandling services sector, in particular with regards to the effects of such opening on the market, the environment, work and social conditions, and the administration of airports.

3. The EU legislative package for airports of 2007

The first of the above-listed reports on the effects of implementation of Directive 96/67 constituted one of three pillars of the legislative package on airports elaborated by the Commission and issued on 24 January 2007 under the title ‘Airport Package 2007’.

The Commission’s decision to include the issue of access to the groundhandling market in its proposed legislative package perfectly reflects the Commission’s opinion that the further liberalization of the air transport sector cannot be implemented appropriately if the groundhandling market is not taken into account, as there is a strict interdependence between the two sub-sectors and a complementariness between air transport services and groundhandling services.

⁸ Based on, among others: Ecorys Netherland BV *Social developments in the EU air transport sector A study of developments in employment, wages and working conditions in the period 1997-2007*, December 2007; available at: http://ec.europa.eu/transport/modes/air/studies/doc/internal_market/2008_01_social_study_final_report.pdf i and Booz & Company *Effects of EU Liberalization on Air Transport Employment and Working Conditions - final report for the European Commission Directorate – General for Energy and Transport*, June 2009; available at: http://ec.europa.eu/transport/modes/air/studies/doc/internal_market/2009_effects_of_eu_liberalisation_on_air_transport_employment_and_working_conditions.pdf.

4. Future directions of changes to Directive 96/97

The first initiative in the question of modification of Directive 96/67 took place in 2003, less than one year after publication of the SH&E report. In March 2003 the EC published its *Consultation Paper*, the contents of which concerned questions which needed to be taken into consideration when considering future modification of Directive 96/67. The Member States of the EU, candidate countries for EU membership, and suppliers and stakeholders in the groundhandling services market were all invited to take part in the consultations.

Taking into consideration eventual future revisions of Directive 96/67, the European Parliament recommended that the Commission concentrate on the following issues: (a) increasing the number of groundhandling service suppliers in those categories of services reserved to the largest airports, i.e. those servicing more than 10 million passengers annually; (b) increasing the role of users of airport infrastructure (the Airport Users' Committee) in the selection process of new suppliers; (c) establishing recognized minimum, harmonised quality standards as criteria for the selection procedure for suppliers, as well as the introduction of minimum, harmonised quality standards for services rendered by sub-contractors; (d) introduction of a systematized level of training required for the personnel of groundhandling suppliers.

As a result of the analyses and consultations carried out in the second half of 2011 a "Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports, and repealing Council Directive 96/67/EC" was issued on 16 March 2012.⁹ Its overall aim is to enhance the efficiency and overall quality of groundhandling services for airlines as well as for passengers and freight forwarders, and the introduction of harmonized requirements for the provision of groundhandling services, with the aim of improving the quality of overall airport operations.

The project delineates the following specific aims: (a) securing greater freedom of choice to air carriers in choosing groundhandling service suppliers in EU airports; (b) harmonizing and clarifying the national administrative conditions for entry into the market (approval); (c) securing that suppliers of groundhandling services acting in accordance with differing legal regimes are granted an equal opportunity at the EU airport level; (d) securing

⁹ Based on the Report of the Council of the European Union nr 7704/12 of 16 March.2012, to which is attached the Proposal for a Regulation, hereinafter cited as "The European Parliament Proposal for a Regulation repealing Directive 96/67/EC." This document is available at: <http://register.consilium.europa.eu/pdf/en/12/st07/st07704.en12.pdf>.

quality and safety standards in the services offered by groundhandling suppliers; (e) clarification of the legal provisions applicable to the training and transfer of personnel; and concluding that (f) “considering the new need for minimum, harmonised quality standards at airports to implement the gate-to-gate approach for the realisation of the Single European Sky and the need for further harmonisation to fully exploit the benefits of the gradual opening of the groundhandling market in terms of increased quality and efficiency of groundhandling services, Directive 96/67/EC should therefore be replaced by a Regulation.”

The major provisions of the project, which was presented to the Council of the European Union at its meeting of 22 March 2012, concern the following issues:

- a) Further gradual opening of the groundhandling market in the EU Member States, including securing open access to groundhandling services for users of airports employing self-handling;
- b) For airports whose annual traffic has been over 5 million passengers or 100 000 tons of freight for at least the previous three years, Member States shall not limit the number of suppliers to fewer than three suppliers except for situations whereby limitations are placed on the number of suppliers in categories 3–5 and 7;
- c) Allowing Member States to request exemptions from the general principles limiting the number of suppliers of groundhandling services in the third party handling market and for self-handling airlines in the case of ‘temporary constraints’ with regard to one or more categories of groundhandling services, taking into account the specific space availability constraints or constraints on access to airport capacity arising from congestion or from the indicators regarding use of airport capacity (the number of suppliers of groundhandling services in the third-party handling market may be reduced to one or two in one or more of groundhandling categories 3–5 and 7 for airports whose annual traffic has been over 5 million passengers or 100,000 tons of freight for at least the previous three years;
- d) Introducing improvements to the management of centralized infrastructure. The propositions contained in the Parliament’s proposal involve a more precise definition of centralized infrastructure and the principles for setting fees for its use and carrying out consultations with the Airport Users’ Committee concerning the elements of airport infrastructure which should be centralized;
- e) Introduction of principles providing for the annual dissemination, from the management body of an airport to the Airport Users’ Committee as

- well as suppliers of groundhandling services and, in appropriate instances, other owners or users of centralized infrastructure, of information on the components serving as the basis for determining the groundhandling fees;
- f) application, by the managing bodies of airports, of the principle that airports be required to keep separate accounts for their infrastructure management and regulatory activities on the one hand and for the supply of ground-handling services on the other, as outlined in the objectives of Directive 96/67;¹⁰
 - g) Detailing the public procurement procedures to be applied in situations where limitations are placed on the number of suppliers of groundhandling services during a period of ‘temporary constraints,’ with the aim of securing the best results from proffered tenders, including use of the two-stage tender procedure involving a pre-qualification stage as well as the ordinary stage of assessing the compliance of tenders from interested suppliers with the selection requirements detailed in the bid; as well introduction of a provision that suppliers of groundhandling services shall be authorised for a minimum period of seven years and a maximum period of ten years¹¹ of service in the third-party handling market and for self-handling airlines for those suppliers chosen by the bid and tender procedure, in consultation with the Airport Users’ Committee as well as those carriers which supply their own groundhandling services;
 - h) Tightening up the regulation of subcontracting, including restricting this form of collaboration between suppliers of groundhandling services in the third-party handling market and users of airports supplying their own groundhandling services only to situations of *force majeure*, as well prohibiting cascading subcontracting, requiring suppliers of groundhandling services to inform the managing bodies of airports of their employment of any subcontracting services, and requiring companies taking part in public procurement procedures to indicate in their applications the extent to which they intend to employ subcontractors as well as the names of the subcontracting firms;
 - i) Placing an obligation on the management bodies of airports to coordinate groundhandling services in airports in such a way as to secure better coordination of their activities, particularly in crisis situations, including those situations when an airport is operating in bad weather conditions. Management bodies of ‘large airports’, defined as those which handled

¹⁰ The Council did not accept the Commission proposal for this division, citing legal obstacles.

¹¹ The seven year maximum duration was, in the opinion of interested parties on the market, an insufficient period to allow for the depreciation of handling equipment.

- a passenger turnover exceeding 20 million passengers in the year preceding the repeal of Directive 96/67, are obliged to maintain, from a date contained in the Regulation, coordination activities based on the decision-taking procedures elaborated in CDM (*Collaborative Decision Making*);
- j) The establishment by the EU Member States, in collaboration with the management bodies of airports and the Authority in charge of supervising civil aviation, of a system of monitoring and control in airports whose annual traffic has been over 5 million passengers or 100 000 tons of freight for at least the previous three years. Said system shall establish minimum quality requirements in the groundhandling services area and provide the managing bodies of airports with the authority to ensure that such minimum standards are met by suppliers of groundhandling services in the third party handling market, as well as by airport users employing self-handling. The scope of the norms and standards established shall include parameters for carrying out operational activities, training, information dissemination and support for passengers, safety, security and protection, emergency plans and procedures, and environmental standards. For large airports (above defined) the standards shall include CDM decision-taking processes, and operators at large airports may also be required to secure appropriate systems and equipment for airport security operations;
- k) The introduction of requirements concerning the training of employees by suppliers of groundhandling services in the third party handling market as well as by airport users employing self-handling; as well as the delineation by airport management bodies, or if necessary by the appropriate authorities of Member States in charge of civil aviation, of minimal requirements for training programs for the personnel of suppliers of groundhandling services;
- l) Definition of the principles governing proceedings concerning the personnel of companies which lose their rights to carry out activities in a category of groundhandling services subject to restrictions, including introduction of the possibility for Member States to include a condition that such personnel be accepted for employment by companies submitting bids in the public procurement procedure, independently of the provisions of Directive 2001/23/EC concerning the harmonization of Member States' law with regard to the protection of employees' rights in the event of takeovers of a company, plant, or part of a company or plant;¹²

¹² This document is available at: <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:04:32001L0023:PL:PDF>

- m) Granting to Member States the right, in the event a monopoly or duopoly arises from the fact that a company terminates its activities prior to the designated expiration date in a previous tender, the right to designate for an interim period a new company to carry out the unexpired activities without resort to the public procurement procedure. In the event a suitable replacement company cannot be found, the proper authorized representative of the Member State may impose administrative fees for the services carried out in the temporary monopolistic conditions until such time as a replacement groundhandling service supplier has been contracted;
- n) harmonization of the principles concerning fees imposed for the use of centralized infrastructure with the regulations concerning airport fees in airports whose annual traffic is over 2 million passengers, including consultation procedures, fee appeal procedures to the Airport Users' Committee, and the establishment of fees by an independent body supervising an airport.

The EU Parliament proposal postulates that the provisions of the Regulation repealing Directive 96/67 are to be applied within 30 months from the date the Regulation takes effect.¹³ It should be noted however that the Council did not accept the initial proposal made by the European Commission for the introduction of a mandatory system of confirmation or approval of service suppliers, harmonization, and the principle of reciprocal recognition of national approvals. During the consulting and opinion rendering period there was a return to the proposal of voluntary cooperation, similar to the system currently in place, whereby the Member States can confirm the employment of service providers via the proceedings of an independent organ. If this approach is adopted, they will however still have to observe the conditions for confirmation set forth in the Regulation.

5. Practical problems in the provision of groundhandling services in Polish airports in light of the existing legal regulations

5.1. The legal basis for the provision of groundhandling services in Poland

In Poland the legal acts which establish the principles for carrying out activities in the groundhandling sector are contained in: The Polish Aviation Law of 2002; the Regulation of the Minister of Infrastructure of 6 May 2003 with respect to the certification of activities in civil aviation;¹⁴ the Regulation of the Minister of Infrastructure of 30 April 2004 with respect to the creation

¹³ The Government of the Polish Republic, in its official response to the European Commission, suggested that the adaptation period be extended to 5 years.

¹⁴ Polish Official Journal 2003 No 146, item 1421.

of committees and their activities as well as cooperation and consultation in airports;¹⁵ and the Regulation of the Minister of Infrastructure of 25 May 2009 with respect to groundhandling services in airports.¹⁶

Articles 160–163a and Articles 173–182 of the **Aviation Law of 2002** regulate, respectively, the issues concerning certification of suppliers of groundhandling services for aircraft, freight handling, passenger and baggage handling, as well as the maintenance and servicing of aircraft. They also deal with the question of granting approvals for carrying out economic activities in public service airports with respect to supplying groundhandling services for aircraft, passengers, freight, and baggage. The certifications currently required concern only aircraft services for air carriers which involve unsafe materials as well as the fuel servicing of aircraft (with the exception of groundhandling services related thereto). On the other hand, in contrast to certification, official approval is required for the provision of groundhandling services, except with regard to entities providing their own groundhandling services. Approval may be granted either for the whole range of groundhandling services or for groundhandling services belonging to specific categories.

Companies supplying groundhandling services, as well as air carriers employing self-handling, must be guaranteed, with certain exceptions, free access to the groundhandling services market. Limitations on the number of companies supplying groundhandling services in the third-party handling market may be introduced by the President of the Civil Aviation Authority (CAA) in airports whose annual traffic is over 2 million passengers or 50,000 tons of freight, where such limitations are justified with respect to available space or airport capacity. With respect to air carriers employing self-handling, the threshold limits are one million passengers or 25,000 tons of freight. Managing bodies of airports may introduce restrictions in less-frequented or less-used airports if such restrictions are necessary to make optimal use of the airport.

Article 177(1) of the Aviation Law of 2002 requires participants to organize groundhandling services based on the principle of equal treatment of companies offering such services as well as those servicing the users of airports, which should nonetheless retain the right of choice to choose from among qualified service providers. At the same time legislators required the managing bodies of airports (in Article 180(2)) to guarantee to suppliers of groundhandling services in the third-party handling market, as well as air

¹⁵ Polish Official Journal 2004 No 103 item 1088.

¹⁶ Polish Official Journal 2009 No 83, item 695.

carriers employing self-handling, access to airport infrastructure (necessary equipment and premises as well as the key centralized infrastructure) on the basis of non-discrimination and free and fair competition.

The Aviation Law of 2002 requires suppliers of groundhandling services to assure appropriate levels of quality, insurance, workplace safety, protection of servicing equipment, aircraft and aircraft equipment, persons and the environment. The Law also contains requirements which mirror those contained in Directive 96/67 with respect to keeping accounting procedures for groundhandling services separate from those concerning other airport activities.

The Polish 2003 regulation in the matter of certification for the activities of civil aviation details the principles and methods for executing certification as well as the scope and criteria of assessment for determining whether a given entity meets the necessary requirements for certification. It also determines the types of certification, the format of the certificates themselves, and the method for granting them.

The Polish 2004 regulation concerning the creation and activities of committees imposes on management bodies of airports, among other things, the requirement to carry out consultations concerning the applicable principles for granting access to airport infrastructure and its use, including the methods for establishing and collecting fees for the access to and use of airport equipment and installations, as well as the fees for the use of centralized infrastructure. It also envisions consultations with suppliers of groundhandling services concerning the procedures for, among other things, establishing the conditions prevailing in the airside of an airport.

Since 25 May 2009 **the regulation concerning groundhandling services in airports** has been in effect in Poland. Above all this decree repeals limitations earlier applicable to specific categories of groundhandling services. Limitations on the number of approvals have also been liquidated. Currently the only possible scenarios for introducing such limitations involve specific damage limiting the available space or capacity of an airport. Such restrictions however may be introduced only for a temporary period on the basis of a justified request submitted by the managing body of an airport, which must be based on a thorough analysis of airport capacity and contain a plan for the application of counter-measures designed to liquidate the causes of the temporary restriction(s), either *ex officio* or by way of a decision by the CAA President.

The 2009 regulation concerning groundhandling services in airports also places no limitations on granting approvals for selected services within only a single category.

The new Polish regulations also reduce the scope of documentation necessary to granting an approval. Suppliers seeking approval for carrying out groundhandling services or air carriers seeking approval for self-handling need to submit only the minimum necessary documentation.

The 2009 regulation concerning groundhandling services in airports also specifies the principles for granting access to centralized infrastructure or airport equipment and installations, as well as access to centralized infrastructure or equipment and installations which may be owned by other entities.

5.2. Centralized infrastructure

Specific regulations have been elaborated concerning “centralised infrastructure”, i.e. specific installations and/or facilities including, where relevant, services necessary for the proper management of such installations and/or facilities at an airport which cannot, for technical, environmental, cost or capacity reasons, be divided or duplicated and whose availability is essential and necessary for the performance of subsequent groundhandling services.¹⁷ Directive 96/67 on access to the groundhandling market at Community airports envisions that Member States may reserve centralized infrastructure to the management bodies of airports or another organ responsible for its management, and suppliers of groundhandling services may be obligated to make use of said infrastructure (in the sense that they may not make use of their own equipment or installations serving the same purpose(s)). This principle is of key importance for the managing bodies of airports, which must invest in airport infrastructure for groundhandling services secure in the knowledge that it will be used by airport users and service suppliers, which will increase the efficiency of airport operations and in addition allow for return of costs on infrastructure investments.

On the basis of Polish law, the definition and distinction of centralized infrastructure vis-à-vis its management is of key importance in those instances when the management bodies of airports intend to obligate users to make use of the airport’s centralized infrastructure. Otherwise its special treatment would be irrelevant. Article 180(5) of the Polish Aviation Law of 2002 envisions the possibility that the CAA President may require suppliers of groundhandling services and carriers employing self-handling to make use of the centralized infrastructure belonging to airport management

¹⁷ See Article 8 of Directive 96/67/EC, as well as Article 2(23) of the Polish Aviation Law as amended on 30 June 2011.

bodies. The 2009 regulation concerning groundhandling services in airports – which provides in § 32(4) that “the managing body of an airport may, in collaboration with other entities which own centralized infrastructure, publish a list of the equipment and components which constitute centralized infrastructure” – grants airport managing bodies the possibility to designate components which it does not own as part of airport infrastructure. This provision may however turn out to be far from effective in practice, as it does not provide for any solutions if airport management authorities and the owners of specific equipment and/or installations cannot come to an agreement. A much more effective solution – which the legislators have overlooked – would be to provide the CAA President with the authority to issue an order, directed to the third party owners of designated centralized infrastructure, requiring them to make its equipment or installations available to third parties to the extent use thereof is required for the efficient implementation of groundhandling services.¹⁸ Presently the decision as to what components of equipment or installations belonging to third parties are required for the efficient implementation of groundhandling services is left to the airport managing bodies, and their decisions may not always coincide with the interests of said third parties.

The first and foremost condition for qualifying components of airport infrastructure as “centralized infrastructure” is that they be necessary for the efficient implementation of groundhandling services. The second condition is that they “cannot, for technical, environmental, cost or capacity reasons, be divided or duplicated.” “Divided or duplicated” must be understood as meaning the introduction of identical infrastructure or other components serving the same purpose.¹⁹ It is worth noting that the Directive does not include issues of security as being among the conditions for classifying designated components as part of centralized infrastructure. In this regard however it should also be noted that Article 17 of the Directive provides that “[t]he provisions of this Directive in no way affect the rights and obligations of Member States in respect of law and order, safety and security

¹⁸ In this regard, it should be noted that Article 209 of the Polish Aviation Law provides for the imposition of financial sanctions on the management bodies of airports or other entities owning centralized infrastructure which, without any legal basis, prevent third parties otherwise entitled to the use of such infrastructure from access thereto or use thereof. These financial sanctions may not exceed 2% of the turnover of such an entity for the financial accounting year prior to the date on which the penalty is assessed, nor be less than 25,000 PLN.

¹⁹ For example, if a fuel system is recognized as a component of centralized infrastructure, an airport managing body may require users to make use of such system (with the exception of distributions from fuel cisterns).

at airports,” which allows national authorities to take security issues into consideration in the issuance of national laws implementing the Directive. Unfortunately however the Polish law (Article 2(23) of the 30 June 2011 Act on Aviation Law) mirrors the language of Article 8 of Directive 96/67 and makes no reference to safety or security concerns. As a result, only by taking a broad definition of the term ‘reasons’ can the incorporation of security concerns into the definition of centralized infrastructure be justified.

The definition of centralized infrastructure contained in the amendment to the Aviation Law of 2002 may give rise to problems of interpretation over which components of infrastructure may, in practice, be designated as “centralized”. The 2009 regulation concerning groundhandling services in airports envisions an open catalogue of components which may be designated as “centralized”, depending on the constellation of equipment and installations in a particular airport. On the other hand, the 2009 regulation itself significantly narrowed the possible application of the open catalogue.

Table 1 below presents a comparison of components which have been recognized as ‘centralized’ in selected EU airports:

Table nr 1: Elements of centralized infrastructure based on the examples of selected airports in Europe

Airport (country)	Components of centralized infrastructure
The Warsaw Chopin Airport (Poland)	<ul style="list-style-type: none"> • Ticket and baggage check-in counters, together with the equipment used therein; • Computerized system of passenger control – Platform APC CUTE & CUSS, which includes: <ul style="list-style-type: none"> – CUTE counters/booths, together with the equipment used therein; – self-check in services for passengers using CUSS kiosks, • Baggage sorting premises together with conveyor belts for sorting outgoing and incoming baggage; • Parking space for vehicles and equipment used by groundhandling services, with the exception of fuel trucks; • Parking space for de-icing and washing down aircraft; • Stationary equipment for providing electrical charging to aircraft – 115/200V Hz AC or 28 V DC (GPU); • Passenger ramps (including boarding sleeves); • Mobile radio communication system (trunking system); • Electronic system of providing airport information (FIS); • Parking spaces for fuel trucks performing groundhandling services described in category 7 of the Annex to Directive 96/67.

Airport (country)	Components of centralized infrastructure
Katowice Pyrzowice (Poland)	<ul style="list-style-type: none"> • Objects and equipment for servicing passengers in the terminal: <ul style="list-style-type: none"> – uniform system of passenger and baggage check-in, together with the equipment used therein, – conveyor belts and conveyor belt operating machines for sorting outgoing and incoming baggage, – system for providing airport information, • Airport installations for servicing aircraft: <ul style="list-style-type: none"> – places for providing electrical charging to aircraft – 220V/50 Hz (stand) for aircraft on airport runways, – access to drinking water installations and sewage pipes, • Groundhandling system Tetra; • Parking space for vehicles and equipment used by groundhandling services; • Objects and equipment for fuel supply.
Krakow – Balice (Poland)	<ul style="list-style-type: none"> • Ticket and baggage check-in counters, together with the CUTE and audio-visual system; • System for sorting and transporting baggage; • Parking places in reserved and secured areas; • Water facilities; • Mobile radio communication system.
Rome Fiumicino (Italy)	<ul style="list-style-type: none"> • Baggage services: <ul style="list-style-type: none"> – BHS (Bags Handling Systems), – NET (Transfer Baggage System), – pick-up of national baggage, – pick-up of baggage from UE and non-UE territories, • Passenger ramps; • Charger 400 Hz; • FIDS; • Central PA system; • Access to and use of CUTE counters/booths.
Vilnius (Lithuania)	<ul style="list-style-type: none"> • Baggage handling services; • Passenger services; • System of CUTE counters/booths for registering passengers and baggage and processing and storing operational data; • Electrical charging of aircraft.
Munich (Germany)	<ul style="list-style-type: none"> • Baggage sorting; • Passenger ramps; • Stationary equipment for electrical charging of aircraft; • Servicing stations for aircraft; • Servicing of airplane toilets; • Access to drinking water installations; • Electronic airport information system (FIS).

Airport (country)	Components of centralized infrastructure
Frankfurt am Main (Germany)	<ul style="list-style-type: none"> • Central conveyor belt system for foreign and transfer baggage; • Equipment for supplying gates with information concerning the transport of foreign baggage; • Central system of national baggage transport; • Equipment for de-icing and washing down aircraft; • Chargers 400 Hz up to 3 hours for passenger aircraft and up to 4 hours for cargo planes; • Access to drinking water installations and airplane toilet services; • CUTE network; • Access to fuel equipment for aircraft; • Customs warehouse; • Conveyor belt for incorrectly marked or transferred baggage; • Neutral Cargo Transfer Point (NCTP)
Zadar (Croatia)	<ul style="list-style-type: none"> • Centralized infrastructure for passenger flow: <ul style="list-style-type: none"> – baggage check-in system together with a weigh-in system; – telephone communications; – network for charging computers; – necessary space for servicing passengers; • Centralized infrastructure connected with ramp service: <ul style="list-style-type: none"> – premises, equipment and servicing of baggage sorting system for incoming and outgoing baggage; – equipment and servicing for baggage transport to and from the baggage sorting premises and aircraft; – necessary equipment for loading and unloading aircraft; – fire extinguishing and emergency equipment; – system and equipment necessary to service airplane toilets, together with the sewage system required; – access to water and water pipes; – garbage collection system and equipment; – installations and equipment for de-icing and washing down aircraft as well as disposal of waste water connected therewith;
Vienna (Austria)	<ul style="list-style-type: none"> • Ticket and baggage check-in counters and system; • Transfer – technical and communications equipment necessary to transfer passengers (access to telephones and networks); • Stationary electrical charging equipment for aircraft 400 Hz – installations; • Passenger ramps;

Airport (country)	Components of centralized infrastructure
	<ul style="list-style-type: none"> • Premises for baggage sorting; • Warehouse space for „BAG” (aircraft-baggage-containers) in the baggage sorting premises; • Place for de-icing and washing down airplanes as well disposal of waste water connected therewith; • Garbage disposal • Control of the natural environment; • Service, conservation, and use of equipment for fuel storage and supply.

Author's own chart based on data contained in the following internet websites: www.lotnisko-chopina.pl; www.katowice-airport.com; www.krakowairport.com; www.adr.it; www.vno.lt; www.munich-airport.de; www.frankfurt-airport.de; www.zadar-airport.hr; www.viennaairport.com.

5.3. Categories of services

The attachment to the Polish 2009 regulation concerning groundhandling services in airports mirrors the list contained in the Annex to Directive 96/67, which groups groundhandling services into eleven categories.²⁰ The general nature of the activities listed by category frequently leads to interpretational problems whether a given activity should be considered as a groundhandling activity or not. This issue is particularly thorny with regard to the need to obtain approvals for supplying groundhandling services. The ambiguous nature of some of the classifications can put the managing bodies of airports in a difficult situation when dealing with entities seeking to provide services which fall within the slippery boundary between groundhandling services and other services. The inability of an airport managing body to definitively resolve such issues, as well as the lack of other Member State organs authorized to do so, can lead to doubts concerning the competencies of a given entity to carry out specified activities on the territory of an airport, particularly if such activities may involve access to and the use of centralized infrastructure (where certification and/or approval is required), leaving open the question whether the entity may be relying on other competencies and/or also on the freedom of establishment. The lack of clarity inherent in such situations can disorganize the commercial and operational activities subject to the supervision of the management body of an airport, causing doubts as to the rights and competencies of the entity involved as well as its potential clients. Such an ambiguous situation can have significant financial consequences for all interested parties.

²⁰ See section 1 of this chapter above.

5.4. Access to infrastructure

One of the fundamental premises underlying Directive 96/67 is to assure efficient conditions and fair competition to suppliers of groundhandling services and carriers engaged in self-handling. These aims are also reflected in the Polish 2009 regulation concerning groundhandling services in airports. Suppliers of groundhandling services and carriers engaged in self-handling are guaranteed open access to airport infrastructure (in particular to the those components designated as centralized infrastructure and to necessary equipment and installations in airports) to the extent required to enable them to carry out their activities. In Poland the airport managing body, applying the principles outlined above, must ensure that the issues of access to infrastructure are resolved applying objective, transparent, and non-discriminatory criteria. Centralized infrastructure, equipment, installations and airport space (including access to suitable premises) must be assured to suppliers of groundhandling services while respecting the principles of fair competition between all suppliers. The conditions of access may be formulated based on commercial considerations, so long as the fees are justified and established using objective, transparent, and non-discriminatory criteria and applying the appropriate procedures.

Fulfilment of the condition of non-discriminatory access, both for existing and new users, is less problematical as concerns airport runways, equipment, and installations to which access is determined using generally applicable principles (non-exclusive). This concerns even centralized infrastructure such as de-icing platforms, baggage sorting equipment, and ticket and baggage check-in counters. Significantly more difficult issues arise with respect to rented space – social, office, and warehouse premises, etc. The question arises: what criteria should be applied concerning access to these premises in order to comply with the provisions of Directive Nr 96/67/EC and the Polish regulation of 2009 concerning groundhandling services in airports? Is the chronological order of submitting requests sufficient to serve as an objective criteria? In the event of a public tender, should the supplier who offers the most competitive (i.e. highest) price automatically be awarded a lease?

5.5. Collection of fees for access to airport equipment

Article 16(3) of Directive 96/67 permits the collection of fees, but provides that such fees “shall be determined according to relevant, objective, transparent and non-discriminatory criteria.”

The Polish regulation of 2009 concerning groundhandling services in airports delineates in detail two circumstances which give rise to the collection of a fee for access to centralized infrastructure or the equipment or installations in an airport. Such a fee may be imposed when (a) it is necessary to meet the requirement of equal treatment of suppliers and other users of an airport and guarantees to them effective and fair competition (§§ 33-34.); and (b) to the extent the costs connected with the maintenance, access, or duplication of centralized infrastructure or other equipment or installations are not covered by any other source of income (§ 36(2)(2)).

In practice however not all European airports collect a fee for access to infrastructure. The factual nature of fees collected by an airport managing body for access to the equipment and installations at an airport has been the subject of proceedings in front of the European Court of Justice (ECJ). In its ruling of 16 October 2003 in case C-363/01 in the matter of *Flughafen Hanover-Lagenhagen GbmH v Deutsche Lufthansa AG*,²¹ the ECJ defined the nature of the fees in question in such a way that Directive 96/67 on access to the groundhandling market at Community airports, in particular Article 16(3) thereof, precludes the managing body of an airport from making access to the groundhandling market in the airport subject to payment by a supplier of groundhandling services or self-handler of an access fee as consideration for the grant of a commercial opportunity, in addition to the fee payable by that supplier or self-handler for the use of the airport installations. However, the Court unequivocally declared that an airport managing body may collect a fee for the use of airport installations of an amount to be determined according to the criteria laid down in Article 16(3) of the Directive, which takes account of the interest of that body in making a profit.

The issue of the legal right to collect a fee for access to infrastructure in light of the provisions of Directive 96/67/EC arose in yet another case in front of the ECJ. The issue in *Deutsche Lufthansa AG v ANA – Aeroportos de Portugal SA*²² was the justification for a fee collected by the airport managing body (ANA) in the Lisbon Airport from Deutsche Lufthansa AG for the administration and supervision of groundhandling services. The Court held that Community law precludes rules of national law which provide for the payment to the airport managing authority by providers of groundhandling services of a fee for ground administration and supervision, unless the fee

²¹ ECR 2003, p. I-11893.

²² Decision of the ECJ of 5 July 2007 in C-181/06 *Deutsche Lufthansa AG v ANA – Aeroportos de Portugal SA* (ECR 2007, p. I-6705).

for ground administration and supervision provided for by that legislation is payable as the consideration for some or all of the services defined in paragraph 1 of the Annex to Council Directive 96/67 on access to the groundhandling market at Community airports and does not constitute a second charge for services already paid for through another fee or tax.

5.6. The principles governing consultation concerning the provision of access to and use of airport infrastructure

Article 13 of Directive 96/67 envisions that Member States shall ensure that a compulsory consultation procedure is organized between the managing body of the airport, the Airport Users' Committee and the undertakings providing groundhandling services. The subject matter of such consultations should include the charges for groundhandling services in a particular airport and the organization of the provision of those services. Such consultations should take place on a regular basis and be organized at least once a year.

The obligations of Article 13 of the Directive were first introduced into Polish law by the regulation of 2004 concerning the creation and activities of committees, and reaffirmed in the regulation of 2009 concerning groundhandling services in airports. However, while Directive 96/67 provides that one of the issues of such consultations shall be the fees charged in situations where limitations are placed on suppliers in a given airport, the Polish regulation of 2004 concerning the creation and activities of committees limits the issues open to consultation to matters having only an indirect influence on said fees, in particular to the principles establishing access to and use of airport infrastructure and the establishment and collection of fees for access to the equipment and installations of airports, as well as fees for the use of centralized infrastructure. However, the Polish regulation of 2009 concerning groundhandling services in airports adopted the approach envisioned by the Directive.

Among the issues subject to discussion in consultations with the undertakings providing groundhandling services and the Airport Users' Committee, Polish law now envisions consultations concerning: (a) the principles governing the use of centralized infrastructure and access to airport equipment and installations (elaborated by the managing body of an airport and systematized into regulations for airport users); (b) the selection process for suppliers of groundhandling services in a given airport and the public procurement procedures in the event limitations are placed on the number of approvals granted to suppliers or in situations when

one or more categories of services are reserved to one or more particular suppliers; (c) the method of organizing and implementing groundhandling services in a given airport; (d) fees for groundhandling services in the event one or more particular categories of services are reserved to one or more particular suppliers;²³ (e) the principle governing access to and use of airport infrastructure as well as the methods for establishing and collecting fees for the use of centralized infrastructure.²⁴

In addition, the Polish regulation of 2004 concerning the creation and activities of committees gives undertakings supplying groundhandling services in the framework of a different body (the so-called coordination committee) the right to vote in matters connected with the functioning of an airport related to airport capacity, technical equipment, as well as procedures concerning, among other things, the conditions prevailing in the airside premises of an airport as well as access to the airport, its buildings, and infrastructure.

On one hand, managing bodies of airports appreciate the role of and advantages arising from mutual collaboration, cooperation, and consultation with airport users and suppliers of groundhandling services with respect to the functioning of an airport. On the other hand, however, they feel that the procedures outlined above tend to be one-sided. Airport managing bodies are required to be fully transparent insofar as concerns the establishment and collection of fees for the use of airport infrastructure and the services provided to carriers and their service suppliers. They also must demonstrate the justification(s) for the fees imposed, not only to service suppliers and airport users but also to regulators. The service suppliers and carriers participating in the consultations, however, are placed under no such obligation to disclose. In practice the airport managing bodies have very limited possibilities to obtain information concerning the prices charged by suppliers of groundhandling services at the airports they administer, not to mention their near-total lack of influence on such costs, even if with the aim of improving competition among the suppliers of groundhandling services at a particular airport. The only means by which airport managers may obtain access to the fees charged by suppliers of groundhandling services is in the context of public procurement procedures, and then only when the airport managing body is the organizer of the procurement process.

²³ The issues addressed in subpoints (a) to (d) result from the 2009 regulation concerning groundhandling services

²⁴ The issue addressed in subpoint (e) results from the 2004 regulation concerning the creation and activities of committees.

5.7. Conditions for carrying out groundhandling activities in airports

One of the issues which is not directly regulated by the provisions of Directive 96/67 is the matter of contracts between the suppliers of groundhandling services and the managing bodies of airports with respect to the use of airport equipment and installations necessary to the provision of such services, and fixing the fees and principles underlying the charges for groundhandling services. In light of the Polish regulation of 2009 concerning groundhandling services in airports, every supplier of groundhandling services (those with certificates, as well as those with airport approvals for the provision of specific ground services), must enter into a contract for the provision of such services.

The two sets of documents, i.e. the approvals and fee arrangements as well as the contracts, concern the same issue. Taking into account the principles of equal treatment and non-discrimination, as well as the fact that the management body of an airport is required to announce the principles governing the establishment and collection of fees for access to and use of airport equipment, installations, and infrastructure, the bi-lateral contracts signed with suppliers cannot deviate from the announced general principles with regards to the establishment and collection of fees.

The lack of a formal obligation on the part of entities seeking approval to sign a preliminary agreement with the management body of an airport for the use of infrastructure, as well as the failure to engage such suppliers in the approval process (with the exception of groundhandling security services, where the supplier seeking a certificate must be engaged in the process and supply all requested documentation), significantly reduces the possibilities for managing bodies of airports to react timely in advance to requests from suppliers for airport space and puts constraints on their ability to plan and establish parameters concerning airport capacity while taking into account the number of groundhandling service suppliers for a given period, the number of personnel employed by such suppliers, as well as the planned exploitation of equipment involved in groundhandling services. Inasmuch as the managing bodies of airports only find out about the granting of certificates and approvals after the fact, they cannot petition the President of the CAO in advance with regard to placing limitations on the number of suppliers, taking into account available space and airport capacity.

One may also question whether the restrictions contained in § 38(3)(1) of the Polish regulation of 2009 concerning groundhandling services in airports, which limit the scope of contracts to the establishment of fee

rates and principles for payment for the use of airport infrastructure and its equipment and installations, do not imply the supremacy of approvals over contract terms and reduce the latter to the status of a supplementary process to the granting of the certificates and approvals, which act as authorizations for suppliers of groundhandling services to operate on airport territory.

5.8. Guarantees concerning the level of groundhandling services and environmental protection requirements

The managing bodies of airports are naturally interested in the introduction of standards applicable to the activities carried out by suppliers of groundhandling services. These standards consist of at least a minimum level of quality of services and norms associated with environmental protection. Article 11(1)(a) of Directive 96/67, as well as § 14(1)(2) of the Polish regulation of 2009 in the matter of groundhandling services in airports both concern the establishment of standard conditions or technical specifications to be met by the suppliers of groundhandling services as part of the public procurement process for choosing suppliers, but are silent with regard to standards in remaining instances.

The best solution would seem to be to institute a system of applicable standards which would include discounts for the optimal use of centralized infrastructure and other airport equipment and installations. This could significantly and positively influence the parameters concerning airport capacity as well as give an airport a competitive advantage in the eyes of potential users vis-à-vis other airports in the region and throughout Europe.

In light of the justifications for the establishment of standards guaranteeing the quality level of groundhandling services, the introduction of obligatory provisions setting forth such standards would require a clear and unequivocal interpretation of the following issues: (a) following the introduction, by the managing bodies of airports in consultation with the Airport Users' Committee, of standards as well as norms connected with environmental protection which must be met by the technical equipment and vehicles used by the suppliers of groundhandling services, can the management body of airports refuse to enter into a contract with a supplier who cannot guarantee such standards, but who possesses a prior approval and/or certificate for supplying such services, and who was not selected in a public tender; and (b) could such standards and norms be regarded as a prohibited limitation on access to the groundhandling services market by suppliers not chosen by public tender.

6. Summary and conclusions

The analysis and considerations presented above lead to the following conclusions:

1. It must be underscored that the results of independent studies have confirmed that the introduction of the EU regulations discussed above have led to the gradual opening of the groundhandling services market in the European Union.
2. The groundhandling sector can be characterized by increased competition as a result of the increased number of suppliers of groundhandling services to third parties appearing in EU airports, which has produced tangible results to air carriers in the form of lower prices for groundhandling services.
3. However, in addition to the positive effects resulting from regulation and liberalization of the groundhandling services market, negative effects can also be noted. In particular these include: reduced quality of the services offered (as a result of the competition to lower prices); lack of investment in the branch in light of the relatively short duration (maximum seven years) of approvals (via public procurement) granted to suppliers of groundhandling services; a distinct worsening of the social and workplace conditions for employees of the operating suppliers, including a reduction in the professional qualifications of employees as a result of the high degree of cadre turnover, all of which also leads to a reduction in quality of the services offered by groundhandling suppliers and in the parameters affecting airport capacity.
4. Analogous effects can be observed in connection with the liberalization of the groundhandling services market in Poland, particularly with regard to the increase in the number of suppliers servicing third parties, reduction in prices for groundhandling services, and increased competition on the market.
5. If the European Parliament proposal for a Regulation repealing and replacing Directive 96/67/EC is brought into effect, this would serve the purposes of further liberalization of the market and the harmonization of provisions concerning the supply of groundhandling services, which would increase access to the market. However, some of the proposed solutions in the European Parliament proposal are controversial and will probably be modified as a result of compromises reached between interested parties in the further legislative process.

Chapter VIII

Airport Security Controls: A Fundamental Rights Perspective

1. Introduction

Security controls of airport users are undeniably necessary in order to ensure the security of civil aviation. Point one of the preamble of Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security (and repealing Regulation (EC) No 2320/2002) provides that “[i]n order to protect persons and goods within the European Union, acts of unlawful interference with civil aircraft that jeopardise the security of civil aviation should be prevented by establishing common rules for safeguarding civil aviation.”¹ It further provides that this aim is to be realized “by setting common rules and common basic standards on aviation security as well as mechanisms for monitoring compliance”, which include, *inter alia*, methods of screening allowed with regard to passengers and cabin baggage.²

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¹ Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002, (Official Journal of the European Union L 97/72 of 9.04.2008).

² Article 4(2) of Regulation (EC) No 300/2008 as well as point 4 of the annex to the Regulation.

The public and political discussion concerning the effectiveness of passenger screening and the use of rigorous and intrusive controls has been ongoing since 2001, motivated by the clear threat of terrorist attacks at airports and on airplane flights.³ The applications of such controls and screening processes may however, under Article 47(1) of the Constitution of the Republic of Poland as well as Article 8(1) of the European Convention on Human Rights (hereinafter ECHR), be viewed as interferences with the right to privacy of passengers.⁴ Security control mechanisms may also interfere with the freedom of belief and principle of equal treatment, i.e. the prohibition of discrimination on grounds of race and ethnic origin. While individual rights and freedoms may be subject to justifiable restrictions, such restrictions may be imposed in a democratic society only to the extent necessary for reasons of national security, public law and order, or to protect the rights and freedoms of other individuals (principle of proportionality).

The main aim of this article is to present an analysis whether the applicable regulations with respect to airport security – and their implementation in practice – are in compliance with the rights and freedoms of individuals and the principle of proportionality, i.e. whether the proper balance is attained vis-à-vis the guarantees of privacy on the one hand, and the requirements of national security on the other (this being the source of most restrictions imposed on airport passengers). The considerations presented below also discuss proposed new methods for control and screening, which are even more intrusive on individual privacy than those currently applied. This article is based on previous research published in Polish.⁵

³ For more, see: M. Żylicz, *Terroryzm lotniczy w świetle prawa międzynarodowego (Airport terrorism in the light of international law)*, Państwo i Prawo No 9/2005, p. 17–33.

⁴ Formally *The Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 XI 1950, cited from the Polish Official Journal of 1993, No 61, item 284 with subsequent changes; hereinafter ECHR. The full content of the ECHR consists not only of its text, but also of the jurisprudence of the European Court of Human Rights issued on its basis. See: L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej z perspektywy Europejskiego Trybunału Praw Człowieka (The Polish Constitution from the perspective of the European Court of Human Rights)* [in:] Z. Maciąg (red.), *Stosowanie Konstytucji RP z 1997 roku – doświadczenia i perspektywy. Międzynarodowa konferencja naukowa (Application of the 1997 Constitution of the RP: experiences and perspectives. International Scientific Conference)*, Kraków 2006, p. 45.

⁵ See: P. Maliszewski, *Zasady i reguły świadczenia usług ochrony portów lotniczych w Polsce (Principles and rules governing security services at Polish airports)*, as well as M. Bernatt, *Międzynarodowe i konstytucyjno-prawne uwarunkowania kontroli osobistych na lotniskach (International and constitutional-legal conditions governing security control of individuals in airports)* [in:] *Usługi portów lotniczych w Unii Europejskiej i w Polsce II – wybrane zagadnienia (Airport services in the European Union and in Poland II – selected issues)*.

2. Legal Regulations defining security controls

The basic legal rules concerning security at airports were first set forth in the Convention on International Civil Aviation signed in Chicago on 7 December 1944. (Chicago Convention).⁶ This issue of security control is regulated in a more detailed fashion in Annex 17 of the Convention, which is entitled: “Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference.” Annex 17 provides that “Acts of unlawful interference – against which appropriate measures must be taken – include carrying of weapons or other dangerous instruments or materials intended for criminal purposes onto an aircraft or the territory of an airport. The signature states to the Chicago Convention are required to screen each and every passenger and their cabin baggage prior to their boarding onto an aircraft.⁷ This obligation also applies to transfer passengers and their cabin baggage as well.⁸ The signatory states are also required to ensure that passengers (and their cabin baggage) who have undergone screening will not have unauthorized contact with other persons who have not undergone such screening from the moment of their having completed the screening process until the time they board the aircraft.⁹ In the event such unauthorized contact takes place, the passengers and their cabin baggage must be re-screened prior to their boarding the aircraft.¹⁰ Coordination of efforts in the sphere of airport security is undertaken by the International Civil Aviation Organization (ICAO) and the head of the ICAO Aviation Security Programme.¹¹ The ICAO also issues, *inter alia*, the *Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference*,¹² one volume of which is wholly devoted to preventive security measures (*Volume IV — Preventive Security Measures*). This manual is deemed to implicate issues of national security and is not publically available.

F. Czernicki, T. Skoczny (ed.), Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2011, p. 145–164 as well as 165–180.

⁶ As cited in the Polish Official Journal of 1959, No 35, item 212 together with subsequent amendments.

⁷ Point 4.4.1. Annex No. 17 to the Chicago Convention.

⁸ Point 4.4.2. Annex No. 17 to the Chicago Convention. If the signatory states will cooperate on a permanent basis, passengers and their cabin baggage are to be screened before boarding, and then again in the event of unauthorized contact with a third person from the control area to the airplane or to the transfer point.

⁹ Point 4.4.3. Annex No. 17 to the Chicago Convention.

¹⁰ Point 4.4.3. Annex No. 17 to the Chicago Convention.

¹¹ See: <http://www2.icao.int/en/avsec/pages/default.aspx/>.

¹² Doc 8973 – Restricted: <http://www2.icao.int/en/AVSEC/SFP/Pages/SecurityHand.aspx>.

More detailed regulations concerning airport security procedures with respect to EU Member States are contained in the Regulations directly applicable to the Member States. The basic act regulating airport security measures is Regulation 300/2008. Its Article 3(6) defines “screening” as “the application of technical or other means which are intended to identify and/or detect prohibited articles.”¹³ Detailed provisions concerning security measures and procedures applicable to passengers and their cabin baggage are set forth in Point 4 of the Annex to Regulation 300/2008 of 4 March 2010 (establishing specific measures aimed at implementation of the basic common norms with respect to protection of civil aviation; as well as in Regulation No 272/2009 of 2 April 2009 supplementing the common basic standards on civil aviation security laid down in the Annex to Regulation (EC) No 300/2008 of the European Parliament and of the Council).¹⁴ Additional regulations which are applicable on the territory of the Republic of Poland are the provisions of Chapter IX of the Aviation Law of 3 July 2002¹⁵ as well as the provisions of Chapter 11 of the Annex to the Regulation of 31 July 2012 concerning the Polish National Program of Civil Aviation Security,¹⁶ issued on the basis of Article 187 of the Aviation Law.

3. The principle of proportionality with respect to restrictions imposed on privacy rights

The right to privacy is a basic Polish constitutional right, requiring protection under Article 47 of the Polish Constitution. In terms of international law Article 17 of the International Covenant on Civil and Political Rights¹⁷ is also of fundamental importance, while in terms of regional, European law Article 8(1) of the European Convention on Human Rights constitutes the basic provision protecting privacy rights. The right to privacy is also

¹³ Article 3 point 7 of Regulation No 300/2008/EC defines ‘prohibited articles’ as ‘weapons, explosives or other dangerous devices, articles or substances that may be used to commit an act of unlawful interference that jeopardises the security of civil aviation.’

¹⁴ Official Journal of the EU L 91/7 of 3.4.2009.

¹⁵ Act of 3 July 2002 – Aviation Act (Polish Official Journal of 2006, No 100, item 696, together with subsequent changes.

¹⁶ Polish Official Journal of 2012, No 912.

¹⁷ International Covenant on Civil and Political Rights, open for signature in New York on 16 December 1966, cited in this article from Polish Official Journal of 1977, No 38, item 167, together with subsequent changes.

protected in the EU law by Article 7 of the Charter of Fundamental Rights of the European Union.¹⁸

In Polish constitutional law the principle that privacy rights require protection was accepted even prior to the adoption of the new Polish Constitution of 1997. In case K 21/96¹⁹ the Polish Constitutional Tribunal (hereinafter sometimes ‘CT’) declared, in its discussion of the application of the principles and rules governing privacy to various spheres of individual life, that the common bond linking all the rules and principles is the right of an individual to “live his or her own life arranged according to his or her own will, with all outside interferences thereto reduced to the absolute minimum necessary.”²⁰ Privacy as so understood relates above all to an individual’s personal life, family life, social life and corresponds with “right to be left alone.”²¹ The CT noted that the right to privacy also encompassed the protection of information and personal data about a person and should guarantee an individual, among other things, a certain state of independence and freedom to decide the extent to which he or she wishes to provide other persons with access to private information about his or her life. In the scholarly legal literature the right to privacy has been defined with relation to a series of conceptual spheres concerning an individual’s life: (a) the sphere of intimacy, where outside interference is always prohibited; (b) the sphere of privacy, where interference is in theory admissible; and (c) the sphere of universal access.²² The Polish Constitutional Tribunal has

¹⁸ Charter of Fundamental Rights of the European Union of 7 December 2000, cited in this article from Polish Official Journal of 30 March 2010, p. 389.

¹⁹ Judgement of the Constitutional Tribunal of 24 June 1997; K 21/96, OTK ZU 1997/2, item 23.

²⁰ See: A. Kopff, *Koncepcja praw do intymności i prywatności życia osobistego (The concept of the right to intimacy, privacy, and a personal life)*, Studia Cywilistyczne, Warszawa-Kraków 1972.

²¹ S.D. Warren, L.D. Brandeis, *The right to privacy*, Harvard Law Review, Vol. IV, No 5, 1890.

²² See: A. Kopff, *Koncepcja praw do intymności i prywatności... (The concept of the right to intimacy, privacy, and a personal life)*. The Polish Constitutional Tribunal referred to such an understanding of privacy in its Judgement of 23 June 2009; K 54/07, OTK ZU No 6/A/2009, item 86. Civil law doctrine argues for a deviation from objective criteria for defining the sphere of privacy, having the aim of allowing for the creation of information borders which in each and every case are indicated by an individual and encompass such information as the individual considers private (See: M. Wild, *Ochrona prywatności w prawie cywilnym (Protection of privacy in civil law)*, Państwo I Prawo No 4/2001, p. 71.) This concept is also related to German legal solutions concerning the individual right to self-determination, understood as the right to freely choose one’s individuality; see: M. Safjan, *Granice autonomii człowieka w prawie współczesnym (The*

declared that the degree of necessity required to justify public interference into an individual's private affairs is not the same for each privacy sphere.²³

The right to privacy is thus not of an absolute nature and restrictions may be placed thereon for justifiable reasons. However, any such restrictions must be in accordance with the principle of proportionality. The proportionality test to be applied requires the fulfilment of three criteria, which arise from the provisions of Article 8(2) of the European Convention on Human Rights and Article 31(3) of the Constitution of the Republic of Poland. First there must exist a sufficiently precise and concrete justification, set forth in an appropriate legal act, for the proposed restriction on the right to privacy.²⁴ Second, the restriction must have as its aim the protection of another public good (protection of a public interest) listed either in Article 8(2) of the ECHR or Article 31(3) of the Polish Constitution (among other reasons, national security or the protection of a third party's rights or freedoms).²⁵ Thirdly, the restriction must be necessary for the

boundaries to individual autonomy in contemporary law), Uniwersyteckie wykłady na koniec starego i początek nowego tysiąclecia (University lectures at the turn of the century), Warszawa 2004. For more, see: M. Bernatt, *Prawo do prywatności osób publicznych. Porównanie regulacji prawa prasowego, prawa karnego i ustawy o dostępie do informacji publicznej* (*The right to privacy of public figures. Comparison of the legal regulation of press law, criminal law, and the law concerning access to public information*), Przegląd Prawniczy Uniwersytetu Warszawskiego, No 2/2007, p. 8–12.

²³ Constitutional Tribunal Judgement of 23 June 2009; K 54/07, where it indicated that the right to privacy in one's home (apartment) requires a higher showing of a necessity to intrude on the part of authorities seeking to place a wiretap device, than a request to review private correspondence.

²⁴ Judgement of the ECtHR of 4 December 2008 in the case of *S. and Marper vs. Great Britain*, No 30562/04, paragraphs 95–96; Judgement of the ECtHR of 12 January 2012 in the case of *Gillan and Quinton vs Great Britain*, No 4158/05, paragraphs 76–77. See also: Judgement of the ECtHR of 2 August 1984 in the case of *Malone vs. Great Britain*; and Judgement of the ECtHR of 26 March 1987 in the case of *Leander vs Sweden*, No 9248/81. The Polish Constitutional Tribunal (CT), in its jurisprudence, has stated that when the activities of an organ (public official) “encroach on the sphere of individual freedoms, the legislator should, in an unequivocal manner, establish the boundaries of permissible intrusion on the part of the public official and provide appropriate procedures for review of the justification for such intrusions”, Judgement of the CT of 20 April 2004; K 45/02, OTK ZU 4/A/2004, item 30.

²⁵ As emphasized by the Constitutional Tribunal (CT), “It is required to indicate the real necessity for undertaking restrictive measures, and that in the name of upholding the principle of a democratic order. An excess based on the assertion that it was ‘incidental to’ the gathering of operational materials data concerning an individual's private life and customs and habits – materials which went beyond the aim of the control – cannot excuse public authorities from answering for an unauthorized intrusion into the sphere

maintenance of a democratic society.²⁶ From this standpoint, any restriction on the right to privacy should be considered an exception, and the argument that such restriction would make the activities of a governmental organ or authority more efficient is not a sufficient justification for the restriction.²⁷ Any restriction on the right to privacy cannot – based on the general principles contained in Article 31(3) of the Polish Constitution – violate the fundamental aspect of the right to privacy – intimacy.

The proportionality test was applied by the European Court of Human Rights (ECtHR)²⁸ to the question whether a search of premises and seizure of personal property violated Article 8 of the ECHR.²⁹ The Court declared that any search of a person by a representative of public authority constitutes an interference into the sphere of one's private life.³⁰ It stressed that an individual's private sphere extends beyond his or her home, i.e. into the public space as well,³¹ and that this concerns searches of personal property, which can possibly create a feeling of shame and humiliation on the part of the person searched.³²

At the same time however the ECtHR distinguished between searches imposed by governmental authorities and searches conducted with the consent of the person searched.³³ As an example of the latter the Court specifically cited persons submitting to screening at airports.³⁴ This distinction

of privacy.” Judgement of the CT of 23 June 2009; K 54/07. See also Judgement of the ECtHR of 25 June 1997 in the case of *Halford vs Great Britain*, No 20605/92.

²⁶ In accordance with the understanding of a democratic government underlying Article 31 paragraph 3 of the Constitution of the RP.

²⁷ For a more detailed overview of this topic, see: Judgement of the ECtHR of 6 September 1978 in the case of *Klass and others vs. Germany*, No 5029/71; Judgement of the ECtHR of 6 June 2006 in the case of *Segerstedt-Wilberg and others vs Sweden*, No 62332/00; Judgement of the ECtHR of 22 May 2008 in the case of *Iliya Stefanov vs Bulgaria*, No 65755/01; Judgement of the ECtHR of 22 May 2008 in the case of *Kirov vs. Bulgaria*, No 5182/02; Judgement of the ECtHR of 1 July 2008 in the case of *Liberty and others vs Great Britain*, No 58243/00.

²⁸ Cited as ECtHR.

²⁹ Judgement of the ECtHR in the case of *Funke vs France*, No 10828/84, paragraphs 55-57; Judgement of the ECtHR of 25 February 1993 in the case of *Crémieux vs France*, No 11471/85, paragraphs 38-40; Judgement of the ECtHR of 25 February 1993 in the case of *Miailhe vs France*, No 12661/87, paragraphs 36-38.

³⁰ Judgement of the ECtHR of 25 February 1993 in the case of *Gillan and Quinton vs Great Britain*, para. 61.

³¹ *Ibidem*, para. 63.

³² *Ibidem*, para. 63.

³³ *Ibidem*, para. 64.

³⁴ *Ibidem*.

however does not mean that Article 8 of the ECHR is inapplicable,³⁵ nor that the consent to be screened nullifies its provisions. It's difficult to accept that the "consent" to be screened at an airport is really voluntary, since the refusal to consent carries with it the consequence that the passenger will be denied boarding. In the same vein, persons who decide to travel by commercial airline are actually forced to submit to the security procedures. The voluntariness of their 'consent' closely resembles, that of the consent, in private consumer law, to the provisions of a contract of adhesion, over which the consumer has no influence. With respect to his or her role as consumer, the air carrier passenger's "choice" is limited to choosing only whether to accept the contract conditions offered by the enterprise. If the consumer wants to make use of the services of the enterprise (i.e. the air carrier), in effect he or she is forced to accept the contract conditions.³⁶ Contracts to render air services are thus, in their essence, contracts of adhesion in which the passenger's "agreement" to submit to the screening process is one of a wide range of conditions over which the passenger has no influence. Furthermore, the passenger has no influence over the degree of intrusion of the screening process into his or her sphere of privacy. It must be kept in mind however that a screening procedure which interferes into a passenger's human dignity would constitute a violation of privacy rights even if it was based on the passengers formal consent to be screened, since "human dignity" is one of the inviolable principles of privacy according to Article 30 of the Polish Constitution. In addition, Article 3 of the ECHR forbids inhumane or degrading treatment.

From the point of view of the European Convention on Human Rights, it's essential to keep in mind that the State party to the ECHR is required to guarantee that an acceptable level of human rights' protection is in place, including protection of the right to privacy. The State has a so-called positive obligation, i.e. it must not only refrain in its activities from violating an individual's right to privacy, but it must also provide a system which guarantee that that the right to privacy is protected, and

³⁵ It would appear that in the above-cited Judgement of the ECtHR the Court accepted – based on the principle of circumstances contrary to the case at hand – that security control measures may constitute legally justified infringements into the sphere of privacy. It did not however explore the issue of the outer limits of such infringements or the degree to which, based on its assumption of the voluntariness of the 'consent' given, privacy rights may be restricted.

³⁶ See Z. Radwański, *Prawo cywilne – część ogólna (Civil law – general overview)*, C.H. Beck, Warszawa 2002, p. 267–268; M. Bernatt, A. Jurkowska, T. Skoczny, *Ochrona konkurencji i konsumentów (Protection of competition and consumers)*, Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2007, p. 152.

not only with respect to interference by the state but by private parties as well. Furthermore, the system put in place to guarantee that human rights are protected (including the right to privacy) must contain an effective system of appeals which would assure that a party whose right to privacy is allegedly violated receives a full and fair hearing with regard thereto. In the event the State decides, with respect to security procedures at airports, to employ the services of a private legal entity (for example a specialized security firm), it should monitor the entity's activities not only from the perspective of their effectiveness in screening out prohibited elements, but also in terms of their respect for the rights and freedoms of passengers, including the right to privacy.

4. Security control and the requirement of proportionality

4.1. Security control methods

Security controls encompasses all passengers and their cabin baggage.³⁷ Submission to airport security checks is thus obligatory, and the consequence of a refusal to submit to such screening measures is the non-entry into security restricted areas (including boarding areas) and hence a ban on boarding the aircraft.³⁸ Prior to undergoing the screening process passengers are required to take off their coats and other items of outer clothing, which are submitted to x-ray security controls along with the cabin baggage.³⁹ Next the passengers are required to pass through walk-through metal detection (WTMD) equipment and, in appropriate instances, to submit to a hand search for metal objects.⁴⁰ The use of hand-held metal detection (HHMD) equipment may be used as a supplementary means of screening, although it is only considered as an accessory tool and does not replace hand searches. If the operator of the security checkpoint is unable to determine whether a passenger is in possession of a metal object, such passenger is denied entry to the security restricted area and must undergo additional security measures until such time as the operator of the checkpoint determines that the aim of the screening process has been accomplished.⁴¹ As an aside,

³⁷ Point 4.1.1. of the Annex to Regulation No 300/2008/EC. Transfer and transit passengers may be exempt from screening in the instances envisioned in Points 4.1.2. and 4.1.3. of the Annex.

³⁸ § 31 paragraph 2 of the National Program for Civil Aviation Security.

³⁹ Point 4.1.1.1. of the Annex to Regulation No 185/2010/EC.

⁴⁰ Point 4.1.1.2. of the Annex to Regulation No 185/2010/EC.

⁴¹ *Ibidem*.

one might ask at this point whether placing the negative consequences on the passenger of an inability to confirm the absence of prohibited articles is legally justifiable.

The EU regulations currently in place do not regulate in detail the methods for conducting hand searches nor the use of WTMD equipment. They also do not indicate which of these methods has priority over the other. From the point of view of the right of public access to legal regulations which constitute a source of restrictions placed on the right to privacy, the lack of public access to such provisions must be viewed as a negative consequence of the repeal of Regulation No 2320/2002/EC. Point 4.1.1.b of the Annex to this Regulation indicated that the use of metal detection gates should also be accompanied by a system of random hand searches. Thus hand searches were permitted, albeit randomly, even when the WTMD equipment did not alarm. It was clear on the other hand that hand searches, including with the use of HHMD equipment, were obligatory if the WTMD equipment alarmed. The currently applicable Regulations 300/2008 and 185/2010 (in particular Point 4.1.1.2. of the annex to the latter Regulation) do not contain similar provisions.⁴² As a consequence, a literal interpretation permits today the application of both WTMD equipment and a hand search of each and every passenger.

Taking into consideration the proportionality requirement, the entities exercising control over security checkpoints should be required to use those methods of screening which would both guarantee airport security and intrude in the least possible manner into the passenger's right to privacy. Hence in practice priority should be given to passage through WTMD equipment. Hand searches clearly are associated with a deeper intrusion into a passenger's sphere of privacy. In instances where passage through WTMD equipment sounds off an alarm, in the first instance an attempt should be made to eliminate the cause of the alarm, which requires re-passage through the WTMD equipment.⁴³ In light of the proportionality principle, only if the alarm cannot be eliminated should a hand search be permissible. Hand searches should not however be used preventively nor should they be applied to passengers whose passage through WTMD equipment did not set off an alarm.

⁴² This issue is not regulated either in the Polish regulations to the Aviation Act nor in the National Program for Civil Aviation Security.

⁴³ See Point 4.1.1.3. of the Annex to Regulation No 185/2010/EC.

4.2. Hand searches

The way of conducting hand searches is defined – in accordance with Annex 4-A attached to Regulation No 185/2010 – by a separate Commission decision. This decision however has not been made public, which makes it impossible for either passengers or legal scholars to precisely delineate the permissible boundaries of hand searches. All that is publicly known is that hand searches must be conducted in such a manner as to make certain, to the extent possible, that the person searched is not in possession of prohibited articles.⁴⁴ Taking into account the proportionality principle, the outer boundaries of a permissible hand search are the sphere of private intimacy and human dignity (which violation in accordance with Article 30 of the Polish Constitution is prohibited absolutely and may not be subject to restriction). With respect to this latter aspect, it is impermissible to carry out any individual search in a manner which is degrading or abusive to the person subject to the search. For these same reasons it seems there should be no exception from the principle that hand searches are conducted by persons of the same sex as the person subjected to the search. However, Article 186f(2) of the amended Aviation Law of 30 June 2011 allows for the possibility of hand searches by persons of the opposite sex if the person subjected to the search consents thereto. It would seem however that this provision should be reserved for exceptional situations and cannot be the basis for a regular practice of hand searches by persons of the opposite sex. The consent of the person being searched could easily be of a superficial nature and be based on time constraints or other factors, including those related to an individual's character. For example a shy person, who might consider a hand search by someone of another sex most humiliating, might also be too reticent to withhold consent thereto.

Another source of the principle that hand searches should be conducted in the least intrusive manner *vis-à-vis* a passenger's privacy rights may be found in the new definition of "hand search" contained in Article 186f(2) of the amended Aviation Law. A hand search is defined as the entire range of activities of a security nature involving the use of touching by the authorities of body coverings, done in a manner so as to bring about the least possible intrusion into the intimate areas of the person searched. It can be seen that this definition is hardly unequivocal, for while on one hand it provides for the protection of a passenger's intimate areas, on the other hand it permits some intrusion therein. This seems unjustifiable if

⁴⁴ Point 4.1.1.3. of the Annex to Regulation No 185/2010/EC.

intimacy is understood as the essential feature of the right to privacy⁴⁵, into which no intrusion is permitted.⁴⁶ It should be argued that in the event more invasive hand searches are necessary, they should be done in private in premises specially designed therefore and only by persons of the same sex as the person subject to the hand search.

4.3. Review of body's surface (body scans)

Some of the newly amended provisions of the Polish Aviation Law must be assessed negatively. Article 186f(3) provides that *with the consent of the person subject to a search, a hand search may also include review of body's surface of the person subject to search by an employee of the airport security staff of the same sex as the person scanned and under conditions assuring the guarantee of intimacy. With the consent of the person subject to a search, the review of body's surface may also be conducted by an employee of the airport security staff of the opposite sex as the person subject to search.*

In the first place, this provision fails to specify what circumstances must exist to give rise to a necessity to do a body scan, providing only that “a hand search may also include review of body's surface.” Secondly, the Polish term used for “body scan” may be translated into English as “view of a body's surface”, which is not sufficiently clear and precise with respect to the outer limits applicable to such a “view” nor as to whether a security controller can demand a view of the completely naked body.⁴⁷ Thirdly, is not clear what

⁴⁵ See A. Kopff, *Koncepcja praw do intymności i prywatności... (The concept of the right to intimacy, privacy, and a personal life)*.

⁴⁶ It seems however that the legislators, when framing Article 186f paragraph 2 of the Polish Aviation Act, used the common understanding of the word ‘intimacy’, treating it virtually synonymously with the concept of privacy and ignoring the legal language used in privacy law.

⁴⁷ The CT has stated that “the meaning of undefined terms in a concrete situation cannot be established arbitrarily. Thus the use of a vague term requires the existence of special procedural guarantees which assure transparency in the evaluation processes used to give concrete meaning to such vague term by an organ applying it in practice.” Judgement of the CT of 23 March 2006; K 4/06, OTK ZU 3/A/2006, item 32; see also the Judgement of CT of 16 January 2006; SK 30/05, OTK ZU 1/A/2006, item 2, which declares that the compliance with the Constitution of practices involving the application of undefined terms must be rigorously examined with regard to regulations which can be used by public organs and authorities to carry out activities which infringe into the sphere of fundamental constitutional rights and freedoms of individuals. See the Judgement of the CT of 23 March 2006; K 4/06. See also the Judgement of the CT of 30 October 2001; K 33/00, where the Court held that “legislators may not, by the use of unclear formulations in legislative texts, grant to those governmental organs meant to apply such

the consequences are of a passenger's refusal to submit to a body scan. If the consequence is denial of access to the airport's security restricted area (resulting in inability to board one's flight), then it seems dubious to give any credence to the notion of a "voluntary consent". Fourthly, to allow for the possibility that a controller of another sex may review the body scan has to be considered unacceptable. A body scan is a significant intrusion into privacy, even into the right to intimacy. It is not difficult to imagine that the person subject to a search may be pressed for time or that a controller of the opposite sex might not be immediately available (especially in smaller airports), hence *de facto* forcing the passenger to consent to the view of the his or her body scan by someone of the opposite sex.

Having in mind the above reservations, one may postulate that Article 186f(3) of the Polish Aviation Law does not contain sufficient guarantees against abuse of the limited right to intrude into the privacy and personal freedoms of individuals. In particular it does not specify or limit the scope of discretion left to public authorities, nor does it detail the circumstances whereby such discretion may be exercised.⁴⁸

One may raise the issue whether body scans are not constitute a totally new method of control and screening, one which is not envisioned in Point 4.1.1.2. of the Annex to Regulation No 185/2010. If so, then their application would be permissible only in situations of heightened security risks,⁴⁹ as 'more stringent measures', which may be applied by Member States only in compliance with the applicable safeguards set forth in Article 6 of Regulation No 300/2008. This Article provides that "more stringent measures" may only be applied "on the basis of a risk assessment and in compliance with Community law ... {and shall be} proportional to the risk that is being addressed." It further provides that "Member States shall inform the Commission of such measures as soon as possible after their application. Upon reception of such information, the Commission shall transmit this information to the other Member States." Thus it is clear

texts in practice an excessive freedom to determine the subjective and objective scope of intrusions into the sphere of constitutional rights and freedoms of individuals."

⁴⁸ See the Judgement of the ECtHR of 24 March 1988 in the case of *Olsson vs Sweden*, No 10465/83, par. 61. The competences of public authorities of a material character should be built on a system of procedural and institutional regulations which secure that such competences will not be left to the discretion of those exercising them. (See: Judgement of the ECtHR of 24 April 1990 in the case of *Kruslin vs France*, No 11801/85, paragraphs 35–36; and the Judgement of the ECtHR of 13 December 2001 in the case of *Metropolitan Church of Bessarabia and others vs Moldavia*, No 45701/99, par. 109).

⁴⁹ In Poland an official state of "heightened security risks" does not exist.

that Article 6 treats the use of ‘more stringent measures’ as being of an exceptional nature.

5. Security scanners

The imperative of ensuring the security of civil aviation in light of the potential scale and magnitude of possible terrorist attacks leads naturally to a search for new and more effective security control mechanisms, of which a number exist (promoted by their producers as extremely effective). One such new control device is security scanners, which include body scanners. Security scanners enable the visualization on screen of things which are hidden from view by, for example, baggage casings and other forms of covering. In the case of individual passengers, they visualize what is hidden under clothing. The security controller sees the design of naked body of the passenger on screen and is able to detect dangerous items hidden next to or even under the skin.

Security scanners are used in over 180 airports in the USA⁵⁰ as well as in Great Britain (in the London Heathrow Airport and in Manchester).⁵¹ In Continental Europe scanners have been used in Finland (Helsinki-Vantaa), Holland (Amsterdam Schiphol), and in Germany (Hamburg).⁵² Tests of such equipment have been carried out in France, Italy, and Denmark.⁵³

The use of scanners as a permanent feature of ensuring security at airports was forbidden in the EU by November 2011.⁵⁴ Based on the state of the directly applicable security mechanisms and instruments used in the EU and described above, Point 4.1.1.2 of the Annex to Regulation No 185/2010 did not envision the use of security scanners as an instrument or

⁵⁰ See the data collected by the American Transportation Security Agency at: www.tsa.gov/approach/tech/ait/index.shtm.

⁵¹ See the project elaborated by the European Commission at the end of 2010 – *ROADMAP. Proposal on security scanners. Adding security scanners to the list of allowed security methods for screening passengers at EU airports and setting technical standards and operational conditions for their use*. Available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2011_move_031_airport_scanners_en.pdf.

⁵² *Ibidem*.

⁵³ *Ibidem*.

⁵⁴ The official position of the European Commission – as a supporter of widening the scope of application of security scanners – is set forth in the above-cited *ROADMAP. Proposal on security scanners...* at p. 3. For more on the Commission’s stance regarding the use of security scanners, see the Communication to the European Parliament and the Council of 15 June 2010 (COM (2010) 311), available at: [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2010\)0311/_com_com\(2010\)0311_pl.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2010)0311/_com_com(2010)0311_pl.pdf).

means for providing airport security. The European Commission, however, decided that their installation and application would be allowable for an interim period (up to 30 months) following approval by the Commission (or lack of objections to a proposal). The Commission's reasoning is based on Point 12.8 of the Annex to Regulation 185/2010,⁵⁵ and security scanners are thus treated as a method of security control relying on the use of new technologies (different from the technology defined in Regulation 185/2010, which may be applied with the aim of assessing such new methods upon the condition that the application thereof does not negatively affect the overall level of protection achieved and furthermore upon the condition that passengers are informed of their use.⁵⁶ The use of security scanners may also be allowed as a 'more stringent measure' applied by a Member State based on Article 6 of Regulation 300/2008.⁵⁷

The legal status concerning the use of security scanners underwent a change with the coming into force of Commission Regulation No 1141/2011 of 10 November 2011 amending Regulation (EC) No 272/2009 supplementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports.⁵⁸ Subparagraph 1 of the Annex to this Regulation is amended by adding to point (f) – "security scanners which do not use ionising radiation". In effect security scanners which do not use ionising radiation (i.e. x-rays) were added to the list of allowed methods for passenger screening for aviation security purposes. However, in the preamble to the Regulation 1141/2011 it was underlined that this Regulation respects fundamental rights, including respect for human dignity and for private and family life, the right to the protection of personal data, the rights of the child, the right to freedom of religion and the prohibition against discrimination. The Regulation also declares that "passengers should be provided with the possibility to undergo alternative screening methods." Detailed rules concerning the use of security scanners are to be adopted separately pursuant to Article 4(3) of Regulation 300/2008.

Allowing for the possibility of applying security scanners raises doubts from the point of view of the right of privacy. It may be questioned whether the use of body scanners – which brings with it restrictions on the right to privacy – is necessary in a democratic society in order to guarantee the security of civil aviation, or whether their application does not give rise to

⁵⁵ *ROADMAP. Proposal on security scanners...*, p. 3.

⁵⁶ Point 12.8.1. of the Annex to Regulation No 185/2010.

⁵⁷ This is the position of the European Commission, as set forth in: *ROADMAP. Proposal on security scanners...*, p. 3.

⁵⁸ Official Journal of the European Union, L 293/22 of 11.11.2011.

an impermissible invasion of the right to privacy.⁵⁹ The use of body scanners not only reveals the surface characteristics of the passenger's body, but also reveals elements connected with medical treatment, personal hygiene, and the effects of medical operations (such as, for example, implants, prosthetics, or hygienic inserts). In addition, the use of scanners may create an impermissible data base on passengers (their scanned images constitute computer data), and the fact that such a data base contains images of the naked body may be irreconcilable with some religious beliefs (for example, Islam) or minority sexual orientations (i.e., transsexuals). Opponents of the use of body scanners also point out that their application may involve as-yet-undiagnosed health risks to those subject to body scanners.

In addition there is as yet no credible proof that the use of security scanners – which carries with it high costs – has in fact contributed to an increase of security vis-à-vis civil aviation. One may also question whether their application aids in processing passengers or instead lengthens the process and gives rise to delays, or whether they constitute a real factual alternative to the airport security methods in place. It is clear that in the event potentially dangerous or even just suspicious computer images show up on a screen, this will lead in any case to a hand search. Finally, the USA media has exposed instances whereby metal objects strapped to or placed on a body were not revealed by body scanners.⁶⁰ Only recently has it also been discovered that the use of x-ray scanners has a potentially negative effect on passenger health. It was this discovery that ultimately led the EU – in Regulation 1141/2011 – to ban the use of scanners employing ionising radiation on the entire territory of the EU.⁶¹ But as pointed out earlier, other possibly adverse health effects may be yet undiscovered.

Further discussion on the use and application of security scanners in Europe should take into account the need to maintain strong guarantees of the right to privacy. In my opinion the doubts already raised (as outlined

⁵⁹ Doubts in this respect were expressed by the European Parliament. See the Resolution of 23 October 2008, No (2008) 0521, available at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2008/10-23/P6_TA-PROV\(2008\)10-23_PL.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2008/10-23/P6_TA-PROV(2008)10-23_PL.pdf), pp. 58-60. For more on this topic, see also: O. Mironenko, *Body scanners versus privacy and data protection*, *Computer Law & Security Review*, Vol. 27, No 3/2011, p. 232–244; as well as A. Welch, *Full-Body Scanners: Full Protection from Terrorist Attacks or Full-On Violation of the Constitution?*, *Transportation Law Journal*, Vol. 37, 2010, p. 167–198.

⁶⁰ See: <http://www.dailymail.co.uk/news/article-2111417/TSA-nude-body-scanners-Jonathan-Corbett-video-exposes-loophole.html>

⁶¹ See: <http://www.forbes.com/sites/daviddisalvo/2011/11/15/europe-bans-airport-body-scanners-over-health-and-safety-concerns/> and http://www.msnbc.msn.com/id/45286987/ns/travel-news/t/eu-adopts-guidelines-airport-body-scanners/#.UI_YJK7PL3U.

in this article) are significantly serious to justify a) abandonment of the idea of use of body scanners in EU airports; and b) the implementation of mandatory programs aimed at improving the security mechanisms applied in EU airports, including training programs for security staff. However, at the moment this remains wishful thinking. Hence the need to elaborate principles which would at least secure that security scanners in airports are used in such a way as to provide maximum protection for privacy rights. In the first place, they should not be obligatory for every passenger. Persons who refuse to consent to a body scan should be screened using the usual methods (passing through WTMD equipment and being subjected to a hand search).⁶² In addition, care should be taken to assure that a refusal to consent to a body scan does not bring with it additional difficulties, such as long waits for alternative control procedures to be applied. Secondly, the reviews of body scan images should be done by controllers who do not have any direct contact with the persons subjected to body scans.⁶³ Thirdly, the reviews of body scans should be done only by persons of the same sex as the passengers scanned. Fourthly, the body scan images should reveal the body images in such a way that they cannot be associated with a concrete individual.⁶⁴ And fifth, those body images which do not give rise to any doubts or suspicions vis-à-vis aviation security should be immediately deleted and erased from the system.

6. Security controls and freedom of belief

Security control mechanisms involve not only intrusions into the right to privacy, but encompass other potential violations of rights and freedoms protected by international agreements and national Constitutions. In Poland this concerns the freedom of belief (religion), protected in Article 53 of the Constitution of the Republic of Poland as well as by Article 9 of the ECHR.

At the Warsaw Chopin Airport, border guards made several requests to Shaminder Puri, a British national of Hindu origins and a Sikhism

⁶² This possibility exists in the United States, but the alternative to a body scanners is a heightened hand search of the entire body.

⁶³ Otherwise the image shown with the use of the scanner could be identified and associated with a concrete person. As confirmation that this is possible, see the solution thereto implemented in the USA at: <http://www.tsa.gov/approach/tech/ait/privacy.shtm>.

⁶⁴ The first security scanners showed, in essence, images of naked passengers. Currently specific images are blurred. The fear remains, however, that the image obtained can be easily reconstructed to show the individual features of the controlled (naked) subject.

practitioner, to remove his turban during screening procedures.⁶⁵ For Sikhs, the turban is a religious symbol and its public removal is considered to be degrading. The request that he remove his turban was made even though he was not asked to pass through WTMD equipment.⁶⁶ The authorities making the request also refused to conduct a hand search until such time as he removed his turban,⁶⁷ and carried out their control operation based on the use of equipment for screening cabin baggage.⁶⁸ In S. Puri's complaint he alleged that the airport screening was carried out without employing the mechanisms available – passage through WTMD equipment, use of HHMD equipment, a hand search without removal of his turban, and use of the General Electric Entry Scan gate – and that the demand that he remove his turban violated his right to human dignity, his freedom of religion, and his freedom of movement.⁶⁹

The above-described case raises the issue of the proportionality of the methods applied to the given situation, i.e. was the demand that Mr. Puri remove his turban a necessary condition to guarantee aviation security, especially in light of the fact that the demand constituted a significant interference into his religious freedom?⁷⁰ This question is also connected

⁶⁵ The dispute herein described has given rise to a civil suit alleging an infringement of personal rights by the Polish Border Guard. The case was litigated before the District Court of Warsaw, and its Judgement is currently on appeal. See K. Rusiłowicz, *Shaminder Puri v. Straż Graniczna. Przeszukanie na lotnisku a prawa człowieka (Shaminder Puri vs. the Border Control Authority. Searches in airports and human rights.)*, Biuletyn informacyjny Programu Spraw Precedensowych, Helsińska Fundacja Praw Człowieka (Helsinki Foundation for Human Rights), No 1-2/2011, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/file/1-2-2011_korV3_OK.pdf, p. 1–4.

⁶⁶ K. Rusiłowicz, *Shaminder Puri v. Straż Graniczna. Przeszukanie...*, (*Shaminder Puri vs. the Border Control Authority. Searches in airports and human rights*), p. 1.

⁶⁷ Ibidem.

⁶⁸ Screening of cabin baggage is done by means of a hand search, x-rays, or the use of WTMD equipment. See Point 4.1.2. of the Annex to Regulation No 185/2010.

⁶⁹ See: <http://www.hfhrpol.waw.pl/precedens/aktualnosci/nastepna-rozprawa-w-sprawie-zdjecia-trubanu.html>. The sought-after remedies in the complaint include an apology, an order directing the border control authorities to cease and desist the application of practices not in accordance with those in place in the EU on the basis of applicable EU regulations, including those applicable in Poland, and a damage award of 30,000 PLN to be paid to an agreed upon social organization.

⁷⁰ The Helsinki Foundation for Human Rights has taken the position that a request that a passenger remove his turban should take place only in the case of a justified suspicion, following the application of all available passenger screening methods envisioned in Regulation (EC) No 2320/2002 of the Parliament of Europe and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security. See: <http://www.hfhrpol.waw.pl/oswiadczenie-157-pl.html>

to the principles of equality and non-discrimination. The demand that he remove his turban when other passengers were not requested to remove their clothing – especially taking into account that WTMD equipment was not used – could give rise to a claim of discrimination against the adherents of particular religion or a particular ethnic group. It also may be relevant that the behaviour of the Polish authorities deviated from the principles governing their counterparts in the United States and United Kingdom, where the removal of a turban is not required in airport screening in the absence of an alarm emanating from WTMD or HHMD equipment.⁷¹

The key issue is whether the application of other means of screening and control, such as a hand search of the turban (without its removal), would have been sufficient to guarantee airport security, and whether it was necessary to apply a method of screening which automatically involved a high degree of intrusion into the subject's freedom of religion. The border control authorities claim that some of the prohibited items listed in Annex 4-C of Regulation 185/2010, which was publicly available,⁷² would not have been revealed with the use of a metal detector and thus necessitated a hand search involving, among other things, a search of the head wrap itself. The border control authorities argue that a turban consists of a large number

⁷¹ In accordance with the instructions and principles issued by the Heathrow airport concerning screening procedures (based on Article 13 of the Aviation Security Act of 1982) “one of the fundamental principles concerning aviation security in the United Kingdom is that passengers submit to routine security procedures; each passenger may be required, on the same basis of probability, to submit to additional screening controls, without discrimination based on age, sex, ethnic origin or religion (...) In the event the security control agents do not have any particular suspicions with regard to the possibility that a passenger may be carrying a forbidden item under his or her clothing (for example under a turban, burka etc.), there is no need to request that such item(s) of clothing be removed in the presence of other passengers.” (*note: translation from the Polish version of the text*). However in the case of the United States, the instructions of the Department of Transportation to security personnel at airports indicate that a request to remove a turban, without the setting off of an alarm by metal detection device(s) or the existence of other important reasons for suspicion, is without justification. See: <http://www.hfhrpol.waw.pl/precedens/aktualnosci/jakie-sa-instrukcje-przeprowadzenia-kontroli-bezpieczenstwa-na-okieczu.html>.

⁷² Legal regulations containing a list of prohibited articles must publish such a list in a legal act which is universally available to the public; see the Judgement of the ECJ in C-345/06 *Gottfried Heinrich*, paragraphs 42-44 and 59-63, wherein it was stressed that the principle of legal certainty requires that EU regulations are made public in such a way that all concerned persons can examine them to precisely determine what obligations are imposed upon them by such legislation.

of wraps of material, creating a body of cloth so large that it may be used to hide plastic knives or non-metal components of explosive materials.⁷³

In deciding this dispute, the court was called upon to determine if a) an intrusion into S. Puri's personal rights actually occurred; and b) if so, whether the intrusion was of an illegal nature, i.e. constituted a violation of the right involved. Unfortunately there are no precise EU rules – particularly noteworthy is the lack of a specific provision in Regulation 185/2010 – which would clearly indicate the legality of the demand to remove the turban (or any other clothing associated with a religious practice). The court, in making its determination, needs to interpret the existing legal rules regulating the screening of passengers and their cabin baggage which would guarantee an adequate and sufficient level of aviation security while at the same time interfering into passengers' freedom of belief (or other privacy rights) to the minimum degree necessary.⁷⁴

7. Sanctions for the obstruction of security control operations

Obstruction of security control operations can result in the imposition of sanctions. Any legal rule imposing such sanctions must, however, be of a universal nature and must be formulated in such a way as to fulfil the conditions applicable to all criminal laws set forth in Article 42(1) of the Constitution of the Republic of Poland.⁷⁵

⁷³ See the letter of the Chief Commander of the Border Control Authority of 17 June 2010, available at: <http://www.hfhrpol.waw.pl/pliki/2010-06-28-15-04-02-01.pdf>.

⁷⁴ The Warsaw District Court, on 11 December 2011, dismissed the complaint of S. Puri. In its oral justification, the Court emphasized that while an infringement into the plaintiff's right to personal privacy did occur, the infringement was legally permissible. In the Court's opinion, the Border Control authorities acted within their legal competences when they requested S. Puri to remove his turban. The case is currently on appeal. For more, see: <http://www.hfhrpol.waw.pl/precedens/aktualnosci/wyrok-w-procesie-sikha-przeciwko-strazy-granicznej.html>

⁷⁵ In its Judgement of 9 June 2010 in the case of SK 52/08, OTK ZU No 5/A/2010, item 50, point III 1.1., the Constitutional Tribunal affirmed that the principle of precision in the definition of criminal actions also protects individuals from arbitrary actions and abuses of authority by public agents. It found that the following specific rules result from this principle: 1) the forbidden activity must be specifically included in the legal act (*nullum crimen sine lege scripta*); 2) the definition of such activity must be maximally precise (*nullum crimen sine lege certa*); 3) the use of analogical reasoning from other acts (disadvantageous to the actor) to widen the scope of the prohibited act cannot be used; 4) legislation imposing criminal responsibility or expanding existing responsibility cannot act *ex post facto* (*nullum crimen sine lege praevia, lex retro non agit*); and 5) provisions of

From this perspective it is worthwhile to examine a problem noted by the District Court of Warsaw.⁷⁶ On 19 October 2010 it filed a request for clarification of a legal question with the Constitutional Tribunal of Poland, asking whether Article 210(7) of the Polish Aviation Law is in compliance with Article 42(1) of the Constitution of the Republic of Poland. Article 210(7) of the Aviation Law provides that *where a prohibition or warning is made publicly available by the managing body of an airport on a bulletin board or by other adequate means of communication, anyone who violates said prohibition or order may be subject to a fine.*

The District Court has doubts concerning the blanket nature of the provision. In effect the behaviour for which a fine may be assessed is defined by another legal act.⁷⁷ In addition, in the opinion of the District Court this regulation does not fulfil the requirements laid out in another decision by the Constitutional Tribunal, where it found that in instances when orders and prohibitions are addressed to persons who are not in a legal relationship which makes them subject to the issuer of such orders or prohibitions (i.e. passengers subject to screening at airports), such orders or prohibitions must be of a generally applicable nature.⁷⁸ The District Court's doubts arise from the fact that the acts for which the Aviation Law, in Article 210(7)(1), envisions the imposition of fines are not defined by any law or other legal act within the meaning of Article 87 of the Constitution of the Republic of Poland. The fact that the fines may be a relatively mild sanction cannot be used to make an otherwise illegal act legal. According to the District Court in Warsaw, the non-compliance of 210(7)(1) of the Aviation Law with Article 42(1) of the Constitution of the Republic of Poland arises from CT judgement of, 21 July 2006, in case P 33/05,⁷⁹ where the Constitutional Tribunal struck down as unconstitutional an act analogous to the provision in question of the Aviation Law. In that

legal acts denoting criminal activity must fulfill the tests of rationality and foreseeability of legal consequences..

⁷⁶ The Court's position is based on the description given in K. Rusiłowicz, *ShaminderPuri v. Straż Graniczna. Przeszukanie...* (*Shaminder Puri vs. Border Control Authorities...*), p. 3–4.

⁷⁷ In the case of the Warsaw Chopin Airport, the prohibited behaviours are defined in Regulation No 81 of 1 July 2010 of the Chief Director of the Enterprise of State Airports. § 2 point 6 of this Regulation declares that "on the territory of the entire airport it shall be forbidden to disrupt the peace, disturb public order, or interfere into or make impossible the carrying out of their duties by airport personnel and security organs."

⁷⁸ See the Judgement of the CT of 8 July 2003; P 10/02, OTK ZU 6/A/2003, item 62, point III 4.

⁷⁹ OTK ZU 7/A/2006, item 83.

case an order setting forth acts and obligations of passengers was issued by the managing body of an airport, aimed at securing the safety of flights and order in the airport premises, in accordance with Article 82(3) of the Aviation Law. The order stipulated behaviours that could be subject to fine.

The District Court's query, which has been assigned docket number P 43/10 in the Constitutional Tribunal, will be answered in due course. Regardless of the outcome of the decision, rationally speaking it would seem that a review should be conducted of the prevailing provisions regulating airport security in Poland, and that behaviour which may lead to the imposition of a fine should be clearly defined in appropriate legal acts. Theoretically it is also possible that Article 210(1)(7) could be amended prior to the issuance of a decision by the Constitutional Tribunal.⁸⁰

8. The carrying out of security control operations by private entities⁸¹

As a result of entering into force of Article 186b of the Aviation Law, security control operations in Polish airports may be conducted by private entities (enterprises). This provision envisions that tasks related to security in civil aviation operations are the responsibility of the managing board of an airport, in particular with respect to the screening of passengers and baggage, freight, post, supplies and deliveries to airplanes and to airport premises, as well as the registration of agents authorized to deliver such supplies, as described in Regulation No 300/2008. While state border control authorities (Polish Border Guard) are no longer responsible for these tasks, they are nonetheless obligated to exercise supervision over the airport managing body with regard to its implementation of the tasks related to security. This supervision involves the observation (and registration) of the operation of screening and control checkpoints, supervision over the number of airport employees with security-related tasks and their work habits, and the obligation to inform the airport managing body immediately

⁸⁰ This could result in a (permanent) suspension of the proceedings before the Constitutional Tribunal.

⁸¹ This section of this article is based also on a research report by P. Maliszewski entitled *'Zasady i reguły świadczenia usług ochrony portów lotniczych w Polsce'* (*Principles and rules for providing security services in Polish airports*), published in: *Usługi portów lotniczych w Unii Europejskiej i w Polsce II – wybrane zagadnienia* (*Servicing airports in the European Union and in Poland, part II – selected issues*) – a joint work edited by Filip Czernicki and Tadeusz Skoczny; Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warszawa 2011, p. 145–164.

of any doubts the border control authorities may have as to the physical-psychological state of any security staff. An essential part of the supervision exercised by the border control authorities is the requirement that they react immediately to any observed violations of security procedures by security staff and file a petition with the airport managing body requesting that any such violations be stopped immediately. The border control authorities also exercise supervision over the granting of certificates attesting to the qualifications of private security staff. In the event security operations are entrusted to a private firm or enterprise, there is a need to guarantee their professionalism. The standards elaborated by the Aviation Security Services Association are of great assistance in this regard.

From the perspective of fundamental rights of passengers it is crucial that these rights will not be violated by the private enterprises to whom the airport managing body delegates the security operations. It is essential that real and effective supervision be exercised by the State (i.e. the border control authorities) over the level of services provided by such entities. It is not enough if the supervision exercised by the border control authorities is limited to the checking whether the formal requirements are met. The question of whether security operations are carried out in a way that maximally protects fundamental human rights, which requires that they be examined from the perspective of the proportionality principle, is also subject to supervision. According to the European Convention on Human Rights the state parties have the positive obligation to assure that private enterprises, especially those entrusted with public functions, are guaranteeing in practice the appropriate level of protection of individual rights and freedoms.

9. Conclusions

9.1. General comments

Security control operations should be carried out in such a manner that the right to privacy and individual freedoms (such as the freedom of belief) are respected. To the extent some restrictions thereon are necessary, they should meet the proportionality principle. Restrictions on these rights are only possible to the extent necessary to guarantee the security of civil aviation operations. Legislator should not introduce or implement control mechanisms or measures which may violate fundamental rights if they are not absolutely necessary (in the sense that other, less intrusive mechanisms or measures may be sufficient and available). The security

controllers, on the other hand, should apply only those means of control at their disposal which are sufficient to guarantee the security, and should not use mechanisms which infringe on the right to privacy or other freedoms unless such mechanisms are absolutely required.

9.2. Specific conclusions

1. Based on the legal and technological solutions currently in place, the first component of screening at airports should be WTMD equipment. The more intrusive – from the viewpoint of the right to privacy – hand search should only be resorted to if the security officials cannot eliminate the cause for an alarm sounded by the WTMD equipment. Hand searches of passengers who pass through WTMD equipment without sounding an alarm should not be conducted at random or as preventative measures.
2. Hand searches should only be conducted by persons of the same sex as the subject being searched. Any exception from this principle may be justified only in exceptional circumstances.
3. The new provision of the Polish Aviation Law (Article 186f(3)) regarding the review of body's surface does not contain sufficient guarantees against intrusion into the intimacy sphere of passengers. Doubts are also raised as to whether such review permissible under the Polish provision are permissible under applicable provisions of EU law.
4. The discussion over the use of security scanners in Europe should take into account that a high level of protection of the right to privacy must be secured. Security scanners should be used in such a manner that is least intrusive into privacy rights.
5. There are no specific provisions in EU law, in particular in Regulation 185/2010, which would require passengers, as part of screening operations, to remove items of clothing which constitute for them a religious symbol (for example a turban). The existing provisions with respect to screening procedures to be applied to passengers and their cabin baggage must be interpreted in such a way that – without compromising security – reduces interference into the freedom of belief (religion) to the minimum extent possible.
6. The legal basis for the imposition of fines against individuals for the obstruction of security operations should be defined precisely by appropriate legal acts. It must be postulated that behaviours which are considered to give rise to the imposition of financial sanctions should be regulated in the most exhaustive way by legal acts of general application.

9.3. Further discussion

Further discussions on the topic of airport security are certainly necessary in the era of terrorist threats thereto. It is necessary however that the overall aim of security does not overshadow the need to provide a high level of guarantees for the fundamental individual rights of airport users, i.e. passengers. In addition to the issues cited above, it is also necessary that security operations are not motivated by considerations of ethnic origin and characteristics associated therewith (colour of skin, hair, facial features, dress etc.). This principle should be strictly implemented in practice, even if voices may be heard that screenings based on ethnic identity (having the aim of intercepting potential terrorists trying to board aircraft) may be highly effective.⁸²

Of key importance is that regulatory provisions with respect to personal searches and screenings are formulated as precisely as possible, also taking into account their effectiveness, and are generally available. The best guarantee of the foregoing would be if they were implemented by separate legal acts. From this perspective, it is unfortunate that the legislation amending the Polish Aviation Law of 2011 did not move the provisions of the National Program for Civil Aviation Security to the level of primary legislative act. It should be recalled that all forms of restriction imposed on fundamental individual rights and freedoms must be regulated at the level of a primary legislative act, and not as secondary regulations based on vague delegations contained in primary legislation.

⁸² Such screening methods are permissible in Israel. They are prohibited however in Europe and the United States. See: M. Zawadzki, *Wygląd nie ma znaczenia? (Looks don't matter?)* Gazeta Wyborcza, 2–3 July 2011, p. 20–21.

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Chapter IX

Strategies realized by medium-sized European Airports

I. Introduction: Aims and assumptions of our research

1. Assumptions underlying the choice of airports

“Strategic Management” as a branch of science searches for optimal business models, so-called “winning models”, which enable companies and other business organizations to attain their aims in a competitive market. For this reason, in many instances strategic studies focus on market leaders or successful firms which are concentrating on either eliminating or controlling less successful ones (see Porter, 1994). It’s difficult to find a winning formula for medium-sized firms, which Porter’s typology of firms (1994) describes as those “stuck in the middle”. Nonetheless there are certain companies or organizations which find it difficult, in either the short-term or medium-term perspective, to alter the scale of their activities inasmuch as their opportunities are limited by the size of the market. In such situations even a monopolistic position would not guarantee them good financial results, particular in situations where substitute goods or services are available.

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This is the position of medium-sized airports on the European market, hence our interest in searching for viable business strategies for such airports. The days are gone when airports located near capital cities had a guaranteed passenger movement and no competition. Today, owing to investments into local and regional airports they have become direct competitors with major airports. In addition, open borders and public investments into autobahns and highways as well as rail lines have opened up new possibilities for combined travel, including travel to other airports than those located nearest to one's point of departure. This changing situation is especially visible in smaller countries like Czech, Hungary, or Switzerland, where one can reach, within two hours travel time, foreign airports offering a wide range of attractive global connections. In the large countries like Great Britain, France, or Germany, in addition to the hub airports which have large transit services servicing particular airlines – Heathrow in Great Britain (British Airways); Frankfurt in Germany (Lufthansa) and the Paris airports servicing Air France – the number of smaller regional airports is also growing. It needs to be noted at the outset however that despite their lower rank in terms of size in the countries in which they operate, in many cases these 'smaller regional airports' are as large or larger than the largest airports of smaller countries. Thus in terms of examining strategies for medium-sized airports, we need to look at both these groups. On one hand we are referring to airports such as Budapest, Lisbon, Prague, Warsaw, and Zurich. Each of these airports is the largest in their respective countries, but they face stiff competition from foreign airports as well as the smaller regional airports in their own countries. On the other hand we are referring to airports located in the leading countries in terms of air travel services, but occupying lower market positions in those countries. Here one may mention Manchester, Munich, and Lyon. A comparison of the strategies and business models adopted by both these groups of airports may allow us to formulate some interesting conclusions with regard to the business strategies and financial results of medium-sized airports.

2. Assumptions underlying the description and comparison of airports and their strategies

In any comparison concerning the activities of entities operating in the airport branch of the aviation industry the key element is to identify the profile of the airport. Airport models vary widely from country to country, and the wide variations in the scope of their activities can render inadequate

comparisons of the results achieved by different models. In addition, the methods used to carry out specific activities may also be different in different airports. For example, in Great Britain the managing bodies of airports have been characterized by the following types in terms of their engagement in airport management:

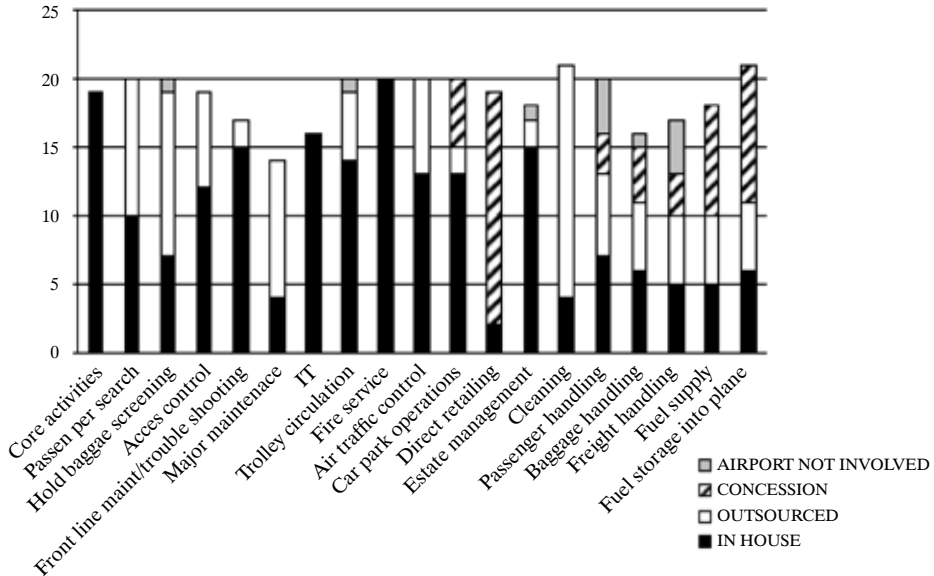
- execution of activities by a company created to service the airport and its dependent entities;
- outsourcing, i.e. the sub-contracting of activities to outside companies which are not financially related to the airport management companies;
- concessions, or granting outside companies access to conduct various activities on airport premises based on generally applicable conditions or on public procurement procedures.

It should also be kept in mind that in each of the countries described in this analysis there are also spheres of airport activities in which the managing bodies of airports are not involved. For example, in some countries security control operations are carried out by services specially created for that purpose, while in other countries they may be contracted out to private companies.

The most basic interdependencies (see Chart 1.) are: (a) services carried out independently by airport managing bodies (or by controlled entities), including basic airport services, repairing breakdowns, managing information systems, fire prevention services, managing real estate, and control of movement in the airport; (b) the most common subcontracted services include: baggage control, maintenance of infrastructure, and janitorial and hygiene services; (c) the most common concessions include: commercial and gastronomical services in airports, and storage and delivery of fuel. Airport management bodies are more and more resigning from themselves servicing passengers and freight.

From the results of our research it may be concluded that it is difficult to determine a specific model for carrying out a specific task at a concrete airport. We operated on the assumption that the airports analysed carry out their own independent activities in a manner similar to those at airports in Great Britain. Before we present our data and detailed results, as well as our comparative models and conclusions, a few reservations about our analysis are in order. The airports described all offer similar, if not identical, services, which from the passenger's point of view has come to be associated with certain 'standards' expected of airports. Yet from the legal, organizational, and ownership points of view, the methods applied in airport management may differ widely according to the business model in place.

Chart 1. A business model for airports in Great Britain (based on data from 21 airports)



Source: The Airport Statistics 2007/8.

Among the airports analysed we can find:

- **from the point of view of ownership structure** – airports owned and run by private entities, as well as owned by the state or local government;
- **from the point of view of management** – managing bodies running a single airport, as well as managing firms operating multiple airports;
- **in addition, every airport has its own complicated structure of internal relations** concerning the scope and methods for carrying out and executing those services offered by airport operators.

In connection with the above, it is difficult to carry out a single comprehensive and fully verifiable “benchmarking” analysis. There is also the fact the applicable external regulations are not the same for each airport, nor do the managing bodies take decisions legally in the same way, hence every airport is different. Finally, it is not possible – partly for cost reasons – to obtain full access to all the information that would be required to carry out a comprehensive comparative analysis of each airport. Many of the airports analysed do not make public their financial statements or operating reports. On the other hand, from the point of view of an outside investor or a client (passenger) of an air carrier, the structure of

the entity which carries out the operations may not be that essential. What matters to investors is a general assessment based on empirical indices, and what matters to passengers is satisfaction with the services – in terms of punctuality, safety, security of baggage, and comfort – in getting them from point A to point B.

In connection with the foregoing, in our financial analysis we had to resign from comparing the nature and scale of investments (for example, indices showing return on investment, or price/earnings ratios for shares or from in-kind investments). These indices would depend on the business model in operation as well as the profit-making possibilities and opportunities for capital investment. In our search for an appropriate measure for comparison, we decided to rely on the Airport Management-Oriented Key Performance Indicator known as **WLU**, or Work Load Unit, whereby 1 Work Load Unit = 1 passenger or 100 kg of cargo. This allows us to determine the ratio of operating expenses per WLU, with operating expenses generally being the costs for staff, communications and utilities, supplies and materials, repairs and maintenance, contractual services etc., *excluding* depreciation.

These values allow us to determine the scale of activities of a given airport, and thus assess the infrastructure requirements necessary to service the activities undertaken. In the case of many airports the assets of the airport are placed under the control of a company-subsidary company managing the airport, and the results of the financial operations are not consolidated. In such instances the sum of the assets, or in other words the engaged capital, does not reflect the scale of the activities carried out at the airport. The mistakes inherent on reliance on such data are compounded by the varying quality of the data on offer, whether it concerns the costs of investments undertaken or operational costs.

The advantage of using the **WLU** index we've chosen is its objectivity. Data concerning the movement through airports is often given out by entities and/or authorities independent from the managing bodies of airports. In our assessments of such data we use the metric **EBITDA**, which is an acronym for earnings before interest, taxes, depreciation, and amortization. This measure is used for comparison of inter-branch activities or other instances when the costs of depreciation and/or financing may significantly alter a company's financial results. Of course, like every measurement, this one has its limitations. In terms of our research this concerns mainly the failure to take into consideration income and financial burdens associated with operating costs. In addition we used basic gross costs, depreciation, labour costs, and income without division into aeronautical revenues and non-aeronautical revenues. We also used **CAPEX** (Capital Expenditures

index), which we applied in reference to the WLU values. Our adoption of this measurement method requires some explanation. WLU treats the two basic segments of airport movement – passenger and freight – analogously, even though each is governed by its own laws. We assumed however that all of the airports we analysed service these two types of movement. Even though we don't know which part of profits are attributable to which of these movements in a given airport, taking into consideration their complementarities we assumed that in each of the airports under consideration both movements are present and that one does not dominate over the other, in which case the comparison of results would be skewed.

II. Survey of European airports

1. Lisbon

1.1. Brief description

The airport in Lisbon is Portugal's largest airport, both in terms of passengers (14.8 million passengers in 2011) and freight (94,400 tons).¹ The airport acts as a central hub, and also serves as headquarters to Portugal's flagship airline TAP, which belongs to the Star Alliance. In 2011 TAP accounted for 58% of all passenger and freight movement at the airport.

The Lisbon airport is distinguished by its unusual – for a large European airport – location. It's located on city territory, only seven kilometres from the historical centre of Lisbon. It is the most congested airport on the Iberian Peninsula. Built in the 1940s, its maximum capacity is calculated to be 10 million passengers annually, a figure it surpassed in 2005.

1.2. Ownership structure

The Lisbon airport is state-owned. Until 1998 it was managed by a public state enterprise (*empresa pública*) by the name of Aeroportos e Navegação Aérea. In 1998 this enterprise was divided into two entities: a joint-stock company (*sociedade anónima*) by the name of Aeroportos de Portugal (hereinafter cited as 'ANA'), which was to act as the managing body of the airport's civil aviation activities; and the state enterprise Navegação Aérea de Portugal (NAV), which offers navigational services.

¹ ANA, annual report 2011.

Act No 404/98 of 18.12.1998² granted ANA a concession for the management of the airports in Lisbon, Porto, Faro, and five airports located on the islands belonging to the Azores Archipelago (Ponta Delgada, Santa Maria, Horta and Flores).³

As of 31 December 2011 the capital structure of ANA was as follows:

- Parpública – Participações Públicas (SGPS), SA – 68.56%;
- Government Treasury – 31.44%.

Parpública is a joint stock company, created with the aims of:

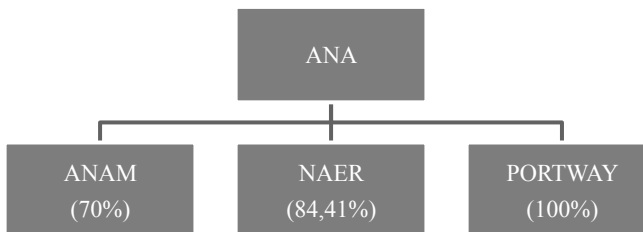
- a) managing the shares of the company during the privatization process, or those shares designated for privatization;
- b) restructuring the company to prepare it for its later privatization;
- c) promotion of a public-private partnership model as a form for offering services of a public nature.

1.3. Management model

The airport in Lisbon is managed by the ANA group, which, as can be seen in **Illustration 1** below, consists of three companies:

- ANAM – an entity managing the airports in the Autonomous region of Madera;
- NEAR – an entity responsible for developing the plans and supervising the construction of a new airport in Lisbon;
- Portway – a company created in July 2000 to offer groundhandling services.

Illustration 1. Organizational structure of the ANA group



Source: ANA.

² Decreto-Lei no.404/98, 18.12.1998.

³ Four remaining airports in the Azores Islands are managed by the Sata group, which includes, among others, the airlines Sata Air Açores and Sata Internacional.

As can be seen, the firm NEAR, which belongs to the capital group ANA, is responsible for developing the plans and supervising the construction of a new airport in Lisbon. In 2011 the main suppliers, in terms of the gross value of supply contracts, were the construction companies Edifer (16.4 mln EUR), Mota-Engil (4.7 mln EUR), Somague (6.7 mln EUR), Alves Ribeiro (12.7 mln EUR), H.C.I. Construções (4.5 mln EUR), and Teixeira Duarte (4.3 mln EUR).

Groundhandling services at the Lisbon airport are supplied by two companies – Portway and Groundforce. In 2011 their share in the ground-handling ‘free market’ (excluding the self-handling services provided by TAP/PGA) in the Lisbon airport was 48% and 52% respectively.⁴

The firm Portway was created in 2000 as a joint venture between ANA (60%) and Fraport (40%). In addition to Lisbon, this firm services three other Portuguese airports – Porto, Faro and Funchal. In 2011 Portway employed 1253 persons.⁵ Its services include:

- Passenger and baggage check-in
- Boarding
- Escorting arriving passengers
- Offering VIP services
- Offering special services – care of underage and handicapped passengers
- Lost-luggage services
- Ramp maintenance (transportation of passengers and crew, cleaning of cabins, subcontracting), maintenance of sanitary infrastructure in airplanes
- loading, unloading, and handling luggage and cargo, x-raying packages

Portway specializes in servicing low-cost air carriers. Its major clients include Easy Jet, Ryanair, and DHL.

Portway’s main competitor is Groundforce, a handling agent which is owned by Urbanos (50.1% of capital) and TAP (49.9%). Groundforce offers its services at the airports in Lisbon, Faro, Madera, and Porto Santo, and in 2011 had approximately 1900 employees (of whom 1250 worked in the Lisbon airport). It provides groundhandling services to TAP, and also competes with Portway for service contracts with other airlines. In 2011 Groundforce generated a loss of 11.1 million euro. Its financial difficulties arise from its high costs of labor (which constituted 62% of its operating costs in 2011⁶), which are the result of over-employment and high wages (about 40% higher than those paid by Portway).⁷

⁴ Portway, annual report 2011.

⁵ Portway, annual report 2011.

⁶ Groundforce, annual report 2011

⁷ J. Barros, “Groundforce “é insustentável””, *Publituris*, 19.02.2009.

In the largest Portuguese airports (Lisbon, Porto, Faro, Ponta Delgada, Madeira) passenger handling services (“free access” services) are supplied by Servisair. For security control, ANA makes use of the Security firm Prosegur. In 2011 this firm was, after the construction firm Edifer, the ANA’s second largest supplier in terms of total contract value (16 million euro in 2011).⁸

Seventeen “Just for Travellers” chain stores operate in Portuguese airports (including in Lisbon). These stores are managed by Lojas Francas de Portugal, which arose as a joint-venture company between the Portuguese air carrier TAP (which has 51% ownership interest in the company) and the international group Nuance, a leader in airport commerce (49% ownership interest).⁹

The external suppliers of ANA include: the Security firm Prosegur (16 million euro worth of contracts in 2011); Siemens (8 million euro); energy supplier Endesa (7 million euro); and the fire prevention firm Moreira-Maia (1 million euro).

1.4. Finances

In 2011 ANA received 43% of its gross revenue of non-aeronautical revenues (mainly retail trade, real estate rentals, parking services, car rentals, and leasing advertising space).

Table 1. Financial data for ANA, managing body of the Lisbon airport

Position	Lisbon*
Costs (excluding depreciation costs) calculated per WLU	12,29
Depreciation costs per WLU	2,67
Labor costs per WLU	1,98
Revenue per WLU	12,49
Aeronautical revenue per WLU	6,91
Non-aeronautical revenue per WLU	5,21
EBITDA per WLU	6,41
CAPEX per WLU	3,16
EBITDA as a percentage of revenue	53%
Share of non-aeronautical revenue in total revenue	43%

* Data for ANA.

Source: own calculations based on ANA Annual Report, 2010.

⁸ ANA, Relatório de Governo Societário 2008.

⁹ Lojas Francas de Portugal (LFP S.A.) renovam presença nos aeroportos até 2014, www.tapvictoria.com, 12.02.2009.

2. Lyon

2.1. Brief description

Lyon is the fourth largest airport in France in terms of passenger movement, and the second, after Paris, in terms of freight handling. It is located in the Rhône-Alpes region, 20 kilometres from Lyon. In 2011 it handled 8.4 million passengers. Since 1997 it acts as a regional European hub for the carrier Air France. The TGV Paris-Lyon line, opened in 2001, slowed down the growth in national connections, which now constitute about 40% of the airport's passenger traffic. In 2011, the main carriers using the airport were: Air France-KLM (40% of flights), easyJet (20%), and Lufthansa (15%).

Lyon, as distinguished from, for example, Nice, is a traditional airport with a business profile, and is dependent only to a small degree on low-cost airlines. Nonetheless, the low-cost segment of operations at the Lyon airport has been growing for the past several years, and in 2008 easyJet opened an operational base in Lyon. While in 2007 low cost carriers accounted for only 6.5% of all air traffic in the airport, by 2011 they accounted already for 21%. In November 2011 Lyon opened Terminal 3, specially designated for low-cost airlines. The reconstruction of the airport increased its capacity to 10 million passengers annually. Thus one can expect an increase in low-cost flights to and from the airport in the nearest future.

2.2. Ownership structure

The company Aéroports de Lyon was created on 9 March 2007 as the first joint-stock company created under Act nr 205-357.¹⁰ The company's shareholders are as follows: State Treasury (60%), CCI de Lyon (25%), Région Rhône-Alpes (5%), Département du Rhône (5%), and Grand Lyon (5%). The company took over the concession for managing the airport from CCI de Lyon, with an extension of the concession until 2047. The government of France is considering selling its stock in Aéroports de Lyon. One of the companies interested in purchasing the stock is the group Aéroports de Paris, which manages the airports of Paris-Charles de Gaulle and Paris-Orly.¹¹

¹⁰ Loi n°2005-357 du 20 avril 2005 relative aux aéroports, Journal Officiel de la République Française, 21 avril 2005.

¹¹ Smith, H. "AdP sees Lyon as 'Best Target'", Bloomberg, 26.02.2011.

2.3. Management model

Two hundred and ten companies operate on the premises of the Lyon airport, with 5,600 total employees.¹² The managing body of the airport does not carry out groundhandling activities. The independent groundhandling commercial agents working at the airport include Elite Handling Service, Servisair, Swissport, and Aviapartner. In addition some airlines engage in self-handling.

Security control services are all handled by outside companies. Fuel supply and storage is managed by a group of businesses known as GALYS (Groupement pour l'Avitaillement de Lyon-Satolas), which is owned on a 50/50 basis by Total Fina and Elf.

Telecommunication services for the airport (including, among others, wi-fi) are supplied by the company Hub Telecom, which belongs to the group AdP. Janitorial and cleaning services are supplied by the company GSF Mercure, while bars and restaurants are handled by the SSP group.

Between 2007–2009 the Lyon airport, in partnership with the development company Sogelym-Steiner, completed the “Hub Business” project, as a result of which the airport now boasts a business centre occupying ten thousand square meters of floor space, with two thousand square meters designated for the construction of a conference centre and a four-star hotel belonging to the NH Hotels group.

2.4. Finances

The managing body's non-aeronautical revenue share in 2007 was 44%, lower than both the European average of 48% as well as the average for large regional airports in France (45.8%). Operational efficiency (EBIDTA) was 27% in 2007 (see Table 2.). In 2011 the managing body's non-aeronautical revenue share dropped to 42%, while its EBIDTA margin rose to 33%.

¹² <http://www.lyon.aeroport.fr/index.php?module=cms&desc=default&action=get&id=98>; accessed on 20.09.2009 r.

Table 2. Financial data for the Lyon airport

Position	Lyon*
Costs (excluding depreciation costs) calculated per WLU	14,94
Depreciation costs per WLU	4,24
Labor costs per WLU	3,25
Revenue per WLU	15,69
Aeronautical revenue per WLU	8,79
Non-aeronautical revenue per WLU	6,90
EBITDA per WLU	4,05
CAPEX per WLU	2,45
EBITDA as a percentage of revenue	27%
Share of non-aeronautical revenue in total revenue	44%

* Most recent available data from 2007.

Source: own calculations based on Aéroports de Lyon Annual Report, 2007.

In 2008 the Lyon airport began implementation of a 5-year investment plan with an envisioned financial outlay of 200 million euro. In the long term, i.e. by 2020, the airport is to be reconstructed and its capacity increased to 15 million passengers annually, which would put it in second place in France in terms of passenger traffic.

3. Prague

3.1. Brief description

The Vaclav Havel airport in Prague¹³ (IATA code: PRG) is located in the northwestern part of the city, 17 kilometres from the city centre (20–25 minutes by car, or 55 minutes by public transportation). The airport services approximately 50 air carriers, offering direct flights from Prague to approximately 130 destinations worldwide. In 2011 the airport serviced 11.8 million passengers. The airport consists of three passenger terminals: Terminal 1, which handles connections outside the Schengen area; Terminal 2, designated for connections within the Schengen area;

¹³ Until October 2012 the airport was known as The Ruzyně Airport.

and Terminal 3, servicing small private aircraft. In addition the airport has two cargo terminals. The airport has two take-off runways: RWY 06/24 and RWY 13/31, with a total capacity to handle 46 operations (take-offs and landings) per hour.¹⁴

A new runway is necessary for the further development of the airport. In 2009 the company Letiště Praha purchased, for 152.8 million euro, an 80 hectare area designated for a new runway. Completion of this project is supposed to increase the value of the airport by approximately one billion euro and facilitate its privatization.¹⁵

In 2008 the airport was recognized as the best Eastern European airport in the World Airport Awards competition. It negotiated an agreement, the so-called ‘Understanding concerning Quality of Services’, with the air carriers using the airport, aimed at increasing the quality and security of the services offered by the airport. A similar type of initiative, called the “Common decision-making project”, was introduced recently and is aimed at improving operational efficiency and mitigating the negative environmental effects caused by the airport’s activities.

3.2. Ownership form and structure

Letiště Praha is a joint stock company created in February 2008 as a result of the commercialization of the state enterprise Správa Letiště Praha. In accordance with the Memorandum of the Government of the Czech Republic (nr. 888 of 9 July 2008), nearly all the assets of Správa Letiště Praha were transferred to the company Letiště Praha. The next stage in the privatization process is to find a private investor. One of the plans under consideration is to sell all or part of the company’s stock on the capital market.

In December 2010 it was announced that Letiště Praha and CSA would be joined together into a new entity controlled by the Czech government, known as Cesky Aeroholding. In March 2012 the company Letiště Praha became part of a new holding company, which includes Czech Airlines Handling (from October 2011), CSA Services (from November 2011), HOLIDAYS Czech Airlines (from December 2011) and Czech Airlines Technics (from April 2012). In June 2012 the Czech government announced that the Czech Airline CSA would be included in the holding company.

¹⁴ http://www.prg.aero/Files/cs/O_letisti/vyrocní_zpravy/profil-2010.pdf

¹⁵ “New runway to help airport sale,” Eurobuild Poland, February 1, 2009.

3.3. Management model

The airport itself directly employs approximately 2,200 persons, while approximately 15,000 are employed by outside firms carrying out operations at the airport.

In 2007 non-aeronautical revenues accounted for 36.5% of the total income of the managing company. This income consisted of rental income for premises (office space, sales outlets, advertising space), parking, commercial services, VIP lounge, etc.

3.4. Finances

Letiště Praha is one of the most profitable companies owned by the Czech State Treasury.¹⁶ Its total revenues in 2009 were 5 billion, 488 million Czech koruna (208 million euro),¹⁷ representing a decline of 6% from the previous year. Its operational profits were 1 billion, 432 million Czech koruna (54 million euro – a decline of 16%),¹⁸ and its profits before taxes totaled 1 billion, 64 million Czech koruna (40 million euro – a decline of 28%).¹⁹ The across-the-board declines noted in 2009 were the result of the decline in passenger traffic, brought on in part by increased competition from regional airports. The Prague airport's largest competitor, however, continues to be the Vienna airport.²⁰ The economic situation also influenced the 2009 financial results. Prior to the onset of the financial crisis the airport was appraised to have a market value of 3.82 billion euro, but at the end of 2009 its appraised fair market value was only half that amount.²¹

¹⁶ <http://www.pragueairport.co.uk/lotnisko-praga.htm>.

¹⁷ Source: Prague Airport, Company Profile 2009–2010. Since 2008 the company does not publish its financial results, hence the lack of data concerning the level of EBITDA. Financial data for 2010 are not available. Czech koruna converted into euro based on the 2009 average exchange rate of the EBC.

¹⁸ Ibidem.

¹⁹ Ibidem.

²⁰ "Prague Ruzyně Airport faces tough times," Centre for Asia Pacific Aviation – News, June 9, 2011.

²¹ "New runway to help airport sale," Eurobuild Poland, February 1, 2009.

Table 3. Financial data for the Vaclav Havel airport in Prague

Position	Prague*
Costs (excluding depreciation costs) calculated per WLU	7,14
Depreciation costs per WLU	3,47
Labor costs per WLU	3,58
Revenue per WLU	15,05
Aeronautical revenue per WLU	9,40
Non-aeronautical revenue per WLU	5,64
EBITDA per WLU	8
CAPEX per WLU	data unavailable
EBITDA as a percentage of revenue	53%
Share of non-aeronautical revenue in total revenue	37%

* Most recent available data: 2007.

Source: own calculations based on Prague Airport Annual Report, 2007.

4. Budapest

4.1. Brief description

The Budapest airport (IATA code: BUD) is the largest airport in Hungary. In 2011 it serviced 8.9 million passengers.

The Budapest airport was built in 1939 and was aimed at servicing civilian, military, and recreational aircraft. The airport was located 16 kilometres outside the city border, and in order to connect it with the city centre a special rail line was built in 1942. Following the damage caused by the war, reconstruction was commenced in 1947. In the 1980s a modern new terminal (Terminal 2) was built, and in light of the increased air traffic Terminal 2b was put into operation in 1997.

In 2002 the body managing both the airport and air traffic control was divided into two parts: Budapest Airport Zrt responsible for management of the airport premises, and Hungaro Control responsible for air navigation. In the meantime, the use of the airport rose from 3.9 million passengers in 1998 to 7.9 million in 2005. In light of the need for new investment and the lack of governmental revenue sources, the decision was made to sell the stock in the managing company: 75% (minus one vote) was sold to BAA (a part of Ferrovial) in 2005. In turn BAA sold this stock in 2007 to HOCHTIEF AirPort (HTA) and other financial investors. In July of 2011 the government of Hungary sold its remaining stock to HTA.

Since its privatization the airport has continued to expand and develop. The airport management has set the goal of attaining the position of regional leader. It has elaborated a strategy called 'BUD Future,' which is based on rebuilding the cargo terminal and establishing new cargo carrier lines, reconstruction of the passenger terminals, and expansion of the airport runways so that more passenger and freight aircraft can take off and land. The airport capacity for handling passenger movement was supposed to reach 15 million passengers annually by 2012. The total cost of investments was envisioned to be 261 million euro. A key feature of the investment program of BUD Future was the building of a new passenger terminal building known as Sky Court, which was completed in March of 2012 at a cost of 102 million euro.

Among the activities undertaken was implementation of a direct cargo connection with Hong Kong (five flights per week by Boeing 747-400 F) as well as permanent passenger connections with New York (American Airlines and Delta Airlines) and Doha (Qatar Airlines).

One of the main strategic challenges currently faced by the managing company of the airport is the change in the airport's profile brought about by the bankruptcy of the air carrier Malev. This flagship Hungarian airline, which was the main client of the Budapest airport, declared bankruptcy in February 2012. The resulting shortage of national connections will most likely be taken up by low-cost air carriers, of which Ryanair is the most active in the Budapest airport. The bankruptcy of Malev also brought about a radical change in the financial structure of the airport. In 2011 36% of passenger movements in the airport were generated by Malev; 34% by traditional carriers; 26% by low-cost airlines; and 4% by charter flights. In 2012 it is envisioned that low cost airlines will generate 52% of passenger service, traditional airlines 40%, chartered flights 5%, and Malev 3%.²²

Because of the loss of its main client, the Budapest airport has suspended implementation of a part of its planned investments envisioned as part of the BUD Future project. As part of its cost reduction program it has had to make redundant 250 employees, or about 20% of its workforce.

4.2. Ownership structure

Budapest Airport Zrt is a closed stock company, operating on the basis of the Hungarian Commercial Code. Hochtief AirPort (HTA) controls

²² Budapest Airport, Key Highlights 2011.

49.67% of the stock, while the remaining shares are the property of financial investors: Malton Investment (18.17%), Caisse de depot et placement du Québec (CDP) (18.17%), Aero Investment S.á.r.l. (10%) and KfW IPEX-Bank (4%).²³

In addition to Budapest, Hochtief AirPort is also the managing body of the airports in Athens, Düsseldorf, Hamburg, Sydney, and Tiran. In 2011 the combined passenger movement for all the airports managed by HTA was almost 95 million passengers.²⁴

4.3. Management model

Budapest Airport Zrt is responsible for the management of the Budapest Airport, conducting its operating activities, and guiding its development. Its tasks include collections of airport fees, managing passenger movements, baggage handling, fuel supply and storage, freight and post services, maintenance of the airport information system, first aid, management of the airport's real estate, security control, and other tasks associated with the functioning of the airport.

The group of companies comprising Budapest Airport Zrt include entities providing and/or handling: financial counseling, fuel supply, management of real estate, social and commercial organizations, and museums and foundations.

The airport is very active in seeking out new air routes and connections. With this aim in mind the airport has developed an airport cost calculator which allows airline management to accurately estimate the costs of various types of connections with Budapest. In addition the airport has undertaken intensive efforts aimed at establishing medium and long distance routes. These activities have already yielded results, including the implementation of a daily connection with Doha serviced by Qatar Airlines as well as a connection with New York serviced by American Airlines. Since 2010, twelve new routes have been established.

The marketing department of the Budapest airport is carrying out constant research into the preferences of airport clients, the results of which may enable the airport to assess the size of the market for various airlines and flights.

²³ http://www.bud.hu/english/budapest-airport/facts_about_bud/ownership, (accessed on 25 October 2012).

²⁴ http://www.hochtief-airport.com/hta_en/3.jhtml, (accessed on 28 October 2012).

The airport's activities are aimed at both low-cost and traditional airlines. With respect to the former category, Hungary's own WizzAir is competing in Budapest with Ireland's Ryanair and Great Britain's easyJet. Terminal 1 of the airport is designated for the exclusive use of low-cost airlines. In turn, Terminal 2 (2a and 2b), remodelled in 2011, is reserved for the use of traditional airlines. New commercial premises, including restaurants, coffee shops and rest areas are designed to preserve the prevailing standards of comfort for passengers of traditional airlines. In addition they are supposed to provide an impulse to the development of international flights, especially long-distance connections. In connection with the airport's need to change its profile following the bankruptcy of Malev, efforts are also underway to adapt the airports premises to the needs of passengers travelling on the low-cost airlines.

4.4. Finances

The total revenue of the company managing the airport and the group of companies belonging to Budapest Airport Zrt rose from 255 million euro in 2010 to 292 million euro in 2011. Operating profits were 94 million euro in 2010 and 83 million euro in 2011. Before-tax losses totalled 14.7 million in 2010 and 50.4 million in 2011. One of the major reasons for the worsening financial results was the need to create a bad debt provision for the airport's biggest customer, Malev Hungarian Airlines.

Table 4. Financial data for the Budapest airport

Position	Budapest
Costs (excluding depreciation costs) calculated per WLU	17,68
Depreciation costs per WLU	2,15
Labor costs per WLU	3,10
Revenue per WLU	29,19
Aeronautical revenue per WLU	11,51
Non-aeronautical revenue per WLU	17,68
EBITDA per WLU	9,84
CAPEX per WLU	4,54
EBITDA as a percentage of revenue	34%
Share of non-aeronautical revenue in total revenue	61%

Source: own calculations based on Budapest Airport, Key Highlights 2011.

5. Munich

5.1. Brief description

The Franz Josef Strauss airport in Munich (IATA code: MUC) was opened on 11th May 1992, and is the second largest airport in Germany. It is also one of the largest European airports, occupying seventh place in terms of passenger movements. In 2011 it serviced approximately 38 million passengers, a rather significant increase from the 34.5 million in 2008. About two-thirds of all passengers used Munich as a transit airport. Thus Munich's main competitor is the Frankfurt airport, and to a limited extent the airport in Hahn. The Munich airport has connections to almost all airports in Germany and most of the major European airports.

The Munich airport (MUC) replaced the airport of Munich-Riem.²⁵ The first reconstruction took place as early as in 1997 when it modified its terminal. In 2003 Terminal 2 was built, which increased the airport's theoretical capacity to 50 million passengers annually, and the number of take-offs and landings per hour to 90. A further reconstruction is planned, but because of the financial crisis a detailed action plan has not yet been elaborated.

5.2. Ownership structure

The ownership structure of the Munich airport is as follows: the company Flughafen München GmbH is 51% owned by the German land, 26% by the government, and the remaining 23% by the city of Munich. Most likely however the Munich airport will be privatized in the near future, based on the example of the Frankfurt airport. The city of Munich has already declared its willingness to sell its shares.²⁶

Flughafen München GmbH is also the 50% owner of the airport managing company of the nearby Augsburg airport (Augsburger Flughafen Betriebsgesellschaft mit beschränkter Haftung), even though that airport remains wholly owned by the government. It also owns a subsidiary company supplying groundhandling and catering services to the Munich airport. In addition the airport collaborates with the airports in Nuremberg, Stuttgart, Dresden, Erfurt, and Leipzig in the purchasing and installation of modern airport technology. This collaboration is not, however, of a formal nature.

²⁵ The grounds of the former airport are now used as a public market.

²⁶ A. Graham, *Managing Airports*, op. cit., p. 25 and following.

5.3. Business model

The airport in Munich is managed by a public entity which is also the owner of the airport – Flughafen München GmbH. This same company is also the direct owner of companies offering groundhandling services, catering services, security control, and management of the airport real estate. The firm's structure is based on a modified closed company model – with the following distinguishing characteristics:

- business sphere (*Geschäftsbereiche*): AeroGround, Aviation, client services, management, and real estate development.
- service sphere (*Servicebereiche*): corporate services, IT, planning and construction, security, technical section.
- functional section (*Konzernbereiche*): finance and auditing, business development, environmental protection, Human Resources, legal section, and internal and external communications.

These divisions overlap and all the above-mentioned business units are subject to the direct control of the management, and the indirect control of the board of directors. Such a rich and varied company structure is the result, in part, of the wide variety of activities which the company provides, i.e. to some extent a result of the complicated interactions between various interest groups in the company, characteristic of publicly-owned companies on the German market. The airport employs, just for the services it provides, approximately 30,000 employees in more than 500 companies, but the annual report does not delineate how many are employed in the main company and how many in subsidiary companies.

5.4. Finances

According to the data for 2010,²⁷ Flughafen München GmbH obtained profits, prior to deduction of interest, taxes, depreciation, and amortization (EBIDTA), of 450 million euro on a total revenue of slightly more than one billion euro. For comparison, in 2009 the company had a total revenue of 100 million euro less and a similar EBIDTA.

Income from non-aeronautical revenues constituted about 48% of the total income of the company, which is a high ratio in comparison to other European airports.²⁸ The increase in total revenues over the last three years is attributable in equal measure to both the growth in aeronautical revenues as well as non-aeronautical revenues.

²⁷ The annual report for 2011 does not give EBITDA values.

²⁸ J.J. Parappallil, *Potential of Non-Aeronautical Revenues...*, op. cit., p. 26.

In its overall cost structure, the Munich airport has high labour costs, which is typical for Germany, and also attributable in part to the wide-ranging structure of groundhandling services. Nonetheless the labour costs constitute a stable element in the airport's overall cost structure and their share in overall costs has not significantly changed over the last several years.

Flughafen München GmbH co-financed the construction of Terminal 2, which was completed in 2003. Its capital investments in 2007 were 122 million euro, which averaged 60 euro per passenger – one of the highest per capita investment ratios in Germany. However, as a result of its significant investments, during the course of a decade (1998–2007) the Munich airport experienced a 120% increase in passenger movement, although this did not lead to a significant improvement in its financial position during these years since costs increased by 100% during the same period of time.²⁹

In subsequent years however, as the airport began to make full use of its expanded infrastructure, its financial results improved significantly (see the Table below for details). The increase in WLU over the past three years has also been stable, at approximately 7% per annum.

The operational indexes calculated per WLU have undergone a significant improvement in recent years. This is especially visible in the WLU calculations concerning labour costs – the index has systematically declined over several years, since the stable labour costs have contributed, thanks to the targeted investments, in increases in the number of airport operations. However, the rapid rise in the number of operations has only slightly overtaken the increase in income, as a result of which the value of that parameter fell slightly last year.

²⁹ T. Ülkü, *Efficiency of German Airports...*, op. cit., p. 22.

Table 5. Comparison of selected indexes from 2009–2011 concerning operations at the Munich airport

Position	2009	2010	2011
Costs (excluding depreciation costs) calculated per WLU	lack of data	25,27	21,98
Depreciation costs per WLU	3,58	4,15	3,79
Labour costs per WLU	8,86	8,19	7,57
Revenue per WLU	28,10	28,85	28,26
Aeronautical revenue per WLU	14,67	15,06	14,70
Non-aeronautical revenue per WLU	13,43	13,79	13,57
EBITDA per WLU	10,13	11,96	0,00
CAPEX per WLU	2,59	2,31	3,55
EBITDA as a percentage of revenue	0,36	0,41	0,00
Share of non-aeronautical revenue in total revenue	0,48	0,48	0,48

Source: Own compilation based on data from annual reports.

6. Manchester

6.1. Brief description

The Manchester airport (Manchester Airport PLC – IATA code: MAN) is the fourth largest airport in Great Britain. It was officially inaugurated in June, 1938. Today the airport consists of two parallel take-off runways of 3048 meters each, three passenger terminals, and a cargo terminal. The airport is easily accessed by train routes and a highway network. In 2011, the airport serviced 17.7 million passengers, which was a slight decline with respect to the previous year (mostly attributable to the volcano eruption in Iceland). The airport handled 116,700 tons of freight in 2011 (5th place in Great Britain). More than 100 airlines operate out of the airport, offering connections to 225 destinations worldwide – more than any other airport in Great Britain. The managing body of the airport envisions that it will service 50 million passengers a year by 2030.

The Manchester airport was one of four in Great Britain which was designated as a price-controlled airport. The airport authorities petitioned the Department of Transportation to be de-designated. Following negotiations carried out on a broad scale and with a wide range of parties – which included the CAA, airline carriers using the Manchester airport, companies operating on the airport premises, as well as international organizations such as IATA - it was recommended that the airport be de-designated. This was accomplished by the Order nr. 2702 of 15 October 2008 modifying the *Economic Regulation of Airports (Designation) Act*. The de-designation took effect on 1 April 2009, and since that time the Manchester airport can establish its own airport fees and charges without regulation by the CAA.

6.2. Ownership structure

The Manchester airport is the property of the Manchester Airports Group PLC (MAG), which is the second-largest airport management firm in Great Britain (and the largest in Britain). Besides Manchester, it manages the airports in Bournemouth, Humberside and East Midlands. The Manchester airport is however rather atypical for Great Britain in that it belongs to the local authorities, while most airports in Great Britain belong to private companies or companies which are self-governed. Fifty-five % of the stock in MAG is owned by The Council of the City of Manchester, while nine surrounding districts own the remaining shares (5% each).³⁰

6.3. Business model

If one speaks of the activities of the Manchester Airport PLC, it may be said that, like most airports, its fundamental activities – passenger and client servicing and IT services – are carried out under the supervision of the managing body of the airport. It is worth noting however that the managing body of the airport is not involved in commercial activities (retail shops) nor in the delivery, storage, and supply of fuel for aircraft. These activities are entirely carried out via concession. Freight and baggage services are all subcontracted out, as well as air traffic control activities.

³⁰ These are: Bolton, Bury, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford, Wigan.

Chart 2: Operating activities at the Manchester airport divided into categories based on the method of their execution: by the managing authority; contracted out (outsourcing); grant of a concession; or lack of involvement by the airport*

Activities	Basic activities	Passengers' marketing	Baggage control	Access control	Solving of flights problems	Airport maintenance	IT	Vehicle servicing	Fire prevention	Traffic control	Parking management	Retail sales	Real estates' management	Sanitarian services	Passenger service	Baggage service	Freight service	Fuel delivery	Fuel storage	Police	
Carried out by the airport managing body	A	A		A	A	S	A	A	A		S		S	A	A	S			S		Y
Out-sourced			A			S				A	S		S			S	A	S			
By concession												A								A	

* A – handled completely by the airport operator; S – partly handled by the airport operator; Y – coverage of the costs of police functions at the airport.

Source: *Airport Statistics 2007/8*.

The company MAG also manages and oversees the development of real estate located on the territories of all the airports it manages.

6.4. Finances

The overall revenue of the airport for the accounting period 2010/2011 totalled nearly 260 million British pounds, while operational costs for the same period totalled just under 210 million pounds, which produced an operating profit of more than 50 million pounds. Labour costs, as a percentage of overall costs, fell slightly during this period, thanks to infrastructure investments undertaken earlier. For the previous three years the airport's income had systematically declined, but according to the most

recent annual report, after adjusting for the effects of the volcano eruption in Iceland, the Manchester airport managed to achieve a small increase in income compared to the previous year. Income from aeronautical revenues and non-aeronautical revenues changed in a similar fashion, and it's difficult to determine the precise factors leading to such a result. Similarly, the number of airport operations and WLU systematically declined during this period, although income from non-aeronautical revenues declined to a lesser extent.

Income from non-aeronautical revenues constitutes approximately 49% of the airport's income. Within the context of the activities carried out by the entire MAG group, in which the Manchester airport has the dominating share,³¹ the income structure for the accounting period 2010/2011 also reflected non-aeronautical revenues 49% (127 million pounds), hence the income structure of the Manchester airport is similar to that of the entire capital group. Thanks to the airport investments alluded to earlier, the airport managed to slightly increase its index of income per WLU, but the overall change must be considered minor.

The investments currently being implemented under the project title 'Manchester Airport Enterprise Zone' are aimed at creating, within 10–15 years, the largest business centre in the region. MAG is implementing a part of this project – Airport City – with an estimated value of 650 million pounds.

³¹ Usually (depending on the year) around 75%.

Table 6. Comparison of selected indexes from 2009–2011 concerning operations at the Manchester airport

Position	2009	2010	2011
Costs (excluding depreciation costs) calculated per WLU	lack of data	lack of data	lack of data
Depreciation costs per WLU	lack of data	1,88	1,97
Labor costs per WLU	lack of data	2,39	2,40
Revenue per WLU	11,59	10,72	10,77
Aeronautical revenue per WLU	5,42	5,52	5,50
Non-aeronautical revenue per WLU	6,16	5,20	5,27
EBITDA per WLU	3,67	3,60	3,55
CAPEX per WLU	lack of data	2,30	2,19
EBITDA as a percentage of revenue	0,32	0,34	0,33
Share of non-aeronautical revenue in total revenue	0,53	0,49	0,49

Source: own compilation based on data from annual reports (for comparison purposes the data from the reports was converted from pounds into Euro based on the exchange rate for the last day of the year).

7. Zurich

7.1. Brief description

Zürich-Kloten (IATA code: ZRH) is the largest airport in Switzerland. It was placed in operation in 1948, replacing the military airport of Dübendorf-Wangen. The airport was put into operation in several stages, connected with the changes in ICAO norms and the need to adapt to continuing modifications in various versions of the project. The evolving stages, which included drainage of wetlands, (1961, 1975, 1985, and 2004) paid off in the construction of further take-off runways and terminals as well as expansion of the airport's infrastructure. At the conclusion of 2011 a project was elaborated to expand the airport to include a new building which will function as a commercial and business centre. This investment is planned for the years 2012–2017. At present the Zurich airport has two

terminals and services almost 24.5 million passengers annually, carrying out approximately 280,000 airport operations (data from the 2011 annual report of Flughafen Zürich). The airport possesses a maximum capacity of 36 million passengers, which leaves it with plenty of room for maneuver at the present time in terms of development.

The Zurich airport currently services 184 destinations, of which 125 are in Europe. Traditional airlines account for 87% of its passengers, with only 12% currently making use of low-cost airlines. In terms of airport operations, however, the figures are somewhat different: 75% for traditional airlines and 25% for low-cost airlines. Almost one-half of all passengers are of Swiss and German nationality, and 39% of all flights are of a business or official nature.

7.2. Ownership structure

Flughafen Zürich AG is both the owner and managing body of the Zurich airport. The majority shareholder of the company is the canton of Zurich, while the remaining minority of shares are spread out among a number of small shareholders.

The company was created on 1st April 2000 by the merger of Flughafen-Immobilien-Gesellschaft (FIG), the major shareholders of which were the canton of Zurich (23%), the city of Zurich (18%), and the Directors of the Zürich airport (Flughafen direction Zürich, FDZ), which were controlled by the canton. Following the merger the new company was called *Unique (Flughafen Zürich AG)*, but as a consequence of a rebranding process in 2010 the name “Unique” was reserved exclusively for activities outside the territory of Switzerland. The merger of the two companies resulted in a company with an increased capital structure from 70 million Swiss francs to 245 million Swiss francs (i.e up from about 44 million euro to 154 million euro – based on the exchange rate from 3rd April 2000).

Initially the canton of Zurich owned 78.1% of the shares of the company Flughafen Zürich AG, but following ownership transformations within the company and changes to existing regulations, the canton’s ownership share fell to its current level of 33.36%. The second major shareholder is the city of Zurich, with 5.03% of the shares. A separate subsidiary company was also set up – Unique Airports Worldwide AG – assigned the competence to manage airports outside the territory of Switzerland. At the present time this company owns shares in three airports in Chile, one in Venezuela, and one in India. It also owns another subsidiary company (created as a joint venture capital company with the Brazilian firm Camargo Correa and the

Chilean firm Gestion e Ingenieria), which operates in Colombia, Brazil, Honduras and Curacao.

7.3. Business model

The airport management company Flughafen Zürich AG is registered on the Zurich stock exchange (until April 2010 under the name ‘Unique’). It is also the owner of the Zurich airport.

Its foreign collaboration projects are based either on shares it owns in companies managing airports abroad (India, Brazil, Chile), or on so-called *technical service agreements* (Colombia, Honduras).

The Zurich airport employs approximately 25,000 persons, including about 1,500 in the airport management company, and the rest in the 270 other entities carrying out operations in the airport (data for 2011). Since 2006 the level of employment has remained basically unchanged.

The company’s activities are divided into four main branches: marketing and real estate management (including investments into infrastructure); finances (mainly concerning management of the company’s financial affairs and maintaining liquidity); services (in particular this concerns non-aeronautical activities, but it also concerns matters of administration of the various companies); and operations (servicing of passengers and aircraft and the entire range of airport operations). The directors responsible for each of the above-mentioned branches of activity answer directly to the Director of Operations, and indirectly to the Board of Directors of the company.

7.4. Finances

In 2010 the company had a total revenue of 903 million Swiss francs (about 725 million euro), which represented an increase of over 5% from the previous year. Non-aeronautical revenues constituted almost 36% of total income, which represented a 2% decline in the share of total income from the previous year.

Labour costs rose rather significantly in the three most recent years, but one of the reasons for this was the change in currency exchange rates – the same costs, if converted into euro, underwent considerably less change.

Since 2006 the income of the company has shown a constant positive trend, with the exception of a slight decline in 2009, which was the result of a decline in non-aeronautical revenues and a slight decrease in the number of overall operations. Aeronautical revenues have shown a steady increasing trend, with the exception of a temporary stagnation in 2009. EBITDA has

also risen continuously in the most recent three years. The company has also managed to increase the number of its airport operations year by year, which has resulted in a permanent rise in the WLU indices. Thanks to this factor, the increase in labour costs expressed in WLU have risen only slightly. At the same time, and for the same reasons, non-aeronautical revenues, expressed in WLU, has undergone only a slight decrease in the past three years.

Table 7. Comparison of selected indexes from 2009–2011 concerning operations at the Zurich airport.

Position	2009	2010	2011
Costs (excluding depreciation costs) calculated per WLU	lack of data	12,32	12,14
Depreciation costs per WLU	5,02	5,66	5,81
Labour costs per WLU	3,32	3,68	4,69
Revenue per WLU	21,76	25,61	26,14
Aeronautical revenue per WLU	13,40	15,97	16,73
Non-aeronautical revenue per WLU	8,36	9,64	9,41
EBITDA per WLU	10,67	13,30	14,00
CAPEX per WLU	lack of data	12,17	13,37
EBITDA as a percentage of revenue	0,49	0,52	0,54
Share of non-aeronautical revenue in total revenue	0,38	0,38	0,36

Source: own compilation based on data from annual reports (for comparison purposes the data from the reports was converted from Swiss francs into Euro based on the exchange rate for the last day of the year).

8. Warsaw Chopin Airport

8.1. Brief description

The Warsaw Chopin Airport (IATA code: WAW) is located in the Włochy district of the city of Warsaw, just 8 kilometres from the city centre. The airport was first built in 1920 on the Mokotowski Field, and the ceremonial

transfer of that airport to the present location in the Okęcie territory took place in 1934. The airport was known as Warsaw Okęcie until 2001, when its name was changed to the Warsaw Chopin Airport. The Etiuda Terminal (initially under a different name) was placed into operation in 1979. In the years 2004-2006 a new terminal was constructed, and in 2009 Etiuda was closed. The last large infrastructural project concluded was the placement into operation in 2011 of the Southern pier. The Warsaw Chopin Airport is the headquarters of the Polish flagship airline PLL LOT.

The Warsaw Chopin Airport handles almost one-half of all passenger service in Poland. In 2011 it serviced 9.3 million passengers, which represented a 7.2% increase from the previous year. The airport's present maximum capacity (including environmental determinants) is approximately 15 million passengers annually, which gives it some room for maneuver in terms of its future plans for development. The passenger movements in 2010 also rose in relation to previous years, following an earlier small decline due to the volcanic eruption in Iceland. The Warsaw Chopin Airport serves approximately 100 destinations.

8.2. Ownership structure

The State enterprise Polish Airports (PPL, for the Polish acronym) is the owner and manager of the Warsaw Chopin Airport. This company was created on the basis of the Act of 23rd October 1987, aimed at continuing the activities of the Civil Aviation Authority.

Currently PPL manages two airports: the Warsaw Chopin Airport and the Zielona Góra Airport. It also owns shares of airports converted into commercial companies in Bydgoszcz, Gdańsk, Katowice, Kraków, Modlin, Poznań, Rzeszów, Szczecin, Szymany/k. Szczytna and Wrocław.

8.3. Business model

As a state enterprise, PPL is not registered on the Warsaw stock exchange, although projects for commercializing the company have been in the works for a number of years. In 2012 intensive work was begun on the privatization process and it seems likely this will come to fruition in the near future.

PPL collaborates in its management with entities managing other airports in Poland,³² working both with subsidiary companies (as airport

³² The three next-largest, in terms of passengers serviced, are: Gdańsk, Wrocław, Kraków.

managing bodies) as well as with independent companies (for example, in groundhandling). It also owns shares in some commercial companies servicing some airports. PPL itself employs about 2,000 workers.

Being a state enterprise PPL is subject to detailed legal regulations, which makes it difficult to apply the standard measures and indices used to assess the work of other companies managing airports throughout Europe.

8.4. Finances

The data published by PPL are divided into aeronautical revenues, and ‘activities’. In its annual reports the company shows the major parameters of its activities in terms of the activities of various entities, which taken together allows for an overall general description of the company’s activities.

In 2009, 98% of the company’s income came from the Warsaw Chopin Airport, and totalled 615 million PLN (yielding a net income of approximately 52 million PLN, which according to the 2010 annual report increased to 60 million PLN). In recent years the airport in Rzeszow (now a dependent entity) has gained in importance in PPL’s activities, but its share in the overall activities of PPL continues to be in the single digits. In its 2010 annual report PPL reported an overall net income for all its activities of approximately 130 million PLN.

Labour costs have remained at a stable level in recent years, even as income has increased. Aeronautical revenues have increased faster than non-aeronautical revenues,³³ which is reflected in the index of income based on categories of activities, calculated on the basis of WLU – the index for aeronautical revenues slightly increased. Only slightly however, because the WLU itself rose in a significant manner. As a result, the labour costs, calculated using WLU, significantly decreased.

In the international compilation of data and ratings for 2010, published by the monthly journal “Airline Business”, PPL is ranked 84th. This ranking took into consideration indices such as: turnover, operational results, operating profit, and net profit.

³³ Although the general structure of income has not undergone any significant change.

Table 8. Comparison of selected indexes from 2009–2011 concerning operations at the Warsaw Chopin Airport.

Position	2009	2010	2011
Costs (excluding depreciation costs) calculated per WLU	11,54	11,29	10,94
Depreciation costs per WLU	2,68	2,62	2,54
Labour costs per WLU	7,39	6,99	5,62
Revenue per WLU	16,98	17,13	16,10
Aeronautical revenue per WLU	12,11	12,25	11,61
Non-aeronautical revenue per WLU	4,87	4,88	4,48
EBITDA per WLU	data unavailable	data unavailable	5,16
CAPEX per WLU	15,56	16,97	2,75
EBITDA as a percentage of revenue	data unavailable	data unavailable	32%
Share of non-aeronautical revenue in total revenue	29%	29%	28%

Source: own compilation based on data from annual reports (for comparison purposes the data from the reports was converted from Polish zlotys (PLN) into Euro based on the exchange rate for the last day of the year).

IV. Comparison of the strategies adopted by selected European airports

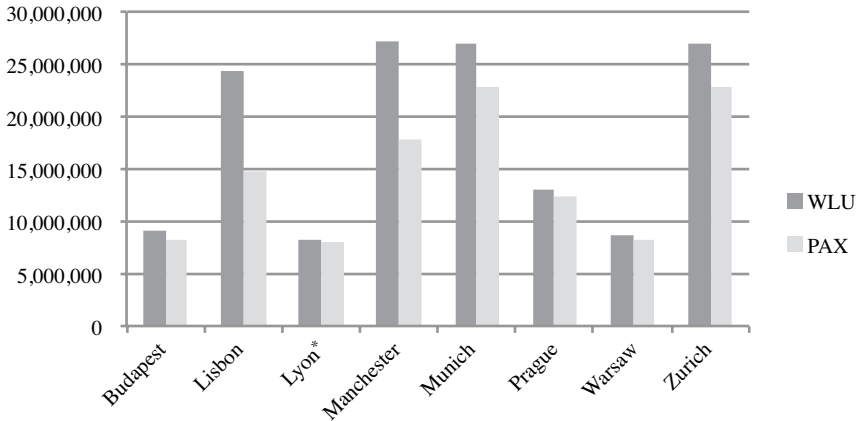
1. Comparison of the scale of airport movements in the analysed airports

In order to achieve relevant research results we have focused on a comparative analysis of the financial and operational results achieved by the airports selected for our study. The common indicator adopted for our study is the Work Load Unit (WLU), based on the formula: Work Load Unit = 1 passenger or 100 kg of cargo. In this way our financial categories can be reduced to costs per passenger or unit of cargo at a given airport. Another advantage of this methodology is the relatively easy access to airport data which can be calculated based on WLU.

In the charts below we present the operational data of the airports selected for this study. It may be observed that, based on similar characteristics in

terms of size and aircraft movement, they can be divided into two groups: Prague, Budapest, and Warsaw (Central Europe); and Zurich, Munich, Lyon, and Manchester (Western Europe). The Western European airports, depending on the category chosen for comparison, are roughly two to three times larger than the Central European group (see Chart 3). From the perspective of our further analysis based on the comparison of financial results, it is interesting to try and determine the extent to which economies of scale affect the results. It is generally assumed that the profitability of the large infrastructural investments necessary to improve modern airport operations are related to the scale of activities undertaken at a given airport.

Chart 3. Data concerning passengers and WLU in the analysed airports in 2011

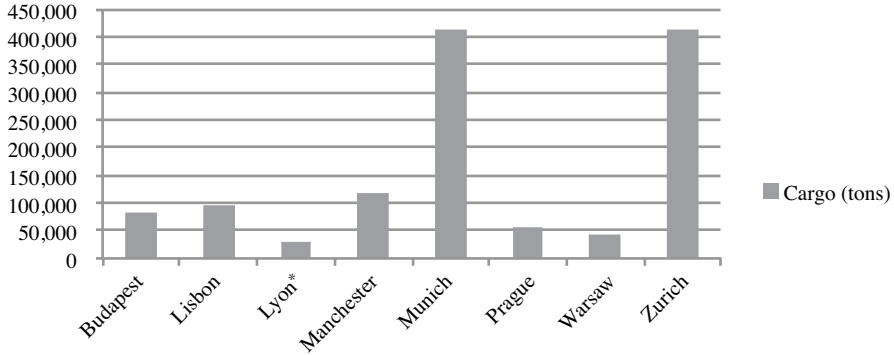


* Data for 2007.

Source: own calculations based on data from the selected airports.

The data concerned freight handling is also quite varied, however in this instance the variations are also observable for the Central European airports (see Chart 4). The larger cargo loads for the Munich and Zurich airports are visible, which, taken together with the investments into logistical centres in these airports, may indicate a strategy on the part of the airport operators to increase the share of cargo transport in the airports' overall operations. It should be noted that the airports located in so-called 'Old Europe' continue to have an advantage in terms of generating cargo transport, which aids them in making efficient use of airport infrastructure. The exception in this respect is the Budapest airport, the cargo movements of which are comparable to those in Lisbon or Manchester.

Chart 4. Cargo (freight) movements (in metric tons) for the selected airports in 2011



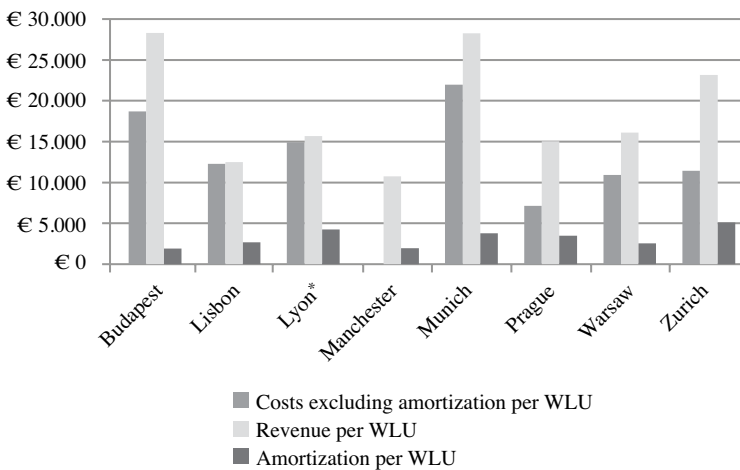
* Data for 2007.

Source: Airport reports.

2. Income and costs calculated per WLU

In our first compilation (Chart 5) we analyse the basic financial categories, i.e. total revenue, costs without depreciation, as well as depreciation calculated per WLU. This approach enables us to observe the fundamental differences in the financial results for the analysed organizations.

Chart 5. Income, costs, and depreciation, calculated per WLU, for 2011



* Data for 2007.

Source: Airport reports.

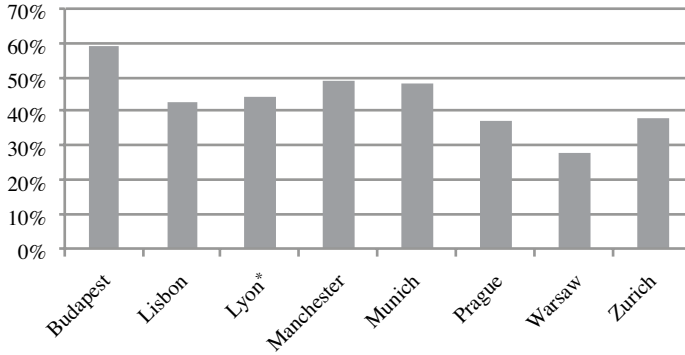
The largest income per WLU was achieved in Budapest, Munich, and Zurich. Budapest's place in this group may seem surprising, and raises the key question of the source of such an attainment. The next three positions are occupied by Lyon, Prague, and Warsaw. The income of the Lisbon and Manchester airports is slightly lower. The low position occupied by the latter gives pause for thought. In our opinion it results from and reflects the highly competitive air transport market in Great Britain, forcing airports to offer the most competitive prices possible.

The effectiveness of airport operations may be reflected in the costs without depreciation, calculated per WLU. In this respect the Prague and Warsaw airports have the lowest costs, while Budapest and Munich have the highest. The Zurich airport presents an interesting case in this respect, inasmuch as its relatively low costs result not from actual costs per unit, but rather from the scale of activities of the airport. It may be observed that lower costs tend to be paired with higher income per WLU. Depreciation costs per WLU, on the other hand, reflect past investments, which should bring added value to the airport. In this instance, with the exception of Zurich most of the airports show similar results per WLU.

3. Revenue from aeronautical revenues and non-aeronautical revenues

In order to draw appropriate conclusions, our further analysis requires a deeper investigation into the structure of airports' revenue, dividing it into revenue from aeronautical revenues and from non-aeronautical revenues. As can be seen from Chart 6 below, the airports may be divided into two groups – one with non-aeronautical revenues of up to 35%, and one with non-aeronautical revenues between 35% and 50%, with Budapest as a separate case. The first group may be considered to be airports which are not yet making use of their full management potential. They have good possibilities to increase their revenues not only in absolute terms, but also as calculated per WLU. This is a critical question for those firms which are forced into making investments into permanent assets. The degree of return on investment will be dependent on the economic efficiency of the assets into which the investments are made. The second group of airports is maintaining non-aeronautical revenues at the average European level of about 50–55%. The high position of the Budapest airport in this respect, with non-aeronautical revenues of almost 60%, helps explain its similar high position in income per WLU.

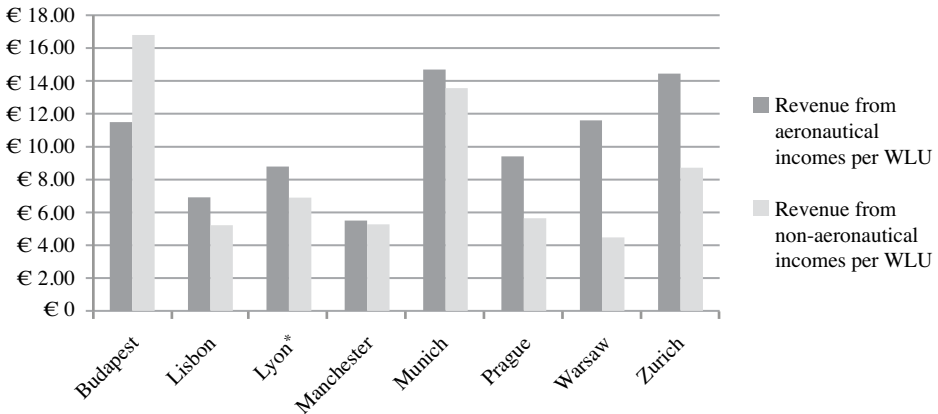
Chart 6. Aeronautical revenues and non-aeronautical revenues as a share of total airport revenues in 2011



* Data for 2007.

Source: Airport reports.

Chart 7. Revenue from aeronautical and non-aeronautical revenues calculated per WLU for 2010 (in Euro)



* Data for 2007.

Source: own calculations based on data supplied by the airports.

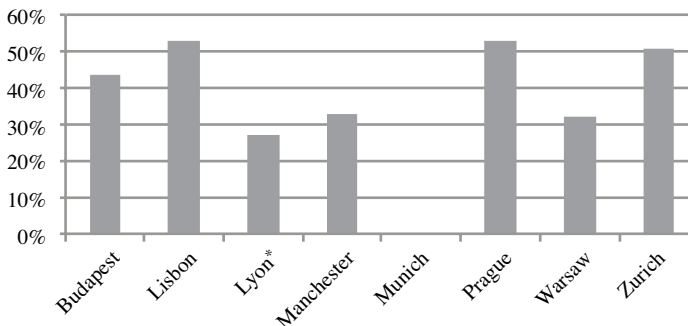
Next, analysis is required of aeronautical and non-aeronautical revenues calculated per WLU. With regard to aeronautical income, use of the WLU unit should not give rise to controversy, since it directly reflects the income generated by the airport per “production unit”, so to speak. On the other hand, analysis of non-aeronautical revenues per WLU is an indirect comparison, reflecting the scope of “sales” generated using the

airport's non-aviation potential based on units of its aviation operations, i.e. passenger and cargo movements. A low index will be an indication that the airport's potential is not being exploited in proportion to the scale of the business movements within the airport. The index will also indirectly indicate the scale of income generated by particular types of airport activities. As can be seen from Chart 7, there is a much smaller variation between the individual indices for each of the airports analysed than in the previous charts, where for example the income per WLU was three times higher for Budapest than for Manchester, even though the latter is three times larger than the former. This demonstrates that smaller airports can attain relative incomes comparable to larger ones. In this respect the income of the Warsaw Chopin Airport from aeronautical revenues seems quite advantageous.

Profitability indicators

The next chart shows earnings before interest, taxes, depreciation, and amortization (EBITDA) for the selected airports. The EBITDA index, expressed as a percentage of sales, indicates the effectiveness of airport authorities in managing an airport's costs and income. Obviously, the higher the index the better the result. Here the best results are attained by the Lisbon, Prague, and Zurich airports, with lower ratings achieved (in order) by Budapest, Manchester, and Warsaw (see Chart 8). It's interesting to note that airports of widely varying sizes can achieve similar EBITDA indices. This would suggest that economies of scale may also have a reverse effect, increasing per unit costs together with the increase in the scale of activities.

Chart 8. EBITDA as a percentage of earnings for the analyzed airports in 2011



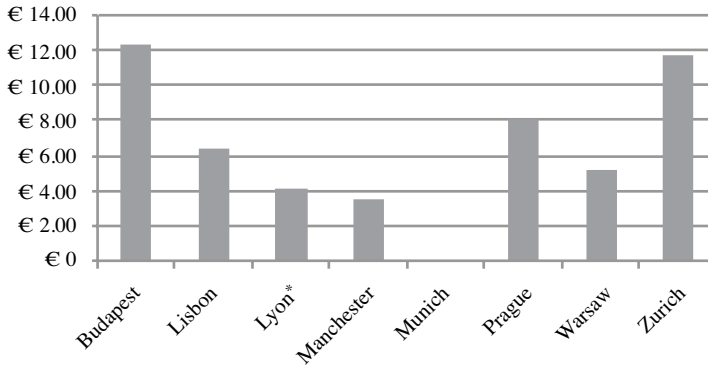
* Data for 2007.

Source: annual reports.

In addition to the percentage index, which takes into account income and costs, it is also worth returning to index based on number of passengers and weight of cargo serviced, i.e. WLU. Thanks to this index we can assess how profitable are the clients serviced by each airport.

As in the earlier chart with respect to WLU, the Budapest airport occupies first place, which is attributable to its large percentage of non-aeronautical revenues. Zurich also maintains a high position, while the remaining airports have indices below 8 euro per WLU (see Chart 9 below). If they are unable to increase revenues by raising prices or increasing the number of clients, they will have to search for a way to reduce operating costs.

Chart 9. EBITDA calculated per WLU for 2011



* Data for 2007.

Source: annual reports.

The situation with respect to the Manchester airport is interesting. In the financial charts above, it has decidedly the weakest position among the selected airports, even though it is the largest of them in terms of passenger movement. In 2010, the airport was released (“de-designated”) from its strict supervision by the British Transportation Agency, which was imposed on it owing to the discounts it offered to passengers and airlines. It can be seen that the competition among European airports is leading not only to a distinct drop in aeronautical revenues, but in operational profits as well. This should cause airports to carefully consider their aims when making decisions about investments into infrastructure.

V. Final conclusions

Our comparative study is aimed at identifying and analyzing the strategies employed by medium-sized European airports. The aviation branch of industry, and in particular airports, are governed by their own specific sets of laws and assumptions, which must be taken into account when carrying out any analysis trying to reach relevant conclusions. An analysis of the hard financial data, based on the indicators described in this study, demonstrates the excellent position of the Vienna airport, although the Budapest airport, with its well-defined strategy, achieves higher results in calculations per WLU. For example, its profits before taxes and depreciation in 2011 amounted to 12.29 euro per WLU, while the same index for Manchester was only 3.55 euro. This example indicates that even small airports, if they take into proper account measures of effectiveness, can compete with large airports. What appears most important is the elaboration of a clear development strategy and persistence and consequence in its realization. In order to do this, however, it is necessary to understand the fundamental interdependencies governing the aviation branch. This is a branch which, firstly, is characterized by massive outlays, which are necessary in the first instance for the proper functioning of the entire branch, and secondly to meet the need for investments to keep up with the increasing demand and the changing legal regulations, for example in the area of environmental protection. Each investor, guided by ordinary business principles, must assess each proposed investment taking into account the risks associated therewith. This can be illustrated by the results of wide-ranging research carried out by Anne Graham,³⁴ who indicates that investments into airports are significantly more attractive than investments into airlines. In the years 2006-2007, the 100 largest airports and groups of airports attained a 16% profit margin, while the profit margin of the 150 largest airlines for the same period averaged only 4%. This has led some to claim that airports use their monopoly position to collect unjustifiably high fees for the activities they carry out. Anne Graham, however, points out that in order to obtain a full picture of the situation it is necessary to examine indicators measuring return on investments for the invested capital, whereby profits are compared to the capital contributed by businesses. For example Airport Councils International (ACI) cites the research of McKinsey, which establishes while that the ROCE (Return on Capital Employed) index is 10% for airports

³⁴ Anne Graham, *Managing Airports: An International Perspective*, Third Edition, Oxford: Butterworth-Heinemann imprint of Elsevier 2008, p. 54.

and 6% for airlines, in fact a more precise analysis of the data indicates that the real figure is 4.6% for airports, while airlines do not fully cover their investment costs into the airport infrastructure which they use.³⁵

Secondly, the aviation branch is characterized by monopolistic features combined with strong competition. Monopolies occur when, in a given location or within a specified area, there is only one airport capable of providing the services the market requires. In most large cities, with the exception of metropolises like London or Paris in Europe or Chicago or New York in the USA, there is usually only one airport servicing the entire passenger and freight market for the area. On the surface it may seem that competition strategies are not applicable to such airports. In fact however the airports must, particularly in light of their massive outlays on and investments into infrastructure, constantly strive to increase the number of passengers serviced, especially by offering incentives to airlines to establish new and more flight connections from a given location. This plays out on two levels – establishing new direct flights and serving as transit hubs. In both situations, the airport's position is highly dependent on collaboration with one or more airlines. One could also mention here other development strategies, such as increasing freight handling by investments aimed at attracting courier companies.

The current state of research indicates that local competitors apply different strategies, taking advantage of positions of strength where possible, or seeking strategic partnerships, particularly with airlines, having the aim of establishing new strengths. Interestingly, despite the monopolistic character of the market, most airport strategies fall within the positioning strategy described by Michael Porter.³⁶ The Zurich airport aims at providing a wide and diverse range of services, while the strategy of the Manchester airport is to be the low cost leader in a wide market, and Budapest's strategy is focused on specific segments of the passenger market together with strengthening the number of connections offered.

Thus one may postulate the following trends in planned activities: The first option is to integrate the airports operating activities with those of airlines. Such integration does not necessarily require the establishment of common or combined legal entities, but it does require commitments on the part of investors in the privatization process to maintain certain scales and structures in air traffic. An example would be the merger into

³⁵ Ibidem, p. 56.

³⁶ Michael Porter, *Strategia konkurencji. Metody analizy sektorów i konkurentów [Competitive Strategy: Techniques for Analysing Industries and Competitors]*, PWE, Warszawa 1994.

one company of the Ruzyne airport in Prague and CSA, the Czech national airline. This merger has given rise to some controversy with respect to EU law. From the point of view of the owner it is designed to increase the value of both entities, and in particular to guarantee the future development of the airport by making it difficult to reduce the airport to the role of acting as a supplier of passengers to other airports.

Another trend is toward the establishment of local hub airports, which allows for expansion into the transit market. This strategy however requires the strong engagement of a business partner in the form of a major airline. In addition, it is only an option after an airport has attained a certain size and scale, for example in the airports in Vienna, Zurich, or Copenhagen, which service almost 20 million passengers annually. Another problem can be the lack of a flagship airline headquartered at an airport, as demonstrated by the problems associated with the bankruptcy of the Malev airline. A strategy of this type fits neatly into the typology of strategies elaborated by Porter, where the strategy of a cost leader or leader in diversified services first requires the attainment of a certain threshold size or scale of activities.

A third trend is toward a specialization strategy, called in the professional jargon a “concentration strategy”. A good example is the takeover of the Budapest airport by HOCHTIEF AirPort. In addition to strengthening the range of passenger connections, the new owner of the airport has set itself a goal of developing the airport’s freight handling activities. This is manifested by the re-construction of the cargo terminal and warehouses, as well as the extension of flight networks. Although the Budapest airport is the smallest in our study in terms of passenger movement, it services 62,000 tons of cargo annually (for comparison purposes, the Warsaw Chopin Airport handles 32,000 tons and Prague 42,000). This adopted strategy is based on the location of the airport and its developmental possibilities. Thus the airports in Budapest and Munich, being located far from cities, have a competitive advantage over airports like Warsaw or Prague, which would encounter difficulties in extending take-off runways.

Filip Czernicki*

Chapter X

Airport Cities – a fashion or a necessity?

1. Introduction

The author of the architectural theory known as “Airport City” is Professor John D. Kasarda of the University of North Carolina Kenan Flagler Business School. For a number of years Professor Kasarda has promoted the concept of developing cities built around airports, described in his book entitled: “Aerotropolis. The way we’ll live next.”¹

The concept of an Aerotropolis is wider than the idea of an Airport City. As Professor Kasarda acknowledges, he is not the author/inventor of the word “Aerotropolis,” a word he heard for the first time during his visit to the Zhuhai province in China, where plans were drawn up for building a small city around a regional airport. Professor Kasarda used the concept himself for the first time in an article he wrote for “Urban Land” in 2000. As he says in the introduction to his book: “Not so long ago, airports were built near cities, and roads connected the one to the other. This pattern – the city in the centre, the airport on the periphery – shaped life in the twentieth century, from the central city to exurban sprawl. Today, ubiquitous jet travel, round-the-clock workdays, overnight shipping, and global business networks have turned the pattern inside out. Soon the airport will be at the centre and the city will be built around it,

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¹ John D. Kasard, Greg Lindsay, *Aerotropolis. The way we’ll live next*. Farrar, Straus and Giroux, New York 2011.

the better to keep workers, suppliers, executives, and goods in touch with the worldwide market.”

According to Professor Kasarda’s theory, an aerotropolis may include:

- business and technology parks;
- logistics parks and distribution centers;
- industrial parks and light manufacturing;
- retail and wholesale merchandise marts;
- info-communications and technology centres;
- bioscience and medical facilities;
- higher education campuses;
- hotel, convention and entertainment centres;
- large mixed-use commercial/residential developments.²

The drawing below illustrates Professor Kasarda’s theory and is also used as a model for an aerotropolis in the ‘greenfield project.’



In accordance with Professor Kasarda’s definition, an aerotropolis is a combination of a large airport, a well-planned urban development (city), and a shipping facility and business hub. Just as city agglomerations (sometimes termed metropolises) have their centre, so too Airport Cities would constitute the centres around which aerotropolises would arise. Although it’s difficult to argue with the fact that cities change together with the lifestyle changes of their inhabitants – and today in accordance with changes in world trade – nonetheless the model presented by Professor

² For more on this topic, see John D. Kasard, Greg Lindsay, *Aerotropolis...*, op. cit.

Kasarda seems a little too futuristic at the present. Thus, in order not to stray too far into unknown territory, this chapter is focused above all on the narrower concept of an “Airport city”. The architectural vision that airports will become the hubs around which contemporary agglomerations will arise seems much closer to the actual current demands of the business world. This requires examination into a connected current issue: to what extent are and to what extent should airports be investing into land use planning of the territory surrounding their airports? As one lecturer joked during an international conference devoted to the development of the airport branch of industry: “An airport is a business phenomenon. Can you think of any other branch of industry which brings in so much revenue, whose main clients endure the same losses year after year?” While this way of stating the problem is obviously somewhat simplistic, the question may also be answered in a simplistic way – airports have found the answer to the financial crisis in the airport branch by diversifying their sources of income.

New urban planning models have been incorporated into the planning for initial airport investments into green fields in places such as Hong Kong, Incheon, Kuala Lumpur, or Dubai. But terminals already exist which meet the contemporary planning model standards, such as for example the Singapore Changi Airport, which went into use in 1981 and includes a cinema complex, fitness centre, and even a tropical park with butterflies. The Schiphol Airport in Amsterdam is also often presented as a model of perfect organization and construction in its building of a transit terminal in a hub fashion. Following its reconstruction in the 1990s it added functions such as becoming a filial art gallery of the famous Rijksmuseum, as well as the operation of a casino.

International developments surrounding the idea of an Airport City are discussed each year at the annual conference “Airport Cities. World conference and Exhibition.” The first in this cycle of conferences took place in Orlando, Florida (USA) in 2002. Since that time additional conferences have been held in Pittsburgh, Pennsylvania, (USA), Dubai (UAE), Detroit, Michigan (USA), Rome (Italy), Hong Kong (China), Frankfurt (Germany), Dallas/FortWorth, Texas (USA), Athens (Greece), Peking (China), Memphis, Tennessee (USA), and in 2012 in Denver, Colorado (USA). Upcoming conferences are planned for Ekurhuleni (Republic of South Africa) and Kuala Lumpur (Malaysia). The largest conference to date was the most recent one in Denver, where 800 conference participants gathered, representing 110 airports in 45 countries. Each year the number of participants increases and among the lecturers and participants one may encounter a large number of heads of airports and persons with key positions

in the air industry. The increasing popularity of these conferences reflects the growing interest in the concept of Airport Cities throughout the globe.

In Poland the first conference devoted to the development of Airport Cities took place on 5 December 2011 in the Pepsi Arena stadium in Warsaw. Seminars organized by the leaders of business consultation firms as well as law firms attracted the major representatives of airports in Poland, consulting firms in the industry, and investment banks, demonstrating in emphatic fashion that the world trend towards Airport Cities has reached Poland and will soon be incorporated into the developmental strategies of regional airports. Interest in the idea is growing rapidly among investment counselors and developers, who see the enormous potential of the concept.

2. Why Airport Cities?

Since time immemorial, civilizational progress has been concentrated along trade routes and transportation lines. Thanks to the silk route, the spices route, and even the amber route through Poland, metropolises arose and trade flourished. In ancient times the trade routes were almost exclusively by land, but later maritime trade rapidly developed and port cities became economic giants and even governments unto themselves. Together with the industrial revolution and steam power, railroads became the next great magnet attracting entrepreneurs and, what goes with them, goods trade. Railroad centres became the next bustling metropolises, and the hub cities of railroad routes became vast commercial centres for doing business of all types. In the last two centuries railroad stations became the centres, both literally and figuratively, of nearly every city and became not only architectural landmarks, but above all the centre of expansive trade and services districts.

This state of affairs still dominated in most parts of the world throughout the twentieth century, but will the 21st century mark yet another ‘revolution’? People now travel at speeds of not tens or even hundreds of kilometres per hour, but at speeds exceeding the speed of sound. Today time is the main “commodity” which decides who does business with whom, and where, when, and what kind. Airplane travel is more universal and faster than ever before. Since time is so precious, and airport capacity and efficiency is calculated in terms of numbers of passengers processed and value and/or weight of services over time, has the time not come to transform airports into the commercial centres of contemporary civilization? In the 1970s urban planners and developers were still focused on building airports on the peripheries of the hives of humanity, i.e. cities. But those days are

becoming history. Today the noise of airplanes is becoming ubiquitous, and the new generation not only accepts the proximity of airports, but in many cases treats having an airport nearby as a major advantage. The significant price reductions in air carrier transport mean that air travel is no longer the domain of a rich and exclusive club, but has become ever more a natural component of contemporary and urban life.

It is no different with business – in fact one may postulate that businesspersons were among the first to recognize the commercial value of close and easy communications with an airport. But there is another, new class of persons who have come to see in the emerging and changing circumstances a chance to increase their incomes. As is well known, previously the territory surrounding airports was usually an area of unoccupied land which served as a natural buffer zone and was not developed. Over time the owners of these strips of land have come to recognize that the development of the airport and surrounding territory offers them opportunities to unfreeze their frozen assets, and even make handsome profits. Whether the owners are private investors or components of public entities they, along with the managing bodies of airports, are now eager to take advantage of the investment opportunities related to the development of the territory surrounding airports.

Among the main arguments given for the creation of investment projects in the territory surrounding airports are the following:

1. Airports are looking for new and stable sources of income from non-airport related activities, not only to diversify their income profiles but also to increase their competitiveness on the market and improve the quality of the basic services they offer;³
2. The business sector is looking for affordable (cheap) real estate in the territory surrounding airports, especially in areas which at the same time offer excellent communication networks with the large urban conglomerates in the vicinity;

³ Income of airport managing bodies is divided into income from airport activities (aeronautical revenues) and income from non-airport activities (non-aeronautical revenues). The main sources of airport income include passenger fees, fees collected from air carriers, and fees collected from entities providing airport services (such as groundhandling). The main sources of non-aeronautical revenues include rental of office and commercial space on airport premises, advertisements, and parking. Currently most airport managing bodies are aiming to secure a larger percentage of income from non-aeronautical revenues than from airport activities. In some instances non-aeronautical revenue accounts for as much as 70% of the income of an airport managing body, but the European average is about 50%. The Warsaw Chopin Airport currently produces about 30% of its income from non-airport activities.

3. The rapidly increasing passenger and freight volume in airports increases the attractiveness of the surrounding areas, and the competition to 'be the first one in,' combined with the fear of being "left out", also increases interest in such investments;
4. Airports usually enjoy excellent land transportation connections with the nearest urban conglomerates, which attracts the interest of businesses in the urban areas in establishing locations near the airports, even if they don't rely on air transportation themselves.

The expanding activities surrounding airports, both 'airside' and 'landside' (i.e. in areas not directly managed by airports, but with good public access to the airport), include the following:

- restaurants, catering and other food services,
- international brand and specialty retail shops,
- banks and currency exchanges,
- duty free shops,
- airline lounges,
- private meeting rooms,
- hotels and accommodation,
- office buildings,
- convention and exhibition centres,
- cultural and entertainment attractions including museums, art galleries and cinemas,
- kiosks of all types,
- leisure and recreation venues including golf courses, race tracks, and gaming facilities,
- personal and family services such as fitness facilities, spas, and child day care for airport employees, passengers, and those persons with business at the airport,
- medical and healthcare facilities,
- wedding chapels,
- factory outlet stores oriented to both air travellers and local inhabitants,
- auction, exchange, and trade complexes,
- aviation-related industries such as aircraft maintenance, repair, and overhaul,
- logistics and distribution centres, including refrigeration and cool-chain facilities, as well as value-adding logistics,
- Free Trade Zones, special economic zones, and bonded warehouses.⁴

⁴ John D. Kasard, *Global Airport Cities*, *Insight Media* 2010, p. 21.

Today's airports in a natural fashion attract people, businesses, and trade organizations to their surrounding territory, which constitutes a central commercial area employing thousands of people. Hub airports, of which there are no more than a couple on each continent, live according to a totally different rhythm than the world around them. Most of them operate 24 hours a day. Airports such as Atlanta, Heathrow, or Hong Kong have no need to compete among themselves, but for the convenience and safety of passengers they must closely cooperate and make sure that the exchange of information is fast and reliable – for they serve the same clients. The Hartsfield-Jackson airport in Atlanta (USA) is the world's largest and services 90 million passengers a year, more than the combined total of annual visitors to Disney World, Graceland, and the Grand Canyon.

3. Selected models of Airport Cities

3.1. Introduction

In Europe several models of Airport Cities have evolved. Two factors exercise the greatest influence on the type and scale of investments therein:

- distance between the airport and the city centre;
- the overall size and scale of the territory available for investment.

In cases where the airport is located 20 kilometres or more from the centre of the city (or metropolis) which it serves, there is usually a considerable amount of available territory adjacent to the airport and the population concentration of inhabitants is relatively low. Such a situation is typical for those airports which were constructed more recently and planned as a greenfield investment, in which case they were intentionally located at a sufficient distance from the city centre in order to decrease the noise and pollution for the urban residential areas. Among such airports should be included the airports (some of which are further described below) in Athens (20 kilometres), Helsinki (20 kilometres), Gatwick (45 kilometres), Arlanda (57 kilometres) as well as the Schoenfeld airport, presently under re-construction and which is to be renamed the Berlin Brandenburg Willy Brandt Airport (25 km).

Another model of Airport City involves airports located within relatively close distance to city centres. In these airports the investor is usually the airport itself, and the available investment real estate is so small that it may consist of only a few buildings. In extreme cases, like for example in Zurich, planned investments must be restricted to a single hotel and office building in one construction site.

3.2 Frankfurt

The airport in Frankfurt was built in 1936 and is one of the biggest on the European continent, serving more than 50 million passengers a year. The airport is only a short distance from the centre of Frankfurt, and even though the configuration of runways is such that airplanes do not fly over the city centre, the noise accompanying the high number of flights led to the imposition of restrictions on night flights to and from this large and busy airport.

Over the course of years, a large and powerful airport support and service infrastructure was created adjacent to the airport, including a logistical park as well as so-called Cargo City. Thanks to this advanced infrastructure, especially with regard to freight transport, Frankfurt is today one of the largest freight handling centres in the world, occupying eighth place globally.

Having limited access to remaining territory for construction in the airport vicinity, planning officials consulted on how to most effectively use the territory directly adjacent to the airport. It turned out that an ideal place and structure was the newly built railway station for high-speed, long-distance train connections, which was located only several hundred meters from the airport. As a result a truly impressive building was completed in 2010, constructed on steel stakes over the railway station. The Squire, so-called for its spindle-shaped structure (from the words “square” and “air”), is a combination hotel and office building with available space of 140,000 square meters. It has become a new symbol of the airport and a contemporary example of making effective use of territory adjacent to an airport. It is directly connected to Terminal 1 of the Frankfurt Airport by means of a connecting corridor for pedestrians.⁵

There are also plans to build a large office park, to be known as Gateway Garden, which is supposed to be constructed on a 35 hectare area of land directly adjacent to Terminal 2. There is also one more territory of 110 hectares situated right on the Main River, known as the Mönchhof logistics and office site, which is managed by Fraport Real Esteta Mönchhof GmbH & CO.KG.⁶

⁵ http://www.fraport.com/content/fraport-ag/en/fra_development/real_estate-_andareadevelopment.html.

⁶ Airport Cities: The Evolution. The transformation of airports into world-class airport cities”. *Insight Media*, 2008.

Owing to its effective management of the territory located near the airport, Fraport AG attained an unheard of – on the European scale – level of non-airport related income reaching 70%.⁷

3.3 Düsseldorf

The Düsseldorf airport is the third largest airport in Germany, servicing over 20 million passengers a year. It is in the heart of Europe, located in an area with 18 million inhabitants living within 100 kilometres distance from the airport. It owes its dynamic development, in part, to the large and efficient German carriers Air Berlin and Lufthansa. Interestingly, it is located in close proximity to the Düsseldorf city centre, which is only 8 kilometres from the airport.

Owing to its advantageous location, excellent local communication and transportation network, and enormous developmental potential, the managing body of the airport decided to examine the possibilities for non-airport related income in the form of real estate investments in the territory located in the direct neighborhood of the airport. The real estate development company Flughafen Düsseldorf Immobilien GmbH now has 23 hectares of land at its disposition.⁸ The company divided the entire investment into separate plots of land and investment projects associated therewith. Its first investment project consisted of a huge hotel project – construction of the North-Rhine Westphalia Hotel and Conference Centre, with 533 hotel rooms and a conference hall for 5000 persons. The hotel is surrounded by green gardens and parks, and nearby the first office building has already been completed, which is already home to more than 200 companies, with restaurants, bars, and coffee shops located conveniently among the offices on the ground floor, creating an atmosphere of a welcoming and friendly small city, inviting for both users and visitors. Another undoubted attraction of Düsseldorf's "Airport City" is the Porsche car salon built by the Gottfried-Schulz Group, which is one of the largest car salons in Germany. The office park and conference centre are located only a few steps from the passenger terminal. The user profile of the construction projects comprising Airport City fit in perfectly with the airport's activities, creating a synergy effect for both the airport managers and the investors. The airport is attracting increasing numbers of

⁷ http://www.fraport.com/content/fraport-ag/en/misc/binaer/investor_relations/annual_reports/annual-report-2011/jcr:content.file/Fraport%20Annual%20Report%202011.pdf, p. 4.

⁸ http://www.duesseldorf-international.de/dus_en/airport_city.

potential lessees to its office complex as well as the interest of companies in organizing large conferences, making use of the conference centre facilities. At the centre of it all, of course, is the airport itself and its advantageous connections with increasing numbers of passengers from all Europe.

3.4 Athens

In the mid 1990s, when the government in Athens decided to revive operations on the suspended project for the Spata airport, the existing Hellinikon airport was already suffocating from its lack of sufficient airport capacity. The location of the new airport, 20 kilometres from the Athens city centre, carried with it enormous developmental potential, in part because of the existence of a large undeveloped territory in the area surrounding the airport. Thus shortly after completion of the new airport in 2001 authorities turned to plans to develop the expanse of territory lying between the two parallel runways of the airport.⁹

The excellent communications network between the airport and the Athens city centre, consisting of both rail connections and highways, guaranteed the accessibility of both passengers and local inhabitants to the airport and its facilities. The plans, initiated with great fanfare, to build an airport around two parallel yet distant runways, connected by rapid transport and rail lines, also yielded many possibilities for the development of the significant amount of free territory in between. The airport managing body calculated that the territory would be ideal for light construction buildings with large available floor space, and that such construction would be a new phenomenon on the European scale, making way for use of the territory between take-off runways for investments atypical of territories surrounding airports. Thus a string of chain outlet stores – including among others IKEA, Leroy Merlin and Neo Factory Outlet – sprang up on the territory, together with one of the largest exhibition halls and conference centres in Greece, the Metropolitan Exhibition and Conference Centre.¹⁰

The exceptional nature of Athen's Airport City consists mainly of the fact that, thanks to the excellent communications network between the airport and the Athens city centre, the main clients of the Airport City are the inhabitants of Greek's capital city themselves. This is a rare instance whereby the Airport City and the airport to which it is attached have little in common besides their close proximity and do not significantly influence each other.

⁹ Yiannis Paraschis, "The next step", *Global Airport Cities*, Issue 1 Volume 4 2009.

¹⁰ <http://www.aia.gr/pages.asp?pageID=1145&langID=2>.

3.5 Helsinki

A somewhat unique business and marketing model also functions in Helsinki. The Airport City project in Helsinki was constructed mainly in reliance on the Aviapolis marketing brand.¹¹

Aviapolis consists of a wide area of land surrounding the Helsinki-Vantaa Airport, belonging to the airport, the city of Vantaa, as well as private entities. Aviapolis is a marketing brand, a strategy whose main aim is to promote the area surrounding the airport as a model of communication space and land use planning.

The airport servicing Helsinki is located more than 20 kilometres from the city center, on territory belonging to the directly adjacent city of Vantaa. The development of the airport in its initial stages was obstructed by developmental projects in the northern edge of Helsinki as well as in Vantaa itself. The local inhabitants had significant reservations about the development of the airport, and the lack of an efficient local communication network hampered the business development of the area. Only following the installation of light rail transit between the airport and Helsinki and improvements made to the road system was this problem finally overcome. The fact of the airport's construction cannot, however, be said to have acted like a magnet in terms of attracting interest and investment.

However, the Aviapolis project began in 2002, when the first meetings were organized to project land use planning for the territory surrounding the airport. After several months the marketing brand of "Aviapolis" was created and local authorities, i.e. the city authorities of Vantaa, became engaged in the project. This made the whole Airport City project more efficient and accelerated the pace of its realization. The leading authorities of Vantaa used the Aviapolis marketing brand to promote the territory surrounding the airport as a great location for business development opportunities (in particular office buildings) as well as for the construction of large trade centres. Good communications, cheap land, and good marketing quickly led to an investment boom in the Aviapolis territory. Today it boasts a Hilton hotel, business centre, recreation centre, conference centre, trade centre, and even a single-home residential community. Plans for the future include another trade centre, logistical centre, and reconstruction and expansion of the existing hotel as well as construction of a second one.

One of the key entities responsible for the Aviapolis marketing brand is the city of Vantaa. It was at the initiative of the city authorities that

¹¹ <http://aviapolis.fi/>.

a marketing plan was put in place to make investment in the Aviapolis territory more attractive and to build it up by the construction of new buildings and structures on the territory surrounding the airport. The city's initiatives undoubtedly led to the success of the project and constituted the locomotive behind Aviapolis. In addition, the city created a new company charged with the responsibility of managing that real estate which belongs to the city but is located on the Aviapolis area. This company is also responsible for promoting Airport City as such, which has led to an increased interest on the part of potential investors to investing in the land thereon, which as a consequence has increased property values. In addition to its constant marketing activities aimed at city and regional inhabitants, including special publications addressed to them, the city has also undertaken promotion efforts in the international arena, which include promotion of Aviapolis at the annual international "Airport City" conferences described earlier in this article.

Another important component of Aviapolis consists of the territories lying directly adjacent to the airport and under the management of the firm LAK – Airport Real Estate (hereinafter LAK), which is 100% owned by Finavia, the entity responsible for managing all airports in Finland. The assets of LAK include the land, obtained from Finavia, surrounding the Helsinki-Vantaa Airport. The core business of the company is to manage its own real estate as well as lands belonging to Finavia. Currently LAK has elaborated and begun to implement a development plan for 13 hectares of real estate near the airport, some of which has been sold to private investors and the funds received therefore invested into the building of a large trade center, which will be leased out to businesses when completed.

4. The Chopin Airport City project

4.1 The Warsaw Chopin Airport

The "Polish Airports" (hereinafter 'PPL,' the Polish acronym for Przedsiębiorstwo Państwowe „Porty Lotnicze”) is an independent entity, both legally and financially. It carries out its activities on the basis of the Act of 23 October 1987 (Dz. U. (Polish official journal) 1987.33.185, together with subsequent amendments).

PPL carries out activities of a service nature, including airport services, non-airport services, and groundhandling services for aircraft, passengers, baggage and freight. The enterprise builds and monitors civil airport communications, provides services to air carriers, and oversees passenger

services in airports (among other things, renting of commercial and gastronomical premises, construction of parking areas, etc.).

PPL is the managing body of the Warsaw Chopin Airport, which is one of the largest and most modern-equipped airports in Central Europe. In 2011 the Warsaw Chopin Airport served 9.3 million passengers (of whom 36% were business clients), which accounted 43% of all civil aviation in Poland.

The airport is located 8 kilometres from the centre of Warsaw. It consists of two crisscrossing take-off runways and two terminals designed to handle approximately 20 million passengers a year. It is presently estimated that the Warsaw Chopin Airport will serve approximately 11 million passengers by 2016, and by 2020 approximately 13 million annually.

According to the CB Richard Eblis report, Warsaw occupies fifth place in the ranking of the most attractive investment locations among developing countries. The capitol of Poland is already home to branch offices of 150 of the largest 280 international concerns. In this respect Warsaw occupies 12th place worldwide, just below New York and Paris. The majority of flights into and out of the Warsaw Chopin Airport are scheduled commercial flights and charter flights, linking Warsaw with over 100 airports worldwide. The main type of flights serviced by the Warsaw Chopin Airport are short-distance flights to other European airports, which make up 94% of all the flights serviced at the airport. The major destinations are London, Paris, Frankfurt, and Amsterdam.

The Warsaw Chopin Airport has a modern and user-friendly commercial area with a total floor-space of over 7 thousand square meters, which is visited daily by almost 25 thousand passengers. The airport, and the Chopin Airport City, has excellent communications with the centre of Warsaw, thanks to a newly installed express road which links the airport with the A2 Highway Warsaw-Berlin as well as the Warsaw city centre. In addition six local bus lines service the airport, assuring easy travel access to almost every district of the city. And in mid-2012 the railway station “Warsaw Chopin Airport” was constructed, providing a rapid rail connection between the airport and Warsaw’s major railway stations.

4.2 Basic information about Chopin Airport City

Chopin Airport City (CAC) is an investment based on the construction of an office park, accompanied by a conference center complex and buildings housing other related services. All in all it is envisioned that the park will consist of 17 buildings with heights up to eight stories.

Among the major attributes of CAC should be listed:

- excellent transportation network between CAC and the Warsaw city centre,
- a comprehensive communication plan designed to assure that the transportation services related to airport activities do not collide with those related to the CAC,
- movement within the territory of the CAC will be by pedestrian walkways,
- it will be possible to implement the investments in stages,
- the CAC will be constructed based on the most contemporary and interesting architecture,
- high standards of construction and finishing work will be enforced.

The blueprints for the CAC Project are for the construction of 17 class A office buildings arranged into an office park, including one conference-offices-services complex which will consist of four connected buildings. In order to achieve the optimal efficiency of the buildings, twelve are projected to be of medium height, i.e. of up to six stories, not to exceed 25 meters in height. The remaining five are projected as high rise buildings, up to eight stories (29 meters) in height. In order to protect the safety of airport operations, no building can exceed the maximum height of 45 meters. Each of the buildings will have a two story underground parking garage. In addition, each building will have limited access roads and parking in front for business services (taxis, etc.).

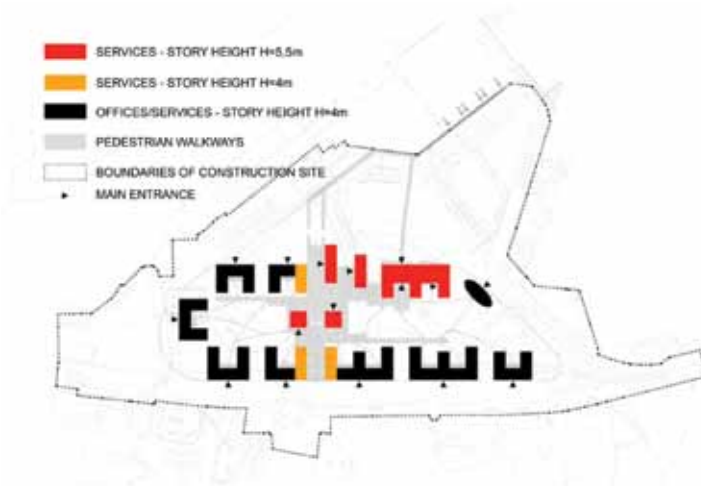
The urban planning project for the CAC is based on a closed-premises concept, with the provision of optimal conditions for pedestrian walkways between the buildings in the complex in such a way that pedestrians will not have to cross busy streets. Vehicular traffic within the complex will be reduced to the necessary minimum.

In the middle of the park a generally accessible public square is planned, integrating the entire establishment with the Warsaw Chopin Airport via a special transportation service. Adding a spatial element to the park will be a number of fountains, increasing the psychological comfort level of the office workers, hotel and conference guests, and airport passengers from the Warsaw Chopin Airport. Food courtyards are to be located in the ground floor of each building, with access to a common outdoor green park, which will attract the lessees of CAC building premises as well as the guests of the nearby Marriott hotels.

One of the priorities of the CAC project is maintenance of the principle of sustainable development, hence the urban planners involved in planning the CAC project as a whole will seek to obtain certification in the LEED-ND (LEED for Neighborhood Development) system. Irrespective of whether such certification is obtained, all the buildings planned for construction

on the CAC territory will be projected, built, and used in full accordance with the principle of sustainable development, and each building should obtain a certificate equivalent to the level of, at least, LEED Gold. By guaranteeing the obtainment of individual certification for each building, as well as for the premises leased therein, Poland's CAC will be recognized as one of the most 'sustainable developments' in the country.

Illustration 1. Ground floor functions



Source: Report by Ove ARUP for PPL.

The building project contains the following parameters:

Table 1. Surface area indicators for CAC in the plan under discussion

Surface area of the investment plot of land, restricted by surrounding roads	13.27 hectares
Surface area allocated to natural surroundings (gardens, trees etc.) on native soil	42,800 m ² (32%)
Building land surface area	31,758 m ²
Office and commercial space in all buildings combined	200,414 m ²
Space available for rent (85%)	170,352 m ²
Number of parking places in underground parking lots	3,258
Building intensity	1.6

Source: Report by Ove ARUP for PPL.

Illustration 2. Visualization of Chopin Airport City



Source: Report by Ove ARUP for PPL.

5. 3 Phasing-in of the construction of the CAC office park

The implementation of the CAC Project has been divided into two phases. This demarcation results from the need to implement the planned construction without significant disruptions to traffic patterns around the airport.

In the first phase the office-services complex will be built with only minor changes to the communication arrangements, and perhaps six other office buildings will be built.

Illustration 3. Phase I of the construction plan

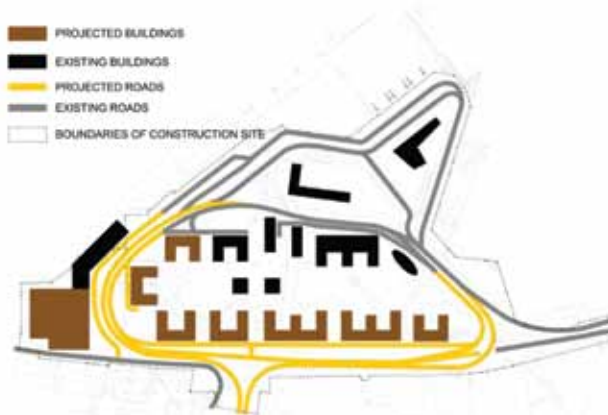


Source: Report by Ove ARUP for PPL.

The second phase of implementation of the project encompasses building the remaining office buildings as well as the parking lot for the Warsaw Chopin Airport and changes to the communication arrangements and targets, as presented in the illustration below.

Independent of the phases presented herein, the project may be divided into additional phases in order to avoid an overlap and mutual interference in the implementation of particular investments. In addition the project may be spread out over time in order to avoid the negative impact of a sudden surge in the supply of available office space on the market, which could potentially depress rents.

Illustration 4. Phase II of the building plan



Source: Report by Ove ARUP for PPL.

5. Summary

There is an irreversible trend in the market for air transport services toward the creation of Airport Cities, where the central magnet drawing in investment and construction is the airport itself. In terms of airport infrastructure, in the broadest sense of the word, what matters more than location is *accessibility*. This new trend represents a 180-degree reversal of the former tendency to establish buffer zones between airports and business and residential areas. New developments in technology are aiding this process, making aircraft quieter and more environmentally friendly, and passengers and even ordinary citizens are getting used to the fact that above their heads the skies are swirling with transportation activities. As

Christopher Dickey succinctly put it: ‘Soon airports will be the destination of our travels.’¹²

The rapid increase in air passenger travel, though disrupted in recent years by terrorism attacks, epidemics, and the economic and financial crisis, has quickly returned and is expected to continue to accelerate in both the short-term and long-term future. This trend is a significant incentive for investors to invest in the aviation branch, including the activities “landside” to airports and not directly connected with the provision of aviation services. One of the largest and most ambitious of such activities is the creation of Airport Cities. The nature of investments into Airport Cities, both in terms of their high initial capital outlays and the need to phase-in the construction in stages, makes rapid returns on capital investments virtually impossible, and high returns may not be visible even for decades. Nonetheless the trend seems irreversible, and since airport managers and associated entities need to diversify their income portfolios, investments into Airport Cities seems to be a natural fit. Rental income from developed real estate projects will constitute a permanent source of income spread out over long periods of time, and it should protect the airports against market swings brought about by such factors as changes in fuel prices, spread of epidemics, or the onset of a meteorological disaster such as volcano dust. Conversion of parts of airport premises themselves into gastronomical and commercial service centres does not offer the same degree of protection against market fluctuations as do investments into adjacent airport territories. The Chopin Airport City project is in full accord with the current global trends and constitutes an example of a creative yet responsible plan for the sustainable development of the Warsaw Chopin Airport.

¹² Christopher Dickey, *Sky Cities. Imagining the airport of the future as destination*, *Newsweek International*, July 16, 2012.

Chapter XI

PPL's ownership policies and plans for new enterprises

1. PPL's strategy with respect to the Capital Group company

Since 1987 “Polish Airports” (“Porty Lotnicze” – PPL) has been engaged in, among other things, the construction and exploitation of airports as well as providing services to passengers, users, and airline carriers. PPL manages two airports: in Warsaw, where it services 43% of the passenger traffic in Poland and 80% of cargo transport, and in Zielona Góra. PPL also owns shares in ten airport management companies, which manage airports in Cracow, Szczecin, Poznan, Gdansk, Modlin, Wroclaw, Katowice, Bydgoszcz, and Rzeszow. In addition PPL owns shares in groundhandling companies and firms offering non-aeronautical services.

The mission of PPL is to provide effective, innovative, socially responsible, and good business management of airports in Poland and abroad. Its vision is “PPL – in 2020 in the top twenty EU enterprises in the management and development of airports sector.”

In 2010 work was completed on the document: *The strategy of “Polish Airports” with respect to the “Polish Airports” Capital Group*. This document, which was elaborated on the basis of the conclusions reached in deep and far-ranging analytical sessions with external experts, and then consulted with the Ministry of Infrastructure, was accepted by the Board of PPL.

* Filip Czernicki – graduated from the Faculty of Law and Administration of the University of Warsaw. Deputy Manager of the Office of Analysis and Projects in the Department of Subsidiaries’ Supervision in the “Polish Airports” (“PPL”).

In accordance with the strategy laid out, the overriding aim of PPL is to maximize the value of shares of stock in the company Capital Group, together with simultaneously realizing its public mission, earlier defined. Its operational goals are:

- a) in the financial dimension – to obtain maximum returns on the capital invested by the Capital Group over a twenty-year perspective;
- b) in the market position dimension – to maintain and eventually increase the market position of PPL in the Polish airport services market;
- c) in terms of public mission – to precisely define the tasks of PPL with respect to its role as an integrator of airports in Poland, and their fulfilment within the framework of existing legal and contractual obligations.

In addition PPL has elaborated its underlying strategic principles necessary to undertake activities, as follows:

- a) determining the key regional markets in which PPL will maintain or strengthen its market position over defined periods of time;
- b) providing support for firms which have established and strong positions on their respective markets;
- c) in the long term perspective, withdrawal from markets localized in areas not considered strategic, neither by PPL nor by the Polish government;
- d) increasing the value of the Capital Group by taking part in business projects in the airport sector as well as nearby-airport development projects, and implementation of outsourcing;

In order to realize the projects and aims introduced, the following actions have been undertaken:

- a) preliminary investigation of strategic companies;
- b) deep analysis has been performed with the aim of defining companies of key importance to building up the value of Capital Group;
- c) activities are underway to eliminate unnecessary companies from PPL's portfolio;
- d) the "Development strategy for the company PORT-HOTEL for 2011–2025" has been accepted;
- e) intensive analytical work has begun on the project "Chopin Airport City";
- f) preparatory work has begun in order to introduce the project "Implementation of operating models in airports";
- g) actions have been undertaken connected with the consolidation of groundhandling companies, with the aim or restructuring them in order to obtain optimal results.

**Table 1. Information about the structure of the PPL's Capital Group
– status as of 31.12.2012**

Company	Shareholder	% shares	No of shares	Initial capital in PLN
<i>MPL Kraków-Balice Sp. z o.o.</i>	Polish Airports	76,190	154 264	77 132 000
	Voivodeship Małopolska	22,730	46 012	23 006 000
	City of Kraków	1,040	2 104	1 052 000
	City of Zabierzów	0,040	84	42 000
	Total	100,000	202 464	101 232 000
<i>Górnośląskie Towarzy- stwo Lotnicze S.A.</i>	WĘGŁOKOKS S.A. Katowice	40,298	504 943	50 494 300
	Polish Airports	16,410	205 623	20 562 300
	Voivodeship Śląsk	38,159	478 134	47 813 400
	City of Katowice	4,638	58 114	5 811 400
	Others (dispersed)	0,495	6 198	619 800
	Total	100,000	1 253 012	125 301 200
<i>PL Gdańsk Sp. z o.o.</i>	Polish Airports	29,093	3 645	36 450 000
	Voivodeship Pomorze	32,852	4 116	41 160 000
	City of Gdańsk	33,626	4 213	42 130 000
	City of Gdynia	2,235	280	2 800 000
	City of Sopot	2,195	275	2 750 000
	Total	100,000	12 529	125 290 000
<i>PL Wrocław S.A.</i>	Polish Airports	19,744	81 672	40 836 000
	City of Wrocław	49,143	203 287	101 643 500
	Voivodeship Dolnośląskie	31,113	128 701	64 350 500
	Total	100,000	413 660	206 830 000

Company	Shareholder	% shares	No of shares	Initial capital in PLN
<i>PL Poznań-Ławica Sp. z o.o.</i>	Polish Airports	40,520	113 223	113 223 000
	City of Poznań	34,530	96 489	96 489 000
	Voivodeship Wielkopolskie	24,950	69 723	69 723 000
	Total	100,000	279 435	279 435 000
<i>PL Szczecin-Goleniów Sp. z o.o.</i>	Polish Airports	54,240	91 231	91 231 000
	City of Szczecin	32,840	55 236	55 236 000
	City of Goleniów	3,650	6 139	6 139 000
	Voivodeship Zachodniopomorskie	9,270	15 600	15 600 000
	Total	100,000	168 206	168 206 000
<i>PL Bydgoszcz S.A.</i>	City of Bydgoszcz	23,899	369 376	16 621 920
	Polish Airports	8,062	124 602	5 607 090
	Voivodeship Kujawsko Pomorskie	66,689	1 030 710	46 381 950
	Others (dispersed)	1,350	20 862	938 790
	Total	100,000	1 545 550	69 549 750
<i>PL Mazury Sp. z o.o.</i>	European Business Partners sp. z o.o.	61,030	6 490	1 947 000
	Polish Airports	12,670	1 347	404 100
	Energopol-Trade Sp. z o.o. w Warszawie	13,170	1 400	420 000
	Voivodeship Warmińsko Mazurskie	5,490	584	175 200
	City of Szczytno	3,570	380	114 000
	Others (dispersed)	4,070	432	129 600
	Total	100,000	10 633	3 189 900

Company	Shareholder	% shares	No of shares	Initial capital in PLN
<i>PL Warszawa-Modlin Sp. z o.o.</i>	Polish Airports	30,390	196 810	98 405 000
	Military Property Agency	34,430	222 970	111 485 000
	Voivodeship Mazowieckie	30,370	196 683	98 341 500
	City of Nowy Dwór	4,810	31 186	15 593 000
	Total	100,000	647 649	323 824 500
<i>PL Rzeszów-Jasionka Sp. z o.o.</i>	Voivodeship Podkarpackie	52,952	2 489 766	248 976 600
	Polish Airports	47,048	2 212 200	221 220 000
	Total	100,000	4 701 966	470 196 600
<i>LDT Wrocław Sp. z o.o.</i>	Polish Airports	59,299	5 500	5 500 000
	Wrocław Airport S.A.	40,701	3 775	3 775 000
	Total	100,000	9 275	9 275 000
Welcome AS Sp. z o.o.	Polish Airports	100,000	68 237	34 118 500
GDN AS Sp. z o.o.	Polish Airports	100,000	1 290	1 290 000
POZ AS Sp. z o.o.	Polish Airports	100,000	1 084	1 084 000
SZZ AS Sp. z o.o.	Polish Airports	100,000	464	464 000
Port - Hotel Sp. z o.o.	Polish Airports	100,000	870 713	87 071 300
<i>Casinos Poland Sp. z o.o.</i>	PLL LOT S.A.	33,330	100	1 700 000
	Century Casinos Poland Sp. zo.o.	33,330	100	1 700 000
	Polish Airports	33,330	100	1 700 000
	Total	99,990	300	5 100 000

Company	Shareholder	% shares	No of shares	Initial capital in PLN
SELO Sp. z o.o. in liquidation	Polish Airports	63,529	54	2 052 000
	PZL Warszawa Okęcie S.A.	9,412	8	304 000
	City of Warszawa	24,706	21	798 000
	City of Raszyn	1,176	1	38 000
	Paluch A	1,176	1	38 000
	Total	100,000	85	3 230 000
Airport Cleaning Service Sp. z o.o.	Polish Airports	100,000	1 500	1 500 000

2. PPL's advisory and consultation services

In carrying out an ownership policy, PPL attempts to take on the role not of a merely passive investor, but also actively seeks good investments and makes plans for using its professional services in new projects. These activities are aimed at increasing PPL's revenues and should lead to greater diversification of income, above all by increasing the share of non-aeronautical revenue in its overall income structure.

PPL is equipped with a professional cadre possessing both the qualifications to manage projects (certificates PRINCE 2 and PMI) as well as certification from the Polish Treasury Ministry to sit on the supervisory boards of companies, and possess acquired experience in managing many different group tasks.

A special team operates within PPL, responsible for the development of the services it offers and making them available to the entire airport services sector, both in Poland and abroad. It operates non-stop, and performs current analyses of all technical, business, and economic questions and collaboration offers directed to PPL by companies seeking it as a financial partner or as an advisor within the context of new enterprises and projects. This team is responsible for all projects connected with PPL's sale of its consulting and advisory services. The Analyses' and Projects' Division also applies *due diligence* in its work on analysing or implementing projects aimed at obtaining outside investment, including preparing detailed analyses of those entities wishing to join a particular project.

One of the most significant strategic challenges for PPL is to keep abreast of the irreversible contemporary trend in the airport services market toward the creation of “airport cities”, with the airport as the central focus point around which is developed and constructed an infrastructure capable of handling the requisite number of passengers who will also become the main recipients of the services rendered within the framework of airport cities. The scope of airport cities, not only in territorial terms but also in terms of their capital absorption and the time frames involved in their investments (which can stretch over several decades) predetermine that capital investments into airport cities are quite long-term investments. However, owing to their strategic nature it seem inevitable that sooner or later airports will have diversify their sources of revenues and increase non-aeronautical revenues, going beyond use of terminal capacity for strictly commercial and gastronomical activities. The projected Chopin Airport City, which is supposed to arise in the near vicinity of the Warsaw Chopin Airport, is already in the implementation phase, with the initial activities devoted to the construction of a hotel area. Alongside the current four-star Courtyard (Marriot) in the year 2013 a new five-star hotel, Renaissance (Marriot) will be completed, followed by the completion of the two-star Hampton (Hilton).

3. Implementation of an operating model for airports

PPL carefully follows and analyses developments in the airport services markets in other countries. Airport management firms are always seeking additional developmental possibilities. One of them is the creation of a capital group, consisting of both national and international companies. In an effort to join the group of leading airport management and development associations in the European Union, PPL plans to begin expansion into foreign markets.

Based on an analysis of international practices, one may distinguish two basic models for engaging airport management firms in enterprises focused on the sale of services of an advisory/expertise nature to supplement management of airports on a contractual basis.

Model 1 (Build-Operate-Transfer)

In this model the owner(s) (usually public-private entities) sign a contract for management of an airport with outside investors, to whom the entire

airport area, together with buildings, infrastructure and equipment, is leased and who thus become responsible for further investments and the modernization of airport infrastructure. In this model, during the term of the contract the owner does not receive revenues from the functioning of the airport, but upon expiration of the contract the entire airport area and infrastructure returns to it. The managing body receives revenues for airport activities (including activities in the surrounding area of the airport), but the capital gains with respect to its activities involving permanent improvements to real property belong to the airport owner(s) following the expiration of the contract. Contracts for airport management in this model are usually concluded for several decades, and in light of the need for heavy capital investments into the development of the airport, yield on investment may be delayed for 20 or even 40 years. In the event there is no need for significant investment, the term of the contract may be significantly shorter.

This model is employed in the management of airports in Lima, Cairo, and Athens. Undoubtedly the main advantage to this solution from the point of view of the managing body is the significant degree of independence granted to it with respect to running the operation and property entrusted to it, which in turn can lead to maximizing profits. The disadvantage to such an arrangement is the need for the managing body to make significant investments, and the fact that its entire responsibility for the financial success of the operation is subject to a number of potential risks.

Model 2 (Management Contract)

In this model, the owner(s) entrust the management and administration of the airport to a managing body, hired in exchange for a pre-determined rate of payment. Revenues from airport activities carried out and managed by the managing body are transferred to the owner(s) of the airport, who pay the managing body either a fixed sum or, as is much more common, a variable sum, usually based on a percentage of total revenue. In this type of contractual arrangement, this issue of responsibility for investments may be placed wholly on one of the parties or, as is more common, divided up and shared jointly. Management contracts in this model are usually much shorter than those employed in Model 1.

This type of contract has been employed, for example, in the Fraport management of airports in Burgas and Warna. One of the advantages of this type of contract is the method of calculating payments and the lack of a need (on the part of the management company) to outlay large sums for investment into the development of airport infrastructure. The disadvantage

is that the annual payments to the managing company may be based on achieved results (in order to motivate the managing company to work effectively), while the owner receives constant and measurable (passive) income from its ownership of the airport.

Having regard to the two basic models outlined above for airport management, it would seem that PPL should consider the following solutions:

a) *Management by a subsidiary*

In this case PPL would appoint an affiliated company charged exclusively with management of the airport. Such a company would need to independently make a tender in an auction, however with the support of PPL and making use of the PPL brand. In order to realize the contract, the managing company will recruit a group of employees from PPL specially dedicated to management of the airport. Thanks to the application of this strategy greater and more efficient airport operations can be assured, as well as quick and appropriate responses to investment strategies. In addition the managing company will not incur high operating costs and may also employ persons outside PPL for specific tasks.

b) *Airport management conducted directly by PPL*

In this model PPL would carry out all management tasks independently, by relying directly on the human and other resources available to it. In order to keep this alternative open, PPL needs to maintain a specially dedicated cell within its structure, comprised of a group of highly trained and specially schooled employees with the appropriate knowledge and experience. This solution would allow PPL to make use of all its resources and potential without initially encountering additional costs. Importantly, in the auction PPL can directly underscore its own *track record*, including its financial potential.

Coming back to the earlier described operational goal of PPL concerning the attainment of revenues from its provision of advisory and consulting services to outside entities, it would seem that the first model, which envisions close cooperation between PPL and an airport managing company (or an entity wishing to establish an airport) with respect to the realization of projects creating or modernizing civil airports, would seem to be the formula best suited to enable PPL to realize tasks connected with the setting up or modernization of airports. PPL is capable of taking on various tasks, including fulfilling the function of a substitute investor, preparing all documentation with respect to operations, technical solutions and innovations, airport security etc., all of which it can do independently

using its own structures, or through the appointment of an affiliated company dedicated to a particular task.

4. Summary

PPL is a modern firm built on experience and knowledge acquired from its 80 years managing the airport in Warsaw. Recent years have been characterized by intensive and successful investment into the Warsaw Chopin Airport. This can be seen in, *inter alia*, in the preparations for the UEFA EURO2012™ or for servicing the new passenger aircraft PLL LOT Boeing 787 Dreamliner. These were challenges which required planning and close collaboration between all entities and persons involved in airport operations and required detailed and sufficiently advanced planning, but were carried out by PPL with great success.

In 2012 alone PPL was the recipient of a number of honors, awards, and distinctions, including, *inter alia*, the title “Ambassador of the Polish Economy”, bestowed on it by the Business Centre Club in recognition of its record as a credible partner for foreign firms and its contribution to creating a good public image for Polish enterprises. The Warsaw Chopin Airport was also recognized one of the leading business brands in Poland, awarded its prize by the Polish Council of Brands, a board consisting of experts and specialists in the fields of marketing and public relations. During the conference ‘Routes Europe’ in Cagliari, the Warsaw Chopin Airport received the distinction of being “Highly Commended” for its activities in marketing (“Excellence in Airport Marketing”) from among the airports of the Central and Eastern European region. In the Polish journal “Polish Market” it was singled out for its consistent and consequent realization of its entrepreneurial policies and strategies as well as for being a leader among the most dynamic and effective enterprises in Poland.

I close by quoting Mr Michał Marzec, the General Director of “Polish Airports”: “Satisfying clients and business partners is our highest reward. But we also take on increasing obligations and pledge ourselves to greater efforts to make ourselves equal to the growing demands and challenges. Our aim is to make the services offered by Warsaw Chopin Airport into standards for all Polish airports, so that we can, without any complexes, compare ourselves to the leading airports in the world. This is our goal, not only for 2012, but for every year.”

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Polish Airports

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This book publishes the key findings of two consecutive research projects undertaken jointly in 2010–2011 by the members of the Centre for Antitrust and Regulatory Studies (CARS) and a number of employees of Polish Airports State Enterprise (*Porty Lotnicze*, PPL). The joint research projects were undertaken under a contract concluded in 2009 between PPL and the University of Warsaw, Faculty of Management.

Excerpts from the book reviews:

“The book constitutes an extensive compendium of regulatory and jurisprudential knowledge about the airline sector, both in Poland and the European Union. [...] The book contains numerous pointers for those involved in various roles in Polish business and politics. From this perspective it certainly deserves to be widely distributed, so that the information the book contains can be applied in practice within the fast developing Polish airline sector.”

(Prof. Dr. Anna Fornalczyk)

“This is a unique and detailed publication in its field because it is based on a report from a research project that combines the knowledge of academics with the practical experiences of the employees of Poland’s biggest airport. It refers to key problems occurring in the air transport markets and deals with the currently most important issues concerning the evolution of the airline industry.”

(Prof. Dr. Adam Jaroszyński)

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