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EUROPEAN "GHOST AIRPORTS": EU LAW FAILURE OR POLICY FAILURE? THE NEED FOR ECONOMIC ANALYSIS IN STATE AID LAW

Abstract:
Wasteful spending of public funds, leading to the creation of "ghost airports", is often described as a regulatory failure and a major deficiency in European State aid control. It is pointed out that decisions to build or upgrade an airport are often ill-conceived, poorly implemented, and without economic justification. This raises the question whether European law, namely its State aid control system, contains inherent flaws or whether the European Commission's decision-making process can be improved by increasing reliance on objective economic reasoning under the existing legal framework. This article provides an analysis of the decision-making problems leading to failed aid efforts; of the role of the economic approach in State aids; and of the standard of economic assessment required in State aid cases. The article concludes with de lege ferenda *postulates.*

Keywords: air transport, airports, economic analysis, EU law, investment aid, state aid

INTRODUCTION – A PROBLEM OF DEFINITION AND LIMITATIONS

State aid has always been a major part of the European aviation industry.[1] The States' role in creating "ghost airports" – high-cost, underused facilities – is often examined using the almost proverbial *Ciudad Real* case as the prime example of reckless spending and failed investments.[2] The construction and upgrade of airport infrastructure, as well

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[1] M. Stainland, *A Europe of the Air? The Airline Industry and European Integration*, Rowman & Littlefield, Lanham, Boulder, New York, Toronto, Plymouth: 2008, pp. 23-24.

[2] European Court of Auditors (ECA), *EU Funded airport infrastructures: Poor value for money* (Special Report no. 21), available at: http://www.eca.europa.eu/Lists/ECADocuments/SR14_21/QJAB14021ENC.pdf (accessed 30 June 2018).

as the investment process itself, is shaped by two main interrelated factors. The first relates to States' decisions authorising the process to begin. These are often motivated by purely domestic political considerations rather than legal ones, and hence are subject to only indirect control under EU State aid law, and then only to the extent it may affect the compatibility criteria of aid measures. The second factor relates to the EU State aid rules themselves. One of the main goals of the State Aid Modernisation initiative (SAM) – a major overhaul of the European Union's (EU) State aid control system launched in 2012 – is to place a greater emphasis on the appropriateness of aid measures and to avoid wasteful expenditure of public funds.[3] As a result, a number of legislative changes have been introduced by the *Guidelines on State aid to airports and airlines*, issued under Article 107(3)c of the Treaty on the functioning of the European Union (TFEU) and aimed at ensuring the economic viability of airport projects receiving investment aid.[4]

Nevertheless, while a more rigid approach has become noticeable in recent years, both in the regulatory landscape as well as in the European Commission's (EC) decisions, the problem with regard to State aids for the construction and modernisation of airports seems to persist. Consequently, the following research question can be asked: If domestic economic policies fall in principle outside the purview of EU law (and consequently outside the scope of this article) and the State aid rules concerning investment aid to airports already explicitly require proof of economic viability, then where does the problem lie? Alternatively, the question can be reformulated around the issue of the effectiveness of various safeguards designed to prevent wasteful or inefficient spending. Given this perspective, the material law rules of EU State aid law do not themselves warrant a detailed analysis, although they are outlined briefly in paragraph 1. Instead, this article adopts a rebuttable presumption that there are adequately formulated provisions in the existing material law, and thus the analysis focuses on how these provisions are interpreted and above all substantiated, which leads to the formulation of possible *de lege ferenda* postulates.[5]

As already emerges from the foregoing remarks, it is both my opinion and the article's hypothesis that the root cause of the problems of investment failures, and at the same time the answer to the question posed above, lies in the insufficient interface between the rules and operationalization of substantiating economic data. Despite the EC's

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM), COM(2012)0209 final (2012 Communication).

[4] Communication from the Commission — Guidelines on State aid to airports and airlines, OJ [2014] C 99/3 (2014 Guidelines).

[5] The term "adequate" refers to the requirement of a contribution to a well-defined objective of common interest; of limiting aid to the minimum necessary; of the absence of less restrictive means, along with the "controlling" principle of proportionality common to all investment aids authorised under Article 107(3)c TFEU. Although these criteria are fairly generic, given the complex nature of many investment projects the governing rules must remain sufficiently general to provide a solution in the event of a lacuna. These criteria should prevent wasteful spending when correctly applied. Therefore, as mentioned, the problem at issue boils down to the question of how to establish whether these criteria are fulfilled.

claims of its reliance on various economic analyses in its case assessments, it seems that the current approach lacks transparency and methodological rigidity, to the detriment of legal certainty. While it stands to reason that regulators and lawmakers cannot reasonably expect that complex economic relations can be narrowed down to a simple input-reaction equation, and thus a certain randomness is unavoidable, nevertheless unpredictable outcomes could be minimized and legal certainty improved.[6] Therefore, in this article I aim to formulate a hypothesis based on the above-mentioned research question: that when properly structured, the legal sciences, and thus regulatory decision-making, can greatly benefit from the extensive *acquis* of economic/management sciences, and hence I put forward the argument that the Commission's current approach towards State aids for the construction and modernisation of airports can be refined and improved.

This article is organized as follows: Section 1 explores types of decision-making failures in State aids for the construction or upgrade of airports, illustrating the problem outlined in the research question and serving as a springboard to further analysis. Section 2 provides a brief discussion of the role of economic analyses in European lawmaking and market regulation processes in the field of State aid. Section 3 considers the standards for assessing the competitive impact of aid measures. This is followed by an examination of the procedural aspects of State aid cases – the prior notification requirement and burden of proof – in Sections 4 and 5 respectively. The analysis concludes with *de lege ferenda* proposals.

1. DECISION-MAKING FAILURES IN STATE AID TO AIRPORTS – THE NATURE OF THE BEAST

In EU law, State aid is defined as a measure attributable to a State, granting a selective advantage, unobtainable under normal market conditions, to certain undertakings.[7] There is some controversy about whether a distortion of competition and trade between

[6] The concept of legal certainty is recognised as one of the fundamental principles of European Union law. Throughout this analysis, the concept will be interpreted in a European context, which is inextricably linked with the doctrine of legitimate expectations and the principle of good faith. In a nutshell, it will be understood as a requirement that sufficient information must be made public to enable parties to know what the law is and why has it been applied in a particular way. *See* T. Tridmas, *The General Principles of EU Law* (3rd ed.), Oxford University Press, Oxford: 2013, p. 242.

[7] The notion of State aid is traditionally based on the extensive case-law, and rather loosely on the actual wording of Article 107(1) TFEU. In 2015 the Commission adopted the Communication on the notion of State aid (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C262/1 (2016 Notice)) which did not introduce any new approaches but rather codified the pre-existing case-law. Interpretation of the notion of State aid by the EU Courts will thus constitute primary point of reference for this analysis. *See further* K. Bacon, *European Union Law of State Aid*, Oxford University Press, Oxford: 2017, pp. 17-89; H.C.H. Hofmann, C. Micheau (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford: 2016, pp. 65-220; K. Quigley, *European State Aid Law and Policy* (3rd ed.), Bloomsbury, Hart Publishing, Oxford, Portland: 2015.

Member States is an element of the definition itself, or just the compatibility criterion.[8] Yet, such distinction remains a semantic one for this analysis, as the issue of whether or not a measure constitutes State aid, or that the measure is compatible with the Internal Market, must be preceded by a market analysis.[9] Additionally, while the distortion of competition and effect on trade criteria remain distinct, they are usually analysed together.[10]

A comprehensive overhaul of the rules governing State aids to airports is one of the most prominent components of the State Aid Modernisation initiative.[11] The Commission asserted in the policy paper that nearly half of the European airports are not profitable, and further elaborated that there have been cases of "ghost airports" which should not have been constructed in the first place.[12] In the EC's view, the issue has become serious enough to warrant legislative action. Some may argue that spectacular failures are rare, but they tend to be the cases that the media publicizes, so it is more of a publicity problem than any intrinsic failing in the system itself, although it remains debatable what precise percentage of failed investments constitutes a failure of the entire system. Nevertheless, in my opinion the mere fact that such avoidable problems occur requires policy adjustments.

There are two distinct, but linked, sets of problems associated with decision-making on State aids for the construction and modernisation of airports that lead to the failure of aid measures. The first relates to the EC's decisions made on the basis of erroneous forecasts. It goes without saying that every prediction has a margin of error, but in some cases forecasts are *prima facie* methodologically flawed.[13] This problem exists in both State aids and in other cases involving EU funds.[14] The second issue concerns cases where the original predictions are sound, but due to either mismanagement or

[8] Quigley *supra* note 7, pp. 79-80. The EU Courts have held that where aid is granted to an undertaking that operates beyond one Member State, such aid will be regarded as affecting trade on the Internal Market (*See*, *inter alia*, Case C-66/02 *Italy v. Commission* [2005], ECLI:EU:C:2005:768). This interpretation seems applicable if there are international flights at the airport.

[9] The aid may be either declared compatible with the Internal Market, or a particular measure can be considered not to constitute State aid.

[10] *See*, *inter alia*, Cases T-288/97 *Regione Friuli Venezia Giulia v. Commission of the European Communities* [2001], ECLI:EU:T:2001:115, para. 41; T-50/06 *RENV II: Ireland and Aughinish Alumina Ltd v. European Commission* [2016], ECLI:EU:T:2016:227, para. 113.

[11] *Competition policy brief: New State aid rules for a competitive aviation industry*, Issue 2, February 2014 (2014 Policy Brief), available at: http://ec.europa.eu/competition/publications/cpb/2014/002_en.pdf (accessed 30 June 2018).

[12] *Ibidem*, p. 2. This issue has been the subject of Parliamentary Questions (E-001393/2015, P-011981-15), and in its answers the Commission has stated that it has no plans to establish a list of "inefficient airports" but intends to remain in close contact with Member States to make sure that the new rules on State aid for airports are applied.

[13] *See* especially the cases described in Section 5.

[14] In principle State aid must be attributable to the State, which is not the case with the EU funds. However, most EU programmes involve co-financing from States' budgets and thus fall within the ambit of State aid rules (Hofmann & Micheau, *supra* note 7, pp. 204-209). Airports can be financed from the European Regional Development Fund, The Cohesion Fund, or under the Trans-European Transport Networks (TEN-T) programme.

to unforeseen and unavoidable circumstances, the predictions initially made become invalid over time, and thus the original objective of the State's intervention becomes unattainable without further subsequent aid.

Referring to the first scenario, case of *Kassel* (formerly *Kassel-Calden*) serves as a prime example of a project gone wrong.[15] The airport, converted from an airfield, was originally intended to relieve congestion at the Frankfurt Airport. Kassel was supposed to take over parts of low-cost, charter, and cargo operations as well as the general aviation already present on the site. The airport operator benefited from four separate aid measures.[16] All aids were authorised by the Commission, which concluded that the project offered a reasonable prospect for profit. In hindsight, we now know that the airport attracted negligible commercial air traffic and did not even come close to the break-even point. Currently, (i.e. as of November 2017), the owners are considering shutting it down.[17]

If one were to look solely at the formal interpretation of the existing rules, it is difficult to find anything to criticise in the Kassel case. What's more, every single case involving State aid to the Kassel airport outwardly appears to be an example of correct application of the State aid rules. Investment aid may be considered to be compatible with the Internal Market under Article 107(3)c TFEU only if the aid measure is aimed at a "well-defined objective of common interest."[18] At first glance, it would seem this criterion was fulfilled, as the airport was considered to provide a local economic stimulus. There is an extensive body of research that shows a positive relationship between infrastructure development and economic growth, and while the actual extent may be subject to some debate, there is a general consensus regarding the existence of such impacts – direct, indirect, and induced.[19] Consequently, it can be concluded that the aid granted was well-targeted and proportional.[20] Controversy arises over the

[15] In January 2015, Kassel-Calden Airport was renamed Kassel Airport. The previous name is used in older decisions.

[16] Cases: NN14/2007 *Kassel-Calden Airport* [nyr] – Decision not to raise objections; N 112/08 *Flughafen Kassel-Calden* [2009] OJ C97/4 - Decision not to raise objections; N335/2010 *Finanzierung des Ausbaus des Verkehrslandeplatzes Kassel-Calden* [2011] OJ C23/1 – Decision not to raise objections; SA.34089 *Erneute Finanzierung des Ausbaus des Verkehrslandeplatzes Kassel-Calden* [2012] OJ C341/2 – Decision not to raise objections.

[17] The airport operator, Flughafen GmbH Kassel, is owned by the Land Hessen (68%), the city of Kassel (13%), the Landkreis Kassel (13%) and the municipality of Calden (6%). Given this ownership structure, a closure decision may be delayed for political reasons.

[18] 2014 Guidelines, *supra* note 4, para. 79(a). This requirement is common to all aids authorised under Article 107(3) TFEU, not only aids for airports.

[19] *See generally* J. Hakfoort, T. Poot, P. Rietveld, *The Regional Economic Impact of an Airport: The Case of Amsterdam Schiphol Airport*, 35(7) Regional Studies 595 (2001); M.N. Postorino (ed.), *Regional Airports*, WIT Press, Southampton, Boston: 2011; A. Smyth, G. Christodoulou, N. Dennis, M. Al-Azzawi, J. Campbell, *Is air transport a necessity for social inclusion and economic development?* 22(7) Journal of Air Transport Management 53 (2012); Z. Elburz, P. Nijkamp, E. Pels, *Public infrastructure and regional growth: Lessons from meta-analysis*, 58(1) Journal of Transport Geography 1 (2017). This list may not be exhaustive, but it does provide an overview.

[20] Aid is deemed proportionate if the objective cannot be delivered through the use of market means alone, or using an aid scheme that would have a less distortive effect on competition (Bacon, *supra* note 7,

requirement that infrastructure must demonstrate that it has a reasonable prospect of achieving profitability over the mid-term horizon.[21] The Commission pointed to the observable drop in the number of charter operations and to the fact that three regional airports – Paderborn-Lippstadt, Hannover and Erfurt – have similar catchment areas, and therefore concluded that the chances were rather slim that the new airport would satisfy a significant portion of the local demand, estimated at 3.3 million passengers per annum.[22] All of these factors quite clearly indicate that the investment showed dubious prospects for profitability, yet the EC cleared the aid, apparently disregarding its own analysis.

At this point it is worthwhile mentioning that there are no exact annual passenger flow figures to conclusively determine that an airport will be profitable.[23] There is a significant body of research on the subject, highlighting various factors affecting airports' profitability.[24] The Commission concluded that airports serving in excess of 3 million

pp. 100-101; Quigley, *supra* note 7, pp. 377-383). In the case of the Kassel airport, no private investor was interested in the project.

[21] 2014 Guidelines, *supra* note 4, paras. 86, 99 *in fine*. According to submitted (and accepted) business plan, in 2014, the number of passengers was expected to increase to 410,000. The business plan expected a constant yearly growth in passenger numbers (4% per annum). The actual figures were as follows: 2014 – 45,587 passengers; 2015 – 64,926 passengers; 2016 – 54,822; 2017 (January-August) – 34,232 (Kassel Airport – Zahlen, Daten und Fakten, available at: https://www.kassel-airport.aero/de/inhalte-metanavigation-seitenfuss/die-flughafen-gmbh/zahlen-daten-und-fakten (accessed 30 June 2018)).

[22] Additionally, the aid coincided with the financial crisis. The overall downturn resulted in a 4.6% decrease in passenger air transport in Germany in 2009. However, since June 2010 the monthly growth rates in passenger air traffic in Germany have been increasing and were 7% above the monthly growth rates of the previous year, and since 2009 Germany has enjoyed a GDP growth of around 3% per annum. The Commission concluded that figures in the business plan still hold true (Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel-Calden, Intraplan Consult GmbH, 12 März 2012, S. 8 – the business plan is not publicly available in its entirety, only excerpts in the EC's decisions). In decision SA/34089 (para. 63) the Commission asserted: "(…) in the 'most probable' scenario examined, it is not expected that Kassel-Calden airport will be able to fully exhaust its regional market potential of 3.1 million passengers. Overall, a market share of 16.3% is expected." Such threshold is well below the EC's own estimates on airports' profitability (2014 Guidelines, *supra* note 4, para 118).

[23] Additionally, the data suggest that low cost carriers usually bring less revenue for airports than legacy carriers (especially non-aeronautical – i.e. from passengers). Therefore, if an airport mostly depends on low cost carriers, the required number of passengers per annum may be higher than indicated below (*see*, *inter alia*, D. Gillen, P. Forsyth, J. Müller, H-M. Nimeier (eds.), *Airport Competition: The European Experience*, Ashgate, Farnham: 2010, pp. 68-70; J. Wiltshire, *Airport competition: Reality or myth?*, 67 Journal of Air Transport Management 241 (2018); M. Yokomi, P. Wheat, J. Mizutani, *The Impact of Low Cost Carriers on Non-Aeronautical Revenues in Airport: An Empirical Study of UK Airports*, 64 Journal of Air Transport Management 77 (2017)). These figures also do not take into account the existence of other indirect aid measures, such as marketing contracts.

[24] *See generally*, *inter alia*, Gillen et al., *supra* note 23; Postorino, *supra* note 19; C. Oliviera Cruz, J. Miranda Sarmento, *Airport privatization with public finances under stress: An analysis of government and investor's motivations*, 62(7) Journal of Air Transport Management 197 (2017); J. Zuidberg, *Exploring the determinants for airport profitability: Traffic characteristics, low-cost carriers, seasonality and cost efficiency*, 101 Transportation Research Part A: Policy and Practice 61 (2017). The list is by no means exhaustive.

passengers per annum should be able to cover their operating costs.[25] The European Commission broadly based its assessment on the research conducted at Cranfield University in 2002.[26] The Cranfield analysis is generally considered to be thorough and reliable, but it remains an open question whether these figures have become outdated.

The above highlights a more general problem, relevant for all regulatory measures. The central dilemma here focuses on whether fixed parameters – imposed *ex ante* – can be the basis for an appraisal of all cases involving interventions in the market. i.e. State aids, competition, merger control, and so on. There exists an unrealizable dream among many market regulators that economic processes can be reduced to invariable formulas, "stimulus and reaction."[27] Since this is impossible in practice, all economic regulations must allow for a margin of appreciation, meaning a certain degree of flexibility.[28] This flexibility is sometimes incorrectly equated with arbitrariness, especially in State aid cases where the Commission enjoys a high degree of discretionary power.[29] At the same time however, it is also true that without transparency flexibility can easily transform into arbitrariness, or at least be perceived as such, to the obvious detriment of legal certainty.

The importance of this factor becomes apparent when considering interpretation of the compatibility criteria in the *Kassel* case. From a purely formal standpoint, the existing rules were correctly applied. The interpretation was sound, logical, coherent, and consistent with the *ratio legis* of the State aid system.[30] Yet the investment has proven to be a failure. If one searches for the root cause of this manifest divergence,

[25] 2014 Guidelines, *supra* note 4, para. 118. It is worth mentioning that in a prior version of Aviation Guidelines (Communication from the Commission, *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports* [2005] OJ C312/1) the Commission stated that airports need between 500,000 and 1.5 million passengers to make a profit, although it rightly observed that there are no absolute figures with regard to the break-even point, a fact directly referred to in the 2002 Cranfield Study. In the current guidelines (2014 Guidelines), the EC has revised these figures: according to the Commission airports with annual passenger traffic above 3 million are usually profitable, while smaller airports may not be able to cover at least part of their operating costs (*cf.* para. 72 of the 2005 Guidelines with para. 118 of the 2014 Guidelines). The current guidelines also quote from the 2002 Cranfield Study, but these figures remain unsourced.

[26] Study on competition between airports and the application of State aid rules – Cranfield University, June 2002 (2002 Cranfield Study), available at: http://bit.ly/2ERSyQC (accessed 30 June 2018).

[27] Karl Popper correctly pointed that every rulemaking can be boiled down to the method of "trial and error" (K. Popper, *Objective Knowledge: An Evolutionary Approach*, Oxford University Press, Oxford: 1973, p. 9). Additionally, one can point out the emblematic "butterfly effect" describing situation when a small change in one state of a deterministic nonlinear system can result in large differences in a later state (E.E. Peters, *Applying Chaos Theory to Investment & Economics*, Wiley & Sons, New York, NY: 1994). It can be argued that in the complex economic relationship high number of variables make accurate prediction impossible.

[28] In legal doctrine, the term margin of appreciation is often used in a specific context of human rights. The term will continue to be used in this analysis in the literal sense with no relation to that context.

[29] P. Nicolaides, M. Kekelekis, P. Buyskes, *State Aid Policy in the European Community: A Guide for Practitioner*s, Kluwer Law International, Alphen aan den Rijn: 2004, p. 164.

[30] *See* criteria in 2014 Guidelines, *supra* note 4, paras. 83-111.

a purely legal analysis of the compatibility criteria does not reveal any apparent flaws. On the contrary, these rules seem to be impartial and aimed at achieving economic efficiency, while avoiding wasteful or inefficient expenditures. However, as mentioned in the Introduction, the problem lies at the interface between the above-mentioned rules and the data used to substantiate a particular interpretation. If erroneous data is fed to the regulator or competition authority, the application of these rules will fail to produce the desired result.[31]

The case of the Kassel airport is by no means an isolated one. A similar problem can be seen not only in State aids wherein a project is financed entirely from the public purse, but also in cases involving EU funds and those co-financed by the State.[32] The following most glaring examples can also be found: Córdoba (unnecessary airside expansion); Fuerteventura (oversized terminal); La Palma (too large airside expansion); Thessaloniki (unused cargo terminal); Kastoria (extension to the runway that has never been used by the type of aircraft it was designed for); Vigo (extensive overlaps in catchment areas of at least two non-congested airports); Murcia – San Javier (extensive overlaps in catchment areas of other airports); and Corvera (simultaneous construction of another airport).[33]

The second mentioned category relates to the situation when initial projections rightly prove that the investment is viable (viability must be assumed at this point), but the project has been derailed at a later stage.[34] There is no better example than the Berlin-Brandenburg airport. This case has become a source of national embarrassment as the project has been plagued by cost overruns and construction delays.[35] In this case, the apparent failure of aid measures cannot be attributed to using unrealistic profitability forecasts.[36] Examples from around the world convincingly show that hub airports, especially those that serve major cities, are generally profitable.[37] For this reason, it could be assumed that the airport serving Berlin would have been profitable as well. However, in the case of the Berlin-Brandenburg airport management errors were to blame.[38] It can thus be argued that sound management practices should have prevented the occurrence of such negative events. But this is a separate issue and should not be confused with the existence of over-optimistic, biased forecasts. However, because these

[31] I. Sanderson, *Evaluation, policy learning and evidence-based policy making*, 80 Public Administration 1 (2002).

[32] *See* N. Robins, *State aid assessments in the aviation and ports sectors: The role of economic and financial analysis*, 18 ERA Forum 121 (2017).

[33] Special Report no. 21, *supr*a note 2, pp. 18 et seq.

[34] It is widely believed that there is a general trend for infrastructure projects carried out and paid for by central or local governments to involve overly optimistic assumptions regarding costs and predicted profitability (*see* B. Flyvbjerg, *Five Misunderstandings about Case-study Research*, 12 Qualitative Inquiry 219 (2006)). The two failures described above are not mutually exclusive.

[35] J. Fiedler, A. Wendler, *Berlin Brandenburg Airport*, in: G. Kostka, J. Fiedler, (eds.), *Large Infrastructure Projects in Germany: Between Ambition and Realities*, Palgrave Macmillan, London: 2016, pp. 87 et seq.

[36] *Ibidem*, pp. 88-91.

[37] Gillen et al., *supra* note 23, pp. 63-73.

[38] Fiedler, Wendler, *supra* note 35, p. 93 et seq.

events are not mutually exclusive, such confusion can easily occur. Nevertheless, the fact remains that fixing these problems requires different solutions.

This example serves to illustrate that securing a sound and reliable analysis cannot be regarded as the universal *panaceum* for unsuccessful State interventions. Therefore, it must be noted that the analysis which follows and the proposed improvements are only applicable to situations where economic demand does not in itself justify construction of the airport.

2. APPLYING A MORE ECONOMIC APPROACH – A FORGOTTEN IDEA?

Placing a greater emphasis on economic efficiency is nothing new in competition law. In the late 1980s and early 1990s the European system was criticised (and rightly so) for being "too legalistic and lacking in economic analysis."[39] Many critics pointed out the unfavourable comparison between EU competition law and that of its equivalent – US Antitrust law – which since the 1970s has been applied through the lens of objective economic analysis.[40] These arguments have been largely substantiated in some high-profile "transatlantic" cases – *Boeing/McDonnel Douglas* (1997), *GE/Honeywell* (2001) and *Microsoft* (2004) – when a conflict between the US and the (then) European Community competition authorities exposed problems with the (then) contemporary European approach.[41]

As a result, in 1999 the European Commission (under Mario Monti, then the Competition Commissioner) undertook an ambitious, but "soft" reform under the label *More Economic Approach*.[42] During this process, the Commission enacted a series of acts, mostly soft law, within the antitrust (Articles 101 and 102 TFEU) as well as Merger Control spheres, outlining an approach "based on the effects on the market."[43] While the broad goal of grounding law in microeconomics is not hard to decode, the concept of the *More Economic Approach* seems superfluous, as official policy papers have failed to clearly explain its agenda.[44]

Such vagueness is unavoidable to a certain extent, because as Robert Bork famously said about the US antitrust system, "only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[45] The same holds true in case of the EU competition law, and there is an ongoing and unresolved debate over the

[39] B.E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 Common Market Law Review 973 (1995).

[40] R. van den Bergh, *Modern Industrial Organisation versus old-Fashioned European Competition Law*, 17 European Competition Law Review 75 (1996); A.C., Witt, *The More Economic Approach to EU Antitrust Law*, Hart Publishing, Oxford, Portland: 2016, pp. 10-11.

[41] Witt, *supra* note 40, pp. 11-24.

[42] Commission of the European Communities, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1 (1999 White Paper).

[43] A list of these acts is available in Witt, *supra* note 40, pp. 57-60.

[44] Witt, *supra* note 40, pp. 57-59.

[45] R. Bork, *The Antitrust Paradox*, Free Press, New York: 1993, p. 59.

goals, priorities, and values of the European economic model.[46] Nevertheless, despite these uncertainties the practical ramification of this new approach is, broadly speaking, the use of an economic analysis as a justification for a given EC decision.[47] A lack thereof may constitute a violation of the applicable procedural standards, resulting in a declaration of *ex tunc* nullity.[48] Yet, this development cannot give rise to a legitimate expectation regarding the quality of these analyses, but merely their existence.[49]

While the approach presented above can be criticised as half-hearted, surprisingly even as such it did not initially find its way into State aid law. Only in 2005 did the European Commission publish a vague document entitled *State Aid Action Plan* outlining (in rather broad strokes) a conceptual framework for the appraisal of State aids.[50] The balancing test laid out therein has subsequently been introduced into a number of sectoral guidelines and further refined as part of the SAM reform.[51] While these declarations remain mostly vague and aspirational, nevertheless they cannot be completely ignored and as a result practicing lawyers can expect some economic justification for State aids. However, as with its antitrust counterpart, such an expectation does not extend to a specific methodological standard. Even though there has been observable progress over recent years, State Aid Modernization seems oblivious to those voices advocating the need to improve analyses of distortions of competition and effects on trade.[52] This becomes apparent given that the EC did not introduce into State aids a market analysis comparable to that carried out under Articles 101 and 102 TFEU and in Merger Control.[53] In a similar vein, the CJEU has remained reticent in its case-law

[46] There is an extensive debate among legal scholars over the goals of both the EU Competition law as well as the whole European economic model. While it is broadly accepted that these goals encompass the effective allocation of resources, consumer welfare, and integration of the Internal Market, there is no consensus on meaning of these notions as well as on the relationship between them.

[47] G. Monti, *EC Competition Law*, Cambridge University Press, Cambridge: 2007, pp. 15-17.

[48] It can be considered as "infringement of an essential procedural requirement" within the meaning of Article 263 TFEU. *See* Cases T-34/02 *EURL Le Levant 001 and Others v. Commission of the European Communities* [2006], ECLI:EU:T:2006:59; T-1/08 *Buczek Automotive sp. z o.o. v. Commission of the European Communities* [2008], ECLI:EU:T:2008:79.

[49] Bacon, *supra* note 7, p. 84.

[50] Commission of the European Communities, *State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005–2009*, COM(2005) 107 final (2005 SAAP).

[51] Bacon, *supra* note 7, pp. 15-16; Hofmann & Micheau, *supra* note 7, pp. 33-35.

[52] *See* X. Boutin, N. Gaál, *Modernising State Aid through Better Evaluations – Insights from Recent Discussions with Stakeholders*, 13(1) European State Aid Law Quarterly 67 (2014); F. Gröteke, K. Mause, *The Economic Approach to European State Aid Control: A Politico-Economic Analysis*, 17(2) Journal of Industry, Competition and Trade 185 (2016). The State aid control system was put in a difficult position following the financial crisis, when many extraordinary measures were authorised. The too-great leniency towards ailing operations was one of the main causes of the SAM reform. Despite this initiative however, the post-crisis fallout has not yet been fully cleaned up. *See* A. Sanchez-Graells, *Digging itself out of the hole? A critical assessment of the European Commission's attempt to revitalise State aid enforcement after the crisis*, 4(1) Journal of Antitrust Enforcement 157 (2015).

[53] J.T. Lang, *EU State Aid Rules – The Need for Substantive Reform*, 3 European State Aid Law Quarterly 440 (2014).

and rejected suggestions that it should revise its methods to analyse the impact of aid measures.[54]

Although relatively recently (November 2016) the Commission published a call for a tender to evaluate the impact of state measures on the market and assess how market analyses can be applied to State aid cases, so far it has not resulted in any legislative initiative.[55] This apparent deficiency is inextricably linked with the construction of the State aid control system, which determines the required standard of impact assessment. Each of these areas will be discussed in turn below.

3. DISTORTION OF COMPETITION AND EFFECT ON TRADE – ACTUAL V. PREDICTED DATA

The existing lack of methodological rigidity can be explained, but not entirely justified, by the low standard of the effect on competition and trade test. For our purposes here, the crucial determinant is that, in principle, aid in the aviation sector, especially investment aid, requires prior notification.[56] Member States may not initiate an aid measure before the Commission has given its approval. However, non-notified aid is not automatically deemed incompatible with the Internal Market.[57] For this reason, the analysis of the effects of the aid measure must be made on the basis of the *ex ante* (or *a priori*) characteristics of the given measure.[58]

In the model scenario, a compatibility assessment is done before data showing its actual effect becomes available. It follows from this that basing the substantive assessment on a predicted impact seems to be the only practically feasible solution. Therefore, the analysis of distortions of competition and effects on trade does not require a definition of the relevant geographic and product markets. Similarly, there is no need to identify all existing conditions relevant to the case; *inter alia* the level and dynamics of trade, extent of existing competition, supply-demand structure etc.[59] It is sufficient to present a theoretically valid mechanism showing the potential effect on

[54] *See* especially Case C-518/13 *Eventech Ltd v. The Parking Adjudicator* [2015], ECLI:EU:C:2015:9, paras. 64-71.

[55] Available at: http://ec.europa.eu/competition/calls/exante_en.html (accessed 30 June 2018), under no. COMP/2016/005.

[56] With the exception of regional aid under GBER and *de minimis* aid.

[57] Bacon, *supra* note 7, pp. 94-95; Hofmann & Micheau, *supra* note 7, pp. 348-350.

[58] Although the Commission may strengthen its evidence by reference to new data, where these confirm the EC's assessment. *See* Case C-142/97 *Belgium v. Commission (Tubemeuse)* [1990], ECLI:EU:C:1990:125, para. 39.

[59] Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and Others v. Commission of the European Communities* [2000], ECLI:EU:T:2000:151, para. 95; T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v. Commission of the European Communities* [2000], ECLI:EU:T:2000:223, para. 102; T-58/13 *Club Hotel Loutraki AE and Others v. European Commission* [2015], ECLI:EU:T:2015:1, paras. 88-89.

competition and trade, without real supporting data establishing the likelihood of its actual occurrence.

As a result, the actual threshold for proof is rather low.[60] Although, while in *Hotel Cipriani* the Court held that a distortive effect could not automatically be assumed from the case's circumstances, it was sufficient to show the existence of factors leading to the conclusion that the measure is liable to distort competition and affect inter-State trade.[61] In other words, the Commission needs only to present a theoretically valid but practically unverifiable mechanism. While the decision is likely to be overturned if there is no link between this mechanism and the facts of the case, nevertheless the analysis remains purely theoretical.[62]

One more point merits mentioning here: according to the Court's established case law, the generic test for a distortion of competition is whether the aid strengthens the position of the beneficiary vis-à-vis its competitors.[63] However, this line of reasoning is problematic due to parallel case-law where the Court has asserted that neither an assessment of the relative strength of the undertakings nor the establishment of the existence of actual competitors is required.[64] It is sufficient merely to prove the elimination of costs which are usually incurred by a typical undertaking.[65] This interpretation appears to be a leap in logic by linking the advantage criterion with the criteria of distortion of competition and effect on trade. The argument runs that if a measure confers an economic advantage, it will distort intra-community competition and trade (or be liable to have such effect).[66]

The reason why this factor is especially relevant here is that there is an ongoing debate among economists about whether airports have market power, i.e. whether they can compete with other airports.[67] This issue remains controversial and there are radically conflicting opinions concerning this question. Regardless, even if in a particular case the existence of market power can in principle be established, it cannot be done without

[60] Bacon, *supra* note 7, p. 84; Hofmann & Micheau, *supra* note 7, pp. 150-152.

[61] Case T-254/00, T-270/00 and T-277/00 *Hotel Cipriani SpA and Others v. Commission of the European Communities* [2008], ECLI:EU:T:2008:537, paras. 227-228.

[62] *See* Cases T-34/02 *Le Levant*; T-1/08 *Buczek*.

[63] Established for the first time in Case 730/79 *Philip Morris Holland BV v. Commission of the European Communities* [1990], ECLI:EU:C:1980:209.

[64] *See* model example of this reasoning in AG Darmon opinion in Case C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993], ECLI:EU:C:1993:97, para. 61.

[65] *See*, *inter alia*, Cases C-494/06 P *Commission of the European Communities v. Italian Republic and Wam SpA* [2009], ECLI:EU:C:2009:272, para. 54; C-71/09 P, C-73/09 P and C-76/09 P *Comitato «Venezia vuole vivere», Hotel Cipriani Srl and Società Italiana per il gas SpA (Italgas) v. European Commission* [2011], ECLI:EU:C:2011:368, para. 136.

[66] Mause & Gröteke, *supra* note 52,

[67] *See generally* Gillen et al., *supra* note 23; S. Maertens, *Estimating the Market Power of Airports in Their Catchment Areas: A Europe-Wide Approach*, 22 Journal of Transport Geography 10 (2012); A. Polk, V. Bilotkach, *The Assessment of Market Power of Hub Airports*, 29 Transport Policy 29 (2013); Wiltshire, *supra* note 23. This list is not exhaustive. It is merely a representation of the positions in a debate.

a detailed analysis of catchment areas, route networks, demand structures, and so on. This leads to the conclusion that an assumption that an advantage (the existence of which is very easy to establish) automatically distorts competition is oversimplifying a more complicated issue for the sake of maintaining a *quasi*-legal assumption of the incompatibility of the State aid measures. This is particularly important for the State aid control system, because it places the burden of proof on the Member State, as discussed below in Section 5.

4. IMPORTANCE OF PRIOR NOTIFICATION – SAFEGUARDING THE ENFORCEMENT SYSTEM

It would seem that another, and arguably more important, reason why such a rudimentary test of the effect on trade and competition is accepted is to avoid incentivising violations of the notification requirement.[68] It goes without saying that only an *ex post* impact evaluation can be based on actual data and thus is most likely to be more detailed and accurate than even the best predictions. Preservation of the integrity of the State aid control system is certainly a valid goal. First, there is a matter of principle: infringement should never be rewarded. This reflects the old legal adage that rights cannot be based on, or derived from, injustices or the violation of other rights.[69] Additionally, avoiding notification is not only detrimental to the effectiveness and predictability of State aid control, but also in the long term such an erosion is dangerous to the control system itself.[70] It is often pointed out that the disregard or disobedience of legal rules creates an environment conducive to various abuses, which pose a serious threat to the rule of law.[71] From an individual case perspective, it could lead to wasteful spending and misuse of State aids, even if a recovery decision were issued *ex post*, as at this point the funds are usually spent and have become irrevocably lost.

The case of Gdynia-Kosakowo airport in Poland is especially instructive in this respect, as it shows the practical consequences of disregarding the notification requirement and highlights the relevance and importance of a prior notification requirement.[72] It was glaringly obvious that building a new regional airport within approximately 20 km from the operating, non-congested airport in Gdańsk constituted a blatant infringement of

[68] Bacon, *supra* note 7, p. 83.

[69] *Ex iniuria ius non oritur* principle is recognized and endorsed by the EU Courts. *See* especially Case C-208/90 *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991], ECLI:EU:C:1991:333.

[70] Hofmann & Micheau, *supra* note 7, pp. 25-30.

[71] A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, Routledge, Abingdon: 2012, p. 560.

[72] Commission decision SA.35388 Setting up the Gdynia-Kosakowo Airport [2015], OJ L250/165. This is the only case so far in regard to aid to airports wherein the EC has issued negative decision with respect to recovery. This interpretation was upheld by the Court (Case T-215/14 *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v. Commission* [2014], ECLI:EU:T:2014:733) although the ruling lowered the amount of the sum sought to be recovered due to an initial cost allocation error.

State aid rules.[73] Yet, the investment went ahead unnotified, owing to mismanagement bordering on criminal.[74] When the Commission finally launched an investigation, the construction was essentially completed and all the funds already spent.[75] Since most funds were allocated to the construction of the terminal building (located on a military terrain – the airstrip has dual purpose military and civilian usage), there was no possibility of recovering the aid, especially given that airport is not operating.[76] There is no doubt that it is far more difficult to recover money after it is spent than to prevent it from being spent in the first place. Yet, it cannot be said that the State has somehow benefited from its failure to notify the aid.[77] This was clearly a lose-lose situation which has spiralled out of control due to wilful disregard of the State aid rules. The point of this example is to show that prior notification has a value in itself; and requires legal protection. (As a side note: in November 2017 the Court annulled the Commission decisions on the grounds of procedural error.[78] However, the Court did not rule on the substantive issue – the compatibility of the aid itself – and the Commission will be able to start a new case and essentially re-issue its previous decision).

We see here a clash between maintaining a prior authorisation system and improving the quality of assessments in State aid cases. The line of reasoning behind disallowing actual data when it is available hinges on the assumption that recourse to an analysis of existing data will make it possible to prove that an effect on trade and competition that is non-existent or negligible. However, the opposite may actually be the case. First, it might turn out that the actual impact of aid will exceed its baseline forecast.[79] Secondly,

[73] The Case was assessed under 2005 Guidelines. The Commission asserted that the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. This would be the case if the new airport was in the catchment area of an existing airport where the existing airport is not operating at or near full capacity and the medium-term prospects for use of this new infrastructure are not demonstrated by a sound business plan (The 2014 Guidelines repeat these criteria). The Gdańsk airport, located within 20 km of the then-prospective airport, was operating at approx. 60% capacity and Gdynia failed to provide any data substantiating its claims. In fact, they wasted an opportunity to do so by disregarding notification. A clearer example of infringement of aid criteria could not be found.

[74] Mismanagement and waste of public funds can be considered a crime, even if no official directly profited from it, and even if it is involuntary (although it is hard to imagine that such a blatant infringement was involuntary). The wilful disregard of the notification procedure is the decisive factor, and there exists no objective reason why this aid was not notified *ex ante*. Additionally, the Commission usually advocates the approach that aid should be notified in cases of doubt (*See* reasoning in Case C 284/12 *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* [2013], ECLI:EU:C:2013:755).

[75] J. Kociubiński, *Regional airport policy – financing construction and operations: European state aids perspective. Role for national parliaments?*, in: W. Szydło, M. Szydło (eds.), *Parlament jako instytucjonalny uczestnik sektorów sieciowych*, Oficyna Prawnicza, Wrocław: 2014.

[76] No further aid can be issued so long as the previous illegal aid is not paid in full.

[77] The airport operator went into insolvency liquidation.

[78] Case T-263/15 *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v. Commission* [2017], ECLI:EU:T:2017:820.

[79] It is worth recounting Court's position that the EC's analysis may be augmented by further data if the data supports the initial assessment (Case C-142/97 *Tubemeuse*). Based on a strict reading of the word-

when *ex post* assessment is performed relatively early after a measure has been put into effect, the evidence needed to demonstrate its full impact may not yet be available. It therefore seems an oversimplification to draw categorical dichotomous distinctions between accurate "real" data and inaccurate predictions. The variables are too complex and the circumstances too case-specific.

It must therefore be stated that violating the notification requirement, based on an assumption that the actual data can be used *ex post*, may not bring about the desired results for either the beneficiary or the Member State. Nonetheless, the mere unquantifiable possibility of creating an incentive to breach the notification requirements should be reason enough to impose uniformity on assessment standards.[80] Additionally, any such incentivisation can be perceived as discriminatory against those States who have adhered to the notification requirements.[81] To conclude this part of the discussion, it seems it must be tentatively accepted (after due consideration) as a matter of principle that no actual data should be used in a test for establishing an effect on trade and competition. In the light of the foregoing, I would argue that the real problem lies not in the factual differences between actual and predicted data, but in the fact that no methodological requirements or standards exist for either of them.

5. BURDEN OF PROOF – PROCEDURAL PROBLEMS OF DATA VERIFICATION

Bearing in mind the discussion in the above Section 4, the question arises as to the significance of the procedural aspects of the application of State aid law and the burden of proof. From a formal standpoint, only the Commission and the Member State concerned participate in a proceeding; but in reality it bears a strong resemblance to *inter partes* procedures.[82] Therefore, it seems more accurate to say that it is *de facto* dialogue-based, as during the administrative procedure the Commission may request Member States (and thereby indirectly undertakings) to provide any further information necessary to complete its analysis. The procedure also offers ample opportunity for updating data if

ing it is not entirely clear whether actual data supporting opposite conclusion may be accepted *ex officio*, or only upon a request from a Member State.

[80] As was held by the Court in Case C-351/98 *Kingdom of Spain v. Commission of the European Communities (Spanish Trucks)* [2002], ECLI:EU:C:2002:530, paras. 66-67.

[81] In EU law, not every unequal treatment is considered discriminatory. Discrimination is interpreted as unequal treatment in a comparable situation (*See, inter alia*, cases 17-76 and 16-77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen; Diamalt AG v. Hauptzollamt Itzehoe* [1977], ECLI:EU:C:1977:160, para. 7; C-127/07 *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008], ECLI:EU:C:2008:728, para. 23). In the latter case all parties were equally bound by the notification requirements, which have made them comparable.

[82] L. Ortiz Blanco (ed.), *EU Competition Procedure* (3rd ed.), Oxford University Press, Oxford: 2013, pp. 884-885.

deemed deficient, so it aims at consensual solutions.[83] Yet the Commission is entirely free to decide whether to accept or reject data submitted by a State. In practice, only in cases of a *prima facie* incompatibility with the Internal Market, i.e. when a measure has no redeeming qualities, is all data rejected outright.

The overall idea behind the dialogue-based procedure is certainly laudable, as it allows for addressing any data deficiencies. But at the same time, it lacks transparency. Here we see another case of contradictory policy objectives. It stands to reason that sensitive business information, which the beneficiary will not want disclosed, is routinely presented in State aid cases.[84] This adds another layer of complexity. Since most data used by the Commission is confidential (in the business sense), it is hard to determine whether an EC decision to accept or reject data was reasonable. Errors of judgment may only become apparent in hindsight, following a project's failure, but such *post factum* validation serves little useful purpose.[85] For these reasons the procedure itself, when involving confidential information, must be protected as well, and thus is not open to public observation and scrutiny (and rightly so).[86] Therefore, there is no practical and effective method of monitoring cases on a continuous basis. The above observations seem to reinforce the view that the imposition of certain methodological standards from the outset would appear to be the most feasible way to objectify the decision-making process in State aid cases, or at least to reduce the failure rate.

On top of this there are additional practical problems relating to the burden of proof. As a general rule, the onus is on the Member State to prove that the aid meets all the criteria set out in Article 107 TFEU and in sector-specific rules.[87] In other words, State measures initially are given a rebuttable presumption of incompatibility with the Internal Market (there are a few exemptions).[88] The Commission is therefore forced to rely on the data supplied by the Member States. These may be better or worse, but as mentioned before the EC is free to decide whether to accept or reject the data.

The infrastructure improvements – financed by the EU funds – of Polish regional airports, especially in Zielona Góra and Łódź, provide instructive case studies. In the applications for EU funds (mostly from the Regional Development Fund) airport

[83] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9 (2015 Procedural Regulation).

[84] Data confidentiality is guaranteed in the 2015 Procedural Regulation.

[85] Some commentators suggest that penalties should be imposed on the Member States that unlawfully grants the aid (Lang, *supra* note 53, p. 453; J. Lever, *EU State Aid Law – Not a Pretty Sight*, 12 European State Aid Law Quarterly 5 (2014)). It may have a certain deterrent effect, and it reinforces the author's postulates. Additionally, individuals may be responsible under domestic law.

[86] Ortiz Blanco, *supra* note 82, pp. 418-419.

[87] Bacon, *supra* note 7, p. 465; Hofmann & Micheau, *supra* note 7, pp. 224-225.

[88] Such an interpretation stems directly from the literal wording of Article 107(1) TFEU and has been repeated numerous times in the case-law. *See*, *inter alia*, Case T-348/04, *Société internationale de diffusion et d'édition SA (SIDE) v. Commission of the European Communities* [2008], ECLI:EU:T:2008:109, para. 58. Exceptions include Regional aid and *de minimis* aid.

operators presented data showing unprecedented rates of air traffic growth, not even remotely close to the values recorded earlier.[89] This data was accepted as valid estimates and used as a basis for financing. Some experts questioned the plausibility of these figures from the outset. These concerns proved entirely justified, as it turned out that the submitted predictions were wrong by staggering percentages in some cases.[90] It was speculated that the analyses were deliberately biased to make them appear more favourable than warranted, and/or that the forecasters were just too eager to please.[91] At some stage a lawsuit or some form of dispute settlement action against the authors of these analyses have been taken into consideration, as such erroneous predictions can result in withdrawal of the funding.[92] In a nutshell, these were typical examples of the "ghost airports" mentioned earlier. The dilemma presented in these cases is how to filter out erroneous data.[93] It seems logical that such data should not be accepted at face value, since the applicants are in a conflict of interest situation, naturally being interested in presenting data supporting their claims.[94]

One alternative possibility which can be considered would be to invert the burden of proof in favour of the Member State. Such an approach would mean that the requirement to present theoretically valid mechanisms of effect on trade and competition would effectively be replaced by a presumption that the aid is non-distortive unless proven otherwise. However, given the need for and nature of *ex-ante* appraisals, this alternative is unlikely to lead to any radical improvement. Of course, there is always the option of issuing a negative decision on the grounds that the conclusions were not justified by the data, but as mentioned earlier, the distinction between "good" and "bad" data can be problematic and is particularly hard to discern with respect to *ex ante* data

[89] This conclusion is supported by the statements for the European Commission and by the European Court of Auditors, although, however the actual analyses (except for Master plan for the Zielona Góra airport) were either withdrawn or never published.

[90] In Poland there exists a quite heated debate concerning "ghost airports." A brief overview in English is available in: *Reuters Special Report: EU funds help Poland build 'ghost' airports*, available at: http://www.reuters.com/article/us-poland-airports-specialreport/special-report-eu-funds-help-poland-build-ghost-airports-idUSKBN0JS06K20141214 (accessed 30 June 2018).

[91] The master plan for the Zielona Góra airport, containing the predicted growth of air traffic, is available (in Polish only) at: http://airport.lubuskie.pl/wp-content/uploads/selected-elements-of-the-master-plan-epzg-2014-2034.pdf (accessed 30 June 2018). At the same time, the PricewaterhouseCoopers acknowledges that the city of Zielona Góra had commissioned the report on the prospects for their local airport. The conclusions did not support the idea of airport expansions nor the overly optimistic data presented in master plan, so it therefore remained unpublished.

[92] Proving deliberate research misconduct would however be extremely difficult.

[93] Robins, *supra* note 32, pp. 132-133.

[94] It is worth mentioning that in merger control cases the Commission expressed the view that there must be the possibility to submit data prepared by the undertakings to independent verification. The argument runs that merging parties are interested in providing data supporting their claims, and they such data should not be accepted at face value (I. Kokkoris. H. Shelanski, *EU Merger Control. A Legal and Economic Analysis*, Oxford University Press, Oxford: 2014, pp. 270 et seq.). A similar motivation would seem to exist in State aids, yet an analogous interpretation has not been fully endorsed.

(except in cases where research misconduct can be proven). Therefore, all the problems mentioned earlier with respect to prediction-based appraisals will remain. Furthermore, a requirement that the Commission should always conduct its own research would place an unsustainable strain on its resources and manpower. It should also be pointed out that such a solution seems contrary to the principle that a person (or entity) wishing to derive a right must prove that they are entitled to it.

Additionally, multiple aid schemes may exist simultaneously, provided to the same beneficiary, either directly or indirectly.[95] It goes without saying that for an airport, the ability to attract carriers and air cargo traffic is crucial to the establishment of a positive financial performance. At the same time, an airline may be reluctant to enter a small or untested market due to the risks associated with such an entry.[96] Therefore, air traffic may require a stimulus either through a PSO for the thinnest "public service" routes or through start-up aid for routes that will ultimately prove profitable.[97] Hence a domino effect occurs, as airport profitability predictions hinge on the assumption that another State intervention will prove successful.[98] It is true of course that no one can reasonably assume State aid failure in their baseline scenario, but nevertheless other aids should be assessed separately, as possible failures can directly affect other aid measures.[99] Such a risk factor is largely because the above-described data accuracy problem exists for each separate aid share.

CONCLUSIONS – EXORCISING "GHOST AIRPORTS"

In this article I have repeatedly referred to "forecasts", "predictions" and "economic analysis", without elaborating on the specifics of a given research. This was done because practicing competition lawyers have neither a legal nor a professional obligation to be fully versed in conducting sophisticated market research. Although competition law is by its very nature "immersed" in economics and lawyers draw heavily upon its *acquis*, no one can reasonably expect legal professionals to have the ability to self-verify economic data.

[95] Only rescue and restructuring aid *ex lege* cannot be combined with any other type of aid.

[96] *See generally* Gillen et al., *supra* note 23; Postorino, *supra* note 19; Zuidberg, *supra* note 24.

[97] Start-up aid is regulated by the 2014 Guidelines and requires prior notification under generic State aid rules. Compensation for discharging a Public Service Obligation is not considered to constitute a State aid within the meaning of Article 107(1) and is therefore entirely exempted from the notification requirement. Member States have essentially carte blanche discretion to impose PSOs.

[98] An aid measure will be addressed to a different beneficiary – the airline. Thus, the airport will benefit indirectly.

[99] Research conducted on the Spanish market reveals that airlines usually abandon routes as soon as funding dries up. Importantly in this connection, start-up aid has a finite period and is not renewable (*see* D. Ramos-Pérez, *State Aid to Airlines in Spain: An assessment of regional and local government support from 1996 to 2014*, 49 Transport Policy 137 (2016)). Since this research covers only one state and predominately one carrier, so due to the insufficient data we can only speculate whether this is an EU-wide trend.

What can be expected is that all analyses submitted will meet a specific set of methodological criteria. However, it must be clearly said that the problem of research misconduct cannot be eliminated through purely legal means – e.g. requirements, incentives, penalties. The procedural aspects presented earlier – avoiding any encouragement of the infringement of notification requirements, maintaining cohesion of the control system, and the burden of proof – produce a limitation in the possible range of legal and regulatory solutions. Therefore, a realistic goal is to minimize rather than completely eliminate the obvious biases existing in research. In order to achieve improvement from the perspective of the initial hypotheses, the following variants can be considered:

Variant one – Hard law regulation. This variant encompasses an amendment to the 2015 Procedural Regulation. It would introduce prescribed requirements and a procedure for methodologically evaluating the findings submitted to the Commission in State aid cases. Not meeting this standard would result in the State aid being declared incompatible with the Internal Market. Since the post-notification procedure is dialogue-based, the Commission could always request the State to bring a submitted analysis up to the required standard, instead of rejecting the application outright. The same holds true for non-notified aid.[100]

Although this solution has the merit of clarity, its bluntness, bordering on arbitrariness, poses a problem that becomes immediately apparent: the desired methodological standard would have to be established through the legislative procedure, which would make a sector-specific approach impossible without separately dedicated procedural rules; which in turn could lead to an unnecessary multiplication of laws, thus further complicating the system and creating secondary problems, including, *inter alia,* choice-of-law conflicts. Additionally, any possible deficiencies in a proposed act could affect the entire spectrum of State aid cases. Finally, this solution that lacks flexibility, as any changes would require complex and time-consuming legislative procedures.

Variant two – Soft law regulation. A large – and constantly growing – number of soft law instruments have been adopted by the Commission. According to well-established case-law, soft law, while directly enforceable, contributes to greater legal certainty as undertakings are able to know beforehand in what way the EC will interpret and apply competition rules (including State aids) to a certain sector.[101] The argument runs that these acts create binding results as long as they do not lead to a *contra legem* interpretation of the Treaties.[102] Soft law has been successfully used in other sectors; for example the Commission has adopted so-called 'analytical grids' to assist it in the assessment of whether a measure involves State aid, and if so, whether the compatibility criteria are met.[103] Additionally, it is

[100] Ortiz Blanco, *supra* note 82, pp. 938-939.

[101] L. Senden, *Soft Law in European Community Law*. Hart, Oxford, Portland: 2004, pp. 132-133.

[102] *Ibidem*, pp. 282-287.

[103] Following analytical grids has been adopted in: Water infrastructures; Roads, bridges, tunnels and inland waterways; Railway, metro and local transport; Port infrastructure; and Culture, heritage and nature conservation. Available at: http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html (accessed 30 June 2018).

worth mentioning that a set of "Best Practices" exists for the submission of economic evidence and data collection in cases concerning the application of antitrust and merger rules.[104] There are no objective reasons why they could not be implemented in the air transport sector.

However, this approach shares risks in common with variant one. A deficiency in an analytical grid could negatively affect all subsequent State aid decisions. However, the Commission is acting alone when adopting soft law instruments, so these are relatively easy to replace or update. Moreover, unlike hard law regulations, the European Commission can always deviate from its self-imposed guidelines, although potential problems could arise from this latter issue; past experience suggests that soft law is not always strictly adhered to. The Commission is rather inclined to take a more lenient stance, on a case-to-case basis, than make *ex ante* criteria (*vide* SGEI Altmark criteria).[105] While a certain degree of interpretive flexibility is a must, nevertheless this practice could potentially erode legal certainty, leading to a regulation which misses its main purpose.

Variant three – Hybrid regulation (**hard law + soft law**). The third variant amalgamates certain features of the two previous options by entailing the parallel application of both soft and hard law instruments. Amendments to a procedural regulation could introduce a "hard law" requirement for substantiation, while at the same time granting a legislative delegation to the Commission to enact soft law detailing the required methodological standard – for example the analytical grid. In theory, this method offers the benefits of both above-discussed methods while avoiding their drawbacks. The approach allows for the flexibility of soft law regulation together with the increased legal certainty of hard law regulation, although without the heavy-handed manner of the latter approach. However, it can be argued that this method is to a certain extent redundant, because *de facto* the binding nature of soft law can as well be inferred from its mere existence. Nevertheless, having direct recourse to a soft law instrument can be interpreted as a strong dedication to the "more economic approach." It may also indicate that cases where the submitted documentation does not meet the requirements specified in the relevant soft law will not be cleared, except on an exceptional basis.

Variant four – No change. This last variant serves merely as a reference point. The current situation cannot be considered as radically negative, although as has been shown the most apparent disadvantage lies in its arbitrariness and thus sometimes in insufficient legal certainty. As a result, the general standard is too lax in areas where

[104] The following best practices have been published: Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in Merger cases; Best Practices on the Submission of Economic Evidence and Data Collection; available at: http://ec.europa.eu/dgs/competition/economist/best_practices_en.html (accessed 30 June 2018).

[105] *See* Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003], ECLI:EU:C:2003:415 with CaseT-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v. Commission of the European Communities* [2008], ECLI:EU:T:2008:29.

a more stringent approach is needed. It must also be said that those situations when State aid is obviously misapplied, although spectacular and drawing widespread media attention, are relatively rare, statistically speaking. Furthermore, it must also be noted that recently the Commission has taken a stricter approach, which to a certain extent can remedy existing problems, although legal certainty will remain problematic.

To sum up, my attempt to answer to the title-question has revealed the limitations of law on one hand, and the deficiencies of policy on the other. While each proposed variant has its advantages and disadvantages, in my opinion the hybrid solution offers the most advantageous combination of features for an objectivized decision-making process. Yet it must again be emphasized that certain limitations are insurmountable, and that the overall success of any reform hinges upon two interwoven factors: the quality of the required methodology; and the consistency of the Commission's decision-taking practice.