

## Case T-196/04 *Ryanair v Commission*

**State aids and publicly owned airports: the application of the private investor principle to the aviation sector**

**Laura Elizabeth John**

**17 December 2008**

Striking down Commission Decision 2004/393/EC ('the Contested Decision'), the Court of First Instance of the European Communities ('the CFI') in Case T-196/04 *Ryanair v Commission*, has ruled for the first time on the application of the private investor principle to the aviation sector. This principle provides that a measure is not an unlawful state aid under Article 87 EC where it confers on the State a benefit equivalent to that which a private investor might have obtained under a commercial arrangement. The CFI has confirmed that, in determining whether a measure affecting the aviation sector breaches Article 87 EC, it is not lawful to separate the provision of airport infrastructure and airport management services, for the purposes of applying that principle. Both are to be considered economic activities, to which the principle requires to be applied.

Ryanair Ltd ('Ryanair') had entered into two agreements in November 2001 by which it became the principal occupant of Charleroi airport, in the Walloon Region of Belgium. In return for an undertaking by Ryanair to increase sevenfold the numbers of passenger carried from the airport, for the next fifteen years:

(i) the Walloon Region ('the Region'), the owner of the airport, reduced the landing charges payable by Ryanair by 50% as compared with their regulatory level, and undertook to compensate Ryanair for any loss of profit it may incur as a result of regulatory changes to airport charges or opening hours.

(ii) the Brussels South Charleroi Airport ('the Company'), a public sector company operating the airport and controlled by the Region, contributed to the costs incurred by Ryanair in establishing its base, and reduced the level of charges payable by Ryanair for ground handling services by 90% as compared with the published tariff for other operators.

The Commission, in the Contested Decision, found both agreements to be unlawful state aids, contrary to Article 87(1) EC. The agreements were each found to grant an economic advantage to Ryanair, the first having been concluded in the exercise of the Region's legislative and regulatory competence, such that the private investor principle was inapplicable; the second was assessed by reference to the private investor principle, but was found not to

be compatible with it. Additionally, both agreements were found to be aids of a specific character, being granted to Ryanair only; to involve the transfer of State resources; and to impact upon intra-Community trade and competition. Ryanair successfully challenged the Commission's findings in respect of the 'economic advantage' alleged to have been granted.

### **The owner and operator of the airport are a single economic entity**

The CFI held that the Region and the Company are a single economic entity for the purposes of applying the private investor principle. It noted the Company was economically dependent on the Region, it being a public undertaking 96.28% of whose share capital is public capital. The Region not only participated in the Company's activities, but potentially also obtained financial consideration for having granted the measures in issue to Ryanair. The Commission was required "*when applying the private investor test, to envisage the commercial transaction as a whole in order to determine whether the public entity and the entity which is controlled by it, taken together, have acted as rational operators in a market economy.*" (paragraph 59). In treating the entities as separate, notwithstanding their financial links, the Commission had made an error of law.

### **The Region's actions were an economic activity, for the purposes of applying the private investor principle**

The CFI also upheld Ryanair's submission that the actions of the Region were an economic activity to which the private investor principle should have been applied. It stated that "*...a distinction must be drawn between the obligations which the State must assume as an undertaking exercising an economic activity and its obligations as a public authority...*" (paragraph 84). The management of airport infrastructure having already been held to be an economic activity (Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929), the Region's fixing of landing charges and granting an accompanying indemnity to Ryanair against potential future regulatory changes was likewise an economic activity, both being directly connected with the management of airport infrastructure (paragraph 88).

In reaching this conclusion, the Court rejected the Commission's arguments that various factors rendered the Region's actions an exercise of regulatory competence, not an economic activity. All were held to be insufficient to impact upon the determination. In particular:

(a) The nature of the grant to Ryanair. Unlike the taxes which were at issue in the judgment of the European Court of Justice in Case C-355/00 *Freskot* [2003] ECR I-52363, relied upon by the Commission, the airport charges in the present case were properly regarded as fees, being "*consideration obtained for services rendered*" by the Region or the Company (paragraph 90). Likewise, the fact that the grant was in legal terms an exemption did not render the Region's actions non-economic (paragraph 98-101).

(b) The provision of airport facilities taking place in the public sector (paragraph 91).

(c) The Region being a public authority and the airport in public ownership. The Court noted the Commission's acknowledgement that an airport owner may simultaneously be both regulator and private investor, and its concession that it would have considered the Region acted as a private investor had the Company not acted as intermediary between it and Ryanair (paragraphs 92-93).

(d) The availability of the Region's regulatory powers. Regulation of airport charges is commonplace, as even where airports are managed by private companies their charges are often capped by regulators in view of their monopolistic positions. The various means of setting airport charges does not, therefore, exclude the application of the private investor principle (paragraphs 95-96)

(e) Whether the Region had acted *ultra vires* under national law in entering the agreements. This was held not to be a relevant factor in determining whether an authority acted in breach of Article 87(1) EC (paragraph 98)

(f) The Commission Guidelines on the application of Articles 87 and 88 EC to State aid in the aviation sector of 10/12/1994. The Court held that these confirm the operation of airports and the fixing of associated charges is an economic activity, even when conducted by public bodies. The Commission's argument that they supported a distinction between airport infrastructure and airport management, was rejected. (paragraph 99).

Based on the above, the Court held that the Commission's Decision had been unlawful in failing to apply to private investor principle to Ryanair's agreement with the Region.

### **The application of the private investor principle to the Company**

In view of the Court's conclusions above, it held it unnecessary to rule upon Ryanair's third argument, namely that the Commission had misapplied the private investor principle to its agreement with the Company. However, the Court expressly rejected the Commission's argument that a reassessment of the agreements by reference to the private investor principle would have yielded the same outcome. It noted that it could not exclude the possibility that the outcome would have been different, and in any event emphasized that its role in an annulment action was confined to ruling upon the legality of the challenged measure. "*It is not for the Court, in such an action, to reassess the wisdom of the investment and to rule on whether a private investor would have made the proposed investment at the time when the contested decision was adopted*" (paragraph 104). Rather, the Court conducts a judicial review, and will not "*substitute its own economic assessment for that of the author of the decision.*" (paragraph 41).

### **Conclusions**

The judgment is a confirmation that the application of the private investor principle hinges not on the status of the body granting the measure, or on the means by which it effects that grant, but on the nature of the State's activity in adopting the measure.

In the aviation sector, future assessments of the nature of Member States' activities will need to consider the ownership of infrastructure, and operation and management services, as a joint economic activity to which the principle requires to be applied. The judgment may be expected to enable Member States to improve access to their lesser known, regional airports, permitting them to offer incentives to airline operators in exchange for their taking the commercial risks associated with opening and expanding new routes to such airports.

John Swift QC and Josh Holmes appeared for Ryanair Ltd

**For more information on John Swift QC, Josh Holmes and Laura Elizabeth John, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' section at [www.monckton.com](http://www.monckton.com).**