

courtesy translation

**MIT Guidelines on incentives for start-up and development of air routes by air carriers,
pursuant to article 13 (14) and (15) of Decree Law No 145 of 23 December 2013,
converted, with amendments, into Law No 9 of 21 February 2014**

Position of the Authority

1 - Preliminary remark

On 8 August 2016 the Ministry of Infrastructure and Transport (hereinafter MIT) submitted the new *“Guidelines on incentives for start-up and development of air routes by air carriers, pursuant to article 13 (14) and (15) of Decree Law no 145 of 23 December 2013, converted, with amendments, into Law no 9 of 21 February 2014”* (hereinafter *“Guidelines”*) aimed at replacing those issued by Ministerial Decree no 397 of 2 October 2014¹ on which the Authority, pursuant to the provisions of article 13 (14) of Decree Law no 145/2013², had delivered its opinion in March 2014³.

The accompanying note included the request to *“inform about any evaluation thereof as soon as possible”*.

2 - Legal issues

Apparently, with the new Guidelines, MIT is determined to relieve airport managing bodies and air carriers of the obligation to adopt the procedures outlined in 2014 Guidelines for those incentive schemes that satisfy the MEO test. In fact, the previous guidelines, as highlighted in the aforesaid opinion, included the procedures which applied both to incentives constituting state aid and not.

On the other hand, as stated in 2016 Guidelines, other national and Community provisions are in place which establish the principle of non-discrimination of airlines by airport managing bodies.

In the first place, reference should be made to the law establishing the Authority. The issue of incentives for start-up and development of air routes by carriers is, indeed, part of the more general scope of verification of the existence of fair and non-discriminatory conditions for access to infrastructure, including airports, as referred to in art. 37 (2) (a) of Decree Law no 201/2011.

¹ https://www.enac.gov.it/La_Normativa/Normativa_nazionale/Altre_fonti_nazionali/info-590039986.html

² Decree Law on “Urgent start-up measures for “Destination Italy” plan – art. 13 (14): *“Airport managing bodies providing contributions, subsidies or any other fees to air carriers as regards the start-up and development of air routes intended to satisfy and promote demand in their respective catchment areas shall carry out transparent procedures of choice of the beneficiary so as to ensure the widest participation of potentially concerned carriers, according to procedures to be defined by means of specific Guidelines adopted by the Minister of Infrastructure and Transport, having acquired the opinion of the Transport Regulatory Authority and the National Civil Aviation Authority, within thirty days as of the date of entry into force of the law converting this decree. (15) Airport managing bodies shall inform the Transport Regulation Authority and the National Civil Aviation Authority about the outcome of the procedures provided for under (14) for the purpose of checking their compliance with the requirements of transparency and competitiveness.”*.

³ Opinion No 1/2014, Draft guidelines art. 13 (14) and (15) of Decree Law no 145 of 23 December 2013, converted into Law no 9 of 21 February 2014.

<http://www.autorita-trasporti.it/wp-content/uploads/2014/04/Parere-n.-1-2014-Linee-Guida-Mit-aiuti-di-Stato-aeroporti-e-compagnieaeree.pdf> .

Furthermore, with regard to airport charges, the Authority performs the functions referred to in Article 71 et seq. of Decree Law no 1/2012 implementing Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009.

Article 3 of the Directive, based on a provision implemented by art. 75 of Decree law no 1/2012, provides that *“Member States shall ensure that airport charges do not discriminate among airport users, in accordance with Community law. This does not prevent 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.”*.

Pursuant to article 79 of Decree Law no 1/2012 *“1. The Supervisory Authority shall authorize the airport managing body to change the quality and extent of particular services, airport terminals or parts thereof in order to provide customised services or a specialised terminal or part thereof. 2. The amount of airport charges may be differentiated according to the quality and extent of the services referred to in paragraph 1, and to the related costs or any other objective, transparent and non-discriminatory reason. 3. If the number of airport users wishing to access the customised services referred to in paragraph 1, or a specialised terminal or part thereof, exceeds the number of users that can be accommodated due to airport capacity constraints, access is established on the basis of relevant, objective, transparent and non-discriminatory criteria, as proposed by the airport managing body and approved by the supervisory authority.”*.

Recital 7 of Directive 2009/12/EC also clarifies that *“[i]ncentives for starting up new routes, such as to promote, inter alia, the development of disadvantaged and outermost regions should only be granted in accordance with Community law.”*. Pursuant to Recital 12 *“in order to ensure impartial decisions and the proper and effective application of this Directive, an independent supervisory authority should be established in every Member State.”*.

To uphold the non-discrimination principle, paragraphs 1 and 2 of art. 80 of Decree Law no 1/2012 on *“Supervision on the determination of airport charges for the use of infrastructure and services on an exclusive basis”* provide as follows:

“1. The Supervisory Authority shall ensure the application of the following principles in the determination of the airport charges to be required to airport users for the use of infrastructures and services provided by the airport managing body on an exclusive basis:

- a. cost correlation, transparency, relevance, reasonableness;*
- b. consultation of airport users;*
- c. non-discrimination;*
- d. orientation, in compliance with the principles referred to under (a), to the European average airport charges applied in airports with similar infrastructure and traffic characteristics and standards of services rendered.*

2. In case of infringement of the principles referred to in (1) and non-compliance with the economic and charging policies of the sector, the Supervisory Authority shall adopt measures to suspend the charging system applied.”

Therefore, it is unquestionable that the Authority is required to carry out extensive supervision on the activities of airport managing bodies as regards incentive and development of air routes. This supervisory function does not appear to be limited to the incentive schemes that have not passed the test of the private investor operating in a market economy, as it can be also concluded on the basis of the combined provisions of paragraphs 14 and 15 of Article 13 of Decree Law no 145/2013. Therefore, with reference to the MEO test, it is considered that the supervisory function over the correctness of ex ante evaluations should be preserved both in terms of comparative analysis of market prices and incremental profitability being generated for the airport managing body.

Indeed, these evaluations seem to be the only applicable criterion in the application of the new Guidelines.

In order to exercise its supervisory powers with respect to the obligation of transparency and equal access to all incentive schemes for air carriers, the Authority shall be addressed

- a. the preliminary documentation in support of both favourable and unfavourable outcome results of the MEO test;
- b. the documentation on the procedures for granting incentives, in the form of contributions, subsidies or any other fees to air carriers, with respect to the start-up and development of routes intended to meet and promote the demand in the respective catchment areas.

In order to allow the exercise of the above-mentioned supervisory functions, the Authority reserves the right to provide airport managing bodies with further operating guidelines in addition to those referred to in paragraph 3 below, taking into account the provisions of the Communication from the Commission concerning "*Guidelines on State aid to airports and airlines*".

3 – Technical/economic issues

I. "MEO" test (or market economy operator test)

The assessment of the compliance of public incentives with the MEO test should follow the indications provided by the Commission in the above-mentioned 2014 Communication concerning "*Guidelines on State aid to airports and airlines*". The MEO test is satisfied where the economic conditions applied to airport services are in line with market prices, or where such conditions are able to ensure, in the medium term, a reasonable incremental profit margin.

The Commission's guidelines lay down the rules of application of the MEO test and the information to be produced by airport managing bodies and airlines, both for market price comparison and for determination of the increase in the ex-ante profitability of public incentive programmes. Furthermore, the Commission considers ex ante incremental profitability analysis to be the most relevant criterion for the assessment of the compliance of the arrangements concluded between airports and airlines with the MEO test.

In order to ensure the correct application of the MEO test, airport managing bodies and airlines concerned with public incentives, should be made available all the information required in the Communication from the Commission, which is useful to evaluate the comparison of economic incentives with market prices and, above all, the ex-ante incremental profitability of incentive programmes.

With reference to the market price analysis, airport managing bodies should base their analysis on an appropriate definition of the market perimeter (benchmark), by evaluating, inter alia, volumes and type of traffic, type and level of airport services provided, proximity of the airport to a large city, number of inhabitants in the catchment area, GDP per capita of the surrounding area, different geographical areas from which passengers could be attracted, taking into account the need for a sufficient number of suitable 'comparator airports' available.

On the other hand, with regard to the analysis of incremental profits arising from incentives, airports should have accurate and detailed medium-term information, both historical and prospective, concerning the increase in traffic volumes and the variation in costs and revenues that would result from incentive programmes. In this respect, incremental costs and revenues, as well as the rate of return on capital, should be determined starting from the forward-looking estimates concerning the development

of new routes and traffic, by specifying cost/volume and revenue/volumes relationships, based on the models approved by the Authority by Decision no 64/2014.

For this purpose, it is necessary to take into account the historical and prospective capacity of airport traffic management, as well as their historical and prospective degree of use, in order to highlight any new infrastructural investment needs. The prospective information required by the MEO test should be coherent and consistent with the airport cost models adopted by the Authority both in terms of valorisation of cost items (payable and not) and revenue items, and in terms of accounting allocation to airport services. Cost elasticity to prospective variations in traffic volumes should also be consistent with the latest cost models used to determine airport charges, except for properly justified cases. Similarly to cost accounting models, the rate of return on capital of any incremental investments should be determined in accordance with the methodology set out in Decision no 64/2014.

For the purpose of the ex-ante analysis of incremental profitability, it should be specified that, in line with the Commission's guidelines to define incremental revenue estimates, the managing body may take into account the expected revenue from non-aviation activities arising from the airline activities (such as the margin of commercial activities).

The Authority shall take into account the guidelines on incentives for start-up and development of air routes in the course of the review of the airport charges regulatory models.

II. Procedure of choice of aid beneficiaries

MIT Guidelines are aimed at ensuring the widest accessibility of airlines to incentive programs, which do not satisfy the MEO test, adopted by airport managing bodies for start-up and development of air routes. Airport managing bodies remain free to choose the airlines which are considered to be most suitable for the development of air routes and traffic. In this respect, the Guidelines provide that the airport managing body publishes incentive programmes every six months and carries out selective procedures of the beneficiaries.

Predetermined criteria for the choice of aid beneficiaries is an essential prerequisite for the compliance with the non-discrimination principle, which is protected both at EU and at national level pursuant to Articles 3 and 97 of the Constitution. Indeed, based on the provisions of article 12 of Law No 241/90 (Law on administrative procedure): *"1. The granting of funding, allowances, subsidies or financial aid and the granting of economic benefits of any kind to persons or to public or private bodies shall be subject to the prior determination, by the authorities conducting the procedures and in the forms provided for by their respective internal rules, of the criteria and procedures which shall be followed by the same authorities. 2. The actual compliance with the criteria and procedures referred to under paragraph (1) shall be evidenced in the measures concerning the interventions referred to under the same paragraph (1)."*

Further, article 1, paragraph (1b) of the aforesaid Law No 241/90 provides that *"[p]rivate parties responsible for carrying out administrative activities shall ensure the compliance with the criteria and principles referred to under paragraph (1) with a level of guarantee which shall not be lower than that required to public administrations pursuant to the provisions of this law"*. The criteria mentioned in paragraph 1 of art. 1 of Law no. 241/90 include impartiality and transparency.

Therefore, the airport managing bodies referred to in article 13 (14) of Decree Law no 145/2013 cannot be relieved of the obligation of predetermining the criteria of choice of the aid beneficiary.

Indeed, the public nature of the funding to be granted constitutes a constraint for the conduct of the airport managing body at that stage. On the other hand, the predetermination of the criteria for the

choice of the beneficiary encourages the compliance with the criteria of transparency and maximum participation of the potentially interested carriers, those criteria being expressly mentioned in the a.m. paragraph 14.

Turin, 8 September 2016

The President
Andrea Camanzi