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Construction of Central Communication Airport from the perspective of subsidy law

Abstract: Central Communication Airport is a project that raises discussions – political, economic and legal. Without going into assessment whether this project has its merits and staying within the field of legal analysis the issue of State aid is of primary importance. This paper presents mentioned investment project from the State aid law perspective. Following problems are analyzed: When a public intervention could be regarded as State aid; when financing of the project could be extended; what are compatibility criteria for State aid and what are legal risk factors associated with subsidization.

Keywords: Central Communication Airport; State Aid; EU Law

Introduction

The construction plan of the Central Communication Airport (CKP) presented as one of the key infrastructure projects is widely commented on in the media causing numerous controversies. There are numerous voices raising, not always in line with reality, various arguments of pro or contra the title concept. In the face of the high temperature of political debate, such a significant simplification or even distortion of certain facts is somewhat inevitable, but that is why there is a lack of a cold, scientific view of the issue. This article presents the title project from the perspective of state aid law. At the same time, the text cannot be treated as a voice for or against the proposed investment, but only as an analysis of the *sine ira et studio* of the emerging legal issue.

When considering the aspects of the law of public aid appearing in the context of the construction of FPCs, it should be noted that in European Union (EU) law there is no legal definition of the aforementioned term "public aid" [1]. In 2016, guidelines issued by the European Commission (EC) regarding the interpretation of the term were published, but they are to a large extent a compilation of the previous jurisprudence and decision practice without introducing any new elements [20]. All the more so because the nature of the aforementioned concept makes it impossible to put it in a hard-definitional framework and the interpretation of the concept will always be based on casuistry [1]. For the purposes of these considerations public aid will be understood as a measure attributable to the State, granting to some companies an advantage that is not achievable under normal market conditions. [9].

Looking at the investment consisting of the construction of a "transfer airport" from a large airport transfer, there is no question that the scale of the undertaking will require the involvement of state resources. However, not every investment financed from the budget (whether central or local government) will automatically constitute state aid for the future operator of the building or special-purpose vehicle running the investment [1, 9, 10]. This issue will largely determine the structure of the further discourse because firstly the issue will be analyzed when state interference will constitute state aid within the meaning of art. 107 TFEU, and if so, what are the conditions of its admissibility and what legal risk factors may appear in the context of the title project.

Central Communication Airport - general characteristics of the undertaking

Taking into account the main topic, the characteristics of the concept must have a propaedeutic character limited to its outline, thus establishing a certain context for the analyzed legal issue, all the more so as the technical parameters of the investment are largely irrelevant from a legal perspective.

The title Central Communication Airport is a development of the concept of building a Central Airport for Poland in 2010, supplemented by a study adopted by the Council of Ministers in November 2017, which, however, contains very serious deficiencies and methodological and substantive deficiencies making it impossible to fully assess the adopted plan [12, 19]. Thus, remaining at a certain level of generality, the described project assumes the construction of a hub (airport hub) of the airport to eventually replace the Chopin airport in Warsaw, which currently operates at the capacity limit and does not offer the possibility of extending i.e. due to the proximity of urban areas and restrictions regarding night operations. The Okęcie is to be closed eventually. According to currently available information, the facility is to be located approximately 35 km from Warsaw in the area of Grodzisk Mazowiecki, in the Baranów commune near the A2 motorway and national road 50. Extrapolating the experience of comparable facilities in the world and the original 2010 study, it should be expected that the area the object's gravity will extend to the area of central Poland along the main communication routes. It should be noted, however, that much depends here on the development of the High-Speed Railway, which would result in a synergistic effect, because CPK provides for the location of the railway junction along the planned Ygrek line and currently modernized Central Railway Line and railway line No. [12, 19].

As part of the study work on the original concept in 2010, a number of advanced analytical works were carried out, showing the economic rationality of investments in the face of the dynamics of the existing dynamics of air traffic development [12]. The accuracy of the simulations prepared at that time and their analysis have never been questioned, while the question about their validity remains open, the more so because it should be noted that no additional analyzes have been carried out as part of the current CPK concept.

The principle of a market investor

In fact, the only comparable investment that can serve as a reference material for the above issues is the construction of the Berlin-Brandenburg airport. In the face of increasing delays and emerging problems, i.e. with fire protection installations causing an increase in investment costs, in 2013 Germany decided to co-finance the facility's operator with the amount of approx. EUR 2.2 billion - the measure was launched in 2016 [7]. Meanwhile, the facility operator has already received public aid (approved by the EC in 2009) [3]. It was intended for the same purpose as the latest support, so the purpose of the previous measure was not originally implemented. In addition, in 2012, the facility operator was recapitalized once again, but then the operation was carried out on normal market conditions, so the EC did not state the existence of public aid [4]. The Berlin-Brandenburg airport operator was in total a beneficiary of three state interventions, two of which (from 2012 and 2016) were not considered public aid, and one (from 2009) was classified as aid compatible with the Internal Market, i.e. admissible [3, 4, 7].

The main tool for assessing when the involvement of State resources is public aid, also applied in the above-mentioned proceedings, is the so-called the market investor principle [1, 10]. It has been conceived as an instrument allowing for commercial separation - profit-oriented - (in a simplified way, it can be said, purely business) of the activities of state structures from activities serving the implementation of non-economic goals of public

authority [10]. It is based on a counterfactual scenario involving the analysis of the activities of a hypothetical private investor (hence the name of the principle), guided, for the purposes of the test, solely by economic considerations [17, 20]. If the research shows that this hypothetical investor would be willing to commit its funds on the same principles as the state did, then the state interference in question is treated as a commercial investment, not as public aid [10, 17, 20]. In other words, it is recognized that the state acts then as a rational investor.

The idea that accompanies the introduction of this principle into EU law is clear and deserving of approval. Although the market investor rule is considered by the European Commission to be an appropriate and effective benchmark, its practical application is sometimes problematic [1, 10]. It is indicated that the state will generally have much larger resources than any private investor, so the hypothetical operator used for the purposes of the test will not have its counterpart in reality [1, 10]. In addition, the incomparability of the situation of public authorities and a private investor is supported by the fact that this first group is able to accept a much longer period and a lower return on investment [6]. The state also does not bear business risk in the strict sense, so it can engage in more risky projects [6, 10]. Finally, it can be argued that the state is simply not a private investor and therefore it cannot be attributed to the motivation typical of such an entity [10].

In this context, it is pointed out that the inability to find a *pari passu* investor indicates that the conditions of the market investor test have not been met [15]. This is an interpretation that can be reduced to the following arguments: If no private entity wants to engage in the venture itself, the use of state resources will not be economically rational (although it may be justified by public interest reasons).

In the case of very large enterprises, one can only speculate whether it is impossible for anybody to undertake the investment, that the necessary involvement of public funds will not be fulfilled by the market investor test [15, 20]. In other words, it is not clear whether the cause is lack of willingness or lack of opportunity to complete the investment. However, one can try to adopt a rather restrictive, but "safe" interpretation, that the scale of investment means an automatic failure to perform a market investor test and the entire involvement of state resources should be assessed in terms of compliance with public law. The "security" of this interpretation results from the fact that the controversies discussed above and the uncertainty as to the classification of the measure are omitted, but at the same time perhaps the definition of state aid may be too far. On the other hand, the aforementioned speculation results in the fact that, apart from the continuous delays caused by the construction of the Berlin-Brandenburg airport, there are no investments comparable to the construction of the CPK, so the interpretation must be based largely on judiciary and decision-making practice in other sectors and smaller enterprises. In the case of very large enterprises, one can only speculate whether it is impossible for anybody to undertake the investment, that the necessary involvement of public funds will not be fulfilled by the market investor test [15, 20]. In other words, it is not clear whether the cause is lack of willingness or lack of opportunity to complete the investment. However, one can try to adopt a rather restrictive, but "safe" interpretation, that the scale of investment means an automatic failure to perform a market investor test and the entire involvement of state resources should be assessed in terms of compliance with public law. The "security" of this interpretation results from the fact that the controversies discussed above and the uncertainty as to the classification of the measure are omitted, but at the same time perhaps the definition of state aid may be too far. On the other hand, the aforementioned speculation results in the fact that, apart from continuing delays in the construction of the Berlin-Brandenburg airport, there is no investment comparable to the construction of the CPK, so the interpretation must be based largely on judiciary and decision-making practice in other sectors and smaller projects.

Trying to evaluate the construction of CPK on this background, it should be emphasized that the beneficiary of the aid will be the future operator of the facility, not the investment contractor (the operator will be PPL). The latter simply perform a contract for construction works. Therefore, when assessing whether a hypothetical private investor would involve its resources in a venture, one should ask where such an entity could earn. There is no "classic" model, where the entity financing the creation of infrastructure becomes its operator (not necessarily the owner) and derives profits from this [18]. Therefore, it is not clear what economic motivation could be for engaging in an investment. Interpreting the market investor criterion by counterfactually assuming that a hypothetical investor would become the operator of the facility would then be a mere abuse.

Unless (as interpreted in the case of the last intervention in the Berlin-Brandenburg port) the interference will be made by the operator's shareholders, then it will be possible to talk about the existence of a profit perspective (as far as realistic, it is a different matter) [4]. The power which is a shareholder in the whole public enterprise can of course operate taking into account only economic reasons, but at the same time the application of the private investor test is then a purely theoretical operation, not related to the real market situation. Although it may be logically correct, it is questionable how acceptable it is to accept such analysis as the basis for determining the subject of public aid. This is a controversy that constitutes an immanent part of the presented principle, which seems to be also possible in the context of building the CPK.

The possibility of another financing the undertaking

When assessing any new intervention, it is necessary to take into account the existence of earlier aid measures [1]. Here are some practical issues: Looking at the support for the Berlin-Brandenburg port, from today's perspective, we know that the initial interventions were ineffective [3]. However, they were approved (first intervention) or deemed not to constitute aid within the meaning of art. 107 TFEU (second intervention) and above all, the funds were spent in full, which is why the post factum assessment or earlier errors at the stage of designing and implementation of the funds were at this point practically pointless [3, 4]. However, when assessing the next recapitalization, the regulator faces a dilemma whether to approve the support if the previous measures have failed and thus accept the spiral of rising costs or disagree, while realizing that the investment will not take place without another aid plan. The second option would obviously mean a complete fiasco of the venture and irretrievable loss of funds invested so far (at least this alternative appeared in the case of the Berlin port).

According to the adopted interpretation line of state aid law, in a situation when the State granting aid decides to change the aid program, supplementing the measure may not in itself constitute aid if the private investor would also take an analogous step [7, 14]. This is quite a controversial interpretation. As it was indicated, the recognition of the measure as public aid means that no hypothetical private investor would like to or would not be able to involve his funds in this way [1, 10, 20]. Why, therefore, supplementing the aid is to be assessed in terms of assessing compliance with the market investor principle? This seems illogical, because even if the last element of the measure under examination would be economically rational for a private subject, he would never consider the investment in question if its previous, inseparable stages would be unacceptable. One can therefore risk the claim that the above interpretation is justified, first of all, when the person granting the aid is a shareholder in the facility or towards funds that were initially considered to be fulfilling the market investor test.

An alternative option is to treat the next stage of intervention as a separate aid measure. Then you cannot "take advantage" of a previous positive decision of the EC allowing support (or stating that there is no aid), but the private investor test is then performed only in relation

to the current measure in isolation from any previous aid efforts [1, 20]. The assessment of whether the new measure is part of a previous support program is carried out to a large extent by ad casum, but the basic premises can be decoded from the case-law practice [1, 13]. In principle, the chronology of intervention, its objectives and business risk and the financial situation of the beneficiary - the airport operator [13] are taken into account. In the case of support for the Berlin-Brandenburg airport, the EC concluded that the latest interference in 2016 was the result of unpredictable handicaps, which is why it is of an independent character, especially since a long time elapsed between its launch and the previous state aid which took place in 2009 [3, 7].

New airport construction - conditions of admissibility of investment aid

For measures that do not comply with the MEOT test - constituting public aid - the criteria for the admissibility of support for airports are set out in the 2014 European Commission Guidelines on State aid to airports and airlines [11]. The aid for the so-far used comparative material for the construction of the Berlin-Brandenburg port was approved under the rule of no longer binding rules [3]. The assessment of possible assistance for the Central Communication Port will therefore have a precedent character.

The aforementioned Guidelines are an act of the so-called soft law and formally do not constitute a source of any rights or obligations, but somehow indicate the EU institutions (mainly the EC) will interpret the treaty provisions [1]. Thus, they increase legal certainty by introducing predictability of interpretation in a situation where the treaty rules constituting the basis for granting state aid are very general and framework [1]. In accordance with the consistently applied line of interpretation, the interpretation made on the basis of the mentioned "soft" acts is considered as binding as long as it is not contrary to the Treaties [1]. Therefore, for further considerations, it can be assumed that the principles set out in the Cited Guidelines of 2014 are de facto binding [11].

When assessing investment aid - allocated to the construction of an airport - the referenced Guidelines state that support will be acceptable if it meets at least one of three conditions: it will increase mobility of EU citizens and improve connectivity with regions by creating access points for intra-EU flights; or it will counteract excessive traffic congestion at the major Union hubs; or it will entail the development of a given region [11]. It is safe to assume that the construction of the CPK will serve the implementation of the first and third premises. Assessment in this matter seems obvious, so if the mentioned criteria are not cumulative, it may prima facie seem that testing whether a given measure contributes to fulfillment of the remaining premise is pointless.

In fact, the assessment of the occurrence of condition number two is inextricably linked to the existence of factors that may determine the inadmissibility of support and may, therefore, prove to be crucial [8]. The 2014 Guidelines referred to state that the aid will not be conducive to the achievement of the common interest objective and will, therefore, be incompatible with the Internal Market (unacceptable) if it leads to the creation of unused capacity and duplication of unprofitable airports [11].

These are the factors that decided about the fiasco of support for the Gdynia-Kosakowo airport [5]. A full description of the circumstances of the case is beyond the scope of this study, but it should be pointed out here that in the negative decision the EC emphasized that the Gdynia port is very close to the port in Gdansk (their catchment areas overlap), which itself has no capacity problems. The investment would not only solve any problem but would additionally lead to cannibalization of markets [5, 11]. By way of explanation, it should be added that the recent judgment of the Tribunal abrogating the decision of the European Commission regarding support for Gdynia was caused by procedural irregularities of the contested decision, not calling into question the interpretation of the admissibility of aid

(there is nothing, therefore, to re-issue the analogous decision). Returning, however, to the main issue, and contrario to the example above, one can indicate the case regarding assistance for Kassel airport (former Kassel-Calden) [2]. The decision indicated that the port should mainly take over charter and low-cost traffic, thus relieving the nearby Frankfurt hub [2]. Although the interpretation seems theoretically reasonable, because it became the basis for a positive EC decision, the port did not contribute to relieving Frankfurt and attracted a lot of air traffic so that the Hessian authorities even considered closing the site completely (in December 2017, the final decision was lifted). Therefore, the investigation of the Hessian airport shows, on the one hand, a seemingly completely correct interpretation of the factors authorizing aid, but on the other hand it is a case study where the forecasts for fulfilling the support objectives turned out to be completely wrong, so despite the positive decision, the aid was wasted.

The study of the impact of newly created infrastructure on existing airports in the context of the admissibility of investment aid, according to the author, is a key issue for CPK and at the same time the place where the largest (legal) risk factor is potentially located. The relatively simplest issue is related to the impact on the airport of them. Chopin. The port at Okęcie operates close to the daily bandwidth limit and taking into account the proximity of the urban area, the expansion of the facility, both in terms of acquisition of land and noise restrictions in the case of night operations (important especially for cargo), is highly questionable. The newly created hub is meant to replace the Port. Chopin, which is supposed to be closed, so here the issue of duplication of infrastructure does not occur.

However, the issue arises in connection with the assessment of the impact of the CPK on the continued functioning of other airports in the country, especially the ports in Modlin, Łódź, Radom (and perhaps in Bydgoszcz) located in the "immediate vicinity". In 2010, the Ministry of Infrastructure published a study of the Central Airport for Poland on which the concept of CPC is based to a very large extent [12]. Analyzes carried out at that time (excluding Modlin and Szymany) indicated not only the lack of a negative but positive, synergistic effect of the newly created hub on other airports [12]. Although the data has never been questioned, the question remains whether the passage of time has not caused the analysis results to be outdated. Newer, equally comprehensive studies confirming or falsifying previous arrangements do not exist.

A new circumstance is the reform of the EU public aid system initiated in 2012, part of which is referred to in the Guidelines of 2014 [1, 8, 10, 11, 20]. In the area of airport financing, the changes involve tightening the criteria for granting aid to airports [1, 10, 11]. In particular, it is necessary to cancel the granting of the so-called operating aid for airports (with the exception of the smallest facilities), i.e. support intended to cover the current operations of the enterprise [1, 11]. Thus, the economic parameters of operations of these facilities are changing, because, according to the general intention of the reforms, the ports are supposed to be able to sustain themselves from income from activity or they will be forced to fail [1, 10, 11]. This is an element that responds to the critics' voices that in the past generous financing of infrastructure projects from public funds led to the creation and operation of "ghost airports" with the famous Ciudad Real in Spain at the head.

In this context, it is necessary to put a politically sensitive issue on the future fate of those airports whose economic *raison d'être* is doubtful. When analyzing the construction of the CPK and talking about transport infrastructure at all, it cannot be assumed a priori that the current airport network is optimal and therefore unchanged [8]. In the light of the new state aid rules, the fact that the facility has not been able to attract air traffic for a number of years to achieve a positive financial result is a premise to extinguish the operation of the facility [11]. The following, very unfavorable interpretation for CPK is possible: In the area of gravitation of the newly created airport, there are already airports with no problems with

congestion, so the investment will be nothing more than the artificial creation of unused capacity, which is a model example of the occurrence of non-compliance with the Internal Market and it can be said that the Gdynia-Kosakowo casus was repeated on a much larger scale [5, 11]. It can be argued at this point that the transfer airport is incomparable with small regional facilities. This is essentially true but does not change the above-mentioned interpretation regarding the existing bandwidth. The open path to the interpretation that the large reserve of existing capacity means that there is simply no market for such a large facility is still open. Meanwhile, the occurrence of the aforementioned premises that support the admission of aid must concern the current situation, not the future one and the uncertain one [11].

Summary

When starting the summary of the considerations regarding state aid for the newly created Central Communication Port, it should be emphasized once again that there is no case that could be a sufficiently close parallel. The series of proceedings related to delays in the construction of the Berlin-Brandenburg airport is relatively the closest [3, 4, 7]. Indeed, the project is a useful case study on how to interpret the market investor principle, which determines whether the interference of public authorities constitutes public aid within the meaning of art. 107 TFEU, but it cannot be used to assess the conditions for the admissibility of aid, as the decisions were made there under a different legal status. In the aspect of assessing the reasons for possible public aid with the Internal Market, the title undertaking has no precedent.

It seems that the possibility of recognizing that the private investor test is fulfilled in the event of such a large investment is doubtful, although not excluded in the light of the Court's existing case-law practice. While the generally large airport transferring the capital is a profitable venture, the investment is so large that a hypothetical private investor can see the meaning of the commitment of their funds but may simply not have enough resources. Especially that the facility operator is to be public, so for a private investor there may not be a viable mechanism to return the investment made.

The second scenario assuming the existence of state aid carries several serious risk factors. The main identified in the analysis is the impact of unused capacity at other airports in the country, especially those closest to them. It can be concluded that the network of airports in the country is a system of connected vessels. The admissibility of investment aid cannot be assessed without reference to the situation of other facilities. The case of Gdynia-Kosakowo airport, being aware of all differences, is, unfortunately, a model example of completely ignoring the premises of inadmissibility of aid presented. The situation of the CPK against the background of the airport network in Poland makes these premises relevant and their addressing may be decisive for obtaining a positive decision of the European Commission regarding investment aid for the title project.

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