RE:

Carlisle Airport

Planning Application reference 10/1116

OPINION

Introduction

1. I am asked to advise Carlisle City Council ("the Council") in connection with potential EU state aid issues arising from a recommendation to grant planning permission to Stobart Air ("SA") for the development on SA's airport land of a freight distribution centre ("FDC") and improvements to the airport infrastructure. The proposed FDC would be separate from the airport and would likely be used almost exclusively for the purposes of Eddie Stobart Ltd's haulage business. The latter would pay rent to SA of some £2m per annum for use of the FDC. By virtue of a s.106 agreement to be entered between the Council and SA, the latter would be bound to keep the airport open as long as it was economically viable. The assessment of this matter would include the rental income from the FDC.

2. EU state aid issues were first raised in connection with this planning application by a letter dated 2.8.12 to the Council from Dickinson Dees, solicitors ("DD") who represent Mr. Gordon Brown, an objector to the planning application. This letter raised state aid considerations in general terms without providing any detail about what the potential state aid issues were.

3. By a letter dated 9.8.12, the Council sought clarification of the state aid points raised in DD's letter. On 23.8.12 DD sent a further letter to the Council seeking to clarify the state aid points. In relevant part, that letter was in the following terms:

> "In broad terms, State aid applies where a public body puts another body in an advantageous position. Notwithstanding that Carlisle Airport would be classed as a category D airport the need for notification still arises if the aid falls outside the terms of the Commission Guidelines. In this instance, the State can aid airports but cannot assist with the development of infrastructure which is not directly associated with the airport. The FDC falls outwith the definition of infrastructure for the purposes of the Commission Guidelines since it is not functionally related to the operation of the airport. Moreover, even if it were to be considered to be infrastructure, it does not satisfy the tests of having been procured in an 'open unconditional and non-discriminatory bidding procedure' as required by the Guidelines at paragraph 55. In addition, if the FDC is not 'infrastructure' for these purposes the cross-subsidy which is proposed to flow from the FDC to the airport is not allowable. If the FDC were to be considered to be 'infrastructure' within the Guidelines, then the Altmark procedure must be followed. In any event, we consider that Stobart being procured to run the FDC clearly disadvantages other freight operators and raises issues in relation to abuse of a dominant position".

4. Some five months later, on 22.1.13 DD sent the Council a copy of a joint opinion of counsel which they had obtained, explaining why SA's planning application fell within EU state aid rules and required to be notified to the EU Commission. I have now been provided with a copy of the joint opinion and am asked to advise on whether the planning application raises any issues of state aid which require to be notified to the EU Commission.

5. At the outset, I note that the joint opinion focuses only on potential state aid issues. It does not in terms rely on the ECJ's judgment in *Altmark* as giving rise to "state aid", nor on any issue under EU competition law, such as 'abuse of a dominant position'. Moreover, the joint opinion appears to accept that the Commission "guidelines" referred to in DD's letter of 23.8.12 (namely, *Community Guidelines on Financing of Airports and Start-UP Aid to Airlines Departing from Regional Airports* (2005/C 312/01), published in the Official Journal on 9.12.05), are only relevant if it is first established that the grant of planning permission to SA gives rise to state aid.

6. In summary, I do not consider that there are any issues arising from EU law on state aid which are relevant to the determination of SA's planning application for the FDC. Having read the joint opinion carefully, I consider it to be, at most, equivocal on the key question of whether any economic benefits which flow from a grant of planning permission can be attributed to state resources. For my part, I do not consider that the grant of planning permission gives rise to any "economic aid" granted by the state to SA or, if it does, that any such "economic aid" is attributable to state resources.

The Elements of State Aid

7. The starting point for EU law on state aid is article 107(1) of the Treaty on the Functioning of the EU ("TFEU"). This provides:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

8. Articles 107(2) and 107(3) provide particular exceptions, where state aid either shall or may be justified, for example, "aid having a social character", or aid to promote economic development in deprived areas. These exceptions are only relevant in the event that it is found that there is state aid.

9. It follows from article 107(1) TFEU that in order to qualify as "state aid" a measure must satisfy four criteria:

   (i) it must confer an economic benefit or advantage on the recipient;

   (ii) it must be granted by the state and through state resources;

   (iii) it must favour certain undertakings or sectors, that is, it must be selective; and

(iv) it must be liable to distort competition within the EU.

10. Taking (iv) first, it is plain that economic activities related to airports will often, if not always have an impact on inter-state trade. For this reason, the EU Commission issued a communication on financing of airports, the latest version contained in *Community Guidelines on Financing of Airports and Start-UP Aid to Airlines Departing from Regional Airports* (2005/C 312/01). Indeed, some airport related activities are even the subject of specific EU legislation, e.g. some groundhandling services are governed by Directive 96/67/EC. This confirms that economic activities connected with airports can have an effect on inter-state trade and are therefore of interest to the EU Commission.

11. The substance of criteria (i) to (iii) for state aid are neatly captured in the following dictum of Advocate General Slynn in *Van der Kooy v. Commission*, Cases 67, 68, 70/85 [1988] ECR 219 (at 251):

> "It is of the essence of a State aid that it is non-commercial in the sense that the State steps in where the market would not. The State may have its reasons for doing so but they are not commercial in the ordinary sense of the word. Thus the State may subscribe for shares in a company or lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting aid which falls within article [107(1)] if the tests of that provision are satisfied".

12. In effect, for state aid to exist the state or its agents must descend into the market place, purporting to act as a market player but using state resources directly or indirectly to favour certain undertakings. Two points immediately follow from this: first, the state aid rules do not govern the state when it is doing what *only the state* can do; secondly, some benefit must be conferred which is ultimately traceable back to state resources, whether by means of a payment or the state foregoing revenues in some direct or indirect respect.

13. As to the first point, when the state is acting *qua* state, that is, in its governmental capacity, performing functions which are exclusively reserved to or conferred on the state, the state aid rules do not reach such activities. In *Diego Cali*, Case C-343/95 [1997] ECR I-1547, the Court of Justice of the EU ("ECJ") found that the state's role in ensuring compliance with marine pollution laws was not affected by EU competition rules. The Court observed (at para 16):

> "As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an individual or commercial nature by offering goods or services on the market".

14. The same is true of the state aid rules, which form part of the wider EU competition law scheme. Where the state is exercising 'official authority', it is not affected by the state aid rules and this is so whatever the commercial implications of state action may be: see *Preussen Elekta*, below.

15. In short, where the state is acting as a commercial person, performing functions which any private person could perform, such as a rich private investor, it must comply with EU state aid rules. But where it is performing functions which only the state can perform, it is not affected by the state aid rules.

16. I accept that there is a borderline, arising from the definition of "state functions". Clearly, some state functions can also be performed by private persons (see *Commission v. Italy*, Case 41/83 [1983] ECR 873: British Telecom's rule making activities part of its business activity and therefore caught by the state aid rules). In the present case, it is not necessary to dwell long on this matter because when the state is acting as a local planning authority under the Town and Country Planning Acts, it is plain that it is performing functions conferred on it as the state, which *only the state* can perform.

17. On the second point, *viz.* identifying a benefit or "aid" conferred on a favoured undertaking from, or attributable to, state resources, this is a prerequisite for the state aid rules to bite. If the benefit is ultimately attributable to or falls on private resources, the state aid rules are not engaged. What is required is that the benefit or aid is in some way, however indirectly, imputed to the state. The ECJ has generally adopted a broad view of what constitutes the "state", encompassing not merely central government authority but also other public authorities and bodies, including quangos. However, the concept of state resources is not without bounds. So, for example, in *Preussen Elektra*, Case C-379 [2001] ECR I-2099, there was a state price-fixing scheme designed to encourage *private* electricity distribution undertakings to take some supplies from renewable energy sources, with the additional costs entailed by the scheme falling on the electricity distribution undertakings and, ultimately, on private consumers. The scheme was challenged on the ground that it indirectly granted state aid to renewable energy suppliers. The ECJ found that there was no state aid. The Court concluded (at paras 58-62):

> "…only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article [107(1)]. The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State…the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity…Therefore, the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either…In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article [107(1)] of the Treaty. That conclusion cannot be undermined by the fact…that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State…."

18. In summary, simply because some private undertakings enjoy an advantage from the operation of state measures, while others suffer a burden, is not sufficient to give rise to state aid. There must be some transfer or denial of resources imputable to the state.

The Joint Opinion

19. At paragraph 10 of the joint opinion, the criteria for state aid are set out in substantially the same terms as I have explained above. I agree with the joint opinion that, if it is established that there is a grant of 'economic aid' to SA which is attributable to state resources, then such aid favours SA on a selective basis and has a potential effect on inter state trade. However, I disagree with the joint opinion's conclusion that a grant of planning permission by a public authority gives rise to 'aid' for the purposes of the state aid rules. Further, even if I am wrong on that point, a grant of planning permission does not give rise to 'aid' which is attributable to state resources.

20. It is necessary to summarise the building blocks for the joint opinion's conclusion that in this case, the grant of planning permission for the FDC gives rise to an "exceptional exercise of planning powers" (§21 of the joint opinion) triggering the state aid rules.

21. First, whilst acknowledging (at §13 and 14) that there is no case law on state aid and the grant of planning permission and that "in principle the exercise of regulatory powers such as development control is exempt from the law on state aid", the joint opinion argues that "the issue is different where the exercise of planning policy takes the form of the exceptional process of 'enabling development'" (§15). In essence, the joint opinion argues that the grant of planning permission for the FDC, which is contrary to policy, has "the explicit purpose of raising revenue for Carlisle airport".

This is so different from the norm of planning control that it must fall under the state aid rules. In short, "the exceptional process of enabling development" by this grant of planning permission to SA gives rise to "economic aid" to SA.

22. Secondly, the joint opinion concludes that this 'aid' is attributable to state resources. The authors acknowledge that this is a "difficult issue" (§22) and "in most cases a planning permission is not the transfer of a resource" because "it is well established that the mere exercise of regulatory power, even when it benefits certain undertakings more than others, is not state aid" (§24). However, they rely on three factors which make it "arguable" (cf. §56) that the "aid" to SA by the grant of planning permission in this case is imputable to state resources:

    (i) the implications of the Community Infrastructure Levy ("CIL") potentially give rise to state issues in planning decision-making (§25). Implicitly, therefore, state aid rules can have relevance for planning applications;

    (ii) s.106 obligations can trigger the state aid rules because of their financial implications for developers and public authorities (§26);

    (iii) in cases of 'enabling development', planning permission would not have been granted but for "income" from the non-compliant development being used for a planning purpose which could otherwise not be achieved (§27).

23. The joint opinion does not dwell on the CIL point (no doubt because it is accepted that it is not relevant in this case). However, the joint opinion argues that the Council would not grant planning permission for the proposed FDC but for it being used to "raise funds" to support an "ailing industry" (which is, presumably, a reference to Carlisle airport (§28)). In short, in this case there is enabling development in order to

"raise funds" to keep the "ailing airport" open, combined with a s.106 agreement to place a legal obligation on SA in this respect.

24. Although the joint opinion accepts that the "mechanism of the s.106 agreement does not directly transfer funds from the Council to the owner of the airport", it goes on to say that the planning permission "gives the owner the business opportunity of raising new funds" for the airport (§35). The joint opinion then acknowledges no precedent for such a case before the ECJ or the EU Commission. However, it turns to the question of whether "resources derived from private parties" can ever be attributed to the state for the purposes of state aid. In support of the conclusion that state aid can be found in such cases, the joint opinion relies heavily on the ECJ decision in *Commission v. Netherlands*, Case C-279/08P. I will return to this ECJ decision below.

25. The joint opinion concludes that the "arrangement" of granting planning permission for the FDC so that SA has the "business opportunity of raising new funds" for the airport, the viability assessment of which is underpinned by a planning agreement, "is certainly imputable to the state" (§36). This conclusion is said to depend on three factors. First, relying on *Commission v. Netherlands*, the joint opinion argues that the attribution to state resources arises from a "counterfactual", namely, what the state gives up by way of its potential enforcement powers, by granting planning permission (§ 43 - 44).

26. Secondly, the benefit to SA arising from the grant of planning permission in this case is also attributable to state resources because of what the state "foregoes" in lost "revenues or public benefits" that it would have received by refusing this application and granting other planning applications or agreeing other s.106 agreements (§46).

27. Thirdly, by proceeding "by way of enabling development on this site", the state has made "a choice over the allocation of state resources…in principle available to it [under] the planning law framework" (§48). In this way, it is said that permission for enabling development is attributable to state resources, a fact bolstered by an "entirely disproportionate use of state resources" under the "current scheme" (§49). This bold assertion is supported by the following reasoning:

> "…the Owner [SA] will receive a planning permission that enables them to build the FDC, the benefits of which they will enjoy in perpetuity, even if the Airport is judged to be non-viable and is closed down, according to the arrangements provided for in the draft s.106 agreement" (§49).

28. Having concluded that it is "arguable" that the "economic aid" to SA if planning permission is granted is "attributable to state resources", the joint opinion then argues that there is nothing in EU legislation or guidance which makes the grant of aid lawful, so that the Council is under a duty to notify the EU Commission of what is proposed.

Does planning permission give rise to economic aid?

29. At one point, the joint opinion appears to suggest that benefits *to the state* can give rise to state aid (see §26: "…a planning permission that is accompanied by a s.106 agreement brings with it important contributions to a local authority's budget, either financial or in kind"). Yet at §22, the joint opinion records that state "aid involves state resources both in the direct form of a grant and in the indirect form of the waiver of revenue".

30. I know of no authority for the proposition that *benefits* to the state's budget can give rise to state aid. The correct position is that state aid only arises where there is some direct or indirect loss to state resources, whether by a grant, subsidy or, in various possible forms, revenue foregone: see *Italy v. Commission*, Case C-6/97 [1999] ECR I-2981, at §15.

31. Be that as it may, I do not accept the arguments in the joint opinion that a grant of planning permission to SA for the FDC and improvements to the airport infrastructure, combined with a s.106 agreement to keep the airport open as long as it is economically viable, the assessment of which is to include the future rental income from the FDC, gives rise to economic aid for the purposes of the state aid rules. Nor do I accept that if this were to give rise to economic "aid", that it is attributable to state resources.

32. Turning first to the question of whether a grant of planning permission gives rise to economic aid, the conclusion of the joint opinion on this point depends on there being a special, or "exceptional" category of planning permission which involves 'enabling development'. In my view, this is not sound.

33. In the first place, there is one statutory scheme of planning control under the Town and Country Planning Acts. Among the key provisions of the Town and Country Planning Act 1990 is s.70(2), which requires a local planning authority, when dealing with an application for planning permission, to "have regard to the provisions of the development plan…and to other material considerations". Further, s.37(6) of the Planning and Compulsory Purchase Act 2004 provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

34. It is well-established that among lawful material considerations is that policy compliant development will be enabled by a grant of planning permission which is otherwise contrary to policy. Indeed, there is settled case law that it is lawful for a local planning authority to take into account as material considerations, 'financial considerations' which will enable development to take place.

35. In *R v. Westminster City Council, ex parte Monahan* [1989] 1 PLR 36, the local planning authority approved a development scheme the main purpose of which was to improve the facilities of the Royal Opera House in Covent Garden. The scheme could only proceed if permission were also granted for adjacent commercial development which would provide the funds required to improve the Opera House. Planning policy meant that permission would not have been granted for the commercial development alone. One aspect of the judicial review challenge was that the authority had failed to consider other sources of finance to develop the Opera House, which did not involve non-compliant commercial development.

36. Webster J in the High Court dismissed the challenge and an appeal was dismissed by the Court of Appeal, where Kerr LJ made the following observations:

> "Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e. related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the realities of the overall situation" (at 50-51).

37. Furthermore, at page 55 of Kerr LJ's judgment, he endorsed the following comments of Webster J in the High Court:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the

> proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

38. In my opinion, this case confirms that there is not a special category of planning permission involving enabling development which can "exceptionally" engage the EU state aid rules. There is one statutory scheme of planning control under which 'enabling development' is a lawful material consideration. There is no sound reason for carving out one group of lawful material considerations which the statutory decision-maker is entitled to have regard to in the discharge of public planning powers, so as to trigger the EU state rules in that case but not others.

39. The question is then whether the ECJ is likely to adopt a different approach. The joint opinion observes that there is no EU case law on state aid and the grant of planning permission. That is true. However, EU law is not without experience of the interaction between domestic planning laws and EU law on the single market. Indeed, in the field of public procurement law the ECJ has rejected the proposition that EU public procurement rules are triggered by the state's grant of planning permission.

40. In *Muller v. Bundesamt fur Immobilienaufgaben*, Case C-451/08, among the questions which the ECJ was required to consider was whether EU public procurement rules were triggered by the state's exercise of regulatory planning functions. The ECJ concluded (at paragraph 57 of the Court's judgment) that the "mere exercise of urban-planning powers" does not fall within article 1(2)(a) of the public sector Directive (Directive 2004/18/EC).

41. The reason for this conclusion is explained in the opinion of the Advocate General, who made the following observations:

> "…the Commission itself has stated that its principal concern is that certain persons may acquire a benefit without first being placed on an equal footing with other persons who may be interested in acquiring the benefit in question. In cases such as the present one, the benefit consists in the increase in the value of land resulting from the fact that the public authority has given permission for certain building activities to be carried out on it. So, on the Commission's interpretation, any 'increase in value' of immovable property that is attributable to an activity of the public authorities should be subject to the provisions of the [public procurement] Directive. It is therefore clear that, if one takes that position, one may have to accept the hypothesis, however absurd, that *all town planning activities* are subject to the Directive since, by definition, provisions on the possible execution of building works substantially alter the value of the land in question."
>
> (at paragraph 36 of Advocate General Mengozzi's Opinion)

42. The Advocate General rejected the Commission's hypothesis and concluded that the activities of a public authority must extend beyond "the mere exercise of the general powers vested in that authority with respect to town planning" before the public procurement rules could be engaged (see §60).

43. The decision in *Muller* is instructive because, by the same token, on the joint opinion's approach, all grants of planning permission and not only those involving enabling development would fall within the state aid rules merely by virtue of the fact that they will, invariably, confer some economic benefit on the recipient of the permission. This is a proposition which the ECJ has already rejected in the field of public procurement law.

44. The ECJ is mindful of the systematic nature of EU law. I consider that having visited this issue in one important area of EU single market law and rejected it, the Court is highly unlikely to reach a different conclusion that the exercise of discretionary powers in the field of town and country planning is subject to the law on state aid.

"Attributable to state resources"

45. The joint opinion relies heavily on what it considers to be the implications of the ECJ's decision in *Commission v. Netherlands*. What is said to be significant is the "counterfactual" of what the state gives up by granting planning permission. It is argued that the grant of planning permission is attributable to state resources because of what the Council gives up by way of enforcement powers by granting permission (§43); or loses by not being able to grant permission for an FDC elsewhere (§45); or from "lost" s.106 agreements in respect of other sites (§46).

46. I do not consider that the ECJ's decision in *Commission v. Netherlands* supports any of these arguments. In the first place, it is necessary to be clear about the issue which was before the ECJ. The case concerned the state issuing for free emissions allowances which it could have charged for. As the Court explains the matter at §18 of its judgment:

> "According to the contested [Commission] decision, the Netherlands authorities had the option of selling or auctioning the emission allowances. By offering NOx credits free of charge as intangible assets, the Member State therefore suffers foregone revenue. The Commission thus concludes that that scheme involves state resources".

47. So the loss to the state was clear. More importantly, there was at least a potential market for the emissions permits. They could have been sold by the state. In contrast, planning permission cannot be sold by the state. This is a key difference with the present case and one that seems to have been overlooked in the joint opinion.

48. Moreover, the "counterfactual" merely leads to a circularity: what is said to be relevant is the state giving up enforcement powers (e.g. levying fines) which it could otherwise have exercised if permission had not been granted. So, planning permission is "aid" attributable to state resources because, if it is not granted and the

developer goes ahead regardless, the state is giving up its enforcement powers by granting planning permission.

49. Since only the state has the power to enforce planning control, this analysis simply brings us back to the question whether an economic benefit entailed by a grant of planning permission is attributable to state resources for the purposes of the state aid rules, in the first place. The "counterfactual" does not take this matter any further.

50. In addition, the joint opinion's analysis that there is an attribution to state resources from what the state loses or gives up through a grant of planning permission inevitably means that all planning permissions fall under the state aid rules. In all cases in which planning permission is granted, the state inevitably loses some potential enforcement powers and also "revenue or public benefits" which it might putatively have received from granting planning permission elsewhere (§46). Accordingly, the joint opinion's initial attempt to carve out an "exceptional" class of planning permission involving enabling development, to be covered by the state aid rules, breaks apart when it comes to finding an attribution to state resources. On the joint's opinion's approach on this issue, every grant of planning permission is caught by the state aid rules.

51. Finally, the joint opinion proceeds on the basis that the state's powers to grant planning permission involves the allocation of resources. On the contrary, the planning legislation sets up a system for regulating the use and development of land. It is a classic system of administrative, regulatory powers over what already exists. It entails no "allocation of resources", whether generally or in relation to interests in land, in any meaningful sense.

The *Altmark* Case

52. The joint opinion does not rely on the ECJ's decision in *Altmark*, Case C-280/00 [2003] ECR I-7747 in terms. However, its discussion of that case and EU legislation and guidance following it suggests that it is relevant here. For the avoidance of doubt, I disagree with that suggestion.

53. I approach the ECJ's judgment In *Altmark* from a different starting point than the joint opinion. In *Altmark*, the ECJ confirms that the state aid rules can apply to 'compensation' paid by a public authority to an undertaking, in return for the performance of public service obligations ("services of general economic interest"). The main issue in *Altmark* concerned the city government's grant of licences along with subsidies to a private company to operate a public bus service. In effect, the subsidies were necessary in order to make the bus service economically viable. In principle, the Court concluded that the EU's competition and state aid rules applied to the case.

54. In order to avoid compensation for public service obligations giving rise to state aid, *Altmark* provides four conditions must be fulfilled: the public service obligation to be performed by the undertaking must be clearly defined; the compensation must be appropriate and established objectively; there must be a strict *quid pro quo*, that is, the compensation cannot exceed what is reasonably required to discharge the public service obligations; and the undertaking should ideally be selected following a lawful public procurement exercise.

55. As the joint opinion explains, the *Altmark* 'rule' is now codified in EU legislation: see EU Commission Decision 2012/21/EU. However, it is clear that the *Altmark* ruling and the Decision are mainly directed at the situation where the state uses a public service obligation as a cloak to disguise what is, in substance, conferral of a benefit

on an undertaking. In other words, disguised state aid. It would be too easy to circumvent the state aid rules if public authorities could defend a payment or benefit by reference to the claim that local operators needed (inflated) subsidies to perform public services contracted out to them. Hence the strict conditions in *Altmark* for compensation for public service obligations to be immune from the state aid rules.

56. While it may be said that SA has something akin to a public service obligation to keep the airport open, there is no 'compensation' paid by the Council for this obligation. Ultimately, the obligation is funded either from the airport activities themselves, or by SA developing the FDC and then letting it for profit. The state's only involvement is as planning authority, which for the reasons set out above, is not affected by the state aid rules. The fact that the state obtains a benefit from the continuing operation of the airport is not enough, in itself, to engage the state aid rules: see *Preussen Elektra* (discussed above).

57. In short, just as the state aid rules do not apply to the state's exercise of regulatory powers, nor can lawful exercise of those powers amount to 'compensation' for the purposes of the *Altmark* case. Indeed, this is underlined by the Commission Communication on the application of EU state aid rules to compensation granted for the provision of services of general economic interest (2002/C/8/02). At paragraph 2.1.2 of this Communication it is expressly stated that the EU state aid rules do not apply where the State acts "'by exercising public power' or where authorities emanating from the State act 'in their capacity as public authorities'". Since only the state exercises regulatory planning powers, these can no more give rise to 'compensation' for the performance by undertakings of services in the public interest, than they can to state aid.

Conclusion

58. It is well-established that the EU state aid rules do not apply to the state acting in its official capacity. What this means is that where the state is acting in a role which only the state is able or empowered to perform, the state aid rules do not apply. Only the state can grant planning permission. Accordingly, the state aid rules do not affect its powers in this field.

59. In any event, even if it were possible to identify any relevant 'aid' to SA arising by virtue of the grant of planning permission for the FDC, which I advise is not possible, such aid is not attributable to state resources. Accordingly, even if the state aid rules could apply to a grant of planning permission, the threshold conditions for state aid to arise are not satisfied.

60. There is no 'compensation' being paid by the Council to SA in return for keeping the airport open. Accordingly, no issue arises from the ECJ's judgment in *Altmark*.

61. If I can provide further assistance to the Council in connection with this Opinion, I will be happy to be contacted by telephone or e-mail in Chambers in the usual way.

28th January 2013

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RE:

Carlisle Airport

Planning Application reference 10/1116

OPINION

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