



EUROPEAN COMMISSION

Brussels, 16.V.2006

C (2006) 1840 final

Subject: State aid No N 149/2006 – Ireland
Traffic guarantee for M3 Clonee to North of Kells and N7 Limerick Southern Ring Road Phase II

Sir,

1. Procedure

1. Ireland notified by letter dated 7 March 2006 two new ad hoc measures, which consist of an upfront construction grant, an operational grant and a traffic guarantee for two Irish road projects to be constructed and maintained under Public Private Partnership (thereafter: PPP) agreements. Ireland considers that the measures do not constitute State aid, but has notified them for the purpose of legal certainty.
2. The Commission has acknowledged receipt of the notification by letter of 9 March 2006 (COMP D 52062).

Mr Dermot AHERN,
Minister for Foreign Affairs,
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Ireland

2. Detailed description of the measure/aid

3. The support is to be granted by the Irish National Road Authority (hereafter: NRA), which is a State-controlled statutory entity. The NRA is in charge of construction and maintenance work in regard to national roads in Ireland. Whenever it considers it useful, it may outsource this task by setting up a public private partnership with a private investor.
4. The present case concerns the construction and the maintenance of two new road projects, the M3 motorway Clonee to North of Kells and the Limerick Tunnel, which is part of the N7 national road.
5. The PPP covers in both cases the design, the construction, the financing and the operation of the new road infrastructure, which are to be carried out by a private investor. In other words, the PPP is a combination of a public works contract for the construction of the road and of a concession for operating the road once it is finished.
6. The PPP agreements will have duration of 30 to 45 years. For each project, the winning company or consortium is chosen through an open, non-discriminatory and transparent procedure, conducted in accordance with the European and national public procurement rules. Selection takes place under the so-called “negotiated procedure” with prior publication of a notice in the Official Journal of the European Union.
7. The Irish authorities have sent the Commission, together with the notification form, a model of the contract to be concluded with the successful bidder for carrying out this PPP. The contract is composed of 14 parts, the most important ones of which will be briefly described in the following paragraphs.
8. Part 4 of the contract deals with questions related to property. It obliges the NRA to make available access to the site on which the highway and the tunnel will be build to the successful bidder. The bidder cannot use the land for any other purpose than building the highway. [...]*.
9. Part 5 concerns the design and the construction of the highway and the tunnel. The parties will agree on a time schedule, and the NRA will have to certify the completion of each step. In case of breach of the schedule, the contract foresees fines.
10. Part 6 concerns the operation and maintenance of the highway and the tunnel, once it is completed. It foresees that the successful bidder is obliged to operate the highway and the tunnel from the date of issue of the Permit to use certificate until the expiry of the contract period. The responsibility for traffic management, signing and communications lies with the successful bidder.
11. Part 9 to 11 concern payments, financing and monitoring. This part is explained in detail below in point 2.3.

* Confidential information

12. In the following sections, the two projects, the procedure of the tender and the financing will be described in more detail.

2.1 The two projects

13. The M3 motorway Clonee to North of Kells will consist of 49 km of motorway/dual carriageway between Clonee and Kells, 10.2 km of wide single carriageway between Kells and Carnaross and approximately 15 km of link roads. The estimated costs are € 600 million.
14. The Limerick tunnel involves the construction of 10 km of new dual carriageway, and a tunnel under the River Shannon of a length of 900m. The estimated costs are € 400 million.
15. An environmental impact statement with respect to the projects has been published in March 2002.

2.2 The tender procedure

16. The two projects will be attributed to private investors using a prior call for tenders. Selection takes place following the so-called “negotiated procedure”. The calls for tender have been published in the Official Journal on 10 and 14 April 2004; the negotiations are currently under way.
17. The procedure is as follows. Following the publication of the call for tenders in the Official Journal, interested parties can inform the NRA that they would like to be selected to negotiate. Based on the pre-qualification submissions received, four tenderers were pre-qualified to participate for each of the two competitions.
18. Following the receipt of their offers, the NRA has two possible ways of proceeding. Either it invites two or more tenderers to submit their best and final offers, which are then evaluated against each other. Or it appoints a provisional preferred tenderer, which is then invited to negotiate further with the NRA. At the stage of the notification, the Irish authorities had not yet decided which option they were to choose. In April 2006, the Irish authorities have informed the Commission that they have in both cases opted for the second option, i.e. they have appointed a provisional preferred tenderer, with whom they are now negotiating the final contract.
19. The publication of the call for tenders in the Official Journal in connection with the contract documents, which were sent to all parties that expressed interest in the case, sets out the criteria according to which the offers have been evaluated, in order to find the provisional preferred tenderer.
20. In general, the contract will be awarded to the bidder that makes the most economically advantageous offer. The evaluation and ranking of tenders is based on technical, financial and legal criteria:
 - Technical - the technical criteria comprise minimum requirements only (such as the compliance of the tenderer’s conceptual design with the NRA’s construction requirements); this part of the evaluation is pass/fail;

- Financial - the financial criteria comprise both minimum requirements (such as the requirement for tenders to be financially robust) and a scoring system (where the net present value or NPV of the tenderers' expected total payments less Revenue Share based on a weighted average of the Authority's traffic forecasts are ranked). The financial evaluation makes up 80% of the overall tender evaluation; and
- Legal - the legal evaluation consists of an assessment and evaluation of all amendments to the form of PPP contract issued by the NRA (the "**issued contract**") and which are proposed by tenderers in their tender submissions. Amendments proposed by tenderers are evaluated on a relative basis to the form of issued contract issued by the NRA prior to tender submission. Certain clauses of the issued contract issued by the NRA are identified as being of particular importance to the NRA, and this is reflected in the evaluation, where weighted marks are deducted for amendments to these key clauses. The legal evaluation makes up 20% of the overall tender evaluation. The NRA also retains an overall right to reject a tender which seeks to fundamentally amend the allocation of risk set out in the issued contract.

2.3 The financing of the two projects

21. The private investors recoup their investment through upfront grants (so-called construction payments), ongoing grants (so-called operational payments) and the toll revenue collected on the new roads. The exact amount of these payments is subject to negotiation during the tender procedure.
22. It is expected that the private partner in the PPP finances the bulk of the investment necessary. The Irish government expects that more than 60% of the investment will be paid from private funding. The exact repartition will only be known once the negotiations between the provisional preferred tenderer and the NRA are closed.
23. In addition, they obtain a traffic guarantee or "shadow toll". [...]
24. [...]
25. The thresholds for the traffic guarantee are set in a way that it guarantees the payment of 90% of the debt which is expected to be raised by the private investors for the financing of the respective project. The contracts will contain a clause that once 90% of the debt are paid back, the traffic guarantee ceases.
26. The Irish authorities consider that it is very difficult to pre-calculate the value of the traffic guarantee. They expect that the different bidders may assign different values to the traffic guarantee, depending on how likely they consider the traffic forecasts of the NRA to be met. In a worst case scenario, (i.e. a scenario with no traffic at all, which is purely theoretical), the NRA would need to pay 90% of the debt financing the project. [...]

3. Assessment of the measure/aid

27. According to Article 87(1) EC Treaty, “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 common market.”
28. It thus has to first to be assessed whether the measures the Irish government envisages, i.e. the construction payment, the operating payment and the traffic guarantee, constitute State aid in the sense of Article 87 (1), and then, whether such an aid is compatible with the common market.

3.1 Presence of State aid

3.1.1 Road construction and maintenance as an economic activity

29. The financial measures notified by the Irish government concern the financing of the construction and operation of road transport infrastructure through a private company in the framework of a PPP. The measures can only constitute State aid if the construction and operation of road transport infrastructure is to be considered an economic activity, and thus the body carrying out this activity is to be considered an undertaking in the sense of Art. 87 (1) EC Treaty.
30. The Court of Justice considers “any activity consisting in offering goods and services on a given market is an economic activity”.¹
31. In the light of this jurisprudence, the Commission has considered in past Commission decisions and practice that the construction of a transport infrastructure by public authorities does not constitute an economic activity, provided that it is open to all potential users on equal and non-discriminatory terms.²
32. Where the construction of transport infrastructure is carried out by a private company, the Commission has decided in the past that this operation constitutes an economic activity that may give rise to State aid issues, if the infrastructure is not open to all potential users on equal and non-discriminatory terms, or if the public financing of the construction may lead to overcompensation³. The construction of infrastructure by a private company does not give rise to issues of State aid concern where there is no

¹ ECJ Case C 180-184/98, *Pavel Pavlov*, n° 75 ; Case C-35/96 *Commission v Italy*, n° 36; Case 118/85, *Commission v Italy*, n° 7.

² See most recently Commission decision N 284/2005 Irish Broadband, point 34, decision of 8 March 2006 and the following earlier Commission decisions: C 42/2001 Terra Mitica SA, point 64; N 355/2004 PPP Antwerp Airport, point 34; N 550/2001 Partenariat public privé pour la construction d’installations de chargement et de déchargement, point 24; N 649/2001 Freight Facilities Grant, point 45; N 356/2002 Network Rail, point 70; N 511/1995 Jaguar Cars Ltd. See also 1994 Guidelines on State aid in the aviation sector, point 12; 1998 White book on infrastructure charges (COM (1998) 466 final of 22 July 1998, paragraph 43; 2001 Communication on improving the quality of European ports (COM (2001) final of 13 February 2001, p. 11. See also reply of the Commission to written question No 28 of Mr Dehousse of 10 April 1967, OJ No 118, 20. 6. 1967, p. 2311/67.

³ See Commission decision C 41//2001 Terra mitica SA, point 64; N 550/2001 Partenariat public privé pour la construction d’installations de chargement et de déchargement, point 24; see also the new “Guidelines for the financing of regional airports”, OJ C 312/1, 9.12.2005, p. 1, point 30 and following.

overcompensation and the infrastructure is open to all potential users on equal and non-discriminatory terms.

33. In the present case, the infrastructure is open to all potential users on equal and non-discriminatory terms. Moreover the tender mechanism employed in the present case should ensure the absence of over compensation. The Commission notes, however, that due to the contractual and financial arrangements foreseen for the present case, it is not possible to clearly distinguish between the construction and the operation of the transport infrastructure at hand.
34. In the past, the Commission has decided that the management of a transport infrastructure by a private entity constitutes an economic activity⁴. In line with these decisions, the Commission considers that the management of the M3 Clonee to North of Kells motorway and of the Limerick tunnel by PPP constitute economic activities.
35. Therefore, the Commission considers that the construction of a transport infrastructure constitutes an economic activity that must be looked at in the light of the State aid rules enshrined in the Treaty, if the business model chosen is such that the construction and the management of the infrastructure are intrinsically interwoven and carried out by a private company, for example through a build and operate PPP as in the present case.
36. The Commission therefore considers that the construction and operation of the M3 motorway and the Limerick tunnel by PPPs constitute economic activities that must be examined in the light of the State aid rules of the Treaty.

3.1.2 Presence of an economic advantage

37. The Irish government considers that there is no economic advantage for the private companies involved in the PPP, as they have been selected through a call for tender. The price they receive from the Irish government thus reflects, according to the Irish government, the market value for the construction and operation of the roads in question, including the traffic guarantee.
38. The Commission in general considers that a call for tender can be an appropriate mean for establishing the market value of a given good or service⁵ ⁶. The Commission notes that an open, transparent and non-discriminatory tender procedure tends to minimize potential advantages to the service providers and thus possible elements of state aid. However, an element of state aid may remain.

⁴ See most recently Commission decision N 420/2005 Mont Blanc Tunnel; see also Commission decision N 540/2000 French Highways.

⁵ See amongst others Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10 July 1997, pp 3-5; European Commission report on competition policy, 1993, paragraphs 402 and 403. See also Commission decision N 234/96 Channel Tunnel Rail Link; Commission decision N 462/99 Elefsina, Stavros, Spata Airport motorway; Commission Decision N 617/98 Container Terminal Utrecht; Commission decision N 264/2002 London Underground Public Partnership.

⁶ Commission decision N 117/05 Scottish Broadband.

39. In the present case, the Irish authorities have opted for a negotiated procedure.⁷ As the outcome of this procedure, which is very complex, is not yet known, the Commission considers that it cannot exclude that the financing measures proposed by the Irish authorities may confer an economic advantage to the successful bidder.

3.1.3 Granted by a Member state or through State resources

40. The notified measures are financed through the Irish State budget.

3.1.4 Distortion of competition and affect on trade between Member States

41. It has to be assessed whether there is a potential for distortion of competition and affect on trade between Member States.

42. It cannot be excluded that the proposed measures will strengthen the position of private investors selected to construct and manage the two road projects. As companies are competing for these projects at least community-wide, strengthening the financial position of one of them has the potential to distort competition and affect trade between Member States.

3.1.5 Conclusion: presence of State aid

43. The Commission thus cannot exclude that the measures notified by the Irish government constitutes State aid in the sense of Article 87 (1).

3.2 Compatibility of the aid

44. There are no specific guidelines or other rules applicable for State aid in the area of the construction and operation of road infrastructure. The compatibility of the measures notified by the Irish government will thus have to be assessed directly on the basis of Article 87 (3) (c) EC Treaty, which provides that “*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” can be declared compatible with the common market.

45. The Commission has considered in the past that in order for an aid measure to be compatible with the common market on the basis of Art. 87 (3) (c), the aid must fulfil the following criteria:

- The aid must aimed at a well-defined objective of common interest
- The aid must be well designed to deliver the objective of common interest. In particular, it must be an appropriate instrument and it must be proportional,
- The distortions of competition and the effect on trade limited, so that the overall balance is positive

46. In its recent guidelines on State aid for regional airports, the Commission has further specified these requirements with respect to State aid for infrastructure projects. In point 61 of these guidelines, the Commission considers that State aid for infrastructure can be authorized if the following criteria are met:

- construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.),

⁷ Indeed, the closing of the procedure is depending, among other things, on the State aid clearance.

- the infrastructure is necessary and proportional to the objective which has been set,
- the infrastructure has satisfactory medium-term prospects for use, in particular as regards the use of existing infrastructure
- all potential users of the infrastructure have access to it in an equal and non-discriminatory manner,
- the development of trade is not affected to an extent contrary to the Community interest.

47. The present case will be assessed according to these five criteria.

48. **Clearly defined objective of general interest (accessibility, regional development).** Ireland has decided to construct the M3 Clonee to North of Kells motorway in order to improve the accessibility of areas of Ireland that are currently insufficiently connected to the rest of the country. The realization of this new motorway thus contributes to improve the connectivity of the regions concerned, which in turn will increase their chances of participating in the growth of the Irish economy. In addition, the new motorway will reduce travel times and congestion, which will both contribute to economic growth. The increase of interconnectivity is also one of the objectives set out in the Commission's 2001 White Paper on Transport Policy.

49. The construction of the new Limerick tunnel will reduce the traffic congestion in Limerick and thus eliminate a bottleneck in the Irish road system. The reduction of congestion through the elimination of bottlenecks is also one of the objectives set out in the Commission's 2001 White Paper on Transport Policy.

50. In addition, both projects will increase the traffic safety, and the Commission thus considers that the two projects are in the common interest.

51. Finally, the Commission notes that, from a regional policy point of view, the proposed road projects are coherent with the priority "national roads" of P.O Objective 1 "Economic and social infrastructure" for the planning period 2000 to 2006. The community fund FEDER will contribute 585 million € for this.

52. **Infrastructure necessary and proportional to the objective that has been set.** The Irish authorities have detailed in their submission that the only solutions for addressing the current congestions problems, coping with the expected traffic increase and improving the interconnectivity of the regions in questions is the construction of the new highway and of the tunnel. Alternative solutions are not available: as far as the highway is concerned, extending the existing national road would not be sufficient to reduce travel times and to take in the additional amounts of traffic expected; as for the tunnel, there is no alternative equivalent solution for crossing the river Shannon.

53. **Satisfactory medium-term prospects for the use of the infrastructure.** The traffic forecasts submitted by the Irish government show that the use of the infrastructure will be viable as a toll road.

54. **Equal access.** All potential users will have equal and non discriminatory access to the new infrastructure.

55. **Necessity and proportionality of the aid.** The Irish authorities have also provided the Commission with sufficient explanation why the financing measures are necessary for attracting private investors into the two projects. Indeed, initial market investigations carried out by the Irish government have shown that private investors would not have accepted to take on the risk of the two projects without the construction payments, the operating payments and a guarantee from the government in respect of traffic volume
56. Ireland also considers that the traffic guarantee is less distortive of competition than an additional up-front payment, as under the traffic guarantee, the State will only need to pay money in the case there is less traffic than forecast. The Commission shares the assessment of the Irish authorities.
57. The Commission has found in past decisions that a tender procedure tends to minimize potential advantages to the service providers and thus possible elements of state aid.⁸ But even if an element of state aid were to remain, the fact that the beneficiary has been selected through a tender procedure is a positive element that is taken into account when assessing the aid under Art. 87 3 c EC Treaty.
58. The tender procedure in the present case is subject to the publication of a prior call for tender in the Official Journal of the European Union and the successful tenderer will be selected on the basis of the economically most advantageous proposal. The selected companies will thus be solicited from the open market in accordance with EC rules and principles on public procurement, including publication of a notice in the Official Journal of the European Union. The tenders, seeking the economically most advantageous proposal, appear designed to minimise the cost of investment and the associated public funding.
59. In the present case, the Irish government has informed the Commission that it has received numerous requests for the tender documents, and that bidding was very competitive.
60. In the present case, the tender procedure will thus have as a consequence that the money the Irish government is spending for the construction payments and the operational payments will be limited to the amount necessary for financing the proposed project.
61. **Positive effects outweighing negative effects for competition and trade.** As shown above, the notified measures may strengthen financially the position of the two private investors that will be chosen to carry out the proposed construction work.
62. As far as the negative impact on competitors of the two winners of the tenders is concerned, the Commission considers that the selection through a call for tender gave every competitor the chance to submit an offer, and that in the present case the call for tender tends to minimise the economic advantage for the winner. Accordingly, the negative impact on competition is therefore likely to be small.

⁸ Commission decision N 117/05 Scottish Broadband.

63. On the positive side, the new road projects are likely to re-invigorate competition between the Irish regions which will be better connected as a result of the new road constructions. For instance, companies located along the new part of the M3 motorway will be able to increase their range of operation, and the areas newly connected will be able to compete at better terms with the other Irish regions for new investment, although this may consequently expose them on harder competition from outside.
64. The new road projects are intended to reduce travel time and congestion; they are thus, in terms of time saving, welfare-enhancing for the citizens.
65. The Commission thus concludes that the positive impact on competition outweighs in the present case the potential negative impact.
66. **Conclusion.** The Commission concludes that the financing scheme notified by the Irish authorities is compatible with the common market on the basis of Article 87 (3) (c) EC treaty.

4. **Decision.**

The Commission has accordingly decided:

- to consider the aid to be compatible with the EC Treaty

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Yours faithfully,
For the Commission

Jacques Barrot
Vice-president