State aid & Infrastructure

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How to Assess Whether Support for an Infrastructure Project Involves State Aid

- Notion of aid in infrastructure projects
- Infrastructure analytical grids
- Overview of State aid rules in different sectors
Is there aid when infrastructure is funded?

- Will the funding come from *State resources*?
- Will the infrastructure be used for by an *undertaking*, i.e. for and *economic activity*?
- Who are the potential beneficiaries? (*Selective advantage*)
- Will the funding *distort competition*?
- Will the funding have an *effect on trade*?
State aid can be excluded when...

There are no State resources involved

- Funds provided by public undertakings without any influence/decision of the State

- Funds provided by international organisations – no State interference

ESIF are imputable to the State => there are State resources (not for EFSI)
State aid can be excluded when...

*The beneficiary does not qualify as an undertaking*

-> *does not conduct an economic activity*

*Any entity conducting an economic activity*  
=> *undertaking*
What is an economic activity?

**Economic activity: offering goods and services on a given market**

- If a market, however limited, exists for the activity concerned, then the activity is to be considered economic.

- In spite of a **decision of an authority to close a market to competition**, an economic activity **can exist** where other operators would be willing and able to provide the service in the market concerned.

- The decision of an authority to attribute a certain service to a single **in house** company and not to allow third parties to provide it (e.g. because it wishes to provide the service in-house) **does not rule out the existence of an economic activity.**
What activity is not economic?

- Exercise of public powers by the State - exercise of State authority:
  - *maritime traffic control* (e.g. Port of Patras - SA.38048)
  - *police* (e.g. Cruise ship terminal in Wismar - SA.39637)
  - *customs* (e.g. Port of Katakolo - SA.35738)
  - *anti-pollution surveillance* (e.g. ECJ Case C-343/95, Cali & Figli v Servizi ecologici porto di Genova)

- State social activities with solidarity principles: public education, public hospitals

- No remuneration for the use of the access infrastructure (public road, rail)
  - *unless the infrastructure is "dedicated"* (e.g. rail tracks and utilities in Seaport extension Wismar - SA.39608)
What about ancillary economic activities?

- If the economic activities performed by the infrastructure remain **purely ancillary**, the funding of the whole infrastructure will fall outside state aid rules (considered as not entailing state aid).

- Economic activities will be considered as ancillary if they are:

  - **directly related to and necessary** for the operation of the infrastructure or **intrinsically linked** to its main non-economic use, **and**

  - **limited in scope**, i.e. the economic activity does not exceed 20% of the infrastructure's overall annual capacity (in the area of research).
Infrastructure used for economic activity?

- Financing of construction of the infrastructure = SA?
- Future use of infrastructure: an economic activity or not?

(Leipzig-Halle judgment 2011) - recently confirmed in Black cabs judgment (C-518/13)

- The economic or not character of the future use of the infrastructure
  => economic or not character of its construction

  => the funding of its construction can be State aid or not
Infrastructure used for non economic activity?

- Infrastructure used for non-commercial purposes:
  - broadband for public administrations;
  - roads available free of charge to all users and thus benefitting the whole population;
  - historic monuments;
  - public libraries

...as long as it is **not a dedicated infrastructure linked to a commercially exploited** (or exploitable) one

- But it may become State aid if used otherwise! Requires a case-by-case analysis to rule out SA
State aid can be excluded when...

**There is no advantage granted**

- Market economy investor principle

  - Owner recovers investment + reasonable profit from operator (private co-investors, business plan)

  - Recovery of full costs or market-conform fee (tender, benchmarking, profitability)

- The infrastructure is necessary for the provision of an SGEI and the Altmark criteria are fulfilled
Advantage - MEIP

 Would a market economy investor (MEI) have provided the public funds to the project under the same conditions?

 This may be demonstrated by the fact that private co-investors participate to a significant degree to the project on terms and conditions (such as overall risk and return) that are the equivalent to those of the public investor (pari passu).

 A sound ex ante business plan showing a return on investment would also be a good indication. Note however that accompanying or prior State aid measures pursuing the same objective invalidate a conclusion that a similar measure would also have been undertaken by a MEI.
Advantage – Altmark criteria

If a project and/or its operation is:

1. necessary for the provision of a service entrusted as a service of general economic interest (SGEI) and
2. the parameters of compensation have been clearly and objectively defined in advance and
3. there is no compensation paid beyond the net costs for the provision of the public service and a reasonable profit and
4. the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community

or

the compensation does not exceed what an efficient company would require

=> then State aid is not involved in the project
State aid can be excluded when...

There is no distortion of competition because there is no competition

- Not liberalised market: management of railway infrastructure
- Competition on the market and competition for the market
- How about situations where the decision to liberalize the market are left for the local or regional authorities?
Distortion of competition

- If the undertaking enjoys a **legal monopoly** confined by the **regulatory regime applicable** to this activity, and the **market is not liberalised**, i.e. not opened up to competition due to EU or national legislation or de facto by market developments, and the **beneficiary is not active in other markets or geographic areas**

  => **there is no distortion of competition**

- If the beneficiary, on the contrary, **provides services on any market**

  => **Distortion of competition cannot be excluded**

  => **the public funding of investments of this beneficiary may qualify as State aid**

Example: Commission decision N 356/2002 Network Rail
State aid can be excluded when...

There is no effect on trade:

- Activities are **purely local** and there is no competition for the market open to undertakings from other MS
- No presumption: depends on facts/evidence available; case by case analysis
- Local commercial radius: will beneficiary attract customers from other Member States?
  - "Local" more likely for services than goods
  - Less likely when beneficiary is part of national network
- Marginal or no impact on trade between MS – no effects on an international market – no involvement of group operating similar facilities, e.g. arenas, sport facilities
Effect on trade

- **Effect on trade** is usually present since State aid strengthens the position of an undertaking compared with other companies competing in intra-EU trade.

- There is no threshold or percentage below which trade between Member States can be regarded as not having been affected. The relatively small amount of aid or the relatively small size of the recipient undertaking does not a priori mean that trade between Member States may not be affected.

- But the Commission has in several cases concluded, in the context of the application of State aid rules, that activities had a purely local character and did not affect trade between Member States.
No effect on trade

Package of decisions - no effect on trade of 29/5/2015 (IP/15/4889)

- Purely local activities - no competition for the market open to undertakings from other MS
  - Sports/leisure: swimming pool, marinas, outdoors sports centre, community golf clubs
  - Health care: emergency or «standard» medical services
  - Culture: venues which do not attract foreign visitors («destinations in themselves»)
  - Others: port (Lauwersoog), airport (Isle of Scilly)

De minimis Regulation: aid below EUR 200 000 (EUR 500 000 for SGEI) for a 3 year period
Notice on the notion of aid

Draft for public consultation available at:

- The notice on the notion of aid is an integral part of the Commission's State aid modernisation (SAM) programme.

- The notice intends to provide practical guidance in order to identify State aid measures pursuant to Article 107 (1) of the TFEU, which have to be notified to and approved by the Commission before being lawfully implemented.
When is it necessary to notify a State aid measure?

- **Article 108 (3) TFEU:**
  The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.

- **The Commission has the exclusive competence to assess compatibility of State aid measures**
No need to notify

- **GBER (Reg. 651/2014)**, requiring compliance with:
  - Specific provisions relevant for the infrastructure
  - Common provisions (Chapter 1) always apply!

- **SGEI Decision (2012/21/UE)**, applying to infrastructure necessary to provide an SGEI for compensation up to €15 million per year (including the depreciation of the investment)

- Falling under an approved scheme
When notification is necessary?

- If the ceilings of the GBER or SGEI decision are exceeded or if the infrastructure project does not fall within the categories of the GBER or SGEI decision (e.g. ports, airports)

- The Commission will assess the aid on the basis of its Guidelines or directly under the Treaty – guiding principles:
  - Promote investments in infrastructure in order to stimulate growth and jobs
  - Avoid harming competing projects and existing infrastructure
  - Avoid over-compensation (funding gap analysis)
  - Ensure access of different users to infrastructure
How to proceed in practice?

1. Does the project involve an economic activity?
   - NO → No State aid
   - YES → 2. Are the other criteria Article 107(1) TFEU fulfilled?
     - NO → Obligation to notify (108(3) TFEU)
     - YES → 3. Is GBER or SGEI Decision or the de minimis Regulation applicable?
       - NO → Compatibility analysis
       - YES → Compatible aid – no need to notify

Obligation to notify (108(3) TFEU)

- Compatibility analysis
- Decision within 2 months from the receipt of a complete notification
Is there guidance available?

- In general, in case of doubt about the existence of aid or compatibility of the aid in a certain project, Member States can engage in informal discussions with the Commission's services (e.g. pre-notification);
- For GBER application, the Commission services may provide clarity on the interpretation of the GBER provisions and their possible application to certain projects;
- For infrastructure projects, analytical grids have been developed.
Varying levels of guidance

Infrastructure is not a uniform notion - 4 main scenarios in terms of guidance

A) **Specific guidelines** (+ GBER): Airports, Energy infrastructure, Broadband

B) **Partial guidance** (GBER): Local infrastructure, Sports, Culture and heritage

C) **Well-established case practice**: Ports, Rail, ...

D) **Evolving case practice**: Motorways, Urban transport, Water & Waste water networks
Analytical grids
What are the analytical grids?

• Checklists to clarify State aid rules applicable to public funding of infrastructure projects

• First GRIDS were developed in 2012 for Structural Funds mainly

• Due to recent developments in SA for infrastructure (new GBER, SGEI, guidelines, recent decisions, ... ), these GRIDS were updated

• Not only applicable to projects financed with Structural Funds

• Where to find them?

2015 analytical grids

The new set of Grids does not yet contain a general grid – "General checklist" (on general principles to determine whether public financing of infrastructure is likely to involve State aid in the meaning of Art. 107(1) TFEU)

The new set of Grids has not:

i. a grid for motorways, toll roads, bridges or tunnels;

ii. an updated grid for infrastructure for water services – the 2012 grid can still be used
## 2015 analytical grids

<table>
<thead>
<tr>
<th>Sector</th>
<th>2012</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Broadband</td>
<td>YES</td>
<td>Revised</td>
</tr>
<tr>
<td>2. Airports</td>
<td>YES</td>
<td>Revised</td>
</tr>
<tr>
<td>3. Ports</td>
<td>YES</td>
<td>Revised</td>
</tr>
<tr>
<td>4. Research</td>
<td>YES</td>
<td>Revised</td>
</tr>
<tr>
<td>5. Culture</td>
<td>YES</td>
<td>Revised</td>
</tr>
<tr>
<td>6. Sport and multifunctional recreational</td>
<td>(part under culture)</td>
<td>NEW</td>
</tr>
<tr>
<td>infrastructures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Energy</td>
<td>NO</td>
<td>NEW</td>
</tr>
<tr>
<td>8. Waste management</td>
<td>NO</td>
<td>NEW</td>
</tr>
<tr>
<td>9. Rail and local public transport</td>
<td>NO</td>
<td>NEW</td>
</tr>
</tbody>
</table>
## 2015 analytical grids: missing ones

<table>
<thead>
<tr>
<th>Sector</th>
<th>2012</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex(1) : <strong>General checklist</strong></td>
<td>YES</td>
<td>To be updated</td>
</tr>
<tr>
<td>Ex(6) : <strong>Water services</strong></td>
<td>YES</td>
<td>To be updated</td>
</tr>
<tr>
<td><strong>Motorways / bridges / tunnels</strong> (with and without tolls)</td>
<td>NO</td>
<td>To be developed</td>
</tr>
</tbody>
</table>
Structure of the analytical grids

The grids are structured as follows:

- Existence of State aid? (e.g. Is there economic activity? MEIP? Impact on trade? de minimis?)
- If SGEI – no aid if compliance with Altmark criteria
- State aid, but exempted from notification: GBER, SGEI decision, or falling under existing State aid schemes
- State aid, need to notify for SA clearance

The grids include most relevant case practice
Airports

- **Guidance: 2014 Aviation Guidelines**

- **Aid/No aid:** Investment in airport infrastructure generally considered an economic activity when used to provide airport services

- **Compatibility:**
  - SGEI Decision (< 200,000 passengers/year)
  - 2014 Aviation Guidelines
  - No GBER for the time being
Airports – investment aid

Allowed only for airports below 5 million passengers per year

- Only for useful projects (in terms of mobility, accessibility, de-congestion of hubs, regional development)
- No "duplication" (close airport with spare capacity)
- No "ghost airport" (no real demand)
- Aid limited to the minimum necessary for implementation of the project (funding gap + maximum aid intensities)
Airports – operating aid

- > 3 million passengers: operating aid (4 April 2014)
- 700,000 – 3 million passengers: operating aid (4 April 2019)
- < 700,000 passengers: operating aid (4 April 2024)

Transitional period: review by 2018
Broadband

- **Guidance**: 2013 Broadband Guidelines

- **Aid/No aid**: Investment in BB infrastructure is generally considered economic

- **Compatibility**:
  - GBER Article 52
  - 2013 Broadband Guidelines
Energy infrastructure

- **Guidance:** EEAG

- **Aid/No aid:** Investment in energy infrastructure is generally considered an economic activity

- **Compatibility:**
  - GBER Article 48
  - EEAG
Waste infrastructure

- **Guidance**: EEAG + GBER

- **Aid/No Aid**: Aid insofar as the infrastructure is intended for the provision of waste treatment services against payment

- **Compatibility**:
  - GBER Article 47
  - SGEI Decision
  - EEAG, section 3.5.
Research infrastructure

- **Guidance**: RD&I Framework

- **Aid/No Aid**: Aid insofar as the infrastructure is used to perform economic activities

- **Compatibility**:
  - GBER Article 26
  - RD&I Framework
Culture and Heritage

- **Guidance**: GBER. No guidelines.

- **Aid/No Aid**: Aid only insofar as the infrastructure is intended activities which are economic (and have an effect on trade)

- **Compatibility**:  
  - GBER Article 53  
  - TFEU Article 107(3)(d)
Sports & multifunctional infrastructures

- **Guidance**: GBER. No guidelines.

- **Aid/No Aid**: Investment in stadia and similar infrastructure may be aid insofar as the facilities are used for an economic activity (and have an effect on trade)

- **Compatibility**:
  - GBER Article 55
  - TFEU Article 107(3)(c)
Local infrastructure

- **Guidance**: GBER - no guidelines

- **Aid/No Aid**: recital 75 GBER "A number of measures taken by Member States with regard to local infrastructures do not constitute aid (...) for example because there is no effect on trade between Member States..."

- **Compatibility**:
  - GBER Article 56
  - TFEU Article 107(3)(c)
Ports

- **Guidance**: Case practice
- **Aid/No Aid**: Investment in port infrastructure is economic insofar as the infrastructure is intended for the provision of port services to shipping companies against payment; this excludes "public remit"

- **Compatibility**:
  - SGEI Decision: max 300,000 passengers/year
  - TFEU Articles 107(3)(c) or 93 (inland ports/intermodal platforms)
  - No GBER for the time being
Urban transport infrastructure

- **Guidance:** Very limited case practice

- **Aid/No Aid:** Infrastructure investment has been considered economic where the infrastructure was intended for the provision of transport against payment + effect on trade (SA.34056 – Cable car for London)

- **Compatibility:**
  - TFEU Article 93 (Cable car for London)
State aid Regulations for 2014-2020 period excluding notification:

- **De minimis Regulation** No 1407/2013 (OJ L 352, 24.12.2013)
- **SGEI de minimis Regulation** No 360/2012 (OJ L 114, 26.4.2012)
- **General Block Exemption Regulation** No 651/2014 (17.06.2014) (OJ L 187, 26.06.2014)
- **Commission SGEI Decision** No 2012/21/EU (OJ L7, 11.01.2012)
Compatibility rules for 2014-2020 period

- **Broadband Guidelines** (OJ C 25, 26.01.2013)
- **Risk Finance Guidelines** (OJ C19, 22.01.2014)
- **Aviation Guidelines** (OJ C 99, 04.04.2014)
- **Environmental and Energy Aid Guidelines** (OJ C 200, 28.06.2014)
- **Research & Development & Innovation Framework** (OJ C 198, 27.06.2014)
- **Promotion of IPCEI - Compatibility criteria** (OJ C 188, 20.06.2014)
SGEI compatibility rules

- Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C8, 11.01.2012)
- SGEI Framework (OJ C8, 11.01.2012)
Thank you!