



European  
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# **Analytical Grids on the application of State aid rules to the financing of infrastructure projects**

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This series of staff working documents contains the "Analytical grids" on the application of State aid rules to the public financing of infrastructure projects.

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Grid No 2: Construction of airport infrastructures

Grid No 3: Construction of port infrastructures

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waste management services

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Please see the Annex for the documents.

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## INTRODUCTION TO THE ANALYTICAL GRIDS <sup>1</sup>

### *Disclaimer:*

*The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case the services of the Directorate-General for Competition (DG COMP) are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.* <sup>2</sup>

### **Background to the analytical grids**

1. In 2012, in the wake of the Leipzig-Halle judgment<sup>3</sup>, DG COMP provided guidance by way of so-called "analytical grids" on the application of State aid rules to the public financing of infrastructure projects. The content of the grids reflected the rules and decisional practice at that point in time. Since then, the State aid regulatory framework has undergone modifications in the context of the State aid modernisation exercise, resulting in a need to update those grids. More specifically, the new grids integrate new State aid rules (the new General Block Exemption Regulation<sup>4</sup>, the new *de minimis* Regulation<sup>5</sup>, the new Aviation Guidelines<sup>6</sup>, etc.)<sup>7</sup>.

### **State aid rules and projects funded by the European Fund for Strategic Investments (EFSI)**

2. EFSI financing is not State aid within the meaning of the EU Treaties, and EFSI financing will not have to be approved by the European Commission under EU State aid rules<sup>8</sup>. Projects supported by EFSI may however also benefit from financial support (co-financing) by Member States (ESI Funds and national co-financing). Such co-financing is, unless granted on market terms, State aid which must be approved by the Commission.

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> Commission Notice on *Best Practices Code on the conduct of State aid control proceedings*, OJ C 136, 16.6.2009, p. 13.

<sup>3</sup> Joined Cases T-443/08 and T-455/08 Flughafen Freistaat Sachsen and others v Commission, EU:T:2011:117.

<sup>4</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>5</sup> Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

<sup>6</sup> Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3.

<sup>7</sup> State aid rules in force are available on: [http://ec.europa.eu/competition/state\\_aid/legislation/legislation.html](http://ec.europa.eu/competition/state_aid/legislation/legislation.html).

<sup>8</sup> See the Communication from the Commission to the European Parliament and the Council "*Working together for jobs and growth: The role of National Promotional Banks (NPBs) in supporting the Investment Plan for Europe*", [COM/2015/0361 final](#), and the Commission's Factsheet on "*The Investment Plan for Europe: Questions and Answers*", [press release of 20 July 2015](#).

3. The Commission will assess EFSI projects with Member State co-funding on the basis of its modernised State aid framework. To support EFSI, it will assess Member State co-financing as a matter of priority, and give it fast-track treatment, aiming to complete its assessment within six weeks of receiving the required information from the Member State.

#### **Structure of the analytical grids**

4. The analytical grids follow a uniform structure, providing sector-specific guidance as to when:
  - i. aid is not involved, and therefore a notification is not necessary (due for example to the use of the infrastructure not involving an economic activity, the lack of potential for any effect on completion and trade, or the absence of economic advantage);
  - ii. aid is involved but no notification is necessary, and specific rules may apply (in case of aid exempted from notification obligations); and
  - iii. aid is involved and a notification is necessary, with reference to the main applicable State aid rules.

#### **Access to State aid decisions on DG Competition's website**

5. Decisions and other published State aid case documentation may be accessed by using the search function in the following link: <http://ec.europa.eu/competition/elojade/isef/index.cfm>

#### **List of sector-specific grids:**

- 1) Broadband infrastructures
- 2) Airports
- 3) Ports
- 4) RDI infrastructures
- 5) Culture infrastructures
- 6) Sport and multifunctional recreational infrastructures
- 7) Energy
- 8) Waste management infrastructures
- 9) Rail, metro and local transport infrastructures

## INFRASTRUCTURE ANALYTICAL GRID N° 1<sup>1</sup> – BROADBAND NETWORK INFRASTRUCTURES

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### General principles

1. This analytical grid covers the construction of broadband infrastructures. Public funding can be granted to the complete infrastructure roll-out or to part of the infrastructure only (for instance for constructing backhaul networks or basic physical infrastructure elements, such as ducts).
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

### Instances in which the presence of State aid is excluded

#### **No economic activity: construction of a broadband network for non-economic use**

3. If a broadband network is rolled out exclusively for non-commercial purposes not favouring any undertaking (e.g. a network to provide connectivity services to public bodies not engaged in economic activity<sup>2</sup>), then the funding for such a project does not involve State aid. However, if such a network (for instance its extra capacity) is made available for use by commercial broadband investors or other operators, State aid is likely to be involved. Similarly, if the network is made available later for commercial use, any further construction/upgrade may involve State aid.

#### **No potential effect on trade between Member States: de minimis**

4. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>3</sup>.

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See for instance Commission decision of 30 May 2007 in case N 46/2007 – UK - Welsh Public Sector Network Scheme, OJ C 157, 10.07.2007, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/218491/218491\\_683319\\_19\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf).

<sup>3</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

5. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

6. The deployment and the operation of a broadband infrastructure can qualify as a SGEI. Broadband deployment as a SGEI should normally be based on the provision of a passive<sup>4</sup>, technologically neutral<sup>5</sup> and open<sup>6</sup> infrastructure that provides universal service coverage for the given area. Any compensation should be limited to the related wholesale access services, and should not include retail communication services<sup>7</sup>. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of broadband services that can be considered as genuine SGEI for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>8</sup>.

### **SGEI de minimis Regulation<sup>9</sup>**

7. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

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<sup>4</sup> The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

<sup>5</sup> A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users.

<sup>6</sup> Open, non-discriminatory wholesale access shall be granted to third party operators.

<sup>7</sup> See Communication from the Commission EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (“Broadband Guidelines”), OJ C 25, 26.1.2013, p. 1, paragraph 2.

<sup>8</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

<sup>9</sup> Commission Regulation on application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

### Instances in which there is no need to notify for State aid clearance, but other requirements could apply

8. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

#### **General block exemption regulation (GBER)<sup>10</sup>**

9. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, Article 52 GBER allowing investment aid for broadband infrastructure up to EUR 70 million total costs per project can apply. Article 14 GBER allowing regional aid for broadband network development can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases all the provisions of Chapter 1 of the GBER must also be complied with.

#### **Service of General Economic interest: SGEI Decision<sup>11</sup>**

10. If the deployment and the operation of a broadband infrastructure is necessary for the provision of a SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such a SGEI up to 15 million per year (average over the whole duration of the entrustment<sup>12</sup>), may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation<sup>13</sup>.

#### **If aid can be granted under an existing State aid scheme**

11. If the Commission has approved a scheme allowing aid for broadband infrastructure, Member States may grant aid in conformity with the conditions established in the relevant Commission decision. The list of all Commission decisions taken under the State aid rules concerning broadband is available at the following website: [http://ec.europa.eu/competition/sectors/telecommunications/broadband\\_decisions.pdf](http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf).

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<sup>10</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>11</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>12</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (those infrastructures may be depreciated for more than 10 years).

<sup>13</sup> See Section 2.3 of the Broadband Guidelines on "State aid for broadband deployment as a SGEI".

### **Instances in which notifying for State aid clearance is necessary**

12. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification (see section above), a notification to the Commission for State aid clearance is required.

### **Broadband Guidelines<sup>14</sup>**

13. The compatibility of State aid for broadband infrastructure is normally assessed on the basis of the Broadband Guidelines. In general, the Broadband Guidelines distinguish target areas according to current level of coverage with broadband infrastructure. If no comparable broadband infrastructure is available ("white areas"), State aid is allowed if the relevant compatibility conditions are met. In areas where several broadband infrastructures are already deployed or planned to be deployed by commercial operators in the next three years ("black areas"), the Commission views aid measures negatively. The most common compatibility conditions are detailed in paragraph 78 of the Broadband Guidelines. One of the guiding principles set out in the Broadband Guidelines is that, whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with spirit and the principles of the EU Public Procurement Directives<sup>15</sup>.

### **Regional Aid Guidelines (RAG)<sup>16</sup>**

14. Broadband infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to broadband infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG<sup>17</sup>.

### **Service of General Economic Interest: SGEI Framework<sup>18</sup>**

15. The compatibility of State aid for broadband infrastructure which is necessary for the provision of an SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework. The considerations set out in point 6 on the quality of the definition of the public service obligation for broadband deployment regarding passive, open and technologically neutral infrastructures providing universal coverage will apply. In addition, the SGEI Framework includes a number of further compatibility conditions that must be complied with.

### **Projects that in principle should not be supported**

16. Projects that involve State aid but do not comply with the relevant State aid rules (GBER, Broadband Guidelines, RAG, or SGEI) should not be supported. In those cases, serious distortions

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<sup>14</sup> See footnote 8.

<sup>15</sup> See paragraph 78(c) of the Broadband Guidelines. See also the clarifications provided in footnote 96 for situations where a public authority decides to deploy and manage the network directly.

<sup>16</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

<sup>17</sup> Note that RAG contains specific requirements for broadband infrastructure.

<sup>18</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.



of competition cannot be excluded. In particular, and in broad terms, projects should not be supported that do not comply with the generally required conditions, which include amongst others:

- Award made on the basis of a transparent, open and non-discriminatory competitive selection process;
- The project must conform with the principle of technological neutrality, both at the level of project selection and at the level of commercialisation (wholesale), allowing for different technologies to compete;
- The project must offer the widest open and non-discriminatory access to the publicly-funded infrastructure;
- The project takes place in areas where there is no infrastructure of the same category (either basic broadband or next generation access (NGA) network) and where no such infrastructure is likely to be developed on commercial terms in the near future.

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*References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [European Union framework for State aid in the form of public service compensation](#), OJ C 8, 11.1.2012, p. 15.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks](#), OJ C 25, 26.01.2013, p. 1.

***A comprehensive list of Commission decisions taken under State aid rules concerning broadband:***

- [http://ec.europa.eu/competition/sectors/telecommunications/broadband\\_decisions.pdf](http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf)

## **INFRASTRUCTURE ANALYTICAL GRID N° 2<sup>1</sup> – CONSTRUCTION OF AIRPORT INFRASTRUCTURES**

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudice possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### **General principles**

1. This analytical grid covers the application of State aid rules to airport infrastructure. The Commission distinguishes three types of public support:
  - Support for the construction of airport infrastructure (investment aid);
  - Support for the operation of airport infrastructure (operating aid); and
  - Support for the airlines using the infrastructure.
2. According to established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of airport infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

### **Instances in which the existence of State aid is excluded**

#### **No economic activity: activities within the public policy remit**

3. The distinction between public policy remit and economic activities has to be assessed on a case-by-case basis.
4. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general fall outside the scope of the State aid rules. Certain investments in airport infrastructure, which are exclusively reserved for functions within such a "public policy remit", may concern such non-economic activities<sup>2</sup>. This can be the case in particular for air traffic control-related infrastructure, customs and police related infrastructure (e.g. premises allocated to customs / police within a terminal), aircraft rescue and firefighting (ARFF) infrastructure and infrastructure necessary to counteract public threats or terrorist attacks (such as equipment to screen luggage or passengers, CCTV and

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See paragraph 98 of Joined Cases T-443/08 and T-455/08 Flughafen Freistaat Sachsen and others v Commission EU:T:2011:117. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatised.

fences preventing access to the airport's reserved area<sup>3</sup>). Public funding granted for the construction, extension or modernisation of infrastructure exclusively used for such activities does not constitute State aid provided that it is limited to compensating the costs to which they give rise and does not lead to undue discrimination between airports<sup>4</sup>.

5. While the exact extent of the services provided by airports varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all Member States<sup>5</sup>.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

6. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.
7. The financing of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEOP are nevertheless complied with<sup>6</sup>.

#### **No economic advantage at the level of the user of the infrastructure**

8. Where an airport has public resources at its disposal, aid to an airline using that airport can, in principle, be excluded if: (a) the price charged for the airport services corresponds to the market price, as estimated on the basis of prices charged by comparable airports ("benchmarking approach" or (b) it can be demonstrated through an ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport. However, the

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<sup>3</sup> See Commission decisions of 23 July 2014 in case SA.22614 – France – Airport Pau Pyrénées, OJ 201, 30.7.2015, p. 109, [http://ec.europa.eu/competition/state\\_aid/cases/223036/223036\\_1614098\\_1194\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/223036/223036_1614098_1194_2.pdf) and in case SA.33961 – France – Aéroport de Nîmes, not yet published.

<sup>4</sup> When it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be recipients of State aid, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature (see paragraph 37 of Guidelines on State aid to airports and airlines ("Aviation Guidelines"), OJ C 99, 4.4.2014, p. 3).

<sup>5</sup> See paragraphs 31-33 of the Aviation Guidelines (footnote 4).

<sup>6</sup> See for example Commission decision of 13 July 2014 in case SA.32576 Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/243457/243457\\_1359832\\_419\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf); Commission decision of 3 October 2012 in the case SA.23600 Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, [http://ec.europa.eu/competition/state\\_aid/cases/226773/226773\\_1399901\\_101\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf).

Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price. Thus it considers the ex *ante* incremental profitability analysis to be the most relevant criterion for the assessment of arrangements concluded by airports with individual airlines for the purposes of determining whether they involve State aid.

**No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

9. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of a genuine service of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>7</sup>.
10. The Aviation Guidelines provide guidance on what activities can be considered an SGEI<sup>8</sup>. In substance, the overall management of an airport can be considered as an SGEI only in exceptional cases, such as airports located in isolated, remote or peripheral regions of the Union. In any case, the pursuit of commercial activities not directly linked to the airport's core activities cannot be included in the scope of an SGEI<sup>9</sup>.

**SGEI de minimis Regulation**

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI de minimis Regulation are also fulfilled<sup>10</sup>.

**No potential effect on trade between Member States: de minimis**

12. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>11</sup>.

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<sup>7</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415.

<sup>8</sup> See paragraphs 67-73 of the Aviation Guidelines.

<sup>9</sup> See paragraph 73 of the Aviation Guidelines, and decision of 23 July 2014 in case SA.33963 - Aéroport d'Angoulême, OJ 201, 30.7.2015, p. 48, [http://ec.europa.eu/competition/state\\_aid/cases/244154/244154\\_1603693\\_425\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/244154/244154_1603693_425_2.pdf).

<sup>10</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>11</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

### Instances in which there is no need to notify for State aid clearance, but other requirements could apply

13. State aid may be considered compatible with the Treaty and can be granted without notification in the following instances<sup>12</sup>:

#### **Service of general economic interest: SGEI Decision<sup>13</sup>**

14. If the construction, renovation or extension of an airport is necessary for the provision of an SGEI, it may be considered as part of the SGEI mission, depending on the exact content of the public service obligations imposed on the airport operator. If the compensation of such an SGEI concerns airports with an average annual traffic of fewer than 200 000 passengers, it may be covered by the SGEI Decision, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation<sup>14</sup> established ex ante, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

#### **If aid can be granted under an existing State aid scheme**

15. If the Commission has approved a scheme allowing aid for airport infrastructure, Member States may grant aid in conformity with the conditions established in the legal acts adopted by the Member State to establish the scheme, as notified to the Commission, and in the Commission decision clearing the scheme.

### Instances in which notifying for State aid clearance is necessary

16. If the measure constitutes State aid and the measure does not meet the conditions of a scheme approved by the Commission or the conditions allowing an exemption from the notification obligation, a notification to the Commission for State aid clearance is required.

#### **Aviation Guidelines<sup>15</sup>**

17. The compatibility of State aid for airport infrastructure is normally assessed on the basis of the **Aviation Guidelines**. Investment aid for airports can be declared compatible by the Commission, provided that the conditions detailed in paragraphs 84 to 108 of the Aviation Guidelines are complied with.

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<sup>12</sup> Currently Commission Regulation No 651/2014 (GBER) includes no criteria based on which airports could be exempted from notification. Provided that sufficient case experience is further developed allowing the design of operational exemption criteria ensuring the ex ante compatibility of aid for airport infrastructure, the Commission intends to review the scope of the GBER with a view to including that type of aid.

<sup>13</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>14</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

<sup>15</sup> See footnote 4.

18. Member States can notify State aid schemes for investment aid for airports with average annual traffic below 3 million passengers.
19. The following aid measures cannot be covered by State aid schemes and should always be notified individually:
- investment aid to airports with average annual traffic above 3 million passengers;
  - investment aid with an aid intensity exceeding 75 % to an airport with average annual traffic below 1 million passengers, with the exception of airports located in remote regions;
  - investment aid granted for the relocation of airports;
  - investment aid financing a mixed passenger/freight airport handling more than 200 000 tonnes of freight during the two financial years preceding that in which the aid is notified;
  - investment aid aimed at the creation of a new passenger airport (including the conversion of an existing airfield into a passenger airport); and
  - investment aid aimed at the creation or development of an airport located within 100 kilometres distance or 60 minutes travelling time by car, bus, train or high-speed train from an existing airport.

#### **Service of General Economic interest: SGEI Framework<sup>16</sup>**

20. The compatibility of State aid for airport infrastructure which is necessary for the provision of an SGEI in airports with more than 200 000 passengers per year may be assessed on the basis of the SGEI Framework<sup>17</sup>.
21. The considerations as to the definition of a genuine SGEI in the airport sector (see point 10) will apply.

#### **Projects that in principle should not be supported**

22. Projects that involve State aid but do not comply with the relevant compatibility rules (Aviation Guidelines and SGEI) should not be supported. Projects falling into that category would be those involving:
- investment aid to airports with more than 5 million passengers per year, except in very exceptional circumstances<sup>18</sup>;
  - investment aid to an airport located in the catchment area of an existing airport when the said investment does not have satisfactory medium-term prospects for use, or diminishes the medium-term prospects for use of existing infrastructure in the catchment area<sup>19</sup>.

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<sup>16</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

<sup>17</sup> According to that article: "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*"

<sup>18</sup> Such as relocation of an existing airport, where the need for State intervention is characterised by clear market failure, taking into account the exceptional circumstances, the magnitude of the investment and the limited distortions of competition.

Such cases would most likely require an in-depth assessment which could result in a conclusion that the aid is incompatible with the internal market.

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*References:*

- Guidelines on State aid to airports and airlines ("[Aviation Guidelines](#)"), OJ C 99, 4.4.2014, p. 3.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

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<sup>19</sup> The Commission will have doubts as to the medium-term prospects for use of airport infrastructure at an airport located in the catchment area of an existing airport where the existing airport is not operating at or near full capacity.

## INFRASTRUCTURE ANALYTICAL GRID N° 3<sup>1</sup> – CONSTRUCTION OF PORT INFRASTRUCTURES

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. Concerning port infrastructure, the existence of State aid is in general<sup>2</sup> examined at three levels:
  - Owner/manager of port infrastructure
  - Operator of port infrastructure
  - User of the infrastructure
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of port infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

### Instances in which the existence of State aid is excluded

#### **No economic activity: activities within the public remit**

3. The distinction between public policy remit and economic activities has to be assessed on a case-by-case basis.
4. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general fall outside the scope of State aid rules. The funding of certain investments in port infrastructure linked to activities that normally fall under the State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the State aid rules<sup>3</sup>

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> Depending on the organisational structure of the port in question.

<sup>3</sup> See Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, EU:C:2012:821, paragraph 42.



(for example maritime traffic control<sup>4</sup>, police<sup>5</sup>, customs<sup>6</sup>, antipollution surveillance<sup>7</sup>, control and security of navigation<sup>8</sup>).

5. However, if the funding concerns a project that also includes infrastructure elements which can be economically exploited, it can involve State aid.
6. The construction of access infrastructure (e.g. public road, rail, utilities etc.) to ports which is made available free of charge to all users and is thus not commercially exploitable, may be considered as non-economic, as long as it is ensured that it is not specifically dedicated to the activity of the operator in exploiting the port infrastructure but benefits the population as a whole<sup>9</sup>.
7. However, other activities, like for instance dredging or breakwater works, which may not be of an economic nature *per se*, may be considered as economic if they form an intrinsic part of a project with a commercial objective<sup>10</sup>. If the purpose of such works is directly linked to the development of a port infrastructure, which is commercially exploitable, they constitute economic activities. Such activities therefore require a case-by-case analysis<sup>11</sup>.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

8. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound

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<sup>4</sup> See Commission decision of 25 June 2014 in case SA. 38048 – Greece – Upgrading of the Port of Patras, OJ C 280, 22.08.2014, p. 20.

<sup>5</sup> See Commission decision of 30 April 2015 in case SA.39637 – Germany - Extension of the cruise ship terminal in Wismar, OJ C 203, 19.06.2015, p. 3.

<sup>6</sup> See Commission decision of 19 June 2013 in case SA. 35738 – Greece - Aid for the upgrading of Katakolo port, OJ C 204, 18.07.2013, p. 3.

<sup>7</sup> Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* EU:C:1997:160, paragraphs 22 and 23.

<sup>8</sup> See Commission decision of 15 December 2009 in case SA. C 39/2009 (ex N 385/2009) – Latvia - Public financing of a port infrastructure in Ventspils Port, OJ C 62, 13.03.2010, p. 7.

<sup>9</sup> See Commission decisions of 30 April 2015 in case SA.39608 – Germany - Sea port extension Wismar, OJ C 203, 19.06.2015, p. 3 and in case SA.39637 – Germany - Extension of the cruise ship terminal in Wismar (see footnote 5).

<sup>10</sup> See Commission decision of 19 December 2012 in case SA. 34940 (2012/N) – Italy – Port of Augusta, OJ C 77, 15.03.2013, p. 1.

<sup>11</sup> See, for instance, Commission decision of 27 March 2014 in case SA.38302 - Italy – Investment Aid to the Port of Salerno, OJ C 156, 23.05.2014, p. 10; in that case, the objective was to develop a dock that was to be commercially exploited. Furthermore, the upgraded infrastructure benefitted exclusively cargo ships, containers and Ro-Ro traffic. Therefore, the works did not provide an advantage to all the operators of the port but only to particular undertakings. For those two reasons, the dredging activity did not fall within the public remit and was considered to be of an economic nature. At the same time, see Commission decision of 11 March 2014 in case SA. 35720 – United Kingdom – Liverpool City Council Cruise Liner Terminal, OJ C 120, 23.04.2014, p. 4; in that case the Commission considered that dredging was not solely connected to the construction and operation of a specific port, but rather enhanced access to a river and benefitted all operators on the river without distinction. Thus, it was considered as public works aimed at maintaining access to maritime routes for the benefit of the maritime community as a whole, in the interest of the general public.

business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors, in line with the normal market rate of return that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

9. The financing of port infrastructure often requires substantial capital investments that can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEOP are nevertheless complied with.

**No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

10. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of port services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined<sup>12</sup>; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>13</sup>.

**SGEI de minimis Regulation<sup>14</sup>**

11. Public funding granted for the provision of an SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

**No economic advantage at the level of the user**

12. The existence of an economic advantage at the level of the end users may be excluded if the port is not dedicated for the use by a specific operator, all end users enjoy equal and non-discriminatory access to the infrastructure and the infrastructure pricing policy *vis-à-vis* end users is established on market terms<sup>15</sup>.

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<sup>12</sup> For example if a port is the only one on an island.

<sup>13</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

<sup>14</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>15</sup> See list of Commission decisions at the end of this grid.

## No potential effect on trade between Member States

13. There may be cases of very small ports that cater almost exclusively to local demand and where the investment does not lead to a significant increase of the port's capacities. In such cases a potential effect on competition and trade may be excluded<sup>16</sup>. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis except for cases covered by the *de minimis* Regulations.
14. Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions set out therein are also respected<sup>17</sup>.

## Instances in which there is no need to notify for State aid clearance, but other requirements could apply

15. Possible State aid is considered to be compatible with the internal market and can be granted without notification in the following instance<sup>18</sup>:

### Service of general economic interest: SGEI Decision<sup>19</sup>

16. If the construction, renovation or extension of a port is necessary for the provision of an SGEI, it may be considered as part of the SGEI mission. If the compensation of such an SGEI concerns ports with an average annual traffic of fewer than 300 000 passengers, it may be covered by the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation<sup>20</sup> established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

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<sup>16</sup> See Commission decision of 29 April 2015 in case SA.39403 (2014/N) – Netherlands – Investment aid for Lauwersoog port, OJ C 259, 7.8.2015, p. 3n. In that decision, the Commission considered that the Lauwersoog port was mainly used by small fishing vessels registered in that Member State which choose that port mainly in view of its geographical proximity to the relevant fishing grounds. The investment would not lead to a significant increase in the port's capacities and, in particular, would not increase its capacity to cater for larger ships. Thus, the investment in the fishing port was targeted at a local market in the sense that it would not provide incentives to fishermen from other Member States to use the Port of Lauwersoog rather than fishing ports in other Member States. The parts of the project aimed at recreational activities were also clearly targeted at a local market (the marina only has 60 moorings) and, as such, would not have any effect on cross-border trade.

<sup>17</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

<sup>18</sup> Currently, Commission Regulation No 651/2014 (GBER) includes no criteria based on which airports could be exempted from notification. Provided that sufficient case experience will have been developed allowing the design of operational exemption criteria ensuring the ex-ante compatibility of aid for port infrastructure, the Commission intends to review the scope of the GBER with a view to possibly including that type of aid.

<sup>19</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>20</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

### Instances in which notifying for State aid clearance is necessary

17. If the measure constitutes State aid and the measure does not meet the conditions allowing an exemption from notification, State aid clearance following a notification to the Commission is required:

#### **State aid for port infrastructure directly under Article 107(3)(c) TFEU for seaport infrastructure and under Article 93 TFEU for inland ports and intermodal platforms**

18. The compatibility of aid to seaports is normally assessed on the basis of Article 107(3)(c) TFEU. That provision constitutes the legal basis for aid to facilitate the development of certain economic activities or of certain economic areas. Under that legal basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; and (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

19. The compatibility of aid to inland ports, intermodal platforms or intermodal infrastructures in ports is assessed on the basis of Article 93 TFEU, which constitutes the legal basis for aid for the coordination of transport or the reimbursement for the discharge of certain public service obligations<sup>21</sup>. Under that legal basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality, and incentive effect of the aid; (iii) open access to all users on a non-discriminatory basis; and (iv) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

#### **Service of General Economic Interest: SGEI framework<sup>22</sup>**

20. The compatibility of State aid for port infrastructure which is necessary for the provision of an SGEI in ports with more than 300 000 passengers per year may be assessed on the basis of the SGEI Framework<sup>23</sup>.

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#### *References:*

- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

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<sup>21</sup> See Commission decision of 1 October 2014 in case SA.37402 - Hungary - Development of the Győr-Gönyű Public Port, OJ C 141, 9.05.2014, p. 5, and Commission decision of 17 December 2012 in case SA.34501 - Germany - Extension of the inland port of Konings Wusterhausen/Wildau, OJ C 176, 21.06.2013, p. 1.

<sup>22</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

<sup>23</sup> According to that article: "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*"

- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

***Indicative list of Commission decisions taken under State aid rules concerning port infrastructure:***

- § C 39/2009 (ex N 385/2009) – Latvia – Public financing of port infrastructure in Ventspils Port:  
[http://ec.europa.eu/competition/state\\_aid/cases/234343/234343\\_1080097\\_16\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/234343/234343_1080097_16_1.pdf)  
[http://ec.europa.eu/competition/state\\_aid/cases/234343/234343\\_1276398\\_146\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/234343/234343_1276398_146_2.pdf)
- § SA 38302 – Italy – Investment aid to the Port of Salerno:  
[http://ec.europa.eu/competition/state\\_aid/cases/251758/251758\\_1536127\\_128\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251758/251758_1536127_128_2.pdf)
- § SA 38478 – Hungary – Development of the Győr-Gönyű Public Port:  
[http://ec.europa.eu/competition/state\\_aid/cases/253617/253617\\_1593938\\_102\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/253617/253617_1593938_102_2.pdf)
- § SA 38048 - Greece – Upgrading of the Port of Patras:  
[http://ec.europa.eu/competition/state\\_aid/cases/252397/252397\\_1563559\\_76\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252397/252397_1563559_76_2.pdf)
- § SA 36953 - Spain – Investment aid to the Port of Bahía de Cádiz:  
[http://ec.europa.eu/competition/state\\_aid/cases/249217/249217\\_1481221\\_99\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/249217/249217_1481221_99_2.pdf)
- § SA 36621 - Italy – Investment aid to the Port of Capo d'Orlando:  
[http://ec.europa.eu/competition/state\\_aid/cases/248535/248535\\_1511225\\_165\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/248535/248535_1511225_165_2.pdf)
- § SA 36223 – Spain – Investment aid to the Port of Santa Cruz of Tenerife:  
[http://ec.europa.eu/competition/state\\_aid/cases/248020/248020\\_1453836\\_60\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/248020/248020_1453836_60_2.pdf)
- § SA 35720 – UK – Liverpool City Council Cruise Liner Terminal:  
[http://ec.europa.eu/competition/state\\_aid/cases/251566/251566\\_1529732\\_82\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251566/251566_1529732_82_2.pdf)
- § SA 35738 – Greece – Aid for the upgrading of Katakolo port:  
[http://ec.europa.eu/competition/state\\_aid/cases/246700/246700\\_1444527\\_188\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246700/246700_1444527_188_2.pdf)
- § SA 34940 – Italy – Port of Augusta:  
[http://ec.europa.eu/competition/state\\_aid/cases/246189/246189\\_1407362\\_66\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246189/246189_1407362_66_2.pdf)
- § N 60/2006 – Pays-Bas – Project main port development Rotterdam:  
[http://ec.europa.eu/competition/state\\_aid/cases/203707/203707\\_1154249\\_37\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/203707/203707_1154249_37_2.pdf)
- § N 520/2003 – Belgique – Aide financière pour des travaux d'infrastructure dans les ports flamands:  
[http://ec.europa.eu/competition/state\\_aid/cases/136485/136485\\_486858\\_9\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/136485/136485_486858_9_2.pdf)
- § N 110/2008 – Germany – Port infrastructure – Public financing of the Jade WeserPort Project:  
[http://ec.europa.eu/competition/state\\_aid/cases/224653/224653\\_1391736\\_43\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/224653/224653_1391736_43_2.pdf)
- § SA. 30742 – Lithuania – Construction of infrastructure for the Passenger and Cargo Ferries Terminal in Klaipeda:  
[http://ec.europa.eu/competition/state\\_aid/cases/235848/235848\\_1304328\\_127\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf)
- § N 44/2010 – Latvia – Public financing of port infrastructure in Krievu Sala:  
[http://ec.europa.eu/competition/state\\_aid/cases/235848/235848\\_1304328\\_127\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf)

- § SA 37402 – Hungary – The intermodal development of the Freeport of Budapest:  
[http://ec.europa.eu/competition/state\\_aid/cases/250036/250036\\_1534981\\_92\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/250036/250036_1534981_92_2.pdf)
- § SA 39403 – Netherlands – Investment aid for Lauwersoog port:  
[http://ec.europa.eu/competition/state\\_aid/cases/256021/256021\\_1668108\\_140\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/256021/256021_1668108_140_2.pdf)

## INFRASTRUCTURE ANALYTICAL GRID N° 4<sup>1</sup> – RESEARCH DEVELOPMENT AND INNOVATION

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. This analytical grid concerns investment aid for the construction and upgrade of research infrastructures<sup>2</sup> and innovation clusters<sup>3</sup>.
2. According to established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of research infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.
3. Economic activities of research infrastructures that are primarily used to perform non-economic activities may result from efforts to achieve an efficient use of resources, such as in the case of research equipment with possible dual use (non-economic and economic).
4. The Commission distinguishes three types of public support involving research infrastructures:
  - Support for the construction or upgrade of the infrastructure (investment aid);
  - Support for the operation of the infrastructure; and
  - Support to the users of the infrastructure.
5. This grid however concerns mainly the support for construction or upgrade of research infrastructure.

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> As defined in Article 2(91) of Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, ("GBER") and in point 15(ff) of the Framework for State aid for Research and Development and Innovation, OJ C 198, 27.06.2014, p. 1 ("RDI Framework").

<sup>3</sup> As defined in Article 2(92) of the GBER and point 15(s) of the RDI Framework.

## Instances in which the existence of State aid is excluded

### **No economic activity: research infrastructure used for non-economic activities (not applicable to innovation clusters)**

6. Public funding for the construction or upgrade of research infrastructure will not be considered as State aid if the infrastructure is used exclusively for non-economic activities as defined in point 19 of the RDI Framework. This is the case where the primary activity of the infrastructure is (i) education for more and better skilled human resources, such as public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State, (ii) independent R&D for more knowledge and better understanding (including collaborative R&D), i.e. where the activity is not influenced by economic interests of individual undertakings; (iii) the wide dissemination of R&D results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases or open publications of open software. In particular, this may concern the construction of university buildings, lecture halls, libraries, laboratories and equipment used exclusively for teaching and for carrying out independent research<sup>4</sup>. Furthermore, knowledge transfer activities conducted by, or jointly with, or on behalf of other research infrastructure are generally non-economic, provided that all profits from those activities are reinvested in the infrastructure's primary, non-economic activities.
7. Research infrastructures may be used to perform both economic and non-economic activities. In such cases, only the funding of the costs linked to the economic activities falls under State aid rules. Thus the funding of costs related to the non-economic activities does not fall under State aid rules. However, it has to be ensured that the costs, funding and revenues of the two different types of activities are clearly separated, so that cross subsidisation of the economic activities is effectively avoided. A research infrastructure used for both economic and non-economic activities avoids the risk of cross-subsidisation of its economic activities by keeping separate accounts ("functional separation") in line with the principles governing the Transparency Directive<sup>5</sup>.

### **Research infrastructure performing ancillary economic activities linked to main non-economic activities (not applicable to innovation clusters)**

8. Research infrastructures that are primarily used for non-economic activities often also perform some economic activities in order to use their resources efficiently. As long as the economic activities remain ancillary to the non-economic activities, no State aid is deemed to be present. This is the case, for instance, if the infrastructure (e.g. equipment and laboratories) is occasionally rented out to industrial partners or if it is used in part to perform contract research on behalf of industry provided that economic activities resulting from the use of the research infrastructure remain purely ancillary in nature, which means that:

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<sup>4</sup> Provision of R&D services and R&D carried out on behalf of undertakings are not considered as independent R&D.

<sup>5</sup> Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.



- i. they are directly related to and necessary for the operation of a research infrastructure or are intrinsically linked to its main non-economic use<sup>6</sup>. In general, ancillary economic activities consume exactly the same inputs as the primary non-economic activities, e.g. material, equipment, labour and fixed capital<sup>7</sup>;
- ii. they remain limited in scope, i.e. the capacity of the research infrastructure allocated each year for economic activity should not exceed 20% of the overall annual capacity.

#### **No potential effect on trade between Member States: de minimis**

9. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>8</sup>.

#### **No economic advantage: investment in compliance with the Market Economy Operator Principle (MEOP)**

10. As far as the economic activities are concerned, if it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note however that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.
11. The financing of research infrastructures and innovation clusters often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. Thus, in such cases Member States would have to provide a convincing explanation why the criteria for the application of the MEOP are complied with.

#### **Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

12. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

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<sup>6</sup> See point 20 of the RDI Framework and recital 49 of the GBER.

<sup>7</sup> Thus, equipment and facilities used exclusively for economic activities must be excluded from the eligible expenditure.

<sup>9</sup> See footnote 2.

### **General Block Exemption Regulation (GBER)<sup>9</sup>**

13. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, **Article 26 of the GBER** allowing investment aid for research infrastructures up to EUR 20 million of aid per infrastructure, can apply. Furthermore, aid must be limited to 50 % of the eligible costs and must comply with all the conditions of Article 26 of the GBER.
14. **Article 27 of the GBER** allowing aid for innovation clusters up to EUR 7.5 million of aid per cluster representing maximum of 50 % of the eligible cost, can also apply. For investment aid, an increase in aid intensities of 5 and 15 percentage points can be granted in assisted areas fulfilling the conditions of subparagraphs (a) and (c) of Article 107(3) TFEU respectively.
15. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded and that all the conditions set by Article 14 are complied with. In particular the access to research infrastructures must be transparent and non-discriminatory.
16. Note that in all cases the provisions of Chapter 1 of the GBER must also be complied with.

### **Instances in which notification for State aid clearance is necessary**

17. If the measure constitutes State aid and does not meet the conditions allowing exemption from notification, a notification to the Commission for State aid clearance is required.

### **Framework for Research Development and Innovation (RDI Framework)<sup>10</sup>**

18. The compatibility of notifiable State aid for the construction or upgrade of research infrastructures and innovation clusters is normally assessed on the basis of the RDI Framework.

### **Regional Aid Guidelines (RAG)<sup>11</sup>**

19. Research infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to research infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG.

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<sup>9</sup> See footnote 2.

<sup>10</sup> See footnote 2.

<sup>11</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

*References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Commission Directive 2006/111/EC](#) of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.
- [Framework for State aid for Research and Development and Innovation](#), OJ C 198, 27.06.2014, p. 1.

## INFRASTRUCTURE ANALYTICAL GRID N° 5<sup>1</sup> – CONSTRUCTION OF CULTURE INFRASTRUCTURES

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. This analytical grid concerns aid for the construction of culture infrastructures such as museums, theatres and cinemas<sup>2</sup>, as well as for the renovation of historical monuments.
2. In the culture and heritage conservation sector, a number of measures taken by Member States may not constitute State aid because they do not fulfil all the criteria of Article 107(1) TFEU, for example because the activity is not economic or because trade between Member States is not affected.
3. According to the established jurisprudence of the Union Courts any activity consisting in offering goods and services on a market constitutes an economic activity. Thus the construction of infrastructures for cultural purposes constitutes an economic activity if those infrastructures are exploited commercially. However, cultural institutions and projects do not typically give rise to significant distortion of competition, and the Commission's decisional practice shows that often such aid has limited effects on trade.

### Instances in which the existence of State aid is excluded

#### **No economic activity: construction or renovation of culture infrastructure and renovation of historical monuments for non-economic use**

4. If the culture infrastructure or historic monuments are not used to carry out an economic activity, State aid is not involved. Activities through which the State fulfils a genuine public task and responsibility (in the educational, cultural and social areas) are not of an economic nature and in general fall outside the scope of State aid rules.
5. The Commission has, for instance, considered that public libraries can be vehicles for the State authorities to fulfil a genuine public task and responsibility (in the educational, cultural and social areas), in which case there is no economic activity<sup>3</sup>. Moreover, nature protection and

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See Commission decision of 26 November 2008 in case NN 70/2006 - Finland - *Finnish film support scheme*, OJ C 268, 10.11.2009, p. 17, [http://ec.europa.eu/competition/state\\_aid/cases/246172/246172\\_1421787\\_126\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246172/246172_1421787_126_2.pdf).

<sup>3</sup> See decision of 16 April 2013 in case SA.35529 (2012/N) - Czech Republic - *Digitization of books in public libraries*, OJ C 134, 14.05.2013, p. 3, [http://ec.europa.eu/competition/state\\_aid/cases/246172/246172\\_1421787\\_126\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246172/246172_1421787_126_2.pdf).

conservation activities<sup>4</sup> that have an exclusively social character and are based on the principle of solidarity may also be considered as non-economic<sup>5</sup>.

6. In a case where a renovation financed by public money improved the accessibility of an infrastructure that can be visited free of charge without any limitation and that is not used for any commercial activity, the Commission considered that the public funding did not support the conduct of any economic activity and therefore did not benefit any undertaking within the meaning of EU competition law<sup>6</sup>.
7. In circumstances where the aided infrastructure is used almost exclusively for non-economic activities, the principle of ancillarity may apply. That is to say, the existence of a minor economic activity that is directly related to and necessary for the operation of the infrastructure, or that is intrinsically linked to its main non-economic use, will not affect the overall classification of the activity as non-economic.

### No potential effect on trade between Member States

8. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
9. The Commission has generally held that the restoration of cultural and historical landmarks does not, in most cases, affect intra-Union trade<sup>7</sup>.
10. For museums and historic monuments that cater for a local demand and do not attract international visitors, the effect on trade may be minimal and therefore State aid rules would not apply<sup>8</sup>.
11. The limited size of museum-related projects may also preclude any effect on trade between Member States, as people from other Member States are less likely to cross borders for the primary purpose of visiting those museums<sup>9</sup>. Equally, for cinemas in rural areas or cinemas with specialised ("*art house*") programming in urban areas, there may be no effect on trade or distortion of competition.

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<sup>4</sup> Such activities would not include sale of wood and meat, hunting and fishing leases, or tourism activities.

<sup>5</sup> See Case T-347/09 Germany v Commission EU:T:2013:418.

<sup>6</sup> See Commission decision of 20 November 2012 in case SA.34891 (2012/N) - Poland - *State support to Związek Gmin Fortecznych Twierdzy Przemysł*, OJ C 293, 9.10.2013, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/244866/244866\\_1398073\\_222\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/244866/244866_1398073_222_3.pdf).

<sup>7</sup> See Commission decisions of 9 April 2002 in case N560/2001 - UK - *National heritage fund for Brighton West Pier Trust*, OJ C 239, 4.10.2002, p. 3 and of 20 July 2005 in case NN 55/2005 - PL - *Heritage conservation*, OJ C 295, 26.11.2005, p. 10, [http://ec.europa.eu/competition/state\\_aid/cases/199545/199545\\_516648\\_24\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/199545/199545_516648_24_2.pdf).

<sup>8</sup> See Commission decisions of 28 November 2007 in case N 377/2007 - Netherlands - *Support to Bataviawerf - Reconstruction of a vessel from the 17th century*, OJ C 35, 8.02.2008, p. 3, [http://ec.europa.eu/competition/state\\_aid/cases/220891/220891\\_771915\\_6\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/220891/220891_771915_6_1.pdf) and of 2 July 2013 in case SA.35909 (2012/N) – Czech Republic - *Infrastructure for tourism (NUTS II region Southeast)*, OJ C 306, 22.10.2013, p. 4.

<sup>9</sup> See Commission decision of 18 February 2004 in case N 630/2003 - Italy - *Musei di interesse locale – Sardegna*, OJ C 275, 8.11.2005, p. 3, [http://ec.europa.eu/competition/state\\_aid/cases/136585/136585\\_490232\\_15\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/136585/136585_490232_15_2.pdf) and Commission decision of 20 November 2012 in case SA.34891 (2012/N) - Poland - *State support to Związek Gmin Fortecznych Twierdzy Przemysł*, (see footnote 6).

12. In some cases, the geographical position (i.e. where the aided project is situated in a remote location, far from borders with other Member States, etc.) can help establish that there would be no effect on trade<sup>10</sup>.
13. For larger museums and historic monuments which enjoy an international reputation, however, it may not be possible to exclude an effect on competition and trade between Member States. The assessment depends on the actual/potential capacity to attract foreign visitors<sup>11</sup>.
14. For film studios, the high mobility of film and television productions implies that an effect on competition and trade between Member States normally is assumed.
15. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected<sup>12</sup>.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

16. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

#### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

17. The existence of an economic advantage may be excluded if: (i) the infrastructure project is necessary for the provision of cultural and heritage conservation<sup>13</sup> services that can be

<sup>10</sup> See decisions of 7 November 2012 in case SA.34466 (2012/N) - Cyprus - *State aid to the Centre for Visual Arts and Research*, OJ C 1, 4.01.2013, p. 10, [http://ec.europa.eu/competition/state\\_aid/cases/244012/244012\\_1383483\\_121\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/244012/244012_1383483_121_2.pdf) and of 6 November 2013 in case SA.36581 (2013/NN) - Greece - *Construction of archeological museum Messara Crete*, OJ C 353, 3.12.2013, p. 4, [http://ec.europa.eu/competition/state\\_aid/cases/250254/250254\\_1484489\\_76\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/250254/250254_1484489_76_2.pdf).

<sup>11</sup> In its decision in case SA.35909 (2012/N) – Czech Republic - *Infrastructure for tourism (NUTS II region Southeast)*(see footnote 8), the Commission took into account that the tourist overnight flows from neighbouring countries to the region receiving the aid are very limited.

<sup>12</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1

<sup>13</sup> Nature conservation heritage included; in this respect see Commission decision of 2 July 2009 in case NN 8/2009 – Germany - *Nature conservation areas*, OJ C 230, 24.09.2009, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/229660/229660\\_973605\\_24\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/229660/229660_973605_24_1.pdf).

considered as a genuine service of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>14</sup>.

#### **SGEI de minimis Regulation<sup>15</sup>**

18. Public funding granted for the provision of an SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

#### **Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

19. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following two instances:

#### **General Block Exemption Regulation (GBER)<sup>16</sup>**

20. The measure may be exempted from notification if it is granted in compliance with conditions the GBER. In particular, **Article 53 of the GBER** allowing investment aid for culture and heritage conservation<sup>17</sup> up to EUR 100 million per project, can apply. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases the provisions of Chapter 1 of the GBER must also be complied with.

#### **Service of General Economic Interest: SGEI Decision<sup>18</sup>**

21. If the infrastructure is necessary for the provision of cultural services entrusted as an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to

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<sup>14</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4 .

<sup>15</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>16</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>17</sup> Including natural heritage conservation.

<sup>18</sup> See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

EUR 15 million per year (average over the whole duration of the entrustment<sup>19</sup>), may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of an SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

#### **Instances in which notifying for State aid clearance is necessary**

22. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification under the GBER or the SGEI Decision, State aid clearance after a notification to the Commission is required.

#### **State aid for cultural infrastructure assessed directly under Article 107(3)(d) TFEU**

23. The compatibility of aid for cultural infrastructure is normally assessed directly under the TFEU on the basis of **Article 107(3)(d) TFEU, as aid to promote culture and heritage conservation**. In such cases the Commission assesses whether the aid is intended for a genuine cultural objective and if the conditions of necessity and proportionality are met.

#### **Service of General Economic interest: SGEI Framework<sup>20</sup>**

24. The compatibility of State aid for culture infrastructure which is necessary for the provision of a genuine SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

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#### *References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106\(2\) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest](#), OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.

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<sup>19</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of the investments) as SGEI compensation.

<sup>20</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.



- [Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to \*de minimis\* aid granted to undertakings providing services of general economic interest](#), OJ L 114, 26.4.2012, p. 8.

## INFRASTRUCTURE ANALYTICAL GRID N° 6<sup>1</sup> – CONSTRUCTION OF SPORT AND MULTIFUNCTIONAL RECREATIONAL INFRASTRUCTURES

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. This analytical grid concerns aid for the construction and renovation of sport and multifunctional recreational infrastructures such as stadiums<sup>2</sup>, multipurpose arenas<sup>3</sup>, sport and wellness facilities<sup>4</sup>, marinas<sup>5</sup>, climbing halls<sup>6</sup>.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law.
3. The construction and renovation of sport and multifunctional recreational infrastructures constitutes an economic activity if the infrastructure is used to provide goods or services on a given market<sup>7</sup> and thus exploited commercially. Where users, including professional<sup>8</sup> and non-

<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See Commission decision of 18 December 2013 in case SA.35501 - France - Financement de la construction et de la rénovation des stades pour l'EURO 2016, not yet published in the OJ, [http://ec.europa.eu/competition/state\\_aid/cases/248555/248555\\_1532962\\_165\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/248555/248555_1532962_165_2.pdf).

<sup>3</sup> See Commission decisions of 21 October 2008 in case C4/2008 - Netherlands - Investment of the municipality of Rotterdam in Ahoy complex, OJ L 248, 22.09.2009, p. 28, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D0713&from=EN> of 15 May 2013 in case SA.33728 - Denmark - Financing of a new multiarena in Copenhagen, OJ L 152, 22.05.2014, p. 32, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0297&from=EN> and of 2 May 2013 in case SA.33618 - Sweden - Uppsala arena, OJ L 243, 12.09.2013, p. 19, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0452&from=EN>.

<sup>4</sup> See Commission decision of 23 July 2014 in case SA.33045 - Germany - Alleged unlawful aid in favour of Kristall Bäder AG, OJ C 393, 7.11.2014, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/247490/247490\\_1580456\\_110\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247490/247490_1580456_110_2.pdf).

<sup>5</sup> See Commission decision of 29 October 2003 in case C 10/2003 - Netherlands - On measures in favour of non-profit harbours for recreational crafts, OJ L 34, 6.02.2004, p. 63, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0114&from=EN>.

<sup>6</sup> See Commission decision of 5 December 2012 in case SA.33952 - Germany - Climbing centres of Deutscher Alpenverein, OJ C 21, 24.01.2013, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/246072/246072\\_1392662\\_211\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246072/246072_1392662_211_2.pdf).

<sup>7</sup> See for example Commission decision in case SA.33728 Copenhagen multiarena, see footnote 3, (recital 24).

<sup>8</sup> See Commission decisions of 9 November 2011 in case SA.31722 - Hungary - Supporting the Hungarian sport sector via tax benefit scheme, OJ C 364, 14.12.2011, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/240466/240466\\_1271180\\_52\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/240466/240466_1271180_52_3.pdf) and in case SA.35501 - France - Stadiums EURO 2016 (see footnote 2).

professional users, have to pay a fee for the use of the infrastructure or where the infrastructure is rented out for the organisation of various events in return for remuneration, it is used on a commercial basis, i.e. for an economic activity.<sup>9</sup> Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and the relevant funding may fall within the ambit of State aid rules.

### **Instances in which the presence of State aid is excluded**

#### **No economic activity: infrastructure for non-economic use**

4. In circumstances where the aided infrastructure is used almost exclusively for non-economic activities, the principle of ancillarity may apply. That is to say, the existence of a small amount of economic activity that is directly related to and necessary for the operation of the infrastructure, or that is intrinsically linked to its main non-economic use, will not affect the overall classification of the activity as non-economic.

#### **No potential effect on trade between Member States**

5. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis except for cases covered by the *de minimis* Regulations.
6. Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions of the *de minimis* Regulation are also respected<sup>10</sup>.
7. There may be no effect on competition and on trade between Member States, *inter alia*, in the following instances:
  - a. The financing of arenas or stadiums primarily used by amateur or smaller professional sport clubs and that operate locally, i.e. where the effects of the construction of the infrastructure do not extend across the border with another Member State. Such infrastructure does not appear to have an effect on trade<sup>11</sup>. However, the presence of an effect on trade can be

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<sup>9</sup> See for example Commission decision in case SA.33045 - Germany - Kristall Bäder (see footnote 4), recitals 45-47.

<sup>10</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p.1

<sup>11</sup> Typical examples for that category could be small sport facilities, see for example Commission decisions of 9 November 2011 in case SA.31722 - Hungarian sport sector (see footnote 8) and of 25 April 2001 in case N118/2000 - France - Subventions publiques aux clubs sportifs professionnels, OJ C 333, 28.11.2001, p. 6, [http://ec.europa.eu/competition/state\\_aid/cases/135387/135387\\_1153844\\_18\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/135387/135387_1153844_18_2.pdf).

Nevertheless, in other cases the measure was considered to have a potential effect on competition or trade. In its decisions of 20 March 2013 in case SA.35440 – Germany – Multifunktionsarena der Stadt Jena (OJ C 140, 18.05.2013, p. 2 and in case SA.35135 – Germany – Multifunktionsarena der Stadt Erfurt (OJ C 140, 18.05.2013, p. 1), the Commission considered that, given the distance from any border with another Member State, the effect on trade was mainly local/regional but that given the existence of an open, competitive market for non-sport event organisation across the Union an effect on trade could not be excluded. In Commission decision of 9 April 2014 in case SA.37342 (2013/NN) – UK – Regional stadia development in Northern Ireland (OJ C 418, 21.11.2014, p. 5), the "relative proximity" of the border with Ireland (which was in fact closer to the respective project than the distances between the project and the

presumed if the arenas or stadiums are used to host large international events, considering the existence of an international market for such activity<sup>12</sup>.

- b. The funding does not involve State aid if it is granted to amenities such as swimming pools<sup>13</sup> or marinas<sup>14</sup> of small size that are mainly used by locals and will not likely attract international visitors except to a marginal extent. Such aid is unlikely to impact trade among Member States.
8. If a commercial group controls or owns a single facility that receives State support, the entire group will be presumed to benefit from the measure<sup>15</sup>. Consequently, if the group operates several similar facilities in one Member State or carries out commercial activities also in other

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Czech border in both the Jena and Erfurt cases) was considered a factor giving rise to a potential effect on trade between Member States.

<sup>12</sup> For larger arenas, generally, there will be an effect on trade. See Order of the General Court in case T-90/09 - Mojo Concerts and Amsterdam Music Dome Exploitatie v Commission EU:T:2012:30, concerning AHOY in Rotterdam, where it considered that the market for the exploitation of arenas is not necessarily limited to the Netherlands. In its decision of 2 October 2013 in case SA.36105 – Germany – Fussballstadion Chemnitz (OJ C 50, 21.02.2014, p. 4, [http://ec.europa.eu/competition/state\\_aid/cases/247460/247460\\_1472227\\_93\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247460/247460_1472227_93_2.pdf)), the Commission considered that the renovation and upgrade of a German third division football team's stadium gave rise to a mainly local/regional effect on trade for sporting and other events, though it was recognised that a wider effect on trade – for example due to the fact that there was an open, competitive market for the provision of non-sport-related commercial services across the Union – remained theoretically possible. Similarly, in Commission decision in case SA.33618 – Sweden – *Uppsala arena* (see footnote 3), the asset in question was primarily used by the local ice hockey and basketball teams (both comprised mainly of amateur players), but an effect on trade could not be excluded since holding mid-sized and larger events was also possible – notwithstanding the fact that it would be "unlikely that events taking place in the arena would compete with arenas in nearby countries". In Commission decision of 13 December 2013 in case SA.37373 (2013/N) – Netherlands – Thialf ice arena, Heerenveen (OJ C 50, 21.02.2014, p. 9, [http://ec.europa.eu/competition/state\\_aid/cases/250448/250448\\_1502751\\_94\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/250448/250448_1502751_94_2.pdf)), the renovation and improvement of an ice arena was deemed to have a predominantly local effect. Reference was made to the fact that the nearest border with another Member State (Germany) was distant and that the geographic market for recreational ice skating (the predominant use of the improved asset) is generally local, but the potential of an effect on trade between Member States was not excluded because of the possibility of holding major sporting and other events given the asset's strong technical credentials (enjoying a high official classification within its industry). In Commission decision of 20 November 2013 in case SA.37109 (2013/N) – Belgium – Football stadiums in Flanders (OJ C 69, 7.03.2014, p. 13, [http://ec.europa.eu/competition/state\\_aid/cases/249493/249493\\_1510284\\_167\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/249493/249493_1510284_167_2.pdf)), which concerned the construction/improvement of stadiums for use by professional football teams playing in the Belgian first and second division, it was generally observed that competition between professional football clubs clearly has an international dimension - with reference to the existence of supranational industry standards to which stadium construction must conform.

<sup>13</sup> In its decision of 12 January 2001 in case N 258/2000 - Germany - Leisure Pool Dorsten (OJ C 172, 16.06.2001, p. 16, [http://ec.europa.eu/competition/state\\_aid/cases/137009/137009\\_1153410\\_12\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/137009/137009_1153410_12_2.pdf)) the Commission held that the aid in favour of facilities aimed at attracting international visitors is likely to affect trade between Member States. However, considering that the swimming pool would be mainly used by the local population and does not have any special characteristics to attract customers from abroad, the Commission came to the conclusion that there was no effect on trade.

<sup>14</sup> In its decision in case C 10/2003 – Netherlands - Harbours for recreational crafts(see footnote 5) the Commission decided that the aid provided to two marinas which were not aimed at attracting international visitors and were used on average in a range of 0.25% and 14% by foreign users did not affect trade between Member States.

<sup>15</sup> See Commission decision of 5 December 2012 in case SA.33952 - *Climbing centres*, OJ C 21, 24.01.2013, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/246072/246072\\_1392662\\_211\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/246072/246072_1392662_211_2.pdf), recitals 62-63.

Member States, the measure is liable to affect trade between Member States and to constitute State aid<sup>16</sup>.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

9. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

#### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest in line with the Altmark criteria**

10. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of services that can be considered a genuine service of general economic interest (SGEI)<sup>17</sup> for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>18</sup>.

#### **SGEI de minimis Regulation<sup>19</sup>**

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

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<sup>16</sup> For example, in its decision in case SA.33952 - *Climbing centres* (see footnote 16), the Commission considered that aid granted to a single climbing centre of a local character but that was controlled by a group with branches that operate several climbing facilities across Germany and provide hotel and restaurant services in Austria and Italy was liable to affect trade between Member States.

<sup>17</sup> This could for instance be the case where a municipality decides to build a sports stadium for its local population and schools, provided the infrastructure is open to everybody.

<sup>18</sup> See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4 .

<sup>19</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

### Instances in which there is no need to notify for State aid clearance, but other requirements could apply

12. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following two instances:

#### **General Block Exemption Regulation (GBER)<sup>20</sup>**

13. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, **Article 55 of the GBER** allowing aid for sport and multifunctional recreational infrastructures up to EUR 15 million or the total costs over EUR 50 million per project, can apply. Under Article 55 of the GBER, it is important to note that the supported sport infrastructures must not be used exclusively by professional sports users. Note that all the conditions set by Article 55 of the GBER and the general provisions of Chapter 1 of the GBER must be complied with.
14. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that the aid intensities established in the regional aid map are not exceeded, and that all the conditions of Article 14 of the GBER are complied with. Note that all the conditions set by Article 14 of the GBER and the general provisions of Chapter 1 of the GBER must be complied with.

#### **Services of General Economic interest: SGEI Decision<sup>21</sup>**

15. If the sport and multifunctional recreational infrastructure is constructed or renovated to facilitate the provision of an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to EUR 15 million per year (on average over the whole duration of the entrustment<sup>22</sup>) may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

### Instances in which notifying for State aid clearance is necessary

16. If the measure appears to constitute State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

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<sup>20</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>21</sup> See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>22</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

## State aid for sport and multifunctional recreational infrastructure under Article 107(3)(c) TFEU

17. In such a case, the assessment of the aid to sport and multifunctional recreational infrastructures is normally conducted under Article 107(3)(c) TFEU<sup>23</sup>.

## Service of General Economic interest: SGEI Framework<sup>24</sup>

18. The compatibility of State aid for sport and multifunctional recreational infrastructure which is necessary for the provision of a genuine SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

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### References:

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106\(2\) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest](#), OJ L 7, 11.01.2012, p. 3.

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<sup>23</sup> See for instance Commission decision of 2 October 2013 in case SA.36105 - Germany - Fussballstadion Chemnitz, OJ C 50, 21.2.2014, p. 4.

<sup>24</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

## INFRASTRUCTURE ANALYTICAL GRID N° 7 <sup>1</sup> – CONSTRUCTION OF ENERGY INFRASTRUCTURE

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudice possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. This analytical grid only covers investment aid for the construction, including modernisation and upgrade, of energy infrastructure.
2. For the purpose of the present document, the definition of energy infrastructure means any physical equipment or facility located within the Union or linking the Union to one or more third countries and falling under the categories defined in the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)<sup>2</sup>. That definition covers, for instance electricity transmission, distribution and storage infrastructure; electricity smart grids, gas transmission and distribution pipelines; underground storage facilities of gas; regasification or decompression facilities for liquefied natural gas; oil pipelines and pumping stations; CO<sub>2</sub> networks of pipelines. The exhaustive list of network elements falling under energy infrastructure has been enumerated in points (19) to (31) EEAG.
3. For the purpose of the present document, the definition of energy infrastructure does not cover aid for energy production units or aid for the construction or operation of district heating and cooling<sup>3</sup>.

### Existence of State aid

#### **Economic activity**

4. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules. Energy infrastructure is usually rolled-out with a view to

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

<sup>3</sup> Such projects may be supported in accordance with the specific provisions of the GBER and/or the EEAG. For instance, among other indications, the EEAG refer at footnote 6 to the European Council Conclusions from 23 May 2013 which *confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure.*



its commercial exploitation, i.e. transport, distribution, storage, etc. of energy products against payment. Public funding of energy infrastructure therefore relates to an economic activity and is hence in principle subject to State aid rules.

### **Potential to distort competition**

5. To the extent that an energy market is liberalised, public financing can affect competition and therefore, State aid rules apply. Even in cases of so-called natural or legal monopolies (established in compliance with EU law) at local, regional or national level, distortion of competition cannot be excluded; in particular in situations in which the beneficiary is not precluded from being active on other geographic or service/products markets; or in which there is scope for competition for the market (for instance after the expiry of a licence). On markets closed to competition by law, such effects are still possible, once the given market undergoes liberalisation. Potential spill-over effects on neighbouring markets must also be taken into account. Such spill-over effects may include, for instance, (i) effects on upstream markets for energy supply (in particular in cases of vertically integrated undertakings, unless separate accounting is in place); (ii) effects on downstream markets for (local) distribution (such as the creation of barriers to market entry and the strengthening of the position of incumbents through increased sales to (new) customers); or (iii) effects on alternative markets for certain types of infrastructure (e.g. underground gas storage facilities as opposed to LNG terminals).
6. In addition, State aid for construction or modernisation of energy infrastructure may indirectly create a source of additional profits for operators such that the overall financial position of the beneficiary can be reinforced vis-à-vis its competitors. In case of interconnectors, there is a risk of discouraging possible market investors and deterring future interest from competing operators, or at least decreasing the value of other interconnection investments. Moreover, the aid, by strengthening the position of infrastructure operators and favouring the development of the infrastructure at hand, has the potential to influence the patterns of competition between energy sources that are partly substitutable (for instance between different forms of fossil fuels and renewable sources) for generation of electricity and heat.

### **Effect on trade**

7. Effect on trade is present as the energy products are to a large extent traded across the European Economic Area and on global markets.

### **Instances in which the presence of State aid is excluded**

#### **No potential effect on trade between Member States: de minimis**

8. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>4</sup>.

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<sup>4</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1

### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

9. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

10. Energy infrastructure is to a large extent built by market actors and financed through user tariffs, in the case of regulated assets. In the majority of the Member States, no public financing of the general energy infrastructure can be observed. It is thus generally considered that it would not be appropriate to attach specific public service obligations to an activity that is satisfactorily provided by undertakings operating under normal market conditions.
11. However, in exceptional circumstances where the market cannot deliver the service in a satisfactory manner and under conditions (such as price, objective quality characteristics, continuity and access to the service) that are consistent with the public interest, the Member States may decide to compensate the service provider within the framework of a clearly defined and entrusted, genuine service of general economic interest. This could, for instance, be particularly relevant in situations where there is difficulty in providing access to energy infrastructure against affordable prices for end-users.
12. Thus, in such cases, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined<sup>5</sup>; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) 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<sup>6</sup>.

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<sup>5</sup> For example in areas with difficult access conditions.

<sup>6</sup> See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

### SGEI de minimis Regulation<sup>7</sup>

13. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI de minimis Regulation are also fulfilled.

### Instances in which there is no need to notify for State aid clearance, but other requirements could apply

14. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

### General Block Exemption Regulation (GBER)<sup>8</sup>

15. The measure may be exempted from notification if it is granted in conformity with the GBER. In particular, Article 48 GBER allowing investment aid for energy infrastructure<sup>9</sup> up to EUR 50 million (per undertaking, per investment project) can apply. The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 48 GBER must be complied with. In particular Article 48 GBER lays down the following conditions:

- The energy infrastructure must be located in assisted areas;
- The energy infrastructure must be subject to full tariff and access regulation in accordance with internal energy market legislation;
- The eligible costs are investment costs;
- The aid amount cannot exceed the difference between the eligible costs and the operating profit of the investment. The operating profit can be deducted from the eligible costs *ex ante* or through a claw-back mechanism.

### Service of General Economic Interest: SGEI Decision<sup>10</sup>

16. To the extent the construction of energy infrastructure accompanies a clearly defined and entrusted genuine SGEI, State aid for the compensation of such an SGEI up to EUR 15 million per year (average over the whole duration of the entrustment<sup>11</sup>), may be exempted from notification on the basis of **SGEI Decision**, provided that the criteria of that decision are met: definition and

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<sup>7</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>8</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>9</sup> Except for electricity and gas storage projects and oil infrastructure.

<sup>10</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L7, 11.01.2012, p. 3.

<sup>11</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (those infrastructures may be depreciated for more than 10 years).

entrustment of SGEI, parameters of compensation<sup>12</sup> established ex ante, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

### **Instances in which notifying for State aid clearance is necessary**

17. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

### **Energy and Environmental Guidelines (EEAG)**

18. The compatibility of State aid to energy infrastructure is normally assessed on the basis of the EEAG, provided that the conditions detailed in section 3.8 of the EEAG are met.

19. Energy infrastructure is excluded from the scope of application of the Regional Aid Guidelines<sup>13</sup>.

### **Service of General Economic Interest: SGEI Framework<sup>14</sup>**

20. To the extent that the construction of energy infrastructure is necessary for the provision of a clearly defined and entrusted genuine SGEI, the compatibility of such aid that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

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### *References:*

- [Guidelines on State aid for environmental protection and energy 2014-2020](#) (2014/C 200/01) OJ C 200, 28.6.2014, p. 1.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [European Union framework for State aid in the form of public service compensation](#), OJ C 8, 11.1.2012, p. 15.

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<sup>12</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

<sup>13</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. For the exclusion of energy infrastructure, see point 11.

<sup>14</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

***Indicative list of Commission decisions taken under State aid rules concerning energy infrastructure:***

*Indicative list of cases on the basis of Article 107(3)(c) TFEU before the adoption of the EEAG:*

- § N 55/2009 – PL - Aid for constructing and modernisation of electricity connection networks for renewable energies in Poland :  
[http://ec.europa.eu/competition/state\\_aid/cases/229627/229627\\_976404\\_32\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/229627/229627_976404_32_1.pdf)
- § N 56/2009 – PL – Aid for modernisation and replacement of electricity distribution networks in Poland:  
[http://ec.europa.eu/competition/state\\_aid/cases/229628/229628\\_976408\\_32\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/229628/229628_976408_32_1.pdf)
- § N 594/2009 – PL - Aid to Gaz-System SA for gas transmission networks in Poland:  
[http://ec.europa.eu/competition/state\\_aid/cases/233663/233663\\_1085184\\_36\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/233663/233663_1085184_36_1.pdf)
- § N 660/2009 – PL – Aid to PGNiG for underground gas storage in Poland:  
[http://ec.europa.eu/competition/state\\_aid/cases/234044/234044\\_1118402\\_56\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/234044/234044_1118402_56_1.pdf)
- § N 629/2009 – RO - Grants for investment in electricity and natural gas transmission networks:  
[http://ec.europa.eu/competition/state\\_aid/cases/233848/233848\\_1177808\\_84\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/233848/233848_1177808_84_2.pdf)
- § N 542/2010 – PL - Construction of interconnection and cross-border power line between Poland and Lithuania:  
[http://ec.europa.eu/competition/state\\_aid/cases/238433/238433\\_1191452\\_40\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/238433/238433_1191452_40_3.pdf)
- § SA. 31953 – PL - Construction of a LNG Terminal in Swinoujsciu:  
[http://ec.europa.eu/competition/state\\_aid/cases/241631/241631\\_1267250\\_72\\_3.pdf](http://ec.europa.eu/competition/state_aid/cases/241631/241631_1267250_72_3.pdf)
- § SA. 36740 – LT - Aid to Klaipedos Nafta – LNG Terminal:  
[http://ec.europa.eu/competition/state\\_aid/cases/250416/250416\\_1542635\\_190\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/250416/250416_1542635_190_2.pdf)
- § SA. 35977 – EL - 2nd Upgrade of LNG Terminal at Revithoussa:  
[http://ec.europa.eu/competition/state\\_aid/cases/247194/247194\\_1517529\\_163\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247194/247194_1517529_163_2.pdf)
- § SA. 36890 – EL - 400 kV electric transmission connecting EHV S/S Lagada and EHV S/S Philippi:  
[http://ec.europa.eu/competition/state\\_aid/cases/249106/249106\\_1621479\\_71\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/249106/249106_1621479_71_2.pdf)
- § SA. 35197 – EL - High Pressure Natural Gas Pipeline to Ag. Theodori – Megalopoli:  
[http://ec.europa.eu/competition/state\\_aid/cases/247391/247391\\_1555138\\_113\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247391/247391_1555138_113_2.pdf)
- § SA. 36892 – EL - EHV Megalopoli Substation:  
[http://ec.europa.eu/competition/state\\_aid/cases/249108/249108\\_1621450\\_69\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/249108/249108_1621450_69_2.pdf)
- § SA. 35975 – EL - Supply and installation of 150 kV Underground Cables for S/S Iraklio I feeding from the System (Transmission Line 150 kV Linoperaramata -Ierapetra):  
[http://ec.europa.eu/competition/state\\_aid/cases/247192/247192\\_1621488\\_119\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247192/247192_1621488_119_2.pdf)
- § SA. 35695 – EL - Aid for the interconnection of Cyclades islands with the National Mainland Interconnected Transmission System:  
[http://ec.europa.eu/competition/state\\_aid/cases/252208/252208\\_1621522\\_59\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252208/252208_1621522_59_2.pdf)

*Indicative list of cases adopted on the basis of the EEAG:*

- § SA. 36290 – UK - Extension of Northern Ireland Gas Pipeline to West and North West:  
[http://ec.europa.eu/competition/state\\_aid/cases/252947/252947\\_1580489\\_102\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252947/252947_1580489_102_2.pdf)
- § SA. 38918 – SE - Loans to network operators to facilitate connection of renewable electricity production:  
[http://ec.europa.eu/competition/state\\_aid/cases/255685/255685\\_1664987\\_53\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/255685/255685_1664987_53_2.pdf)

## INFRASTRUCTURE ANALYTICAL GRID N° 8 <sup>1</sup> – INFRASTRUCTURES FOR WASTE MANAGEMENT SERVICES

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

#### **Introduction to the waste management services market**

1. This analytical grid concerns aid for the construction of infrastructure relative to the provision of waste management services, excluding waste water infrastructure.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of waste management infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.
3. The generally economic nature of waste management services is apparent from the fact that lucrative, established markets for service provision of that kind exist in the European Economic Area (EEA)<sup>2</sup>. Prospective aid beneficiaries in that sector often operate as concessionaires and may be deemed to be providing an SGEI. In consequence, there may be a heightened risk of cross-subsidisation of other economic activities of such beneficiaries. Concession awards should therefore always take place via an open and transparent tender process. Moreover, when notifying aid measures in which the beneficiaries are concessionaires, Member States may wish to commit to scrutinise concession arrangements on a continuing basis.
4. Waste management can relate to direct service provision to households and businesses that is typically narrow in scope, particularly as regards its geographic extent (which usually reflects municipal boundaries). However, multinational enterprises sometimes are engaged in such direct service provision.
5. The waste management sector is highly regulated, at national level as well as at Union level. In that context, the waste hierarchy principle which prioritises the ways in which waste should be

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See Commission Staff Working Paper "The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation" Brussels, 23.03.2011 SEC(2011) 397 final, point 3.3.1.

treated and the polluter pays principle according to which undertakings generating waste should be held liable for the cost of its treatment, are core principles of Union legislation. As described more fully below, the most relevant Union State aid instruments include: (i) the General Block Exemption Regulation (GBER)<sup>3</sup> (ii) the Guidelines on State aid for environmental protection and energy (EEAG)<sup>4</sup>; (iii) the Regional Aid Guidelines (RAG)<sup>5</sup>; (iv) the SGEI Decision<sup>6</sup>; and (v) the SGEI Framework<sup>7</sup>.

6. Certain State-aided waste management projects (for example projects involving waste incineration infrastructure) may lead to energy production. Such projects may be supported in accordance with the specific provisions of the GBER and/or the EEAG and this grid does not apply to those projects<sup>8</sup>.

### **Instances in which the existence of State aid is excluded**

**No potential effect on competition and trade: the market is closed to competition (e.g. exclusive rights) and the beneficiary is precluded from being active on other geographic or service/product markets.**

7. Whenever a market is open to competition, public financing can affect competition and therefore State aid rules are likely to apply.
8. If markets are closed to competition State aid is not present. No potential effect on competition and trade may occur if the beneficiary holds an exclusive right in the waste management services market and is not and cannot be active on other markets (e.g. energy generation) or geographic areas open to competition. The assessment depends on national/regional/local rules in the Member State concerned. If the recipient is active on other markets, the financing of infrastructure that falls within the reserved area may constitute State aid. Keeping separate accounts<sup>9</sup> for operations in different markets allows the identification of possible cross-subsidisation between/among markets.

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<sup>3</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>4</sup> Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

<sup>5</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. See also, for example, Commission decision of 24 February 2010 in case N 495/2009 - Latvia – *Electric and electronic waste sorting and recycling facility in Tume*, OJ C 94, 14.4.2010, p. 9, [http://ec.europa.eu/competition/state\\_aid/cases/232806/232806\\_1080784\\_34\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/232806/232806_1080784_34_1.pdf). Despite "positive spill-over effects" on other undertakings and "efficiency improvement in the regional waste collection system", the measure was notified primarily under RAG principles on the basis that it would contribute to regional development in Latvia.

<sup>6</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>7</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

<sup>8</sup> See sections 3.3, 3.4 and 3.5 of the EEAG.

<sup>9</sup> According to the principles set out in Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

### **No potential effect on trade between Member States: *de minimis***

9. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>10</sup>.

### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

10. The provision of "universal" waste management services for households and businesses alike<sup>11</sup> may be entrusted as an SGEI<sup>12</sup>. In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of waste management service that can be considered as a genuine service of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit; and (iv) 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<sup>13</sup>.

### **SGEI *de minimis* Regulation<sup>14</sup>**

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

12. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market

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<sup>10</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

<sup>11</sup> See by contrast Commission decision of 25 April 2012 in case SA.25051 – Germany – Association for disposal of dead animal bodies, OJ L 236, 1.9.2012, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/237074/237074\\_1323831\\_302\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/237074/237074_1323831_302_2.pdf) and Case C-126/01 Ministère de l'Economie, des Finances et de l'Industrie v GEMO, EU:C:2003:622.

<sup>12</sup> Mainly waste collection and possibly waste treatment in duly justified cases.

<sup>13</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 8.

<sup>14</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.



rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

**Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

13. Possible State aid may be considered compatible with the internal market and may be granted without notification in the following two instances:

**General Block Exemption Regulation (GBER)<sup>15</sup>**

14. The measure may be exempted from notification if it is granted in compliance with the conditions of the GBER. A number of GBER provisions may be applicable.

15. **Article 47 of the GBER** allowing investment aid for waste recycling and re-utilisation up to EUR 15 million (per undertaking per investment project) can apply, subject to compliance with certain conditions reflecting core Union environmental rules<sup>16</sup> – namely that: (i) the aid is granted for the recycling and re-utilisation of waste generated by other undertakings; (ii) without the aid, the recycled or re-used materials treated would be disposed of, or be treated in a less environmentally friendly manner; (iii) the aid is not granted to waste recovery operations other than recycling; (iv) the aid does not indirectly relieve the polluters from a burden that should be borne by them under Union law, or from a burden that should be considered a normal company cost; (v) the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials; and (vi) the investment goes beyond the state of the art.

16. **Article 36 of the GBER** allowing investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards up to EUR 15 million. Only the part of the investment which is linked to the achievement of a higher level of environmental protection going beyond the Union standards can be covered by Article 36 of the GBER. Subject to certain exceptions, aid may not be granted under this provision for projects simply involving early implementation of Union standards that have already been adopted but are yet to enter into force.

17. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area and that aid intensities established in the regional aid map are not exceeded and that all the conditions of Article 14 are complied with<sup>17</sup>.

18. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid or up to EUR 20 million of total costs. It covers only investment aid granted for the

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<sup>15</sup> See footnote 3.

<sup>16</sup> See EEAG, in particular section 3.5.

<sup>17</sup> Please note that waste incineration infrastructure that leads to energy production, falls outside Article 14 GBER.

construction or upgrade of infrastructure contributing towards the improvement of the local business and consumer environment. Operating aid is not exempted. Aid for dedicated infrastructure is not permissible under Article 56 of the GBER<sup>18</sup>. It is important to note that Article 56 GBER will only apply where other GBER provisions (e.g. Article 47 – see point 15) are not applicable.

19. Note that in all cases the provisions of Chapter 1 of the GBER must also be complied with.

#### **Service of General Economic interest: SGEI Decision<sup>19</sup>**

20. If the infrastructure is necessary for the provision of "universal" waste management services for households and businesses alike that are entrusted as an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to EUR 15 million per year (on average over the whole duration of the entrustment<sup>20</sup>) may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of an SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

#### **Instances in which notifying for State aid clearance is necessary**

21. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

22. Under the **Energy and Environmental Guidelines (EEAG)**<sup>21</sup> the compatibility of State aid for waste management infrastructure is normally assessed on the basis of section 3.5 of the EEAG.

23. Waste management infrastructure may also be assessed as aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards, or aid for early adaptation to future Union standards<sup>22</sup>, provided that the conditions detailed in section 3.2 of the EEAG are met.

#### **Service of General Economic Interest: SGEI Framework<sup>23</sup>**

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<sup>18</sup> Investment aid for the construction or upgrade of dedicated infrastructure is not exempted under Article 56 GBER as per Article 56(7) GBER. In case SA.36147 – Germany – Infrastructure aid implemented by Germany in favour of Propapier (Commission decision of 1 October 2014), OJ L 89, 1.4.2015, p. 72, the Commission decided that a wastewater plant that was used by several investors and open to all users on a non-discriminatory basis did not constitute a dedicated infrastructure although it was built in an industrial park that mainly served the needs of one company.

<sup>19</sup> See footnote 6.

<sup>20</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of the investments) as SGEI compensation.

<sup>21</sup> See footnote 4.

<sup>22</sup> This type of aid is intended for the management of the beneficiary's own waste.

<sup>23</sup> See footnote 12.

24. To the extent that the construction of waste management infrastructure is necessary for the provision of a clearly defined and entrusted genuine SGEI, the compatibility of such aid that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

#### **Regional Aid Guidelines (RAG)<sup>24</sup>**

25. Waste management infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to waste management infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG.

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#### *References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Directive 2006/111/EC](#) of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [Guidelines on State aid for environmental protection and energy 2014-2020](#) OJ C 200, 28.6.2014, p. 1.

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<sup>24</sup> See footnote 10.

## INFRASTRUCTURE ANALYTICAL GRID N° 9<sup>1</sup> – RAIL, METRO, LOCAL TRANSPORT INFRASTRUCTURE

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### General principles

1. This analytical grid covers the financing of the construction, maintenance and management of railway, local transport (including metro) infrastructure, as well as the purchase of rolling stock for metro and local public transport.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules. Investment into a project with a view to its future economic exploitation, to which it is intrinsically linked, will constitute an economic activity. The investment may be exploited by a local authority's in-house transport operator or a third party transport provider.

### Instances in which the existence of State aid is excluded

#### **No effect on competition and on trade between Member States: Investment into the construction, maintenance and management of general railway infrastructure**

3. The responsibility to operate and manage the main national railway networks is the responsibility of the State, either through an administrative body or by a public undertaking, in many cases under a statutory monopoly<sup>2</sup>. As the management and operation of the main rail infrastructure networks within the EU are generally carried out in national, geographically closed and separated markets that are not subject to competition, public financial support made available to infrastructure managers is generally not liable to affect intra-Union trade.
4. Therefore, if the railway infrastructure is part of the general rail infrastructure managed by the railway infrastructure manager, the Commission considers that State aid is not involved in the project when the following conditions are satisfied:

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See for instance Commission decision of 2 May 2013 in case SA.35948 - Czech Republic - Prolongation of the interoperability scheme in railway transport, OJ C 306, 22.10.2013, p. 7, [http://ec.europa.eu/competition/state\\_aid/cases/247158/247158\\_1468536\\_73\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247158/247158_1468536_73_2.pdf).

- i. there is no competition by virtue of the fact that the infrastructure manager has a legal monopoly to manage the main national rail infrastructure<sup>3</sup>; in that context the investment must concern a part of that general rail infrastructure which is not otherwise provided on the market; and
- ii. the financing must not benefit any commercial activities of the infrastructure manager, which has to keep the accounts for its infrastructure-related tasks separate from its other activities<sup>4</sup>.

#### **No potential effect on trade between Member States: Local infrastructure**

5. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
6. Where the financed infrastructure is of a purely local nature, such as small railways of local importance, with an insignificant number of users from other Member States and not likely to attract foreign investment, the support may not constitute State aid due to the absence of effect on trade.<sup>5</sup>

#### **No potential effect on trade: de minimis**

7. Support granted under the *de minimis* Regulation<sup>6</sup> is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected.

#### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

8. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on similar projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor

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<sup>3</sup> See Commission decision of 17 July 2002 in case N 356/2002 - UK - Railtrack plc/Network Rail, OJ C 232, 28.09.2002, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/137131/137131\\_453400\\_5\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/137131/137131_453400_5_2.pdf).

<sup>4</sup> See Commission decision of 7 June 2006 in case N 478/2004 - Ireland – State guarantee for capital borrowings by Coras Iompair Eirann for infrastructure investments, [http://ec.europa.eu/competition/state\\_aid/cases/180019/180019\\_577971\\_10\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/180019/180019_577971_10_2.pdf).

<sup>5</sup> See for instance Commission decision of 7 May 2014 in case SA.38441- UK - Isles of Sicily, OJ C 5, 9.1.2005, p. 4, [http://ec.europa.eu/competition/state\\_aid/cases/252032/252032\\_1545484\\_83\\_5.pdf](http://ec.europa.eu/competition/state_aid/cases/252032/252032_1545484_83_5.pdf).

<sup>6</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

9. The financing of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore in such circumstances not be undertaken on the basis of purely economic considerations. Thus in such cases, Member States would have to successfully argue that the criteria for the application of the MEOP are complied with<sup>7</sup>.

**No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

10. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be necessary for the provision of public transport services. In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of a service that can be considered as a **genuine service of general economic interest (SGEI)** for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit; and (iv) 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<sup>8</sup>.

**Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

11. State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

**Public service obligation (PSO): Regulation 1370/2007**

12. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be part of public transport obligations. In that case Regulation 1370/2007<sup>9</sup> will be applied to the costs related to those investments.
13. In general, public service contracts must be awarded on the basis of an open, transparent and non-discriminatory procurement procedure. A local authority can, however, award such a contract directly to its in-house provider, provided that it has complete control of the provider

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<sup>7</sup> See e.g. Commission decision of 13 July 2014 in case SA.32576 – Germany - Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/243457/243457\\_1359832\\_419\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf); and Commission decision of 3 October 2012 in the case SA.23600 – Germany - Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, [http://ec.europa.eu/competition/state\\_aid/cases/226773/226773\\_1399901\\_101\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf).

<sup>8</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 8.

<sup>9</sup> Regulation(EC) of the European Parliament and the Council No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

and the provider does not operate outside of the territory for which the local authority is responsible. Moreover, public service contracts concerning railway transport (excluding metro) can be awarded directly for up to 10 years with a possibility of prolongation by 5 years.

14. The main conditions of Regulation 1370/2007 are a clear definition of the public service obligation, clear rules setting out the compensations for the service and the prevention of overcompensation. The latter condition means that the entity providing the transport can only be paid the difference between its costs and revenues from the PSO, plus a reasonable profit.
15. When those conditions are fulfilled, the financing of the PSO is deemed compatible with the internal market and may be implemented without being notified to the Commission.

#### **General Block Exemption Regulation (GBER)<sup>10</sup>**

16. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. Article 56 of the GBER allowing investment aid for local infrastructures up to EUR 10 million of aid or total costs exceeding EUR 20 million, can apply. In particular, the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis. In practice those requirements mean that: (i) the price charged for the use or the sale of the infrastructure must correspond to the market price; and (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procurement procedure. Note that the provisions of Chapter 1 of the GBER must also be complied with.

#### **Instances in which notifying for State aid clearance is necessary**

17. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required. The Commission would then assess the compatibility of such aid individually on its merits under Article 93 or Article 107(3)(c) TFEU.
18. The compatibility of aid to infrastructure which meets the needs of coordination of transport, such as intermodal platforms, is assessed on the basis of Article 93 TFEU<sup>11</sup>. Under that legal basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality, and incentive effect of the aid; (iii) open access to all users on a non-discriminatory basis; and (iv) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

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<sup>10</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>11</sup> See for instance Commission decision of 19 September 2012 in case SA.34985 - Austria – Programme for supporting the development of connecting railways and transfer terminals 2013 – 2017, OJ C 43, 15.2.2013, p.19, [http://ec.europa.eu/competition/state\\_aid/cases/245111/245111\\_1398705\\_116\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/245111/245111_1398705_116_2.pdf) and Commission decision of 1 August 2014 in case SA.38714 (2014/N) – France - Aides à l'investissement au projet d'autoroute ferroviaire atlantique, OJ C 369, 17.10.2014, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/252684/252684\\_1583429\\_106\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252684/252684_1583429_106_2.pdf).

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- Communication of the Commission (2008/C 184/07) "[Community guidelines on State aid for railway undertakings](#)", OJ C 184, 22.7.2008, p. 13.