



State aid & Infrastructure: Water & Waste

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** The information and views of this presentation are those of the speaker and do not necessarily reflect the official position of the EU Commission*

Background – state aid & infrastructure

- ❖ The public financing of infrastructure - from "general measures of public policy" to **measures subject to State aid control**
- ❖ Before Court ruling of 2000 for *Aéroports de Paris* (T-128/98): legitimate expectations
- ❖ Legal uncertainty in the wake of **Court rulings of 2011 and 2012 for Airport Leipzig/Halle** (C-288/11)
- ❖ Need for specific clarifications

Broader policy context

- ❖ Promote investments in infrastructure in order to stimulate growth and jobs (Cfr Investment plan for Europe)
- ❖ What contribution of State aid policy in this context ?
 - **Avoid harming competing projects** and existing infrastructure
 - **Avoid over-compensation** (funding gap analysis)
 - Ensure **access of different users** to infrastructure

Commission response

Commission initiatives at different levels (**SAM**):

- ❖ *1st Analytical grids on infrastructure (2012)*
- ❖ **GBER** n. 651/2014 (**2014**) including most types of infrastructure projects
- ❖ *2nd Analytical grids on infrastructure (2015)*
- ❖ **Commission Notice on the Notion of aid (2016)**
– Infrastructure chapter
- ❖ *3rd set of Analytical grids on infrastructure (2016)*
- ❖ **GBER revision (2017): Regulation n. 2017/1084** including ports + airports
- ❖ *4th set of Analytical grids on infrastructure (2017)*

Infrastructure – Sectoral guidance

- ❖ **State aid control typically applies** to the construction of infrastructure in the following sectors:

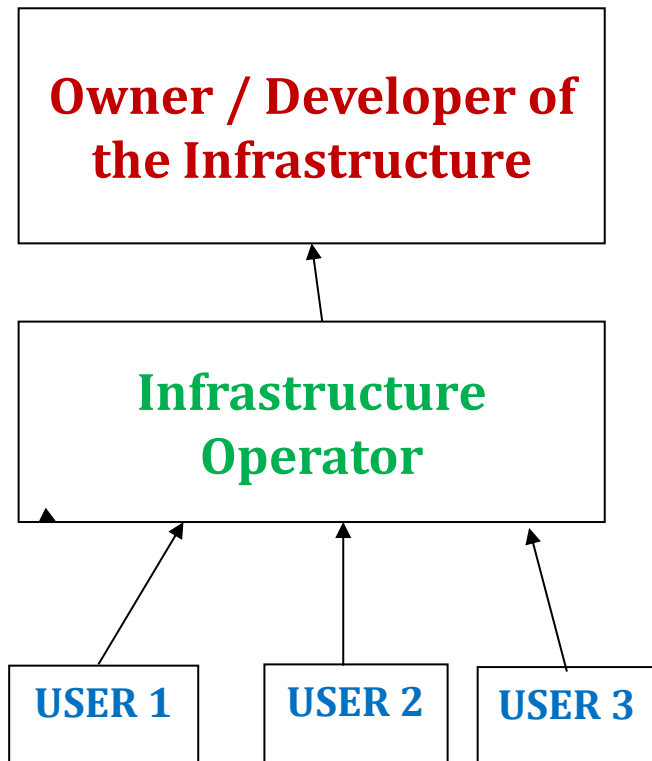
Airports, Ports, Broadband, Energy

- ❖ **State aid control typically does not apply to the construction** of infrastructures in the following sectors:

*Railway, Roads/Bridges/Tunnels, Canals/Inland Waterways,
Water Supply and Wastewater Networks*

- Available for free - no economic activity
- Against fee - construction typically fulfils conditions for no effect on competition/trade – natural monopoly (as opposed to operation)

State aid: analysis at which levels?



- Do operators/users receive an advantage?
- Is the advantage passed on ?
- See NoA §200 and sections 7.2, 7.3 and 7.4



WATER SUPPLY & WASTE WATER NETWORKS

Main principles

- ❖ Financing of construction, maintenance and operation of comprehensive water supply and waste water networks
 - "**water infrastructure**" [*§221 Notion of Aid*]
- ❖ This type of infrastructure - **typical case of natural monopoly** as **comprehensive network infrastructure** for which replication would be uneconomical => its construction does not affect trade /distort competition
- ❖ The operation of water infrastructure may be an economic activity => state aid rules may apply
- ❖ In practice, construction and operation are often bundled

Construction/development – natural monopoly

This type of infrastructure is **typically**:

- ❖ **natural monopoly** as comprehensive network infrastructure for which replication would be uneconomical, for which
- ❖ **effect on trade** between MS or distortion of competition is normally **excluded as regards the construction** where:
 - i. the infrastructure typically faces no direct competition;
No direct competition **with other infrastructures of the same kind** or other infrastructures of a different kind offering **services with a significant degree of substitutability**, or with such services directly (likely for comprehensive network infrastructures that are natural monopolies)
 - i. private financing is insignificant in sector/MS concerned;
 - ii. it is not "dedicated", but benefits society at large.

§211 §212 §219 §220 §221 of NoA

Operation – legal monopoly

- ❖ In many Member States the responsibility to operate and manage water infrastructure is with the State (i.e. local, regional authorities) under **legal monopoly**, either through an administrative body or a **(in house)** public undertaking
- ❖ Organisation in local, geographically closed & separate markets => not subject to competition => no effect on trade
- ❖ Financing infrastructure - **not subject to State aid rules** if the cumulative conditions set in **§188 NoA** are met:
 - i. Construction, management & operation of the infrastructure is subject to **a legal monopoly** (established **in compliance with EU Law**)
 - i. **excluding** not only **competition *in*** the market, but also ***for*** the market
 - ii. the service is not in competition with other services
 - iii. and **cross-subsidisation has to be excluded** if the operator of the infrastructure is active in another geographical and product market.

Bundled construction & operation: quid?

- ❖ Construction and operation are often **bundled**
- ❖ Financing of bundled operations does **NOT** constitute SA if:
 - A. **Construction + Operation are tendered out** together; or
 - B. Construction refers to infrastructure which is **natural monopoly** + management and operation is subject to **legal monopoly** (i.e. reserved service assigned by law to an exclusive in-house provider) not only excluding competition *in* the market, but also *for* the market

*See §219 and §188 of NoA; Commission decision in case
N 356/2002 - UK - Network Rail*

No economic activity

No economic activity: in case of infrastructure not commercially exploited, e.g. if used by the State in the exercise of its **public powers** (flood prevention) or **distant from markets** (desalination plants, hydrological basins for flood risk prevention)

Caveat: public remit is not a static notion, it may become economic e.g. if the service is privatised!

Economic & non-economic use of infrastructure

- ❖ Mixed use: in case of infrastructure used for **both economic and non-economic activities**, prohibition to cross-subsidize
 - > finance net costs + clear separation of accounts
- ❖ **Ancillarity or customary amenities** do not seem to apply in practice to this type of infrastructure as they are in principle economic

Economic advantage?

At which level?

No economic advantage – 3 level analysis for:

1. Owner/developer: excluded if **MEOP**:

- *Pari passu* (§86-88 NoA)
- **Benchmarking** (§98-100 NoA)
- Other **assessment methodologies** - ex ante sound business plan - IRR at market values (§101-105 NoA)
- Specific guidance for loans/guarantees : Reference rate Communication and Guarantee Notice

Economic advantage?

No economic advantage – 3 level analysis for:

2. Operator/*concessionaire* if the operation is:

- a) assigned **for a positive price** on the basis of **competitive, transparent, non-discriminatory and unconditional tender**;

It must be ensured that no state aid is passed on – tender ensures market price

- a) at **fees in line with MEOP** on the basis of (i) benchmarking, or (ii) generally accepted standard assessment methodology;
- b) entrusted as SGEI in line with **Altmark** criteria.

3. Users if undertakings:

State aid can be excluded as long as the infrastructure is **not dedicated**, and all users enjoy **equal and non-discriminatory access**, on **market terms**.

Compatible State aid

Compatible and exempted from notification, if e.g. under

1. Article 56 GBER for "local infrastructures"
2. Article 14 GBER for regional investment aid, if dedicated
3. SGEI Decision 2012/21/EU (entrustment for the provision of universal water services) if:
 - Compensation per SGEI below €15 million per year

Otherwise **NOTIFICATION necessary** under:

- Art. 106(2) TFEU on the basis of SGEI Framework
- Art. 107(3)(c) TFEU

WASTE MANAGEMENT INFRASTRUCTURE



Main principles

- ❖ The construction, upgrade and extension of waste management infrastructure **commercially exploited** constitutes an **economic activity** => its public funding is **subject to State aid rules**.
- ❖ Investment aid for waste management includes: re-utilisation, recycling and recovery activities.
- ❖ Certain publicly funded waste management projects may lead to energy production: excluded from this analysis
- ❖ Core principles: aid has to be in line with the **waste hierarchy principle**, and the **polluter pays principle**
- ❖ Waste management can relate to service provision geographically narrow in scope, often reflecting district or municipal boundaries – but still global players may be involved

Exclusion of state aid - Legal monopoly

1. In certain Member States the responsibility to develop, operate and manage waste management infrastructure is with the State (i.e. local, regional authorities) under **legal monopoly**, either through an administrative body or a (in house) public undertaking
2. Financing infrastructure is **not subject to State aid rules** in this case if the cumulative conditions set **in §188 NoA** are met:
 - i. Construction, management & operation of the infrastructure is subject to **a legal monopoly** (established **in compliance with EU Law**)
 - i. **excluding** not only **competition *in*** the market, but also ***for*** the market
 - ii. the service is not in competition with other services
 - iii. and **cross-subsidisation has to be excluded** if the operator of the infrastructure is active in another geographical and product market.

Economic advantage?

No economic advantage — analysis of three levels

1. Owner/developer: aid is excluded if MEIP (*pari passu* and/or credible business plan ex ante with a return IRR to market values)

2. Other levels, if the transaction is:

- a) allocated at a **positive price** on the basis of **competitive, transparent, non-discriminatory and unconditional tender** — or the fees comply with the **MEOP**
- b) entrusted as SGEI in line with the **Altmark** criteria
- c) For **users**, if the infrastructure is **not dedicated**, all users **enjoy equal and non-discriminatory access**, and pricing policy is established on **market terms**

Compatible State aid

Compatible and exempted from notification requirements under GBER:

1. Article 14 GBER - **regional investment aid**
2. Article 36 GBER – allowing **investment aid for environmental protection** enabling undertakings to go beyond Union standards or to increase the level in the absence of Union standards up to EUR 15 million
3. Article 47 GBER – allowing **investment aid for waste recycling and re-utilisation** up to EUR 15 million (per undertaking per investment project)
4. Article 56 GBER – investment aid for **local infrastructure**

Decision 2012/21/EU (SGEI for the provision of universal services):

- *SGEI compensation below EUR 15 million per year*

State aid to be notified

Otherwise, if the notification is necessary - assessment pursuant to:

- Guidelines on State aid for environmental protection and energy 2014-2020 (**‘EEAG’**): See section 3.5 of the EEAG
- **Regional aid guidelines**
- Art. 106(2) - on the basis of the **SGEI Framework**

Thank you! - Questions?



Useful information – State aid & Infrastructure:
http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html