

TECHNICAL MEETING WITHIN THE COORDINATION COMMITTEE OF THE FUNDS (COCOF)

"State aid issues in infrastructure cases" – 29 January 2013 Written replies to the questions sent by MS in preparation to the meeting¹

CZECH REPUBLIC

- 1. Q: We would like to invite the Commission to provide detailed explanation on "supporting documents", which should be provided by Member States as underpinning their assessment whether the State aid is involved in the project or not – which documents will the Commission request to that end, and what details should they contain?**

A: There is no check list of supporting documents. Member States are invited to follow the analytical grids when assessing whether State aid is involved or not within the investment project.

Where Member States consider that no State aid notification is required, they should provide the Commission with an explanation and, if appropriate, supporting documents. As supporting documents, Member States are invited to provide those documents that can justify their assessment (i.e. in case of a beneficiary which holds an exclusive right and cannot be active on other services markets, a document that states this obligation).

See also reply to question n°1 from Italy.

- 2. Q: Does the SGEI status cover a project in the area of environmental protection (e.g. can the construction and operation of water treatment plants be considered as services of general economic interest)?**

A: The construction and operation of waste water infrastructure with a view to providing service to the general population – as opposed to a plant dedicated to and serving only one or a few industrial users- can be part of a service of general interest entrusted to a service provider.

- 3. Q: The cross-border effect of urban facilities such as "cultural centers" or "multi-purpose arena".**

¹ This document only replies to the preparatory questions sent by the Member States concerning infrastructure projects and on the application of the infrastructure analytical grids sent to the Member States by letter of 1st August 2013. Questions beyond such scope were not covered. The replies address issues of compliance with State aid rules.

A: *No precise figures or indication can be granted, the effect on trade shall be proven on a case by case basis. See also recent Commission decisions in this respect:*

- *Swimming pools and other leisure facilities intended predominantly for a local catchment area²;*
- *Museums or other cultural infrastructure unlikely to attract visitors from other Member States³;*
- *Hospitals and other health care facilities aimed at a local population⁴;*
- *News media and/or cultural products which, for linguistic and geographical reasons are have a locally restricted audience⁵;*
- *A conference centrum, where the location and the potential effect of the aid on prices was unlikely to divert users from other centres in other Member States.⁶*

See also reply to question n°2 from France.

- 4. Q: How to interpret the concept of "influence of the trade between the Member States" regarding art. 107§1 of TFEU? What is the acceptable distance from the border when the cross-border effect "expires", and when does it "transpire"? What is the scope and definition of the regional aid which has no effect on trade and competition ("events and activities of limited regional importance")? Examples and applicable ECJ jurisdiction welcome.**

A: *No precise figures or indication can be given, the effect on trade must be assessed on a case by case basis. The Court's approach has been primarily to provide a negative definition, by explaining which factors do not exclude an effect on trade rather than the ones which are liable to impact trade. Therefore positive evidence of an impact on trade is not required, for it is sufficient to establish that the aid is liable to affect trade between Member States. The Commission is required neither to precisely define the affected market nor to demonstrate the actual consequences of the aid on intra-EU trade.*

The Court has given a broad meaning to the potential impact on trade, even where the beneficiary's activity has a local or regional character. Indeed, the effect on trade is not ruled out if the aid is liable to reduce the chances for firms from other Member States to access the market. The modest amount of aid or the small size of the beneficiary do not as

² Commission Decision in Case N 258/2000 – Germany – Leisure pool Dorsten, OJ C 172, 16.06.2001.

³ SA. SA. Commission Decision in Case N 630/2003 – Italy – Local Museums – Region of Sardinia, OJ C 275, 08.11.2005, and, Commission Decision in Case SA.34466 – Cyprus – Center for Visual Arts and Research (Costas and Rita Severis Foundation, OJ C 1, 04.01.2013.

⁴ Commission Decision in Case N 543/2001 – Ireland – Capital allowances for hospitals, OJ C 154, 28.06.2002, and Jean Piaget / Northeast Continuing Care Clinic SA.34576

⁵ Commission Decision in Case N 257/2007 – Spain – Subsidies for theatre productions in the Basque country, OJ C 173, 26.07.2007. Commission Decision in Case N 458/2004 – Spain – State aid to Editorial Andaluza Holding, SL, OJ C 131, 28.05.2005. Jornal de Madeira SA.33243.

⁶ Commission Decision in Case N 486/2002 – Sweden – Aid in favour of a congress hall in Visby – Gotland, OJ C 075, 27.03.2003.

such exclude an effect on trade, especially in sectors with strong competition or where most of the active firms are small and the aid is widely available to them.⁷

Examples where the Commission found situations that do not affect trade between Member States can be found in the previous answer (question n°3 from Czech Republic), as well as in grid n°4 related to cultural infrastructures.

5. Q: State aid provided to healthcare facilities (incl. facilities of a mere regional field of activity).

A: *Public funding to healthcare facilities are covered in detail in the Commission's 2012 SGEI package.*

Specific questions concerning the transport sector

6. Q: How does the question whether an infrastructure is charged or not affect the considering of (non)existence of state aid in an infrastructure project? In this regard there have to be mentioned the case of a road built through PPP representing state aid (see EC Decision on State Aid N 462/09 – Poland – Aid for the construction and operation of the A2 Motorway, Świecko – Nowy Tomyśl section) which is not tolled and from the users' view is the same as a road financed exclusively from public funds, which is built in the interest of the general public and in principle excluded from the application of State aid rules (according to the DG COMP Note to DG Regio, Application of State aid rules to infrastructure investment projects, dated 03/2011⁸).

A: *The notion of 'economic' use is not linked to the presence of a charge. An infrastructure may qualify as being used for 'economic' purposes even if there is no charge imposed on the users.*

'Revenues typically point to a commercial character of an activity. However, depending on the circumstances of the case, it may be that despite revenues generated a measure still does not meet all the criteria of Article 107(1) TFEU and thus does not qualify as a State aid. On the other hand, there can be activities which are provided free of any charge and which still qualify as 'commercial activity' and as a State aid in the meaning of Article 107(1) TFEU. This is the case in particular if other market players offer the same or a similar service and there is thus a 'market' for such activities.

The relevant consideration is whether there is a market for such use. The notion of aid will provide further guidance on this.

⁷ An illustration of the wide scope of this criterion can be given by the Court's ruling (C-172-03) that a self-employed dentist could affect trade between Member States since "it is not inconceivable that medical practitioners specialising in dentistry, such as Mr Heiser, might be in competition with their colleagues established in other Member States".

⁸ It was not possible to identify the mentioned note

7. **Q: Furthermore we would like to hear a clear definition of a commercial exploitation of an infrastructure, i.e. does any charging (including a mere application of the polluter pays principle) mean a commercial use of an infrastructure.**

A: Please see answer to Q 6. The forthcoming Communication on the notion of aid will provide general guidance in this respect.

8. **Q: In this respect we would support the Commission in drafting an overview of examples of a standard way of considering at least some of particular types of infrastructure projects in terms of State aid, taking into account both the type of infrastructure (railway, road, waterway) and the (not)charging the access to the infrastructure.**

A: The forthcoming Communication on the notion of aid may provide further guidance in this respect.

9. **Q: Regarding point 6. of the analytical grid [No 1], we would like to clarify whether construction, operation and maintenance of road or railway infrastructure can be considered as a service of general economic interest?**

A: Whether construction of road or rail infrastructure can be considered as a service of general economic interest (SGEI) depends on the way how this infrastructure is operated and requires case-by-case assessment. With regard to the operation and maintenance of such infrastructure, more explanation and background information would be necessary.

ESTONIA

1. **Q: "Pure" 100% local government water undertakings.**

In Estonia, the organisation of drinking water and wastewater treatment (water service) is a public law function imposed on local governments by the State. The respective infrastructure has been in the possession of local governments since the Soviet times. On the whole, each local government has founded a separate company (water undertaking) for the provision of water service which is in 100% ownership of the respective local government and to the ownership of which the infrastructure (pipes, treatment plants, etc.) has also been transferred in most cases. The exception is the capital, Tallinn, where 34% of the shares of the water undertaking belongs to the local government and the rest to private owners.

Such undertakings control essential facilities for the purposes of § 15 of the Competition Act, i.e natural monopolies. Therefore, the definition already indicates that it is a field which basically lacks competition.

As we are dealing with a monopoly, the price of water service is subject to control by the Competition Authority in water service areas with the population equivalent starting from 2000 and in smaller local governments by the council of local government. According to the methods of the Competition Authority, the price of water service shall account for all reasoned costs and investments whereas the investments for which non-returnable aid (funds of the local government, state or

EU) has been received shall not be accounted as costs. Water undertakings may have reasonable profit (usually 4-8%).

In case of the Cohesion Fund projects, the financial need of the project which shall be calculated is based on the requirement that the water service price cannot be more than 4% of household expenses on the average.

Local government water undertakings operate within one local government (as an exception AS Emajõe Veevärk was founded in the EU financing period 2004-2006 by local governments from the entire region and has been providing water service since on the territory of local governments which own it) without the intention to expand. There are no cases in which such local government/water undertaking has even considered expansion.

As a rule, local governments which own water undertakings try to keep the water service price possibly low for their clients. Therefore, water undertakings operate rather on the borderline of profitability and it would not be possible for them to expand (especially to another Member State). Besides, the expansion of such activity outside the territory would also raise the question of its compliance with local governments public law mission (i.e. to provide water service to its residents).

Up to the present there have been no signs that water undertakings owned 100% by local governments would compete with each other within Estonia. Therefore, it cannot be argued that they could compete between the Member States.

On the basis of the above we are of the opinion that supporting the water services infrastructure projects of companies owned 100% by local governments is not State aid.

A: Based on the analytical grid (N°7), the conclusion that an aid to water undertakings as described does not distort or threaten to distort competition would need to result from clear legal limitations – rather than intentions or de facto situations - preventing water companies from providing their services on other geographic or service markets than the ones where they operate.

2. Q: 100% local government (combined) water and heating undertakings.

In addition to the above, certain local government undertakings engage in second area of activity in addition to the water service or separate area of activity – heating management (such practise is part of the Soviet legacy, as already mentioned above). Here we can differentiate between 3 types of cases:

District heating of local government settlements has been privatised or subjected to long-term commercial lease;

- a) A separate company has been founded for the provision of heating service;
- b) The same company which is also a water undertaking and which is in 100% ownership of a local government provides the heating service.

The price of the heating service in all cases is also subject to control by the Competition Authority. Up to the present, the Environmental Investment Centre (government foundation granting State aid) has deemed the support of all heating

management projects to be State aid. In this context, the Environmental Investment Centre is interested in the support of water management projects of undertakings listed under the third option (c).

Such mixed undertakings also operate within the territory of local governments and are 100% owned by them. For the same reasons as in the case of the so-called “pure” water, undertakings we cannot speak of the “combined” undertakings’ expansion to elsewhere, especially to another Member State.

As both the price of water and heating services is subject to separate control by the Competition Authority under which the revenues and expenditures of both fields are accounted for separately, such water and heating undertakings shall also keep separate accounts for their water and heating services. Based on that, it can be stated with sufficient certainty and accuracy that generally one area of activity is not subsidised on the account of the other.

On the basis of the above, the Environmental Investment Centre considers that such a case involving water infrastructure projects carried-out by mixed undertakings shall not be deemed to be State aid. This applies even in case the support for heating management projects of the same undertaking is deemed to be State aid (e.g. regional aid or state aid granted as compensation for services of general economic interest). Practically we are dealing with two separate activities (with common management and support structures) within one undertaking.

A: As stated in the analytical grid [No 7], if the recipient – i.e. the water undertaking – is active on other markets on which there is competition, e.g. heating, the financing of infrastructure that falls within the reserved area of the water undertaking may constitute State aid. Separate accounts could allow verification of possible cross subsidisation between different markets but not rule out that aid to water infrastructure threatens to distort competition on heating markets.

FRANCE

- 1. Q: The analytical grids do not address the situation in which the construction of an infrastructure was tendered to a provider through a competitive procedure in accordance with EU and national rules on public contracts. Could DG REGIO clarify the criteria to fulfill the presence of State aid in favor of the selected provider?**

A: If the sale and purchase of assets, goods and services (or other comparable transactions⁹) are carried out through an open, transparent, non-discriminatory and unconditional tender procedures (in compliance with the principles of the Public procurement Directives) it can be presumed that such transactions are market conform.

When public bodies buy assets, goods and services (economic, regional, environmental, employment) no public policy consideration shall be considered in the selection or the award criteria.

In order to establish a market price, the tender process shall give rise to a sufficient level of competition to be qualified as a competitive tender process. In the case of procedures

⁹ E.g. the lease of certain goods.

where it is apparent ex ante that only one operator will be able to submit a bid, the tender cannot be deemed competitive and thus not considered sufficient to establish the market price.

However, even if aid can be excluded at the level of the company entrusted with the construction of the infrastructure, there may still be state aid for other parties (e.g. operator of the infrastructure). That is a question which must be examined independently.

2. Q: Could the Commission clarify when the "local character" of an economic activity determines the absence of effect on trade between Member States and therefore the absence of aid?

A: *No precise conditions can be given for qualification of infrastructure with "local character", but the main principles and few recent case examples could be recalled.*

It is important to highlight that the definition of State aid does not require that the effect on trade be significant or material. The fact that the amount of aid is low or the recipient undertaking is small will not in itself rule out affectation of trade.¹⁰

The Commission has in several cases considered that some activities were of a purely local impact and consequently did not affect trade between Member States. Some examples are:

- Swimming pools and other leisure facilities intended predominantly for a local catchment area¹¹;*
- Museums or other cultural infrastructure unlikely to attract visitors from other Member States¹²;*
- Hospitals and other health care facilities aimed at a local population¹³;*
- News media and/or cultural products which, for linguistic and geographical reasons have a locally restricted audience¹⁴;*
- A conference centrum, where the location and the potential effect of the aid on prices was unlikely to divert users from other centres in other Member States.¹⁵*

In summary, the main common features of such decisions have been: a) that the aid does not lead to investments being attracted in the region concerned; b) that the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone; c) that there is at most marginal effect on the markets and, in particular,

¹⁰ Case T-55/99, CETL, [2000] ECR II-3207, point 89. Altmark, point 81.

¹¹ Commission Decision in Case N 258/2000 – Germany – Leisure pool Dorsten, OJ C 172, 16.06.2001.

¹² SA. SA. Commission Decision in Case N 630/2003 – Italy – Local Museums – Region of Sardinia, OJ C 275, 08.11.2005, and, Commission Decision in Case SA.34466 – Cyprus – Center for Visual Arts and Research (Costas and Rita Severis Foundation), OJ C 1, 04.01.2013.

¹³ Commission Decision in Case N 543/2001 – Ireland – Capital allowances for hospitals, OJ C 154, 28.06.2002, and Jean Piaget / Northeast Continuing Care Clinic SA.34576

¹⁴ Commission Decision in Case N 257/2007 – Spain – Subsidies for theatre productions in the Basque country, OJ C 173, 26.07.2007. Commission Decision in Case N 458/2004 – Spain – State aid to Editorial Andaluza Holding, SL, OJ C 131, 28.05.2005. Jornal de Madeira SA.....33243.

¹⁵ Commission Decision in Case N 486/2002 – Sweden – Aid in favour of congresshall in Visby – Gotland, OJ C 075, 27.03.2003.

on consumers in neighbouring Member States; and d) that the market share of the beneficiary is limited.

3. **Q: The analytical grids seem to help determine whether further use of a publicly funded infrastructure falls within the scope of State aid rules. Whereas the "potential beneficiary" of the infrastructure has not yet been selected, should the construction phase be assessed separately from the phase of operation/use?**

A: *Three types of configurations might be identified and lead to different solutions.*

First when the operator is chosen at the moment of the construction, the potential presence of aid at its level should be assessed. Such assumption will also arise when the conditions under which the potential beneficiary will operate are defined but its identity is not known yet (for instance the tender conditions are already laid down but the tender still has to be carried out). Hence later appointment of beneficiaries does not allow escaping a State aid assessment. The third scenario would be where an infrastructure which was originally not destined for economic use, is later used for economic purposes (e.g. a military airport is later converted for military use). In the latter scenario only the conversion costs could be relevant from a State aid point of view.

4. **Q: Besides, we regret the absence of a specific analytical grid for the waste management and public transport sectors, for which we are concerned in our overseas departments (OD). It would be useful to touch upon these two sectors during the meeting.**

A: *The analytical grid provided an overview on the assessment of infrastructure projects where the Commission had sufficient case practice and experience. However, the general principles set out in the General Analytical grid can provide guidance for other sectors. Moreover, the Communication on the notion of aid may provide further guidance in this respect.*

GERMANY

PART 1

Considering that the first part of the questions submitted by Germany do not directly relate to infrastructure topics, the Commission's services have not replied to such questions (see footnote 1 of page 1).

1. **Q: As part of InterAct, DG Competition has examined informally typical cases of transnational projects in terms of aid issues and mostly determined the State aid rules were not applicable. Is the possibility envisaged that the programs concerning European territorial (especially transnational) cooperation will be exempted from the applicability of the State aid rules?**
2. **Q: In general, it is difficult to assess transnational ETC-projects based on the State aid conditions, because of their integral character. Interreg-projects are relatively complex, they serve not individual partners (especially not individual companies), but offer the solution to a transnational problem (in the public interest). The individual project partners (including the companies) are working together to reach a solution; the individual interests become subordinate to the collective interests of the project. In addition, the projects are in competition with each other, to which any region and European institution can participate. The decision is made in consensus**

by a transnational body. Also because of that the possibility to favor a particular company is strongly limited. Furthermore, the activities are largely "precompetitive" (as within the Framework Programme). Generally, no marketable products are produced. Most project partners (including companies) show regarding the project no market activities and settle only real costs. Results of the project activities are publicly available. Is the State aid relevant when a project neither consists in promoting individual companies nor involves primarily market-oriented activities?

3. Q: It should be clarified whether there is for example a difference between national aid and subsidies that are financed by European funds, and are granted by the aforementioned transnational bodies in consensus. Are such subsidies not very similar to the European subsidies for which the State aid rules are not relevant, like the subsidies financed by the Research Framework Programme? Are there basically possibilities to apply those more developed rules concerning the Research Framework Programme also to the European territorial cooperation subsidies?
4. Q: Is the measure selective? These measures are only indirectly open to all companies. There is no general (legal) claim to the granting. On the other hand there is an open competition to apply for European territorial cooperation subsidies, which all government agencies and companies are able to join. In addition, the advantage does not benefit directly to individual companies, but only to transnational project-partnerships. Individual companies meet only tasks within the project objectives; the project results are available to all companies, public authorities, and institutions. Can this be regarded as a non-selective advantage?
5. Q: Has the measure a favourable effect on the company? There is no advantage, if the grant of the benefit is offset by a normal market return. The appropriate method (market investor test) is difficult to apply in the case of Interreg. However, usually there is no advantage, when all project activities will be settled on the basis of actual costs incurred, when the project activities are not aimed at profit, if all project results are made freely available to the public and the partners involved have no specific rights regarding the results, when the procurement law is taken into account in respect of all project expenditure and if a cost segregation of economic and non-economic activities has been made. This is the attitude that is taken in the North Sea program. Is this legally covered and can these conditions therefore be applied to other European territorial cooperation programs?
6. Q: Is there a distortion of competition? Basically a distortion of competition is only possible, when there is also competitiveness. In this context it should be noted that many private players are currently pre-competitively active in the area of European territorial cooperation, or the project activities are focused on strategic partnerships, networking and the development of policy tools. Is the European territorial cooperation here more not relevant in the context of state aid?
7. Q: Is the trade between Member States of the EU affected? As well the financial size of the transnational European territorial cooperation projects as the advantage to each partner (especially compared to the Objective 1 and Objective 2 programs of the European Structural Funds) do not expect any distortion of competition. Moreover, many transnational projects are substantively more focused on a regional

or local (pilot investment) advantage, or only on the preparation of major investments. Size and character (of the pilot investments) can therefore rather be expected to affect trade in the EU. Would it therefore be justified, to qualify transnational European territorial cooperation projects not as relevant - because trade is not affected?

8. Q: GBER: In transnational projects particularly SMEs are involved. Whether and to what extent the GBER can be used?

9. Q: Permitted state aid is inter alia

- the economic development of areas where the standard of living is abnormally low;
- an important project of common European interest;
- the development of certain economic activities or areas, and
- the culture and heritage conservation.

Many transnational projects concern these subjects. Has this priority over the individual assessment of aid granted to companies or vice versa?

PART 2

1. Q: In relation to the notification of infrastructure funding provided as part of the Joint Scheme "Improving the Regional Infrastructure" and in individual cases, the Commission had repeatedly confirmed to Germany between 2003 and 2005 that the funding of the establishment of commerce-related infrastructures does not in principle involve State aid, i.e. that it is not a State aid within the meaning of Art. 107(1) of the TFEU.

The analytical grids now presented by the Commission, on the other hand, assume that infrastructure projects do basically involve State aid.

This raises the general question of whether, in the light of recent case practice, the Commission intends to depart from its previous line (i.e. that infrastructure projects do not in principle involve State aids). We would be grateful for clarification.

Should in future the Commission take the view that the provision and related financing of infrastructure in principle involves State aid, we believe that many questions – both general and specific – remain to be resolved.

A: State aid is an objective notion. The Commission applies the notion of State aid as interpreted by the European Court of Justice.

2. Q: To the extent that in the future the Commission categorises funding for the establishment of infrastructure as involving State aid, what is the relationship between these analytical grids and the existing Guidelines on the financing of regional airports¹⁶ and the Communication on maritime ports¹⁷?

A: The analytical grids provide guidance under which conditions public funding granted to airport managers might raise State aid issues, and thus might need to be notified to the

¹⁶ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005/C312/01).

¹⁷ 2001/0047 (COD)

Commission according to the Article 108(3) of the TFEU. The Aviation Guidelines provide a more detailed guidance, in particular as regards the conditions under which such aid can be deemed compatible with the internal market.

- 3. Q: The Commission is now pursuing a sectoral approach in the analytical grids. Does the Commission expect this sectoral approach to be continued in future?**

A: In addition to the general analytical grid, six specific grids have been designed to address State aid issues related to different sectors where there is sufficient case practice¹⁸. The forthcoming Communication on the notion of aid aims at providing broader guidance.

- 4. Q: According to the preliminary remarks, the analytical grids mainly apply to the Structural Funds; at the same time, they claim to reflect current case practice and would therefore also apply to the evaluation of projects receiving other funding. Is this the case? If yes, how does the Commission believe that classic examples of infrastructure projects (e.g. general road construction) should be assessed?**

A: In line with the main principles explained in the analytical guidelines, general (toll-free) road construction would normally be outside the scope of the state aid rules as it is not considered to be an economic activity. In general, assessment should be conducted on a case by case basis.

- 5. Q: How does the Commission assess fields in which the provision of infrastructure is a legal requirement for the state (municipality) in terms of whether state aids are involved (in Germany this is the case with water and waste water)?**

A: The presence of a legal obligation which the public authority is due to discharge is immaterial for the assessment under Article 107(1) TFEU. Where a service is provided against payment, even in a "captive" market, the activity is of an economic nature and the entity providing it, an undertaking for the purposes of Article 107(1) TFEU. Such activity may however be considered as a service of general economic interest, subject to the applicable rules.

- 6. Q: The analytical grids are to serve as a tool for the Member States; they process the State aid rules and contain, for example, a general application of the ruling on Halle/Leipzig Airport. However, even after this latest court ruling there are many uncertain aspects. For example, there is a need for detailed comments, e.g. on the distinction between public/non-profit-making (services of general economic interest) and actual economic activities in infrastructure projects (particularly ports, but also elsewhere), and we request the Commission to provide more detail here.**

A: The forthcoming Communication on the notion of aid may provide further guidance in this respect. In any case, Member States are invited to contact DG COMP services in case of questions regarding the application of rules on EU State aid control.

- 7. Q: Overall, it seems that legal certainty for the financing of infrastructure projects can currently only be achieved via a large number of individual notifications. To the extent that the Commission assumes that infrastructure projects will in principle involve State aid in the future, we therefore ask the Commission to provide us with**

¹⁸ Airports, Broadband, Culture, Ports, RDI and Water.

clear guidance on how the provision of infrastructure and its financing will have to be shaped in the future so that it can continue to be categorised as not involving State aid.

Is the Commission already planning a corresponding framework/guidelines for the assessment of whether infrastructure measures involve State aid?

Should the Commission categorise the support – even partially – as involving state aids, we would like to point out that, in the interest of continuing public investment in infrastructure, substantially higher intervention rates (possibly with graduations) will be required for the provision of infrastructure as opposed to the support of enterprises.

A: The forthcoming Communication on the Notion of aid may provide further guidance in this respect. Furthermore, the case practice (through authorization of aid measures) continues to provide guidance in the meantime for any specific infrastructure projects.

- 8. Q: Irrespective of the substantive questions, there is the question as to whether notified guidelines on the provision of funding from the current programming period (2007-13) need to be re-notified from the beginning of the new programming period from 2014 (assuming they are unchanged), or whether the approval remains valid.**

A: In general, Commission decisions approve State aid measures for a limited duration and on the basis of an assessment under the relevant legal framework. Once new legislation is adopted, compliance with the new rules is assured through a proposal of appropriate measures (Article 18 of Regulation No 659/1999).

ITALY

- 1. Q: Whether the Form related to Major investment Projects including co-financed infrastructures and the relevant documentation - which is sent to DG REGIO for authorisation – can be also considered as valid documentation to be sent to DG COMP in the context of a possible notification procedure pursuant to Article 108(3) TFEU.**

A: The Form for requesting co-financing for Major Investment Projects that is submitted to REGIO, and the accompanying documentation – such as cost-benefit analysis etc., can also be submitted for the purposes of supporting the state aid notification. It is even recommended that the documentation which was already submitted to DG REGIO be also sent to DG COMP for the State aid notification.

At the same time, it should be noted that the information contained in the form and documents submitted to DG REGIO does not always cover certain aspects which are of relevance for the State aid assessment.

When it comes to the construction of infrastructures, the State aid assessment is carried out for identifying if there is State aid at the level of the different players involved. In cases where there are indeed different players involved, DG COMP will request additional clarifications, to identify if there is State aid at the level of each of them.

See also reply to question n°1 from Czech Republic.

2. **Q: The Commission is requested to illustrate - starting from the "Major projects" Forms provided by the rules regarding structural funds and, in particular the cost-benefit analysis and the financial tables therein - the correct methodology for setting the financial amount that can be authorised according to the State aid rules.**

A: *The amount of State aid for the construction of infrastructure must be limited to the identified funding gap ratio. The funding gap ratio is calculated according to the same methodology that is being used in the Form for requesting co-financing for Major Investment Projects, in particular Section E therein.*

To be noted, however, that sometimes the State aid assessment might require that the cost-benefit analysis be done at separate levels. This could occur if the owner of the infrastructure is not going to operate the infrastructure himself, but shall contract out the operation of the infrastructure. There might also be differences in the costs and revenues to be taken into account or the applied discount rate for the calculation of the Net Present Value. However, the methodology as such for carrying out the cost-benefit analysis leading to determining the funding gap ratio remains the same. It should also be underlined that the approach adopted for the State aid assessment does not preclude in any way the analysis of DG REGIO of the application for co-financing.

3.

- a. **Q: Whether there can be cases where public resources available for the project are higher than the funding gap identified in the cost-benefit analysis. In other words, we request whether it is possible that additional public resources may exceed the funding gap ratio within a project, not qualified as State aid pursuant to Article 107(1) TFEU.**

A: *It is established decision practice that, in order to be considered proportional, aid for the construction of infrastructure projects must be limited to the identified funding gap ratio. Additional public resources exceeding the funding gap ratio, insofar as qualifying as State aid in the meaning of Article 107(1), cannot be declared compatible with the Treaty (as the aid would not be limited to the minimum necessary).*

- b. **Q: In particular, we refer to the case where part of the public resources are invested in the infrastructure project according to the MEIP or according to the costs of the infrastructure related to public activities. As regards public activities, the "Infrastructures analytical grid no. 5 - port infrastructures" (Rif. Ref. Ares(2012) 1108005 – 24/09/2012¹⁹) stated that: "However, if the projects involves infrastructural elements which can be economically exploited, there can be State aid". In light of the above, if a project involves both public activities and economic activities, the existence of State aid is a possibility ("can") and not the necessary outcome. We request clarification on the cases where the costs related to public activities can be considered non-aid.**

¹⁹ See Annex 3.

A: *There are two distinct points that are raised by Italian authorities in the paragraph above. One is the question whether there is a possibility to conclude that part of the public financing provided for the construction of an infrastructure is State aid, and another part does not involve State aid because it is market-conform, i.e. it satisfies the Market Economy Operator test. The other is the question of what categories of public support can be considered to be within the public remit, and therefore do not involve State aid.*

Regarding the first question, i.e. State aid aside with public financing not involving State aid as satisfying the Market Economy Operator test: as a matter of general principle, it cannot be excluded a priori that such situations might indeed exist. Each individual case has its own specificities, and it would be a matter of examining case by case if such a situation is indeed present. However, it seems difficult to demonstrate that a part of the public financing is conform with the market economy operator test where the project has a Negative Present Value. The Negative Present Value indicates that the project would not have been undertaken by a private investor, and therefore it needs aid in order to become viable. Since the project as a whole would not have been viable without State aid, it becomes difficult to claim that one segment of the project is profitable.

See also reply to question n°5 from Poland.

Regarding the question on expenses within the public remit: certain expenses may indeed be qualified as within the public remit, and consequently as not involving State aid, as established by the jurisprudence. See recital 42 of the recent Court judgment in Case C-288-11 P - Mitteldeutsche Flughafen AG et al. v Commission (Leipzig Halle), which mentions "the expenses relating to security and police functions, to fire-protection measures and public security measures, to the German meteorological service and to the air traffic control service" as examples of expenses that may be qualified as being within the public remit. It shall therefore be up to the Member State to demonstrate that certain expenses do fall within the public remit and therefore do not involve state aid. In this respect, the Commission's scope of review is of the "manifest error" type. The Commission shall examine case by case if the expenses in question can be qualified as within the public remit.

To be noted, however, that if in a specific case it is demonstrated that certain expenses are within the public remit, such expenses should then be excluded from the costs of the project for the purposes of the cost-benefit analysis and the identification of the funding gap ratio.

4.

- a. Q:** **More specifically, as regards the costs related to the exercise of public powers, we would like to present the following arguments. The above mentioned infrastructure analytical grids issued by the Commission distinguish, on a case by case basis, the activities which can be related to the exercise of a public function and those which are economic/commercial.**

However, during the notification procedure pursuant to Article 108(3) in a specific case regarding the construction of port infrastructures, the Commission contested the costs related, for example, to fencing the areas or to environmental mitigation. The Commission argued that the infrastructure, once realised, would have been also used for commercial reasons and therefore those expenses cannot be qualified as within the public remit since they would not have incurred without the infrastructure project. In particular, as regards the environmental mitigation works, the Commission argued that even if in principle covering those costs is one of the public tasks of the port authority, the fact that those costs would not have been necessary without the infrastructure qualifies those costs as State aid.

A: In the case that is referred to here²⁰, it was argued in the notification that expenses for reducing the noise during the construction of the infrastructure, noise which would have affected the neighbouring city, were to be considered within the public remit. However, to claim that reducing the negative environmental impact of construction works is a public remit obligation of the State, and not an obligation of the investor, is in contradiction with the 'polluter pays' principle. Furthermore, to accept that such expenses are within the public remit when it is the State itself investing in a project, whereas private investors must cover themselves such costs for their own projects, would also be a discrimination between public and private investors.

- b. Q: The Italian authorities disagree for the following reasons. From the methodological point of view, it is observed that the issue "aids and infrastructures" in case of large projects shall necessarily take into account two profiles (regional policy and competition). Therefore, the characteristics of the projects, the conditions for their realisation, the economic and financial aspects, the feasibility, etc... must comply with the rules on Structural Funds in addition to those on State aid. Moreover, when dealing with State aid rules for these projects, it must be considered that they have been already drafted according to the logics and rules of the regional policy.

Moreover, in the analytical grid [No 5] related to port infrastructures it is provided that "*Existence of State aid is excluded in particular in the following instances: activities within the public remit... certain investments in port infrastructure, which are exclusively reserved for functions within the public remit (for example, customs and police related infrastructure, security infrastructure, ...) may concern non-economic activities. However, if the project also includes any infrastructure elements which can be economically exploited, it can involve State aid*". Therefore, the infrastructural elements that can be economically exploited are those which can raise State aid issues. It is obvious that the anti-fire system in itself, as well as the environmental/security system cannot be economically exploited but are built in the context of the infrastructure only because of legislative obligations and certainly not for

²⁰ See State aid SA. 35193 (2012/N), Termini Imerese Port (Italy), decision adopted on 5 June 2013 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35193); and SA. 34940 Interporto di Augusta.

commercial use. In fact, they have to be realised by the entity which is entrusted with this obligation considering its public functions it performs, and not by the private operator which would not have any interest in making them. On the other hand, no infrastructure in the interest of the public or open to users and citizens (ports, airports, schools, museums, hospitals, etc...) could ever be built without the construction of parts of "public" infrastructures and vice versa. Where the decision to build an infrastructure is made, that infrastructure cannot be made without the public sector complying with the legislative obligations and providing for the systems and measures to protect the users and the citizens according to the law.

A: On this aspect, please, see above the answer already provided to question 4(a) from Italy.

- c. **Q:** In the light of the above, the costs for those public infrastructures have been "carved out" from the notified aid amount, as explained by the Commission in many occasions and as provided by the analytical grids. In fact, those costs are not covered, by definition, by Article 107, and, if included in the notification and consequently authorised by the Commission, costs that are part of the ordinary exercise of public activities would be authorised as State aid.

We therefore request the Commission to provide guidance as regards to the correct State aid framework for the expenses related to the exercise of public powers in the context of infrastructure financed by public resources.

A: This question was answered at point 3b. above.

- d. **Q:** We also request, in case it was confirmed that the sole fact that the infrastructure is also open for commercial use is sufficient to qualify public expenses as State aid, to give examples of public expenses related to co-financed infrastructure not involving State aid which could thus "carved out" from the amount of the notified aid.

A: Please see the examples mentioned at point 3b. above. It is important to distinguish financial costs due to compliance with necessary safety, environment or fire prevention regulations that all undertakings in that sector have to bear – in comparison with typical tasks of a public authority.

As an example, car factories cannot receive State aid because they need to install safety belts in the cars – that is cost stemming from a regulatory obligation.

On the contrary, there are typical tasks of the Member State that are the prerogatives of official authorities and are performed by the State and which do not constitute economic activities.

Examples are activities related to: the army or the police; air navigation safety and control²¹; maritime traffic control and safety²²; anti-pollution surveillance²³; the organisation, financing and enforcement of prison sentences²⁴; and the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data²⁵.

MALTA

1. Q: Energy (RES)

A: In addition to the general analytical grid, six specific grids have been designed to address State aid issues related to different sectors where there is sufficient case practice²⁶. The forthcoming Communication on the notion of aid aims at providing broader guidance.

2. Q: Waste to Energy Projects

A: See reply to the related question n°4 from France.

3. Q: Transport Projects (Maritime)

A: See grid n°5, as well as replies to question n°8 from the Slovak republic and question n°2 from Germany (part 2).

4. State Aid to State-owned Entities and Ministries

A: The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status, the way in which they are financed²⁷ or their owner ship (State owned or not State owned). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too²⁸. Where

²¹ Case C-364/92 SAT/Eurocontrol, paragraph 27; Case C-113/07 P Selex Sistemi Integrati v Commission [2009] ECR I-2207, paragraph 71.

²² Commission Decision of 16 October 2002 in Case N 438/02 — Belgium — Aid to port authorities, OJ C 284, 21.11.2002.

²³ Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

²⁴ Commission Decision in Case N 140/2006 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006.

²⁵ Case C-138/11 *Compass- Datenbank GmbH v Republik Österreich* [2012].

²⁶ Airports, Broadband, Culture, Ports, RDI and Water.

²⁷ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

²⁸ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125, paragraph 21; Case C-244/94 *FFSA and Others* [1995] ECR I-4013; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28.

this is not the case, non-profit providers remain of course entirely outside of State aid control.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

POLAND

- 1. Q: According to the point 4b of the grid [No 6], all intellectual property rights created in R&D in the phase of implementation/construction of research facilities financed by public funds shall belong entirely to the research organisation;**

Do we understand it correctly, that point 4b refers only to cases where the RO performs contract research on behalf of industry, and not to cases of occasional renting the infrastructure (in such cases the IPR shall be allocated by industrial partners to which the infrastructure is rented)?

A: The condition specified in Point 4b of the analytical grid 6 applies only to the implementation/construction phase of research infrastructures owned by research organisations. It should therefore not be interpreted as introducing any type of obligation of transferring, to the research organisation, the IP rights generated by industry users simply renting the infrastructure for their own R&D activities.

- 2. Q: Point 4 of the grid [No 1]: The phrase "Support granted under a *de minimis* regulation, is not regarded as State aid, if no more than EUR 200 000 is granted over a period of three years for one firm" should be clarified. Existing state aid law (also Commission Regulation (EC) No 1998/2006) uses the term "undertaking" not "firm". We would like to ask the Commission to clearly explain the meaning of "undertaking", in the sense of "single economic unit" concept and the consequences of applying this notion when granting *de minimis* aid.**

A: The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed²⁹. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

Two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice looks at the existence of a controlling share or functional, economic and organic links³⁰. On the other hand, an entity that in itself does not provide goods or services on a market is not an undertaking for the simple fact of holding shares, even a majority shareholding, when the shareholding gives rise only to the exercise of the rights attached to the status of

²⁹ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.

³⁰ Case C-480/09 P *AceaElectrabel Produzione SpA v Commission* [2010] ECR paragraphs 47 to 55; Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SPA and Others* [2006] ECR I-289, paragraph 112.

shareholder or member as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset³¹.

- 3. Q: Grid No 4 – Regarding cultural sites, is it legitimate to treat their commercial activities (e.g. space rent, gastronomic activity, trainings, conferences) – considering their marginal character – similarly to “ancillary activities” in case of financing RDI infrastructure?**

A: If an infrastructure is used for both economic and non-economic activities, public funding falls under State aid rules only with regard to the former. If, in such cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, it may fall outside State aid rules in its entirety if the economic activity is only ancillary. In general, such ancillary activities consume the same inputs as the primary non-economic activities; e.g. material, equipment, labour, fixed capital. Ancillary economic activities have to remain limited in scope, i.e. the capacity of the infrastructure should not represent an appreciable part of the effectively used total capacity.³² Examples of such ancillary economic activities may be a research organisation that occasionally rents out its equipment and laboratories to industrial partners, or a public museum which occasionally lets its installations for corporate events.

- 4. Q: In the document DG COMP suggests that in order to ensure that State aid is not present in certain projects, one of the possibilities is to use Market Economy Investor Principle test. It should be stressed, that accurate application of this test is rather difficult. Is it possible for the Commission to prepare a kind of guidelines on MEIP test, taking into account the judicial and case practice?**

A: The forthcoming Communication on the notion of aid will provide an overview on the application of the market economy operator (MEO) test. In a nutshell, economic transactions carried out by public bodies or undertakings do not give rise to an advantage to their counterpart, and therefore do not constitute an aid, if they are carried out in line with normal market conditions. Thus, the behaviour of public authorities or undertakings should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such authorities or undertakings grant an advantage to their counterparts. The decisive element is whether the public authorities acted like a market economy operator would have done in a similar situation. If that is not the case, the beneficiary undertaking should be considered as having received an economic advantage which it would not have obtained under normal market conditions³³, placing it in a more favourable position than that of its competitors³⁴.

For the purpose of the market economy operator test, the roles of the State as shareholder of an undertaking, on the one hand, and as a public authority, on the other, must be distinguished³⁵. Accordingly, the MEO test should be applied leaving aside all social,

³¹ Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SPA and Others* [2006] ECR I-289, paragraphs 107-118 and 125.

³² Ancillary economic use should be assessed both in absolute and relative terms, i.e. relative to the capacity of the infrastructure and to what extent it brings extra capacity on the market.

³³ Case T-228/99 *Westdeutsche Landesbank Girozentrale v. Commission*, [2003], ECR.II-435, paragraph 208.

³⁴ See, to that effect, case C-124/10 *EDF* [2012], paragraph 90, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy v Commission*, paragraph 16.

³⁵ C-124 2010 *EDF* paragraph 79-81 (see, to that effect, Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium v Commission* [1986] ECR 2321, paragraph 13; Joined Cases C 278/92 to C

*regional-policy and sectoral considerations which relate to a Member State's role as a public authority*³⁶.

*The assessment of whether a State intervention is in line with market conditions shall be examined on an ex-ante basis, having regard to the available information and foreseeable developments at that time*³⁷. Any prudent market economy operator would normally carry out its own ex-ante assessment on the strategy and financial prospects of a project³⁸, for instance, by means of a business plan.

5. **Q: Point 2 of the grid No 1, says that "accompanying or prior State aid measures pursuing the same objective invalidate a conclusion that a similar measure would also have been undertaken by a MEI". Does it mean that qualification of a project for support under a state aid scheme (notified or exempted on the basis of GBER) invalidates a potential conclusion that a MEI would have provided the funds for the project without public support?**

A: If a project needs State aid in order to be realized or has already received such aid before (either under GBER, existing framework schemes or individual notification), it becomes very questionable that any further State support can be seen independently from the State aid and can be considered to comply with the market economy operator principle.

6. **Q: Point 4 of the grid [No 6] – Shall we understand that meeting the conditions listed in this point when financing ancillary economic activities excludes existence of State aid or does not exclude existence of State aid, but there is no need to notify it? Some doubts have arisen because of the section title: "No need to notify for State aid clearance, but other requirements could apply".**

A: To the extent that the economic activities remain "ancillary" their presence will not put the non-economic nature of the use of the research infrastructure into question. No State aid will therefore be deemed present.

SLOVAK REPUBLIC

1. **Q: State aid for major investment projects and its cumulation with other State aids;**

A: In case the financing of a major investment project involving State aid compatible under a specific guidelines (or under the TFEU), the cumulation rules of that specific guidelines should be respected. Whether a project is qualified as a major project under SF rules is not relevant for the State aid assessment perspective. It follows that the normal State aid cumulation rules apply.

2. **Q: State aid for infrastructure projects linked to services of general economic interest (SGEI), including calculation of compensation opposed to calculation of grant for projects under Structural Funds/Cohesion Fund;**

280/92 Spain v Commission [1994] ECR I 4103, paragraph 22; and Case C 334/99 Germany v Commission [2003] ECR I 1139, paragraph 134). Case T196/04 [2008] ECR II-3643. Paragraph 85).

³⁶ Case T-228/99 Westdeutsche Landesbank Girozentrale v. Commission [2003] ECR.II-435, T-20/03 Kahla Thüringen Porzellan v Commission [2008] ECR II-2305, Case T-98/00 Linde v. Commission [2002] ECR II-3961.

³⁷ Case T-16/96 Cityflyer Express v Commission [1998] ECR II-757, paragraph 76.

³⁸ Commission Decision in case of C53/2006 Citynet Amsterdam, the Netherlands. JOCE L/247/2008, paragraph 114.

A: *The State aid rules on SGEI allow compensation of SGEI costs and those costs include costs of infrastructure necessary for the provision of the SGEI (see explicitly for the SGEI Decision Article 5(3)(d) of the Decision). In particular, depreciation of the respective investment costs is possible (see question 124 of the SGEI guide). On infrastructure used both for SGEI and non-SGEI activity see question 139; on financing the setting up of infrastructure see question.*

- 3. Ban of transfer of ownership for infrastructure co-financed from the Structural Funds/Cohesion Fund so that the change in the nature of ownership does not induce granting of undue State aid (issue NOT related to Art. 57 of the General Regulation).**

A: *A mere change in ownership after the granting of aid does not normally have an impact on the State aid assessment. The relevant time for assessing potential aid for the construction of infrastructure is the time when the aid is granted.*

- 4. Issue of State aid monitoring, i.e. period of time until when the State aid projects must be monitored.**

A: *A general prescription period of 10 years from the date of aid granting applies, after which no recovery of unlawful aid can be ordered (laid down by Article 15 of Regulation No 659/1999).*

The period of time will depend on the compatibility conditions under which the measure is approved, which need to be respected: the conditions need to be respected, and during that time, the investment project must be monitored, i.e., in the case that the measure has been approved as regional aid, there is a condition of maintenance of the investment in question in the region concerned for a minimum period of at least five years after its completion. During this period, the project must be monitored

State aid monitoring depends on the respective applicable State aid rules. For instance, if SGEI rules apply, they foresee periodic checks for overcompensation (in principle at least every three years but specific rules apply in certain situations). For projects approved under the Broadband Guidelines, a minimum monitoring period of 7 years applies.

- 5. Q: On services of general economic interest (SGEI). Although European Commission released in 2012 new legislative acts (including the guide with questions about the application services of general economic interest) would be appropriate to practice decision-making process in the area of services of general economic interest especially in areas as social services, housing.**

A: *The Commission recently published a detailed guide on SGEI, which is available here: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf. Also, the forthcoming EU guidelines to State aid on airports and airlines will provide guidance on the conditions under which a project can hold the qualification of "SGEI" and fall outside the scope of State aid rules. Especially when, in such a situation, a Member State considers that a project of construction falls in the "SGEI" category, it will not be allowed to circumvent the rules on investment aids.*

- 6. Q: Cultural relics, museums, galleries. The issue of assessing the investment in cultural heritage (use of premises for commercial activities), museums, galleries- in**

which way to assess the term of "enterprise" in these institutions (European Commission decision-making practice - should be considered a substitution effect - as providers of leisure services) geographic impact - the effect on cross-border trade (as one of the conditions for meeting the definition of state aid) - Which indicative parameters used to express the impact (also potential) for Trade (European Commission decision-making practice cases of museums in Hungary vs. Museum in the Netherlands)

A: The assessment is always carried out on a case by case: no uniformly applicable thresholds or figures are available (see also reply to question n°4 from Czech Republic).

- 7. In the document "Verification of compliance with State aid rules in infrastructure cases", the Commission states that for major projects for which the application has already been submitted but for which the major project decision under the Structural funds rules is still pending, Member States are requested to re-examine if their initial assessment on the need for a State aid notification is valid and to inform the Commission of the result of the assessment.**

- a. Q: Does the assessment concerned relate only to major projects as stated in the document or to all cases of infrastructure projects for which the application has already been submitted, but the decision is still pending?**

A: The assessment concerns all projects (major and non-major with some nuances indicated in section 1 of the above-mentioned Guidance note). As stated in the COCOF note on "Verification of State aid", the Commission does not intend to carry out systematic examinations for all infrastructure projects for which the Commission has already adopted a decision under the Structural funds rules. However, this does not preclude further action by the Commission under the circumstances explained in the said Guidance note.

- b. Q: Does the Commission determine any deadline for submitting the information concerning the result of the assessment carried out by Member States to the Commission?**

A: If the application has been sent to the Commission, we recommend Member States to submit their assessment on the involvement of state aid as soon as possible. There is no specific legal deadline.

- c. Q: How is the Commission planning to comment on the information received and in what time limit not to threaten the launch of the projects?**

A: If the Member States' application does not include the necessary justification that no State aid is present, the Commission services will ask the Member State concerned to provide it. In case the Commission services consider that the information provided is insufficient, it will ask further questions to the Member State. The internal process of the Commission provides for a restricted period of time to deal with the case (either to agree with the major project or to ask for further information). The time limit depends on the Member State's availability to provide the necessary justification.

- 8. Q: The Commission has elaborated general analytical grid to determine whether public financing of infrastructure involves State aid within the meaning of Article**

107(1) TFEU, as well as specific analytical grids for certain sectors (airports, broadband, culture and port infrastructures, research, development and innovation, water services). Does the Commission intend to prepare also a specific analytical grid for the infrastructure projects in the transport sector? If yes, in what time would it be possible to expect its elaboration and submission to Member States?

A: The forthcoming Communication on the notion of aid may provide further guidance in this respect.

9. Q: Generating profits in the non-economic activities of the public sector in the implementation of the project. What to do with profit, how to proceed?

A: If an activity is non-economic (for instance toll-free roads), there would normally be no profits. To the extent that a State charges fees for non-economic services, State aid rules do not limit the use of these revenues. Please note however that the revenues may be taken into account under cohesion policy rules to limit the contribution from the Funds..

10. Q: In the case of State aid to the private sector, which in a project cooperating with the public sector is a problem with proving that for the private sector is not provided hidden state aid - i.e. problem is who and how can use instruments, equipment, etc., purchased in a single project both private and public sectors.

A: In case of dual use of the infrastructure (both commercial and non-commercial operators are using it), commercial operators need to pay market conform prices for the use of the infrastructure so that no State aid can be conferred to them.

Point 5.1.4 of the RDI Framework, regarding eligible costs for R&D projects, provides that « The following costs shall be eligible: ... (b) costs of instruments and equipment to the extent and for the period used for the research project. If such instruments and equipment are not used for their full life for the research project, only the depreciation costs corresponding to the life of the research project, as calculated on the basis of good accounting practice, are considered as eligible; ...». Therefore, undertakings can receive support only with regard to their effective use of the relevant instruments and equipment for the R&D project at stake.

If the abovementioned equipment and instruments are owned by a research organisation participating in the project, the latter should charge a market price (or in the absence of a market price, a price which reflects the full costs plus a reasonable margin) for the use of the equipment/instruments to any undertaking in order to avoid the transfer of indirect aid. As mentioned above, the price thus charged by the research organisation will represent an eligible cost for the undertakings participating in an R&D project.

It is also important to remind that the general conditions that should be respected in order to avoid indirect State aid to undertakings through public funded research organisations in the framework of collaborative projects are spelled out at Point 3.2.2 of the RDI Framework. If none of the conditions provided for in Point 3.2.2 of the RDI Framework is respected, "the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings".

- 11. Questions of Audit authority to COCOF-12-0059_01: Introduction, 2nd paragraph, it is stated that Member States should provide information for major projects which do not involve State Aid³⁹. We consider this competence new and we are not sure what is expected from Member States under this competence as it is, e.g. special documentation or forms in order to comply with this.**

The Guidance note on the "Verification of Compliance with State aid rules in infrastructure cases" does not impose any new obligations on Member States. The purpose of the Note is to give guidance without creating any new obligations for Member States, especially considering that Member States have to indicate if the major project involves State aid when submitting the application form⁴⁰.

- 12. Guidance on treatment of projects, 2nd paragraph, Member States indicate in the application form whether State Aid is involved to be notified to the EC⁴¹. We propose to clarify the wording "application form" if notification form or grant form is meant.**

The term application form refers to Annex XXII of Implementing Regulation 1828/2006 (see footnote 40).

- 13. OP Employment and Social Inclusion suggests to include support provided to social services and social protection of children and social guardianship (e.g. investments in social services) to the services of general interest and assign them to the same position as in education, and healthcare.**

The cost of constructing an infrastructure may be compensated as cost of a SGEI. Public fundings to healthcare facilities are covered in detail in the Commission's 2012 SGEI package.

UK

- 1. Q: The UK believes that the reference in the analytical grids (Ares 2012, 934142⁴²) to 'owning' infrastructure goes beyond the rationale in the Leipzig/Halle judgement, risks causing confusion and should be removed. This issue needs to be discussed on 29 January.**

The position as set out in the introduction to COCOF 12-0059-01: "the operation of infrastructure to offer goods and services on a given market constitutes an economic activity" reflects the Court's position. This is restated in the DG Comp note (03/2011 Application of the State Aid rules to infrastructure investment projects) at paragraph 7 which states "the financing of any type of infrastructure ... that is later commercially exploited is State Aid relevant".

³⁹ See Annex 6.

⁴⁰ Commission Regulation (EC) No 1828/2006 – OJEU L 371/1, 27.12.2006 – Annex XXII Major project request for confirmation of assistance under Articles 39 to 41 of Regulation (EC) No 1083/2006 - European Regional Development Fund / Cohesion Fund - productive investment.

⁴¹ See also document in Annex 6.

⁴² See Annex 1.

From these sources, the Leipzig Halle principle applies to the "operation of infrastructure". This suggests an intervention into the market. However, the analytical grids extend the principle in Leipzig Halle to organisations which "own, use or manage" infrastructure. The inclusion of "use or manage" is correct. This equates to operation - it is an action which intervenes within the market. The inclusion of "own" is incorrect, ownership is not in itself an action, nor does it (in the absence of use or management) intervene in the market.

The inclusion of "own" is inconsistent with fundamental State Aid decisions - for example, the state is free to purchase shares on a no aid basis (MEIP). It is not the ownership which is the issue, but rather the downstream impact. With infrastructure, the same approach should apply, but does not if "own" is included. In addition, the inclusion of the word "own" also appears to draw the Leipzig Halle principle into a position that is contrary to Article 345 of the TFEU in that it prevents ownership, which would be permitted if it were achieved with private funds.

In summary, our view is that the Analytical Grids should not contain the reference to "own" and that the Commission document "the Notion of State Aid" should make it clear that the Leipzig Halle principle applies to situations where there is the operation of infrastructure (or investment with a view to such operation) rather than ownership by itself.

A: Whilst the article 345 of the TFEU states that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership", it is difficult to imagine that an operator would carry-on a project of construction for the mere purpose of owning. Therefore, it seems in practice not possible to dissociate the ownership from the further use which will be made of the infrastructure.

2. **Q:** The UK is concerned about the wording relating to the funding of infrastructure that is "later commercially exploited". This also means a contrario that only the financing of infrastructure that is later not commercially exploited and built in the interest of the general public is in principle excluded from the application of state aid rules.

There is no definition of how much later, or if there was any intention of it being commercially exploited at the time of the construction. This opens the door for questions to be asked, especially by the ERDF Court of Auditors, about any infrastructure - even if it was not intended to be commercially exploited at the time of its construction.

Potentially this could catch RD&I infrastructures, which at the moment fulfil the requirements of not requiring notification, but in theory could be converted at a later date even when that was not intended at the time. We would like a further discussion on how in practice Member States should approach this issue.

A: The public funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of State aid rules. This refers to infrastructure

such as public roads or canals or dams which is made available for public use without any consideration.

Some infrastructure may be intended for activities that the State normally performs in the exercise of its official powers as a public authority (for instance air traffic control related infrastructure in airports, lighthouses and other equipment for the needs of general navigation, police and customs related infrastructure and other infrastructure for the needs of public safety). Such activities are not of an economic nature and fall outside the scope of the State aid rules, and so does the financing of the related infrastructure.

If an infrastructure is not exploited economically (such as toll-free highway, internal broadband networks, military airport, etc.) State aid rules do not apply. However, whenever existing infrastructure is started to be exploited commercially (introduction of tolls for the highway, opening of the capacity of the internal network for external operators, transforming the military airport to a commercial one, etc.), such activity shall be in line with the State aid rules.

For the situation that an infrastructure is built with the intention of only being used for non-economic activities but at a later stage it is decided to operate a certain economic activities, the Commission has not yet developed case practice. Certainly, where the modification occurs after the full depreciation of the investment costs linked to the construction of the infrastructure (or after the end of its normal economic life) only the costs to refurbishment and conversion in view of the economic use should be taken into account from a State aid perspective.

- 3. Q: The UK also has concerns about the lack of definition of what would be considered to be a purely local museum or local monument which might be caught. This opens up the possibility of having to notify for legal certainty, or at least of challenges by the Court of Auditors as to why we did not do so for such cases. We think this could open up programmes to fruitless arguments about things which should be non-contentious. We would be grateful for a further discussion on this point.**

As a general view, we think that the Commission has extended the remit too broadly and this runs completely contrary to DG Competitions simplification agenda.

A: *Please note that local nature is decided on a case by case basis, no universally applicable thresholds or figures can be granted.*

See reply to question n° 4 from Czech Republic.

ANNEXES

Annex 1 – Letter to the Member States dated 01.08.2012 (ref. Ares 2012, 934142)

Ref. Ares(2012)934142 - 01/08/2012



EUROPEAN COMMISSION
Directorate General
Regional Policy
Directorate General
Competition

Brussels,
REGIO/YS/Ing/B3(2012)

PERMANENT REPRESENTATION, AUSTRIA
PERMANENT REPRESENTATION, BELGIUM
PERMANENT REPRESENTATION, BULGARIA
PERMANENT REPRESENTATION, DENMARK
PERMANENT REPRESENTATION, GERMANY
PERMANENT REPRESENTATION, GREECE
PERMANENT REPRESENTATION, SPAIN
PERMANENT REPRESENTATION, FINLAND
PERMANENT REPRESENTATION, FRANCE
PERMANENT REPRESENTATION, IRELAND
PERMANENT REPRESENTATION, ITALY
PERMANENT REPRESENTATION, LUXEMBOURG
PERMANENT REPRESENTATION, NETHERLANDS
PERMANENT REPRESENTATION, PORTUGAL

PERMANENT REPRESENTATION, ROMANIA
PERMANENT REPRESENTATION, SWEDEN
PERMANENT REPRESENTATION, UNITED KINGDOM
PERMANENT REPRESENTATION, CZECH REPUBLIC
PERMANENT REPRESENTATION, ESTONIA
PERMANENT REPRESENTATION, CYPRUS
PERMANENT REPRESENTATION, LATVIA
PERMANENT REPRESENTATION, LITHUANIA
PERMANENT REPRESENTATION, HUNGARY
PERMANENT REPRESENTATION, MALTA
PERMANENT REPRESENTATION, POLAND
PERMANENT REPRESENTATION, SLOVENIA
PERMANENT REPRESENTATION, SLOVAKIA

Subject: Respect of State aid rules in the implementation process of Operational Programmes under Structural Funds and the Cohesion Fund

Analytical grids to support the assessment by the Member States

Your Excellency

The Commission has drawn attention already, by letter of 10 November 2011 and in meetings of the Coordination Committee of the Funds of December 2011 and June 2012, to the need to ensure the respect of State aid rules when implementing Operational Programmes under Structural Funds and the Cohesion Fund. Member States are responsible for verifying if the financial support provided under an Operational Programme involves State aid. Such verifications must also cover support to infrastructure projects since public support for the construction of infrastructure may be considered to involve State aid if the infrastructure is intended to be exploited for commercial purposes.

In order to facilitate the assessment process in relation to infrastructure projects, the Commission services have developed analytical grids that should help national authorities in identifying those projects which should be notified to the Commission for State aid clearance. The analytical grids are attached to this letter, and we request that they are made widely available to your national authorities.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 229911111
Ofis: CSM1 DG/RS - Tel. direct line +32 229 67752

http://ec.europa.eu/regional_policy/

As to the content of the analytical grids, a general document provides information that is relevant for all types of infrastructures. In addition, specific analytical grids for the construction of airports, ports, broadband, RD&I, cultural infrastructures and for the water sector include information which is relevant for the particular sectors. All grids are structured in a way that they first mention the reasons why State aid may not be present. Clearly, where no State aid is involved, there is no need for a State aid notification. To the extent that State aid may be present, the grids then proceed to describe the types of situations where, nevertheless, no State aid notification is necessary because they fall into the category of general exemptions from the notification requirement and for which lighter procedural requirements apply under the State aid rules.

The analytical grids can be used by the national authorities for projects regardless of their size. For major projects as defined in Article 39 of Council regulation (EC) 1083/2006, the standard application form (contained in Annex XXI and XXII to Commission Regulation (EC) 1828/2006) requires an indication whether the project involves State aid. In case the national authorities consider that a project does not involve State aid which has to be notified to the Commission, they are invited to use the analytical grids for explaining their findings and, if appropriate, to submit the documents underpinning their assessment. The use of the analytical grids is not compulsory but their use as reference in submissions to the Commission would be particularly useful as a way of ensuring that the relevant information is provided, thus speeding up the Commission's examination and treatment of applications under the relevant rules for Structural Funds and the Cohesion Fund.

For any questions, both our services are available to help. For questions on the content of the analytical grids, please address them to stateaidgreffe@ec.europa.eu and for those on the Structural Funds rules please send them to region-coordination@ec.europa.eu.

Yours faithfully



Walter Deffaa
Director General
DG Regional Policy



Alexander Italianer
Director General
DG Competition

In absence of the Director General
Nicholas Martyn
Deputy Director General

Annex 2 – Analytical Grids

INFRASTRUCTURE ANALYTICAL GRID N° 1 – GENERAL ANALYTICAL GRID

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

This analytical grid provides guidance to determine whether public financing of infrastructure involves State aid within the meaning of Article 107(1) TFEU and, if so, is subject to the notification obligation pursuant to Article 108(3) TFEU.

The present analytical grid is complemented by specific grids with additional information for infrastructure related to certain sectors (Airports, Broadband, Culture, Ports, RDI and Water).

General remarks

The future use of infrastructure (for an economic activity or not) determines whether its funding falls within the scope of the State aid rules.

Depending on the characteristics of the project, the potential beneficiaries² could be all undertakings which can own, use or manage all or part of the infrastructure benefiting from financing from the Funds.

The legal status of the aid beneficiary (own legal personality or not; subject to private or public law; part of the administration; publicly owned company or non-profit entity) is irrelevant for the State aid assessment. Even if it is part of the administration or a public law entity, non-profit or loss making, State aid issues can arise.

This assessment has to be carried out by the Member State not only for 'major projects' as defined under Structural Funds rules³ but for all projects.

Existence of State aid

1. Do any of the potential beneficiaries carry out an **economic activity**? If not, State aid is not involved. The concept of economic activity is defined as offering goods and services on a given market.

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² Article 2 (4) of EC Regulation 1083/2006 clarifies that the term "beneficiary" is used with different meaning under Structural Funds (*Beneficiary: an operator, body or firm, whether public or private, responsible for initiating or initiating and implementing operations*) and State aid rules (*Beneficiaries: public or private firms carrying out an individual project and receiving public aid*)

³ See Article 39 of EC Regulation 1083/2006: *a series of works, activities or services intended in itself to accomplish an indivisible task of a precise economic or technical nature which has clearly identified goals and whose total cost exceeds EUR 50 million*

The Commission has considered in decisions in area of culture that cultural services are economic activities where there are commercial entities offering the same or substitutable goods and services. If a market, however limited, exists for the activity concerned, then the activity is organised on market principles and is to be considered economic⁴. Also in spite of a decision of an authority to close a market to competition, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned.

It should in particular be noted that the decision of an authority to attribute a certain service to a single company and not to allow third parties to provide it (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity.

When the aid beneficiary carries out a non-economic activity alongside with an economic one, the risk of cross subsidisation should be avoided by keeping separate accounts ("*functional separation*") in line with the principles governing the Transparency Directive⁵.

2. Would a **market economy investor** (MEI) have provided the funds to the project under the same conditions? If so, State aid is not involved.

This may be demonstrated by the fact that private co-investors participate to a significant degree to the project on terms and conditions (such as overall risk and return) that are the equivalent to those of the public investor (*pari passu*). A sound *ex ante* business plan showing a return on investment would also be a good indication. Note however that accompanying or prior State aid measures pursuing the same objective invalidate a conclusion that a similar measure would also have been undertaken by a MEI.

3. In order to be caught by Article 107 of the TFEU, the support must affect or threaten to affect trade between Member States. **Effect on trade** is normally presumed when State aid strengthens the position of an undertaking compared with other companies competing in intra-EU trade. There is no threshold or percentage below which trade between Member States can be regarded as not having been affected. The relatively small amount of aid or the relatively small size of the recipient undertaking does not a priori mean that trade between Member States may not be affected. On the other hand, the Commission has in several cases concluded, in the context of the application of State aid rules, that activities had a purely local character and did not affect trade between Member States⁶.

⁴ N 464/09 – Hungary Aid to performing arts organisations, paragraph 14 and N 293/2008 "Cultural Aid for multifunctional community cultural centres, museums, public libraries and complementary higher education centres", paragraph 18

⁵ 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 - 25

⁶ E.g. swimming pools to be used predominantly by the local population, local hospitals aimed exclusively at the local population; local museums unlikely to attract cross-border visitors; local cultural events, whose potential audience is restricted locally. For practical examples, see the analytical grid on cultural infrastructure.

4. **De minimis aid:** Support granted under a *de minimis* regulation is not regarded as State aid, if no more than EUR 200 000 is granted over a period of three years for one firm⁷.

5. ***Distortion of competition***

Once the existence of an economic activity and an advantage is established⁸, it should be assessed whether the measure may distort competition. If the undertaking enjoys a legal monopoly and is confined by the regulatory regime applicable to this activity, and furthermore the market is not liberalised, i.e. not opened up to competition due to EU or national legislation or de facto by market developments, there is no risk of distortions of competition.⁹ If the beneficiary, on the contrary, provides services on any market¹⁰, the public funding (EU and national co-funding) of investments of this beneficiary may need to be scrutinised under 107(1) TFEU.

Service of general economic interest

6. If a project and/or its operation is (1.) part of a service entrusted as a **service of general economic interest (SGEI)** and (2.) the parameters of compensation have been clearly defined in advance; (3.) there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit; and (4.) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require, then State aid is not involved in the project¹¹. Note that SGEI rules also foresee the possibility of compatible aid¹² or *de minimis* aid¹³.

Exemption from prior notification, but other requirements could apply

7. If the public funding of infrastructure appears to fall under the State aid rules, it has to be established if the project is subject to the notification obligation under Article 108(3) TFEU. This is not the case if either of the following is fulfilled:
- a. the measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g the submission of a summary information sheet or a transparency sheet) and compatibility rules¹⁴;

⁷ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis aid*, OJ L379 of 28.12.2006. Specific regulations with different ceilings apply to agriculture or fisheries or in presence of a SGEI.

⁸ See point 1 above

⁹ See Commission decision N 356/2002 Network Rail.

¹⁰ I.e., where supply, even from a sole supplier, meets demand

¹¹ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

¹² Either not subject to notification (see point 7b below) or subject to notification under the Commission's SGEI Framework.

¹³ Commission Regulation (EU) No 360/2012 of 25.4.2012 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 114/8, 26.4.2012.

¹⁴ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the Vademecum on Community law on State aid:

- b. the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's **SGEI** Decision 2012/21/EU¹⁵, which notably requires a clear entrustment act and a check that the amount of compensation does not go beyond the net costs of providing the service of general economic interest including a reasonable profit.
- c. the measure is exempted from notification on the basis of Regulation 1370/2007¹⁶ which lays down the rules applicable to the compensation of public service obligations in land public passenger traffic.
- d. aid can be granted under an **existing State aid** scheme and the conditions specified in the respective existing aid scheme shall be complied with. The list of Commission State aid decisions is available at the following website:
http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3

It should be reminded that to most infrastructure projects the Environmental Impact Assessment (EIA) Directive¹⁷ applies, regardless of the funding falling under State aid rules.

Need to notify for State aid clearance

- 8. If the measure constitutes State aid and does not meet the conditions recalled under point 7 above, State aid clearance after a notification to the Commission is required. In its assessment of the compatibility of an aid, the Commission verifies whether the aid pursues an objective of common interest, is necessary, and does not affect trade to an extent contrary to the common interest. The assessment is conducted either under the relevant specific State aid compatibility rules, when available¹⁸ or, in the absence of specific compatibility rules, directly under Article 93, 106 or 107 of TFEU.

http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

¹⁵ Specific conditions apply, e.g. existence and duration of entrustment and compensation not exceeding an annual amount of EUR 15 million or a certain number of passengers for air and maritime transport. 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 a longer period is justified by the amortisation of investments.

¹⁶ (EC) Regulation No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70, OJ L315 of 3.12.2007, p.1.

¹⁷ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

¹⁸ A compilation of State aid rules in force is available on :
http://ec.europa.eu/competition/state_aid/legislation/legislation.html

INFRASTRUCTURE ANALYTICAL GRID N° 2 – CONSTRUCTION OF AIRPORT INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudice possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles:

1. Concerning 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
 - Support for the user of the infrastructure

This analytical grid concerns only investment aid as it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

Existence of State aid is excluded in particular in the following instances:

Activities within the public policy remit

2. The distinction between public policy remit and economic activities has to be done on a case-by-case basis.

Certain investments in airport infrastructure, which are exclusively reserved for functions within the public policy remit (for example, air traffic control related infrastructure for en-route control, customs and police related infrastructure, security infrastructure, i.e. infrastructure necessary against public threats, terrorist attacks etc.) may concern non-economic activities². However, if the project also includes any infrastructure elements which can be economically exploited, it can involve State aid.

Investments in compliance with the market economy investor principle (MEIP)

3. Would a market economy investor (MEI) have provided funds to the project expecting a remuneration on the capital invested under the same conditions as a public authority intends to do? If so, State aid appears not to be involved. The financing of airport infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it is very difficult to establish that the State would participate in such financing as a MEI. Consequently, even if the Member State concerned argues that the criteria for the application of the MEI are complied with, we would still encourage it to (pre-)notify the measure to the Commission under Article 108(3) TFEU.

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See paragraph 98 Leipzig-Halle judgement- Joint Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission and T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt c/ Commission. 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. Moreover, the existence of aid must be analysed at the level of the owner, operator and user.

Project is entrusted as service of general economic interest (SGEI)

4. If a project and/or its operation is (1.) part of a service entrusted as a service of general economic interest (SGEI), (2.) the parameters of compensation have been clearly defined in advance, (3.) there is no compensation paid beyond the costs of providing the public service and a reasonable profit and (4.) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require, then State aid is not involved in the project.³ Note that SGEI rules also foresee the possibility of compatible aid or de minimis aid. Regarding airports, the Airport guidelines⁴ provide guidance on what activities can be considered an SGEI⁵. In substance, the overall management of an airport can be considered as an SGEI only in exceptional cases, such as airports located in isolated regions. 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.⁶

Exemption from notification, but other requirements could apply

5. If the public funding of infrastructure appears to fall under the State aid rules, it has to be established whether the project is subject to the notification obligation under Article 108(3) TFEU. No State aid notification is necessary if:
 - a. the funding measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g. the submission of a summary information sheet or a transparency sheet) and compatibility rules⁷; support to airport infrastructure could be compatible and exempted from notification for instance as regional aid, or possibly as aid for SMEs⁸.
 - b. the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's SGEI Decision 2012/21/EU (conditions from the 2005 Community Guidelines on financing of airports apply⁹). Note that the SGEI Decision is only applicable to airports with no more than 200 000 passengers per year. In addition, the SGEI Decision requires a clear entrustment act and a check that the amount of compensation does not go beyond the costs of providing the service of general economic interest and reasonable profit.
 - c. If aid can be granted under an **existing State aid** scheme.

Need to notify for State aid clearance

³ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

⁴ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports OJ C 312, 9.12.2005, p. 1–14.

⁵ See paragraph 34 and 53 of the Airport guidelines.

⁶ See paragraph 53 (iv) of the Airport guidelines.

⁷ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the Vademecum on Community law on State aid: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

⁸ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124 of 20.5.2003, p.36

⁹ See paragraph 53 (iv) of the airport guidelines

6. If the measure constitutes State aid and the measure does not meet the conditions recalled above, State aid clearance after a notification to the Commission is required. Normally, State aid for airport infrastructure can be declared compatible on the basis of:

a. The conditions of the 2005 Airport guidelines

Under the 2005 airport guidelines investment aid can be declared compatible, provided that the conditions of the guidelines¹⁰ are complied with: presence of a clearly defined objective of general interest, necessity and proportionality of the infrastructure to the objective, satisfactory medium-term prospects for use, access to the infrastructure in an equal and non-discriminatory manner and limited affectation of trade relative to EU interest. In addition the aid itself should be necessary and proportional and have an incentive effect.

b. SGEI framework for airports linked with the provision of an SGEI

To the extent that an exemption from the notification requirement under the SGEI Decision is not fulfilled, the SGEI framework provides indications on when a public service compensation can be considered compatible State aid (the conditions from the 2005 Airport Guidelines apply, see above point 4).

c. the Regional Aid Guidelines

Under the current Regional Aid Guidelines¹¹ (RAG), only movable assets (i.e. transport equipment) are excluded as eligible expenses for investment aid. Nonetheless, any transport infrastructure can benefit from investment aid. This implies that Member States can, in principle, grant investment aid for airport infrastructure under the RAG¹².

¹⁰ See paragraph 61 of the airport guidelines.

¹¹ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹² Member States can also apply the General Block Exemption Regulation (GBER) for the support of airport infrastructure without the need to notify, albeit subject to other procedural requirements: submission of summary information sheet or a transparency sheet, if the eligible expenses exceed € 50 million but does not exceeds the notification threshold (see also point 7 of the general analytical grid).

INFRASTRUCTURE ANALYTICAL GRID N° 3 – CONSTRUCTION OF BROADBAND INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles:

1. Public funding can be granted to the complete infrastructure roll-out or only part of the infrastructure (for instance for constructing backhaul networks or basic physical infrastructure elements, such as ducts). The construction of all such infrastructure element(s) with a view of its future economic exploitation by the State or third party operators, to which it is intrinsically linked, will constitute an economic activity. Aid should be always be allocated on the basis of a competitive tender process².

This analytical grid only covers the construction of broadband infrastructures and complements the General analytical grid which gives broader guidance on infrastructure³⁴.

Existence of State aid is excluded in the following instances:

Construction of a broadband network for non-economic use

2. If a broadband network is rolled out exclusively to provide connectivity services to public bodies not engaged in economic activity⁵, then State aid is not involved in the project. On the other hand, if such a network (for instance its extra capacity) is made available for the use of commercial broadband investors or other operators, State aid is likely to be involved in the project.

Investments in compliance with the market economy investor principle (MEIP)

3. If a commercial investor would also have provided the necessary funding to the project under the same terms and conditions, then State aid is not involved⁶. This shall be demonstrated either by significant co-investments of commercial operators with the public authorities and/or by the presence of a sound business plan (validated by external experts) demonstrating that the investments provides an adequate rate of return for the investors – which is in line with the rate of return expected by commercial operators for similar projects.

Service of General Economic interest (SGEI)

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See paragraph 14 of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks OJ C 235, 30.9.2009, p.7 (the Broadband Guidelines).

³

Depending on the facts of the case, State aid granted for the construction of a broadband network may benefit not only the owner/operator of the network but also third party providers of broadband access and possibly – if the network is dedicated to a small category of users (for instance companies in a specific business park) – also the users of the broadband services.

⁵ See for instance Commission decision in case N 46/2007 "Welsh Public Sector Network Scheme".

⁶ See point 2 of the General analytical grid.

4. A construction of a network and/or its operation could be part of a service entrusted as an SGEI. Broadband deployment as an SGEI should normally be based on the provision of a passive⁷, neutral⁸ and open⁹ infrastructure that provides universal service coverage for the region and any compensation shall be limited to the related wholesale access services without including retail communication services. In case there is no over-compensation (on the basis of clear parameters established ex ante) and the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require, then State aid is not involved in the project.

No need to notify for State aid clearance, but other requirements could apply

5. General block exemption regulation

See point 7 of the general analytical grid.

6. Service of General Economic interest (SGEI)

State aid for the compensation of public service obligations is exempted from notification if it fulfils all conditions of Commission Decision 2012/21/EU. It should also be noted that the above considerations on the quality of the definition of the public service obligation for broadband deployment (see above in section 4 on passive, neutral, wholesale only, infrastructures providing universal coverage) will apply, in line with the existing rules¹⁰.

7. If aid can be granted under an existing State aid scheme

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.

Need to notify for State aid clearance

8. If the measure constitutes State aid and the measure does not meet the conditions recalled in this analytical grid or under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required.
9. Normally, State aid for broadband infrastructure can be declared compatible on the basis of State aid **Broadband Guidelines**. In general, the Broadband Guidelines distinguishes target areas according to current level of coverage with broadband infrastructure. In case no comparable broadband infrastructure is available ("white areas") aid is allowed if the relevant compatibility

⁷ The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

⁸ A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users.

⁹ Open, non-discriminatory wholesale access shall be granted to third party operators.

¹⁰ See 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 of 11.1.2012, p.4-14, paragraph 48.

conditions are met, while 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 51 and 79 of the Broadband Guidelines.

10. Broadband State aid projects may also be deployed in assisted areas under the **Regional Aid Guidelines (RAG)**¹¹. In this case, aid to broadband may qualify as aid for an initial investment within the meaning of the RAG.
11. **Service of General Economic interest (SGEI)**: The European framework for State aid in the form of public service compensation¹² applies to SGEI compensation not exempted from notification (see point 6 above). The above considerations on the quality of the definition of the public service obligation for broadband deployment (see above point 4 on passive, neutral, wholesale only, passive infrastructures providing universal coverage) will apply.

¹¹ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹² OJ C 8 of 11.1.2012, p.15 -22.

INFRASTRUCTURE ANALYTICAL GRID N° 4 – CONSTRUCTION OF CULTURE INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹³.

General principles:

1. This analytical grid concerns aid for the construction of cultural infrastructures such as multipurpose arenas¹⁴, museums, film studios and cinemas¹⁵, as well as for the renovation of historical monuments.

This analytical document only covers the construction of culture infrastructures and complements the General analytical grid which gives broader guidance on infrastructure.

Existence of State aid is excluded in the following instances:

2. Investments in compliance with the market economy investor principle (MEIP).

If a commercial investor would also have provided the necessary funding to the project under the same terms and conditions, then State aid is not involved in the project. This shall be demonstrated either by significant co-investments of commercial operators with the public authorities and/or by the presence of a sound business plan demonstrating that the investments provides an adequate rate of return for the investors – which is in line with the rate of return expected by commercial operators for similar projects.

3. Local infrastructure facilities:

- a. The presence of State aid could be excluded for *smaller arenas* without a professional sports club being a user and with a catchment area not exceeding a border with another Member State¹⁶. The assessment also depends on the actual/potential use of the arena: for example the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to trade between Member States. Thus the effect on trade can often be assumed for such cases. Even if most of the activities which are to be carried out in the actual arena are of local character, the arena may have the capacity to host large international events as well, and thus an effect on competition and trade between Member States might not be excluded¹⁷.

¹³ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

¹⁴ See cases C4/08: Ahoy, SA.33728: Copenhagen and SA.33618: Uppsala

¹⁵ See case NN70/06: Finnish film support scheme

¹⁶ Typical examples for this category could be small sport facilities used only by amateur sport clubs. See for example case SA.31722 – Hungary - Supporting the Hungarian sport sector via tax benefit scheme and case N118/2000 – France – Subventions publiques aux clubs sportifs professionnels.

¹⁷ For larger arenas generally there will be an effect on trade See order of the GC of 26.01.2012 concerning AHOY in Rotterdam, T-90/09, where it finds that the market for exploitation of arenas is not necessarily limited to the Netherlands.

- b. For smaller museums and historic monuments which address a very local demand and are not attracting international visitors, it may appear that there is not necessarily an effect on trade¹⁸. The limited size and budget of museum-related projects may also enable to exclude an effect on trade between Member States, as people from other Member States are not liable to cross borders for the primary purpose of visiting these museums¹⁹. For larger museums and historic monuments which enjoy an international reputation, however, an effect on competition and trade between Member States may not be possible to exclude. The assessment depends on the actual/potential capacity to attract foreign visitors.
- c. For smaller cinemas in rural areas or cinemas with specialised ('arthouse') programming in urban areas, it could be argued that there is no effect on trade or distortion of competition²⁰.
- d. For film studios, including those created by renovating historic buildings, the high mobility of film and television productions implies that an effect on competition and trade between Member States cannot be excluded.

Exemption from notification, but other requirements could apply

See point 7 of the General analytical grid

Need to notify for State aid clearance

If the measure constitutes State aid and the measure does not meet the conditions recalled under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required. The assessment of cultural infrastructure is normally conducted directly under Article 107 (3) (d) of TFEU.

¹⁸ See case N 377/2007 NL- Support to Bataviawerf – Reconstruction of a vessel from the 17th century (Decision of 28.11.2007)

¹⁹ See case N 630/2003 IT- Musei di interesse locale – Regione autonoma della Sardegna (Decision of 18.2.2004)

²⁰ Some Member States also offer aid to cinemas, for example to support rural cinemas or arthouse cinemas in general or to cover their transition to digital film projection. However, the amounts involved are usually small, so that rural and arthouse cinemas should be sufficiently served by the levels of aid which fall under the *de minimis* Regulation. Aid for renovation investment of small and medium-sized enterprises (SME) may also meet the conditions of the General Block Exemption Regulation (GBER). If special circumstances would justify more support, this should be assessed on a case-by-case basis.

INFRASTRUCTURE ANALYTICAL GRID N° 5 – CONSTRUCTION OF PORT INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles

1. Concerning port infrastructure, the Commission distinguishes three types of public support :
 - Support for the construction of port infrastructure (investment aid)
 - Support for the operation of port infrastructure
 - Support for the user of the infrastructure

This analytical grid concerns only investment aid as it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

The construction of an infrastructure which is economically exploited falls within the scope of State aid rules. However, certain types of activities are excluded from this principle, as they fall within the public remit and therefore do not constitute economic activities.

Existence of State aid is excluded in particular in the following instances:

Activities within the public remit²

2. The distinction between public remit and economic activities has to be done on a case-by-case basis.

Certain investments in port infrastructure, which are exclusively reserved for functions within the public remit (for example, customs and police related infrastructure, security infrastructure, i.e. infrastructure necessary against public threats, terrorist attacks) may concern non-economic activities³. However, if the project also includes any infrastructure elements which can be economically exploited, it can involve State aid.

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² State aid C39/2009 (ex N 385/2009) Public financing of a port infrastructure in Ventspils Port.

³ See paragraph 98 Leipzig-Halle judgment. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatized. Moreover, the existence of aid must be analyzed at the level of the owner, operator and user.

For example, maritime access routes (breakwaters, sea locks, navigable channels), sea walls and rail tracks outside the port have been considered by the Commission, under certain specific conditions, as non-commercially exploitable infrastructures, see in this respect cases N 520/2003 – BE – Flemish ports (decision of 20/10/2004) and N 60/2006 – NL – Port of Rotterdam (decision of 24/04/2007). More recently, the Commission has indicated that the financing of these infrastructures may involve State aid, ultimately leaving, however, the question open, see N 110/2008, DE, Jade-Weser-Port, OJ C 137/2009 and C 39/2009 (ex N 385/2009), LV - Ventspils Port, OJ C 62/2010

Investments in compliance with the market economy investor (MEI) principle

3. Would a market economy investor (MEI) have provided funds to the project expecting a remuneration on the capital invested under the same conditions as a public authority intends to do? If so, State aid appears not to be involved⁴.

The financing of port infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it is very difficult to establish that the State would participate in such financing as a typical market economy investor. Consequently, even if the Member State concerned argues that the criteria for the application of the MEI are complied with, we would still encourage it to (pre-)notify the measure to the Commission under Article 108(3) TFEU.

Project is entrusted as service of general economic interest

4. If a project and/or its operation is (1.) part of a service entrusted as a service of general economic interest (SGEI), (2.) the parameters of compensation have been clearly defined in advance, (3.) there is no compensation paid beyond the costs of providing the public service and a reasonable profit and (4.) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require, then state aid is not involved in the project⁵. Note that SGEI rules also foresee the possibility of compatible aid or de minimis aid.

Exemption from notification, but other requirements could apply

5. If the public funding of port infrastructure appears to fall under the State aid rules, it has to be established if the project is subject to the notification obligation under Article 108(3) TFEU. No State aid notification is necessary if:
- a) the measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g the submission of a summary information sheet or a transparency sheet) and compatibility rules⁶; support to port infrastructure could be compatible and exempted from notification for instance as regional aid⁷.
 - b) the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's **SGEI** Decision 2012/21/EU⁸. In particular, the SGEI Decision is only applicable to ports with no more than 300 000 passengers per year. In

⁴ See also point 2 of the General analytical grid.

⁵ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

⁶ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the Vademecum on Community law on State aid: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

⁷ see below footnote 11

⁸ Specific conditions apply, e.g. existence and duration of entrustment. 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.

addition, the SGEI Decision requires a clear entrustment act and a check that the amount of compensation does not go beyond the costs of providing the service of general economic interest and reasonable profit.

- c) If aid can be granted under an **existing State aid** scheme.

Need to notify for State aid clearance

- 6. If the measure constitutes State aid and the measure does not meet the conditions recalled in the point above, State aid clearance after a notification to the Commission is required. There is currently no specific State aid guidelines for ports. Therefore normally, State aid for port infrastructure can be declared compatible on the basis of:

- a. Direct assessment under Article 107 (3) of TFEU**

The assessment of the compatibility of an aid is fundamentally about balancing its negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest, as demonstrated in its case practice. In particular, the measure should comply with the following conditions: presence of a clearly defined objective of general interest, necessity and proportionality of the infrastructure to the objective, satisfactory medium-term prospects for use, access to the infrastructure in an equal and non-discriminatory manner, and limited affectation of trade relative to Union interest. In addition the aid itself should be necessary and proportional, and have an incentive effect.

- b. For ports linked with the provision of an SGEI: SGEI decision or SGEI framework**

To the extent that an exemption from the notification requirement under the SGEI Decision is not fulfilled, the SGEI framework provides information on when a public service compensation can be considered compatible State aid.

- c. The conditions of the Regional Aid Guidelines⁹ (RAG)**

Under the current RAG¹⁰, transport infrastructure can benefit from investment aid. This implies that Member States can, in principle, grant investment aid for port infrastructure under the RAG.

⁹ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹⁰ Member States can also apply the General Block Exemption Regulation (GBER) for the support of port infrastructure without the need to notify, albeit subject to other procedural requirements: submission of summary information sheet or a transparency sheet, if the eligible expenses exceed € 50 million but does not exceeds the notification threshold (see also point 7 of the general analytical grid).

INFRASTRUCTURE ANALYTICAL GRID N° 6 – RESEARCH DEVELOPMENT AND INNOVATION

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

Checklist – RDI infrastructures

The Commission distinguishes three types of public support involving RDI infrastructures:

- Support for the construction of the infrastructure (investment aid)
- Support for the operation of the infrastructure
- Support to the users of the infrastructure

This analytical grid concerns investment aid and it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

General principles:

1. RDI infrastructures are in practice often used for activities falling into the public policy remit² (e.g. education, independent research). Economic activities are often only the result of an efficient use of resources of research organisations, such as research equipment with possible dual use (non-economic and economic). This specificity of RDI infrastructure shall be kept in mind when analysing support for their construction and operation under State aid rules.

Existence of State aid is excluded in particular in the following instances:

Non-economic activities of research organisations

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See point 3.11 of the Community Framework for State aid for Research and Development and Innovation, OJ C 323 of 31.12.2006 (The "RDI Framework")

2. The construction of RDI infrastructure will not be considered as State aid if the infrastructure is owned /operated by a research organisation³ and such infrastructure is used exclusively for non-economic activities as defined in point 3.1.1 of the RDI Framework. 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, i.e. for activities falling within its public remit. Moreover, collaborative R&D and dissemination of research results are also regarded as non-economic activities in the circumstances set out in Point 3.1.1 of the RDI Framework. This is the case where i) the research activities are of independent nature, i.e. they are not influenced by economic interests of individual undertakings, (ii) the collaborative R&D results in the creation of general knowledge that will be widely disseminated and (iii) any intellectual property rights which result from such activities are fully allocated to the research organisation for its future non-economic use. Also public funding of research databases or any other infrastructure used for dissemination of research results with an open and non-discriminatory access to all users can be regarded as a non-economic activity.

Investments in compliance with the market economy investor (MEI) principle

3. It should be observed, however, that the financing of RDI infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it can be very difficult to establish that the state would participate in such financing as a market economy investor.

No need to notify for State aid clearance, but other requirements could apply

Ancillary activities

4. As stated in point 1 above, often RDI infrastructure is used by research organizations for the purpose of performing non-economic activities. However in order to use efficiently their resources, they may perform also some ancillary economic activities. This is the case, for instance, if the infrastructure capacity (e.g. equipment and laboratories) is occasionally rented out to industrial partners or if the research organisation uses in part its infrastructure to perform contract research on behalf of industry, provided that the following conditions are met:
 - a. inputs (such as land, materials, existing technology, equipment, instruments, and main services including construction, energy and water supplies as well as supportive services for project development and management) which are necessary for the construction of the research infrastructure are tendered out/procured in accordance with the EU and national

³ Within the meaning of Point 2.2 d) of the RDI Framework.

legislation respecting the principle of open, transparent and non-discriminatory procurement;

- b. all IPR rights generated within the implementation/construction phase of the publicly financed research infrastructure are fully allocated to the research organization;
- c. the research organisation provides an open and non-discriminatory access to the infrastructure;
- d. the research organisation charges market prices⁴ to the users (covering depreciation costs on pro-rata basis);
- e. the economic activities resulting from the use of the R&D infrastructure remain ancillary in nature, i.e. they are directly related and necessary for the operation of a research infrastructure or intrinsically linked with the main activity of public independent research. In general, ancillary activities consume the same inputs as the primary non-economic activities, e.g. material, equipment, labour, fixed capital. Ancillary economic activities of the research organisation have to remain limited in scope, e.g. capacity of the research infrastructure used for economic activity should not represent an appreciable part of the effectively used total capacity;
- f. the research organisation keeps separate accounts in order to prevent cross-subsidization of its economic activities;
- g. all profits from economic activities are reinvested into the non-economic activities, (the profits generated from the use of publicly financed infrastructure cannot be used for the expansion of economic activities of the research organisation which must remain ancillary in nature);
- h. Equipment and facilities used exclusively for economic activities are not eligible expenditures.

GBER, SGEI, existing aid scheme

5. See point 7 of the general analytical grid.

Need to notify for State aid clearance:

6. If the measure constitutes State aid and the measure does not meet the conditions recalled under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required. Normally, State aid for RDI infrastructure can be declared compatible on the basis of the RDI framework, and in particular:

a. RDI infrastructure as a part of cluster (cluster infrastructure)

⁴ Market price is defined as a price charged to a user for access to a similar research facility (market benchmark). Where no benchmark exists, the price has to cover the full costs pro rata and a reasonable margin.

If the infrastructure is part of an innovation cluster, the compatibility of the State aid for its construction can be assessed under the provisions of Point 5.8 "Aid for innovation clusters" of RDI Framework.

b. RDI infrastructure as a part of an R&D project

If the infrastructure is a part of an R&D project and cannot be block-exempted under Article 31 of GBER, the compatibility of the State aid for the construction can be assessed under the provisions of Point 5.1 of the RDI Framework.

INFRASTRUCTURE ANALYTICAL GRID N° 7 – WATER SERVICES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹⁰⁷.

General principles

1. Infrastructure directly necessary to suppliers of water services may be held not to be severable from the service provided downstream. For instance, the modernisation and extension of network pipelines, sewage and waste water treatment plants connected to households and business all concur to the provision of economic services to end users. The provision of water services (e.g. drinking/waste water) against payment of a price is an economic activity and, accordingly, the financing of infrastructure which is necessary to supply on a market may involve State aid.
2. **Existence of State aid**
3. For water services, the following grounds for exclusion of State aid seem to be particularly relevant:
 - a. **No potential effect on competition and trade - Is the market closed to competition (e.g. exclusive rights) and the beneficiary precluded from being active on other geographic or service/product markets?**

Whenever there is a market opened up to competition either by EU or national legislation or de facto by market developments, public financing can affect competition and therefore State aid rules are likely to apply.

For State aid to be excluded, the project should take place in markets closed to any competition¹⁰⁸. The assessment depends on national/regional/local rules on the Member State concerned. No potential affectation of competition and trade may occur if the beneficiary holds an exclusive right in the local water market and is not and cannot be active on other service markets (e.g. waste, energy) or geographic areas open to competition¹⁰⁹. If the recipient is active on other markets, the financing

¹⁰⁷ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

¹⁰⁸ In case N 588/2006 NL- Subsidy measure vital Gelderland (Decision of 4.4.2007), the Commission held that subsidy measures benefitting only drinking water companies (owned by local authorities) in the Dutch market, which is not open to competition, did not have the potential to affect competition and trade between Member States. However, measures open to other beneficiaries or concerning industrial water –which was a market open to competition- were found to have such potential.

¹⁰⁹ In case N 443/2003 BE- Grey Water Circuits (Decision of 2.6.2004) the Commission analysed investment aid to inter-municipal bodies for sewage plans and distribution networks aimed at providing "grey water" (i.e. purified waste water). Even if local markets were not subject to competition, the bodies in question could be qualified as "undertakings" and could, at least in theory, be active in other Member States. The planned subsidies were found to involve (compatible) State aid.

of infrastructure that falls within the reserved area may constitute State aid. Separate accounts could allow verification of possible cross subsidisation between different markets.

- b. No economic activity: Are the planned infrastructure and the activities of the beneficiary carried out outside any market for service provision, e.g. upstream of the service markets on which water services are provided against payment?**

The financing of infrastructure owned and operated by beneficiaries which are not active on any market does not involve State aid, because the beneficiaries are not undertakings performing an economic activity. This may concern infrastructure which is distant from the market on which water services are provided involving hydrological basins serving different local areas. Current case practice shows that such infrastructures, as part of the public policy remit (e.g. desalination plants, flood risk prevention,)are normally general infrastructure of a non-economic nature pertaining to the public policy remit of the Member State. Financing of such infrastructure may not fall under State aid rules, as the entities running the infrastructure do not qualify as undertakings and the operation of the infrastructure would not be an economic activity.

- c. No economic advantage - SGEI - Is the operation of the infrastructure assigned to a services provider as an SGEI?**

If this is the case and there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit and the SGEI has been either assigned through a public procurement procedure or the compensation does not exceed what an efficient company would require, then there is no State aid for the operator of the service.

- d. No economic advantage - Market Economy Investor: In case the beneficiary carries out an economic activity and there is a market open for competition, is the investment viable on market terms?**

If a commercial investor had also provided the necessary funding to the project under the same terms and conditions, then State aid is not involved in the project. This shall be demonstrated either by (1) significant co-investments of commercial operators with the public authorities and/or (2) by a presence of a sound business plan (validated by external experts) demonstrating that the investments provides an adequate rate of return for the investors – which is in line with rate of return expected by commercial operators for similar projects.

Exemption from State aid notification, but other requirements could apply

In two other instances, possible State aid may be deemed to be automatically compatible with EU rules and needs not to be notified:

- a. the General Block Exemption Regulation (GBER) applies to investment aid in water infrastructure allowing environmental protection in the absence or in excess of EU Standards¹¹⁰. It allows for an aid intensity of 35% of the eligible costs and other conditions apply.
- b. the provision of "universal" water services for households and business alike may be entrusted as SGEI. If the compensation per service of general economic interest is below EUR 15 million per year (average over the whole duration of the entrustment¹¹¹) it is covered by the new Commission SGEI Decision, if all other requirements are met as well.

* * *

¹¹⁰ GBER Art. 18, with possible aid intensities up to 35% of the eligible costs. EU obligations for Member States as to water management not applicable to individual undertakings are not deemed to be EU standards.

¹¹¹ 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 (water infrastructure may be depreciated for more than 10 years).



COMMISSIONE EUROPEA
DIREZIONE GENERALE
POLITICA REGIONALE
Italia, Malta, Portogallo, Spagna
Italia e Malta
Il Capo Unità

Bruxelles,
REGIO.G.3 PDA/ib D(2012)1280934

Ministero dello Sviluppo Economico
Dipartimento per lo Sviluppo e la
Coesione Economica
Direzione Generale Politica Regionale
Unitaria Comunitaria
c.a. Dr.ssa Maria Ludovica Agrò
Via Sicilia 162/C
00187 Roma

Autorità di Gestione dei Programmi
operativi Regionali e Nazionali 2007-
2013

Oggetto: Programmi Operativi Regionali e Nazionali 2007-2013.
Rispetto delle norme in materia di aiuti di Stato nella fase di attuazione
dei programmi operativi.

Con nota della DG COMP/RI/ydf- 0/2011*119603 del 10 novembre 2011, i servizi della Commissione hanno richiamato gli Stati membri al rispetto delle norme in materia di aiuti di Stato nella fase di attuazione dei Programmi operativi. Con la stessa nota, a seguito della sentenza del 24/03/2011 della Corte di Giustizia Europea sul caso T 455-/08 (Leipzig-Halle)¹ i servizi della Commissione hanno incoraggiato le Autorità nazionali a dare primaria attenzione alle problematiche in materia di aiuti di Stato sollevate dalla sentenza, in particolare nel caso di grandi progetti.

Al fine di aiutare le autorità di gestione dei programmi operativi a verificare se il sostegno fornito a progetti infrastrutturali contiene eventuali Aiuti di stato, la Direzione generale Politica regionale e la Direzione Generale Concorrenza hanno elaborato delle griglie analitiche che si trasmettono in allegato nella loro traduzione italiana.

È importante ricordare che la verifica circa l'eventuale esistenza di aiuti di stato dovrà essere effettuata per tutti progetti di tipo infrastrutturale indipendentemente dalla loro entità e non solo per i Grandi progetti.

¹ Casi T-455/08 Flughafen Leipzig-Halle GmbH e Mitteldeutsche Flughafen AG c/Commissione e T-443/08 Freistaat Sachsen e Land Sachsen-Anhalt c/Commissione.

Le griglie di valutazione allegate sono strutturate in modo tale da indicare innanzitutto i motivi per cui l'aiuto di Stato può non essere presente. Per i casi in cui può esservi aiuto di Stato, lo schema indica gli ambiti per i quali non è necessario notificare l'aiuto, dato che esistono esenzioni generiche dall'obbligo di notifica previste dal Regolamento generale di esenzione per categoria.

Per eventuali domande si invita a contattare i funzionari competenti o ad inviarle a regio-coordination@ec.europa.eu

Willebrordus Sluijters

Allegato 1 : [Griglia analitica](#)



EUROPEAN COMMISSION
Directorate-General
Regional and Urban Policy
Operational Efficiency and Central Europe
Czech Republic

Brussels,
DG REGIO F3/TKR/fe D(2012)1417823

Subject: Respect of State aid rules in the implementation process of Operational Programmes

Ref: Your letter 31275/2012-27, 19 September 2012

Dear Ms Letáčková,

Thank you for your letter of 17 September 2012 concerning the need to verify compliance with State aid rules for major infrastructure projects. In particular, you refer to our letter of 24 August 2012 by which we submitted so-called *analytical grids*.

In the spirit of the principle of subsidiarity, Member States are responsible for ensuring compliance with State aid rules. Since we are aware of the difficulties that may arise in carrying out the State aid assessment in relation to major infrastructure projects, we provided every Member State with analytical grids. The grids are supposed to help Member States and national authorities in their State aid assessment. There is no obligation for the Member States to make use of them. Also, the grids are not imposing or changing any obligations for the Member States.

Article 41(1) of Regulation (EC) No 1083/2006 provides that the Commission shall appraise a major project in the light, *inter alia*, of its consistency with other Union policies. Therefore, for the approval of a major project, it has to be verified whether the financing of infrastructure is consistent with State aid policy. In case national authorities consider that a project does not involve State aid which has to be notified to the Commission, they are invited to use the grids for explaining their findings.

Concerning your question as of when major projects should be inspected, I would like to refer to the Guidance Note on "Verification of Compliance with State aid rules in Infrastructure cases" that was presented at the COCOF meeting on 26 September 2012 and which has been submitted to you in preparation of the COCOF meeting. Based on this guidance, for projects for which a major project decision has already been adopted, the Commission services do not intend to systematically examine compliance with State aid rules. Therefore, it is not necessary that Member States provide additional

Olga Letáčková
National Coordination Authority
Ministry for Regional Development
Staroměstské náměstí 6
CZ - 110 15 Prague
Czech Republic

information about State aid compliance for those cases, unless the Commission services explicitly ask for such information.

For pending major project applications, it may be necessary to provide additional information to allow for a swift approval process. In this respect, Czech geographical desk of DG Regional and Urban Policy has already contacted the relevant managing authorities directly, clearly indicating the concerned major projects.

Please do not hesitate to contact me in case you would like to receive further guidance. Please also note that for any question on the analytical grids the services of both DG Regional and Urban Policy and of DG Competition are of course available.

Best regards

Jack Engwegen

21/11/2012

COCOF_12-0059-01



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY

GUIDANCE NOTE TO THE COCOF

VERIFICATION OF COMPLIANCE WITH STATE AID RULES IN INFRASTRUCTURE CASES

DISCLAIMER:

"This is a working document prepared by the Commission services. On the basis of the applicable EU law, it provides technical guidance to the attention of public authorities, practitioners, beneficiaries or potential beneficiaries, and other bodies involved in the monitoring, control or implementation of the Cohesion policy on how to interpret and apply the EU rules in this area. The aim of this document is to provide Commission services' explanations and interpretations of the said rules in order to facilitate the implementation of operational programmes and to encourage good practice(s). However this guidance note is without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission."

I. Introduction

According to the case law of the Court, the operation of an infrastructure to offer goods or services on a given market constitutes an economic activity, and is therefore subject to State aid control. As a consequence, the financing or the provision of infrastructures which can be exploited to offer goods or services on a given market can grant an advantage to the beneficiary, within the meaning of Article 107(1) TFEU, and therefore constitute a State aid.¹ Financing of such infrastructure therefore is in principle subject to State aid control.

However, until now, the Commission's services did not systematically carry out checks on a statement made by Member States when submitting major project applications for these types of infrastructure projects that no State aid was involved. The Commission will now systematically check this point and Member States should therefore provide information in cases where they consider that support to the infrastructure projects does not involve any State aid, explaining the basis for their conclusion.

The purpose of this note is to give guidance on the treatment of infrastructure projects under Cohesion policy rules.

II. Legal framework

Article 9(5) of Regulation (EC) No 1083/2006 stipulates that all operations financed by the Funds have to comply with the provisions of the Treaty and of acts adopted under it. This includes the provisions on State aid.

Article 60(a) of Regulation (EC) No 1083/2006 lays down that the Managing Authority is responsible for managing and implementing the operational programme, and in particular that it is responsible for "*ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable [EU] and national rules*".

Under Article 61 of Regulation 1083/2006, the certifying authority of a programme "*shall be responsible in particular for: (a) drawing up and submitting to the Commission certified statements of expenditure and applications for payment*";

As indicated in the template for certification of expenditure, the certifying authority must certify that "*the expenditure declared complies with the applicable Community and national rules and has been paid in respect of operations selected for funding in accordance with the criteria applicable to*

¹ Case C-82/01 *P. Aeroports de Paris v Commission* [2002] ECR I-9297, para 80; Case 41/83 *Italy v Commission* [1985] ECR 873, para 18; Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689.

the operational programme and the applicable Community and national rules, in particular State aid rules" (Annex X to Regulation (EC) No 1828/2006).

Pursuant to Article 108 (3) TFEU, State aid must not be put into effect before the Commission has taken a decision authorising such aid. Therefore, any State aid which is not exempted from an individual State aid notification requirement pursuant to Article 109 TFEU and the secondary law adopted on this basis or on the basis of Article 106 (3) TFEU² has to be notified and approved by the Commission before it can be put into effect.

III. Guidance on treatment of projects

Member States should take into account the case law of the Court in their assessment whether a State aid notification is required for an infrastructure project co-financed by the Funds. This applies both for major projects and for non-major projects.

For major projects, Member States have to indicate in the application form whether State aid is involved that has to be notified to the Commission. Member States are invited to use the analytical grids provided by the Commission's services to explain any finding that no State aid notification is required. If appropriate, Member States can also provide supporting documents underpinning their assessment. The use of the analytical grids is not compulsory but their use facilitates the examination by the Commission's services.

For major projects for which the application has already been submitted but for which the major project decision under the Structural funds rules is still pending, Member States are requested to re-examine if their initial assessment on the need for a State aid notification is valid and to inform the Commission of the result of the assessment in the light of this note. Where Member States consider that no State aid notification is required, they should provide the Commission with an explanation and, if appropriate, supporting documents. This information will be useful to help the Commission making the assessment required prior to the adoption of the major project decision.

The Commission does not intend to examine systematically compliance with the State aid rules of

² Currently, such exemptions exist under of Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings, OJ L 156, 28.6.1969, p. 8; Regulation (EC) 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; Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (*General block exemption Regulation*), and Commission Decision 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 (*SGEI decision*).

Note in addition, the 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 (*SGEI de minimis*) as well as Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (*de minimis regulation*).

major infrastructure projects covered by this note which have already been subject of a decision on the amount to be co-financed from the Funds before the date of this note. Also for non-major projects that concern such infrastructure and for which the national awarding decision was taken before the date of this note, there is no need for a systematic re-examination for the purposes of Cohesion policy. Nevertheless, for both types of projects the Commission will have to adopt a decision under State aid control rules following notification by a Member State for reasons of legal certainty or following a complaint by an interested party. This may also lead to a review of a major project decision.

IV. Consequences for the declaration of expenditure for major projects and non-major projects

Member States may certify the legality and regularity of expenditure related to infrastructure projects intended to be used for economic purposes if, according to the assessment of the Member State the State aid rules have been complied with in accordance with the case law on infrastructure financing and State aid. Certification of the expenditure may take place if the infrastructure project concerned either involves no State aid or the State aid is exempted from an individual notification requirement pursuant to Article 109 TFEU and the secondary law adopted on this basis or on the basis of Article 106 (3) TFEU, or if the State aid has been approved by the Commission pursuant to Article 108 (3) TFEU.

If expenditure is declared, the Member States assume the risk that in case of incompatible aid, the declared expenditure will have to be withdrawn from the payment claim submitted after the Commission decision on State aid is taken, and that they will have to recover the incompatible aid from the beneficiary.

Annex 6 – Overview of questions per Member States

MS	Questions	Topic	Analytical grid
Czech Rep	1	Procedural aspects	6
Czech Rep	2	Water and SGEI	7, 1
Czech Rep	3	General (cross border effect in culture)	1
Czech Rep	4	General (cross border : how many km?)	1
Czech Rep	5	General (healthcare facilities)	1
Czech Rep	1	Transport -road	3
Czech Rep	2	Transport/General (definition of commercial exploitation)-	1, 2
Czech Rep	3	Transport – railway, road, waterway examples of toll free	3
Czech Rep	4	Transport – SGEI in road and railway	3
ESTONIA	1	Water	7
ESTONIA	2	Water	7
FRANCE	1	General (tender)	1
FRANCE	2	General (local character)	1
FRANCE	3	General (link construction-operation)	1
FRANCE	4	Waste management and public transport	2, 5, 3
Germany	1-9	General / Procedures ETC projects	1
Germany	1-8	General - A new commission policy on infrastructure? Link with SAM	1
ITALY	1	General , procedural and transport (relevance of info submitted in the notification for major project)	1, 2
ITALY	2	General /transport – aid amount and funding gap ratio	1, 2
ITALY	3	General /transport – BP chemicals: can ERDF funding be partly aid, partly no aid?	1, 2
ITALY	4	General /transport –should cost for public remit activities be considered in cost benefit analysis?	1, 2
ITALY	5	General/transport – examples of public remit activities	1, 2
MALTA	1	Energy	
MALTA	2	Waste to energy	
MALTA	3	Maritime transport	5
MALTA	4	General (Owned entities and ministries)	1
POLAND	1	RDI	6
POLAND	2	General	1
POLAND	3	Genera	1
POLAND	4	General	1
POLAND	5	General	1
POLAND	6	RD	6
Slovak	1	Procedure (major project and possible	

Rep.		cumulation with other SA)	
Slovak Rep	2	General: calculation of SGEI compensation and calculation of grant under ERDF rules	1
Slovak Rep	3	General: change in ownership of infrastructure	1
Slovak Rep	4	Procedures: how long SA projects are monitored?	
Slovak Rep.	5	General : request of example of cases in SGEI and social housing and social service	1
Slovak Rep.	6	General: assessment in cultural cases	1, 4
Slovak Rep.	7	Procedure : re-examination of major projects not yet decided, but for which the application is under assessment in REGIO	
Slovak Rep.	8	Transport: will grids for other sectors be prepared?	1, 2
Slovak Rep.	9	General: treatment of profits generated by non- economic activities of public sector	1
Slovak Rep.	10	General /RDI - Use of equipment in PPP?	1, 6
Slovak Rep.	11		
Slovak Rep.	12		
Slovak Rep.	13		
UK	1	General (ownership of infrastructure)	1
UK	2	General /RDI (later commercial use)	1, 6
UK	3	General (local character)	1

Annex 7 – Overview of questions per topics

Analytical grid	Country	Questions
1	POLAND	2, 3, 4, 5
	MALTA	4
	FRANCE	1, 2, 3
	CZECH REP	2, 3, 4, 5 / 2
	UK	1, 2, 3
	ITALY	1, 2, 3, 4, 5
	GERMANY	1-9 / 1-8
	SLOVAK REP	1-10
2	FRANCE	4
	CZECH REP	2
	ITALY	1, 2, 3, 4, 5
	SLOVAK REP	8
3	FRANCE	4
	CZECH REP	1, 3, 4
4	SLOVAK REP	6
5	MALTA	3
	FRANCE	4
6	POLAND	1, 6
	CZECH REP	1
	UK	2
	SLOVAK REP	10
7	ESTONIA	1, 2
	CZECH REP	2
Procedural aspects	CZECH REP	1
	ITALY	1
	SLOVAK REP	1, 4, 7