

INFRASTRUCTURE ANALYTICAL GRID FOR WATER INFRASTRUCTURES

Disclaimer: this is a working document drafted by the services of the European Commission for information purposes and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts. In any case the services of the Directorate-General for Competition (DG COMP) are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

I. PRINCIPLES FOR WATER AND WASTE WATER INFRASTRUCTURE

- (1) This analytical grid covers the financing of the construction, maintenance and operation of comprehensive water supply and waste water networks¹. All those types of infrastructure will be qualified throughout this text as "water infrastructure".
- (2) Comprehensive water supply and waste water networks are typically a natural monopoly (see Part II.1 below). To the extent that they are used to provide services to end-users on equal and non-discriminatory terms and that private financing for their construction is insignificant, the public financing for their construction would typically not affect trade between Member States or distort competition.
- (3) Conversely, the operation of water infrastructure, for example by a local authority's in-house operator or a third party provider, constitutes in many instances an economic activity to which the State aid rules may apply. For instance, the provision of water services (e.g. for drinking/waste water) against payment of a price is typically an economic activity.
- (4) In practice, the **construction and the operation of water infrastructure may be bundled**². The financing of such bundled operations does not constitute State aid if for instance the construction relates to water infrastructure which is a natural monopoly (see Part II.1 below) and either (i) the bundled construction and operation of the water infrastructure is tendered out together (see Part II, Point 7.1 below), or (ii) the operation of that infrastructure is subject to a legal monopoly (see Part II.2 below).

II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

- (5) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator/*concessionaire* or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

¹ Such as the infrastructure for the distribution of water and the transportation of waste water, and the respective pipes.

² Bundling means that the same entity is in charge of the construction, maintenance and operation of the infrastructure.

1. No potential effect on trade or distortion of competition for the construction of water infrastructure: natural monopoly and insignificant private financing

- (6) Water networks typically constitute **natural monopolies** which are not in competition with other infrastructures of the same nature, as their duplication would be uneconomical and private financing for the construction of such infrastructure is normally insignificant. An effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time:
- (i) an infrastructure typically faces no direct competition,
 - (ii) private financing is insignificant in the sector and Member State concerned and
 - (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large³.
- (7) The construction of a comprehensive water supply and waste water network as such typically fulfils the conditions set out above and its financing therefore typically does not distort competition or affect trade between Member States. The condition relevant to insignificant private financing of water infrastructures has to be assessed at the level of the Member State concerned rather than at regional or local level.
- (8) In order for the entire public funding of a given water infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of the water infrastructure in the situation mentioned above cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the water infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner/developer does not engage in any other economic activity or – if the infrastructure owner/developer is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities⁴.

2. No potential distortion of competition for the operation of an infrastructure: legal monopoly

- (9) In many Member States in the water sector the responsibility to operate and manage water infrastructures is the responsibility of the State (i.e. of local or regional authorities), either through an administrative body or a public undertaking, often realised under a legal monopoly⁵. As the management and operation of water infrastructures in many Member States are carried out in local, geographically closed and separate markets that are not subject to competition, public financial support made available to public infrastructure managers/operators in such cases is not liable to affect trade between Member States.

³ See paragraph 211 of the Notice on the Notion of aid ("NoA").

⁴ See paragraph 212 of the NoA.

⁵ In its decision of 4 April 2007 in case N 588/2006 – The Netherlands – *Subsidy measure vital Gelderland*, OJ C 107, p. 1, 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.

- (10) However, the fact that public authorities assign the management and operation of a water network to an **in-house provider** does not as such exclude a possible distortion of competition. In order to exclude a distortion of competition in such a situation the following cumulative conditions have to be met:
- a. the management and operation of the infrastructure is subject to a **legal monopoly**⁶ (established in compliance with EU law, and in particular with the Treaty rules on competition⁷);
 - b. the legal monopoly not only excludes competition *on* the market, but also *for* the market, in that it excludes any possible competition to become the exclusive operator of the water infrastructure in question⁸;
 - c. the service is not in competition with other services; and
 - d. if the operator of the water infrastructure is active in another (geographical or product) market that is open to competition, **cross-subsidization has to be excluded**. This requires that **separate accounts** are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

3. No economic activity: water infrastructure not meant to be commercially exploited

- (11) The funding of water infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns for instance water infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** or that is not used for offering goods or services on a market. Such activities are not of an economic nature and consequently fall outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure.
- (12) This may concern infrastructure which is distant from the market on which water services are provided, involving hydrological basins serving different local areas. Current experience shows that such infrastructures, as part of the public tasks of the State (e.g. desalination plants, hydrological basins for flood risk prevention) are normally general infrastructure of a non-economic nature. Financing of such infrastructure typically does 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.

⁶ A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

⁷ Chapter 1 of Title VII of the Treaty.

⁸ Judgment of the General Court of 16 July 2014, *Germany v Commission*, T-295/12, ECLI:EU:T:2014:675, paragraph 158. For example, if a concession is awarded through a competitive procedure there is competition for the market.

4. Water infrastructure used for both economic and non-economic activities

- (13) If water infrastructure is used for both economic and non-economic activities, public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the entity's economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.

5. No potential effect on trade between Member States: purely local impact

- (14) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (15) Support granted under the *de minimis* Regulation is deemed not to constitute State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected⁹.
- (16) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case if the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, and if it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

6. No economic advantage at the level of the owner/developer

- (17) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of water infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation¹⁰; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations¹¹. Note, however, that the existence of consecutive State interventions concerning the same water infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹²

⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1

¹⁰ For more details, see paragraphs 86 to 88 of the NoA.

¹¹ For more information see in this respect chapter 4.2, and in particular paragraphs 101 to 105, of the NoA.

¹² See in this respect also paragraph 81 of the NoA.

7. No economic advantage at the level of the operator/concessionaire

7.1. *Selection of the operator/concessionaire through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle*

- (18) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (19) If the operation of a water infrastructure is assigned for a positive price to an operator/*concessionaire* on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU on public procurement¹³, an advantage can be excluded at this level, as it can be presumed that the agreement on the right to exploit the infrastructure is in line with market conditions.
- (20) If the operator/*concessionaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*concessionaire* are in line with normal market conditions¹⁴ through (i) benchmarking with comparable situations¹⁵, or (ii) on the basis of a generally-accepted standard assessment methodology¹⁶.

7.2. *The operation of the water infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria*

- (21) The existence of an economic advantage at the level of the operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require¹⁷.

¹³ As described in paragraphs 91-96 of the NoA.

¹⁴ See Commission decision of 15 June 2011 in case SA.31296 (N 322/2010) – Germany – *Individual Aid to Water Supply Company*, OJ C 1, 4.1.2013, p. 2.

¹⁵ See paragraphs 97 to 100 of the NoA.

¹⁶ See paragraphs 101 to 105 of the NoA.

¹⁷ See case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

7.3. SGEI de minimis Regulation¹⁸

- (22) Public funding granted for the provision of a SGEI not exceeding EUR 500.000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

8. No economic advantage at the level of the user

- (23) In case the user(s) are undertakings, and the operator of water infrastructure has received State aid or its resources constitute State resources, an economic advantage at the level of the user(s) can be excluded (i) if the water infrastructure is not dedicated for the use by a specific user, (ii) all users enjoy equal and non-discriminatory access to the infrastructure and (iii) the infrastructure is made available to the users on market terms¹⁹.

III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

- (24) State aid may be considered compatible with the internal market and can be granted without notification in the following instance:

1. General Block Exemption Regulation (GBER)²⁰

- (25) The measure is exempted from notification if it is granted in conformity with the conditions of the GBER. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid and total costs not exceeding EUR 20 million, can apply²¹. In particular, (i) the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis, (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procedure, and (iii) at the level of the owner, only the difference between the eligible costs and the operating profit of the investment can be financed. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that it refers to an investment which takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases the provisions of Chapter 1 of the GBER must also be complied with.

¹⁸ Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

¹⁹ See Commission decisions in cases SA.37757 (2013/N) – Italy – *Framework Law concerning the Bonification Consortia (Consorti di Bonifica)* and SA.35661 (2012/N) – Italy – *Contributions pour les travaux d'irrigation des Consortiums de bonification des Marches*; and of 1 October 2014 in case SA.36147 – Germany – *Infrastructure aid implemented by Germany in favour of Propapier*, OJ L 89, 1.4.2015, p. 72.

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

²¹ Investment aid for the construction or upgrade of dedicated infrastructure is not exempted under Article 56 GBER as per Article 56(7) of the GBER. In its decision of 1 October 2014 in case SA.36147 – Germany – *Infrastructure aid implemented by Germany in favour of Propapier*, OJ L 89, 1.4.2015, p. 72, the Commission held that a wastewater plant that was used by several investors and open to all users on a non-discriminatory basis did not constitute a dedicated infrastructure although it was built in an industrial park that mainly served the needs of one company.

2. Service of General Economic Interest: SGEI Decision²²

- (26) The provision of "universal" water services for households and businesses alike may be entrusted as an SGEI. If the compensation per service of general economic interest is below EUR 15 million per year (on average over the whole duration of the entrustment²³) it will be covered by **SGEI Decision 2012/21/EU**²⁴, provided that the other requirements of that Decision are also met.

IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

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

1. State aid for water infrastructure under Article 107(3)(c) TFEU

- (28) The compatibility of aid to water and waste water infrastructure is normally assessed on the basis of Article 107(3)(c) TFEU²⁵. That provision constitutes the legal basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, a measure should comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principles
- (29) Regarding the possible advantage for end-users in case of waste water infrastructure, the **polluter pays principle**²⁶ should be taken into account when determining user fees (if users are undertakings)²⁷.
- (30) More specifically, State aid for the financing of a water infrastructure may be compatible with the internal market, for example if it contributes to achieve a higher level of

²² See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

²³ 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).

²⁴ See 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, OJ L7, 11.01.2012, p. 3.

²⁵ See Commission decisions of 2 June 2004 in case N 443/2003 – Belgium – *Eaux de deuxième circuit*, OJ C 21, 28.1.2006, p. 4; of 5 June 2008 in case N 670/2007– Czech Republic – *Investment aid for the reduction of industrial emissions into water*, OJ C 184, 22.7.2008, p. 3; and of 11 December 2008 in case N 445/2008 – Austria – *Boxmark Leather – Grant for waste water filtering unit*, OJ C 46, 25.2.2009, p. 1.

²⁶ As defined in paragraph 19(28) of the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) as the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

²⁷ Concerning the determination of user fees, for the public funding of open infrastructures not dedicated to any specific user(s) the Commission considers that the applicable conditions are satisfied where their users incrementally contribute, from an ex ante point of view, to the profitability of the project/operator.

environmental protection (for going beyond Union standards), in compliance with the provisions of the Guidelines on State aid for environmental protection and energy²⁸.

2. Service of General Economic interest: SGEI Framework²⁹

- (31) The compatibility of State aid for water infrastructure which is necessary for the provision of a genuine SGEI may be assessed on the basis of the SGEI Framework³⁰. Under the SGEI Framework, which is based on article 106(2) of the Treaty, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with Directive 2006/111/EC³¹, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision of 20 December on the application of Article 106\(2\) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest](#), OJ L7, 11.01.2012, p.3.
- [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.
- [Commission Guidelines on State aid for environmental protection and energy 2014-2020](#) (2014/C 200/01)
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.

²⁸ See paragraph 18 of the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01)

²⁹ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15

³⁰ Communication from the Commission - European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

³¹ Directive 2006/111/EC on the 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.

Indicative list of Commission decisions taken under State aid rules concerning construction of water infrastructure:

Instances in which the existence of State aid is excluded:

- C 15/2005 (ex NN 34/2005) – The Netherlands – Aid toward VAOP Oud Papier:
http://ec.europa.eu/competition/state_aid/cases/199244/199244_580074_56_1.pdf
- N 559/2008 – Italy – Framework Law concerning the Bonification Consortia (*Consorti di Bonifica*):
http://ec.europa.eu/competition/state_aid/cases/228289/228289_1006841_20_1.pdf
- SA.31296 (N 322/2010) – Germany – Individual Aid to Water Supply Company (DE):
http://ec.europa.eu/competition/state_aid/cases/237041/237041_1243261_83_3.pdf
- SA.35665 – Italy – Contributions pour les travaux d'irrigation des Consortiums de bonification des Marches:
http://ec.europa.eu/competition/state_aid/cases/246689/246689_1403398_64_2.pdf
- SA.36147 – Germany – Alleged infrastructure aid for Propapier PM2:
http://ec.europa.eu/competition/state_aid/cases/238104/238104_1170011_46_2.pdf
http://ec.europa.eu/competition/state_aid/cases/238104/238104_1604031_278_4.pdf
- SA.37757 (2013/N) – Italy – Framework Law concerning the Bonification Consortia (*Consorti di Bonifica*):
http://ec.europa.eu/competition/state_aid/cases/250754/250754_1554917_76_2.pdf

Instances in which the measure constitutes compatible State aid:

- N 548/99 – Austria – Aid to wastewater treatment measure:
http://ec.europa.eu/competition/state_aid/cases/137995/137995_1153590_1_2.pdf
- C 24/2000 – Austria – A-VOEST Alpine Stahl Linz GmbH - Investment aid for water purification facilities:
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0669&from=EN>
- N 443/2003 – Belgique – Eaux de deuxième circuit:
http://ec.europa.eu/competition/state_aid/cases/137495/137495_483065_34_2.pdf
- N 588/2006 – The Netherlands – Subsidy measure vital Gelderland:
http://ec.europa.eu/competition/state_aid/cases/216718/216718_674315_9_1.pdf
- N 812/2006 – Germany – Investment programme "Wastewater NRW":
http://ec.europa.eu/competition/state_aid/cases/217797/217797_678700_7_1.pdf
- N 670/2007 – Czech Republic – Investment aid for the reduction of industrial emissions into water:
http://ec.europa.eu/competition/state_aid/cases/222898/222898_827818_22_1.pdf
- N 445/2008 – Austria – Boxmark Leather – Grant for waste water filtering unit:
http://ec.europa.eu/competition/state_aid/cases/227331/227331_920262_30_1.pdf

INFRASTRUCTURE ANALYTICAL GRID FOR ROADS, BRIDGES, TUNNELS and INLAND WATERWAYS

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I. PRINCIPLES FOR ROADS, BRIDGES, TUNNELS AND INLAND WATERWAYS

- (1) This analytical grid covers the financing of the construction, maintenance and operation of roads, bridges, tunnels and inland waterways¹. For ease of reference, this text will refer to "road infrastructure" and "roads"; but the same principles apply in relation to bridges, tunnels and inland waterways.
- (2) Roads available for free public use are general infrastructure and their public funding does not fall under State aid rules, unless they have been specifically designed to benefit one or more specific users.
- (3) General road infrastructure is a typical case of natural monopoly which is made available to potential users on equal and non-discriminatory terms, in a sector where private financing for the construction of infrastructures is insignificant. In that case, the **financing of the construction of road infrastructure would typically not affect trade between Member States or distort competition.**
- (4) Conversely, **the operation of a toll road constitutes in many instances an economic activity** for which State aid rules may apply.
- (5) In practice, **the construction and the operation of road infrastructure may be bundled**². The financing of such bundled operations does not constitute State aid if for instance the construction relates to road infrastructure which is a natural monopoly (see Part II. 1 below) and either (i) the bundled construction and operation of the road infrastructure is tendered out together (see Part II, Point 6.1 below), or (ii) the operation of that infrastructure is subject to a legal monopoly (see Part II.2 below)

II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

- (6) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator/*concessionaire* or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

¹ For example, rivers and canals.

² Bundling means that the same entity is in charge of the construction, maintenance and operation of the infrastructure.

1. No potential effect on trade or distortion of competition for the construction of road infrastructure: natural monopoly and insignificant private financing

- (7) Road networks typically constitute natural monopolies which are not in competition with other infrastructure of the same nature, as their duplication would be uneconomical and private financing for the construction of such infrastructure is normally insignificant.
- (8) An effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time:
- (i) an infrastructure typically faces no direct competition,
 - (ii) private financing is insignificant in the sector and Member State concerned and
 - (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large³.
- (9) The construction as such of road infrastructure, including toll-roads, typically fulfils the conditions set out above and its financing therefore typically does not distort competition or affect trade between Member States⁴. The condition relevant to insignificant private financing of road infrastructures, including toll-roads, has to be assessed at the level of the Member State concerned rather than at regional or local level.
- (10) In order for the entire public funding of a given road infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of road infrastructure in the situation mentioned above can not be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the road infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner/developer does not engage in any other economic activity or – if the infrastructure owner/developer is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities⁵.

2. No potential distortion of competition for the operation of an infrastructure: legal monopoly

- (11) For road infrastructure that is commercially exploited the question can arise whether State aid is present at the level of the operator of the road infrastructure.
- (12) In many Member States in the road sector the responsibility to operate and manage the main national road infrastructure network is the responsibility of the State, either through an administrative body or a public undertaking, often realised under a legal monopoly.

³ See paragraph 211 of the Notice on the Notion of aid ("NoA").

⁴ An atypical situation in which State aid cannot be excluded would, for example, be a bridge or tunnel between two Member States, offering a largely substitutable service to the service offered by a commercial ferry operators or the construction of a toll-road in direct competition with another toll-road (for example two toll roads running in parallel to each other, thereby offering largely substitutable services).

⁵ See paragraph 212 of the NoA.

- (13) However, the fact that the authorities assign the management and operation of a toll-road to an **in-house provider** does not as such exclude a possible distortion of competition. In order to exclude a distortion of competition in such a situation the following cumulative conditions have to be met:
- a. the management and operation of the infrastructure is subject to a **legal monopoly**⁶ (established in compliance with EU law, and in particular with the Treaty rules on competition⁷);
 - b. the legal monopoly not only excludes competition *on* the market, but also *for* the market⁸, in that it excludes any possible competition to become the exclusive operator of the toll-road in question;
 - c. the service is not in competition with other services⁹; and
 - d. if the operator of the road infrastructure is active in another (geographical or product) market that is open to competition, **cross-subsidization has to be excluded**. This requires that **separate accounts** are used, costs and revenues are allocated in an appropriate way and public funding provided for the road service subject to the legal monopoly cannot benefit other activities.

3. No economic activity: road infrastructure not meant to be commercially exploited

- (14) The funding of road infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns non-tolled roads that are available for free to all users, as they do not entail an economic activity. Tolls are understood in the present analytical grid as payments for the use of a specific road infrastructure.
- (15) It also concerns road infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** (for instance, police, customs infrastructure¹⁰, traffic control and safety, and development and revitalisation of public land¹¹). Such activities are not of an economic nature and consequently fall outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure.

⁶ A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

⁷ Chapter 1 of Title VII of the Treaty.

⁸ Judgment of the General Court of 16 July 2014 *Germany v Commission* T-295/12, ECLI:EU:T:2014:675, paragraph 158. For example, if a concession is awarded through a competitive procedure there is competition for the market.

⁹ Different modes of transport may offer different types of services that are not substitutable. In such a case, intermodal competition is not relevant.

¹⁰ For example, border and customs infrastructure in a toll-road.

¹¹ Commission Decision of 27.03.2014 in case SA.36346 – Germany – *GRW land development scheme for industrial and commercial use*, OJ C 141, 9.05.2014, p.1. The decision is relevant for roads in what concerns ensuring public terrain ready to build upon and connected to transport networks.

4. No potential effect on trade between Member States: purely local impact

- (16) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (17) Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected¹².
- (18) There may be cases of support measures such as support for a dedicated or commercially exploited road infrastructure that has a **purely local impact** and consequently no effect on trade between Member States. This is the case when the beneficiary supplies services to a limited area within a Member State, is unlikely to attract customers from other Member States, and it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

5. No economic advantage at the level of the owner/developer

- (19) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of road infrastructure, then State aid is not involved. This should be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation¹³; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations¹⁴. Note, however, that the existence of consecutive State interventions concerning the same road infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹⁵

6. No economic advantage at the level of the operator/concessionaire

6.1 Selection of the operator/concessionaire through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle

- (20) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (21) If the operation of a road infrastructure is assigned for a positive price to an operator/*concessionaire* on the basis of a competitive, transparent, non-discriminatory and

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

¹³ For more details, see paragraphs 86 to 88 of the NoA.

¹⁴ For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

¹⁵ See in this respect also paragraph 81 of the NoA.

unconditional tender in line with the principles of the TFEU on public procurement¹⁶, an advantage can be excluded at the level of the operator, as it can be presumed that the agreement on the right to exploit the infrastructure is in line with market conditions. Several decisions have, in the past, been adopted on the basis of the above principles¹⁷.

- (22) A change in the conditions of a concession implying a loss of revenues to the concession holders may, in certain circumstances, lead to financial compensation by the State¹⁸.
- (23) If the operator/*concessionaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*concessionaire* are in line with normal market conditions through (i) benchmarking, i.e. in the light of the terms and conditions, under which similar infrastructure is operated by private investors in comparable situations¹⁹, or (ii) on the basis of a generally-accepted standard assessment methodology²⁰.

6.2 The operation of the road infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

- (24) The existence of an economic advantage at the level of the road operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require²¹. Please note that in the existing Commission practice in the sector the financing of road infrastructure has been assessed as compatible aid on the basis of the SGEI Framework (see below paras. 33-35), since the Altmark criteria were not met and an advantage at the level of the road operator could not be excluded.

¹⁶ As described in paragraphs 91-96 of the NoA.

¹⁷ See Commission decision in case N 508/2007 – Greece – *Ionia Odos Motorway*, OJ C 298, 11.12.2007, p. 4. See also the list of similar cases at the end of this grid.

¹⁸ See for instance Commission Decision of 4.12.2013 in case SA.29584 - Poland - Shadow toll compensation to SAM S.A. – A4 motorway (Katowice-Krakow). In that case, key conditions were that the origin of the change leading to the loss of revenues for the concessionaire would lie with the State and that the measure would not overcompensate the concessionaire as compared to the loss endured. In the above circumstances the measure did not constitute aid within the meaning of Art. 107(1) TFEU

¹⁹ See paragraphs 97 to 100 of the NoA.

²⁰ See paragraphs 101 to 105 of the NoA.

²¹ See case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

6.3 SGEI de minimis Regulation²²

- (25) Pursuant to Article 2 of the SGEI *de minimis* Regulation, public funding granted for the provision of an SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

7. No economic advantage at the level of the user

- (26) If the operator of road infrastructure received State aid or if its resources constitute State resources, a selective advantage at the level of the user(s) can be excluded if: (i) the road infrastructure is not dedicated to a specific user²³ and (ii) all users enjoy equal and non-discriminatory access to the infrastructure.

III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

- (27) State aid may be considered compatible with the internal market and can be granted without notification in the following instance:

1. General Block Exemption Regulation (GBER)²⁴

- (28) The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. Article 56 of the GBER allowing investment aid for local infrastructures up to EUR 10 million of aid and total costs not exceeding EUR 20 million, can apply. In particular, (i) the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis, (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procedure, and (iii) at the level of the owner, only the difference between the eligible costs and the operating profit of the investment can be financed. The provisions of Chapter 1 of the GBER must also be complied with.

IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

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

1. State aid for road infrastructure under Article 107(3)(c) TFEU

- (30) The compatibility of aid to motorways is normally assessed on the basis of Article 107(3)(c) TFEU. That provision constitutes the basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii)

²² Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

²³ See for instance Commission Decision of 1.10.2014 in case SA. 36147 – Germany – *Alleged infrastructure aid for Propapier*, OJ L 89, 1.06.2015, p.72.

²⁴ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principle.

- (31) The case practice on compatibility relates exclusively to prolongation or changes of the financing conditions of existing concessions. A scenario covered by several decisions dealt with changes following the occurrence of unforeseen crisis circumstances²⁵.
- (32) Under a series of conditions, including an own contribution of the beneficiary, State aid provided to rebalance the financial situation and continue the construction and operation by the existing concessionaire has been considered compatible with the internal market²⁶.

2. Service of General Economic Interest: SGEI Framework²⁷

- (33) The compatibility of State aid for road infrastructure which is necessary for the provision of a genuine SGEI may be assessed²⁸ on the basis of the SGEI Framework²⁹.
- (34) Several decisions³⁰ have been adopted applying this framework in the case of the prolongation/merging of concessions. This could happen, for instance, in a situation in which a Member State may want to conduct big investments in road infrastructures while ensuring that citizens are not burdened with excessive increases in toll tariffs. The case practice relates typically to the financing – by means of prolonged concessions – of new works, to be added to the existing concession, e.g. for safety and/or environmental reasons.
- (35) Under the SGEI Framework, which is based on article 106(2) TFEU, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with the Directive 2006/111/EC³¹, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation, and (vi) transparency.

²⁵ See for instance Commission Decision of 27.10.2014 in case SA. 39224 - Greece - *Reset of Greek Motorway concession projects - Moreas Motorway*, OJ C 460, 19.12.2014, p. 1.

²⁶ See for instance Commission Decision of 27.10.2014 in case SA. 39224 - Greece - *Reset of Greek Motorway concession projects - Moreas Motorway*.

²⁷ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

²⁸ See for instance Commission Decision of 11.12.2015 in case SA.42783 (2015/N) – France – *Fusion de la concession du tunnel Maurice-Lemaire et de la concession autoroutière de la société des Autoroutes Paris-Rhin-RhôneSA*, OJ C 104, 18.03.2016, p.1

²⁹ Communication from the Commission - European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

³⁰ See for instance Commission Decision of 11.12.2015 in case SA.42783 (2015/N) – France – *Fusion de la concession du tunnel Maurice-Lemaire et de la concession autoroutière de la société des Autoroutes Paris-Rhin-Rhône*, op.cit. and Commission Decision of 28.10.2014 in case SA.38271 *Plan de relance autoroutier*, OJ C 63, 20.02.2015, p.1.

³¹ Directive 2006/111/EC on the 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.

3. State aid for road infrastructure projects of common European interest under Article 107(3)(b) TFEU

- (36) This type of cases relate to State aid for the financing of a road infrastructure of European significance. Typical examples are the cases relating to the Øresund and Fehmarn Belt Fixed Link projects³².
- (37) The principles set out in the Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (IPCEI Communication) of 20 June 2014³³ may be applicable to this kind of cases.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.
- [Communication from the Commission on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest](#), OJ C 188 of 20.06.2014, p. 4.

Indicative list of Commission decisions taken under State aid rules concerning road, bridges, tunnels and inland waterways infrastructure:

Instances in which the existence of State aid is excluded:

- N 565/2007 – Greece – Central Greece Motorway (E65) Project:
http://ec.europa.eu/competition/state_aid/cases/222214/222214_1516846_29_2.pdf
- N 566/2007 – Greece – Korinthos – Tripoli – Kalamata Motorway and Lefktro – Sparti Branch Project:
http://ec.europa.eu/competition/state_aid/cases/222215/222215_1516851_31_2.pdf
- N 633/2007 – Greece – Public financing of the motorway sections between Maliakos and Kleidi (part of Pathe programme), between Tembi and Skotina, and between Evangelismos and Leptokaria:
http://ec.europa.eu/competition/state_aid/cases/222714/222714_1516850_29_2.pdf

³² See Commission Decision of 15.10.2014 in case State aids SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark, State aid SA.36662 (2014/NN) – Sweden - *Aid granted to Øresundsbro Konsortiet*, and Commission Decision of 23.07.2015 in case SA.39078 (2014/N) – Denmark - *Financing of the Fehmarn Belt Fixed Link project*.

³³ OJ C 188 of 20.06.2014, p. 4.

- N 45/2008 – Greece – Elefsina - Korinthos – Patras – Pirgos – Tsakona Motorway:
http://ec.europa.eu/competition/state_aid/cases/223891/223891_836956_27_2.pdf (in Greek)
- SA.29584 (ex N 541/2010) – Poland – Shadow toll compensation to Stalexport Autostrada Malopolska S.A. (SAM S.A.) – A4 motorway (Katowice – Krakow):
http://ec.europa.eu/competition/state_aid/cases/238432/238432_1510631_87_2.pdf
- SA.36346 – Germany – GRW land development scheme for industrial and commercial use:
http://ec.europa.eu/competition/state_aid/cases/248011/248011_1534293_255_2.pdf
- SA.36147 – Germany – Alleged infrastructure aid for Propapier:
http://ec.europa.eu/competition/state_aid/cases/238104/238104_1604031_278_4.pdf
- SA.36019 – Belgium - Road infrastructure measures in the vicinity of a real estate project – Uplace:
http://ec.europa.eu/competition/state_aid/cases/255752/255752_1719143_191_4.pdf

Instances in which the measure constitutes compatible State aid:

State aid compatible under Article 107(3)(c) TFEU:

- N 462/2009 – Poland – Aid for the construction and operation of the A2 Motorway, Świecko – Nowy Tomyśl section:
http://ec.europa.eu/competition/state_aid/cases/232531/232531_1098774_65_1.pdf
- SA.36877 (2013/N) – Greece – Reset of Greek Motorway concession projects - Aegean Motorway S.A.:
http://ec.europa.eu/competition/state_aid/cases/249077/249077_1505397_131_2.pdf
- SA.36878 (2013/N) – Greece – Reset of Greek Motorway concession projects – Olympia Odos S.A.:
http://ec.europa.eu/competition/state_aid/cases/249078/249078_1505401_188_2.pdf
- SA.36893 (2013/N) – Greece – Reset of Greek Motorway concession projects – Central Motorway (E65):
http://ec.europa.eu/competition/state_aid/cases/249109/249109_1505405_154_2.pdf
- SA.36894 (2013/N) – Reset of Greek Motorway concession projects - Ionia Odos S.A. – Greece:
http://ec.europa.eu/competition/state_aid/cases/249110/249110_1505406_135_2.pdf
- SA.39224 – Greece – Reset of Greek Motorway Concession Projects – Moreas Motorway:
http://ec.europa.eu/competition/state_aid/cases/253892/253892_1604696_118_2.pdf

State Aid compatible on the basis of the SGEI framework:

- SA.38271 – France – *Plan de relance autoroutier*:
http://ec.europa.eu/competition/state_aid/cases/252816/252816_1614582_186_2.pdf
- SA.42783 (2015/N) – France – *Fusion de la concession du tunnel Maurice-Lemaire et de la concession autoroutière de la société des Autoroutes Paris-Rhin-Rhône SA*:
http://ec.europa.eu/competition/state_aid/cases/259890/259890_1734329_163_5.pdf

State aid compatible under Article 107(3)(b) TFEU:

- State aid cases SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark, State aid SA.36662 (2014/NN) – Sweden - Aid granted to Øresundsbros Konsortiet
http://ec.europa.eu/competition/state_aid/cases/254460/254460_1594710_203_2.pdf
- SA.39078 (2014/N) – Denmark - Financing of the Fehmarn Belt Fixed Link project:
http://ec.europa.eu/competition/state_aid/cases/256101/256101_1677572_164_2.pdf

INFRASTRUCTURE ANALYTICAL GRID FOR RAILWAY, METRO and LOCAL TRANSPORT INFRASTRUCTURE

Disclaimer: this is a working document drafted by the services of the European Commission for information purposes and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts. In any case the services of the Directorate-General for Competition (DG COMP) are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

I. PRINCIPLES FOR RAILWAY, METRO AND LOCAL TRANSPORT INFRASTRUCTURE

- (1) This analytical grid covers the financing of the construction, maintenance and operation of railway¹, as well as metro and local transport infrastructure². For ease of reference, those types of infrastructure will be qualified throughout this text as "rail infrastructure".
- (2) Rail infrastructure is a typical case of natural monopoly (see Part II.1 below). To the extent that it is made available to potential users on equal and non-discriminatory terms, and that the private financing for its construction is insignificant, the public financing of the construction of rail infrastructure would typically not affect trade between Member States or distort competition. The same reasoning applies to investments in railway bridges, railway tunnels, which are considered to be part of railway infrastructure, as well as local transport infrastructure³.
- (3) Conversely, the operation of rail infrastructure, for example by a local authority's in-house transport operator or a third party transport provider, constitutes in many instances an economic activity to which the State aid rules may apply.
- (4) In practice, the **construction and operation of rail infrastructure are often bundled**⁴. The financing of such bundled operations does not constitute State aid rules if for instance the construction refers to a rail infrastructure which is a natural monopoly (see Part II.1 below) and either (i) the bundled construction and operation of the rail infrastructure is tendered out together (see Part II, Point 7.1 below), or (ii) the operation of that rail infrastructure is subject to a legal monopoly (see Part II.2 below).

II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

- (5) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These

¹ Railway Infrastructure is defined in Annex 1 of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), JO L 343, 14.12.2012, p. 32.

² Such as tracks for trams or underground public transport and train stations.

³ See paragraph 219 of the Notice on the Notion of aid ("NoA").

⁴ Bundling means that the same entity is in charge of the construction, maintenance and operation of the infrastructure.

instances may apply to the owner/developer, operator/*concessionaire* or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

1. No potential effect on trade or distortion of competition for the construction of rail infrastructure: natural monopoly and insignificant private financing

- (6) Rail networks typically constitute **natural monopolies** which are not in competition with other infrastructure of the same nature, as their duplication would be uneconomical and private financing for the construction of such infrastructure is normally insignificant.
- (7) An effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time:
 - (i) an infrastructure typically faces no direct competition,
 - (ii) private financing is insignificant in the sector and Member State concerned and
 - (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large⁵.
- (8) The construction as such of rail infrastructure typically fulfils the conditions set out above and its financing therefore typically does not distort competition or affect trade between Member States. The condition relevant to insignificant private financing of rail infrastructure has to be assessed at the level of the Member State concerned rather than at regional or local level.
- (9) In order for the entire public funding of a given rail infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of rail infrastructure cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner/developer does not engage in any other economic activity or – if the infrastructure owner/developer is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities⁶.

2. No potential distortion of competition for the operation of an infrastructure: legal monopoly

- (10) In the railway sector the responsibility to operate and manage the main national railway network is typically the responsibility of the State, either through an administrative body or by a public undertaking, in most cases under a legal monopoly⁷. As within the EU the management and operation of the main railway infrastructure networks are generally carried out in national, geographically closed and separate markets that are not subject to

⁵ See paragraph 211 of the NoA.

⁶ See paragraph 212 of the NoA.

⁷ See Commission decisions of 2 May 2013 in case SA.35948 - Czech Republic - *Prolongation of the interoperability scheme in railway transport*, OJ C 306, 22.10.2013, p. 7 and of 17 July 2002 in case N 356/2002 - United Kingdom - *Railtrack plc/Network Rail*, OJ C 232, 28.9.2002, p. 2.

competition, public financial support made available to the operator⁸ is generally not liable to affect trade between Member States.

- (11) However, the fact that public authorities assign the management and operation of rail infrastructure to an **in-house provider** does not as such exclude a possible distortion of competition. In order to exclude a distortion of competition in such a situation the following cumulative conditions have to be met:
- a. the management and operation of the infrastructure is subject to a **legal monopoly**⁹ (established in compliance with EU law, and in particular with the Treaty rules on competition¹⁰);
 - b. the legal monopoly not only excludes competition *on* the market, but also *for* the market, in that it excludes any possible competition to become the exclusive operator of the rail infrastructure in question;
 - c. the service is not in competition with other services¹¹; and
 - d. if the operator of the rail infrastructure is active in another (geographical or product) market that is open to competition, **cross-subsidization has to be excluded**. This requires that **separate accounts** are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

3. No economic activity: rail infrastructure not meant to be commercially exploited

- (12) The funding of rail infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns, for instance, rail infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** (e.g. infrastructure for safety, security, police or customs activities) or that is not used for offering goods or services on a market. Such activities are not of an economic nature and consequently fall outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure.
- (13) In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers in the rail sector, that entity acts as an undertaking in relation to that activity. In contrast, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the scope of State aid rules.

⁸ In the railway sector, the operator is generally referred to as "infrastructure manager".

⁹ A legal monopoly is understood to exist where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

¹⁰ Chapter 1 of Title VII of the Treaty.

¹¹ Different modes of transport may offer different types of services that are not substitutable. In such a case, intermodal competition is not relevant.

4. Rail infrastructure used for both economic and non-economic activities

- (14) If rail **infrastructure is used for both economic and non-economic activities** (for example customs areas in intermodal platforms, which are typically infrastructures used to perform an economic activity), public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities **cannot be used to cross-subsidize the entity's economic activities**. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.

5. No potential effect on trade between Member States: purely local impact

- (15) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (16) Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected¹².
- (17) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case if the beneficiary supplies goods or services to a limited area within one Member State and is unlikely to attract customers from other Member States and if it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

6. No economic advantage at the level of the owner/developer

- (18) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of rail infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation¹³; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations¹⁴. Note, however, that the existence of consecutive State interventions concerning the same port infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹⁵

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

¹³ For more details, see paragraphs 86 to 88 of the NoA.

¹⁴ For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

¹⁵ See in this respect also paragraph 81 of the NoA.

- (19) The financing of this type of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore in such circumstances typically not be undertaken on the basis of purely economic considerations. In such cases, Member States would have to provide a convincing explanation why the criteria for the application of the MEOP are complied with.

7. No economic advantage at the level of the operator/concessionaire¹⁶

7.1. *Selection of the operator/concessionaire through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle*

- (20) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (21) If the operation of a rail infrastructure is assigned for a positive price to an operator/*concessionaire* on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU on public procurement¹⁷, an advantage can be excluded at the level of the operator, as it can be presumed that the fee it pays for the right to exploit the infrastructure is in line with market conditions.
- (22) If the operator/*concessionaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*concessionaire* are in line with normal market conditions through (i) benchmarking with comparable situations¹⁸, or (ii) on the basis of a generally-accepted standard assessment methodology¹⁹.

7.2. *The operation of the rail infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria*

- (23) The existence of an economic advantage at the level of the operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the

¹⁶ In the railway sector, the operator is generally referred to as "infrastructure manager".

¹⁷ As described in paragraphs 91-96 of the NoA.

¹⁸ See paragraphs 97 to 100 of the NoA.

¹⁹ See paragraphs 101 to 105 of the NoA.

provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require²⁰.

7.3. SGEI de minimis Regulation²¹

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

8. No economic advantage at the level of the user

- (25) As regards railway infrastructure in the meaning of Directive 2012/34/EU²², used by railway undertakings²³, where its use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation, the Commission normally considers that public financing of the infrastructure does not constitute State aid to railway undertakings²⁴. It is reminded that Directive 2012/34/EU requires a certain level of independence between railway undertakings, which provide rail transport services to passengers, and the operator of the railway infrastructure²⁵.

III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

- (26) State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

1. Public service obligation (PSO): Regulation 1370/2007

- (27) Regulation 1370/2007 principally applies to the provision of transport services. There may be instances (e.g. in the metro and local transport sectors) where the construction and maintenance of the infrastructure necessary for the provision of those services may be part

²⁰ See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

²¹ Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

²² Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), JO L 343, 14.12.2012, p. 32.

²³ In the meaning of the Communication from the Commission "Community guidelines on State aid for railway undertakings". OJ C 184 of 22.7.2008, p.13.

²⁴ Point 25 of the "Community guidelines on State aid for railway undertakings".

²⁵ Those requirements do not apply to companies "which only operate urban, suburban or regional transport services on local and regional stand-alone networks for transport services on railway infrastructure or on networks intended only for the operation of urban or suburban rail services" (see Article 2 of the Directive).

of public transport obligations. The principles of compensation set out in Regulation 1370/2007²⁶ will be applied to the costs related to those investments.

- (28) In general, public service contracts must be awarded on the basis of an open, transparent and non-discriminatory procurement procedure. A local authority can, however, award such a contract directly to its in-house provider²⁷, provided that it has complete control of the provider and the provider does not operate outside of the territory for which the local authority is responsible.
- (29) The main conditions of Regulation 1370/2007 are a clear definition of the public service obligation, clear rules setting out the compensations for the service and the prevention of overcompensation. The latter condition means that the entity providing the transport can only be paid the difference between its costs and revenues from the PSO, plus a reasonable profit.
- (30) When the conditions in the Regulation are fulfilled, the financing of the PSO is deemed compatible with the internal market and is exempted from the obligation of prior notification to the Commission.

2. General Block Exemption Regulation (GBER)²⁸

- (31) The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid and total costs not exceeding EUR 20 million, can apply. In particular, (i) the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procedure; and (iii) at the level of the owner, only the difference between the eligible costs and the operating profit of the investment can be financed. Note that the provisions of Chapter 1 of the GBER must also be complied with.

IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

- (32) If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required. The Commission would then assess the compatibility of such aid individually on its merits under Article 93 or Article 107(3)(c) TFEU.
- (33) The compatibility of aid to infrastructure which meets the needs of coordination of transport, such as intermodal platforms, is assessed on the basis of Article 93 TFEU²⁹. Under that legal

²⁶ Regulation(EC) of the European Parliament and the Council No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

²⁷ In Regulation 1370/2007 the in-house provider is generally referred to as "internal provider".

²⁸ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

²⁹ See for instance Commission decisions of 19 September 2012 in case SA.34985 - Austria – *Programme for supporting the development of connecting railways and transfer terminals 2013 – 2017*, OJ C 43, 15.2.2013, p.19, and of 1 August

basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality, and incentive effect of the aid; (iii) open access to all users on a non-discriminatory basis; and (iv) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

- (34) Article 107(3)(c) TFEU constitutes the basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, under this provision a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principle.
- (35) When the beneficiary is a railway undertaking in the meaning of Directive 2012/34/EU the aid should be assessed in the first place on the basis of the Community guidelines on State aid for railway undertakings³⁰.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Regulation \(EC\) of the European Parliament and the Council No 1370/2007](#) of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.
- Communication of the Commission (2008/C 184/07) "[Community guidelines on State aid for railway undertakings](#)", OJ C 184, 22.7.2008, p. 13.
- [Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area \(recast\)](#), JO L 343, 14.12.2012, p. 32.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.

2014 in case SA.38714 (2014/N) - France - *Aides à l'investissement au projet d'autoroute ferroviaire atlantique*, OJ C 369, 17.10.2014, p. 1; of 9 November 2011 in case SA. 32632 - Belgium – *Terminal à conteneurs intermodal de Genk*, OJ C 82, 21.03.2012, p. 2; and of 19 October 2011 in case SA. 31825 - Belgium - *Containertransferring Beverdonk*, JO C 350, 1.12.2011, p.2.

³⁰ Communication of the Commission (2008/C 184/07) "[Community guidelines on State aid for railway undertakings](#)", OJ C 184, 22.7.2008, p. 13.

Indicative list of Commission decisions taken under State aid rules concerning rail, metro, local transport infrastructure:

- N 356/2002 – United Kingdom – Network Rail:
http://ec.europa.eu/competition/state_aid/cases/137131/137131_453400_5_2.pdf
- N 478/2004 – Ireland – State guarantee for capital borrowings by Coràs Iompair Eirann for infrastructure investments:
http://ec.europa.eu/competition/state_aid/cases/180019/180019_577971_10_2.pdf
- N 390/2005 – Belgique – Construction d'installations de transbordement sur la ligne ferroviaire Lanaken – Maastricht:
http://ec.europa.eu/competition/state_aid/cases/200378/200378_583327_18_2.pdf
- N 702/2009 – Czech Republic – Aid for the reconstruction of a cableway on Mount Sněžka:
http://ec.europa.eu/competition/state_aid/cases/234375/234375_1143684_32_1.pdf
- SA.31825 – Belgium – Containertransferring Beverdonk:
http://ec.europa.eu/competition/state_aid/cases/241386/241386_1267958_116_2.pdf
- SA.32632 – Belgium – Terminal à conteneurs intermodal de Genk:
http://ec.europa.eu/competition/state_aid/cases/239767/239767_1303823_116_2.pdf
- SA.34985 – Austria – Programme for supporting the development of connecting railways and transfer terminals 2013:
http://ec.europa.eu/competition/state_aid/cases/245111/245111_1398705_116_2.pdf
- SA.35948 – Czech Republic – Prolongation of the interoperability scheme in railway transport:
http://ec.europa.eu/competition/state_aid/cases/247158/247158_1468536_73_2.pdf
- SA.38714 (2014/N) – France – Aides à l'investissement au projet d'autoroute ferroviaire atlantique:
http://ec.europa.eu/competition/state_aid/cases/252684/252684_1583429_106_2.pdf

INFRASTRUCTURE ANALYTICAL GRID FOR PORT INFRASTRUCTURE

Disclaimer: this is a working document drafted by the services of the European Commission for information purposes and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts. In any case the services of the Directorate-General for Competition (DG COMP) are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

I. PRINCIPLES FOR PORTS

- (1) This analytical grid covers the financing of the construction, replacement or upgrade, as well as the operation and use of infrastructure in inland ports and seaports, which for ease of reference, will be qualified throughout the text as "port infrastructure"¹.
- (2) The construction, replacement or upgrade and maintenance of port infrastructure which is commercially exploited constitute an economic activity. Therefore public funding of such infrastructure is in principle subject to State aid rules.

II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

- (3) Please note that the following sections under Part II present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator or user levels, but also to these levels combined (e.g. integrated developer and operator).

1. No economic activity: infrastructure not meant to be commercially exploited

- (4) The funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns, for instance, infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** (for example traffic control²; protection and resilience against extreme weather conditions, longshore drift, waves/tides, flooding and coastal erosion; police³; customs⁴; antipollution surveillance⁵; control and security of navigation⁶, including light houses) or that is not used for offering goods or services on a market. Such activities are not of an economic nature and

¹ Please note that in the draft regulation revising the General Block Exemption Regulation currently in public consultation (http://ec.europa.eu/competition/consultations/2016_second_gber_review/index_en.html), the definition "port infrastructure" is narrower, as the Regulation will apply only for State aid, hence only for economic activities.

² See Commission decision of 25 June 2014 in case SA. 38048 – Greece – *Upgrading of the Port of Patras*, OJ C 280, 22.08.2014, p. 20.

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

⁴ See Commission decision of 19 June 2013 in case SA. 35738 – Greece - *Aid for the upgrading of Katakolo port*, OJ C 204, 18.07.2013, p. 3.

⁵ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* EU:C:1997:160, paragraphs 22 and 23.

⁶ See Commission decision of 15 December 2009 in case SA. C 39/2009 (ex N 385/2009) – Latvia - *Public financing of a port infrastructure in Ventspils Port*, OJ C 62, 13.03.2010, p. 7.

their funding consequently falls outside the scope of the State aid rules, as does, accordingly, the public funding of the related infrastructure⁷.

- (5) The maintenance, replacement, upgrade or construction of access infrastructures to ports (e.g. public roads, rail, locks, dredging of rivers, access routes and channels, etc.) which are available free of charge and on equal and non-discriminatory terms to all users is normally considered as a general measure, carried out by the State in the framework of its responsibility for planning and developing a maritime transport system. If an access infrastructure is located outside the area of a port and is accessible to the general public, the Commission services normally consider, unless specific features of the project point to a different conclusion, that it benefits society at large and that its public funding, therefore, does not constitute State aid. In such a case, both the costs of investments as well as of maintenance can be covered with public funds.
- (6) As an example, the Commission found that dredging in an estuary that would improve access to the river and benefit indistinctly all the operators located in the estuary and along a further inland waterway constituted a general measure for the benefit of the maritime community as a whole. Hence its public funding did not involve State aid.⁸
- (7) For an access infrastructure located within the area of a port, on the other hand, the Commission services normally consider that it specifically benefits the economic exploitation of that port and that its public funding, therefore, constitutes State aid, unless it is part of an access infrastructure crossing the port and which serves also other destinations than the port itself (such as a river crossing one port and leading also to other ports). An example of infrastructure that involved State aid was the construction of rail connections and electric power supply lines located directly on the area of a terminal within a port and exclusively used in the context of the economic exploitation of this terminal.⁹ Similarly, the construction of a road located directly within the area of a terminal and exclusively used in connection with the terminal's economic activity, was found to constitute dedicated infrastructure and its funding, therefore, constituted State aid.¹⁰
- (8) If port infrastructure **is used for both economic and non-economic activities**, public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities. In such cases, Member States have to ensure that the public funding provided for the non-economic activities **cannot be used to cross-subsidize the economic activities**. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.

⁷ See Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, EU:C:2012:821, paragraph 42.

⁸ See Commission decision of 11 March 2014 in case SA. 35720 – United Kingdom – *Liverpool City Council Cruise Liner Terminal*, OJ C 120, 23.04.2014, p. 4, recitals 64-69.

⁹ See Commission decision of 30 April 2015 in case SA.39608 – Germany - *Sea port extension Wismar*, OJ C 203, 19.06.2015, p. 3, recital 31.

¹⁰ See Commission decision in case SA.39637 – Germany - *Extension of the cruise ship terminal in Wismar*, ft. 9.

2. No economic activity: ancillary economic activities linked to main non-economic activities

- (9) If the port infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the port infrastructure, or intrinsically linked to its main non-economic use, and provided that the capacity allocated each year to such activity does not exceed 20% of the port infrastructure overall capacity¹¹.
- (10) However, as port infrastructure is mainly used for economic activities, this hypothesis may not arise often.

3. No potential effect on trade between Member States

- (11) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (12) Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected¹².
- (13) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case when the beneficiary supplies services to a limited area within a Member State, is unlikely to attract customers from other Member States, and it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.
- (14) For example, the public funding of small ports that predominately serve local users and for which the impact on cross-border investment is marginal is unlikely to affect trade¹³. This typically includes ports that due to their geographical location are not connected to any other Member State (i.e. small lake or river ports). The absence of effect on trade can be assessed on the basis of data showing that there is only limited use of the port infrastructure from outside the Member State and that the impact on cross-border investments of the measure under consideration is no more than marginal.

¹¹ See in this respect paragraph 207 of the Notice on the notion of Aid ("NoA").

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

¹³ See Commission decision of 29 April 2015 in case SA.39403 (2014/N) – Netherlands – *Investment aid for Lauwersoog port*, OJ C 259, 7.8.2015, p. 3. In that decision, the Commission considered that the Lauwersoog port was mainly used by small fishing vessels registered in that Member State which choose that port mainly in view of its geographical proximity to the relevant fishing grounds. The investment would not lead to a significant increase in the port's capacities and, in particular, would not increase its capacity to cater for larger ships. Thus, the investment in the fishing port was targeted at a local market in the sense that it would not provide incentives to fishermen from other Member States to use the Port of Lauwersoog rather than fishing ports in other Member States. The parts of the project aimed at recreational activities were also clearly targeted at a local market (the marina only has 60 moorings) and, as such, would not have any effect on cross-border trade. See also Commission decisions of 24 November 2015 in case SA.42219 (2015/N) – Germany – Refurbishment of the Schuhmacher-quay in the port of Maasholm, OJ C 426, 18.12.2015, p. 1, and of 20 July 2016 in case SA.44692 – Germany – *Investment for the Port of Wyk on Föhr*, OJ C 302, 19.08.2016, p. 1.

4. No potential effect on competition for service providers operating the publicly-financed infrastructure: legal monopoly

- (15) A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector, such as typically the ports sector, and where there is, or could be, competition. The fact that the authorities assign a public service to an in-house provider (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if certain conditions are met¹⁴.

5. No economic advantage at the level of the owner/developer

- (16) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of port infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation¹⁵; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial port operators on similar projects taking into account the level of risk and future expectations¹⁶. Note, however, that the existence of consecutive State interventions concerning the same port infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹⁷
- (17) The financing of port infrastructure often requires substantial capital investments that can only be recovered in the very long term and would therefore in such circumstances typically not be undertaken on the basis of purely economic considerations. In such cases, Member States would have to provide a convincing explanation why the criteria for the application of the MEOP are complied with.

6. No economic advantage at the level of the operator/concessionaire

6.1. *Selection of operator/concessionaire through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle*

- (18) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.

¹⁴ See paragraph 188 of the NoA.

¹⁵ For more details, see paragraphs 86 to 88 of the NoA.

¹⁶ For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

¹⁷ See in this respect also paragraph 81 of the NoA.

- (19) If the operation of port infrastructure is assigned for a positive price to an operator/concessionaire on the basis of a competitive, transparent, non-discriminatory and unconditional tender¹⁸ in line with the principles of the TFEU on public procurement¹⁹, an advantage can be excluded at the level of the operator²⁰, as it can be presumed that the fee it pays for the right to exploit the port infrastructure is in line with market conditions.
- (20) If the operator/concessionaire has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/concessionaire are in line with normal market conditions through (i) benchmarking with comparable situations²¹, or (ii) on the basis of a generally-accepted standard assessment methodology²².

6.2. The operation of the infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

- (21) The existence of an economic advantage at the level of the operator (concessionaire) may be excluded, if: (i) the infrastructure project is necessary for the provision of port services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined²³; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require²⁴.

6.3. SGEI de minimis Regulation²⁵

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

¹⁸ As described in paragraphs 91-94 of the NoA.

¹⁹ Provided that the appropriate selection criteria as set out in paragraphs 95 and 96 of the NoA have been used.

²⁰ See Commission decision of 1 October 2010 in case SA.38478 - Hungary – *Development of the Győr-Gönyű Public Port*, OJ C 418, 21.11.2014, paragraph 43.

²¹ See paragraphs 97 to 100 of the NoA.

²² See paragraphs 101 to 105 of the NoA.

²³ For example if a port is the only one on an island. Freight transport services can be considered as SGEI only if they are indeed vital for the accessibility and social and economic development of a region (for instance, remote islands).

²⁴ See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

²⁵ Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

7. No economic advantage at the level of the user

- (23) If the operator of port infrastructure has received State aid or if its resources constitute State resources, it is in a position to grant an economic advantage to the user(s), such as shipping companies.

7.1. Fees set through a tender

- (24) Where the fees for the use of port infrastructure have been set through a competitive, transparent, non-discriminatory and unconditional tender²⁶ in line with the principles of the TFEU in public procurement²⁷, an advantage can be excluded at the level of the user, as it can be presumed that they are in line with market conditions.

7.2. Fees set in line with market conditions by means other than tender

- (25) However, in the absence of a tender, the question of whether a transaction is in line with market conditions can be assessed in the light of the terms and conditions under which the use of similar infrastructure is granted by private investors in comparable situations (benchmarking).
- (26) In the case where this comparison is not possible, it can be established that a transaction is in line with market conditions on the basis of a generally accepted, standard assessment methodology. An advantage can be excluded for public funding of open port infrastructure not dedicated to any specific user(s), where their users incrementally contribute, from an ex ante view point, to the profitability of the project/operator²⁸.

III. INSTANCE IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

- (27) Possible State aid to is considered to be compatible with the internal market and can be granted without notification in the following instance²⁹:

1. Service of general economic interest: SGEI Decision³⁰

- (28) If the construction, replacement or upgrade of a port is necessary for the provision of an SGEI, it may be considered as part of the SGEI mission. If the compensation of such an SGEI concerns ports with an average annual traffic of fewer than 300 000 passengers, it may be covered by the **SGEI Decision**, provided that the criteria of that Decision are met: in

²⁶ As described in paragraphs 91-94 of the NoA.

²⁷ Provided that the appropriate selection criteria set out in paragraphs 95 and 96 of the NoA have been used.

²⁸ See paragraph 228 of the NoA.

²⁹ Currently, Commission Regulation No 651/2014 (GBER) includes no criteria based on which ports could be exempted from notification. However, since sufficient experience has been developed, the Commission is currently reviewing the GBER with a view to including investment aid to ports.

³⁰ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

particular, definition and entrustment of the SGEI, parameters of compensation³¹ established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

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

1. State aid for port infrastructure directly under Article 107(3)(c) TFEU

- (30) The compatibility of aid to ports is often assessed on the basis of Article 107(3)(c) TFEU.³² That provision constitutes the legal basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, a measure should comply with the following conditions³³: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) the aid complies with the transparency principles.

2. Service of General Economic Interest: SGEI Framework³⁴

- (31) The compatibility of State aid for port infrastructure which is necessary for the provision of an SGEI in ports with more than 300 000 passengers per year may be assessed on the basis of the SGEI Framework. Under the SGEI Framework, which is based on Article 106(2) TFEU, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with Directive 2006/111/EC³⁵, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

³¹ Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

³² The compatibility of aid for sea ports as well as inland ports can be assessed under Article 107(3)(c) TFEU. As a matter of fact, the Commission has assessed aid to inland ports under Article 93 TFEU with similar compatibility criteria as under Article 107(3)(c) TFEU.

³³ See for instance Commission decisions of 25 June 2014 in case SA. 38048 – Greece – *Upgrading of the Port of Patras*, OJ C 280, 22.08.2014, p. 20, 19 June 2013 in case SA. 35738 – Greece – *Aid for the upgrading of Katakolo port*, OJ C 204, 18.07.2013, p. 3, 15 December 2009 in case SA. C 39/2009 (ex N 385/2009) – Latvia – *Public financing of a port infrastructure in Ventspils Port*, OJ C 62, 13.03.2010, p. 7

³⁴ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

³⁵ Directive 2006/111/EC on the 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.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

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

- C 39/2009 (ex N 385/2009) – Latvia – Public financing of port infrastructure in Ventspils Port:
http://ec.europa.eu/competition/state_aid/cases/234343/234343_1080097_16_1.pdf
http://ec.europa.eu/competition/state_aid/cases/234343/234343_1276398_146_2.pdf
- SA. 38302 – Italy – Investment aid to the Port of Salerno:
http://ec.europa.eu/competition/state_aid/cases/251758/251758_1536127_128_2.pdf
- SA. 38478 – Hungary – Development of the Győr-Gönyű Public Port:
http://ec.europa.eu/competition/state_aid/cases/253617/253617_1593938_102_2.pdf
- SA 38048 - Greece – Upgrading of the Port of Patras:
http://ec.europa.eu/competition/state_aid/cases/252397/252397_1563559_76_2.pdf
- SA. 36953 - Spain – Investment aid to the Port of Bahía de Cádiz:
http://ec.europa.eu/competition/state_aid/cases/249217/249217_1481221_99_2.pdf
- SA. 36621 - Italy – Investment aid to the Port of Capo d'Orlando:
http://ec.europa.eu/competition/state_aid/cases/248535/248535_1511225_165_2.pdf
- SA. 36223 – Spain – Investment aid to the Port of Santa Cruz of Tenerife:
http://ec.europa.eu/competition/state_aid/cases/248020/248020_1453836_60_2.pdf
- SA. 35720 – UK – Liverpool City Council Cruise Liner Terminal:
http://ec.europa.eu/competition/state_aid/cases/251566/251566_1529732_82_2.pdf
- SA. 35738 – Greece – Aid for the upgrading of Katakolo port:
http://ec.europa.eu/competition/state_aid/cases/246700/246700_1444527_188_2.pdf
- SA. 34940 – Italy – Port of Augusta:
http://ec.europa.eu/competition/state_aid/cases/246189/246189_1407362_66_2.pdf

- SA. 30742 – Lithuania – Construction of infrastructure for the Passenger and Cargo Ferries Terminal in Klaipeda:
http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf
- N 44/2010 – Latvia – Public financing of port infrastructure in Krievu Sala:
http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf
- SA. 37402 – Hungary – The intermodal development of the Freeport of Budapest:
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http://ec.europa.eu/competition/state_aid/cases/260772/260772_1706942_87_2.pdf
- SA.43250 – Portugal – Cruise Ship terminal Porto de Leixões:
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