

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