

INTRODUCTION TO THE ANALYTICAL GRIDS

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I. BACKGROUND TO THE ANALYTICAL GRIDS

(1) In 2012, in the wake of the Leipzig-Halle judgment¹, the Commission services provided guidance by way of so-called "analytical grids" on the application of State aid rules to the public financing of infrastructure projects. The content of the grids reflected the rules and case practice at that point in time. In 2015 following the State aid modernisation exercise, the Commission updated most of these grids by integrating new State aid rules (the new General Block Exemption Regulation², the new de minimis Regulation³, the new Aviation Guidelines⁴ etc.)⁵. In May 2016 the Commission adopted the Notice on the Notion of aid⁶ ("NoA") within which it clarified in particular when public funding for infrastructure projects falls within the scope of EU State aid control. In this context the Commission services prepared a new grid on road infrastructure and updated four of the existing analytical grids (for ports, water, culture and rail infrastructure). The Commission services are currently updating the remaining existing analytical grids⁷.

II. LEGITIMATE EXPECTATIONS REGARDING FUNDING OF INFRASTRUCTURE⁸

(2) The public funding of infrastructure was traditionally considered to fall outside the State aid rules since their construction and operation were considered to constitute general measures of public policy and not an economic activity. More recently, several factors, such as liberalisation, privatisation, market integration and technological progress have, however, increased the scope for commercial exploitation of several types of infrastructure.

(3) In the *Aéroports de Paris* judgment⁹ the General Court acknowledged this evolution, clarifying that the operation of an airport had to be considered as an economic activity. More

¹ Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others v Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821.

² 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

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

⁴ Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3.

⁵ State aid rules in force are available on: http://ec.europa.eu/competition/state_aid/legislation/legislation.html

⁶ OJ C 262, 19.7.2016, p. 1–50

⁷ Broadband infrastructures, airports, RDI infrastructures, sport and multifunctional recreational infrastructures, energy, and waste management infrastructures.

⁸ See paragraph 209 of the Notice on the Notion of aid ("NoA").

recently, the *Leipzig/Halle* judgment confirmed that the construction of a commercial airport runway is an economic activity. While these cases relate to airports, the principles developed by the Union Courts in these cases appear to be of broader interpretation and thus applicable to the construction of other infrastructures that are indissociably linked to an economic activity.

- (4) Due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid. It follows that the Commission cannot put into question such funding measures definitively adopted before the *Aéroports de Paris* judgment on the basis of State aid rules¹⁰. This does not imply any presumption as regards the presence or absence of State aid or legitimate expectations as regards funding measures not definitively adopted before the *Aéroports de Paris* judgment, which will have to be verified on a case by case basis¹¹.

III. UNION RESOURCES – STATE RESOURCES

- (5) Resources coming from the Union (for example from structural funds), from the European Investment Bank (EIB) or the European Investment Fund (EIF), or from international financial institutions, such as the International Monetary Fund (IMF) or the European Bank for Reconstruction and Development (EBRD), are considered as State resources if national authorities have discretion as to the use of these resources (for instance the selection of beneficiaries).
- (6) By contrast, if such resources are awarded directly by the Union, by the EIB or by the EIF, with no discretion on the part of the national authorities, they do not constitute State resources (for example funding awarded in direct management under the Horizon 2020 framework programme, the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME) or to Trans-European Transport Network (TEN-T) projects). EU-level financial instruments in direct management include provisions in the relevant legal framework which ensures State aid consistency in line with the requirements of the Financial Regulation¹².
- (7) Also, Member States may contribute ESI Funds to financial instruments set up at EU-level. Such contributions would not be imputable to the State and, therefore, would not constitute State aid in the meaning of Art 107(1) TFEU, provided the contributing Member State does not attach any conditions as to the use of these contributions. The condition that the ESIF contributions are invested in the territory of the contributing Member State specified in the Operational Programme(s) does not make the resources imputable to the Member State

⁹ Judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 125, confirmed on appeal in Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617.

¹⁰ See paragraph 209 of the Notice on the Notion of aid ("NoA").

¹¹ These clarifications are without prejudice to the application of Cohesion Policy rules in these circumstances, on which guidance has been provided in other instances. See for example the Commission's guidance note to the COCOF: Verification of compliance with State Aids in infrastructure cases, available under http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2012/cocof_12_0059_01_en.pdf.

¹² Regulation (EU, EURATOM) No 966/2012, OJ L 298 of 26.10.2012, page 1 ('Financial Regulation'); see Article 140(2)(c).

since the ESI Funds are allocated to Member States in accordance with Union rules that have already determined in which Member State's territory those funds should be invested.

- (8) Financing by the European Fund for Strategic Investments (EFSI) is not State aid within the meaning of the TFEU, and thus EFSI financing will not have to be approved by the European Commission under EU State aid rules. Projects supported by EFSI may however also benefit from financial support (co-financing) by Member States (ESI Funds and national co-financing). Such co-financing constitutes a transfer of State resources and may amount to State aid. The Commission committed to complete the State aid assessment of Member States' co-financing of EFSI projects as a matter of priority, within six weeks of receiving the required information.

IV. GENERAL PRINCIPLES FOR ALL INFRASTRUCTURE PROJECTS

- (9) Infrastructure projects often involve several categories of actors and any State aid involved may potentially benefit the construction (including extensions or improvements), the operation or the use of the infrastructure. It is, therefore, useful to distinguish between:
- the developer and/or first owner ("**developer/owner**") of an infrastructure,
 - the **operators**, that is to say undertakings who make direct use of the infrastructure to provide services to end-users, including undertakings which acquire the infrastructure from the developer/owner to exploit it economically or which obtain a concession or lease for the use and operation of the infrastructure, and
 - the **end-users** of an infrastructure.

Please note these different functions may in some cases overlap.

1. Aid to the developer/owner

- (10) Where all the elements of Article 107(1) of the Treaty are fulfilled as regards the developer/owner of an infrastructure, State aid to the developer/owner is present, irrespective of whether they make direct use of the infrastructure to provide goods or services themselves or make the infrastructure available to a third party operator who in turn provides services to end-users of the infrastructure.

2. Aid to the operator

- (11) Operators who make use of the infrastructure to provide services to end-users receive an advantage if that use 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.

3. Aid to the user

- (12) If the operator of an infrastructure has received State aid or if its resources constitute State resources, it is in a position to grant an advantage to the users of the infrastructure (if they are undertakings) unless the infrastructure is made available to the users on market terms.
- (13) These general principles will be further developed in the individual grids.

V. STRUCTURE OF THE ANALYTICAL GRIDS

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

VI. ACCESS TO STATE AID CASES ON DG COMPETITION'S WEBSITE

- (15) Decisions and other published State aid case documentation may be accessed by using the search function in the following link:

<http://ec.europa.eu/competition/elojade/isef/index.cfm>