

State aid rules – Rules on substance

III. Infrastructure

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These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union.

Public financing of infrastructure and State aid control

- The public financing of infrastructure - from "general measures of public policy" to measures subject to State aid control
- Court ruling of 2000 *Aéroports de Paris* (T-128/98)
- Court ruling of 2012 *Airport Leipzig/Halle* (C-288/11)
- Need for clarification on how infrastructure cases should be handled with regards to State aid rules

Public financing of infrastructure and State aid control

- In the context of the State aid modernisation initiative (2012), definition of the specific objectives to pursue in State aid control of aid in infrastructure cases :
 - Avoid harming competing projects and existing infrastructure
 - Avoid over-compensation (funding gap analysis)
 - Ensure access of different users to infrastructure

Guidance on aid to infrastructure

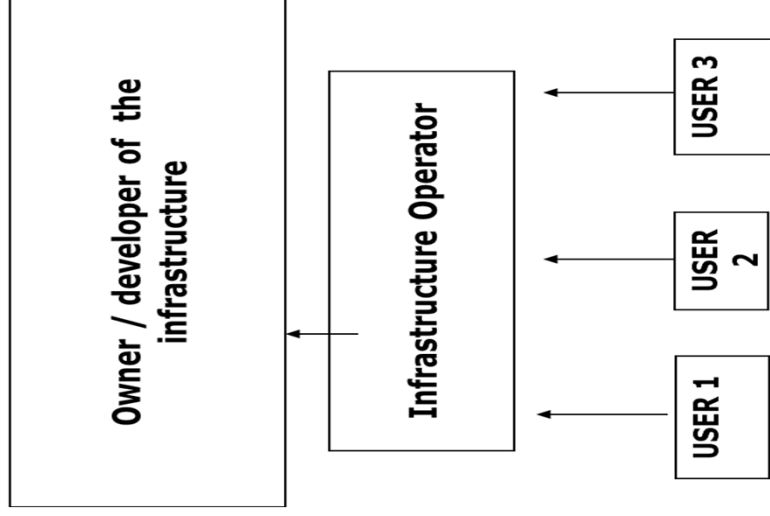
- I. Notice on the notion of aid, general considerations relevant for infrastructure projects
- II. Notice on the notion of aid, Chapter 7 on Infrastructure
- III. Analytical grids

I. NoA: general considerations

most relevant for infrastructures

- **Notions of undertaking and economic activity** : No economic activity in exercise of public authority by the State, "public powers"; State social activities with principle of solidarity; public education, primary research, culture and heritage)- NoA § 17 to 37 -
- **Advantage**: if the sale and purchase of assets, goods and services are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement, it can be presumed that those transactions are in line with market conditions – NoA § 89 to 96-
- **Distortion of competition**: no distortion of competition in case case of legal monopolies –NoA § 188 -
- **Effect on trade** – notion of purely local effect -NoA § 185 to 198

II. NoA: Chapter 7 on infrastructure



- Specific approach to infrastructures cases: assessment of the presence of aid at several levels:
 - Is there aid at the level of the developer/owner?
 - Do operators/users of an aided infrastructure receive an advantage?
 - Is the advantage passed on to end-users?

Assessment of aid at the level of the owner/developer: criterion of economic activity

- Public funding for the construction of an infrastructure used for economic activity = economic activity (*Leipzig/Halle - 2012*)
→ under State aid rules
- If the infrastructure is not economically exploited = no economic activity
 - Exercise of public powers (**public remit**: police, military, customs, safety)
 - Not used for offering goods/services on a market (**roads for free public use**)
→ outside State aid rules

Assessment of aid at the level of the owner/developer: criteria of distortion of competition / effect on trade?

- Local cases ("no effect on trade" decision-making practice) – notion of local catchment area
- Conditions excluding any effect on trade/distortion of competition (cumulative criteria under § 211 NoA):
 - Infrastructures do not face direct competition from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly (likely for comprehensive network infrastructures that are natural monopolies)
 - Private financing insignificant in sector concerned at Member State level
 - Not dedicated infrastructure
- Absence of cross subsidization

Absence of cross-subsidization

- Criteria on previous slide fulfilled = typically no aid at the level of the construction
- Entire funding only falls outside SA rules if cross-subsidization/indirect subsidization of other economic activities is excluded (§ 212 NoA), e.g.:
 - Owner not engaged in (other) economic activity
 - OR **separation of accounts/ appropriate allocation** of costs and revenues + ensured that other activities cannot benefit
 - **Tendering out of operation** (no indirect aid for operator)

Assessment of aid at the level of the operator

- If operators or users of an infrastructure built with public financing pay a market price, they do not receive any 'indirect' State aid (no advantage passed on to them).
- Market price: analysis of the advantage in line with general principles of Noa, especially provisions relative to tender
- The specific section on infrastructure recalls that:
 - competitive and unconditional tender excludes aid to the operator, if concession to operate the infrastructure or parts of it is assigned for a positive price

Assessment of aid at the level of end users

- Exclusion of aid to users(undertakings) if the infrastructure is made available to users on market terms
 - Through tender
 - Through benchmarking
- Incremental cost coverage excludes aid to users

III. The analytical grids

- GRIDS are checklists to provide guidance on the State aid rules applicable to public funding of infrastructure project (Staff working paper, NOT a policy document)
- Structure of GRIDS: existence of State aid, compatible aid exempted from notification, cases where notification is needed for State aid clearance

The analytical grids :

Sector	2012	2015	2016/17
1. Broadband	YES	YES	YES
2. Airports	YES	YES	YES
3. Ports	YES	YES	YES
4. Research	YES	YES	YES
5. Culture	YES	YES	YES
6. Sport and multifunctional recreational infrastructures	-	NEW	YES
7. Energy	-	NEW	YES
8. Waste management	-	NEW	YES
9. Rail and local public transport	-	NEW	YES
10. Water services	YES	NO	YES
11. Roads and motorways / bridges / tunnels / inland waterways	-	-	NEW



Thank you for your attention!

