

INFRASTRUCTURE ANALYTICAL GRID N° 9¹ – RAIL, METRO, LOCAL TRANSPORT INFRASTRUCTURE

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services 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.

General principles

1. This analytical grid covers the financing of the construction, maintenance and management of railway, local transport (including metro) infrastructure, as well as the purchase of rolling stock for metro and local public transport.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules. Investment into a project with a view to its future economic exploitation, to which it is intrinsically linked, will constitute an economic activity. The investment may be exploited by a local authority's in-house transport operator or a third party transport provider.

Instances in which the existence of State aid is excluded

No effect on competition and on trade between Member States: Investment into the construction, maintenance and management of general railway infrastructure

3. The responsibility to operate and manage the main national railway networks is the responsibility of the State, either through an administrative body or by a public undertaking, in many cases under a statutory monopoly². As the management and operation of the main rail infrastructure networks within the EU are generally carried out in national, geographically closed and separated markets that are not subject to competition, public financial support made available to infrastructure managers is generally not liable to affect intra-Union trade.
4. Therefore, if the railway infrastructure is part of the general rail infrastructure managed by the railway infrastructure manager, the Commission considers that State aid is not involved in the project when the following conditions are satisfied:

¹ This is a working document drafted by the services of the European Commission 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.

² See for instance Commission decision 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, http://ec.europa.eu/competition/state_aid/cases/247158/247158_1468536_73_2.pdf.

- i. there is no competition by virtue of the fact that the infrastructure manager has a legal monopoly to manage the main national rail infrastructure³; in that context the investment must concern a part of that general rail infrastructure which is not otherwise provided on the market; and
- ii. the financing must not benefit any commercial activities of the infrastructure manager, which has to keep the accounts for its infrastructure-related tasks separate from its other activities⁴.

No potential effect on trade between Member States: Local infrastructure

- 5. 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.
- 6. Where the financed infrastructure is of a purely local nature, such as small railways of local importance, with an insignificant number of users from other Member States and not likely to attract foreign investment, the support may not constitute State aid due to the absence of effect on trade.⁵

No potential effect on trade: de minimis

- 7. Support granted under the *de minimis* Regulation⁶ 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 are also respected.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

- 8. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on similar projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor

³ See Commission decision of 17 July 2002 in case N 356/2002 - UK - Railtrack plc/Network Rail, OJ C 232, 28.09.2002, p. 2, http://ec.europa.eu/competition/state_aid/cases/137131/137131_453400_5_2.pdf.

⁴ See Commission decision of 7 June 2006 in case 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.

⁵ See for instance Commission decision of 7 May 2014 in case SA.38441- UK - Isles of Sicily, OJ C 5, 9.1.2005, p. 4, http://ec.europa.eu/competition/state_aid/cases/252032/252032_1545484_83_5.pdf.

⁶ 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.

9. The financing 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 not be undertaken on the basis of purely economic considerations. Thus in such cases, Member States would have to successfully argue that the criteria for the application of the MEOP are complied with⁷.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

10. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be necessary for the provision of public transport services. In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of a service that can be considered as **a genuine service 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 the 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 require⁸.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

11. State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

Public service obligation (PSO): Regulation 1370/2007

12. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be part of public transport obligations. In that case Regulation 1370/2007⁹ will be applied to the costs related to those investments.
13. 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 provider, provided that it has complete control of the provider

⁷ See e.g. Commission decision of 13 July 2014 in case SA.32576 – Germany - Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf; and Commission decision of 3 October 2012 in the case SA.23600 – Germany - Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf.

⁸ 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 interest, OJ C 8, 11.1.2012, p. 8.

⁹ 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.

and the provider does not operate outside of the territory for which the local authority is responsible. Moreover, public service contracts concerning railway transport (excluding metro) can be awarded directly for up to 10 years with a possibility of prolongation by 5 years.

14. 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.
15. When those conditions are fulfilled, the financing of the PSO is deemed compatible with the internal market and may be implemented without being notified to the Commission.

General Block Exemption Regulation (GBER)¹⁰

16. 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 or total costs exceeding EUR 20 million, can apply. In particular, the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis. In practice those requirements mean that: (i) the price charged for the use or the sale of the infrastructure must correspond to the market price; and (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procurement procedure. Note that the provisions of Chapter 1 of the GBER must also be complied with.

Instances in which notifying for State aid clearance is necessary

17. 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.
18. 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 TFEU¹¹. Under that legal 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.

¹⁰ 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.

¹¹ See for instance Commission decision 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, http://ec.europa.eu/competition/state_aid/cases/245111/245111_1398705_116_2.pdf and Commission decision of 1 August 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, http://ec.europa.eu/competition/state_aid/cases/252684/252684_1583429_106_2.pdf.

References:

- [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.