



STATE AID LAW: THE APPLICATION OF THE LEIPZIG HALLE PRINCIPLE IN ERDF INFRASTRUCTURE PROJECTS

Introduction

On 19th December 2012, the Court of Justice of the European Union upheld the General Court's decision in the joined cases of [Leipzig Halle](#).

The ruling confirms two legal principles:

- That the transfer of state resources to any public sector organisation that operates within a commercial market shall be subject to the State Aid test¹ and may therefore be found to be State Aid; and
- The construction of infrastructure with a view to its subsequent commercial use, is an economic activity, and shall be *prima facie* aid to the operator².

Implications

This is a significant case which has implications upon how public bodies can invest in infrastructure and undertake 'direct development' works. It applies not only to ERDF awards but also to other projects funded through state resources.

Legal departments at local authorities and other public bodies should familiarise themselves with the principles set out in this case and review the activities of their organisations to ensure they are not at risk of an unlawful State Aid decision.

The first principle reiterates established law. For example, in the 1987 case *Commission v Italy*³ it was stated that a public body which provides goods or services on a given market could be regarded to be an 'undertaking'. However prior to the Leipzig Halle case, it was sometimes thought that revenue generating infrastructure operated on an open and non-discriminatory basis by the State would be considered within the scope of 'public realm' works and therefore no aid. The Leipzig Halle case narrows down the understanding of public realm to activities where the operation does not involve economic activity (for example, parks and motorways⁴).

The second principle requires an assessment to be made at the point of investment. In reviewing cases, the Commission will assess the context of the

¹ The State Aid test is set out in Article 107(1) of the TFEU and subsequent case law. If the measure meets all the criteria within the State Aid test it shall only be lawful where provided under a State Aid exemption or notified to the European Commission under Article 108 of the TFEU.

² At Paragraph 95 of Joint Cases T-455/08 *Flughafen Leipzig Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt c/Commission*

³ ECR 2599 [1987] paragraphs 7 and 8

⁴ Other than those operating on a toll basis.

support and the characteristics of the infrastructure to determine whether the construction has been undertaken with a view to operating within an economic market. The Commission will not evaluate the long term or short term profitability of the operation of the infrastructure⁵ when establishing whether it is economic in nature.

The Commission has confirmed that, as the Leipzig Halle case clarifies the application of the State Aid test, it is obliged to apply the reasoning when investigating unlawful aid in projects, even when it can be established that the aid was awarded prior to the date of the ruling.

Options for public sector bodies applying for ERDF awards for infrastructure projects

State Aid should always be considered early in any public financed project. For example, any organisation (regardless of whether it is public or private funded) that applies for ERDF must explain how it will structure and deliver its project in line with State Aid law.

The Commission has drafted a set of [guides](#) which explain how different types of infrastructure project can ensure compliance with State Aid rules in light of the Leipzig Halle decision. They have also published a table setting out the main implications of the decision, which clarifies what activities may reasonably be considered to be within the [public remit](#) of an organisation (and are therefore compliant).

Where aid is present it is necessary to apply a State Aid exemption. Some of the main exemptions can be found in the [BIS State Aid Manual](#) . If no exemption is appropriate the project may be notified under the process set out in Article 108 of the TFEU.

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⁵ Ibid 2, Paragraph 115