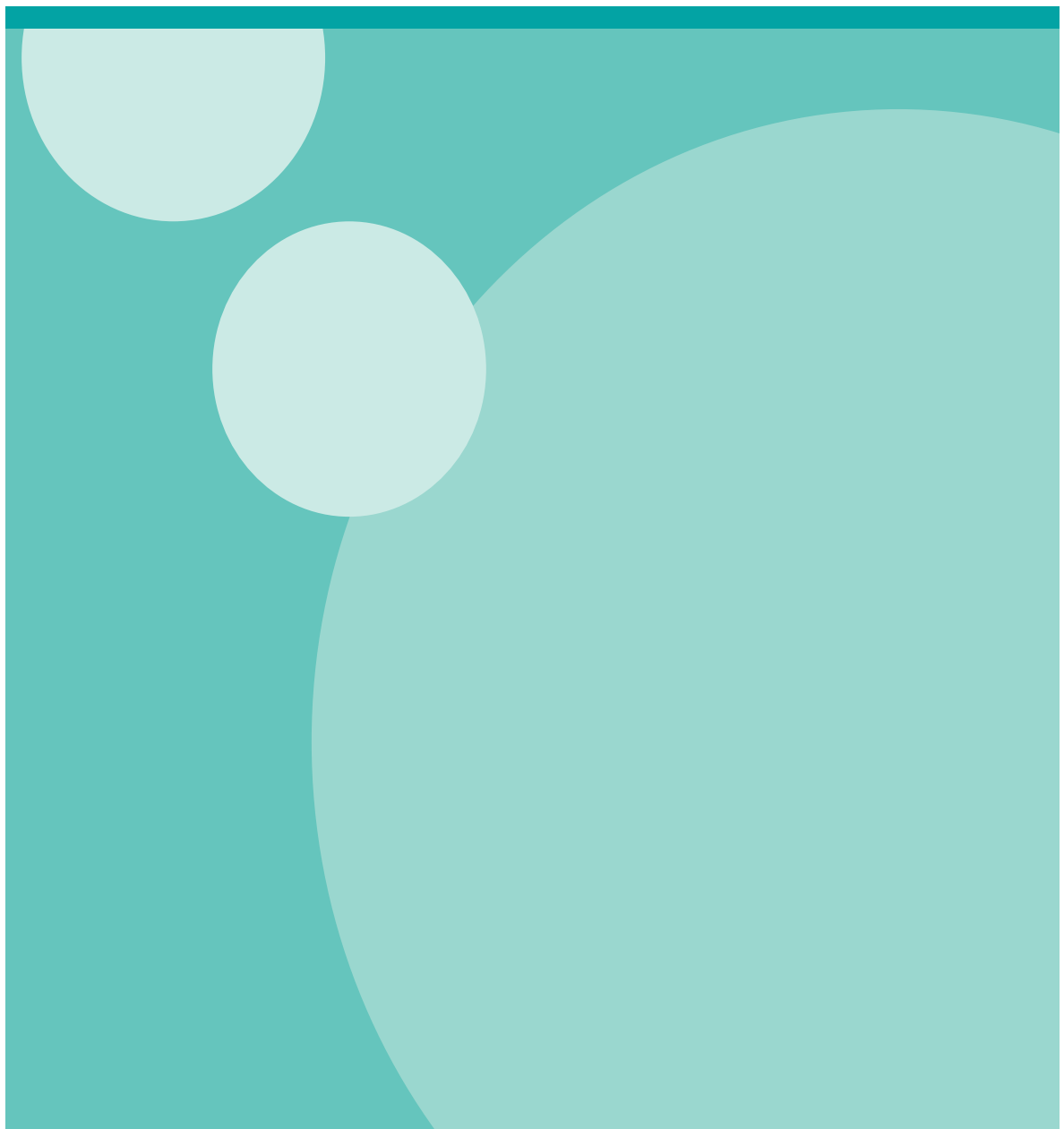


State Aids Guidance

ERDF-GN-1-009



INFRASTRUCTURE ANALYTICAL GRID N° 1 – GENERAL ANALYTICAL GRID

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

This analytical grid provides guidance to determine whether public financing of infrastructure involves State aid within the meaning of Article 107(1) TFEU and, if so, is subject to the notification obligation pursuant to Article 108(3) TFEU.

The present analytical grid is complemented by specific grids with additional information for infrastructure related to certain sectors (Airports, Broadband, Culture, Ports, RDI and Water).

General remarks

The future use of infrastructure (for an economic activity or not) determines whether its funding falls within the scope of the State aid rules.

Depending on the characteristics of the project, the potential beneficiaries² could be all undertakings which can own, use or manage all or part of the infrastructure benefiting from financing from the Funds.

The legal status of the aid beneficiary (own legal personality or not; subject to private or public law; part of the administration; publicly owned company or non-profit entity) is irrelevant for the State aid assessment. Even if it is part of the administration or a public law entity, non-profit or loss making, State aid issues can arise.

This assessment has to be carried out by the Member State not only for 'major projects' as defined under Structural Funds rules³ but for all projects.

Existence of State aid

1. Do any of the potential beneficiaries carry out an **economic activity**? If not, State aid is not involved. The concept of economic activity is defined as offering goods and services on a given market.

The Commission has considered in decisions in area of culture that cultural services are economic activities where there are commercial entities offering the same or substitutable goods and

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² Article 2 (4) of EC Regulation 1083/2006 clarifies that the term "beneficiary" is used with different meaning under Structural Funds (*Beneficiary: an operator, body or firm, whether public or private, responsible for initiating or initiating and implementing operations*) and State aid rules (*Beneficiaries: public or private firms carrying out an individual project and receiving public aid*)

³ See Article 39 of EC Regulation 1083/2006: *a series of works, activities or services intended in itself to accomplish an indivisible task of a precise economic or technical nature which has clearly identified goals and whose total cost exceeds EUR 50 million*

services. If a market, however limited, exists for the activity concerned, then the activity is organised on market principles and is to be considered economic⁴. Also in spite of a decision of an authority to close a market to competition, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned.

It should in particular be noted that the decision of an authority to attribute a certain service to a single company and not to allow third parties to provide it (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity.

When the aid beneficiary carries out a non-economic activity alongside with an economic one, the risk of cross subsidisation should be avoided by keeping separate accounts ("*functional separation*") in line with the principles governing the Transparency Directive⁵.

2. Would a **market economy investor** (MEI) have provided the public funds to the project under the same conditions? If so, State aid is not involved.

This may be demonstrated by the fact that private co-investors participate to a significant degree to the project on terms and conditions (such as overall risk and return) that are the equivalent to those of the public investor (*pari passu*). A sound *ex ante* business plan showing a return on investment would also be a good indication. Note however that accompanying or prior State aid measures pursuing the same objective invalidate a conclusion that a similar measure would also have been undertaken by a MEI.

3. In order to be caught by Article 107 of the TFEU, the support must affect or threaten to affect trade between Member States. **Effect on trade** is normally presumed when State aid strengthens the position of an undertaking compared with other companies competing in intra-EU trade. There is no threshold or percentage below which trade between Member States can be regarded as not having been affected. The relatively small amount of aid or the relatively small size of the recipient undertaking does not a priori mean that trade between Member States may not be affected. On the other hand, the Commission has in several cases concluded, in the context of the application of State aid rules, that activities had a purely local character and did not affect trade between Member States⁶.
4. **De minimis aid**: Support granted under a *de minimis* regulation is not regarded as State aid, if no more than EUR 200 000 is granted over a period of three years for one firm⁷.

5. **Distortion of competition**

⁴ N 464/09 – Hungary Aid to performing arts organisations, paragraph 14 and N 293/2008 "Cultural Aid for multifunctional community cultural centres, museums, public libraries and complementary higher education centres", paragraph 18

⁵ Commission Directive 2006/111/EC of 16 November 2006 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 - 25

⁶ E.g. swimming pools to be used predominantly by the local population, local hospitals aimed exclusively at the local population; local museums unlikely to attract cross-border visitors; local cultural events, whose potential audience is restricted locally. For practical examples, see the analytical grid on cultural infrastructure.

⁷ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis aid*, OJ L379 of 28.12.2006. Specific regulations with different ceilings apply to agriculture or fisheries or in presence of a SGEI.

Once the existence of an economic activity and an advantage is established⁸, it should be assessed whether the measure may distort competition. If the undertaking enjoys a legal monopoly and is confined by the regulatory regime applicable to this activity, and furthermore the market is not liberalised, i.e. not opened up to competition due to EU or national legislation or de facto by market developments, there is no risk of distortions of competition.⁹ If the beneficiary, on the contrary, provides services on any market¹⁰, the public funding (EU and national co-funding) of investments of this beneficiary may need to be scrutinised under 107(1) TFEU.

Service of general economic interest

6. If a project and/or its operation is (1.) part of a service entrusted as **a service of general economic interest (SGEI)** and (2.) the parameters of compensation have been clearly defined in advance; (3.) there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit; and (4.) 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 require, then State aid is not involved in the project¹¹. Note that SGEI rules also foresee the possibility of compatible aid¹² or *de minimis* aid¹³.

Exemption from prior notification, but other requirements could apply

7. If the public funding of infrastructure appears to fall under the State aid rules, it has to be established if the project is subject to the notification obligation under Article 108(3) TFEU. This is not the case if either of the following is fulfilled:
 - a. the measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g the submission of a summary information sheet or a transparency sheet) and compatibility rules¹⁴;
 - b. the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's **SGEI** Decision 2012/21/EU¹⁵,

⁸ See point 1 above

⁹ See Commission decision N 356/2002 Network Rail.

¹⁰ I.e., where supply, even from a sole supplier, meets demand

¹¹ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

¹² Either not subject to notification (see point 10b below) or subject to notification under the Commission's SGEI Framework.

¹³ Commission Regulation (EU) No 360/2012 of 25.4.2012 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 114/8, 26.4.2012.

¹⁴ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the Vademecum on Community law on State aid: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

¹⁵ Specific conditions apply, e.g. existence and duration of entrustment and compensation not exceeding an annual amount of EUR 15 million respectively passenger levels for air and maritime transport. Initial support for investment on

which notably requires a clear entrustment act and a check that the amount of compensation does not go beyond the net costs of providing the service of general economic interest including a reasonable profit.

- c. the measure is exempted from notification on the basis of Regulation 1370/2007¹⁶ which lays down the rules applicable to the compensation of public service obligations in land public passenger traffic.
- d. aid can be granted under an **existing State aid** scheme and the conditions specified in the respective existing aid scheme shall be complied with. The list of Commission State aid decisions is available at the following website:
http://ec.europa.eu/competition/eiojade/isef/index.cfm?clear=1&policy_area_id=3

It should be reminded that to most infrastructure projects the Environmental Impact Assessment (EIA) Directive¹⁷ applies, regardless of the funding falling under State aid rules.

Need to notify for State aid clearance

- 8. If the measure constitutes State aid and does not meet the conditions recalled under point 7 above, State aid clearance after a notification to the Commission is required. In its assessment of the compatibility of an aid, the Commission verifies whether the aid pursues an objective of common interest, is necessary, and does not affect trade to an extent contrary to the common interest. The assessment is conducted either under the relevant specific State aid compatibility rules, when available¹⁸ or, in the absence of specific compatibility rules, directly under Article 93, 106 or 107 of TFEU.

necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless a longer period is justified by the amortisation of investments.

¹⁶ (EC) Regulation No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70, OJ L315 of 3.12.2007, p.1.

¹⁷ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

¹⁸ A compilation of State aid rules in force is available on :
http://ec.europa.eu/competition/state_aid/legislation/legislation.html

INFRASTRUCTURE ANALYTICAL GRID N° 2 – CONSTRUCTION OF AIRPORT INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudice possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles:

1. Concerning airport infrastructure, the Commission distinguishes three types of public support:
 - Support for the construction of airport infrastructure (investment aid)
 - Support for the operation of airport infrastructure
 - Support for the user of the infrastructure

This analytical grid concerns only investment aid as it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

Existence of State aid is excluded in particular in the following instances:

Activities within the public policy remit

2. The distinction between public policy remit and economic activities has to be done on a case-by-case basis.

Certain investments in airport infrastructure, which are exclusively reserved for functions within the public policy remit (for example, air traffic control related infrastructure for en-route control, customs and police related infrastructure, security infrastructure, i.e. infrastructure necessary against public threats, terrorist attacks etc.) may concern non-economic activities². However, if the project also includes any infrastructure elements which can be economically exploited, it can involve State aid.

Investments in compliance with the market economy investor principle (MEIP)

3. Would a market economy investor (MEI) have provided funds to the project expecting a remuneration on the capital invested under the same conditions as a public authority intends to do? If so, State aid appears not to be involved. The financing of airport infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it is very difficult to establish that the State would participate in such financing as a MEI. Consequently, even if the Member State concerned argues that the criteria for the application of the MEI are complied with, we would still encourage it to (pre-)notify the measure to the Commission under Article 108(3) TFEU.

Project is entrusted as service of general economic interest (SGEI)

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See paragraph 98 Leipzig-Halle judgement- 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. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatised. Moreover, the existence of aid must be analysed at the level of the owner, operator and user.

4. If a project and/or its operation is (1.) part of a service entrusted as a service of general economic interest (SGEI), (2.) the parameters of compensation have been clearly defined in advance, (3.) there is no compensation paid beyond the costs of providing the public service and a reasonable profit and (4.) 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 require, then State aid is not involved in the project.³ Note that SGEI rules also foresee the possibility of compatible aid or de minimis aid. Regarding airports, the Airport guidelines⁴ provide guidance on what activities can be considered an SGEI⁵. In substance, the overall management of an airport can be considered as an SGEI only in exceptional cases, such as airports located in isolated regions. In any case, the pursuit of commercial activities not directly linked to the airport's core activities cannot be included in the scope of an SGEI.⁶

Exemption from notification, but other requirements could apply

5. If the public funding of infrastructure appears to fall under the State aid rules, it has to be established whether the project is subject to the notification obligation under Article 108(3) TFEU. No State aid notification is necessary if:
 - a. the funding measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g. the submission of a summary information sheet or a transparency sheet) and compatibility rules⁷; support to airport infrastructure could be compatible and exempted from notification for instance as regional aid, or possibly as aid for SMEs⁸.
 - b. the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's SGEI Decision 2012/21/EU (conditions from the 2005 Community Guidelines on financing of airports apply⁹). Note that the SGEI Decision is only applicable to airports with no more than 200 000 passengers per year. In addition, the SGEI Decision requires a clear entrustment act and a check that the amount of compensation does not go beyond the costs of providing the service of general economic interest and reasonable profit.
 - c. If aid can be granted under an **existing State aid** scheme.

Need to notify for State aid clearance

³ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

⁴ Community guidelines on financing of airports and start-up aid to airlines departing from regional airports OJ C 312, 9.12.2005, p. 1–14.

⁵ See paragraph 34 and 53 of the Airport guidelines.

⁶ See paragraph 53 (iv) of the Airport guidelines.

⁷ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the Vademecum on Community law on State aid:

http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

⁸ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124 of 20.5.2003, p.36

⁹ See paragraph 53 (iv) of the airport guidelines

6. If the measure constitutes State aid and the measure does not meet the conditions recalled above, State aid clearance after a notification to the Commission is required. Normally, State aid for airport infrastructure can be declared compatible on the basis of:

a. The conditions of the 2005 Airport guidelines

Under the 2005 airport guidelines investment aid can be declared compatible, provided that the conditions of the guidelines¹⁰ are complied with: presence of a clearly defined objective of general interest, necessity and proportionality of the infrastructure to the objective, satisfactory medium-term prospects for use, access to the infrastructure in an equal and non-discriminatory manner and limited affectation of trade relative to EU interest. In addition the aid itself should be necessary and proportional and have an incentive effect.

b. SGEI framework for airports linked with the provision of an SGEI

To the extent that an exemption from the notification requirement under the SGEI Decision is not fulfilled, the SGEI framework provides indications on when a public service compensation can be considered compatible State aid (the conditions from the 2005 Airport Guidelines apply, see above point 4).

c. the Regional Aid Guidelines

Under the current Regional Aid Guidelines¹¹ (RAG), only movable assets (i.e. transport equipment) are excluded as eligible expenses for investment aid. Nonetheless, any transport infrastructure can benefit from investment aid. This implies that Member States can, in principle, grant investment aid for airport infrastructure under the RAG¹².

¹⁰ See paragraph 61 of the airport guidelines.

¹¹ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹² Member States can also apply the General Block Exemption Regulation (GBER) for the support of airport infrastructure without the need to notify, albeit subject to other procedural requirements: submission of summary information sheet or a transparency sheet, if the eligible expenses exceed € 50 million but does not exceeds € 100 million (see also point 6 of the general analytical grid).

INFRASTRUCTURE ANALYTICAL GRID N° 3 – CONSTRUCTION OF BROADBAND INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles:

1. Public funding can be granted to the complete infrastructure roll-out or only part of the infrastructure (for instance for constructing backhaul networks or basic physical infrastructure elements, such as ducts). The construction of all such infrastructure element(s) with a view of its future economic exploitation by the State or third party operators, to which it is intrinsically linked, will constitute an economic activity. Aid should be always be allocated on the basis of a competitive tender process².

This analytical grid only covers the construction of broadband infrastructures and complements the General analytical grid which gives broader guidance on infrastructure³.

Existence of State aid is excluded in the following instances:

Construction of a broadband network for non-economic use

2. If a broadband network is rolled out exclusively to provide connectivity services to public bodies not engaged in economic activity⁴, then State aid is not involved in the project. On the other hand, if such a network (for instance its extra capacity) is made available for the use of commercial broadband investors or other operators, State aid is likely to be involved in the project.

Investments in compliance with the market economy investor principle (MEIP)

3. If a commercial investor would also have provided the necessary funding to the project under the same terms and conditions, then State aid is not involved⁵. This shall be demonstrated either by significant co-investments of commercial operators with the public authorities and/or by the presence of a sound business plan (validated by external experts) demonstrating that the investments provides an adequate rate of return for the investors – which is in line with the rate of return expected by commercial operators for similar projects.

Service of General Economic interest (SGEI)

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See paragraph 14 of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks OJ C 235, 30.9.2009, p.7 (the Broadband Guidelines).
Depending on the facts of the case, State aid granted for the construction of a broadband network may benefit not only the owner/operator of the network but also third party providers of broadband access and possibly – if the network is dedicated to a small category of users (for instance companies in a specific business park) – also the users of the broadband services.

⁴ See for instance Commission decision in case N 46/2007 "Welsh Public Sector Network Scheme".

⁵ See point 2 of the General analytical grid.

4. A construction of a network and/or its operation could be part of a service entrusted as an SGEI. Broadband deployment as an SGEI should normally be based on the provision of a passive⁶, neutral⁷ and open⁸ infrastructure that provides universal service coverage for the region and any compensation shall be limited to the related wholesale access services without including retail communication services. In case there is no over-compensation (on the basis of clear parameters established ex ante) and 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 require, then State aid is not involved in the project.

No need to notify for State aid clearance, but other requirements could apply

5. General block exemption regulation

See point 7 of the general analytical grid.

6. Service of General Economic interest (SGEI)

State aid for the compensation of public service obligations is exempted from notification if it fulfils all conditions of Commission Decision 2012/21/EU. It should also be noted that the above considerations on the quality of the definition of the public service obligation for broadband deployment (see above in section 4 on passive, neutral, wholesale only, infrastructures providing universal coverage) will apply, in line with the existing rules⁹.

7. If aid can be granted under an existing State aid scheme

The list of all Commission decisions taken under the State aid rules concerning broadband is available at the following website:

http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

Need to notify for State aid clearance

8. If the measure constitutes State aid and the measure does not meet the conditions recalled in this analytical grid or under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required.
9. Normally, State aid for broadband infrastructure can be declared compatible on the basis of State aid **Broadband Guidelines**. In general, the Broadband Guidelines distinguishes target areas according to current level of coverage with broadband infrastructure. In case no comparable broadband infrastructure is available ("white areas") aid is allowed if the relevant compatibility conditions are met, while in areas where several broadband infrastructures are already deployed or planned to be deployed by commercial operators in the next three years ("black areas"), the

⁶ The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

⁷ A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users.

⁸ Open, non-discriminatory wholesale access shall be granted to third party operators.

⁹ See 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 of 11.1.2012, p.4-14, paragraph 48.

Commission views aid measures negatively. The most common compatibility conditions are detailed in paragraph 51 and 79 of the Broadband Guidelines.

10. Broadband State aid projects may also be deployed in assisted areas under the **Regional Aid Guidelines (RAG)**¹⁰. In this case, aid to broadband may qualify as aid for an initial investment within the meaning of the RAG.
11. **Service of General Economic interest (SGEI)**: The European framework for State aid in the form of public service compensation¹¹ applies to SGEI compensation not exempted from notification (see point 6 above). The above considerations on the quality of the definition of the public service obligation for broadband deployment (see above point 4 on passive, neutral, wholesale only, passive infrastructures providing universal coverage) will apply.

¹⁰ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹¹ OJ C 8 of 11.1.2012, p.15 -22.

INFRASTRUCTURE ANALYTICAL GRID N° 4 – CONSTRUCTION OF CULTURE INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles:

1. This analytical grid concerns aid for the construction of cultural infrastructures such as multipurpose arenas², museums, film studios and cinemas³, as well as for the renovation of historical monuments.

This analytical document only covers the construction of culture infrastructures and complements the General analytical grid which gives broader guidance on infrastructure.

Existence of State aid is excluded in the following instances:

2. Investments in compliance with the market economy investor principle (MEIP).

If a commercial investor would also have provided the necessary funding to the project under the same terms and conditions, then State aid is not involved in the project. This shall be demonstrated either by significant co-investments of commercial operators with the public authorities and/or by the presence of a sound business plan demonstrating that the investments provides an adequate rate of return for the investors – which is in line with the rate of return expected by commercial operators for similar projects.

3. Local infrastructure facilities:

- a. The presence of State aid could be excluded for *smaller arenas* without a professional sports club being a captive user and with a catchment area not exceeding a border with another Member State⁴. The assessment also depends on the actual/potential use of the arena: for example the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to trade between Member States. Thus the effect on trade can often be assumed for such cases. Even if most of the activities which are to be carried out in the actual arena are of local character, the arena may have the capacity to host large international events as well, and thus an effect on competition and trade between Member States might not be excluded⁵.

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See cases C4/08: Ahoy, SA.33728: Copenhagen and SA.33618: Uppsala

³ See case NN70/06: Finnish film support scheme

⁴ Typical examples for this category could be small sport facilities used only by amateur sport clubs. See for example case SA.31722 – Hungary - Supporting the Hungarian sport sector via tax benefit scheme and case N118/2000 – France – Subventions publiques aux clubs sportifs professionnels.

⁵ For larger arenas generally there will be an effect on trade See order of the GC of 26.01.2012 concerning AHOOY in Rotterdam, T-90/09, where it finds that the market for exploitation of arenas is not necessarily limited to the Netherlands.

- b. For smaller museums and historic monuments which address a very local demand and are not attracting international visitors, it may appear that there is not necessarily an effect on trade⁶. The limited size and budget of museum-related projects may also enable to exclude an effect on trade between Member States, as people from other Member States are not liable to cross borders for the primary purpose of visiting these museums⁷. For larger museums and historic monuments which enjoy an international reputation, however, an effect on competition and trade between Member States may not be possible to exclude. The assessment depends on the actual/potential capacity to attract foreign visitors.
- c. For smaller cinemas in rural areas or cinemas with specialised ('arthouse') programming in urban areas, it could be argued that there is no effect on trade or distortion of competition⁸.
- d. For film studios, including those created by renovating historic buildings, the high mobility of film and television productions implies that an effect on competition and trade between Member States cannot be excluded.

Exemption from notification, but other requirements could apply

See point 7 of the General analytical grid

Need to notify for State aid clearance

If the measure constitutes State aid and the measure does not meet the conditions recalled under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required. The assessment of cultural infrastructure is normally conducted directly under Article 107 (3) (d) of TFEU.

⁶ See case N 377/2007 NL- Support to Bataviawerf – Reconstruction of a vessel from the 17th century (Decision of 28.11.2007)

⁷ See case N 630/2003 IT- Musei di interesse locale – Regione autonoma della Sardegna (Decision of 18.2.2004)

⁸ Some Member States also offer aid to cinemas, for example to support rural cinemas or arthouse cinemas in general or to cover their transition to digital film projection. However, the amounts involved are usually small, so that rural and arthouse cinemas should be sufficiently served by the levels of aid which fall under the *de minimis* Regulation. Aid for renovation investment of small and medium-sized enterprises (SME) may also meet the conditions of the General Block Exemption Regulation (GBER). If special circumstances would justify more support, this should be assessed on a case-by-case basis.

INFRASTRUCTURE ANALYTICAL GRID N° 5 – CONSTRUCTION OF PORT INFRASTRUCTURES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles

1. Concerning port infrastructure, the Commission distinguishes three types of public support :
 - Support for the construction of port infrastructure (investment aid)
 - Support for the operation of port infrastructure
 - Support for the user of the infrastructure

This analytical grid concerns only investment aid as it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

The construction of an infrastructure which is economically exploited falls within the scope of State aid rules. However, certain types of activities are excluded from this principle, as they fall within the public remit and therefore do not constitute economic activities.

Existence of State aid is excluded in particular in the following instances:

Activities within the public remit²

2. The distinction between public remit and economic activities has to be done on a case-by-case basis.

Certain investments in port infrastructure, which are exclusively reserved for functions within the public remit (for example, customs and police related infrastructure, security infrastructure, i.e. infrastructure necessary against public threats, terrorist attacks) may concern non-economic activities³. However, if the project also includes any infrastructure elements which can be economically exploited, it can involve State aid.

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² State aid C39/2009 (ex N 385/2009) Public financing of a port infrastructure in Ventspils Port.

³ See paragraph 98 Leipzig-Halle judgement. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatised. Moreover, the existence of aid must be analysed at the level of the owner, operator and user.

For example, maritime access routes (breakwaters, sea locks, navigable channels), sea walls and rail tracks outside the port have been considered by the Commission, under certain specific conditions, as non-commercially exploitable infrastructures, see in this respect cases N 520/2003 – BE – Flemish ports (decision of 20/10/2004) and N 60/2006 – NL – Port of Rotterdam (decision of 24/04/2007). More recently, the Commission has indicated that the financing of these infrastructures may involve State aid, ultimately leaving, however, the question open, see N 110/2008, DE, Jade-Weser-Port, OJ C 137/2009 and C 39/2009 (ex N 385/2009), LV - Ventspils Port, OJ C 62/2010

Investments in compliance with the market economy investor (MEI) principle

3. Would a market economy investor (MEI) have provided funds to the project expecting a remuneration on the capital invested under the same conditions as a public authority intends to do? If so, State aid appears not to be involved⁴.

The financing of port infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it is very difficult to establish that the State would participate in such financing as a typical market economy investor. Consequently, even if the Member State concerned argues that the criteria for the application of the MEI are complied with, we would still encourage it to (pre-)notify the measure to the Commission under Article 108(3) TFEU.

Project is entrusted as service of general economic interest

4. If a project and/or its operation is (1.) part of a service entrusted as a service of general economic interest (SGEI), (2.) the parameters of compensation have been clearly defined in advance, (3.) there is no compensation paid beyond the costs of providing the public service and a reasonable profit and (4.) 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 require, then state aid is not involved in the project⁵. Note that SGEI rules also foresee the possibility of compatible aid or de minimis aid.

Exemption from notification, but other requirements could apply

5. If the public funding of port infrastructure appears to fall under the State aid rules, it has to be established if the project is subject to the notification obligation under Article 108(3) TFEU. No State aid notification is necessary if:
 - a) the measure is exempted from notification because it meets the conditions of the General Block Exemption Regulation (**GBER**), which lays down both procedural (e.g the submission of a summary information sheet or a transparency sheet) and compatibility rules⁶; support to port infrastructure could be compatible and exempted from notification for instance as regional aid (for port infrastructure eligible expenses may not exceed € 100 million)⁷.

⁴ See also point 2 of the General analytical grid.

⁵ See Judgment of the Court of 24 July 2003, Altmark Trans GmbH, case C280/2000

⁶ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214 of 09.08.2008. For an overview, see the *Vademecum* on Community law on State aid: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

⁷ see below footnote 11

- b) the project and/or its operation is part of a service entrusted as a service of general economic interest in accordance with the Commission's **SGEI** Decision 2012/21/EU⁸. In particular, the SGEI Decision is only applicable to ports with no more than 300 000 passengers per year. In addition, the SGEI Decision requires a clear entrustment act and a check that the amount of compensation does not go beyond the costs of providing the service of general economic interest and reasonable profit.
- c) If aid can be granted under an **existing State aid** scheme.

Need to notify for State aid clearance

- 6. If the measure constitutes State aid and the measure does not meet the conditions recalled in the point above, State aid clearance after a notification to the Commission is required. There is currently no specific State aid guidelines for ports. Therefore normally, State aid for port infrastructure can be declared compatible on the basis of:

- a. Direct assessment under Article 107 (3) of TFEU**

The assessment of the compatibility of an aid is fundamentally about balancing its negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest, as demonstrated in its case practice. In particular, the measure should comply with the following conditions: presence of a clearly defined objective of general interest, necessity and proportionality of the infrastructure to the objective, satisfactory medium-term prospects for use, access to the infrastructure in an equal and non-discriminatory manner, and limited affectation of trade relative to Union interest. In addition the aid itself should be necessary and proportional, and have an incentive effect.

- b. For ports linked with the provision of an SGEI: SGEI decision or SGEI framework**

To the extent that an exemption from the notification requirement under the SGEI Decision is not fulfilled, the SGEI framework provides information on when a public service compensation can be considered compatible State aid.

- c. The conditions of the Regional Aid Guidelines⁹ (RAG)**

Under the current RAG¹⁰, transport infrastructure can benefit from investment aid. This implies that Member States can, in principle, grant investment aid for port infrastructure under the RAG.

⁸ Specific conditions apply, e.g. existence and duration of entrustment. Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments.

⁹ Guidelines on national regional aid for 2007-2013 OJ C 54, 4.3.2006

¹⁰ Member States can also apply the General Block Exemption Regulation (GBER) for the support of port infrastructure without the need to notify, albeit subject to other procedural requirements: submission of summary information sheet or a transparency sheet, if the eligible expenses exceed € 50 million but does not exceeds € 100 million (see also point 7 of the general analytical grid).

INFRASTRUCTURE ANALYTICAL GRID N° 6 – RESEARCH DEVELOPMENT AND INNOVATION

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

Checklist – RDI infrastructures

The Commission distinguishes three types of public support involving RDI infrastructures:

- Support for the construction of the infrastructure (investment aid)
- Support for the operation of the infrastructure
- Support to the users of the infrastructure

This analytical grid concerns investment aid and it complements the General analytical grid which gives broader guidance on State aid to infrastructure.

General principles:

1. RDI infrastructures are in practice often used for activities falling into the public policy remit² (e.g. education, independent research). Economic activities are often only the result of an efficient use of resources of research organisations, such as research equipment with possible dual use (non-economic and economic). This specificity of RDI infrastructure shall be kept in mind when analysing support for their construction and operation under State aid rules.

Existence of State aid is excluded in particular in the following instances:

Non-economic activities of research organisations

2. The construction of RDI infrastructure will not be considered as State aid if the infrastructure is owned /operated by a research organisation³ and such infrastructure is used exclusively for non-economic activities as defined in point 3.1.1 of the RDI Framework. In particular, this may concern the construction of university buildings, lecture halls, libraries, laboratories and equipment used exclusively for teaching and for carrying out independent research, i.e. for activities falling within its public remit. Moreover, collaborative R&D and dissemination of research results are also regarded as non-economic activities in the circumstances set out in Point 3.1.1 of the RDI Framework. This is the case where i) the research activities are of independent nature, i.e. they are not influenced by economic interests of individual

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² See point 3.11 of the Community Framework for State aid for Research and Development and Innovation, OJ C 323 of 31.12.2006 (The "RDI Framework")

³ Within the meaning of Point 2.2 d) of the RDI Framework.

undertakings, (ii) the collaborative R&D results in the creation of general knowledge that will be widely disseminated and (iii) any intellectual property rights which result from such activities are fully allocated to the research organisation for its future non-economic use. Also public funding of research databases or any other infrastructure used for dissemination of research results with an open and non-discriminatory access to all users can be regarded as a non-economic activity.

Investments in compliance with the market economy investor (MEI) principle

3. It should be observed, however, that the financing of RDI infrastructure normally requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore normally not be undertaken on the basis of purely economic considerations. Thus, it can be very difficult to establish that the state would participate in such financing as a market economy investor.

No need to notify for State aid clearance, but other requirements could apply

Ancillary activities

4. As stated in point 1 above, often RDI infrastructure is used by research organizations for the purpose of performing non-economic activities. However in order to use efficiently their resources, they may perform also some ancillary economic activities. This is the case, for instance, if the infrastructure capacity (e.g. equipment and laboratories) is occasionally rented out to industrial partners or if the research organisation uses in part its infrastructure to perform contract research on behalf of industry, provided that the following conditions are met:

- a. inputs (such as land, materials, existing technology, equipment, instruments, and main services including construction, energy and water supplies as well as supportive services for project development and management) which are necessary for the construction of the research infrastructure are tendered out/procured in accordance with the EU and national legislation respecting the principle of open, transparent and non-discriminatory procurement;
- b. all IPR rights generated within the implementation/construction phase of the publicly financed research infrastructure are fully allocated to the research organization;
- c. the research organisation provides an open and non-discriminatory access to the infrastructure;
- d. the research organisation charges market prices⁴ to the users (covering depreciation costs on pro-rata basis);
- e. the economic activities resulting from the use of the R&D infrastructure remain ancillary in nature, i.e. they are directly related and necessary for the operation of a research infrastructure or intrinsically linked with the main activity of public independent research. In general, ancillary activities consume the same inputs as the primary non-economic activities, e.g. material, equipment, labour, fixed capital. Ancillary economic activities of the research

⁴ Market price is defined as a price charged to a user for access to a similar research facility (market benchmark). Where no benchmark exists, the price has to cover the full costs pro rata and a reasonable margin.

organisation have to remain limited in scope, e.g. capacity of the research infrastructure used for economic activity should not represent an appreciable part of the effectively used total capacity;

- f. the research organisation keeps separate accounts in order to prevent cross-subsidization of its economic activities;
- g. all profits from economic activities are reinvested into the non-economic activities, (the profits generated from the use of publicly financed infrastructure cannot be used for the expansion of economic activities of the research organisation which must remain ancillary in nature);
- h. Equipment and facilities used exclusively for economic activities are not eligible expenditures.

GBER, SGEI, existing aid scheme

- 5. See point 7 of the general analytical grid.

Need to notify for State aid clearance:

- 6. If the measure constitutes State aid and the measure does not meet the conditions recalled under point 7 of the general analytical grid, State aid clearance after a notification to the Commission is required. Normally, State aid for RDI infrastructure can be declared compatible on the basis of the RDI framework, and in particular:

a. RDI infrastructure as a part of cluster (cluster infrastructure)

If the infrastructure is part of an innovation cluster, the compatibility of the State aid for its construction can be assessed under the provisions of Point 5.8 "Aid for innovation clusters" of RDI Framework.

b. RDI infrastructure as a part of an R&D project

If the infrastructure is a part of an R&D project and cannot be block-exempted under Article 31 of GBER, the compatibility of the State aid for the construction can be assessed under the provisions of Point 5.1 of the RDI Framework.

INFRASTRUCTURE ANALYTICAL GRID N° 7 – WATER SERVICES

Disclaimer: These analytical documents apply mainly to projects co-financed by Structural fund and Cohesion Fund. Their contents reflect the current rules and case practice and do not prejudge possible developments in the enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need to a formal notification procedure, also in the frame of a pre-notification procedure¹.

General principles

1. Infrastructure directly necessary to suppliers of water services may be held not to be severable from the service provided downstream. For instance, the modernisation and extension of network pipelines, sewage and waste water treatment plants connected to households and business all concur to the provision of economic services to end users. The provision of water services (e.g. drinking/waste water) against payment of a price is an economic activity and, accordingly, the financing of infrastructure which is necessary to supply on a market may involve State aid.

2. Existence of State aid

3. For water services, the following grounds for exclusion of State aid seem to be particularly relevant:

- a. No potential effect on competition and trade - Is the market closed to competition (e.g. exclusive rights) and the beneficiary precluded from being active on other geographic or service/product markets?**

Whenever there is a market opened up to competition either by EU or national legislation or de facto by market developments, public financing can affect competition and therefore State aid rules are likely to apply.

For State aid to be excluded, the project should take place in markets closed to any competition². The assessment depends on national/regional/local rules on the Member State concerned. No potential affectation of competition and trade may occur if the beneficiary holds an exclusive right in the local water market and is not and cannot be active on other service markets (e.g. waste, energy) or geographic areas open to competition³. If the recipient is active on other

¹ Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 136, 16.06.2009, p. 13-20

² In case N 588/2006 NL- Subsidy measure vital Gelderland (Decision of 4.4.2007), the Commission held that subsidy measures benefitting only drinking water companies (owned by local authorities) in the Dutch market, which is not open to competition, did not have the potential to affect competition and trade between Member States. However, measures open to other beneficiaries or concerning industrial water –which was a market open to competition- were found to have such potential.

³ In case N 443/2003 BE- Grey Water Circuits (Decision of 2.6.2004) the Commission analysed investment aid to inter-municipal bodies for sewage plans and distribution networks aimed at providing "grey water" (i.e. purified waste water). Even if local markets were not subject to competition, the bodies in question could be qualified as

markets, the financing of infrastructure that falls within the reserved area may constitute State aid. Separate accounts could allow verification of possible cross subsidisation between different markets.

b. No economic activity: Are the planned infrastructure and the activities of the beneficiary carried out outside any market for service provision, e.g. upstream of the service markets on which water services are provided against payment?

The financing of infrastructure owned and operated by beneficiaries which are not active on any market does not involve State aid, because the beneficiaries are not undertakings performing an economic activity. This may concern infrastructure which is distant from the market on which water services are provided involving hydrological basins serving different local areas. Current case practice shows that such infrastructures, as part of the public policy remit (e.g. desalination plants, flood risk prevention,)are normally general infrastructure of a non-economic nature pertaining to the public policy remit of the Member State. Financing of such infrastructure may not fall under State aid rules, as the entities running the infrastructure do not qualify as undertakings and the operation of the infrastructure would not be an economic activity.

c. No economic advantage - SGEI - Is the operation of the infrastructure assigned to a services provider as an SGEI?

If this is the case and there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit and the SGEI has been either assigned through a public procurement procedure or the compensation does not exceed what an efficient company would require, then there is no State aid for the operator of the service.

d. No economic advantage - Market Economy Investor: In case the beneficiary carries out an economic activity and there is a market open for competition, is the investment viable on market terms?

If a commercial investor had also provided the necessary funding to the project under the same terms and conditions, then State aid is not involved in the project. This shall be demonstrated either by (1) significant co-investments of commercial operators with the public authorities and/or (2) by a presence of a sound business plan (validated by external experts) demonstrating that the investments provides an adequate rate of return for the investors – which is in line with rate of return expected by commercial operators for similar projects.

Exemption from State aid notification, but other requirements could apply

In two other instances, possible State aid may be deemed to be automatically compatible with EU rules and needs not to be notified:

"undertakings" and could, at least in theory, be active in other Member States. The planned subsidies were found to involve (compatible) State aid.

- a. the General Block Exemption Regulation (GBER) applies to investment aid in water infrastructure allowing environmental protection in the absence or in excess of EU Standards⁴. It allows for an aid intensity of 35% of the eligible costs and other conditions apply.
- b. the provision of "universal" water services for households and business alike may be entrusted as SGEI. If the compensation per service of general economic interest is below EUR 15 million per year (average over the whole duration of the entrustment⁵) it is covered by the new Commission SGEI Decision, if all other requirements are met as well.

⁴ GBER Art. 18, with possible aid intensities up to 35% of the eligible costs. EU obligations for Member States as to water management not applicable to individual undertakings are not deemed to be EU standards.

⁵ Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (water infrastructure may be depreciated for more than 10 years).