The State aid policy and rules applied to ERDF funded infrastructure projects

JASPERS Networking Platform
Training on general State Aid issues in infrastructure projects
Brussels, 22nd October 2015
2. State aid procedure
3. State aid policy
4. Assessment of the existence of State aid
5. Assessment of the compatibility of State aid
6. Conclusions
1. State aid definition

Art.107.1 TFEU
“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources […] which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”

1. Aid must be granted by a Member State or through State resources
2. It must confer an economic advantage to certain undertakings or economic activities
3. It must distort competition at EU level
4. It must affect trade between the Member States

The measure constitutes State aid
1. Notification requirement to DG COMP unless exemption
2. Compatibility assessment by DG COMP
Structure

1. State aid definition

3. State aid policy

4. Assessment of the existence of State aid

5. Assessment of the compatibility of State aid

6. Conclusions
2. Procedure (1/3)

- **No State aid? Exempted from notification?**
  - Informal contacts with DG COMP
  - Clearly non exempted State aid
  - Pre-notification by the MS
    - Pre-notification discussions with DG COMP
  - Notification by the MS
    - If State Aid + non exempted State aid
  - No Notification of aid
    - Complaint or ex officio investigation
  - Illegal aid
    - Only procedural effects
2. Procedure (2/3)

- **Preliminary Investigation**
  - Non-aid decision by the Commission or withdrawal of the notification
  - Result: no aid

- **Formal investigation procedure**
  - If preliminary conclusion: Might be incompatible State aid
  - Incompatible aid

- **Approval decision by the Commission**
  - Result: compatible aid
  - Positive decision (with recovery if already disbursed illegal aid)
  - No aid or Compatible aid
2. Procedure (3/3)

Project preparation
- Self assessment (Grids)
- Informal contact Prenotification Notification

Project assessment and approval
- Interservice consultation (DG COMP)
- Also during IQR assessment

After project approval
- Still possible that State Aid investigation if no prior decision

“If expenditure is declared, the MS assume the risk that in case of incompatible aid, the declared expenditure will have to be withdrawn from the payment claim submitted after decision on SA is taken, and MS will have to recover the incompatible aid from the beneficiary”

Guidance Note to the COCOF, Verification of compliance with State aid rules in infrastructure cases, COCOF_12-0059-01 (21.11.2012)
Structure

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3. State aid policy

EU State aid Modernization (SAM) 1/2

- Reform programme launched in 2012: *Communication from the Commission to the EP, the Council, the ECSC and the CoR (/* COM/2012/0209 final */)*

- Main objectives:
  1. Foster growth in a strengthened, dynamic and competitive internal market
  2. Focus enforcement on cases with the biggest impact on the internal market
  3. Streamlined rules and faster decisions

“Modernised State aid control should facilitate the treatment of aid which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive ("good aid")... underpinning the Europe 2020 flagships”.

- Main instrument: Revision of existing Guidelines and procedures
## 3. State aid policy

### EU State aid Modernization (SAM) 2/2

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<tr>
<th>Instrument</th>
<th>Effect</th>
<th>Current Status</th>
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| Procedural Regulation           | - Complaints have to provide detailed information on the measures  
- Increased means of investigation and enforcement for DG COMP   | Adopted 22.07.2013        |
| Communication on notion of State Aid | - Clarifies the concept of State aid (all 4 conditions) with specific examples taken from the various sectors. | Draft                    |
| De minimis aid                  | - No increase in the threshold (EUR 200 000/three year period)                                                  | Adopted 18.12.2013        |
| GBER                            | - Increase categories and threshold of exempted aid (e.g. Cultural infr. up to EUR 100 mill, broadband EUR 70 mill, R&D&I infrastr. EUR 20 mill.) | Adopted 21.05.2014        |
| Regional Aid Guidelines         | - More aid categories exempted from notification.  
- Stricter rules on aid for large enterprises in most developed regions | Adopted 19.06.2013        |
| R&D&I Guidelines                | - Specific rules for research infrastructure, regardless of type of research                                  | Adopted 21.05.2014        |
| Environmental and Energy Guidelines | - Previously only Environmental Guidelines. More detailed rules for specific types of projects (waste management, CHP Plants…) | Adopted 09.04.2014        |
| Broadband Guidelines            | - Specific section on administrative and regulatory measures, allowed aid to ultra-fast broadband networks even in black areas, reinforced transparency… | Adopted 18.12.2012        |
| Aviation                        | - Introduces rules on investment aid for airports                                                            | Adopted 20.02.2014        |
3. State aid policy

**JASPERS involvement 1/2**

- **JASPERS advisory:** “JASPERS can request informal feedback on specific points which might raise State aid interpretation issues. Such informal contacts should take place at [the preparation stage of the project], in order to tackle any SA issues as early as possible...both DG COMP and DG REGIO advocate for the early involvement of the Commission services in case there are State aid issues that need to be clarified.”

  (internal document of DG COMP Dealing with State aid in infrastructure projects)

- **Use of Analytical grids:** its aim is to help national authorities and independent experts detect whether the project may involve State aid and if so under which conditions it may be declared compatible within short deadlines.

- **IQR**
3. State aid policy

JASPERS involvement 2/2

Networking and Competence Centre Division

- **External workshops:**
  Specific on State aid on general issues and on thematic issues according to expressed interests as well as on other sectorial topics where State aid will be one of the subjects, possibly in collaboration with DG COMP and DG REGIO

- **Internal workshops and working papers:**
  Resource library:

- **Assistance in projects/horizontal tasks upon request** (and subject to availability)
Structure

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5. Assessment of the compatibility of State aid

6. Conclusions
4. Assessment of the existence of State aid

Art.107.1 TFEU

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources […] which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”

1. Aid must be granted by a Member State or through state resources
2. It must confer an economic advantage to certain undertakings or economic activities
3. It must distort competition at EU level
4. It must affect trade between the Member States

1. General infrastructure (no selective advantage)
2. Exercise of public powers (lack of advantage)
3. SGEI (lack of advantage)
4. Legal monopoly (no market → no undertaking + no competition)
5. De minimis (lack of effect on trade)
4. Assessment of the existence of State aid

4.1. State resources

“Aid granted by a Member State or through State resources”

- Regardless of the form or aim (sufficient if burden on public finances. Thus f.ex. also guarantees,)
- EU funds, decisive element: Effective transfer of the funds onto the beneficiaries: by the MS?

**ERDF, ESF and Cohesion Fund (shared management)**
- ERDF funds are transferred to the national budgets of the Member States
- Selection of the individual projects by the Member State’s managing authority

**Centrally managed funds**[Horizon 2020 Framework/LIFE programs]

– Direct management: Commission receives applications for projects, carries the selection process and awards grants directly to the beneficiaries.
– EU resources paid from the EU budget to the beneficiary
– Member States: limited role if any (support the correct technical and financial implementation of the projects selected by the EU legislator)

But Art. 140 Financial Regulation (966/2012): “**financial instruments** shall be **consistent** with EU State aid rules”
4. Assessment of the existence of State aid

4.2. Selective economic advantage to an undertaking

Direct or indirect advantage to undertakings

- Undertaking? owner
  - Direct advantage?

- Undertaking? operator
  - Direct (or in-) advantage?

- Undertaking? End users
  - Indirect advantage?

- Undertaking? Other indirectly advantaged undertakings
  - Indirect advantage?
4. Assessment of the existence of State aid

4.2. Selective economic advantage to an undertaking

**Undertaking.** Functional definition: Any entity performing an economic activity (offering goods or services in a competitive market)

Regardless of ownership (public or private), legal status, the way in which it is financed or whether carried out its activities without seeking to obtain a profit

→ **Examples of potential undertakings for State aid purposes:**
- A Ministry or any entity which is integrated in a national/regional administration.
- Hospitals, schools…
- Non-for-profit NGOs
- Individuals
- …

**IF** they offer goods or services in a competitive market.

- **Ancillary eco. activity:** If infrastructure used almost exclusively for non-economic activity, its funding may fall outside SA rules entirely, provided that eco. use remains purely ancillary (ex. R&D&I: Same inputs for both activities + eco. activity: use < 20% annual capacity)
4. Assessment of the existence of State aid

4.2. Selectivity of the advantage: general infrastructure (no SA)

- Measures favouring the economy in general **without favouring a specific undertaking** or sector are **not selective** and do not fall within the concept of State aid.

- **DG COMP NOTE TO DG REGIO** Brussels, COMP/03/2011/
  **Subject: Application of State aid rules to infrastructure investment projects**

  “after the Leipzig/Halle ruling, the financing of **any type of infrastructure** (excluding that related to security, safety, etc.) that is later commercially exploited is State aid relevant. **A contrario**, only the financing of infrastructure that is later **not commercially exploited** and built in the interest of the general public is excluded from the application of State aid rules.

  The financing of infrastructure that is commercially exploited related to ports, airports, stadiums, waste treatment plants, as well as certain R&D, energy and broadband infrastructure prima facie falls within the scope of application of the State aid rules.

  In conclusion, there remain very few types of infrastructure where the financing falls outside the scope of State aid rules. As soon as the infrastructure is exploited commercially, also its construction constitutes an economic activity and the project should be assessed as to its compatibility with the State aid rules”.

4. Assessment of the existence of State aid

4.2. Advantage to an undertaking: exercise of public powers (no SA)

**Definition:** tasks that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject → no selective advantage to an undertaking → no State aid

- **Examples:** (a) the army or the police; (b) air navigation safety and control; (c) maritime traffic control and safety; (d) anti-pollution surveillance; (e) the organisation, financing and enforcement of prison sentences;

- **Strict application:** Case SA.35847 Airport Ostrava, paved surfaces (20.02.2014)
  
  Construction of ground lighting at Ostrava airport (upgrade of taxiway centreline lights and illuminated signs at check points).
  
  Aim: offer airport services by low visibility + improve the safety in airport operation
  
  “the improvement of the safety of the airport operation corresponds to normal costs of an economic activity that cannot be considered to fall within the public policy remit”
4. Assessment of the existence of State aid

4.2. Economic advantage to an undertaking: SGEI (no SA) 1/6

**Advantage:** If funds lighten burden normally assumed in an undertaking’s budget. (Beneficiary wouldn’t obtain such financing under normal market conditions)

**Example: District Heating project**

- **ERDF**
- **Municipality**
  - Own funds (5%)
  - ERDF (95%)
- **Assets**
- **Operator**
- **Comm. users**
  - Market price
- **Res. users**
  - Subsidized Tariff

Concession fee (costs + reasonable profit)
4. Assessment of the existence of State aid

4.2. Economic advantage to an undertaking: SGEI (no SA) 2/6

<table>
<thead>
<tr>
<th>Level</th>
<th>Effect of the aid</th>
<th>Advantage</th>
</tr>
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<tbody>
<tr>
<td>Owner</td>
<td>Improved assets BUT no transfer + no increase in concession fee</td>
<td>No (passed on)</td>
</tr>
<tr>
<td></td>
<td>Reduction in operating aid BUT reinvested (no cross-subsidisation)</td>
<td></td>
</tr>
<tr>
<td>Operator</td>
<td>Improved assets w/out increased concession fee BUT cannot fix freely tariffs to users (SGEI: same profit)</td>
<td>No (passed on)</td>
</tr>
<tr>
<td>Comm. User</td>
<td>Improved service not reflected in market price</td>
<td>No (unless dedicated infr.)</td>
</tr>
<tr>
<td>Resid. User</td>
<td>Cost of improvements not translated in increase of subsidized tariffs</td>
<td>No (+no undertaking)</td>
</tr>
</tbody>
</table>

ERDF → Municipality (Owner) → Own funds → Assets → Concession fee (costs + reasonable profit) → Operator → Subsidized Tariff → Residential Users

ERDF → Operator → Market Price → Commercial Users
4. Assessment of the existence of State aid

4.2. Economic advantage to an undertaking: SGEI (no SA) 3/6

1. Non-State aid, exemption from notification or compatible aid

1. Service: special characteristics

2. Formal entrustment

3. No overcompensation

4. Public procurement or proven that costs of the service do not exceed those of a well-managed undertaking

2012 SGEI Framework
Conditions for compatibility assessment
(State aid, requires notification to DG COMP)

Altmark criteria
(no advantage, no state aid)

Compensation <EUR 15 mill/y.
Except: ports <300 000 pax/y.
    airports < 200 000 pax/y.
    Health/social housing: no limit

Entrustment < 10 y.

2012 SGEI Decision
(exempted, compatible aid)
4. Assessment of the existence of State aid

4.2. Economic advantage to an undertaking: SGEI (no SA) 4/6

2. Activities potentially qualifying as SGEI

- Services exhibiting **special characteristics** as compared with ordinary economic activities:
  - Not if actually/potentially provided satisfactorily (def. by State) under normal market conditions
  - Not if they are **not** addressed to citizens or if they are **not** in the interest of society as a whole.

**Examples:**

**Broadband provision:** Access to high speed broadband services answers to a general and basic need. BUT:
- NOT if already provided (private investors already/plan to invest in broadband infrastructure guaranteeing adequate coverage)
- NOT if no universal connectivity (connectivity to all residential and business users)

Also **transport, waste management, energy** [if aim of the project is to ensure security, regularity, quality and price of supplies or environmental protection (including energy efficiency, energy from renewable sources and climate protection)], **water and waste water services**…

**COMMISSION STAFF WORKING PAPER The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation**
4.2. Economic advantage to an undertaking: SGEI (no SA) 5/6

3. Formal entrustment

– By means of one or more official acts having binding legal force under national law.

– The entrustment act or series of acts must at least specify:

1. Content and duration of the public service obligations

   Duration: max. 10 years, except if significant investment is required from the service provider that needs to be amortised over a longer period (2012 SGEI Decision) or Justified by objective criteria, e.g. need to amortise non-transferable fixed assets (2012 SGEI Framework)

2. Undertaking and, where applicable, territory concerned

3. Nature of any exclusive/special rights assigned to the undertaking by the State

4. Parameters for calculating, controlling and reviewing the compensation

5. Arrangements for avoiding and recovering any overcompensation.
4. Assessment of the existence of State aid

4.2. Economic advantage to an undertaking: SGEI (no SA) 6/6

4. Compensation

- **Amount**: cover **net cost** of the public service **plus a reasonable profit**

- **Net cost calculation**, two options:

1. **Difference between costs and revenues**
   - Costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the operation of the SGEI

   Revenues: At least entire revenue from SGEI. MS may decide to assign also revenues from non SGEI activities
   If also non-SGEI activities, **only** costs related to SGEI can be taken into account
   Example: DH, if also produced electricity, only net costs related to production of heat can be compensated.
   If infrastructure used for both activities, financing according to % of use.

2. **Alternatively**: difference between net cost of the service with the PSO and w/out

   - **Reasonable profit**: rate of return on capital that would be required by a typical undertaking considering whether or not to provide the SGEI for the whole entrustment period, taking into account the level of risk. Can include incentive criteria.
4. Assessment of the existence of State aid

4.3. Distortion of competition: Legal monopoly (no SA)

- **Effect on competition**: If aid strengthens actually or potentially, the position of the beneficiary compared with other competing undertakings.

**Distortion of competition**: presumed if beneficiary is an undertaking active in a liberalised sector where there is actual/potential competition

- **Legal monopoly** → No competing undertakings (no competitive market) → no State aid

1. Only one undertaking can be active in the market at stake (geographical + *product*): clear legal restriction

2. Beneficiary cannot be active in other geographical/product markets
   [if it is, respect account separation + no cross-financing sufficient? DG COMP: no]

**DOUBTS**: Competition not in the market but for the market?
   Level of concession fees/potential operating aid/regulated tariff, subject to some restriction?
4. Assessment of the existence of State aid

4.4. Effect on trade at EU level

- “When State aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid”.

  ECJ, 17 September 1980, Case 730/79 Philip Morris

- But recent DG COMP decisions, 29 April 2015, f.ex. Port project in Netherlands:
  
  No significant increase in capacities/capacity to cater for larger ships.
  
  Investment targeted at a local market+ no significant effect on the patterns of trade between MS: no incentive to fishermen from other MS to use the Port rather than fishing ports in other MS.
  
  Parts of the project aimed at recreational activities are also clearly targeted at a local market

  Investment aid for Lauwersoog port (SA.39403)

- Commission Regulation (EU) No 1407/2013 (de minimis Regulation) (no SA)

Def. de minimis: aid that does not exceed a certain fixed amount, and is thus deemed not to meet all the criteria laid down in Article 107(1) TFEU (no effect on trade at EU level)

Threshold: ≤ EUR 200 000 over any period of three fiscal years to a single undertaking

Taken into account any other State aid/de minimis aid, even if different eligible costs
1. State aid definition

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Art. 107.1 TFEU

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Art.107.3 TFEU

“The following may be considered to be compatible with the internal market:

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
Aim of analysis of compatibility: assess whether the measure does not adversely affect trading conditions to an extent contrary to the common interest

Balancing Test

1. The measure pursues an objective of common interest

2. The public intervention has to be necessary to attain the objective

3. The measure has to be proportional

4. No other elements shall affect trading conditions and competition to an extent that is contrary to the common interest
5. Assessment of the compatibility of State aid

5.1. Incentive effect

- **Incentive effect**: The beneficiary should, as a result of the aid, engage in activities that it would not carry out without the aid at all or carry out only in a restricted or different manner.

**Implications** (non exhaustive list):

- **If works already commenced prior to the aid application by the beneficiary to the national authorities the aid does not present an incentive for the beneficiary**
  
  [e.g. Section 3.5.1 Guidelines on regional State aid for 2014-2020]

- **An investment may be necessary in order to meet mandatory EU standards. Since the company would have to comply with those standards in any event, State aid to meet mandatory EU (or national) standards that are already in force cannot be justified.**
  
  [e.g. Section 3.2.4.1. Guidelines on State aid for environmental protection and energy 2014-2020]

Obligation has to be addressed to the beneficiary undertaking, and even then, possible explicit exception allowing to finance such a measure with State aid (ex. Energy audits).
5. Assessment of the compatibility of State aid

5.2. Proportionality of the aid

- Definition: The amount of aid must be limited to the **minimum necessary** for the activity to take place.

1. If Guidelines applicable, usually expressed as % (intensity) of eligible costs  
   (identified sometimes as extra investment costs compared to counterfactual scenario w/out aid)

   **Example**: R&D&I SA Guidelines: Aid for the construction and upgrade of research infrastructures

   - Eligible costs: Investment costs in intangible and tangible assets

   - Aid intensities:

     | Aid for the construction and upgrade of research infrastrs. | Small enterprise | Medium-sized enterprise | Large enterprise |
     |----------------------------------------------------------|------------------|------------------------|------------------|
     | 50 %                                                     | 50 %             | 50 %                   |

   But: if notifiable individual aid, allowed up to 60% of eligible costs, provided the amount does not exceed the minimum necessary for the aided project to be sufficiently profitable 
   e.g. by benchmarking the IRR of the project against other similar projects.

2. If no Guidelines, ad hoc analysis of proportionality. Funding-gap is a valid method
5. Assessment of the compatibility of State aid

5.2. Proportionality of the aid

- **Art.61.8 CPR**: Funding gap does not apply to operations for which support constitutes:
  
  (a) de minimis aid
  
  (b) compatible State aid to SMEs, where an aid intensity or an aid amount limit is applied in relation to SA;
  
  (c) compatible State aid, where an individual verification of financing needs in accordance with the applicable State aid rules has been carried out.

- If simply identification of eligible costs and aid intensity, the funding-gap calculation will have to be done as well, except in the case where the beneficiary is an SMEs.

  If Guidelines establish an eligible costs + maximum aid intensity method for fixing the maximum aid amount, the EU grant shall respect both the funding-gap calculation and the eligible costs + maximum aid intensity calculation (i.e. whichever lower)

- If Guidelines apply a method which identifies the **individual financing needs** of the project, funding gap calculation will not be applicable even for large enterprises (non-SMEs).

**Example**: Energy and Environmental State aid Guidelines: aid shall not exceed the net extra cost necessary to meet the objective, compared to the counterfactual scenario in the absence of aid.

  [Net extra costs include difference of eco. costs (investment + operation) between project and counterfactual].
5. Assessment of the compatibility of State aid

5.3. Exemption from notification: General Block Exemption Regulation

- Art.109 TFEU: “The Council, … may determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure”.

- Art.108.4 TFEU: “The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the [notification] procedure”

- Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [General Block Exemption Regulation]

- Types of aid covered: [Dec.2015 (but long delay): ports and airports]
  Regional investment aid (<EUR 100 mln. eligible costs); Regional Urban Development aid (<EUR 20 mln. total investment);
  R&D (fundamental research <EUR 40 mln. per undertaking per project; industrial research <20 mln; experimental development <EUR 15 mln.);
  sport infrastructure (<EUR 50 mln. total costs); broadband infrastructures (<EUR 70 mln. Total costs);
  investment aid for district heating or cooling distribution network (<EUR 20 mln./undertaking/project)
  investment aid for energy infrastructure (<EUR 50 mln./undertaking/project)

- Self assessment of proportionality, incentive effect, monitoring.
Structure

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6. Conclusions

1. **Increased attention** given to State aid issues [Application form for major projects, IQR, …]

2. **Absence of State aid** can be only based in the **lack of one of the four conditions:**
   - No State funds
   - No selective advantage
   - No distortion of competition
   - No effect on trade

3. State aid might under certain circumstances be **exempted from notification** to DG COMP [GER/SGEI]

4. Advice: Informally clarify/ask the beneficiary to clarify with DG COMP **unless clear precedents** ruling out State aid/ straightforward application of exemption

   [The earlier the better. Pre-notification form: the same as for notification]

5. **Constant changes**, both regulatory (new guidelines) and of DG COMP’s decision practice

   Therefore, what in the past was valid might sometimes no longer be applicable in the future

   [In particular, concepts of legal monopoly and effect on trade are currently subject to some uncertainties]

   and compatibility assessment in some cases not straightforward because of lack of precedents

   [Ex. Defining a correct counterfactual scenario for some energy infrastructures, deciding whether a project falls under a certain category, etc.]
Thank you very much!
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