

## **INFRASTRUCTURE ANALYTICAL GRID FOR RAILWAY, METRO and LOCAL TRANSPORT INFRASTRUCTURE**

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### **I. PRINCIPLES FOR RAILWAY, METRO AND LOCAL TRANSPORT INFRASTRUCTURE**

- (1) This analytical grid covers the financing of the construction, maintenance and operation of railway<sup>1</sup>, as well as metro and local transport infrastructure<sup>2</sup>. For ease of reference, those types of infrastructure will be qualified throughout this text as "rail infrastructure".
- (2) Rail infrastructure is a typical case of natural monopoly (see Part II.1 below). To the extent that it is made available to potential users on equal and non-discriminatory terms, and that the private financing for its construction is insignificant, the public financing of the construction of rail infrastructure would typically not affect trade between Member States or distort competition. The same reasoning applies to investments in railway bridges, railway tunnels, which are considered to be part of railway infrastructure, as well as local transport infrastructure<sup>3</sup>.
- (3) Conversely, the operation of rail infrastructure, for example by a local authority's in-house transport operator or a third party transport provider, constitutes in many instances an economic activity to which the State aid rules may apply.
- (4) In practice, the **construction and operation of rail infrastructure are often bundled**<sup>4</sup>. The financing of such bundled operations does not constitute State aid rules if for instance the construction refers to a rail infrastructure which is a natural monopoly (see Part II.1 below) and either (i) the bundled construction and operation of the rail infrastructure is tendered out together (see Part II, Point 7.1 below), or (ii) the operation of that rail infrastructure is subject to a legal monopoly (see Part II.2 below).

### **II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED**

- (5) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These

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<sup>1</sup> Railway Infrastructure is defined in Annex 1 of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), JO L 343, 14.12.2012, p. 32.

<sup>2</sup> Such as tracks for trams or underground public transport and train stations.

<sup>3</sup> See paragraph 219 of the Notice on the Notion of aid ("NoA").

<sup>4</sup> Bundling means that the same entity is in charge of the construction, maintenance and operation of the infrastructure.

instances may apply to the owner/developer, operator/*concessionaire* or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

**1. No potential effect on trade or distortion of competition for the construction of rail infrastructure: natural monopoly and insignificant private financing**

- (6) Rail networks typically constitute **natural monopolies** which are not in competition with other infrastructure of the same nature, as their duplication would be uneconomical and private financing for the construction of such infrastructure is normally insignificant.
- (7) An effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time:
  - (i) an infrastructure typically faces no direct competition,
  - (ii) private financing is insignificant in the sector and Member State concerned and
  - (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large<sup>5</sup>.
- (8) The construction as such of rail infrastructure typically fulfils the conditions set out above and its financing therefore typically does not distort competition or affect trade between Member States. The condition relevant to insignificant private financing of rail infrastructure has to be assessed at the level of the Member State concerned rather than at regional or local level.
- (9) In order for the entire public funding of a given rail infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of rail infrastructure cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner/developer does not engage in any other economic activity or – if the infrastructure owner/developer is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities<sup>6</sup>.

**2. No potential distortion of competition for the operation of an infrastructure: legal monopoly**

- (10) In the railway sector the responsibility to operate and manage the main national railway network is typically the responsibility of the State, either through an administrative body or by a public undertaking, in most cases under a legal monopoly<sup>7</sup>. As within the EU the management and operation of the main railway infrastructure networks are generally carried out in national, geographically closed and separate markets that are not subject to

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<sup>5</sup> See paragraph 211 of the NoA.

<sup>6</sup> See paragraph 212 of the NoA.

<sup>7</sup> See Commission decisions 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 and of 17 July 2002 in case N 356/2002 - United Kingdom - *Railtrack plc/Network Rail*, OJ C 232, 28.9.2002, p. 2.

competition, public financial support made available to the operator<sup>8</sup> is generally not liable to affect trade between Member States.

- (11) However, the fact that public authorities assign the management and operation of rail infrastructure to an **in-house provider** does not as such exclude a possible distortion of competition. In order to exclude a distortion of competition in such a situation the following cumulative conditions have to be met:
- a. the management and operation of the infrastructure is subject to a **legal monopoly**<sup>9</sup> (established in compliance with EU law, and in particular with the Treaty rules on competition<sup>10</sup>);
  - b. the legal monopoly not only excludes competition *on* the market, but also *for* the market, in that it excludes any possible competition to become the exclusive operator of the rail infrastructure in question;
  - c. the service is not in competition with other services<sup>11</sup>; and
  - d. if the operator of the rail infrastructure is active in another (geographical or product) market that is open to competition, **cross-subsidization has to be excluded**. This requires that **separate accounts** are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

### 3. No economic activity: rail infrastructure not meant to be commercially exploited

- (12) The funding of rail infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns, for instance, rail infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** (e.g. infrastructure for safety, security, police or customs activities) or that is not used for offering goods or services on a market. Such activities are not of an economic nature and consequently fall outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure.
- (13) In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers in the rail sector, that entity acts as an undertaking in relation to that activity. In contrast, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the scope of State aid rules.

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<sup>8</sup> In the railway sector, the operator is generally referred to as "infrastructure manager".

<sup>9</sup> A legal monopoly is understood to exist where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

<sup>10</sup> Chapter 1 of Title VII of the Treaty.

<sup>11</sup> Different modes of transport may offer different types of services that are not substitutable. In such a case, intermodal competition is not relevant.

#### 4. Rail infrastructure used for both economic and non-economic activities

- (14) If rail **infrastructure is used for both economic and non-economic activities** (for example customs areas in intermodal platforms, which are typically infrastructures used to perform an economic activity), public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities **cannot be used to cross-subsidize the entity's economic activities**. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.

#### 5. No potential effect on trade between Member States: purely local impact

- (15) 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.
- (16) Support granted under the *de minimis* Regulation 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 laid down in the *de minimis* Regulation are also respected<sup>12</sup>.
- (17) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case if the beneficiary supplies goods or services to a limited area within one Member State and is unlikely to attract customers from other Member States and if it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

#### 6. No economic advantage at the level of the owner/developer

- (18) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of rail infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation<sup>13</sup>; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations<sup>14</sup>. Note, however, that the existence of consecutive State interventions concerning the same port infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.<sup>15</sup>

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<sup>12</sup> 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.

<sup>13</sup> For more details, see paragraphs 86 to 88 of the NoA.

<sup>14</sup> For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

<sup>15</sup> See in this respect also paragraph 81 of the NoA.

- (19) The financing of this type 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 typically not be undertaken on the basis of purely economic considerations. In such cases, Member States would have to provide a convincing explanation why the criteria for the application of the MEOP are complied with.

**7. No economic advantage at the level of the operator/concessionaire<sup>16</sup>**

**7.1. Selection of the operator/concessionaire through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle**

- (20) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (21) If the operation of a rail infrastructure is assigned for a positive price to an operator/*concessionaire* on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU on public procurement<sup>17</sup>, an advantage can be excluded at the level of the operator, as it can be presumed that the fee it pays for the right to exploit the infrastructure is in line with market conditions.
- (22) If the operator/*concessionaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*concessionaire* are in line with normal market conditions through (i) benchmarking with comparable situations<sup>18</sup>, or (ii) on the basis of a generally-accepted standard assessment methodology<sup>19</sup>.

**7.2. The operation of the rail infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

- (23) The existence of an economic advantage at the level of the operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services 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 providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the

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<sup>16</sup> In the railway sector, the operator is generally referred to as "infrastructure manager".

<sup>17</sup> As described in paragraphs 91-96 of the NoA.

<sup>18</sup> See paragraphs 97 to 100 of the NoA.

<sup>19</sup> See paragraphs 101 to 105 of the NoA.

provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require<sup>20</sup>.

### **7.3. SGEI de minimis Regulation<sup>21</sup>**

- (24) Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

## **8. No economic advantage at the level of the user**

- (25) As regards railway infrastructure in the meaning of Directive 2012/34/EU<sup>22</sup>, used by railway undertakings<sup>23</sup>, where its use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation, the Commission normally considers that public financing of the infrastructure does not constitute State aid to railway undertakings<sup>24</sup>. It is reminded that Directive 2012/34/EU requires a certain level of independence between railway undertakings, which provide rail transport services to passengers, and the operator of the railway infrastructure<sup>25</sup>.

## **III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY**

- (26) State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

### **1. Public service obligation (PSO): Regulation 1370/2007**

- (27) Regulation 1370/2007 principally applies to the provision of transport services. There may be instances (e.g. in the metro and local transport sectors) where the construction and maintenance of the infrastructure necessary for the provision of those services may be part

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<sup>20</sup> 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, OJ C 8, 11.1.2012, p. 4.

<sup>21</sup> Commission Regulation No 360/2012 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, 26.4.2012, p. 8.

<sup>22</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), JO L 343, 14.12.2012, p. 32.

<sup>23</sup> In the meaning of the Communication from the Commission "Community guidelines on State aid for railway undertakings". OJ C 184 of 22.7.2008, p.13.

<sup>24</sup> Point 25 of the "Community guidelines on State aid for railway undertakings".

<sup>25</sup> Those requirements do not apply to companies "which only operate urban, suburban or regional transport services on local and regional stand-alone networks for transport services on railway infrastructure or on networks intended only for the operation of urban or suburban rail services" (see Article 2 of the Directive).

of public transport obligations. The principles of compensation set out in Regulation 1370/2007<sup>26</sup> will be applied to the costs related to those investments.

- (28) 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<sup>27</sup>, provided that it has complete control of the provider and the provider does not operate outside of the territory for which the local authority is responsible.
- (29) 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.
- (30) When the conditions in the Regulation are fulfilled, the financing of the PSO is deemed compatible with the internal market and is exempted from the obligation of prior notification to the Commission.

## 2. General Block Exemption Regulation (GBER)<sup>28</sup>

- (31) 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 and total costs not exceeding EUR 20 million, can apply. In particular, (i) the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procedure; and (iii) at the level of the owner, only the difference between the eligible costs and the operating profit of the investment can be financed. Note that the provisions of Chapter 1 of the GBER must also be complied with.

## IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

- (32) 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.
- (33) 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 TFEU<sup>29</sup>. Under that legal

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<sup>26</sup> 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.

<sup>27</sup> In Regulation 1370/2007 the in-house provider is generally referred to as "internal provider".

<sup>28</sup> 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.

<sup>29</sup> See for instance Commission decisions 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, and of 1 August

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.

- (34) Article 107(3)(c) TFEU constitutes the basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, under this provision 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) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principle.
- (35) When the beneficiary is a railway undertaking in the meaning of Directive 2012/34/EU the aid should be assessed in the first place on the basis of the Community guidelines on State aid for railway undertakings<sup>30</sup>.

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#### References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [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.
- [Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area \(recast\)](#), JO L 343, 14.12.2012, p. 32.
- [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.

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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; of 9 November 2011 in case SA. 32632 - Belgium – *Terminal à conteneurs intermodal de Genk*, OJ C 82, 21.03.2012, p. 2; and of 19 October 2011 in case SA. 31825 - Belgium - *Containertransferring Beverdonk*, JO C 350, 1.12.2011, p.2.

<sup>30</sup> Communication of the Commission (2008/C 184/07) "[Community guidelines on State aid for railway undertakings](#)", OJ C 184, 22.7.2008, p. 13.

*Indicative list of Commission decisions taken under State aid rules concerning rail, metro, local transport infrastructure:*

- N 356/2002 – United Kingdom – Network Rail:  
[http://ec.europa.eu/competition/state\\_aid/cases/137131/137131\\_453400\\_5\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/137131/137131_453400_5_2.pdf)
- 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](http://ec.europa.eu/competition/state_aid/cases/180019/180019_577971_10_2.pdf)
- N 390/2005 – Belgique – Construction d'installations de transbordement sur la ligne ferroviaire Lanaken – Maastricht:  
[http://ec.europa.eu/competition/state\\_aid/cases/200378/200378\\_583327\\_18\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/200378/200378_583327_18_2.pdf)
- N 702/2009 – Czech Republic – Aid for the reconstruction of a cableway on Mount Sněžka:  
[http://ec.europa.eu/competition/state\\_aid/cases/234375/234375\\_1143684\\_32\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/234375/234375_1143684_32_1.pdf)
- SA.31825 – Belgium – Containertransferium Beverdonk:  
[http://ec.europa.eu/competition/state\\_aid/cases/241386/241386\\_1267958\\_116\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/241386/241386_1267958_116_2.pdf)
- SA.32632 – Belgium – Terminal à conteneurs intermodal de Genk:  
[http://ec.europa.eu/competition/state\\_aid/cases/239767/239767\\_1303823\\_116\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/239767/239767_1303823_116_2.pdf)
- SA.34985 – Austria – Programme for supporting the development of connecting railways and transfer terminals 2013:  
[http://ec.europa.eu/competition/state\\_aid/cases/245111/245111\\_1398705\\_116\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/245111/245111_1398705_116_2.pdf)
- SA.35948 – Czech Republic – Prolongation of the interoperability scheme in railway transport:  
[http://ec.europa.eu/competition/state\\_aid/cases/247158/247158\\_1468536\\_73\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/247158/247158_1468536_73_2.pdf)
- SA.38714 (2014/N) – France – Aides à l'investissement au projet d'autoroute ferroviaire atlantique:  
[http://ec.europa.eu/competition/state\\_aid/cases/252684/252684\\_1583429\\_106\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252684/252684_1583429_106_2.pdf)