



State aid and local infrastructures

**SAM working group of Member States
Sofia 2 February 2018**

Felix SCHULYOK
European Commission - DG
Competition

Unit 03 – State aid policy and
Case support

DISCLAIMER

"The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission."



Overview

- Does the funding constitute State aid?
 - Economic activity? Distortion of competition?
 - Effect on Trade?
- Compatibility of aid for (local) infrastructures
 - Article 56 GBER
 - Notification

Economic activity & distortion of competition

- Economic exploitation = economic activity
 - No economic exploitation if:
 - Exercise of public powers (public remit = police, military, customs,...)
 - Not used for offering goods/services on a market (roads for free public use)
- Distortion of competition
 - No distortion in cases of natural (§211 NoA) or legal monopolies (§188 NoA)

Effect on trade - principles

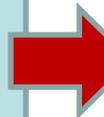
- No need to establish "real" effect on trade – sufficient if it is "liable" to have an effect on trade
- Even if the recipient is not directly involved in cross-border trade
- No threshold or percentage below which there is no effect on trade
- Possible even if undertaking exports almost all its production outside EU
- However, must not be merely hypothetical or presumed.
Depends on all the particularities of the case = facts of the case, meaning evidence available, of the foreseeable effects

Effect on trade - assessment

General principles (set out by the Court of Justice; referred to in paras. 190 to 194 Notice on the Notion of aid)



Fact-specific assessment necessary,
depending on all particularities of the case



Commission provides
guidance:
Abstract principle (NoA)
+ examples in its decision-
making practice

Effect on trade - assessment

Two-tier test:

- Beneficiary supplied goods/services to **limited area within a Member State** and is **unlikely to attract customers from other Member States** (*customer perspective*)
 - ✓ More likely for services than goods
- **Not foreseeable that more than a marginal effect on the conditions of cross-border investments or establishment** (*provider perspective*)
 - ✓ Foreseeable = evidence of exchanges in the relevant sector

Commission Decisions: examples of purely local interventions

- **Sports/leisure facilities:**

- EUR 20 million investment in sports and recreation facility: BLSV Sportcamp Nordbayern (SA.43983).
- Training centre for certification of mountain coaches and instructors in Scotland: Glenmore Lodge (SA.37963).
- Local marina in Slovenia owned by local municipality and predominantly used by locals (SA.45220 of July 2017, **under appeal**)

- **Health care: emergency or "standard" medical services**

- Support for a 200-bed rehabilitation clinic: Bad Nenndorf (SA.38035).
- Support for a local medical centre: Klinikum Mittelbaden (SA.39704).
- Support for regional public hospitals to ensure emergency services and necessary equipment: Hradec Králové (SA.37432).
- Support for an assisted living facility for elderly residents: Santa Casa de Misericórdia (SA.38920). (**under appeal**)

Commission Decisions: examples of purely local interventions

- **Cultural activities:**
 - Support to companies that publish exclusively in the Basque and the Valencian languages (SA.45512 and SA.44942).
- **Support-services for self-employed persons:** Wirtschaftsbüro Gaarden-Kiel (SA.33149).
- Investment aid for **small ports** serving a local community - Lauwersoog (SA.39403) and Wyk auf Föhr (SA.44692).
- **Very small airport** in a remote set of islands: Isle of Scilly (SA.38441)

Effect on trade

- Decisions: Fact specific assessment, yet also intended to give guidance of the **Commission's interpretation of the principles**
- More **general guidance in the NoA**
- Commission emphasizes the need for a **case-by-case approach**
- In light of jurisprudence of the Court the **Commission cannot provide for any percentages, thresholds or "safe-harbours"** (exception: de minimis)
- "purely local impact" = "no effect on trade between Member States possible" (\neq "local" in local infrastructures of Art 56 GBER)

Local infrastructures – Article 56 GBER

- Introduced with GBER reform of 2014
- Availability of local infrastructures prerequisite for the development of business and consumer environment and for modernizing and developing the industrial base in order to ensure the full functioning of the internal market
- If available to interested users on open, transparent and non-discriminatory basis – creation of positive environment for private investments and growth while limited risks for competition distortions
- If financing constitutes aid, the aid is block exempted *"when only small amounts of aid are granted."* (recital 75 GBER)

Local infrastructures – Article 56 GBER

- **Local infrastructure** – wide range of infrastructures (unless covered by another Article of GBER) with small aid amounts, i.e. below notification threshold; however must be local (e.g. cannot cover scheme for rollout of network of infrastructures covering entire Member State)
- Made available to interested users on open, transparent and non-discriminatory basis for a market price – ensures that **no aid is passed on to users**
- Entrustment to third party operator on open, transparent and non-discriminatory basis – ensures that **no aid is granted to operator** – only relevant if third party operates the infrastructure (in-house operator in the meaning of public procurement rules does not constitute third party operator)

Local infrastructures – Article 56 GBER

- Eligible costs: **investment costs for infrastructure** (has to be for *infrastructures* or any equipment related to the use of the infrastructure; not for IT systems of e-booking systems);
 - No operating aid
- Aid amount limited to **funding gap**
- No aid for **dedicated infrastructures** – dedication in this context contains a requirement of being "tailored to their needs", e.g. infrastructure that can only be used by one operator/user (specific requirements) or has considerable value only for a specific operator/user; general influence on design that can be useful for any user/operator does not make the infrastructure dedicated



Local infrastructures – compatibility outside of GBER

- For aid not fulfilling the GBER – notification and individual assessment by the Commission
- Assessment on the basis of the Treaty (or specific Guidelines if applicable)

Local infrastructures – aid vs no-aid

- Notion of aid laid down directly in the Treaty and obligation of Member States to assess whether a measure constitutes aid also directly stems from the Treaty
- **Inclusion of Art 56 in GBER has no effect on qualification of certain projects as aid or no-aid** – GBER only applicable if a given funding constitutes aid
 - See also adoption of 2 no effect on trade packages in 2015 and 2016, meaning after inclusion of Art 56 GBER
- Article 56 GBER constitutes **considerable simplification as compared to situation pre-2014**, as aid measures fulfilling the conditions now do not have to be notified anymore. **Assessment of whether such measures constituted aid was also necessary pre-2014.**

Local infrastructures – conclusions

- Distinction between "purely local impact" (=no effect on trade) and "local" (=GBER)
- Commission gives guidance through **case practice** (especially no effect on trade decisions), the **NoA** and **eWiki**
- Article 56 GBER is a "fallback" provision for a wide range of small (local) infrastructures, if funding constitutes aid it can be block exempted



Thank you for your attention!

Questions?