

Chapter 14

THE INFLUENCE OF EU STATE AID RULES ON PPP INFRASTRUCTURE PROJECTS

Alessandra Romanelli and Kathrin Hornbanger

INTRODUCTION

As the European Commission tries to boost the infrastructure development in key sectors in Europe in order to ensure the effective achievement of the Europe 2020 objectives and to address the current financial crisis, the complex EU rules on the State aid applied by the European Commission continue to constitute a potential obstacle for the attainment of the said objectives.

While the European Commission is expected to simplify and amend these rules with reference to at least crucial infrastructure projects (e.g. Energy) (European Parliament, 2011) the current state of affairs, in particular regard to the case law of the European Commission and the Community Courts on financing of the Public Private Partnerships (PPPs), shows a rather complex picture.

In times of financial turmoil the building, maintenance and operation of infrastructure, as well as the distribution of public services, increasingly requires the cooperation between public authorities and private undertakings (PPP). This is not only due to the budgetary reasons, but also due to the need for more efficient delivery of public services, which can be addressed through the know-how and the working methods of the private sector. The European Commission has underlined the increasing importance of the use of PPP to boost European economic growth and its interest within the framework of the grants provided by the same European Commission (see Cohesion and Structural Funds) (European Parliament, 2011)

Recently, in its Communication Europe 2020, the European Commission identified PPPs as one of the key delivery mechanism to reach a “smart, sustainable and inclusive growth in Member States and regions” (European Commission, 2010). There are extensive debates about the concept of PPP and the spectrum of PPP models can be considered very wide. It broadly includes two main types: institutionalized PPPs and contractual PPPs. The present paper will refer to PPP as including all forms thereof.

The traditional approach to the financing of infrastructure is founded on the non-economic nature of such activities, insofar as the same is strictly connected with the exercise of public prerogatives. This led to the same being traditionally considered as not subject to EU State aid rules. In addition public funded infrastructure can be considered as “general” measures, as it is offered to all users on the same conditions. As a consequence, their public funding would lack the character of “selectivity” and would not constitute State aid.¹ In the last decade the approach of the European Commission to infrastructure funding with reference to State aid rules has been completely redesigned, in particular with reference to the two relevant arguments of “market failure” and “non-selectivity” principles (Heidenhain, 2010), mainly due to the process of market liberalization. Today, the European Commission carefully scrutinizes the construction and development of infrastructure by State authorities under State aid rules (Santamato & Westerhof, 2003).

The funding of infrastructure through PPPs raises complex legal issues. In this case, in fact, the evaluation of the character of “selectivity” of the funding has to be conducted at all levels of a PPP: user level, owner/operator of infrastructure level, and shareholders level. The aim of this paper is to provide an overview of the main aspects that have to be evaluated with reference to funding of infrastructure facilities through PPP, in order to assess whether there is a need to file a notification to the European Commission on measures possibly involving State aid, according to Art. 108 (3) TFEU, or not.

The paper will begin with an overview of the relevant criteria for the existence of State aid with reference to funding of infrastructure in general. A deeper analysis of such criteria with reference to PPP infrastructure schemes will follow, including a chapter on the principles applied for approval of compatible aid under Art. 107 (3)

TFEU. Some selected decisions of the European Commission will be reviewed at the end of the paper, in order to provide a better overview of the Commission's decision-making practice, a case-by-case analysis whereof provides the guiding principles for understanding the European State aid rules.

PUBLIC FUNDING OF INFRASTRUCTURE

In its recent Note to DG REGIO, "Application of State aid rules to infrastructure investment projects," the European Commission, by commenting on the judgment of the General Court in "Leipzig/Halle," has made it clear that the "financing of any type of infrastructure (excluding infrastructure related to security, safety, etc.) that is later commercially exploited is State aid relevant" (European Commission, 2011). Only the financing of infrastructure not commercially exploited (not operated by a concessionaire) and open to the general public can be excluded from the application of State aid rules. In all other cases, the project for construction has to be assessed in order to verify its compatibility with the said rules.

Economic Activity

For the existence of an unlawful State aid with reference to public funding of infrastructure all the criteria under Article 107 (1) TFEU must be met. To begin with, the measure must provide a benefit to "undertakings." Bodies carrying out non-economic activities are not to be considered undertakings. As the Court of Justice pointed out in some of its decisions,² the notion of "undertaking" focuses on the nature of the activity carried out by the entity concerned (functional approach). In particular, the Court of Justice considers that any activity consisting of offering goods and services on a given market is an economic activity.³

In the light of the case-law of the European Court of Justice, the European Commission is of the view that the construction and operation of infrastructure by public entities does not constitute an economic activity, if it is open to all potential users on equal and non-discriminatory terms.⁴ On the other hand, if some public founded construction is carried out or operated by a private company, the operation of the related infrastructure may constitute an economic activity with State aid.⁵ Therefore, any benefit granted to private operators, which affects their economic activity is to be considered

State aid, even in the cases when the infrastructures operated by them are open to all end users under equal terms.⁶ Only the construction and functioning of infrastructure that favors the economy in general does not fall within the scope of Art. 107 (1) TFEU. Furthermore, the exercise of public authority does not constitute economic activity (e.g. safety, customs, police).⁷ The European Commission has underlined, with reference to the aviation sector, that the concept of undertaking does not depend on the legal status or on the way in which an entity is financed. Further, in its “Guidelines on financing of airports and start-up aid to airlines departing from regional airports,” the Commission confirms, in accordance with the “Aéroports de Paris” case,⁸ that the airport management and operation are economic activities, considering that they involve the provision of airport facilities in return for fees. As a result, they do not fall within the exercise of the official powers as public authority. The European Commission goes then further and states that an economic operator engaged in an airport activity should finance the cost for building or using the airport facility which it manages, in order to exclude that State aid has been granted. Finally, the General Court in the “Leipzig/Halle” judgement,⁹ dated 24 March 2011, also confirmed that not only the operation of an airport infrastructure but also its construction linked to its later operation constitutes an economic activity. In principle, this statement has to be extended to all the measures aimed at financing public infrastructure. On 8 June 2011 an appeal before the Court of Justice was brought by Mitteldeutsche Flughafen AG, Flughafen Leipzig/Halle GmbH against the judgment delivered by the General Court, in order to challenge the classification of the financing measures at issue as aid for the purposes of Article 107(1) TFEU. It will be interesting to see how the Court will decide in that regard.

Finally, the issue of “market failure” has to be tackled. As underlined in literature by S. Santamato and J.G. Westerhof (2003) with reference to funding of infrastructure, the presence of a real “market failure” is a limited hypothesis. Only when a market failure occurs (e.g. non-excludable goods, such as street lighting) would the funding of an infrastructure not fall within the scope of State aid rules, i.e., it would be considered as a non-economic activity.

State Resources

Art. 107 (1) TFEU only concerns measures that are financed by a Member State or through State resources. The State in this context can be a federal government, a regional or local authority and also in some cases State controlled undertaking. According to the article, private financing does not fall within the scope of State aid rules and State aid control only applies if subsidies are transferred by State resources. Similarly, some funds coming from the European Union budget, in particular Structural Funds, are subject to State aid rules, as long as the national or local authorities are directly responsible for their management.

With regard to resources coming from State controlled undertakings, the European Court of Justice has restricted the application of State aid rules in two recent judgments: “Stardust Marine” and “PreussenElektra.” In these decisions, the Court of Justice outlined the criteria for accountability to the State as an aid measure taken by a public undertaking. In “Stardust Marine,”¹⁰ the Court held that a transfer of resources by a State controlled undertaking cannot be considered automatically as State aid and before the measure is assessed, several circumstances are to be taken into consideration. In particular, if the company has acted in an autonomous way, an intervention by the State or through State resources should be excluded. In the case of “PreussenElektra,” the Court of Justice had to deal with this issue in the context of the German Electricity Feed Law (“Stromeinspeisungsgesetz”). On the basis of this law companies in the energy sector had to buy “green electricity” at a fixed price above the market price. The Court of Justice was of the view that the aid had not to be considered as State aid as long as the companies obliged to buy “green electricity” were private ones and the advantage to the green electricity companies was granted through a legislative measure regulating the relationship among private operators. Such measures cannot be considered as “transfer of State resources.”¹¹ The European Commission, on the other hand, has referred to the “Stardust Marine” judgment to clarify in the case “Flughafen Lübeck GmbH” that the possible advantage granted by the latter to Ryanair, in the form of inadequate landing charges and passenger charges, as well as marketing arrangements, is an aid that comes from State resources. As a matter of fact, Flughafen Lübeck GmbH is a semi-public company (although at the

moment of the decision 90 % of the shares were owned by a private company, Infratil) which operates an airport that plays an important role with reference to many political issues. Therefore when a decision about the long term development of such an infrastructure is taken, it can be assumed that the public shareholder is involved.¹²

Distortion of Competition, adverse effect on Intra-Community Trade

Art. 107 (1) TFEU foresees that the applicability of State aid rules is subject to the condition that the favorable treatment of an operator adversely affects intra-Community trade. State aid rules apply as long as all legal prerequisites of Art 107 (1) TFEU are fulfilled. As a consequence, the legal prerequisites of distortion of competition and adverse effects on intra-Community trade are as well constitutive for the presence of State aid.

Distortion of competition occurs when State aid intervenes effectively or potentially in already established or emerging competition between undertakings.¹³ In its decision “Commission v Italy”¹⁴ the European Court of Justice held that the competitive situation must be compared before and after the State aid has been granted.

As a general rule, where competition among economic operators already exists in the relevant market, the European Commission assumes a distortion of competition in case of advantages granted to a specific undertaking or a group thereof. The adverse effect on intra-community trade is recognized not only when the concerned company operates in the cross border market, but it is sufficient that the benefit granted to that company has the effect to potentially restrict the access of other EU companies to that market.¹⁵ It has to be pointed out that the presence of adverse effects on intra-Community trade does not depend on the local or regional character of the provided services or products or on the size of area of activities.

When it comes to analyzing funding of infrastructure, the European Commission normally recognizes a potential distortion of competition affecting intra-community trade without any deeper analysis of the particular case. In the opinion of the European Commission the owners or operators of infrastructure compete, by reason of their substitutability, with each other.¹⁶ For example railway transportation of goods and persons has to be considered as being in competition with road transport.

The European Commission has denied the presence of an adverse effect on intra-community trade only in the cases of small yacht harbors, swimming pools and cable railways - used only by local population. On the other hand, where an infrastructure is used also by tourists this is sufficient for the identification of a potential adverse effect on intra-community trade.

A particular case is represented by competition among operators of infrastructure in a natural monopoly. In its decision in "Network Rail", the European Commission excluded the existence of distortion of competition, as long as the concerned infrastructure was owned by the State and operated by another company that did not exercise economic activities in other markets and did not distribute any dividends (there were no shareholders), while reinvesting all surpluses into the business.¹⁷

Economic Advantage and Selectivity Requirement

Another requirement for qualifying a measure as State aid under Art. 107 (1) TFUE is that it confers a selective advantage to defined economic operators or products. The advantage could take the form of a subsidy or a loan, as well as the form of a guarantee or the sale of real estate properties by the State below market price (direct or indirect advantage).

For establishing the existence of State aid, in case of funding of infrastructure, the argument of selectivity has to be considered as a central one. A State financial measure constitutes State aid if the concerned infrastructure is dedicated to one specific undertaking or favors certain undertaking or a branch of production. The European Commission has, for example, stated that funds granted to a consortium of companies for the construction of a propylene pipeline from Rotterdam through Antwerp into the Ruhr region constitutes State aid, as long as the infrastructure only favored the producers of the products concerned.¹⁸ In another case, the European Commission was of the view that a stadium owned by a public entity, that provides facilities for several activities and users and that is rented out to economic operators for a proportional compensation does not favor one specific undertaking or production, and therefore does not fall within the State aid rules.

When the subsidy or advantage is selective, the State aid can be ruled out only if the State concession or financial contribution is

made conditional to the acceptance of certain requirements that would grant that the facilities remain open to all end users on non-discriminatory terms. Further, the amount of funding has to be the minimum necessary to allow the project to proceed or, in case of concession, an adequate compensation should be paid back by the concession holder.

In this regard, the European Commission and the EU courts make use of the so called “market economy investor” test¹⁹ to assess the proportionality of the consideration and exclude the existence of State aid. In particular, it has to be verified that the consideration paid by the beneficiary is an adequate remuneration for State intervention. The “market economy investor” test assesses whether a prudent private investor, in similar circumstances and having regard to the foreseeability of obtaining a return, would have provided a financial contribution of the same size and type, irrespective of the form taken by that State intervention and of the fact that the State has access to resources flowing from the exercise of public power, such as those from taxation, which could not be accessed by a private investor.

As such, the “market economy investor” test is not always suitable as a criterion to evaluate the proportionality of a benefit granted through State resources. In the first place, as clearly outlined in the judgment “*Électricité de France (EDF)*,”²⁰ interventions by the State which are intended to honour its obligations as a public authority cannot be compared to those of a private investor in a market economy. In these kinds of situations, the intervention by the State cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the State (see, to that effect, the Opinion of Advocate General Léger in *Altmark Trans and Regierungspräsidium Magdeburg*). In the same way, in case of monopolies, where benchmarking for the evaluation of proportionality does not exist, the “market economy investor” test is in principle not applicable.

In the case of funding of infrastructure falling outside the exercise of public powers by the State, the European Commission does not usually use the “market economy investor” test to ascertain the existence of an economic advantage, by reason of the complexity of the commercial operation concerned. As a matter of fact, especially in case of PPPs, the involvement of the private sector in the

infrastructure construction and/or operation assumes very complex forms, where there are no separate contracts or clearly identified services or works at easily determined market prices. On the other hand, it is worth pointing out that in its decision “Leipzig/Halle”, the European Commission clearly stated that, in relation to the investments for the new southern runway of the Airport, the “market economy investor” test was applicable, disregarding the argument proposed by the German authorities. Based on the European Commission’s opinion, the applicability of such test cannot be excluded only because the private sector would not be involved in financing the airport infrastructure.

In the case of funding of infrastructure, to exclude the existence of over-compensation, the European Commission, as a general rule, requests that the funding be awarded as a result of an open, transparent and non-discriminatory tender procedure, according to the EU relevant legal provisions. Therefore, the running of such a competitive procedure can be considered as an alternative to the “market economy investor” test. The existence of a State aid as a result of the award of public contract through a competitive procedure has been nevertheless identified in cases where the contracting authority has procured goods or services without a concrete need (see ECJ, Joint Cases T-116/ 01 until T-118 /01). Where a tender procedure cannot be carried out (e.g. where the undertaking receiving aid owns the property or there are only few credible candidates or only one), the European Commission recognizes an independent expert survey as sufficient tool to prove the proportionality of the consideration (see decision “Flughafen Lübeck GmbH and Ryanair,” C 24/07, para. 106). Normally this should be organized under the supervision of the competent regulatory authorities, if they exist (Santamato & Westerhof, 2003).

It is worth pointing out that although the use of public procurement rules to award a concession or provide a financing can be considered normally as a sufficient basis to exclude the existence of an economic advantage, on the other hand, the scope of application of public procurement rules and of State aid rules do not correspond. The purpose of the public procurement rules is the selection of the best offer. On the contrary, the State aid rules aim, in this context, at ensuring the least cost to the community. From a

State aid point of view, as a general rule, the award of a contract should follow the lowest price principle (Koenig & Wetzel, 2007).

Where an open procedure is not carried out, for the purposes of State aid rules, the general EU public procurement principles of publicity, equal treatment of all bidders and non-discrimination nevertheless have to be respected. The direct award of a contract is therefore not sufficient to exclude the applicability of Art. 107 (1) TFEU and neither is the use of a negotiated procedure without prior publication of a contract notice in most cases.

PUBLIC PRIVATE PARTNERSHIPS

The evaluation of the existence of a State aid is even more complex when the infrastructure is not owned and operated by public authorities but is realized and/or operated in the form of a public-private partnership Holger, J. (2010).

In reviewing cooperation between public and private partners the European Commission has increasingly investigated in detail, whether and to what extent such forms of cooperation could constitute an advantage, directly or indirectly, to the operators of the infrastructure, their users and the shareholders of the participating private undertaking (Rauchenwald, 2010).

It has to be outlined that, as a general rule, with reference to funding of infrastructure the European Commission concentrates its scrutiny to ascertain the presence of a State aid on two of the criteria set by Art. 107 (1) TFEU: the favoring of an undertaking and the selectivity of the measure. The arguments relating to the selectivity of a State aid measure and the creation of an economic advantage are not entirely independent of each other. As stated by the Court of Justice in the case “Mediaset Spa v. European Commission” (case C-403/10, 28 July 2011, para. 62) “*a measure may be considered to be selective only if it is likely to create such an advantage for one recipient while not doing so for other persons whose situation is comparable to that of the recipient*”. In this regard, all relevant markets and levels relating to a PPP have to be verified in order to exclude that an illegal State aid has been granted, thus it has to be assessed that neither the end-users, nor the shareholders, nor the owners and/or operators receive an over-compensation for their investments or activities.

In the first place, none of the potential end users, in case they are undertakings, must receive an advantage through the funding of the concerned infrastructure. As a consequence, the use of the infrastructure has to be open to all users on a non-discriminatory basis. In its case “Terra Mítica” the European Commission stated that the infrastructure facilities paid for by the local administration (access routes, motorway links, electricity, water and waste disposal connections, etc.) in the surroundings of the theme park operated by the company “Terra Mítica” (15 % of its capital was held by a public company), favored only that specific company and therefore constituted State aid.²¹

Considering the level of shareholders, a State aid could be identified where the shareholders of a company operating the infrastructure are granted specific benefits. This could be the case when they enjoy more favorable conditions to access the services of the infrastructure concerned than other users, or if they receive payment of dividends or sell the shares of the undertaking, whose value has increased as a consequence of the establishment of the PPP. In this regard, a ban or limit on the sale of shares or an obligation to limit the maximum amount of dividends to be paid would exclude the existence of an unlawful State aid.

In its decision “InfraLeuna Infrastruktur und Service GmbH”²² the European Commission clarified that the question of State aid may also arise on the level of shareholders of the private undertaking (on the condition that the shareholders are undertakings), being part of a PPP. In particular, the European Commission outlined that there might be a specific benefit constituting State aid if the infrastructure operator charges lower prices to its shareholders than to other end-users. In any case the European Commission ruled out the possibility of an advantage to the shareholders, given that InfraLuena’s fixed assets were strictly confined to their prescribed purposes and required unanimous consent of the members’ general meeting before they could be sold.

Finally, the level of the operators and owners has to be taken into consideration. The evaluation of the existence of an economic advantage for the assessment of a potential State aid in favor of a private partner of a PPP is more complex than in traditional infrastructure contracts. As already pointed out, this is due to the fact that the private sector involvement in a PPP can take very different

forms. On the other hand, the private contracting party usually does not receive its consideration in the form of payment, but instead in the form of rights of exploitation of the constructed facility for a certain period of time. An example of such contractual scheme is the form of project financing called BOT (Build-Operate-Transfer). The peculiarities of PPP agreements require a deeper analysis while assessing the existence of a State aid.

The advantage granted to the private partner can be minimized if it is selected through an open, transparent and non-discriminatory tender procedure. In general an open, restricted, negotiated procedure, as well as the use of a competitive dialogue can satisfy the requirement of openness, as long as the tender is sufficiently advertised and all bidders are granted equal access to all relevant information. Nevertheless, the State financial support for construction and maintenance of the infrastructure in favor of the private partner has to represent the market price.²³

In its decision “London Underground,”²⁴ the European Commission outlined that when the concept of a PPP and its contractual arrangements are adjusted during the selection procedure (open, transparent and non-discriminatory), it is allowed from a certain point onwards to negotiate with only the preferred bidder, but the modifications that follow shall not hinder the award of the contract to the best offer. Finally, the European Commission assessed whether the measures taken were proportional. The proportionality was confirmed by the European Commission, on the ground that the thirty years duration of the service contract was proportional to the initial investment and the possibility of overcompensation in favour of the three “Infracos” responsible for the maintenance, renewal and enhancement of the Underground Infrastructure could be excluded. As a matter of fact, the agreement was subject to extensive review processes and there were strong limitations on the use of assets to distort competition in ancillary markets. Additionally, the Commission assessed the existence of State aid in favour of the operator of the Underground services (“LUL”), which was going to provide a service not commercially viable without a subsidy. Also in this regard, according to the Commission no unlawful State aid was granted.

With reference to State aid rules, it is worth pointing out that the model of institutionalised public-private partnerships (IPPPs), where,

as a general rule, a private partner has to be selected for the establishment of a semi-public company that will be entrusted with the operation of an infrastructure, is rather important by reason of its complexity. In such cases, as pointed out by the recent judgement of the Court of Justice, “Acosec,”²⁵ two tender procedures one for selecting the private shareholder in the semi-public company and another to award the concession to the semi-public company are not necessary. On the other hand, the award criteria for the selection of the partner have to include criteria referred to requirements specific to the service to be awarded.

The Court held that the direct award of a public service contract which entails the prior execution of certain works to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, is compatible with the Treaties if the private partner was selected by means of a public and open tender procedure after verification of the financial, technical, operational and management requirements specific to the services to be performed, and if the tendering procedure complies with the principles of free competition, transparency and equal treatment of all bidders. Furthermore the semi-public company must retain the same corporate purpose throughout the duration of the concession.

The “Acosec” judgment seems to clarify the scope of application of the “Stadt Halle” decision (Case C-26/03, January 11, 2005), in which the ECJ held that: “Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of Directive 92/50, as amended by Directive 97/52, with a company legally distinct from it, in whose capital it has a holding, together with one or more private undertakings, the public award procedures laid down by that directive must always be applied.”

If a public procurement procedure is not possible the Commission has accepted in a few cases the application of the so-called low-profit principle (see “InfraLeuna” decision). On this basis it has to be assessed that the private participant in a PPP does not make, or makes limited profits, or that it is obliged to reinvest the profit into the maintenance of the infrastructure. However, this principle has not been applied as a general rule and, as claimed in literature, it cannot avoid distortion of competition in the upstream markets (Koenig, 2003; Koenig & Wetzel, 2007).

EXCEPTIONS UNDER ART. 107 (3) TFEU

In several cases the Commission has recognized the compatibility of measures aiming at funding Infrastructures under the provision of article 107 (3) TFEU. The Commission can assess, by exercising its discretionary powers, whether an aid falling within the scope of Art. 107(1) TFEU contributes to the achievement of the Community objectives and, therefore, can be declared as compatible with the common market. It has to be pointed out that the European Court of Justice has, in this regard, no power to replace the assessment made by the Commission, which retains exclusive competence on the matter.²⁶

A central feature for the assessment of an aid under Art. 107 (3) TFEU is the application of the “balancing test”, as established in the Commission’s State Aid Action Plan,²⁷ that foresees a more defined economic approach to State aid evaluation, focused, in particular, on market failures. According to such a test, the Commission has to verify whether positive effects of aid outweigh its potential negative effects. The positive impact of an aid can depend on how precisely the objective of common interest is identified in the particular case, on whether State aid constitutes an appropriate instrument to address a market failure or on whether the aid is proportionate and creates the needed incentives.

The most relevant provision under which State aid for Infrastructure through PPP can be approved is, in particular, Art. 107(3) (c) TFEU. According to this provision a State aid which aims at facilitating the development of certain economic activities or of certain economic areas can be considered as compatible with the internal market, where the aid at stake does not adversely affect trading conditions to an extent contrary to the common interest. In the established Commission decision-making practice there are specific criteria that need to be fulfilled for this purpose. In the first place, the aid must aim at a well-defined objective of common interest. Furthermore, it must be well designed to deliver the set objective and it must constitute an appropriate and proportional instrument. Finally, the distortions of competition and the effect on trade deriving thereof must be limited, so that the overall balance can be considered positive.

In its recent guidelines on State aid for regional airports (2005/C 312/01), the European Commission specified the above

requirements with reference to funding of infrastructure. The set criteria are as follows:

1. The construction and operation of the infrastructure meet a clearly defined objective of general interest (e.g. regional development, accessibility, etc.);
2. The infrastructure is necessary and proportional to the objective;
3. The infrastructure has satisfactory medium-term prospects for use, in particular as regards to the use of existing infrastructure;
4. All potential users of the infrastructure have access to it in an equal and non-discriminatory manner;
5. The development of trade is not affected to an extent contrary to the Community interest.

In this context, the assessment of the necessity and proportionality of the aid is of particular importance. The planned aid is necessary for the achievement of the defined results, insofar as the infrastructure would not be built under normal market conditions or, at least, not to the extent needed for the achievement of the objectives. As a consequence, an aid for the funding of an infrastructure can be compatible with the common market, where there is a market failure and where the aid has an incentive effect. Further, the infrastructure can be defined as necessary, where it is of interest to the public (Santamato & Westerhof, 2003). An "interest to the public" has to be distinguished from the concept of a service of general economic interest" (SGEI) according to Art. 106 TFEU. An infrastructure is of interest to the public, where it is appropriate and there would be no better systems to serve the general interest than through it. For instance, the construction of an infrastructure which would compete with other facilities that already exist on the same market would be considered unnecessary.

The proportionality of an aid is given, when the distortion effect is minimized. In this regard, it has to be assured that no over-compensation is provided. So far though, the European Commission has not shown a consistent opinion with regard to the maximum admissible amount of aid that can be considered as proportional. In the Commission's decision N 170/2004, for instance, it ruled out the compatibility with the internal market under Art. 87 (3) (c) TEC (now Art. 107 (3) (c) TFEU) of an aid exceeding 50% of the amount

invested. In another case, a State aid in the amount of 94% of the total needed investment was not considered as unlawful (Karpenstein & Schiller, 2008). Also in this context it has to be therefore emphasized that the scrutiny of a measure under State aid rules must be done on a case-by-case basis.

SELECTED DECISIONS OF THE EUROPEAN COMMISSION

The analysis of the most recent European Commission's practice in the field of funding of infrastructures through PPP is of major importance for a deeper understanding of the legal background and of the methods applied to ascertain the existence of State aid. This is in particular valid for the crucial and related arguments of "selectivity" and "economic advantage."

The decisions of the Commission that will be shortly outlined in this section highlight the complexity of the analysis to be carried out to assess the existence of State aid in case of funding of infrastructure through PPPs. This is due in the first place, as already emphasized, to the different levels and markets involved in the assessment. On the other hand, the selected decisions make clear the case-by-case approach of the Commission's methodology and clarify that the answer to the question whether a State aid is present depends to some extent on the sector of activities concerned.

In particular, in the "JadeWeserPort Infrastruktur"²⁸ decision of the European Commission the use of a tender procedure for the award of a concession was considered sufficient to rule out a benefit on the level of the operator of the infrastructure, but a deeper analysis was requested to exclude it on the other market levels. In its decision "Antwerp Airport"²⁹ the Commission stated, instead, that the use of a tender procedure can not automatically lead to the exclusion of a State aid not even on the level of the operator of the infrastructure funded through a PPP scheme. In its case "Irish Road Projects Under PPPs – M3 and N7"³⁰ the Commission, after emphasizing that a tender procedure, whose outcomes are not known yet, is not sufficient to rule out the existence of an economic advantage to a private operator, assessed the necessity and proportionality of the aid under Art.107 (3) (c) TFEU. Of particular interest then is the case "Regional Broadband Programme – Ireland"³¹ where the Commission made use of a quite severe approach for scrutinizing the existence of economic advantages at all

levels and with reference both to the direct and indirect beneficiaries of the measure. As a matter of fact, the Commission in this case applied its guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ C 235/2009), that specify that a tender procedure ensures that an aid is limited to the minimum necessary for a certain project, but the influence of the infrastructure funding must be evaluated with reference to all indirect beneficiaries (downstream markets). This kind of provision is not contained in other guidelines issued by the Commission with reference to the application of State aid rules in different sectors of activities (e.g. Airport). Finally, the decision “R&D National Plan 2008-2011 – Spain” (European Commission, 2006)³² furnishes an overview of the methodology used to apply State aid rules in the field of research and development.

JadeWeserPort Infrastruktur

In its case “JadeWeserPort Infrastruktur“ the European Commission scrutinized the measures planned by the States of Bremen and Lower Saxony to finance, through publicly-owned companies – JadeWeserPort Infrastruktur und Beteiligungen GmbH & Co. KG (“JIB”), and JadeWeserPort Realisierungs GmbH & Co. KG (“JWPR”) – the basic infrastructure (maritime access and connections to land transport networks) and the infrastructure necessary for the construction of a new maritime container terminal in Wilhelmshaven on the mouth of the Jade River. The container terminal was to be financed, constructed, operated and maintained by an operator to be selected through a tender procedure. The execution of the three components of the project was entrusted to three separate entities:

- (1) the basic infrastructure (€ 370 million) to JIB as SPV of the State Lower Saxony as land owners;
- (2) the terminal-related infrastructure (€ 240 million) to JWPR, jointly owned by the state of Lower Saxony and Bremen; and
- (3) the financing, construction, operation and maintenance of the terminal (€ 350 million) to Eurogate Wilhelmshaven, selected as concessionaire on the basis of a public tender procedure.

The European Commission assessed the effects of the foreseen financing under State aid rules on four levels: the level of public land owner JIB and the owner of the public infrastructure JWPR; the level

of the concessionaire Eurogate; the level of future port users; and the level of the purchasers, lessees or tenants of land.

The European Commission was of the view that at the level of JIB and JWPR the public financing of the construction of the basic infrastructure and the terminal-related infrastructures were compatible with the common market pursuant to Article 87(3) (c) of the EC Treaty (now Art. 107 (3) (c) TFUE). The State intervention in the present case was fully in line with the objectives to develop European ports in the framework of the European transport policy.

Furthermore, the European Commission considered that the 40-year concession agreement for the construction and operation of the terminal by Eurogate did not incorporate any State aid elements because it was awarded on the basis of an open, transparent and non-discriminatory public tender procedure. Eurogate had to take all risks associated with the container traffic (business risk), and JWPR and Eurogate would have had to renegotiate the license conditions if the authorities had financed additional relevant infrastructures in the future.

At the level of port users, purchasers, lessees or tenants of land, the European Commission decided that the notified measures did not lead to any State aid as long as the access to the infrastructure was made on equal and non-discriminatory terms and the future purchasers, lessees or tenants of land will pay market price. The European Commission, therefore, after a careful evaluation did not raise any objections to Germany's plan to support the construction of a new port in Wilhelmshaven (JadeWeserPort project).

PPP Project - Antwerp Airport

In the case referred to the PPP Project of Antwerp Airport the European Commission assessed the financing by the Flemish Government of the construction of a tunnel under the Krijgsbaan at Deurne, the development of industrial estates and the operation of Antwerp Airport through a PPP (N 355/2004). The Commission was of the view that the financing granted to the private company through the PPP project was to be considered State aid according to the relevant provisions of the European Community Treaty. By referring to the ECJ decision in "Aéroports de Paris", the Commission stated that, although the construction or the financing of transport infrastructure projects such as airports and motorways are to be seen as a general

measure of economic policy, this general rule does not exclude the possibility that a deeper evaluation can establish the existence of a State aid when a user of the infrastructure, or the operator of it, is favoured by that aid. Moreover, the Commission considered that the tunnelling of the Krijgsbaan was not in favour of the entire community, but that it was arranged with the specific aim to support the airport's activities. Therefore, the cost for the tunnel infrastructure was to be borne by the airport operator. The Commission outlined further that the use of a competitive procurement procedure leads to the assumption that the aid granted to the undertaking does not exceed what is necessary and that the commercial partner does not receive any additional benefits. It does not exclude, however, that a State aid has been granted. The use of a competitive tender procedure could not enable the Commission to automatically conclude that the obtained result was equivalent to the one that would have emerged by applying the normal market mechanisms, due to the discretionary power exercised by the Contracting Authority by choosing the award criteria.

The European Commission concluded that the aid at stake was, anyhow, compatible with the common market according to Art. 87 (3) (c) EC Treaty (now Art.107 (3) (c) TFEU), since public funding, with the aim of preserving airports at regional or local levels, can be considered as necessary for the achievement of a common interest.

Irish Road Projects under PPPs – M3 and N7

In its decision N. 149/2006 the Commission scrutinized the measures notified by the Irish government for the construction and maintenance of two roads projects under public-private-partnerships: the M3 motorway Clonee to North of Kells and the Limerick Tunnel, as part of the N7 national road. The establishment of a PPP aimed at the design, construction, financing and operation of the new road infrastructures for a period between 30 and 45 years. For each project the private company had to be selected through an open, non-discriminatory and transparent tender procedure.

The European Commission confirmed that the management of a transport infrastructure by a private entity constitutes an economic activity. This is applicable, in the Commission's opinion, also where the construction and the management of the infrastructure are intrinsically connected and both carried out by the same entity, such

as a build and operate PPP. Furthermore, the Commission stated that although an open, transparent and non-discriminatory tender procedure tends to minimize potential advantages to the service providers and thus possible elements of state aid, it is still possible that an element of State aid remains. Given that a negotiated procedure was chosen, the Commission held that, before knowing the outcome of it, it could not be assessed whether an economic advantage was granted. Therefore, it could not be ruled out that the measures notified by the Irish Government constituted unlawful State aid.

The measure was nevertheless considered compatible with the Common Market, as per Art. 87 (3) (c) EC Treaty (now Art.107 (3) (c) TFEU). In this regard, by applying the guidelines on State aid for regional airports, the Commission assessed that the financial support was necessary and proportional to the defined objectives, since no alternative solutions were available; moreover, it was demonstrated that no private investor would have accepted to take the risk of the two projects without that public financing (market failure). The Commission held further that where a competitive tender procedure is carried out, although an element of State aid can remain, the use of such a procedure is significant to assess the proportionality of the aid under Art. 87 (3) (c) EC Treaty (now Art.107 (3) (c) TFEU). A positive impact on competition, due to the probability that the measure would re-invigorate competition between Irish regions, was also identified.

Regional Broadband Programme - Ireland

The Irish authorities planned to construct a broadband infrastructure in some rural areas. The project consisted of two components: the construction of an infrastructure for a Metropolitan Area Networks (MANs) and the management of it with the connected wholesale service. While the MAN infrastructure, entirely funded by the public authorities, was to remain in the ownership of the State, the network infrastructure had to be managed, activated and operated within the framework of a public-private-partnership by a management service entity ("MSE"). The MSE was precluded from being owned or controlled by an authorised electronic communications provider.

Both the construction and the management contracts were awarded through a public tender procedure.

To begin with, the European Commission was of the view that the measure at stake could not be considered as Service of General Economic Interest, as claimed by the Irish authorities. As a matter of fact, the objective of the measure was to enable access to broadband services to operators of electronic communications services for business purposes. The measure did not target the general public.

The existence of an economic advantage was scrutinized at three different levels: MAN infrastructure level, operator level and end users level. As long as the public authorities had tendered out the construction of the MAN to civil engineering companies following competitive tender procedures, the presence of State aid at that level could be excluded. However, the Commission was of the view that the measure conferred an economic advantage to the MSE, as long as the MSE, despite the use of a competitive tender procedure for the award of the concession, could establish its business based on the government-funded MAN infrastructure and enter the market for wholesale services on conditions not otherwise available on that market. Furthermore, an indirect advantage was granted to third parties, in particular to operators using the MSE's wholesale network, since they had access to infrastructure and services at prices which would not be available without State support. The Commission also held that the measure could affect competition at the retail level, considering that the availability of the new infrastructure at low market price could lead to distortion of competition also in the downstream markets (e.g. retail leased lines, broadband, mobile services). Finally, only operators in certain regions could receive a benefit and this could have the effect of providing them with an advantage vis-à-vis businesses located in areas not covered by the measure. As a consequence, the European Commission concluded that the notified measure was to be regarded as constituting State aid.

The measure was nevertheless considered as compatible with the common market according to Art. 87 (3) (c) of the EC Treaty (now Art. 107 (3) (c) TFEU), since the Commission regarded it as an appropriate instrument to provide the right incentives to operators. Furthermore, the running of a competitive tender procedure led to the conclusion that the financial support was proportional. The effects on

other infrastructure providers were minimised, the project did not interfere directly with retail markets and the price distortion was limited. Finally, in view of the peculiarities of the Irish market for electronic communications, the European Commission was of the opinion that the overall effect of the measure on the broadband market was positive. As the measure facilitated the development of certain economic activities (wholesale and, indirectly retail high-speed broadband services) in certain economic areas, it aimed at a defined objective of common interest.

R&D National Plan 2008-2011 - Spain: Public-Private Cooperation in the Field of Transport and Infrastructures

In the Commission's decision N 318/2008 a programme of the Spanish National Plan for Research and Development was assessed under Art. 87 (1) EC Treaty (now Art. 107(1) TFEU). The aim of the measure was to boost industrial and experimental development projects in the field of transport and related infrastructures. The measure, in the form of non-repayable direct grants and soft loans, targeted R&D projects and was addressed to groups or consortiums based on collaboration of undertakings and research organizations. The involved research organizations could be private or public research bodies, carrying out both economic and non-economic activities.

After assessing the measure, the Commission held that it had to be regarded as direct State aid in favour of the private undertakings. On the other hand, the Commission was of the view that no aid was granted to research organizations, since the financial contributions were dedicated exclusively to their non-economic activities (economic and non-economic activities being clearly separated and reflected in separated accounts). The Commission also evaluated whether an indirect State aid to the private undertakings through research in collaboration with publicly funded research organizations was present. According to point 3.2.2. of the R&D&I Framework (European Commission, 2006),³³ in case of collaboration projects carried out jointly by enterprises and publicly funded organizations, an indirect aid can be ruled out, as long as the participant undertaking bears the entire cost of the project, or the results which do not give rise to intellectual property rights may be widely disseminated and any intellectual property rights resulting from the collaboration are fully vested into the research organization, or the research organization

receives a compensation from the participating enterprise for the intellectual property rights resulting from the collaboration at market price. In the case at stake, the results, which did not give rise to intellectual property rights, could be widely disseminated and any intellectual property rights resulting therefrom were fully vested into the research organization. As a consequence, no indirect State aid was present.

The Commission found the notified measure compatible with the common market in the light of R&D&I Framework, as it specifies the general provisions of Art 107 (3) (c) TFEU. The Commission further reminded the Spanish authorities that, according to Art. 88 (3) EC Treaty (now Art. 108 (3) TFEU), all plans to refinance, alter or change the aid scheme have to be notified to the Commission.

CONCLUSION

The overtaking of the traditional approach to the funding of infrastructures and the consequent redesign of the two relevant arguments of “market failure” and “non-selectivity” increase the risk of challenge of such financial support measures under State aid rules in comparison to what has happened in the past. In particular, in the context of Infrastructure PPP financing, the decision-making practice of the European Commission reveals that the running of a competitive tender procedure for selection of the private undertaking can only minimize the risk of a challenge on the ground of an over-compensation. However, due also to the complexity of the form that a PPP can assume, it is in itself not sufficient to automatically exclude the existence of some unlawful State aids. As pointed out above, the existence of an advantage has to be assessed at all relevant levels and, therefore, be verified in the upstream, as well as in the downstream markets. As outlined in literature (see Koenig, 2011),³⁴ the exercise of this kind of assessment can lead to uncertain solutions also due to the lack of common methods to identify the relevant markets, as well as the “concept of neighbouring”. In this regard, we support the opinion elaborated in literature that the case law developed by European Courts in the field of competition law regarding the concepts of upstream, downstream and neighbouring markets cannot automatically be transferred to the funding of infrastructure through PPPs, as assessed under State aid rules. Therefore, it would be recommendable that the European Courts

intervene to define a methodology that allows the identification of all relevant markets in PPP related cases, where State aid is at stake. This would facilitate the necessary evaluation of the argument of economic advantage for any practitioner involved.

Legal uncertainties do not only result from the non-observance of clear differentiation between relevant markets and beneficiaries, but are also due to the lack of clear criteria to identify an adequate market return to exclude that a benefit was granted. The contractual complexity of PPP schemes, as a matter of fact, makes the identification of over-compensation a difficult task. This is true in particular where no tender procedure can be carried out, for the reason that, for instance, the undertaking receiving State aid owns the property dedicated for the infrastructure or in cases where there is only one credible candidate. In such situations it is difficult to ascertain whether State aid rules are infringed, as no satisfactory and clear criteria have been developed by the European Commission, as pointed out above. Further, even when a contract related to a PPP infrastructure project is awarded through a public tender procedure, this may not grant that the compensation return is equivalent to the one that would have resulted out of “normal” market mechanisms. As a consequence, other additional criteria to exclude over-compensation have to be applied in any case.

The definition of such additional criteria is of major importance, especially when we consider that according to Art. 108 (3) TFEU a State is in charge of notifying all kinds of planned aid measures to the European Commission (excluding special cases, such as State aid under Block Exemptions Regulations) and must respect, in this regard, a so called “standstill obligation” before implementing the measure. In case of violation of such obligations, a full recovery of the aid can be ordered, where the aid had already been disbursed.³⁵

For these reasons, the partners of a PPP project aiming at the funding of infrastructures are forced to carry out an accurate analysis of the selectivity and the possible economic advantages, in particular in case of complex PPP agreements, such as institutionalised PPPs. In this regard, even if a tender procedure is used, the whole PPP contractual arrangement has to be verified to make sure that the benefits are limited to and used exclusively for the specific project at stake. Further, in such cases it could be recommendable to verify whether the contract duration is adequate and proportional and the

allocation of risks between private and public partners is well balanced. As we can learn from the “London Underground” decision³⁶ to avoid risks of over compensation a PPP contractual model must also provide for clear rules about contract amendments, as well as strict contractual provisions regarding the possible participation of third parties in the partnership, in order to prevent the use of assets from distorting competition in ancillary markets. The criteria outlined in the “London Underground” decision could be used as general guiding principles to assess PPP agreements under State aid rules.

The case-by-case approach of the European Commission and the lack of significant decisions of the European Court of Justice with reference to the application of State aid rules to the funding of infrastructure through PPP, leave the legal and methodological framework for the evaluation under State aid rules fragmented and make the identification thereof a rather delicate exercise. A significant exemplification of the approach currently used by the European Commission in scrutinizing measures aiming at financing infrastructures through PPPs is the decision “Regional Broadband Programme – Ireland”, where the Commission used a rather careful “modus operandi” in order to verify the existence of an economic advantage at all market levels and with reference both to direct and indirect beneficiaries involved. This decision embodies a step in the right direction in terms of definition of methodology. Yet on the other hand this makes it even clearer that the assessment of State aid in PPP projects is indeed a very challenging task for practitioners.

For all these reasons, it might be considered useful to develop through soft law a definition of a unified set of criteria valid for all sectors of activities in order to assess that no more than an adequate consideration is granted, when it comes to the funding of infrastructures. However, for the sake of certainty, it is in particular desirable to develop a robust case-law of the European Court of Justice which clarifies under which conditions a measure to finance infrastructures through PPP does not constitute State aid and can be therefore considered exempt from notification, in analogy to what the “Altmark Trans” judgment³⁷ did with reference to State aid rules on services of general economic interest.

NOTES

1. European Commission Decision *Operators of Cableways Bolzano* (C42/2000) OJ 2003 L 183/19, para. 20; European Commission (2002); see also, Westerhof (2009).
2. European Court of Justice, Case C-41/90 *Höfner und Elser / Macrotron* [1991] ECR I-1979; European Court of Justice, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089; European Court of Justice, Joint Cases C-180-184/98 *Pavel-Pavlov* [2000] ECR I-6451.
3. European Court of Justice, Joint Cases C-180-184/98 *Pavel-Pavlov* [2000] ECR I-6451; European Court of Justice, Case C-35/96 *Commission v Italy* [1998] ECR I-3851; European Court of Justice, Case C-205/03 *Fenin v Commission* [2006] ECR II-357.
4. European Commission Decision *State guarantee for capital borrowings by Coràs Iarnpair Eirann (CIÉ) for infrastructure investment* (N 478/2004) C(2006)2095 JOCE C/207/2006, para. 26; European Commission Decision *Regional Broadband Programme: Metropolitan Network Areas ("MANs") phases II and III* (N 284/2005) C(2006) 436, [2006], JOCE C/207/2006, para. 34; European Commission Decision *Antwerp Airport PPPs* (N 355/2004) C (2005) 1157 JOCE C/176/2005, para. 34.
5. European Commission Decision *State guarantee for capital borrowings by Coràs Iarnpair Eirann (CIÉ) for infrastructure investment* (N 478/2004) C(2006) 2095 JOCE C/207/2006, para. 27; European Commission Decision *Terra Mitica SA* (C-42/2001) JOCE L/091/2003, para. 64; European Commission (2005). "Guidelines for the Financing of Regional Airports." OJ C 312/1, p. 1. See also, Giesberts (2010).
6. European Commission Decision *Freight Facilities Grant* (N 649/2001) C(2001) 4512 JOCE C/045/2002.
7. European Court of Justice, Case C-290/94 *Commission-Greece* [1996] I-03285, para. 34.
8. Court of First Instance, Case T-128/98, *Aéroports de Paris v Commission* [2000], ECR II-3929, paras 75-79.
9. General Court, Joint Cases T-443/08 and T-455/08 *Flughafen Leipzig/Halle GmbH and Mitteldeutsche Flughafen AG v*

Commission and Freistaat Sachsen and Land Sachsen-Anhalt v Commission [2011], para. 95.

10. European Court of Justice, Case C-482/99 *French Republic v Commission – Stardust Marine* [2002] ECR I-4397.
11. European Court of Justice, Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099. See, also, Lübbig, T. (2009). *Beihilferecht der EU: das Recht der Wettbewerbsaufsicht über Staatliche Beihilfen in der Europäischen Union*. (pp. 90-91) Monaco, Germany: C. H. Beck.
12. European Commission Decision *Lübeck-Blankensee Airport* (C 24/2007) NN71/2006 JOCE C/295/2007.
13. European Court of Justice, Case 730/79 *Philipp Morris-Commission* [1980] ECR 2671.
14. European Court of Justice, Case C-35/96 *Commission v Italy* [1998] ECR I-3851.
15. European Court of Justice, Case 102/87 *French Republic v Commission* [1988] ECR 4067; See also Soltész (2003).
16. European Commission Decision *Freight Facilities Grant* (N 649/2001) C(2001)4512fin JOCE C/045/2002.
17. European Commission Decision *Railtrack plc/Network Rail* (N 356/2002) C(2002) 2622fin JOCE C/232/2002.
18. European Commission Decision *Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area* (C 67/03, C 68/03, C 69/03) C(2004) 2031 OJ 2005 L 56, para. 49.
19. European Court of Justice, Case C-303/89 *Eni-Lanerossi* [1989] ECR I-1433; ECJ, Case C-305/89 *Alfa Romeo* [1991], I-01603; European Commission Decision *Alitalia* (N 510/08) JOCE C/46/2009.
20. European Court of Justice, Case T-156/04, *Électricité de France (EDF) v European Commission* [2009] ECR II-04503.
21. European Commission Decision *Terra Mítica SA* (C-42/2001), 2001/C 300/02 OJ L/091/2003, para. 64.
22. European Commission Decision *InfraLeuna Infrastruktur und Service GmbH* (C(1998) 3840) OJ L 260 1999.

23. European Commission Decision *Freight Facilities Grant* (N 649/2001) C(2001) 4512 JOCE C/045/2002.
24. European Commission Decision *London Underground Public Private Partnership* (N264/2002) C(2002)3578fin JOCE C/309/2002.
25. European Court of Justice, Case C-196/08 *Acoset SpA v. Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and others* [2009] ECR I-9913.
26. European Court of Justice, Case C-204/97 *Portugal v Commission* [2001] ECR I-3175.
27. European Commission (2005). "State Aid Action Plan – Less and Better Targeted State Aid: a Roadmap for State Aid Reform 2005-2009." COM(2005) 107 final, para. 11 and 20.
28. European Commission Decision *JadeWeserPort - Financement d'Infrastructures Portuaires* (N110/2008) K(2008)7826fin JOCE C/137/2009.
29. European Commission Decision *PPP project for Antwerp International Airport* (N 355/2004) C(2005)1157fin JOCE C/176/2005.
30. European Commission Decision *Application for clearance under State Aid rules to the provision of a Traffic Guarantee as part of the payment mechanism on the M3 Clonee to North of Kells PPP road scheme and the* (N 149/2006) C(2006) 1840fin JOCE C/207/2006.
31. European Commission Decision *Metropolitan Area Network Broadband Program, Ireland* (N 284/2005) C(2006)436fin JOCE C/207/2006.
32. European Commission Decision *R&D National Plan 2008-2011: Subprogramme for Public-Private Cooperation in the Field of Transport and Infrastructures* (N 318/2008) C(2008) 5752 JOCE C/292/2008.
33. For more information on the topic, see K. Bacon (2009).
34. For a critical opinion on the Commission's methodology to assess Funding of Infrastructure under State aid rules.

35. European Court of Justice, Case C-71/04, *Xunta de Galicia* [2005] ECR I-7419, para. 49; European Court of Justice Case C-39/94, *SFEI and Others*, [1996] ECR I-3547, paras 40 and 68.
36. European Commission Decision *London Underground Public Private Partnership* (N264/2002) C(2002)3578fin JOCE C/309/2002.
37. European Court of Justice, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

REFERENCES

- Bacon, K. (2009). *European Community Law of State Aid*. Oxford, UK: Oxford University Press.
- European Commission (2002). "Communication on Aid Schemes for Cableways." (OJ 2002 C 172/2). Paris, France: Author.
- European Commission, Directorate-General Regional Policy (2003). *Guidelines for Successful Public-Private Partnerships*. [Online]. Available at <http://europa.eu.int/comm/regionalpolicy/sources/docgener/guides/PPPguide.htm>. [Retrieved April 28, 2012].
- European Commission (2004). "Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions." (COM (2004) 327 final). Paris, France: Author.
- European Commission (2005). "Guidelines for the Financing of Regional Airports." (OJ C 312/1). Paris, France: Author.
- European Commission (2005). "State Aid Action Plan – Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009." (COM(2005) 107 final). Paris, France: Author.
- European Commission (2006). "Community Framework for State Aid for Research and Development and Innovation." (OJ 2006 C 323/1). Paris, France: Author.
- European Commission (2010). "Communication on EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth." COM(2010) 2020 final. Paris, France: Author.

- European Commission (2011). "Note to DG Region - Application of State Aid Rules to Infrastructure Investments Projects." (COMP/03/2011). Paris, France: Author.
- European Parliament (2011). "Resolution on Energy Infrastructure Priorities for 2020 and Beyond." (2011/2034(INI)). Paris, France: Author.
- Giesberts, L. (2010). "Unterfallen Investitionen in Flughafeninfrastrukturen dem Beihilferecht?" *Zeitschrift für Beihilferecht*, 3: 1-17.
- Heidenhain, M. (2010). "Public Funding of Infrastructure, Sales of Public Land and Buildings." In M. Heidenhain (Ed.), *European State Aid Law* (pp. 131-148). Monaco, Germany: C.H. Beck.
- Holger, J. (2010). *Die staatliche Finanzierung und Förderung von Fußballstadien am Maßstab des EG-Beihilferechts*. Baden-Baden, Germany: Nomos Verlag.
- Karpenstein, U., & Schiller, G. (2008). "Infrastrukturbeihilfen in der Praxis der EU-Kommission." *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht*, 172: 81-114.
- Koenig, C. (2003). "Gibt es eine EG-beihilferechtliche Kommission-sphilosophie der Infrastrukturförderung?" *Europäische Zeitschrift für Wirtschaftsrecht*, 21: 641-672.
- Koenig, C. (2011). "Better Downstream Regulation through a more refined State Aid Law Approach!" *European State Aid Law Quarterly*, 3: 395-398.
- Koenig, C., & Wetzels, J. (2007). "The Relevance of EC State Aid Control for PPP Infrastructure Funding." *European Public Private Partnership Law Review*, 1: 5-11.
- Lübbig, T. (2009). *Beihilferecht der EU: das Recht der Wettbewerbsaufsicht über Staatliche Beihilfen in der Europäischen Union*. Monaco, Germany: Beck.
- Rauchenwald, A. (2010). "Neues im Bereich PPP." *Jahrbuch Beihilferecht*, 2010: 405-429.
- Santamato, S., & Westerhof, J.G. (2003). "Is funding of Infrastructures State Aid?" *Europäische Zeitschrift für Wirtschaftsrecht*, 21: 645-648.

- Soltész, U. (2003). "Öffentliche Finanzierung von Infrastruktur- und Erschließungsmaßnahmen und das EG-Beihilferecht." *Europäische Zeitschrift für Wirtschaftsrecht*, 21: 107-111.
- Westerhof, J.G. (2009). "Public Funding of the Sport Sector – Scope and Limits?" In *Sportfinanzierung – Spannungen zwischen Markt und Staat* (pp. 87-97). Hamburg, Germany: Hamburg University Press.