



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY

GUIDANCE NOTE TO THE COCOF

VERIFICATION OF COMPLIANCE WITH STATE AID RULES IN INFRASTRUCTURE CASES

DISCLAIMER:

"This is a working document prepared by the Commission services. On the basis of the applicable EU law, it provides technical guidance to the attention of public authorities, practitioners, beneficiaries or potential beneficiaries, and other bodies involved in the monitoring, control or implementation of the Cohesion policy on how to interpret and apply the EU rules in this area. The aim of this document is to provide Commission services' explanations and interpretations of the said rules in order to facilitate the implementation of operational programmes and to encourage good practice(s). However this guidance note is without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission."

I. Introduction

According to the case law of the Court, the operation of an infrastructure to offer goods or services on a given market constitutes an economic activity, and is therefore subject to State aid control. As a consequence, the financing or the provision of infrastructures which can be exploited to offer goods or services on a given market can grant an advantage to the beneficiary, within the meaning of Article 107(1) TFEU, and therefore constitute a State aid.¹ Financing of such infrastructure therefore is in principle subject to State aid control.

However, until now, the Commission's services did not systematically carry out checks on a statement made by Member States when submitting major project applications for these types of infrastructure projects that no State aid was involved. The Commission will now systematically check this point and Member States should therefore provide information in cases where they consider that support to the infrastructure projects does not involve any State aid, explaining the basis for their conclusion.

The purpose of this note is to give guidance on the treatment of infrastructure projects under Cohesion policy rules.

II. Legal framework

Article 9(5) of Regulation (EC) No 1083/2006 stipulates that all operations financed by the Funds have to comply with the provisions of the Treaty and of acts adopted under it. This includes the provisions on State aid.

Article 60(a) of Regulation (EC) No 1083/2006 lays down that the Managing Authority is responsible for managing and implementing the operational programme, and in particular that it is responsible for "*ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable [EU] and national rules*".

Under Article 61 of Regulation 1083/2006, the certifying authority of a programme "*shall be responsible in particular for: (a) drawing up and submitting to the Commission certified statements of expenditure and applications for payment*";

As indicated in the template for certification of expenditure, the certifying authority must certify that "*the expenditure declared complies with the applicable Community and national rules and has been paid in respect of operations selected for funding in accordance with the criteria applicable to*

¹ Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, para 80; Case 41/83 *Italy v Commission* [1985] ECR 873, para 18; Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689.

the operational programme and the applicable Community and national rules, in particular State aid rules" (Annex X to Regulation (EC) No 1828/2006).

Pursuant to Article 108 (3) TFEU, State aid must not be put into effect before the Commission has taken a decision authorising such aid. Therefore, any State aid which is not exempted from an individual State aid notification requirement pursuant to Article 109 TFEU and the secondary law adopted on this basis or on the basis of Article 106 (3) TFEU² has to be notified and approved by the Commission before it can be put into effect.

III. Guidance on treatment of projects

Member States should take into account the case law of the Court in their assessment whether a State aid notification is required for an infrastructure project co-financed by the Funds. This applies both for major projects and for non-major projects.

For major projects, Member States have to indicate in the application form whether State aid is involved that has to be notified to the Commission. Member States are invited to use the analytical grids provided by the Commission's services to explain any finding that no State aid notification is required. If appropriate, Member States can also provide supporting documents underpinning their assessment. The use of the analytical grids is not compulsory but their use facilitates the examination by the Commission's services.

For major projects for which the application has already been submitted but for which the major project decision under the Structural funds rules is still pending, Member States are requested to re-examine if their initial assessment on the need for a State aid notification is valid and to inform the Commission of the result of the assessment in the light of this note. Where Member States consider that no State aid notification is required, they should provide the Commission with an explanation and, if appropriate, supporting documents. This information will be useful to help the Commission making the assessment required prior to the adoption of the major project decision.

The Commission does not intend to examine systematically compliance with the State aid rules of

² Currently, such exemptions exist under of Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings, OJ L 156, 28.6.1969, p. 8; Regulation (EC) 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; Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (*General block exemption Regulation*), and Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (*SGEI decision*). Note in addition, the Commission Regulation 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 (*SGEI de minimis*) as well as Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (*de minimis regulation*).

major infrastructure projects covered by this note which have already been subject of a decision on the amount to be co-financed from the Funds before the date of this note. Also for non-major projects that concern such infrastructure and for which the national awarding decision was taken before the date of this note, there is no need for a systematic re-examination for the purposes of Cohesion policy. Nevertheless, for both types of projects the Commission will have to adopt a decision under State aid control rules following notification by a Member State for reasons of legal certainty or following a complaint by an interested party. This may also lead to a review of a major project decision.

IV. Consequences for the declaration of expenditure for major projects and non-major projects

Member States may certify the legality and regularity of expenditure related to infrastructure projects intended to be used for economic purposes if, according to the assessment of the Member State the State aid rules have been complied with in accordance with the case law on infrastructure financing and State aid. Certification of the expenditure may take place if the infrastructure project concerned either involves no State aid or the State aid is exempted from an individual notification requirement pursuant to Article 109 TFEU and the secondary law adopted on this basis or on the basis of Article 106 (3) TFEU, or if the State aid has been approved by the Commission pursuant to Article 108 (3) TFEU.

If expenditure is declared, the Member States assume the risk that in case of incompatible aid, the declared expenditure will have to be withdrawn from the payment claim submitted after the Commission decision on State aid is taken, and that they will have to recover the incompatible aid from the beneficiary.